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STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2014

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A N A C T

RELATING TO LABOR AND LABOR RELATIONS -- EMPLOYEE CLASSIFICATION

Introduced By: Senators McCaffrey, and Lombardi

Date Introduced: February 27, 2014

Referred To: Senate Labor

It is enacted by the General Assembly as follows:

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

3 **28-14-19. Enforcement powers and duties of director of labor and training.** -- (a) It
4 shall be the duty of the director to insure compliance with the provisions of this chapter 28-14 and
5 28-12. The director or his or her designee may investigate any violations thereof, institute or
6 cause to be instituted actions for the collection of wages and institute action for penalties or other
7 relief as provided for within and pursuant to those chapters. The director or his or her authorized
8 representatives are empowered to hold hearings and he or she shall cooperate with any employee
9 in the enforcement of a claim against his or her employer in any case whenever, in his or her
10 opinion, the claim is just and valid.

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

14 (c) With respect to all complaints deemed just and valid, the director or his or her
15 designee shall order a hearing thereon at a time and place to be specified, and shall give notice
16 thereof, together with a copy of the complaint or the purpose thereof, or a statement of the facts
17 disclosed upon investigation, which notice shall be served personally or by mail on any person,
18 business, corporation, or entity of any kind affected thereby. The hearing shall be scheduled
19 within thirty (30) days of service of a formal complaint as provided herein. The person, business,

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

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

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

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

33 (g) The director shall notify the contractors' registration board of any order issued or any
34 determination hereunder that an employer has violated chapters 28-12, 28-14 and/or 37-13. The

1 director shall notify the tax administrator of any determination hereunder that may affect liability
2 for an employer's payment of wages and/or payroll taxes.

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

5 **28-30-13. Controversies submitted to court.** -- (a) Any controversy over which the
6 workers' compensation court has jurisdiction in accordance with chapters 29 -- 38 and chapter 53
7 of this title, including compensation, reasonableness of medical and hospital bills, degree of
8 functional impairment and/or disability, a dispute between an insurance carrier and an employer
9 under a workers' compensation insurance contract, except disputes under the jurisdiction of the
10 workers' compensation appeals board established pursuant to section 27-9-29, failure of an
11 employer to secure the payment of compensation under chapters 29 -- 38 and chapter 53 of this
12 title and any controversy in which the state or any of its political subdivisions is a party, and
13 appeals from an order of the retirement board pursuant to Rhode Island general law section 45-
14 21.2-9 shall be submitted to the court in the manner provided in chapters 33 and 35 of this title.

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

19 (c) Where any person and/or entity asserts as a related claim or defense of a formal
20 investigation, complaint, and/or claim to the director of the department of labor and training or
21 his or her designee, pursuant to §§ 28-14-19, 28-40-11 and 37-13-14, the absence of an employer-
22 employee relationship or the existence of an independent contractor relationship, the director of
23 the department of labor and training or his or her designee shall refer the matter to the workers'
24 compensation court for an evidentiary hearing and determination of employment status. Such
25 disputes shall not be subject to a pretrial conference in accordance with § 28-35-20. Rather, the
26 court shall assign the matter for trial within twenty-one (21) days of the date on which the matter
27 is docketed at the court. The judge to whom the matter is assigned shall hear and decide all
28 questions of law and fact relating to the disputed employment status and shall render a decision
29 regarding the determination of employment in accordance with the Internal Revenue Service test
30 as amended. The judge's decision shall be based on, but is not limited to the following criteria:

31 (1) The instructions the business gives to the worker;

32 (2) The training the business gives to the worker;

33 (3) The extent to which the worker has unreimbursed business expenses;

34 (4) The extent of the worker's investment;

- 1 (5) The extent to which the worker makes services available to the relevant market;
2 (6) How the business pays the worker;
3 (7) The extent to which the worker can realize a profit or loss;
4 (8) Whether written documents exist to describe the relationship;
5 (9) Whether the business provides the worker with benefits;
6 (10) The duration of the relationship;
7 (11) The extent to which the services performed are a key aspect of the regular and
8 routine operation of the business.

