

**First Regular Session  
Sixty-seventh General Assembly  
STATE OF COLORADO**

**PREAMENDED**

*This Unofficial Version Includes Committee  
Amendments Not Yet Adopted on Second Reading*

LLS NO. 09-0891.01 Christy Chase

**HOUSE BILL 09-1310**

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**HOUSE SPONSORSHIP**

**Levy, Apuan, Court, McCann, Pace, Ryden**

**SENATE SPONSORSHIP**

**Heath,**

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**House Committees**

Business Affairs and Labor  
Appropriations

**Senate Committees**

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**A BILL FOR AN ACT**

101     **CONCERNING THE MISCLASSIFICATION OF EMPLOYEES AS**  
102             **INDEPENDENT CONTRACTORS FOR PURPOSES OF THE**  
103             **"COLORADO EMPLOYMENT SECURITY ACT".**

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**Bill Summary**

*(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments that may be subsequently adopted.)*

Creates the office of employee misclassification (office) in the division of employment and training (division) in the department of labor and employment (department) for the purpose of investigating complaints of employers misclassifying employees as independent contractors, thereby avoiding the payment of employment taxes for such employees. Authorizes the director of the division to investigate complaints and issue

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.  
*Capital letters indicate new material to be added to existing statute.*  
*Dashes through the words indicate deletions from existing statute.*

orders upon a finding that an employer has misclassified employees. Authorizes the director to collect back taxes and interest from an employer who misclassified employees and to impose additional fines and penalties when the director finds that the employer, with reckless disregard, misclassified employees.

Requires the executive director of the department to conduct a statewide study to determine the scope of the problem of employee misclassification, including whether the problem is widespread, whether particular industries are more inclined to engage in the practice, estimates of state revenues lost or not collected due to employee misclassifications, and whether a uniform definition of "employment relationship" is needed. Requires the executive director to submit a report to specified committees of the general assembly regarding the statewide study and the operations of the office in investigating complaints.

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1 *Be it enacted by the General Assembly of the State of Colorado:*

2           **SECTION 1.** Article 72 of title 8, Colorado Revised Statutes, is  
3 amended BY THE ADDITION OF A NEW SECTION to read:

4           **8-72-113. Office of employee misclassification - creation -**  
5 **investigations - enforcement - statewide study - report - definitions -**  
6 **legislative declaration - repeal.** (1) THE GENERAL ASSEMBLY HEREBY  
7 FINDS AND DECLARES THAT:

8           (a) MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT  
9 CONTRACTORS IN VIOLATION OF THE "COLORADO EMPLOYMENT SECURITY  
10 ACT" AND, IN PARTICULAR, THE PROVISIONS OF ARTICLE 70 OF THIS TITLE  
11 DEFINING THE EMPLOYMENT RELATIONSHIP, MAY POSE A SIGNIFICANT  
12 PROBLEM IN THIS STATE AND LEADS TO UNDERPAYMENT OF EMPLOYMENT  
13 TAXES THAT EMPLOYERS ARE OBLIGATED TO PAY THE STATE FOR COVERED  
14 EMPLOYMENT.

15           (b) BUSINESSES THAT MISCLASSIFY EMPLOYEES GAIN AN  
16 UNFAIR COMPETITIVE ADVANTAGE OVER BUSINESSES THAT PROPERLY  
17 CLASSIFY EMPLOYEES AND PAY APPROPRIATE TAXES TO THE STATE.

1 (c) WHEN EMPLOYEES ARE MISCLASSIFIED, THE PROTECTIONS  
2 AVAILABLE TO PROPERLY CLASSIFIED EMPLOYEES AGAINST ECONOMIC  
3 INSECURITY ARE UNAVAILABLE TO THOSE MISCLASSIFIED EMPLOYEES, AND  
4 THE STREAM OF REVENUE THAT SHOULD BE PAID TO THE STATE TO  
5 PROVIDE PROTECTIONS TO MISCLASSIFIED EMPLOYEES IS NOT AVAILABLE.

6 (2) AS USED IN THIS SECTION:

7 (a) "ACT" MEANS THE "COLORADO EMPLOYMENT SECURITY ACT".

8 (b) "COMPLAINANT" MEANS THE PERSON WHO FILES A COMPLAINT  
9 WITH THE OFFICE PURSUANT TO THIS SECTION.

10 (c) "DIRECTOR" MEANS THE DIRECTOR OF THE DIVISION OF  
11 EMPLOYMENT AND TRAINING IN THE DEPARTMENT OF LABOR AND  
12 EMPLOYMENT.

13 (d) "EXECUTIVE DIRECTOR" MEANS THE EXECUTIVE DIRECTOR OF  
14 THE DEPARTMENT OF LABOR AND EMPLOYMENT.

