

2013 -- S 0368 SUBSTITUTE A

LC01198/SUB A/3

STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2013

A N A C T

RELATING TO LABOR AND LABOR RELATIONS -- EMPLOYMENT SECURITY--
GENERAL PROVISIONS

Introduced By: Senators McCaffrey, Goodwin, Lombardi, Miller, and Gallo

Date Introduced: February 13, 2013

Referred To: Senate Labor

It is enacted by the General Assembly as follows:

SECTION 1. Section 28-14-19 of the General Laws in Chapter 28-14 entitled "Payment of Wages" is hereby amended to read as follows:

28-14-19. Enforcement powers and duties of director of labor and training. -- (a) It shall be the duty of the director to insure compliance with the provisions of this chapter 28-14 and 28-12. The director or his or her designee may investigate any violations thereof, institute or cause to be instituted actions for the collection of wages and institute action for penalties or other relief as provided for within and pursuant to those chapters. The director or his or her authorized representatives are empowered to hold hearings and he or she shall cooperate with any employee in the enforcement of a claim against his or her employer in any case whenever, in his or her opinion, the claim is just and valid.

(b) Upon receipt of a complaint or conducting an inspection under applicable law, the director or his or her appropriate departmental designee is authorized to investigate to determine compliance with the chapters 28-12 and/or 28-14.

(c) With respect to all complaints deemed just and valid, the director or his or her designee shall order a hearing thereon at a time and place to be specified, and shall give notice thereof, together with a copy of the complaint or the purpose thereof, or a statement of the facts disclosed upon investigation, which notice shall be served personally or by mail on any person, business, corporation, or entity of any kind affected thereby. The hearing shall be scheduled

1 within thirty (30) days of service of a formal complaint as provided herein. The person, business,
2 corporation, or entity shall have an opportunity to be heard in respect to the matters complained
3 of at the time and place specified in the notice. The hearing shall be conducted by the director or
4 his or her designee. The hearing officer in the hearing shall be deemed to be acting in a judicial
5 capacity, and shall have the right to issue subpoenas, administer oaths, and examine witnesses.
6 The enforcement of a subpoena issued under this section shall be regulated by Rhode Island civil
7 practice law and rules. The hearing shall be expeditiously conducted and upon such hearing the
8 hearing officer shall determine the issues raised thereon and shall make a determination and enter
9 an order within thirty (30) days of the close of the hearing, and forthwith serve a copy of the
10 order, with a notice of the filing thereof, upon the parties to the proceeding, personally or by mail.
11 In the event that any party or entity joined as a party to a formal claim, complaint or other
12 proceeding asserts, as a related claim or defense, the absence of an employer-employee
13 relationship or that the agent or operative employed by the contractor is an independent
14 contractor, the director of the department of labor and training or his or her designee shall refer
15 the matter forthwith to the Rhode Island workers' compensation court for an evidentiary hearing
16 and determination of employment status in accordance with subsection 28-30-13(c). The order
17 shall dismiss the complaint or direct payment of any wages and/or benefits found to be due and/or
18 award such other appropriate relief or penalties authorized under chapter 28-12 and/or 28-14, and
19 the order may direct payment of reasonable attorneys' fees and costs to the complaining party.
20 Interest at the rate of twelve percent (12%) per annum shall be awarded in the order from the date
21 of the nonpayment to the date of payment.

22 (d) The order shall also require payment of a further sum as a civil penalty in an amount
23 up to two (2) times the total wages and/or benefits found to be due, exclusive of interest, which
24 shall be shared equally between the department and the aggrieved party. In determining the
25 amount of any penalty to impose, the director or his or her designee shall consider the size of the
26 employer's business, the good faith of the employer, the gravity of the violation, the previous
27 violations and whether or not the violation was an innocent mistake or willful.

28 (e) The director may institute any action to recover unpaid wages or other compensation
29 or obtain relief as provided under this section with or without the consent of the employee or
30 employees affected.