9 The judge shall entry an order reflecting his or her findings and decisions.

10 Any party aggrieved by the entry of the order by a judge relating to employment status
11 under this section may appeal said order to the appellate division pursuant to § 28-35-28. The
12 workers' compensation court shall establish a special calendar to expedite the appeal of these
13 factual determinations and shall assign the matters to argument on such calendar within thirty
14 (30) days of the date on which the appeal is perfected. Upon the entry of a final order of the court,
15 the matter shall be remanded to the department of labor and training for further proceedings
16 consistent with the court's order.

17 (d) Judicial review of regulations. Any interested person who may be aggrieved by any
18 order issued by the director under this chapter may obtain the review of the order in the superior
19 court for Providence and Bristol counties by filing in the court within thirty (30) days after the
20 date of publication of the order a written petition praying that the order be modified or set aside.
21 A copy of the petition shall be served upon the director of labor and training. The findings of
22 facts shall be conclusive upon the court. The court shall determine whether the order or regulation
23 is in accordance with law.

24 (e) Hearings in the superior court on all appeals taken under the provisions of this chapter
25 shall take precedence over all matters, except matters of the same character. The jurisdiction of
26 the court shall be exclusive and its judgment and decree shall be final except that the judgment
27 and decree shall be subject to review by the supreme court.

28 (f) The commencement of proceedings under subsection (a) of this section shall not
29 operate as a stay of wage order or of an administrative regulation issued under the provisions of
30 this chapter.

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

33 **28-40-11. Determination of unreported contributions due.** -- If an employer for any
34 reporting period fails to make any report used for the purpose of determining the amount of

1 contributions payable under chapters 39 -- 41 of this title at the time and in the manner required
2 by the prescribed rules and regulations, or if those reports when filed are incorrect or insufficient,
3 and the employer fails to file a corrected or sufficient report within twenty (20) days after the
4 director has required it by written notice, the director shall determine on the basis of such
5 information as the director may be able to obtain, the amount of contributions due from that
6 employer, and the director shall give written notice to any employer of the amount of
7 contributions so determined. That determination shall finally and irrevocably fix the amount of
8 contributions due unless the employer, within twenty (20) days after the giving of that notice,
9 applies to the board of review for a hearing, or unless the director on his or her own volition
10 reduces the amount. In the event that any person and/or entity asserts as a related claim or defense
11 of a formal investigation, complaint, and/or claim, the absence of an employer-employee
12 relationship or that the agent or operative employed by the contractor is an independent
13 contractor, the director of the department of labor and training or his or her designee shall refer
14 the matter forthwith to the Rhode Island workers' compensation court for an evidentiary hearing
15 and determination of employment status in accordance with § 28-30-13(c).

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

18 **28-42-7. Independent contractor and employee distinguished.** -- The determination of
19 independent contractor or employee status for purposes of chapters 42 -- 44 of this title shall be
20 made by the Rhode Island workers' compensation court in accordance with § 28-30-13(c) ~~the~~
21 ~~same as those factors used by the Internal Revenue Service in its code and regulations.~~

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

24 **37-13-14.1. Enforcement -- Hearings.** -- (a) Before issuing an order or determination,
25 the director of labor and training shall order a hearing thereon at a time and place to be specified,
26 and shall give notice thereof, together with a copy of the complaint or the purpose thereof, or a
27 statement of the facts disclosed upon investigation, which notice shall be served personally or by
28 mail on any person, firm, or corporation affected thereby. The person, firm, or corporation shall
29 have an opportunity to be heard in respect to the matters complained of at the time and place
30 specified in the notice, which time shall be not less than five (5) days from the service of the
31 notice personally or by mail. The hearing shall be held within ten (10) days from the order of
32 hearing. The hearing shall be conducted by the director of labor and training or his or her
33 designee. The hearing officer in the hearing shall be deemed to be acting in a judicial capacity,
34 and shall have the right to issue subpoenas, administer oaths, and examine witnesses. The