15 (e) "MISCLASSIFICATION OF EMPLOYEES" MEANS ERRONEOUSLY  
16 CLASSIFYING A PERSON AS AN INDEPENDENT CONTRACTOR, FREE FROM  
17 CONTROL AND DIRECTION OF THE EMPLOYER IN THE PERFORMANCE OF  
18 SERVICE FOR THE EMPLOYER, WHEN THE EMPLOYER CANNOT SHOW AN  
19 EXCEPTION, PURSUANT TO SECTION 8-70-103 (11), TO THE GENERAL RULE  
20 THAT SERVICE BEING PERFORMED FOR THE EMPLOYER IS PRESUMED TO BE  
21 EMPLOYMENT FOR PURPOSES OF THE ACT.

22 (f) "OFFICE" MEANS THE OFFICE OF EMPLOYEE MISCLASSIFICATION  
23 CREATED IN SUBSECTION (3) OF THIS SECTION.

24 (g) "RESPONDENT" MEANS THE PERSON AGAINST WHOM A  
25 COMPLAINT IS FILED PURSUANT TO THIS SECTION.

26 (3) (a) THERE IS HEREBY CREATED, WITHIN THE DIVISION OF  
27 EMPLOYMENT AND TRAINING, THE OFFICE OF EMPLOYEE

1 MISCLASSIFICATION. THE OFFICE, AT THE DIRECTION OF THE DIRECTOR,  
2 SHALL BE RESPONSIBLE FOR ACCEPTING AND INVESTIGATING COMPLAINTS  
3 REGARDING MISCLASSIFICATION OF EMPLOYEES AND ENFORCING THE  
4 REQUIREMENTS OF THE ACT REGARDING CLASSIFICATION OF EMPLOYEES  
5 AND PAYMENT OF TAXES.

6 (b) ANY PERSON MAY FILE A WRITTEN COMPLAINT WITH THE  
7 OFFICE ALLEGING THAT A PERSON ENGAGED IN EMPLOYMENT IS BEING  
8 MISCLASSIFIED BY AN EMPLOYER AS AN INDEPENDENT CONTRACTOR. THE  
9 COMPLAINANT SHALL SPECIFY IN THE COMPLAINT THE FACTS SHOWING  
10 THAT THE PERSON CLASSIFIED AS AN INDEPENDENT CONTRACTOR IS  
11 ENGAGED IN EMPLOYMENT, AS DEFINED IN ARTICLE 70 OF THIS TITLE.

12 (c) THE DIRECTOR, THROUGH THE OFFICE, MAY INVESTIGATE A  
13 COMPLAINT FILED PURSUANT TO THIS SUBSECTION (3) AND SHALL FOCUS  
14 THE RESOURCES OF THE OFFICE ON THE INVESTIGATION OF THE MOST  
15 EGREGIOUS COMPLAINTS OR THOSE COMPLAINTS ALLEGING INTENTIONAL  
16 ACTS OF MISCLASSIFICATION OF EMPLOYEES UNDERTAKEN IN ORDER TO  
17 GAIN A COMPETITIVE ADVANTAGE OR TO AVOID THE PAYMENT OF TAXES.

18 (d) NO LATER THAN THIRTY DAYS AFTER RECEIPT OF A COMPLAINT,  
19 THE DIRECTOR SHALL DETERMINE WHETHER OR NOT AN INVESTIGATION IS  
20 WARRANTED. IF THE DIRECTOR DETERMINES THAT AN INVESTIGATION IS  
21 WARRANTED, THE DIRECTOR SHALL NOTIFY THE COMPLAINANT AND  
22 RESPONDENT THAT AN INVESTIGATION WILL BE CONDUCTED AND  
23 SHALL CONDUCT THE INVESTIGATION IN ACCORDANCE WITH THE ACT. THE  
24 RULES ADOPTED PURSUANT TO THE ACT, AND THE COMPLAINANT AND  
25 RESPONDENT SHALL COOPERATE AND PROVIDE INFORMATION AS  
26 NECESSARY TO FACILITATE THE INVESTIGATION.

27 (e) (I) UPON CONCLUSION OF AN INVESTIGATION, THE DIRECTOR

1 SHALL ISSUE A WRITTEN ORDER EITHER DISMISSING THE COMPLAINT OR  
2 FINDING THAT THE EMPLOYER HAS ENGAGED IN THE MISCLASSIFICATION  
3 OF EMPLOYEES AND HAS FAILED TO PAY APPROPRIATE TAXES FOR  
4 COVERED EMPLOYMENT AS DEFINED IN ARTICLE 70 OF THIS TITLE.