31 (f) No agreement between the employee and employer to work for less than the
32 applicable wage and/or benefit rate or to otherwise work under and/or conditions in violation of
33 applicable law is a defense to an action brought pursuant to this section.

34 (g) The director shall notify the contractors' registration board of any order issued or any

1 determination hereunder that an employer has violated chapters 28-12, 28-14 and/or 37-13. The
2 director shall notify the tax administrator of any determination hereunder that may affect liability
3 for an employer's payment of wages and/or payroll taxes.

4 SECTION 2. Section 28-30-13 of the General Laws in Chapter 28-30 entitled "Workers'
5 Compensation Court" is hereby amended to read as follows:

6 **28-30-13. Controversies submitted to court.** -- (a) Any controversy over which the
7 workers' compensation court has jurisdiction in accordance with chapters 29 -- 38 and chapter 53
8 of this title, including compensation, reasonableness of medical and hospital bills, degree of
9 functional impairment and/or disability, a dispute between an insurance carrier and an employer
10 under a workers' compensation insurance contract, except disputes under the jurisdiction of the
11 workers' compensation appeals board established pursuant to section 27-9-29, failure of an
12 employer to secure the payment of compensation under chapters 29 -- 38 and chapter 53 of this
13 title and any controversy in which the state or any of its political subdivisions is a party, and
14 appeals from an order of the retirement board pursuant to Rhode Island general law section 45-
15 21.2-9 shall be submitted to the court in the manner provided in chapters 33 and 35 of this title.

16 (b) Disputes between an insurance carrier and an employer under a workers'
17 compensation insurance contract shall not be subject to a pretrial conference in accordance with
18 section 28-35-20, but shall be assigned consistent with the rules and regulations of the workers'
19 compensation court.

20 (c) Where any party or entity joined as a party to a formal claim, complaint or other
21 proceeding brought before the director of the department of labor and training or his or her
22 designee, pursuant to sections 28-14-19, 28-40-11 and 37-13-14.1, asserts the absence of an
23 employer-employee relationship or the existence of an independent contractor relationship as a
24 related claim or defense, the director or his or her designee shall refer the matter to the workers'
25 compensation court for an evidentiary hearing and determination of employment status. Such
26 disputes shall not be subject to a pretrial conference in accordance with section 28-35-20. Rather,
27 the court shall assign the matter for trial within twenty-one (21) days of the date on which the
28 matter is docketed at the court. The judge to whom the matter is assigned shall hear and decide all
29 questions of law and fact relating to the disputed employment status and shall render a decision in
30 accordance with the workers' compensation laws regarding the determination of employment
31 status and shall enter an order reflecting his or her findings and decisions. Costs, counsel or
32 witness fees shall not be awarded by the court to the prevailing party. Any party aggrieved by the
33 entry of the order by a judge relating to employment status under this section may appeal said
34 order to the appellate division pursuant to the provisions of section 28-35-28. Upon the entry of a

1 [final order of the court, the matter shall be remanded to the department of labor and training for](#)
2 [further proceedings consistent with the court's order.](#)

3 [\(d\) The process created by subsection 28-30-13\(c\) shall not apply to "employment" that](#)
4 [are exempt from the workers' compensations statutory scheme, pursuant to section 28-42-8.](#)

5 SECTION 3. Section 28-40-11 of the General Laws in Chapter 28-40 entitled
6 "Temporary Disability Insurance - Contributions" is hereby amended to read as follows:

