

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

REVISED

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

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

Business, Labor and Technology
Appropriations

A BILL FOR AN ACT

101 **CONCERNING THE MISCLASSIFICATION OF EMPLOYEES AS**
102 **INDEPENDENT CONTRACTORS FOR PURPOSES OF THE**
103 **"COLORADO EMPLOYMENT SECURITY ACT", AND MAKING AN**
104 **APPROPRIATION THEREFOR.**

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,

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.*

SENATE
Am ended 2nd Reading
April 30, 2009

HOUSE
3rd Reading Unam ended
April 8, 2009

HOUSE
Am ended 2nd Reading
April 6, 2009

thereby avoiding the payment of employment taxes for such employees. Authorizes the director of the division to investigate complaints and issue 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 - advisory opinions - rules - employee misclassification**
6 **advisory opinion fund - statewide study - report - definitions -**
7 **legislative declaration - repeal.** (1) THE GENERAL ASSEMBLY HEREBY
8 FINDS AND DECLARES THAT:

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

16 (b) BUSINESSES THAT MISCLASSIFY EMPLOYEES GAIN AN

1 UNFAIR COMPETITIVE ADVANTAGE OVER BUSINESSES THAT PROPERLY
2 CLASSIFY EMPLOYEES AND PAY APPROPRIATE TAXES TO THE STATE.

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

8 (2) AS USED IN THIS SECTION:

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

10 (b) "COMPLAINANT" MEANS THE PERSON WHO FILES A COMPLAINT
11 WITH THE DIVISION PURSUANT TO THIS SECTION.

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

15 (d) "DIVISION" MEANS THE DIVISION OF EMPLOYMENT AND
16 TRAINING IN THE DEPARTMENT OF LABOR AND EMPLOYMENT.

17 (e) "EXECUTIVE DIRECTOR" MEANS THE EXECUTIVE DIRECTOR OF
18 THE DEPARTMENT OF LABOR AND EMPLOYMENT.

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

26 [REDACTED]
27 (g) "RESPONDENT" MEANS THE PERSON AGAINST WHOM A

1 COMPLAINT IS FILED PURSUANT TO THIS SECTION.

2 (3) (a) THE DIVISION SHALL BE RESPONSIBLE FOR
3 ACCEPTING AND INVESTIGATING COMPLAINTS REGARDING
4 MISCLASSIFICATION OF EMPLOYEES AND ENFORCING THE REQUIREMENTS
5 OF THE ACT REGARDING CLASSIFICATION OF EMPLOYEES AND PAYMENT OF
6 TAXES.

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

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

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

1 (e) (I) UPON CONCLUSION OF AN INVESTIGATION, THE DIRECTOR
2 SHALL ISSUE A WRITTEN ORDER EITHER DISMISSING THE COMPLAINT OR
3 FINDING THAT THE EMPLOYER HAS ENGAGED IN THE MISCLASSIFICATION
4 OF EMPLOYEES AND HAS FAILED TO PAY APPROPRIATE TAXES FOR
5 COVERED EMPLOYMENT AS DEFINED IN ARTICLE 70 OF THIS TITLE.

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

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

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

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

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

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

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

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

16 (c) THE DIRECTOR SHALL PROMULGATE RULES IN ACCORDANCE
17 WITH ARTICLE 4 OF TITLE 24, C.R.S., ESTABLISHING THE PROCESS FOR
18 ISSUING AN ADVISORY OPINION AND THE FEES TO BE CHARGED THE
19 REQUESTING EMPLOYER TO COVER THE DIRECTOR'S AND DIVISION'S COSTS
20 IN PROVIDING THE ADVISORY OPINION. ANY FEES CHARGED PURSUANT TO
21 THIS SUBSECTION (4) FOR THE COSTS ASSOCIATED WITH ISSUING AN
22 ADVISORY OPINION SHALL BE DEPOSITED IN THE EMPLOYEE
23 MISCLASSIFICATION ADVISORY OPINION FUND, WHICH FUND IS HEREBY
24 CREATED. MONEYS IN THE EMPLOYEE MISCLASSIFICATION ADVISORY
25 OPINION FUND SHALL BE SUBJECT TO ANNUAL APPROPRIATION BY THE
26 GENERAL ASSEMBLY FOR THE PURPOSES OF THIS SUBSECTION (4).
27 INTEREST DERIVED FROM THE DEPOSIT AND INVESTMENT OF MONEYS IN

1 THE FUND SHALL BE CREDITED TO THE FUND. AT THE END OF ANY FISCAL
2 YEAR, ALL UNEXPENDED AND UNENCUMBERED MONEYS IN THE FUND
3 SHALL REMAIN IN THE FUND AND SHALL NOT BE CREDITED OR
4 TRANSFERRED TO THE GENERAL FUND OR ANY OTHER FUND.