5 (II) IF THE DIRECTOR FINDS THAT AN EMPLOYER HAS ENGAGED IN  
6 THE MISCLASSIFICATION OF EMPLOYEES, THE DIRECTOR SHALL ORDER THE  
7 EMPLOYER TO PAY BACK TAXES OWED AND INTEREST.

8 (III) UPON A FINDING THAT THE EMPLOYER, WITH WILLFUL  
9 DISREGARD OF THE LAW, MISCLASSIFIED EMPLOYEES, THE DIRECTOR MAY:

10 (A) IMPOSE A FINE OF UP TO FIVE THOUSAND DOLLARS PER  
11 MISCLASSIFIED EMPLOYEE FOR THE FIRST MISCLASSIFICATION WITH  
12 WILLFUL DISREGARD, AND FOR A SECOND OR SUBSEQUENT  
13 MISCLASSIFICATION WITH WILLFUL DISREGARD, A FINE OF UP TO  
14 TWENTY-FIVE THOUSAND DOLLARS PER MISCLASSIFIED EMPLOYEE; AND

15 (B) UPON A SECOND OR SUBSEQUENT MISCLASSIFICATION WITH  
16 WILLFUL DISREGARD, ISSUE AN ORDER PROHIBITING THE EMPLOYER FROM  
17 CONTRACTING WITH, OR RECEIVING ANY FUNDS FOR THE PERFORMANCE OF  
18 CONTRACTS FROM, THE STATE FOR UP TO TWO YEARS AFTER THE DATE OF  
19 THE DIRECTOR'S ORDER. UPON THE ISSUANCE OF SUCH ORDER, THE  
20 DIRECTOR SHALL NOTIFY STATE DEPARTMENTS AND AGENCIES AS  
21 NECESSARY TO ENSURE ENFORCEMENT OF THE ORDER.

22 (f) THE DIRECTOR SHALL PROVIDE A COPY OF THE WRITTEN ORDER  
23 TO THE RESPONDENT. THOSE PORTIONS OF THE WRITTEN ORDER THAT ARE  
24 NOT CONFIDENTIAL UNDER THE ACT SHALL BE A PUBLIC RECORD.

25 (g) AN EMPLOYER SHALL HAVE THE RIGHT TO APPEAL THE  
26 DIRECTOR'S ORDER IN ACCORDANCE WITH SECTION 8-76-113.

27 (4) (a) AN EMPLOYER MAY REQUEST A WRITTEN ADVISORY

1 OPINION FROM THE DIRECTOR CONCERNING WHETHER THE EMPLOYER  
2 SHOULD CLASSIFY THE INDIVIDUAL AS AN EMPLOYEE FOR PURPOSES OF  
3 COMPLYING WITH THE ACT. THE EMPLOYER SHALL PROVIDE THE DIRECTOR  
4 WITH INFORMATION NECESSARY FOR THE DIRECTOR TO ISSUE AN ADVISORY  
5 OPINION.

6 (b) UPON RECEIPT OF A REQUEST AND PERTINENT INFORMATION  
7 FROM AN EMPLOYER, THE DIRECTOR SHALL ISSUE AN ADVISORY OPINION  
8 TO THE EMPLOYER, INDICATING WHETHER THE EMPLOYER SHOULD  
9 CLASSIFY THE INDIVIDUAL AS AN EMPLOYEE IN ORDER TO COMPLY WITH  
10 THE ACT. AN OPINION ISSUED PURSUANT TO THIS SUBSECTION (4) IS ONLY  
11 ADVISORY, BASED ON THE INFORMATION PROVIDED BY THE EMPLOYER AND  
12 THE DIRECTOR'S UNDERSTANDING OF THE CIRCUMSTANCES AT THE TIME  
13 ISSUED, AND IS NOT BINDING ON THE DIVISION, THE EMPLOYER, OR ANY  
14 OTHER STATE OR LOCAL GOVERNMENTAL ENTITY.

15 (c) THE DIRECTOR SHALL PROMULGATE RULES IN ACCORDANCE  
16 WITH ARTICLE 4 OF TITLE 24, C.R.S., ESTABLISHING THE PROCESS FOR  
17 ISSUING AN ADVISORY OPINION.

18 (5) THE DIRECTOR, BY ALL MEANS REASONABLE AND WITHIN  
19 BUDGETARY CONSTRAINTS, SHALL PUBLICIZE THE COMPLAINT PROCESS  
20 ESTABLISHED IN THIS SECTION AND ITS AVAILABILITY TO THOSE WHO HAVE  
21 DISCOVERED MISCLASSIFICATION OF EMPLOYEES. THE DIRECTOR SHALL  
22 DEVELOP AND MAKE AVAILABLE FREE OF CHARGE TO EMPLOYERS A  
23 NOTICE EXPLAINING THE RIGHTS OF EMPLOYEES TO BE PROPERLY  
24 CLASSIFIED AND THE AVAILABILITY OF A COMPLAINT PROCESS PURSUANT  
25 TO THIS SECTION. EMPLOYERS SHALL POST THE NOTICE CONSPICUOUSLY  
26 IN THE WORKPLACE OR OTHERWISE WHERE IT CAN BE SEEN AS EMPLOYEES  
27 COME OR GO TO THEIR PLACES OF WORK.

