

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

ENGROSSED

*This Version Includes All Amendments Adopted
on Second Reading in the House of Introduction*

LLS NO. 09-0891.01 Christy Chase

HOUSE BILL 09-1310

HOUSE SPONSORSHIP

Levy, Apuan, Court, McCann, Pace, Ryden

SENATE SPONSORSHIP

Heath,

House Committees

Business Affairs and Labor
Appropriations

Senate Committees

A BILL FOR AN ACT

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

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.*

HOUSE
Amended 2nd Reading
April 6, 2009

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.

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. Employee misclassification - investigations -**
5 **enforcement - statewide study - report - definitions - legislative**
6 **declaration - repeal.** (1) THE GENERAL ASSEMBLY HEREBY FINDS AND
7 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 DIVISION 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) "DIVISION" MEANS THE DIVISION OF EMPLOYMENT AND
14 TRAINING IN THE DEPARTMENT OF LABOR AND EMPLOYMENT.

15 (e) "EXECUTIVE DIRECTOR" MEANS THE EXECUTIVE DIRECTOR OF
16 THE DEPARTMENT OF LABOR AND EMPLOYMENT.

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

24

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

27 (3) (a) THE DIVISION SHALL BE RESPONSIBLE FOR

1 ACCEPTING AND INVESTIGATING COMPLAINTS REGARDING
2 MISCLASSIFICATION OF EMPLOYEES AND ENFORCING THE REQUIREMENTS
3 OF THE ACT REGARDING CLASSIFICATION OF EMPLOYEES AND PAYMENT OF
4 TAXES.

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

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

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

26 (e) (I) UPON CONCLUSION OF AN INVESTIGATION, THE DIRECTOR
27 SHALL ISSUE A WRITTEN ORDER EITHER DISMISSING THE COMPLAINT OR

1 FINDING THAT THE EMPLOYER HAS ENGAGED IN THE MISCLASSIFICATION
2 OF EMPLOYEES AND HAS FAILED TO PAY APPROPRIATE TAXES FOR
3 COVERED EMPLOYMENT AS DEFINED IN ARTICLE 70 OF THIS TITLE.

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

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

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

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

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

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

26 (4) (a) AN EMPLOYER MAY REQUEST A WRITTEN ADVISORY
27 OPINION FROM THE DIRECTOR CONCERNING WHETHER THE EMPLOYER

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

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

14 (c) THE DIRECTOR SHALL PROMULGATE RULES IN ACCORDANCE
15 WITH ARTICLE 4 OF TITLE 24, C.R.S., ESTABLISHING THE PROCESS FOR
16 ISSUING AN ADVISORY OPINION AND THE FEES TO BE CHARGED THE
17 REQUESTING EMPLOYER TO COVER THE DIRECTOR'S AND DIVISION'S COSTS
18 IN PROVIDING THE ADVISORY OPINION.

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

1 COME OR GO TO THEIR PLACES OF WORK.

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

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

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

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

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

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

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

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

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

1 REPORT SHALL ALSO INCLUDE INFORMATION ON THE OPERATION OF THE
2 DIVISION TO INVESTIGATE COMPLAINTS OF EMPLOYEE MISCLASSIFICATION
3 AND ENFORCE THIS SECTION, SPECIFYING AT LEAST THE FOLLOWING:

4 (a) THE NUMBER OF COMPLAINTS SUBMITTED TO THE DIVISION
5 PURSUANT TO THIS SECTION;

6 (b) THE NUMBER OF COMPLAINTS THAT WERE INVESTIGATED BY
7 THE DIRECTOR;

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

12 (d) A RECOMMENDATION REGARDING WHETHER THE
13 DIVISION'S FUNCTIONS PURSUANT TO THIS SECTION SHOULD BE
14 CONTINUED, MODIFIED, OR REPEALED; AND

15 (e) ANY OTHER ISSUES OR INFORMATION THE EXECUTIVE DIRECTOR
16 DEEMS APPROPRIATE.

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

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