5 (5) THE DIRECTOR, BY ALL MEANS REASONABLE AND WITHIN
6 BUDGETARY CONSTRAINTS, SHALL PUBLICIZE THE COMPLAINT PROCESS
7 ESTABLISHED IN THIS SECTION AND ITS AVAILABILITY TO THOSE WHO HAVE
8 DISCOVERED MISCLASSIFICATION OF EMPLOYEES. THE DIRECTOR SHALL
9 DEVELOP AND MAKE AVAILABLE FREE OF CHARGE TO EMPLOYERS A
10 NOTICE EXPLAINING THE RIGHTS OF EMPLOYEES TO BE PROPERLY
11 CLASSIFIED AND THE AVAILABILITY OF A COMPLAINT PROCESS PURSUANT
12 TO THIS SECTION. EMPLOYERS SHALL POST THE NOTICE CONSPICUOUSLY
13 IN THE WORKPLACE OR OTHERWISE WHERE IT CAN BE SEEN AS EMPLOYEES
14 COME OR GO TO THEIR PLACES OF WORK.

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

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

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

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

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

1 (V) ANY OTHER ISSUES THE EXECUTIVE DIRECTOR DETERMINES
2 APPROPRIATE.

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

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

8 (7) NO LATER THAN TWO YEARS AFTER THE EFFECTIVE DATE OF
9 THIS SECTION, THE EXECUTIVE DIRECTOR SHALL SUBMIT A REPORT ON THE
10 STATEWIDE STUDY CONDUCTED PURSUANT TO SUBSECTION (6) OF THIS
11 SECTION TO THE BUSINESS, LABOR, AND TECHNOLOGY COMMITTEE OF THE
12 SENATE AND THE BUSINESS AFFAIRS AND LABOR COMMITTEE OF THE
13 HOUSE OF REPRESENTATIVES, OR THEIR SUCCESSOR COMMITTEES. THE
14 REPORT SHALL ALSO INCLUDE INFORMATION ON THE OPERATION OF THE
15 DIVISION TO INVESTIGATE COMPLAINTS OF EMPLOYEE MISCLASSIFICATION
16 AND ENFORCE THIS SECTION, SPECIFYING AT LEAST THE FOLLOWING:

17 (a) THE NUMBER OF COMPLAINTS SUBMITTED TO THE DIVISION
18 PURSUANT TO THIS SECTION;

19 (b) THE NUMBER OF COMPLAINTS THAT WERE INVESTIGATED BY
20 THE DIRECTOR;

21 (c) THE OUTCOME OF THE COMPLAINTS THAT WERE INVESTIGATED,
22 INCLUDING WHETHER ANY EMPLOYERS WERE FOUND TO HAVE
23 MISCLASSIFIED EMPLOYEES AND THE AMOUNT OF TAXES, INTEREST, OR
24 FINES IMPOSED AGAINST SUCH EMPLOYERS;

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

1 (e) ANY OTHER ISSUES OR INFORMATION THE EXECUTIVE DIRECTOR
2 DEEMS APPROPRIATE.

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

5 **SECTION 2. Appropriation.** (1) In addition to any other
6 appropriation, there is hereby appropriated, out of any moneys in the
7 unemployment revenue fund created in section 8-77-106, (1), Colorado
8 Revised Statutes, not otherwise appropriated, to the department of labor
9 and employment, for allocation to the division of employment and
10 training, for the fiscal year beginning July 1, 2009, the sum of nine
11 hundred seventy-five dollars (\$975) cash funds, or so much thereof as
12 may be necessary, for the implementation of this act.

13 (2) In addition to any other appropriation, there is hereby
14 appropriated, out of any moneys in the employee misclassification
15 advisory opinion fund created in section 8-72-113 (4) (c), Colorado
16 Revised Statutes, not otherwise appropriated, to the department of labor
17 and employment, for allocation to the division of employment and
18 training, for the fiscal year beginning July 1, 2009, the sum of nine
19 thousand eight hundred forty dollars (\$9,840) cash funds and 0.2 FTE, or
20 so much thereof as may be necessary, for the implementation of this act.

21 **SECTION 3. Safety clause.** The general assembly hereby finds,
22 determines, and declares that this act is necessary for the immediate
23 preservation of the public peace, health, and safety.