

Regular Session, 2008

HOUSE BILL NO. 1083

BY REPRESENTATIVE PATRICIA SMITH

LABOR: Enacts the Construction Industry Independent Contractor Act

1 AN ACT

2 To enact Part II-A of Chapter 9 of Title 23 of the Louisiana Revised Statutes of 1950, to be
3 comprised of R.S. 23:931 through 933, relative to the classification of construction
4 employees; to provide for definitions; to provide relative to the duty to classify
5 employees; to provide with respect to penalties for failure to classify; to provide with
6 respect to investigation and prosecution; to provide for suspension of a contractor's
7 license; to provide for stop-work orders; to provide with respect to civil actions; and
8 to provide for related matters.

9 Be it enacted by the Legislature of Louisiana:

10 Section 1. Part II-A of Chapter 9 of Title 23 of the Louisiana Revised Statutes of
11 1950, comprised of R.S. 23:931 through 933, is hereby enacted to read as follows:

12 PART II-A CONSTRUCTION INDUSTRY INDEPENDENT CONTRACTOR ACT

13 §931. Short title; legislative declaration

14 A. This part shall be known and may be cited as the "Construction Industry
15 Independent Contractor Act".

16 B. The legislature hereby declares that employers in the construction
17 industry who improperly classify employees as independent contractors deprive
18 these workers of proper social security benefits, worker's compensation and other
19 benefits, while reducing the employers' state and federal tax withholding and related
20 obligations. This practice puts businesses that bear higher costs for complying with
21 the law at a competitive disadvantage.

1 §932. Definitions

2 A. For purposes of this Part, the following terms shall have the meaning
3 ascribed to them in this Section, unless the context clearly indicates otherwise:

4 (1) "Employer" means a partnership, association, joint stock company, trust,
5 corporation, or other legal business entity or successor thereof who is primarily
6 engaged in the business of, or enters into a contract for, making improvements to real
7 property and includes any subcontractor or lower tier contractor.

8 (2) "Public body" means the state of Louisiana, any of its political
9 subdivisions, any authority created by the legislature of Louisiana, and any
10 instrumentality or agency of the state or of any of its political subdivisions.

11 (3) "Public work" means construction, reconstruction, demolition, alteration,
12 custom fabrication, repair work, or maintenance work, including painting and
13 decorating, done under contract and paid for in whole or in part out of the funds of
14 a public body, except work performed under a rehabilitation program. "Public work"
15 shall also mean construction, reconstruction, demolition, alteration, custom
16 fabrication, or repair work, done on any property or premises, whether or not the
17 work is paid for from public funds, if, at the time of the entering into of the contract:

18 (a) Not less than fifty five percent of the property or premises is leased by
19 a public body, or is subject to an agreement to be subsequently leased by a public
20 body; and

21 (b) The portion of the property or premises that is leased or subject to an
22 agreement to be subsequently leased by the public body measures more than twenty
23 thousand square feet.

24 B.(1) For purposes of the Louisiana's unemployment compensation laws,
25 worker's compensation laws, and applicable state tax laws, services performed in the
26 making of improvements to real property by an individual for remuneration paid by
27 an employer shall be deemed to be employment unless and until it is shown to the
28 satisfaction of the Department of Labor that one of the following applies:

1 (a) The individual has been and will continue to be free from control or
2 direction over the performance of that service, both under his contract of service and
3 in fact.

4 (b) the service is either outside the usual course of the business for which the
5 service is performed, or the service is performed outside of all the places of business
6 of the employer for which the service is performed.

7 (c) the individual is customarily engaged in an independently established
8 trade, occupation, profession, or business.

9 (2) The failure to withhold federal or state income taxes or to pay
10 unemployment compensation contributions or workers' compensation premiums with
11 respect to an individual's wages shall not be considered in making a determination
12 under this Subsection.

