

CHAPTER 192
FORMERLY
HOUSE SUBSTITUTE NO. 1 FOR
HOUSE BILL NO. 230
AS AMENDED BY
HOUSE AMENDMENT NO. 1

AN ACT TO AMEND TITLE 19 OF THE DELAWARE CODE RELATING
TO LABOR

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

Section 1. Amend Title 19 of the Delaware Code to create a new Chapter 35, to read as follows:

“Chapter 35. Workplace Fraud Act.

§ 3501. Definitions.

(a) As used in this chapter:

(1) ‘Construction services’ includes, without limitation, all building or work on buildings, structures, and improvements of all types such as bridges, dams, plants, highways, parkways, streets, tunnels, sewers, mains, power lines, pumping stations, heaving generators, railways, airports, terminals, docks, piers, wharves, buoys, jetties, breakwaters, levees, canals, dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, clearing and landscaping.

(2) ‘Debarment’ means that no public construction contract in this State shall be bid on, awarded to or received by any employer or any person, firm, partnership or corporation in which such employer has an interest who, within 2 years after entry of a judgment pursuant to this chapter, is adjudicated in violation of this chapter in a subsequent proceeding, until 3 years have elapsed from the date of the subsequent penalty judgment.

(3) ‘Department’ shall have the meaning set forth in § 101(a)(2) of this Title.

(4) ‘Employee’ means any person or entity directly hired by, or directly permitted to work by an employer in the State of Delaware, for work to be performed wholly or partly therein. This chapter does not apply to employees of the United States government, the State of Delaware or any political subdivision thereof.

(5) ‘Employer’ means any individual, partnership, association, joint stock company, trust, corporation, the administrator or executor of the estate of a deceased individual or the receiver, trustee or successor of any of the same employing any person excepting those provided for in subsection (b) of this section. This chapter does not apply to employees of the United States government, the State of Delaware or any political subdivision thereof.

(6) ‘Exempt Person’ means any individual who:

(A) Performs services in a personal capacity and who employs no individuals other than a spouse, child, or immediate family member of the individual;

(B) Performs services free from direction and control over the means and manner of providing the services, subject only to the right of the person or entity for whom services are provided to specify the desired result;

(C) Furnishes the tools and equipment necessary to provide the services; and

(D) Operates a business that is considered inseparable from the individual for purposes of taxes, profits, and liabilities, in which the individual:

(i) Owns all of the assets and profits of the business; and
(ii) Has sole, unlimited, personal liability for all of the debts and liabilities of the business; or alternatively, if the business is organized as a single-person corporate entity, to which sole, unlimited personal liability does not apply, the individual must be the sole member of said single-person corporate entity; and

(iii) For which the individual does not pay taxes for the business separately but reports business income on the individual's personal income tax return; and

(E) Exercises complete control over the management and operations of the business.

(7) 'Independent Contractor' means an individual who:

(i) Performs the work free from the employer's control and direction over the performance of the employee's services; and

(ii) Is customarily engaged in an independently established trade, occupation, profession or business; and

(iii) Performs work which is outside of the usual course of business of the employer for whom the work is performed.

(8) 'Knowingly' means having actual knowledge of, or acting with deliberate ignorance, or reckless disregard for the prohibition involved.

(9) 'Public Body' means:

(A) The State;

(B) A unit of State government or an instrumentality of the State; or

(C) Any political subdivision, agency, person or entity that is a party to a contract for which the State appropriated any part of the funds to be used for payment.

(10) 'Secretary' or 'Secretary of Labor' shall have the meaning set forth in § 101(a)(5) of this Title.

(11) 'Stop Work Order' means written notice from the Secretary to an employer to cease or hold work until the employer is given notice by the Secretary to resume work.

(12) 'Violate' or 'Attempts to Violate' includes, but is not limited to, any intent to evade, misrepresent or willfully non-disclose.

(b) For the purposes of this chapter the officers of a corporation and any agents having the management thereof who knowingly permit the corporation to violate this chapter shall be deemed to be the employers of the employees of the corporation.

§ 3502. Application. This Act applies only to the construction services industry.

§ 3503. Acts Prohibited.

(a) An employer shall not improperly classify an individual who performs work for remuneration provided by an employer as an independent contractor.

(b) An employer has improperly classified an individual when an employer-employee relationship exists, as determined in paragraph (c) of this Section, but the employer has not classified the individual as an employee.

(c) An employer-employee relationship shall be presumed to exist when work is performed by an individual for remuneration paid by an employer, unless to the satisfaction of the Department the employer demonstrates that the individual is an Exempt Person or Independent Contractor.

(d) A person shall not knowingly incorporate or form, or assist in the incorporation or formation of, a corporation, partnership, limited liability corporation, or other entity, or pay or collect a fee for use of a foreign or domestic corporation, partnership, limited liability corporation, or other entity for the purpose of facilitating, or evading detection of, a violation of this Section.

(e) A person shall not knowingly conspire with, aid and abet, assist, advise, or facilitate an employer with the intent of violating the provisions of this Act.

(f) The Department shall adopt regulations to further explain and provide specific examples of subsections (c), (d), and (e) of this Section.

§ 3504. Duties of the Department.

(a) The Department shall administer and enforce this chapter.

(b) The Department shall investigate, as necessary, to determine compliance with this Act.

