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HOUSE BILL 91

50TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2012

INTRODUCED BY

Cathrynn N. Brown

AN ACT

RELATING TO EMPLOYMENT; CREATING THE EMPLOYEE FAIR
CLASSIFICATION ACT; DISTINGUISHING BETWEEN EMPLOYEES AND
INDEPENDENT CONTRACTORS; CREATING PRESUMPTIONS; PROHIBITING
CERTAIN CONDUCT; CREATING CAUSES OF ACTION FOR VIOLATION OF THE
EMPLOYEE FAIR CLASSIFICATION ACT; REQUIRING NOTICE TO
EMPLOYEES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. SHORT TITLE.--This act may be cited as the
"Employee Fair Classification Act".

SECTION 2. DEFINITIONS.--As used in the Employee Fair
Classification Act:

A. "employee" means a person directly hired by, or
directly permitted to work by, an employer for work to be
performed wholly or partly in this state;

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1 B. "employer" means a person who hires, engages the
2 services of or makes use of the services of an individual in
3 return for money and includes the state, an agency, institution
4 or instrumentality of the state, a municipality, a county, a
5 school district or another political subdivision;

6 C. "independent contractor" means an individual:

7 (1) who provides services and who is free from
8 direction and control over the means and manner of providing
9 the services, subject only to the right of the person for whom
10 the services are provided to specify the desired results;

11 (2) who provides services and who is
12 responsible for obtaining business registrations or licenses
13 required by state law or local ordinance for the individual to
14 provide the services;

15 (3) who provides services and who furnishes
16 the tools or equipment necessary to perform the services;

17 (4) who provides services and who has the
18 authority to hire and fire employees to perform the services;

19 (5) who is paid for services upon completion
20 of the performance of specific portions of the services or on
21 the basis of a periodic retainer; and

22 (6) who provides services and represents to
23 the public that the services are being provided by an
24 independently established business. An individual is engaged
25 in an independently established business when four or more of

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1 the following circumstances exist:

2 (a) services are primarily performed at
3 a location separate from the individual's residence or in a
4 specific portion of the residence that is set aside for
5 performing the services;

6 (b) commercial advertising or business
7 cards are purchased by the individual, or the individual is a
8 member of a trade or professional association;

9 (c) telephone or email listings used for
10 the services are different from the individual's personal
11 listings;

12 (d) services are performed only pursuant
13 to a written contract;

14 (e) services are performed for two or
15 more persons within a period of one year; or

16 (f) the individual assumes financial
17 responsibility for errors and omissions in services as
18 evidenced by insurance, performance bonds and warranties
19 relating to the services being provided;

20 D. "knowingly" means having actual knowledge of or
21 acting with deliberate ignorance or reckless disregard of a
22 fact;

23 E. "labor organization" means a labor union; an
24 employee organization; a federation of labor unions, groups,
25 locals or other employee organizations; or another organization

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1 in which employees participate and that exists for the purpose,
2 in whole or in part, of dealing with employers concerning
3 grievances, labor disputes, wages, hours and other terms and
4 conditions of employment;

5 F. "misclassification" means wrongly designating an
6 individual who performs services for an employer as not being
7 an employee of the employer; and

8 G. "violate" or "violated" includes an intent to
9 evade, misrepresent or willfully not disclose the provisions of
10 the Employee Fair Classification Act.

11 SECTION 3. PRESUMPTION OF EMPLOYEE STATUS.--

12 A. An employer-employee relationship shall be
13 presumed to exist when work is performed by an individual for
14 remuneration paid by an employer. In a cause of action brought
15 pursuant to the Employee Fair Classification Act, a person
16 asserting that an individual is an independent contractor and
17 not an employee must establish that status by a preponderance
18 of the evidence.

19 B. In a cause of action brought pursuant to the
20 Employee Fair Classification Act, a court or jury, when making
21 a determination about whether an individual is an independent
22 contractor for the purposes of the Employee Fair Classification
23 Act:

24 (1) shall not consider an employer's failure
25 to withhold federal or state income taxes with respect to an

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1 individual; and

2 (2) shall find that an individual is an
3 employee if the control exercised by the party paying
4 remuneration to the individual is general in nature and is
5 exercised directly or indirectly over the physical activities
6 of the individual. It is not necessary for the amount of
7 control to extend to all the details of the physical
8 performance of the duties performed by an individual for that
9 individual to be an employee of the party paying remuneration
10 to the individual.

11 SECTION 4. PROHIBITED CONDUCT.--

12 A. An employer shall not improperly classify an
13 individual as an independent contractor if the individual
14 performs work for remuneration paid by the employer. Improper
15 classification occurs when an employer-employee relationship
16 exists between the employer and individual, but the employer
17 has not classified the individual as an employee.