13 §933. Violations; penalties

14 A. An employer, or any officer, agent, superintendent, foreman, or employee
15 of the employer, who fails to properly classify an individual as an employee in
16 accordance with this part for purposes of Louisiana's unemployment compensation
17 laws, worker's compensation laws, and applicable state tax laws, and fails to pay
18 wages, benefits, taxes, or other contributions required by any of those laws, shall be
19 subject to the following criminal penalties:

20 (1) Whoever violates any provision of this Part, when the benefits claimed
21 or payments obtained have a value of ten thousand dollars or more, shall be
22 imprisoned, with or without hard labor, for not more than ten years, or fined not
23 more than ten thousand dollars, or both; and by a fine of not more than thirty
24 thousand dollars, or imprisonment for not more than two years, or both, for a
25 subsequent offense. Each week, in any day of which an employee is misclassified
26 and each employee so misclassified, shall constitute a separate offense.

27 (2) Whoever violates any provision of this Part, when the benefits claimed
28 or payments obtained have a value of two thousand five hundred dollars or more, but
29 less than a value of ten thousand dollars shall be imprisoned, with or without hard

1 labor, for not more than five years, or fined not more than five thousand dollars, or
2 both; and by a fine of not more than fifteen thousand dollars, or imprisonment for not
3 more than five years, or both, for a subsequent offense. Each week, in any day of
4 which an employee is misclassified and each employee so misclassified, shall
5 constitute a separate offense.

6 (3) Whoever violates any provision of this Part, when the benefits claimed
7 or payments obtained have a value of less than two thousand five hundred dollars,
8 shall be imprisoned for not more than six months or fined not more than five hundred
9 dollars, or both; and by a fine of not more than five thousand dollars, or
10 imprisonment for not more than one year, or both, for a subsequent offense. Each
11 week, in any day of which an employee is misclassified and each employee so
12 misclassified, shall constitute a separate offense.

13 B. In addition, any violator shall be deemed to have caused loss to the
14 employees in any amount by which the employees were underpaid in connection
15 with the misclassification and shall provide restitution to such employees.

16 C. When the secretary finds that an employer has violated provisions of this
17 Part, the secretary may refer the matter to the attorney general, or his designee, for
18 investigation and prosecution. Nothing in this Subsection shall be deemed to limit
19 the authority of the attorney general to investigate and prosecute violations of the
20 Louisiana Code of Criminal Procedure, nor to limit the secretary's ability to refer any
21 matter for criminal investigation or prosecution.

22 D. Any sum collected as a penalty pursuant to this Section shall be applied
23 toward enforcement and administrative costs of the Department of Labor.

24 E. If the secretary determines, after investigation, that an employer or any
25 officer, agent, superintendent, foreman, or employee of the employer has knowingly
26 failed to properly classify an individual as an employee in accordance with this part
27 and failed to pay required wages, benefits, taxes or other contributions, or if a final
28 conviction and disposition of a violation of this Part is made in which the violator is
29 found to be guilty of a crime, then the secretary shall place the employer on a list of

1 employers who are prohibited from contracting, directly or indirectly, with any
2 public body for the construction of any public building or other public work projects,
3 or from performing any work on the same, for a period of one year if the failure is
4 done recklessly, and for a period of two years if the failure is done knowingly. Upon
5 request, the secretary shall give notice by mail of that list to any public body. The
6 secretary may bring an action, in a court of proper jurisdiction and venue, to enjoin
7 or invalidate any contract award made in violation of this Subsection.

8 F.(1) If the secretary determines, after investigation, that an employer failed
9 to properly classify an individual as an employee in accordance with this Part, the
10 secretary may order the immediate suspension of a contractor's license issued if the
11 secretary also determines that ordering an immediate suspension is in the public
12 interest, and provided that the contractor is afforded an opportunity to contest the
13 immediate suspension in the following manner:

14 (a) The secretary shall notify the contractor in writing of the immediate
15 revocation and the contractor's rights under this Subsection.

