

# HOUSE BILL REPORT

## HB 1300

---

### As Reported by House Committee On: Labor & Workplace Standards

**Title:** An act relating to simplifying and enforcing employee status under employment laws to ensure fairness to employers and employees and address the underground economy.

**Brief Description:** Simplifying and enforcing employee status under employment laws to ensure fairness to employers and employees and address the underground economy.

**Sponsors:** Representatives Riccelli, Gregerson, Peterson, Tharinger, Macri, Ryu, Fitzgibbon, Jinkins, Goodman, Stanford, Ormsby, Santos, Bergquist and Farrell.

#### **Brief History:**

##### **Committee Activity:**

Labor & Workplace Standards: 1/23/17, 1/31/17, 2/2/17 [DPS].

#### **Brief Summary of Substitute Bill**

- Creates the Employee Fair Classification Act, which prohibits misclassification of employees as independent contractors and creates remedies, including civil penalties and damages.
- Defines "independent contractor" for purposes of the Employee Fair Classification Act and establishes the same definition for purposes of the Minimum Wage Act, unemployment insurance, industrial insurance, and other employment laws.

---

### HOUSE COMMITTEE ON LABOR & WORKPLACE STANDARDS

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 4 members: Representatives Sells, Chair; Gregerson, Vice Chair; Doglio and Frame.

**Minority Report:** Do not pass. Signed by 3 members: Representatives Manweller, Ranking Minority Member; McCabe, Assistant Ranking Minority Member; Pike.

**Staff:** Joan Elgee (786-7106).

---

*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

## **Background:**

Employment standards and benefits generally apply only if an employer-employee relationship exists rather than an independent contractor relationship. Various multipart tests are used to determine whether an individual is an independent contractor. For purposes of prevailing wage, industrial insurance, and unemployment insurance, a six-part statutory independent contractor test is applied. This test requires that:

- the individual has been and will be free from direction and control, both under the contract and in fact;
- the individual's services are outside the usual course of business for which the service is performed, or outside all the places of business, or the individual must pay the costs of the principal place of business where the services are performed;
- the individual has an independently established business, or a principal place of business that qualifies for an Internal Revenue Service (IRS) deduction;
- the individual is responsible for filing a schedule of expenses with the IRS;
- the individual has a separate set of books and records that reflect all items of income and expenses; and
- the individual has an active and valid registration with the Department of Revenue, has a Unified Business Identifier number, and has any other required state accounts for the payment of taxes.

In the construction industry, a seventh required element is that the individual be registered as a contractor or licensed as an electrical contractor. For industrial insurance, a threshold question is whether a person under contract brings more than their personal labor to the job and for unemployment insurance, persons outside construction may also be independent contractors under an alternative three-part test.

For purposes of the Minimum Wage Act, which also addresses overtime, a common law economic dependence test applies. The inquiry under this test is whether the worker is economically dependent on the alleged employer or is instead in business for himself or herself. Other wage laws also do not have statutory tests. These include the Wage Payment Act, which provides for an administrative or court action to collect wages under the Minimum Wage Act and other wage laws, as well as establishes other requirements. Other laws address deductions from wages and otherwise address failure to pay wages.

If an employer treats a worker as an independent contractor rather than as an employee, the employer may be liable under the various employment laws. Some employment laws address the liability of general contractors for violations of a subcontractor. For example, for purposes of unemployment insurance and industrial insurance, a general construction contractor is not liable for a subcontractor's taxes under certain circumstances.

---

## **Summary of Substitute Bill:**

The Employee Fair Classification Act (EFCA) is enacted.

## Prohibitions and Requirements.

Certain actions by employers and other persons are prohibited. These are:

- willfully misclassifying an employee as an independent contractor. "Misclassification" is designating an employee as a nonemployee. "Willful" is a knowing and intentional action that is not accidental or the result of a bona fide dispute;
- charging a misclassified employee a fee or making unlawful deductions from compensation;
- requiring or requesting an employee to agree to or sign a document that results in misclassification;
- forming, assisting in, or inducing the formation of a business entity or paying or collecting a fee for the use of a business entity, for the purpose of facilitating or evading detection of a violation of the EFCA; and
- conspiring with, aiding and abetting, assisting, or advising an employer (for remuneration) with the intent of violating the EFCA.

Employers who engage independent contractors must post a notice stating that a worker has a right to be classified as an employee if the worker does not meet independent contractor requirements, and that a complaint may be filed with the Department of Labor and Industries (Department) or in court if a person believes misclassification has occurred. The notice must be in English, Spanish, and any other language primarily spoken by the majority of the workforce.

Bona fide independent contractors, commissioned outside salespeople, individuals employed on a casual and sporadic basis, and volunteers are not employees under the EFCA.

#### Employer-Employee Relationship.

An employer-employee relationship exists when an individual performs labor or services for an employer. Proof that an individual is not an employee must be established by a preponderance of the evidence. A person may be an employee of two or more employers at the same time.

#### Definition of Independent Contractor.

An "independent contractor" is an individual who performs labor or services under either of two tests. One test requires that:

- the individual is and will continue to be free from control or direction, both under the contract and in fact. Control or direction includes the right to control or direct, as well as general control or direction over, the individual's physical activities;
- the labor or service is either outside the usual course of business for which the labor or service is performed or outside of all the places of business of the enterprise for which the labor or service is performed;
- the individual is customarily engaged in an independently established trade, occupation, business, or profession that is of the same nature as that involved in the contract;
- the individual is responsible for filing a schedule of expenses with the IRS;

- the individual has a separate set of books and records that reflect all items of income and expenses;
- the individual has an active and valid registration with the Department of Revenue, has a Unified Business Identifier number, and has any other required state accounts for the payment of taxes; and
- if the individual is performing services as a contractor or electrical contractor, the individual has a valid contractor registration or electrical contractor license.