7 **28-40-11. Determination of unreported contributions due.** -- If an employer for any
8 reporting period fails to make any report used for the purpose of determining the amount of
9 contributions payable under chapters 39 -- 41 of this title at the time and in the manner required
10 by the prescribed rules and regulations, or if those reports when filed are incorrect or insufficient,
11 and the employer fails to file a corrected or sufficient report within twenty (20) days after the
12 director has required it by written notice, the director shall determine on the basis of such
13 information as the director may be able to obtain, the amount of contributions due from that
14 employer, and the director shall give written notice to any employer of the amount of
15 contributions so determined. That determination shall finally and irrevocably fix the amount of
16 contributions due unless the employer, within twenty (20) days after the giving of that notice,
17 applies to the board of review for a hearing, or unless the director on his or her own volition
18 reduces the amount. [In the event that any party or entity joined as a party to a formal claim,](#)
19 [complaint or other proceeding asserts, as a related claim or defense, the absence of an employer-](#)
20 [employee relationship or that the agent or operative for whom a contribution has been assessed is](#)
21 [an independent contractor, the director of the department of labor and training or his or her](#)
22 [designee shall refer the matter forthwith to the Rhode Island workers' compensation court for an](#)
23 [evidentiary hearing and determination of employment status in accordance with subsection 28-](#)
24 [30-13\(c\).](#)

25 SECTION 4. Section 28-42-7 of the General Laws in Chapter 28-42 entitled
26 "Employment Security - General Provisions" is hereby amended to read as follows:

27 **28-42-7. Independent contractor and employee distinguished.** -- The determination of
28 independent contractor or employee status for purposes of chapters 42 -- 44 of this title shall be
29 [made by the Rhode Island workers' compensation court in accordance with subsection 28-30-](#)
30 [13\(c\) ~~the same as those factors used by the Internal Revenue Service in its code and regulations.~~](#)

31 SECTION 5. Section 37-13-14.1 of the General Laws in Chapter 37-13 entitled "Labor
32 and Payment of Debts by Contractors" is hereby amended to read as follows:

33 **37-13-14.1. Enforcement -- Hearings.** -- (a) Before issuing an order or determination,
34 the director of labor and training shall order a hearing thereon at a time and place to be specified,

1 and shall give notice thereof, together with a copy of the complaint or the purpose thereof, or a
2 statement of the facts disclosed upon investigation, which notice shall be served personally or by
3 mail on any person, firm, or corporation affected thereby. The person, firm, or corporation shall
4 have an opportunity to be heard in respect to the matters complained of at the time and place
5 specified in the notice, which time shall be not less than five (5) days from the service of the
6 notice personally or by mail. The hearing shall be held within ten (10) days from the order of
7 hearing. The hearing shall be conducted by the director of labor and training or his or her
8 designee. The hearing officer in the hearing shall be deemed to be acting in a judicial capacity,
9 and shall have the right to issue subpoenas, administer oaths, and examine witnesses. The
10 enforcement of a subpoena issued under this section shall be regulated by Rhode Island civil
11 practice law and rules. The hearing shall be expeditiously conducted and upon such hearing the
12 hearing officer shall determine the issues raised thereon and shall make a determination and enter
13 an order within ten (10) days of the close of the hearing, and forthwith serve a copy of the order,
14 with a notice of the filing thereof, upon the parties to the proceeding, personally or by mail. In the
15 event that any party or entity joined as a party to a formal claim, complaint or other proceeding
16 asserts, as a related claim or defense, the absence of an employer-employee relationship or that
17 the agent or operative employed by the contractor is an independent contractor, the director of the
18 department of labor and training or his or her designee shall refer the matter forthwith to the
19 Rhode Island workers' compensation court for an evidentiary hearing and determination of
20 employment status in accordance with subsection 28-30-13(c). The order shall dismiss the
21 charges or direct payment of wages or supplements found to be due, including interest at the rate
22 of twelve ~~per centum~~ percent (12%) per annum from the date of the underpayment to the date of
23 payment, and may direct payment of reasonable attorney's fees and costs to the complaining
24 party.