16 (b) The contractor may notify the commissioner of its request for an
17 opportunity to be heard and contest the immediate suspension in writing within
18 seventy two hours of its receipt of immediate suspension notification.

19 (c) Within seven business days of receipt of the notification from the
20 contractor pursuant to Subparagraph (a) of this Paragraph, the secretary shall grant
21 the contractor a hearing to contest the immediate suspension. The secretary shall
22 permit the contractor to present evidence at the hearing.

23 (d) The secretary shall issue a written decision within five business days of
24 the hearing either upholding or reversing the contractor's immediate suspension. The
25 decision shall include the grounds for upholding or reversing the contractor's
26 immediate suspension.

27 (2) For a second violation of the provisions of this Part, the secretary shall
28 issue a stop-work order requiring the cessation of all business operations at every site
29 at which the violation occurred within seventy-two hours of that determination. The

1 order shall take effect when served upon the employer, or, for a particular employer
2 work-site, when served upon an employee at that work-site. The order shall remain
3 in effect until the secretary issues an order releasing the stop-work order upon
4 finding that the employer has properly classified the individual as an employee and
5 has paid any penalty assessed under this Part. As a condition of release from a stop-
6 work order, the secretary may require an employer who is found to have failed to
7 properly classify an individual as an employee to file with the department periodic
8 reports for a probationary period that shall not exceed two years that demonstrate the
9 employer's continued compliance with this Part. The department shall promulgate
10 rules and regulations to determine filing times and report requirements.

11 (3) For a third or any subsequent violation of the provisions of this Part, the
12 secretary shall issue a stop-work order requiring the cessation of all business
13 operations of the violator within seventy two hours of that determination. The order
14 shall take effect when served upon the employer, or, for a particular employer work-
15 site, when served upon an employee at that work-site. The order shall remain in
16 effect until the secretary issues an order releasing the stop-work order upon finding
17 that the employer has properly classified the individual as an employee and has paid
18 any penalty assessed under this Section. As a condition of release from a stop-work
19 order, the secretary may require an employer who is found to have failed to properly
20 classify an individual as an employee, to file with the department periodic reports for
21 a probationary period that shall not exceed two years that demonstrate the employer's
22 continued compliance with this Part. The department shall promulgate rules and
23 regulations to determine filing times and reporting requirements. Stop-work orders
24 and penalty assessment orders issued pursuant to this Paragraph against an employer
25 shall be in effect against any successor corporation or business entity that has one or
26 more of the same principals or officers as the employer against whom the stop-work
27 order was issued and which is engaged in the same or equivalent trade or activity.

28 G. No employer shall require or request that any individual enter into an
29 agreement or sign a document which results in the misclassification of the individual

1 as an independent contractor or otherwise does not accurately reflect the employment
 2 relationship with the employer. An individual employed as a construction worker
 3 who has not been properly classified as an employee may bring a civil action for
 4 damages against the employer or any other employer who was in contract with the
 5 employee, for failing to properly classify the employee if the employer had
 6 knowledge of this misclassification. An individual representative, including a labor
 7 organization, may bring the action on behalf of the individual or as a class action.
 8 The court may award attorney fees and other costs of the action in addition to
 9 damages to an individual or class of individuals who have not been properly
 10 classified as employees in accordance with this Part.

11 Section 2. This Act shall become effective upon signature by the governor or, if not
 12 signed by the governor, upon expiration of the time for bills to become law without signature
 13 by the governor, as provided by Article III, Section 18 of the Constitution of Louisiana. If
 14 vetoed by the governor and subsequently approved by the legislature, this Act shall become
 15 effective on the day following such approval.

DIGEST

The digest printed below was prepared by House Legislative Services. It constitutes no part of the legislative instrument. The keyword, one-liner, abstract, and digest do not constitute part of the law or proof or indicia of legislative intent. [R.S. 1:13(B) and 24:177(E)]

Patricia Smith

HB No. 1083

Abstract: Enacts the Construction Industry Independent Contractor Act. Provides for the duty to classify independent contractors as employees and establishes penalties for failure to properly classify such employees.

