

## Chapter 206

(Senate Bill 272)

AN ACT concerning

### Labor and Employment – Workplace Fraud Act – Revisions

FOR the purpose of ~~repealing a certain presumption that certain work performed by an individual creates an employer–employee relationship except under certain circumstances; defining the term “independent contractor” as used in the Workplace Fraud Act; making conforming changes;~~ establishing an exception for an employer that produces certain documents for inspection to the presumption that an employer–employee relationship exists for purposes of the Workplace Fraud Act; authorizing an employer to comply with a certain requirement to provide records by producing copies of the records; altering the number of days within which an employer is required to produce certain records; requiring the Commissioner to take certain action regarding an alleged violation of the Workplace Fraud Act within a certain time after the Commissioner receives certain records from an employer; providing that an employer is entitled to a certain hearing within a certain number of days after the hearing is requested unless the right is waived; altering a certain provision of law regarding the issuance of citations by the Commissioner for violations of the Workplace Fraud Act; and generally relating to the Workplace Fraud Act.

~~BY renumbering~~

~~Article – Labor and Employment  
Section 3–901(e) through (h), respectively  
to be Section 3–901(f) through (i), respectively  
Annotated Code of Maryland  
(2008 Replacement Volume and 2011 Supplement)~~

~~BY adding to~~

~~Article – Labor and Employment  
Section 3–901(e)  
Annotated Code of Maryland  
(2008 Replacement Volume and 2011 Supplement)~~

BY repealing and reenacting, with amendments,

Article – Labor and Employment  
Section ~~3–903 and 3–904~~ 3–903, 3–905(d) and (e), 3–906, and 3–913  
Annotated Code of Maryland  
(2008 Replacement Volume and 2011 Supplement)

BY adding to

Article – Labor and EmploymentSection 3–903.1Annotated Code of Maryland(2008 Replacement Volume and 2011 Supplement)BY repealing and reenacting, without amendments,Article – Labor and EmploymentSection 3–905(c)Annotated Code of Maryland(2008 Replacement Volume and 2011 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That ~~Section(s) 3–901(e) through (h), respectively, of Article – Labor and Employment of the Annotated Code of Maryland be renumbered to be Section(s) 3–901(f) through (i), respectively.~~ the Laws of Maryland read as follows:

~~SECTION 2. AND BE IT FURTHER ENACTED, That the Laws of Maryland read as follows:~~

**Article – Labor and Employment**~~3–901.~~

~~(E) “INDEPENDENT CONTRACTOR” MEANS AN INDIVIDUAL WHO IS NOT AN EMPLOYEE FOR PURPOSES OF THE FEDERAL INSURANCE CONTRIBUTIONS ACT AND THE FEDERAL UNEMPLOYMENT TAX ACT, BASED ON APPLICATION OF THE 20 FACTORS SET FORTH IN THE INTERNAL REVENUE SERVICE REVENUE RULING 87–41, ISSUED UNDER 26 C.F.R. 31.3306(i)–1 AND 26 C.F.R. 31.3121(d)–1.~~

3–903.

(a) An employer may not fail to properly classify an individual who performs work for remuneration paid by the employer.

(b) An employer has failed to properly classify an individual when an employer–employee relationship exists ~~as determined under subsection (c) of this section~~ but the employer has not classified the individual as an employee.

(c) ~~¶(1) For~~ **EXCEPT AS PROVIDED IN § 3–903.1 OF THIS SUBTITLE,** **FOR** purposes of enforcement of this subtitle only, work performed by an individual for remuneration paid by an employer shall be presumed to create an employer–employee relationship, unless:

(i) the individual is an exempt person; or

(ii) an employer demonstrates that:

1. the individual who performs the work is free from control and direction over its performance both in fact and under the contract;

2. the individual customarily is engaged in an independent business or occupation of the same nature as that involved in the work; and

3. the work is:

A. outside of the usual course of business of the person for whom the work is performed; or

B. performed outside of any place of business of the person for whom the work is performed.

(2) Work is outside of the usual course of business of the person for whom it is performed under paragraph (1) of this subsection if:

(i) the individual performs the work off the employer's premises;

(ii) the individual performs work that is not integrated into the employer's operation; or

(iii) the work performed is unrelated to the employer's business.

(3) By contract, an employer may engage another business entity, which may have its own employees, to do the same type of work in which the employer engages, at the same location where the employer is working, without establishing an employer–employee relationship between the two contracting entities.

