
Labor & Workplace Standards Committee

HB 2812

Brief Description: Concerning determinations of worker benefits and employer obligations based on a worker's status.

Sponsors: Representatives Stonier, Sells and Pollet.

Brief Summary of Bill

- Requires business entities to make contributions to benefit providers for the purposes of providing certain benefits, including industrial insurance, to workers who provide services to consumers under 1099 federal tax status.
- 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.

Hearing Date: 1/25/18

Staff: Trudes Tango (786-7384).

Background:

Employment standards and benefits, such as industrial insurance, 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. In the construction industry, a seventh required element is that the individual be registered as a contractor or licensed as an electrical contractor.

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.

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.

Summary of Bill:

Worker Benefits.

Provisions are created to require business entities (called "contributing agents") to contribute funds to benefit providers that provide benefits to workers (called "worker beneficiaries").

Contributing agent means a business, organization, corporation, limited liability company, partnership, sole proprietor, or any other business entity that: (1) facilitates the provision of services by workers to consumers seeking services and where the provision of services by workers is taxed under 1099 tax status. A contributing agent may also be a single person business that does not employ any employees and that chooses to opt into a program for benefits.

For the purposes of contributions to pay premiums for industrial insurance, the Department of Labor and Industries (Department) must determine the contribution amount for each risk classification. Contributing agents must collect all premiums necessary to provide coverage for the worker beneficiary based on the rates set by the Department, and must remit the amounts to the Department.

Contributions must be assessed for every hour, or production unit in the cases of piece work, that the worker beneficiary provided services.

In addition to the contribution amount for industrial insurance, contributing agents must contribute an amount equal to 15 percent of the total fee collected from the consumer for each transaction of services provided, or two dollars for every hour that the worker provided services to the consumer, whichever amount is less. If determined per hour, the determination must be prorated per minute.

Contributions must be made to the benefit providers on a monthly basis.

Based on the contributions received, benefit providers must provide industrial insurance under the state's Industrial Insurance Act and some or all of the following benefits, based on input from worker beneficiaries: health insurance, paid time off; retirement benefits; and other benefits determined by benefit providers.

Benefit providers may use up to 10 percent of contribution funds received for administration of benefits.

The Department shall adopt rules to implement the provisions, including rules establishing minimum criteria for entities to become benefit providers, establishing a fee on contributing agents to fund the Department's efforts to monitor compliance, and providing procedures for worker beneficiaries to select benefit providers.

Worker beneficiaries may bring a private cause of action against a contributing agent for noncompliance.

The requirements on contributing agents and the benefits provided may not be considered in determinations of a worker beneficiary's employment status or the contributing agent's employment relationship to the worker beneficiary.

The benefits earned by the worker beneficiary belong to the worker beneficiary and he or she may accrue benefits based on contributions from more than one contributing agent.

Data collection.

All contributing agents must submit annual reports to the Department disclosing specific data about the contributing agent, its worker beneficiaries, and its consumers of services of worker beneficiaries. Data about the contributing agent must include: (a) the total number of worker beneficiaries used in the calendar year; (b) the number of worker beneficiaries who have completed more than thirty tasks, shifts, or trips with the contributing agent during the calendar year; (c) if the contributing agent sells worker beneficiary information to third parties, a disclosure of all third-party recipients of individualized or aggregate worker beneficiary data; (d) reports from worker beneficiaries of sexual harassment or other forms of abuse experienced during tasks, trips, shifts, or services and the contributing agent's response to the reports; (e) basic consumer data including total registered users, new users, and user zip codes; (f) total moneys collected annually from consumers; and (g) total moneys disbursed annually to worker beneficiaries.

Data about worker beneficiaries must include: (a) any known demographic data of the worker beneficiaries, including but not limited to gender, race, and primary language spoken at home; (b) average hours per week of worker beneficiaries, including the average number of tasks, trips, or shifts offered to the worker beneficiary annually; (c) policies outlining the ability of a worker beneficiary to decline or alter the task, trip, or shift offered; (d) average number of months since worker beneficiaries began work with the company; (e) average number of months for worker beneficiaries to complete at least five tasks, shifts, or trips; (f) zip codes in which worker beneficiaries primarily complete tasks, shifts, or trips; (g) the twenty-fifth, fiftieth, and seventy-fifth percentile worker beneficiary payouts per job, per week, and per year; (h) the number of worker beneficiaries who are actively providing services each calendar month and over the course of the year; (i) the median time or miles, or both, while a worker beneficiary is active on the contributing agent's app and the time and/or miles the worker beneficiary is being paid while on the app; and (j) the number of worker beneficiaries terminated from the app.

Data regarding rates must include: (a) average rate per task, trip, or hour, and what that equates to as an hourly wage in total, and as a per hour rate based on the total amount and the time spent

providing services; (b) whether rates are set by the contributing agent or the worker beneficiary; (c) if variable or surge pricing is used, the average hourly rate per task, trip, or hour for the highest top ten percent of rates and the lowest ten percent of rates; (d) the average tips per pay period or per task, trip, or hour; and (e) any benefits or protections, including industrial insurance, auto insurance, and expense reimbursement provided to worker beneficiaries.

Contributing agents that have employees and that use at least 25 or more worker beneficiaries must submit to the Department in quarterly reports the number of worker beneficiaries used in the reporting period.

Survey.

The Department must conduct a survey of at least 300 worker beneficiaries. The survey must seek data on the worker beneficiaries total household income, whether the worker beneficiary receives benefits from other employment sources, and whether the worker beneficiary classifies his or her work as primary or supplemental employment.

The Department must submit a report summarizing the survey to the appropriate committees of the Legislature by December 31, 2018.

Misclassification.

The Employee Fair Classification Act (EFCA) is enacted. Certain actions by employers and other persons are prohibited. These are:

- willfully misclassifying an employee as an independent contractor;
- 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 or in court if a person believes misclassification has occurred.

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

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.

An "independent contractor" is an individual who performs labor or services and:

- 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; and
- 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 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.

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.

A three-year statute of limitations for both administrative and court actions is tolled during any period that an employer deterred an action.

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.

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.

Appropriation: None.

Fiscal Note: Requested on January 16, 2018.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed, except Section 30, relating to definitions under the Minimum Wage Act which takes effect December 31, 2019.