Proposed law creates the Construction Industry Independent Contractor Act. Provides that improperly classifying employees as independent contractors deprives workers of benefits and puts businesses that do comply with the law at a competitive disadvantage.

Proposed law defines an “employer” as a legal business entity or successor thereof who is primarily engaged in the business of or enters into contracts for making improvements to real property. Defines “public body” as the state of Louisiana or any of its political subdivisions. Defines “public work” as making improvements to a facility done under contract and paid for in whole or in part out of funds of a public body. Provides that “public work” also shall include all improvements if at the time of the contract, not less than 55% of the property was leased by a public body and that portion of property is more than 20,000 square feet.

Proposed law provides all services performed in the making of improvements to real property by an individual for remuneration paid by an employer shall be deemed

employment for the purpose of the state's unemployment compensation, workers' compensation, and tax laws unless one of the following applies:

- (1) The individual is free from control or direction over the performance of that service.
- (2) The service is outside of the usual course of business for which the service is performed or the service is performed outside of all the places of business of the employer for which the service is performed.
- (3) The individual is engaged in an independently established trade, occupation, profession, or business.

Proposed law provides that failure to withhold taxes or pay unemployment compensation contributions or workers' compensation premiums with respect to an individuals' wages shall not be considered in making a determination of employment.

Proposed law provides that an employer who fails to properly classify an individual as an employee shall be subject to certain criminal penalties.

Proposed law authorizes the secretary to refer violations of proposed law to the attorney general for investigation and prosecution. Provides that all sums collected as a penalty for failure to properly classify shall be applied toward enforcement and administrative costs of the Department of Labor.

Proposed law if the secretary finds that the employers has knowingly failed to properly classify an individual and failed to pay required wages, benefits, taxes, and other contributions, the secretary shall place said employer on a list of employers who are prohibited from contracting with a public body. Upon request, requires the secretary to mail that list to any public body. Authorizes the secretary to bring an action to invalidate the contract.

Proposed law provides that the secretary may order the suspension of a contractor's license for failure to properly classify an employee. Requires the secretary to mail a notice to the employer informing the employer of the revocation of rights and allows the employer to contest the suspension in writing within 72 hours of notification. Provides that the secretary shall grant the employer an opportunity to contest the suspension within seven days of notification from the employer. Requires the secretary to issue a written decision within five days of the hearing.

Proposed law provides the secretary shall issue a stop-work order requiring the cessation of all business operations of the violator within 72 hours of a determination of a second violation. Provides that the order shall take effect immediately and shall remain in effect until the secretary issues an order releasing the stop-work order upon a finding that the employer has properly classified the individual as an employee and paid any penalty. Allows the secretary to require the employer to file periodic reports, for a not more than two years, that demonstrate the employer's compliance.

Proposed law provides the secretary shall issue a stop-work order requiring the cessation of all business operations of the violator within 72 hours of a determination of a third violation and any subsequent violation. Provides that the order shall take effect immediately and shall remain in effect until the secretary issues an order releasing the stop-work order upon a finding that the employer has properly classified the individual as an employee and paid any penalty. Allows the secretary to require the employer to file periodic reports, for not more than two years, that demonstrate the employer's compliance. Provides that stop-work orders and penalty assessments shall be in effect against any successor corporation or business entity that has one or more of the same principals or officers as the employer against whom the stop-work order was issued.

Proposed law prohibits an employer from requiring or requesting that any individual enter into an agreement or sign a document which results in the misclassification of the individual as an independent contractor. Provides that an employee not properly classified may bring a civil action against the employer for failing to properly classify the employee. Provides that a labor organization may bring an action on behalf of an individual or as a class action. Provides for the assessment of attorney fees and other costs of the action in addition to any damages.

Effective upon signature of the governor or lapse of time for gubernatorial action.

(Adds R.S. 23:931-933)