(d) The Commissioner shall adopt regulations to explain further and provide specific examples of the application of subsection (c) of this section.

### **3–903.1.**

**THE PRESUMPTION THAT AN EMPLOYER–EMPLOYEE RELATIONSHIP EXISTS UNDER § 3–903(C)(1) OF THIS SUBTITLE DOES NOT APPLY IF:**

**(1) AN EMPLOYER PRODUCES FOR INSPECTION BY THE COMMISSIONER:**

(I) A WRITTEN CONTRACT, SIGNED BY THE EMPLOYER AND BUSINESS ENTITY, THAT:

1. DESCRIBES THE NATURE OF THE WORK TO BE PERFORMED BY THE BUSINESS ENTITY;

2. DESCRIBES THE REMUNERATION TO BE PAID FOR THE WORK PERFORMED BY THE BUSINESS ENTITY; AND

3. INCLUDES AN ACKNOWLEDGEMENT BY THE BUSINESS ENTITY OF THE BUSINESS ENTITY'S OBLIGATIONS UNDER THIS ARTICLE TO:

A. WITHHOLD, REPORT, AND REMIT PAYROLL TAXES ON BEHALF OF ALL EMPLOYEES WORKING FOR THE BUSINESS ENTITY;

B. PAY UNEMPLOYMENT INSURANCE TAXES FOR ALL EMPLOYEES WORKING FOR THE BUSINESS ENTITY; AND

C. MAINTAIN WORKERS' COMPENSATION INSURANCE;

(II) AN AFFIDAVIT SIGNED BY THE BUSINESS ENTITY INDICATING THAT THE BUSINESS ENTITY IS AN INDEPENDENT CONTRACTOR WHO IS AVAILABLE TO WORK FOR OTHER BUSINESS ENTITIES;

(III) A CURRENT CERTIFICATE OF STATUS OF THE BUSINESS ENTITY, ISSUED BY THE STATE DEPARTMENT OF ASSESSMENTS AND TAXATION, INDICATING THAT THE BUSINESS ENTITY IS IN GOOD STANDING; AND

(IV) PROOF THAT THE BUSINESS ENTITY HOLDS ALL OCCUPATIONAL LICENSES REQUIRED BY STATE AND LOCAL AUTHORITIES FOR THE WORK PERFORMED; AND

(2) THE EMPLOYER PROVIDED TO EACH INDIVIDUAL CLASSIFIED AS AN INDEPENDENT CONTRACTOR OR EXEMPT PERSON A WRITTEN NOTICE UNDER § 3-914 OF THIS SUBTITLE.

~~3-904.~~

~~(a) An employer may not knowingly fail to properly classify an individual who performs work for remuneration paid by the employer.~~

~~(b) An employer has knowingly failed to properly classify an individual when:~~

~~(1) an employer-employee relationship exists [as determined under § 3-903(c) of this subtitle]; and~~

~~(2) the employer has knowingly failed to properly classify the individual as an employee.~~

~~(c) The Commissioner shall consider, as strong evidence that the employer did not knowingly fail to properly classify an individual, whether:~~

~~(1) before a complaint was filed against the employer or the Commissioner began an investigation of the employer, the employer:~~

~~(i) sought and obtained evidence that the individual:~~

~~1. is an exempt person; or~~

~~2. as an independent contractor:~~

~~A. withholds, reports, and remits payroll taxes on behalf of all individuals working for the independent contractor;~~

~~B. pays unemployment insurance taxes for all individuals working for the independent contractor; and~~

~~C. maintains workers' compensation insurance; and~~

~~(ii) provided to the exempt person or independent contractor a written notice as required by § 3-914 of this subtitle; or~~

~~(2) the employer:~~

~~(i) 1. classifies all workers who perform the same or substantially the same tasks for the employer as independent contractors; and~~

~~2. reports the income of the workers to the Internal Revenue Service as required by federal law; and~~

~~(ii) has received a determination from the Internal Revenue Service that the individual or a worker who performs the same or substantially the same task as the individual is an independent contractor.~~

~~(d) The Commissioner shall adopt regulations to provide guidance as to what constitutes the evidence relevant to the determination of whether an employer knowingly failed to properly classify an employee.~~

3-905.

(c) The Commissioner may enter a place of business or work site to:

(1) observe work being performed;

(2) interview individuals on the work site, including those identified as employees and independent contractors; and

(3) review and copy records.