1           (6) (a) THE EXECUTIVE DIRECTOR SHALL CONDUCT A STATEWIDE  
2 STUDY OF THE ISSUE OF EMPLOYEE MISCLASSIFICATION, WHICH SHALL  
3 INCLUDE, WITHOUT LIMITATION, THE FOLLOWING INFORMATION:

4           (I) THE STATE DEPARTMENTS, DIVISIONS, AND AGENCIES THAT ARE  
5 AFFECTED BY EMPLOYEE MISCLASSIFICATION;

6           (II) THE AMOUNT OF STATE REVENUE THAT IS LOST OR NOT  
7 COLLECTED DUE TO THE MISCLASSIFICATION OF EMPLOYEES;

8           (III) ESTIMATES OF HOW WIDESPREAD THE PROBLEM OF EMPLOYEE  
9 MISCLASSIFICATION IS AND WHETHER PARTICULAR INDUSTRIES ARE MORE  
10 LIKELY TO ENGAGE IN THE MISCLASSIFICATION OF EMPLOYEES;

11           (IV) CONSIDERATION OF WHETHER STATE LAW SHOULD SPECIFY A  
12 UNIFORM DEFINITION OF THE EMPLOYMENT RELATIONSHIP AND, IF SO, HOW  
13 IT SHOULD BE DEFINED; AND

14           (V) ANY OTHER ISSUES THE EXECUTIVE DIRECTOR DETERMINES  
15 APPROPRIATE.

16           (b) THE EXECUTIVE DIRECTOR SHALL DEVOTE DEPARTMENT  
17 RESOURCES AS NECESSARY TO COMPLETE THE STATEWIDE STUDY.

18           (c) THE EXECUTIVE DIRECTOR SHALL SEEK PUBLIC INPUT AND MAY  
19 CONDUCT PUBLIC HEARINGS OR APPOINT STUDY GROUPS AS NECESSARY TO  
20 OBTAIN INFORMATION NECESSARY TO COMPLETE THE STUDY.

21           (7) NO LATER THAN TWO YEARS AFTER THE EFFECTIVE DATE OF  
22 THIS SECTION, THE EXECUTIVE DIRECTOR SHALL SUBMIT A REPORT ON THE  
23 STATEWIDE STUDY CONDUCTED PURSUANT TO SUBSECTION (6) OF THIS  
24 SECTION TO THE BUSINESS, LABOR, AND TECHNOLOGY COMMITTEE OF THE  
25 SENATE AND THE BUSINESS AFFAIRS AND LABOR COMMITTEE OF THE  
26 HOUSE OF REPRESENTATIVES, OR THEIR SUCCESSOR COMMITTEES. THE  
27 REPORT SHALL ALSO INCLUDE INFORMATION ON THE OPERATION OF THE

1 OFFICE, SPECIFYING AT LEAST THE FOLLOWING:

2 (a) THE NUMBER OF COMPLAINTS SUBMITTED TO THE OFFICE  
3 PURSUANT TO THIS SECTION;

4 (b) THE NUMBER OF COMPLAINTS THAT WERE INVESTIGATED BY  
5 THE DIRECTOR;

6 (c) THE OUTCOME OF THE COMPLAINTS THAT WERE INVESTIGATED,  
7 INCLUDING WHETHER ANY EMPLOYERS WERE FOUND TO HAVE  
8 MISCLASSIFIED EMPLOYEES AND THE AMOUNT OF TAXES, INTEREST, OR  
9 FINES IMPOSED AGAINST SUCH EMPLOYERS;

10 (d) A RECOMMENDATION REGARDING WHETHER THE OFFICE AND  
11 ITS FUNCTIONS SHOULD BE CONTINUED, MODIFIED, OR REPEALED; AND

12 (e) ANY OTHER ISSUES OR INFORMATION THE EXECUTIVE DIRECTOR  
13 DEEMS APPROPRIATE.

14 (8) SUBSECTIONS (6) AND (7) OF THIS SECTION AND THIS  
15 SUBSECTION (8) ARE REPEALED, EFFECTIVE JULY 1, 2012.

16 **SECTION 2. Safety clause.** The general assembly hereby finds,  
17 determines, and declares that this act is necessary for the immediate  
18 preservation of the public peace, health, and safety.