25 (b) In addition to directing payment of wages or supplements including interest found to
26 be due, the order shall also require payment of a further sum as a civil penalty in an amount up to
27 three times the total amount found to be due. Further, if the amount of salary owed to an
28 employee pursuant to this chapter but not paid to the employee in violation of thereof exceeds
29 five thousand dollars (\$5,000), it shall constitute a misdemeanor and shall be referred to the office
30 of the attorney general. The misdemeanor shall be punishable for a period of not more than one
31 year in prison and/or fined not more than one thousand dollars (\$1,000). In assessing the amount
32 of the penalty, due consideration shall be given to the size of the employer's business, the good
33 faith of the employer, the gravity of the violation, the history of previous violations and the
34 failure to comply with recordkeeping or other nonwage requirements. The surety of the person,

1 firm, or corporation found to be in violation of the provisions of this chapter shall be bound to
2 pay any penalties assessed on such person, firm, or corporation. The penalty shall be paid to the
3 department of labor and training for deposit in the state treasury; provided, however, it is hereby
4 provided that the general treasurer shall establish a dedicated "prevailing wages enforcement
5 fund" for the purpose of depositing the penalties paid as provided herein. There is hereby
6 appropriated to the annual budget of the department of labor and training the amount of the fund
7 collected annually under this section, to be used at the direction of the director of labor and
8 training for the sole purpose of enforcing prevailing wage rates as provided in this chapter.

9 (c) For the purposes of this chapter, each day or part thereof of violation of any provision
10 of this chapter by a person, firm, or corporation, whether the violation is continuous or
11 intermittent, shall constitute a separate and succeeding violation.

12 (d) In addition to the above, any person, firm, or corporation found in violation of any of
13 the provisions of this chapter by the director of labor and training, an awarding authority, or the
14 hearing officer, shall be ineligible to bid on or be awarded work by an awarding authority or
15 perform any such work for a period of no less than eighteen (18) months and no more than thirty-
16 six (36) months from the date of the order entered by the hearing officer. Once a person, firm, or
17 corporation is found to be in violation of this chapter, all pending bids with any awarding
18 authority shall be revoked, and any bid awarded by an awarding authority prior to the
19 commencement of the work shall also be revoked.

20 (e) In addition to the above, any person, firm, or corporation found to have committed
21 two (2) or more willful violations in any period of eighteen (18) months of any of the provisions
22 of this chapter by the hearing officer, which violations are not arising from the same incident,
23 shall be ineligible to bid on or be awarded work by an awarding authority or perform any work
24 for a period of sixty (60) months from the date of the second violation.

25 (f) The order of the hearing officer shall remain in full force and effect unless stayed by
26 order of the superior court.

27 (g) The director of labor and training, awarding authority, or hearing officer shall notify
28 the bonding company of any person, firm, or corporation suspected of violating any section of
29 this chapter. The notice shall be mailed certified mail, and shall enumerate the alleged violations
30 being investigated.

31 (h) In addition to the above, any person, firm, or corporation found to have willfully
32 made a false or fraudulent representation on certified payroll records shall be referred to the
33 office of the attorney general. The false or fraudulent representation shall be considered a
34 misdemeanor and shall be punishable for a period of not more than one year in prison and/or

1 fined one thousand dollars (\$1,000). Further, any person, firm, or corporation found to have
2 willfully made a false or fraudulent representation on certified payroll records shall be required to
3 pay a civil penalty to the department of labor and training in an amount of no less than two
4 thousand dollars (\$2,000) and not greater than fifteen thousand dollars (\$15,000) per
5 representation.

6 SECTION 6. This act shall take effect upon passage.

=====

LC01198/SUB A/3

=====

EXPLANATION
BY THE LEGISLATIVE COUNCIL
OF
A N A C T
RELATING TO LABOR AND LABOR RELATIONS -- EMPLOYMENT SECURITY--
GENERAL PROVISIONS

- 1 This act would grant jurisdiction to the workers' compensation court to decide whether an
2 individual is an employee or an independent contractor in a number of various labor contexts.
3 This act would take effect upon passage.

=====
LC01198/SUB A/3
=====