1 enforcement of a subpoena issued under this section shall be regulated by Rhode Island civil
2 practice law and rules. The hearing shall be expeditiously conducted and upon such hearing the
3 hearing officer shall determine the issues raised thereon and shall make a determination and enter
4 an order within ten (10) days of the close of the hearing, and forthwith serve a copy of the order,
5 with a notice of the filing thereof, upon the parties to the proceeding, personally or by mail. In the
6 event that any person and/or entity asserts as a related claim or defense of a formal investigation,
7 complaint, and/or claim, the absence of an employer-employee relationship or that the agent or
8 operative employed by the contractor is an independent contractor, the director of the department
9 of labor and training or his or her designee shall refer the matter forthwith to the Rhode Island
10 workers' compensation court for an evidentiary hearing and determination of employment status
11 in accordance with § 28-30-13(c). The order shall dismiss the charges or direct payment of wages
12 or supplements found to be due, including interest at the rate of twelve ~~per centum~~ percent (12%)
13 per annum from the date of the underpayment to the date of payment, and may direct payment of
14 reasonable attorney's fees and costs to the complaining party.

15 (b) In addition to directing payment of wages or supplements including interest found to
16 be due, the order shall also require payment of a further sum as a civil penalty in an amount up to
17 three times the total amount found to be due. Further, if the amount of salary owed to an
18 employee pursuant to this chapter but not paid to the employee in violation of thereof exceeds
19 five thousand dollars (\$5,000), it shall constitute a misdemeanor and shall be referred to the office
20 of the attorney general. The misdemeanor shall be punishable for a period of not more than one
21 year in prison and/or fined not more than one thousand dollars (\$1,000). In assessing the amount
22 of the penalty, due consideration shall be given to the size of the employer's business, the good
23 faith of the employer, the gravity of the violation, the history of previous violations and the
24 failure to comply with recordkeeping or other nonwage requirements. The surety of the person,
25 firm, or corporation found to be in violation of the provisions of this chapter shall be bound to
26 pay any penalties assessed on such person, firm, or corporation. The penalty shall be paid to the
27 department of labor and training for deposit in the state treasury; provided, however, it is hereby
28 provided that the general treasurer shall establish a dedicated "prevailing wages enforcement
29 fund" for the purpose of depositing the penalties paid as provided herein. There is hereby
30 appropriated to the annual budget of the department of labor and training the amount of the fund
31 collected annually under this section, to be used at the direction of the director of labor and
32 training for the sole purpose of enforcing prevailing wage rates as provided in this chapter.

33 (c) For the purposes of this chapter, each day or part thereof of violation of any provision
34 of this chapter by a person, firm, or corporation, whether the violation is continuous or

1 intermittent, shall constitute a separate and succeeding violation.

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

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

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

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

21 (h) In addition to the above, any person, firm, or corporation found to have willfully
22 made a false or fraudulent representation on certified payroll records shall be referred to the
23 office of the attorney general. The false or fraudulent representation shall be considered a
24 misdemeanor and shall be punishable for a period of not more than one year in prison and/or
25 fined one thousand dollars (\$1,000). Further, any person, firm, or corporation found to have
26 willfully made a false or fraudulent representation on certified payroll records shall be required to
27 pay a civil penalty to the department of labor and training in an amount of no less than two
28 thousand dollars (\$2,000) and not greater than fifteen thousand dollars (\$15,000) per
29 representation.

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

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EXPLANATION
BY THE LEGISLATIVE COUNCIL
OF
A N A C T
RELATING TO LABOR AND LABOR RELATIONS -- EMPLOYEE CLASSIFICATION

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.

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