An alternative test requires that:

- the individual is and will continue to be free from control or direction, both under the contract and in fact. Control or direction includes the right to control or direct as well as general control or direction over, the individual's physical activities;
- the individual's business is not financially dependent on the relationship with the party engaging the individual and the business continues after the relationship ends;
- the individual has a substantial investment of capital in the business;
- the individual gains profits and bears losses as a result of managerial skills and capital investment;
- the individual makes his or her labor or services available to the public or business community on a continuing basis;
- the individual files a schedule of expenses with the IRS;
- the party engaging the individual does not represent the individual as an employee;
- the individual has the right to perform similar labor or services for others;
- the individual has an active and valid registration with the Department of Revenue and any other state agencies for purposes of taxes; and
- the individual has a separate set of books and records.

Acts taken to comply with laws are not proof of independent contractor status.

#### Enforcement.

##### *Administrative.*

The Department may investigate violations and for any of the prohibited acts may order payment of:

- a civil penalty of \$1,000 to \$10,000 per employee, or \$10,000 to \$25,000 if the person engaged in a pattern or practice;
- damages of three times the wages and benefits denied or withheld and reimbursement for taxes and the value of benefits paid by the employee. Liability is joint and several for employers and other persons; and
- taxes owed.

The Department may also order reinstatement and reclassification of the employee, or front pay in lieu of reinstatement. For a notice violation, the Department may order payment of a civil penalty of \$1,000 to \$10,000.

##### *Cause of Action.*

Individual and class actions are authorized. If the court determines that a person, including an employer, engaged in any of the prohibited acts, the court must order payment of damages of:

- the greater of:
  - three times the wages and benefits unlawfully denied or withheld; or
  - statutory damages of \$1,000 to \$10,000 per employee or \$10,000 to \$25,000 per employee if a pattern or practice is shown; and
- attorneys' fees and costs.

The court may also order employers and other persons to reimburse the employee for taxes and the value of benefits paid by the employee. Liability is joint and several for employers and other persons.

Employers may also be ordered to pay taxes, and may be subject to injunctive or other relief, including reinstatement and reclassification or front pay in lieu of reinstatement.

#### *Other Enforcement Provisions.*

A three-year statute of limitations for both administrative and court actions is tolled during any period that an employer deterred an action. A "pattern or practice" means that within the previous 10 years, the employer was convicted for nonpayment of wages or delinquent in payment of a court-ordered or administrative assessment for nonpayment of wages. The Department may initiate collection procedures for unpaid premiums and may send its determination to the Employment Security Department.

A general construction contractor is liable for violations of an independent contractor or subcontractor only when the general exerts substantial control over the day-to-day work of the subcontractor or independent contractor.

#### Implementation.

The Department has rule-making authority and may develop a plan for strategic enforcement of the EFCA, prioritizing industries and workplaces with a high concentration of violations. The EFCA Account (Account) is created. Civil penalties must be deposited into the Account, which is appropriated, and moneys in the Account may be used only for enforcement of the EFCA.

#### Existing Employment Laws.

The EFCA independent contractor tests apply to prevailing wage, wage deductions, the Wage Payment Act, the Minimum Wage Act, unemployment insurance, and industrial insurance. Most existing statutory tests are repealed. The EFCA provisions on the employer-employee relationship also apply to these other laws.

The EFCA provisions on general construction contractor liability also apply to wage deductions, the Wage Payment Act, and the Minimum Wage Act.

An employer who engages in a pattern or practice of violations is barred from bidding on a public works contract for one year and is also subject to other sanctions.

**Substitute Bill Compared to Original Bill:**

Requirements are added to the three-part independent contractor test. These are filing a schedule of expenses with the IRS, established accounts for the payment of taxes, a separate set of books and records, and, if required, contractor registration or electrical contract licensing.

---

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date of Substitute Bill:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.

**Staff Summary of Public Testimony:**

(In support) When employers do not play by the rules, it puts rule-following employers at a competitive disadvantage and results in millions of dollars lost to the State General Fund. Many dollars have also been lost in unpaid workers' compensation premiums and unemployment taxes. Wage theft harms honest workers. There is a growing trend of treating people as independent contractors when they are employees. Misclassification has resulted in the Department of Labor and Industries assessing thousands against a cleaning company and a courier service. This bill will make a fair and bright line test, with one test for all laws, rather than different tests. We already have subjective tests. The bill will not prevent workers from establishing their own businesses.

(Opposed) This issue has not been discussed in the advisory committee addressing the underground economy and this bill will not solve the underground economy. The tests are subjective and will be almost impossible to implement fairly. The United States Department of Labor has found there is no test that works for all laws. We already have laws on independent contractors. Employers can be penalized for making a mistake and there can be legitimate disputes. The penalties are problematic.

(Other) Look at the report of the Underground Economy Task Force. Clarity and simplicity are needed and this bill does not simplify. Change the substantial capital part of the test to distinguish different types of businesses. The presumption should be changed so the individual alleging misclassification has the burden.

**Persons Testifying:** (In support) Repetitive Riccelli, prime sponsor; Joe Kendo, Washington State Labor Council; Rebecca Smith, National Employment Law Project; Andrea Schmitt, Columbia Legal Services; Cariño Barragan, Casa Latina; and Paul Benz, Faith Action Network.

(Opposed) Gary Smith, Independent Business Association; and Bob Battles, Association of Washington Business.

(Other) Chris Van Dyk, Bainbridge Media Group.

**Persons Signed In To Testify But Not Testifying:** None.