18 B. A person shall not incorporate or form, or
19 assist in the incorporation or formation of, a corporation,
20 partnership, limited liability corporation or other entity, or
21 pay or collect a fee for use of a foreign or domestic
22 corporation, partnership, limited liability corporation or
23 other entity for the purpose, in whole or in part, of
24 facilitating, or evading detection of, a violation of the
25 Employee Fair Classification Act.

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1 C. A person shall not require or request an
2 individual to enter into an agreement or sign a document that
3 results in the misclassification of the individual as an
4 independent contractor or otherwise does not accurately reflect
5 the individual's relationship with an employer.

6 D. A person shall not knowingly conspire with, aid
7 and abet, assist, advise or facilitate an employer with the
8 intent of violating the Employee Fair Classification Act.

9 E. An employer or an agent of an employer shall not
10 retaliate against an employee or another person by discharging
11 the employee or taking any other action against the employee or
12 other person for exercising a right granted pursuant to the
13 Employee Fair Classification Act, including the right to:

14 (1) make a written or verbal complaint to an
15 employer or to a federal or state agency or at a public
16 hearing, alleging that the Employee Fair Classification Act has
17 been violated or opposing a practice made unlawful pursuant to
18 the Employee Fair Classification Act;

19 (2) institute a proceeding pursuant to or
20 related to the Employee Fair Classification Act; or

21 (3) testify, or prepare to testify, assist or
22 otherwise participate in an investigation or proceeding
23 pursuant to the Employee Fair Classification Act.

24 **SECTION 5. WAIVERS PROHIBITED.**--No provision of or right
25 provided by the Employee Fair Classification Act may be waived,

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1 contravened or otherwise set aside, including the right to a
2 private cause of action and the right to trial by jury.

3 **SECTION 6. CAUSES OF ACTION--LIMITATION--VENUE--RIGHT TO**
4 **TRIAL BY JURY--RELIEF.--**

5 A. An individual, interested party or labor
6 organization aggrieved by a violation of the Employee Fair
7 Classification Act may commence a civil action on behalf of the
8 individual, interested party or labor organization or on behalf
9 of another individual who is similarly situated to the
10 aggrieved individual, interested party or labor organization.

11 B. An action brought pursuant to this section shall
12 be filed within three years from the date of the occurrence of
13 the alleged violation of the Employee Fair Classification Act.
14 The three-year period shall be tolled if the employer-defendant
15 has deterred the ability of an individual to bring an action
16 pursuant to this section.

17 C. An action brought pursuant to this section may
18 be brought in the district court in the county where the
19 alleged violation occurred, the county where the complainant
20 resides or the county where the employer against whom the
21 action is brought resides or where that employer's principal
22 place of business is located.

23 D. For purposes of this section, each violation of
24 the Employee Fair Classification Act constitutes a separate
25 violation for each individual involved and for each day the

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1 violation continues.

2 E. The party bringing an action pursuant to this
3 section shall have the right to select a trial by jury or
4 before the court at the time the action is commenced.

5 F. If a court or a jury in an action brought
6 pursuant to this section determines that a violation of the
7 Employee Fair Classification Act has occurred, the court shall
8 award to the prevailing party all of the following:

9 (1) the amount of wages, salary, employment
10 benefits or other compensation denied or lost to an individual
11 by reason of the violation, plus an equal amount in liquidated
12 damages; provided that the liquidated damages shall equal
13 double the amount of wages due for each violation of the
14 Employee Fair Classification Act that was knowingly committed;

15 (2) compensatory damages;

16 (3) equitable, including injunctive, relief
17 that the court determines to be appropriate; and

18 (4) attorney fees and costs.

19 **SECTION 7. NOTICES.**--If an employer engages an individual
20 to perform services and that individual is not considered by
21 the employer to be an employee pursuant to the Employee Fair
22 Classification Act, that employer shall post and keep posted,
23 in a conspicuous place on each job site where that individual
24 performs services and in each of the employer's offices in this
25 state, in English and Spanish, the following notice:

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"Every individual working for an employer has the right to be properly classified by the employer as an employee rather than as an independent contractor if the individual does not meet the definition of an "independent contractor" pursuant to the Employee Fair Classification Act. If you believe you or someone else has been improperly classified as an employee or as an independent contractor by an employer in violation of the Employee Fair Classification Act, that act gives you the right to challenge the improper classification by bringing a civil action in state district court."

SECTION 8. EFFECTIVE DATE.--The effective date of the provisions of this act is July 1, 2012.