(d) (1) The Commissioner may require each employer to:

[(1)] (I) SUBJECT TO PARAGRAPH (2) OF THIS SUBSECTION, identify and produce FOR COPYING OR INSPECTION all records relevant to the classification of each individual;

[(2)] (II) attest to the truthfulness of each record that is copied in accordance with subsection (c)(3) of this section OR EACH COPY OF A RECORD THAT IS PROVIDED TO THE COMMISSIONER UNDER SUBPARAGRAPH (I) OF THIS PARAGRAPH and to sign the copy; or

[(3)] (III) at the option of the employer, submit a written statement about the classification of each employee on the form provided by the Commissioner, with any relevant records attached.

(2) AN EMPLOYER MAY COMPLY WITH A REQUIREMENT TO PRODUCE RECORDS UNDER PARAGRAPH (1)(I) OF THIS SUBSECTION BY PRODUCING COPIES OF THE RECORDS.

(e) An employer that fails to produce records FOR COPYING OR INSPECTION or a written statement under subsection (d) of this section within [15] 30 business days after the Commissioner's request, OR AN EXTENSION OF TIME MUTUALLY AGREED ON BY BOTH PARTIES, shall be subject to a fine not exceeding \$500 per day for each day the records are not produced.

3-906.

(a) [If, after investigation] AFTER THE EMPLOYER HAS PROVIDED ALL OF THE RECORDS REQUESTED UNDER § 3-905(D) OF THIS SUBTITLE, [the Commissioner determines that an employer has violated this subtitle or a regulation

adopted under this subtitle,] the Commissioner shall [promptly] issue a citation to the employer **OR CLOSE THE INVESTIGATION WITHIN 90 DAYS.**

(b) Each citation shall:

(1) describe in detail the nature of the alleged violation;

(2) cite the provision of this subtitle or any regulation that the employer is alleged to have violated; and

(3) state the civil penalty, if any, that the Commissioner proposes to assess.

(c) Within a reasonable time after issuance of a citation, the Commissioner shall send by certified mail to the employer:

(1) a copy of the citation; and

(2) notice of the opportunity to request a hearing.

(d) Within 15 days after an employer receives a notice under subsection (c) of this section, the employer may submit a written request for a hearing on the citation and proposed penalty.

(e) If a hearing is not requested within 15 days, the citation, including any penalties, shall become a final order of the Commissioner.

(f) (1) If the employer requests a hearing, the Commissioner shall delegate to the Office of Administrative Hearings the authority to hold a hearing and issue findings of fact, conclusions of law, and an order, and assess a penalty under § 3-909 of this subtitle in accordance with Title 10, Subtitle 2 of the State Government Article.

(2) **THE EMPLOYER IS ENTITLED TO A HEARING WITHIN 90 DAYS AFTER A TIMELY REQUEST MADE UNDER THIS SUBSECTION, UNLESS THE EMPLOYER WAIVES THAT RIGHT.**

(g) Within 15 days after a request, in accordance with Title 10, Subtitle 6 of the State Government Article and the applicable regulations of the Department and the Office of Administrative Hearings, the Commissioner shall provide copies of all relevant evidence, including a list of potential witnesses, on which the Commissioner intends to rely at any administrative hearing under this subtitle.

(h) The Commissioner has the burden of proof to show that an employer has knowingly failed to properly classify an individual as an employee.

(i) A decision of an administrative law judge issued in accordance with Title 10, Subtitle 2 of the State Government Article shall become a final order of the Commissioner.

(j) Any party aggrieved by a final order of the Commissioner under subsection (i) of this section may seek judicial review and appeal under §§ 10-222 and 10-223 of the State Government Article.

3-913.

(a) Where, after investigation, the Commissioner issues a citation for a KNOWING violation of this subtitle or regulations adopted under this subtitle by an employer engaged in work on a contract with a public body, the Commissioner shall promptly notify the public body.

(b) (1) On notification, the public body shall withhold from payment due the employer an amount that is sufficient to:

(i) pay restitution to each employee for the full amount of wages due; and

(ii) pay any benefits, taxes, or other contributions that are required by law to be paid on behalf of the employee.

(2) The public body shall release:

(i) on issuance of a favorable final order of a court or an administrative unit, the full amount of the withheld funds; and

(ii) on an adverse final order of a court or an administrative unit, the balance of the withheld funds after all obligations are satisfied under paragraph (1) of this subsection.

SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect ~~October 1, 2012~~ July 1, 2012.

**Approved by the Governor, May 2, 2012.**