

State of Arkansas  
89th General Assembly  
Regular Session, 2013

# A Bill

HOUSE BILL 2245

By: Representative Murdock

## For An Act To Be Entitled

AN ACT TO REQUIRE A CONTRACTOR WHO BIDS ON A PUBLIC CONSTRUCTION CONTRACT TO MAINTAIN RECORDS; TO PERMIT THE INSPECTION OF THE CONTRACTOR'S RECORDS; TO IMPOSE A CIVIL PENALTY FOR THE FAILURE OF A CONTRACTOR TO MAINTAIN RECORDS OR ALLOW INSPECTION OF THE RECORDS; TO IMPOSE A CIVIL PENALTY FOR MISCLASSIFICATION OF AN INDIVIDUAL AS AN INDEPENDENT CONTRACTOR; AND FOR OTHER PURPOSES.

## Subtitle

AN ACT TO REQUIRE A CONTRACTOR WHO BIDS ON A PUBLIC CONSTRUCTION CONTRACT TO MAINTAIN RECORDS; TO PERMIT THE INSPECTION OF RECORDS; AND TO IMPOSE A CIVIL PENALTY.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code Title 22, Chapter 9, Subchapter 2, is amended to add two additional sections to read as follows:

22-9-215. Contractors – Classification of employees.

(a) When a contractor is awarded a public construction contract by the state, a county, a municipality, a school district, or other political subdivision of the state under §§ 19-4-1405 and 22-9-203, an individual:

(1) Shall be classified as an employee of the contractor if the individual is employed in the service of the contractor under a contract of hire or apprenticeship, written or oral, expressed or implied;



(2) Shall not be classified as an employee of the contractor if:

(A) The individual is not employed in the course of the trade, business, profession, or occupation of the contractor; or

(B) The individual:

(i) Holds a current certification of noncoverage from the Workers' Compensation Commission under the Workers' Compensation Law, § 11-9-101 et seq.; and

(ii) Is conclusively presumed not to be an employee for purposes of this section and § 22-9-216 during the term of the individual's certification or a renewal of his or her certification or until he or she elects otherwise, whichever time period is shorter; and

(3) Shall be classified as an independent contractor of the contractor if the individual:

(A) Has a written contract to perform services;

(B) Is free from control or direction over performance of the services both under the contract of service and in fact; and

(C)(i) Is customarily engaged in an independently established trade, occupation, profession, or business.

(ii) An individual is customarily engaged in an independently established trade, occupation, profession, or business with respect to services the individual performs in the commercial or residential building construction industry if the individual:

(a) Possesses the essential tools, equipment, and other assets necessary to perform the services independent of the person for whom the services are performed;

(b) Will realize a profit or suffer a loss as a result of performing the services;

(c) Performs the services through a business in which the individual has a proprietary interest;

(d) Maintains a business location that is separate from the location of the person for whom the services are being performed;

(e) Holds himself or herself out to other persons as available and able to perform the same or similar services while free from direction or control over performance of the services; and

(f) Maintains liability insurance during the

term of the contract.

(b) The failure to withhold federal or state income taxes or pay workers' compensation premiums with respect to an individual's remuneration shall not be considered in determining whether the individual is an employee or an independent contractor.

(c)(1) An individual who is an independent contractor as determined under this section is not an employee.

(2) For purposes of this section, each employment relationship shall be considered separately.

22-9-216. Contractors – Proof of documentation – Misclassification of employees.

(a)(1) The Department of Labor may request that a contractor who bids on a public construction contract of the state, a county, a municipality, a school district, or other political subdivision of the state under §§ 19-4-1405 and 22-9-203 provide the information described under subdivision (a)(2) of this section.

(b) A contractor shall permit the entities listed in subdivision (a)(1) of this section to access its records within five (5) business days of the entities' request under subsection (a) of this section.

(c)(1) If a contractor does not keep the records required under subsection (a) of this section or fails to allow the Department of Labor access to its records under subsections (a) and (b) of this section, the Department of Labor shall investigate whether the failure or refusal was intentional.

(2) The Department of Labor shall issue a written warning and not assess a civil monetary penalty if it finds that the contractor did not intentionally fail to keep records required under subsection (a) of this section or refuse to allow the Department of Labor access to its records under subsections (a) and (b) of this section.

(3)(A) If the Department of Labor finds that the contractor intentionally failed to keep the records required under subsection (a) of this section or allow the Department of Labor access to its records under subsections (a) and (b) of this section, the contractor shall be assessed a civil penalty in the following amount for each employee or independent contractor it failed to keep records for under subsection (a) of this

section:

(i) Not more than two hundred fifty dollars (\$250) for the contractor's first violation;

(ii) Not more than five hundred dollars (\$500) for a second violation; and

(iii) Not less than one hundred dollars (\$100) and not more than (\$1000) for each additional violation.

(B) The Department of Labor shall consider the following when determining the amount of each civil penalty:

(i) The previous violations of the contractor;

(ii) The seriousness of the violation; and

(iii) The size of the contractor.

(d)(1) If the Department of Labor determines that a contractor has misclassified an individual as an independent contractor rather than an employee under § 22-9-215, the Department of Labor shall investigate whether the misclassification was:

(A) Intentional; and

(B) Made to avoid the payment of social security income tax, unemployment tax, or workers' compensation premiums.

(2) The Department of Labor shall issue a written warning and shall not assess a civil monetary penalty if the Department of Labor finds that the contractor's misclassification of an individual as an independent contractor rather than an employee under § 22-9-215 was not intentional and not made to avoid the payment of social security income tax, unemployment tax, or workers' compensation premiums.

(3)(A) If the Department of Labor finds that the contractor intentionally misclassified an individual as an independent contractor rather than an employee to avoid the payment of social security income tax, unemployment tax, or workers' compensation premiums, the contractor shall be assessed a percentage of the contractor's total contract with the state, county, municipality, school district, or other political subdivision of the state as a civil penalty in the following amount:

(i) Not more than two hundred fifty dollars (\$250) for the contractor's first violation;

(ii) Not more than five hundred dollars (\$500) for a second violation; and

(iii) Not less than one hundred dollars (\$100) and not more than (\$1000) for each additional violation.

(B) The Department of Labor shall consider the following when determining the amount of each civil penalty:

(i) The previous violations of the contractor;

(ii) The seriousness of the violation; and

(iii) The size of the contractor.

(e) The Department of Labor shall not impose the civil penalties under subsection (c)(3)(A) of this section or subdivision (d)(3)(A) of this section until it gives a contractor notice and opportunity for a hearing under the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(f)(1) The Department of Labor may file a legal action in the name of the State of Arkansas, without paying costs or giving bond for costs, to recover the civil penalty under subsection (c)(3)(A) of this section or subdivision (d)(3)(A) of this section.

(2) A legal action shall not be filed until:

(A) Notice and opportunity for a hearing have been provided pursuant to the Arkansas Administrative Procedure Act, § 25-15-201 et seq.; and

(B) Entry of a final administrative order.

(3)(A) Following any appeals taken pursuant to the Arkansas Administrative Procedure Act, § 25-15-201 et seq., the Department of Labor may enforce its administrative order in any court of competent jurisdiction.

(B) The Department of Labor's findings of fact shall be conclusive.

(4)(A) The recovery of a civil penalty and attorney's fees shall be placed in the General Revenue Fund Account of the State Apportionment Fund.

(5) This section does not relieve an unsuccessful defendant from paying costs.

(6) The filing of a legal action is a remedy of the state in addition to all other remedies available under the law.

(g) The Department of Labor shall establish rules to enforce this section.