(c) As part of the Department's investigation, the Department is permitted to:

(1) Enter and inspect the premises or place of business, employment, or work site, and upon demand examine and copy, wholly or partly, any or all books, registers, payrolls, and other records, including those required to be made, kept and preserved under this chapter or any regulation published thereunder;

(2) Question an employer, employee, or other person in the premises, place of business or employment, or work site;

(3) Require from any employer full and correct statements in writing, including sworn statements, upon forms prescribed or approved by the Department, with respect to the payment of wages, hours, names, addresses, and such other information pertaining to remuneration pertaining to employees, or require from any employer complete and accurate copies of written notices pertaining to independent contractors, which are maintained by the employer pursuant to § 3511(c) of this Act;

(4) Investigate such facts, conditions, or matters as the Department may deem necessary or appropriate to determine whether a provision of this Act or any regulation published thereunder has been or is being violated; and

(5) Administer oaths and examine witnesses under oath, issue subpoenas, compel the attendance of witnesses and the production of papers, books, accounts, records, payrolls, documents and testimony, and to take depositions and affidavits in any proceeding before it, and, in case of failure of any person or entity to comply with any subpoena lawfully issued, or on the refusal of any witness to testify to any matter regarding which the witness may be lawfully interrogated, the Superior Court, on application by the Department, shall compel obedience as in the case of disobedience of the requirements of a subpoena issued from such Court or a refusal to testify therein.

(d) Following an investigation in which the Department makes an initial determination that an employer has violated one or more of the provisions of this Chapter or any regulation published hereunder, the Department shall notify an employer of such initial determination and shall provide the employer with an opportunity to appeal the Department's determination in accordance with the Administrative Procedures Act. Following notification of the employer and the opportunity for an administrative appeal of the Department's initial

determination, the Department may institute actions in the Superior Court for penalties for any violation of this chapter or any regulation published hereunder.

(e) Nothing contained in this Act shall be deemed a limitation on any power or authority of the Department under any law of this State which may be otherwise applicable to the Department's ability to administer or enforce the provisions of this Act.

§3505. Penalties.

(a) Any employer who violates or fails to comply with § 3503 of this Act or any regulation published thereunder shall be deemed in violation of § 3503, and shall be subject to a civil penalty of not less than \$1,000, and not more than \$5,000, for each such violation. Each employee who is not properly classified in violation of § 3503 shall be considered a separate violation for purposes of this Section.

(b) An employer that fails to produce to the Department the books and records requested pursuant to § 3504(c) of this Act within 30 days of the employer's receipt of a written request sent to the employer via federal express or certified mail from the Department, in the course of an investigation to determine whether the employer is in compliance with the provisions of this Chapter, may be subject to a stop-work order, and may be subject to an administrative penalty, not to exceed \$500 per day, for each day that the requested records are not produced after the date on which the employer receives the written request from the Department.

(c) An employer who discharges or in any manner discriminates against a person because that person has made a complaint or has given information to the Department pursuant to the provisions of this Act, or because the person has caused to be instituted or is about to cause to be instituted any proceedings under this Act, or has testified or is about to testify in any such proceedings, shall be subject to a civil penalty of not less than \$5,000, and not more than \$10,000, for each such violation.

(d) A person who knowingly incorporates or forms, or assists in the incorporation or formation of, a corporation, partnership, limited liability corporation, or other entity, or pay or collect a fee for use of a foreign or domestic corporation, partnership, limited liability corporation, or other entity for the purpose of facilitating, or evading detection of, a violation of this Chapter, shall be subject to a civil penalty not to exceed \$20,000.

(e) A person who knowingly conspires with, aids and abets, assists, advises, or facilitates an employer with the intent of violating this Chapter shall be subject to a civil penalty not to exceed \$20,000.

(f) In addition to the penalties and procedures enumerated in subsections (a) through (e) of this Section, an employer may be subject to a stop-work order, and may be ordered to make restitution, pay any interest due and otherwise comply with all applicable laws and regulations by multiple final determinations of the Department or orders of a courts, including but not limited to, the Division of Unemployment Insurance, the Department of Insurance, the Office of Workers' Compensation, the Division of Revenue, the Office of the Attorney General, or any other agency, department or division of the state.

(g) Notwithstanding subsections (a) through (e) of this Section, an employer found by any court or the Department to be in violation of this chapter shall be required, within 30 days of the final order:

(1) To pay restitution to or on behalf of any individual not properly classified;
and

(2) To otherwise come into compliance with all applicable labor laws, including those related to income tax withholding, unemployment insurance, wage laws, and workers' compensation.

(h) Notwithstanding subsections (a) through (e) of this Section, an employer who has been found by a final order of a court or the Department to have violated this Chapter twice in a two year period:

(1) Shall be assessed an administrative penalty of \$20,000 for each employee that was not properly classified, and may be debarred for five (5) years; and

(2) Notwithstanding paragraph (1) of this subsection, an employer that is fined or debarred in accordance with this Section may be ordered to make restitution, pay any interest due, and otherwise comply with all applicable laws and regulations by orders of a court and all relevant departments, agencies and divisions, including the Division of Unemployment Insurance, the Department of Insurance, the Office of Workers' Compensation, the Division of Revenue, and the Office of the Attorney General.

(i) Any penalty issued under this Section against an employer shall be in effect against any successor corporation or business entity that:

(1) Has one or more of the same principals or officers as the employer against whom the penalty was assessed; and

(2) Is engaged in the same or equivalent trade or activity, with the intent to violate one or more of the provisions of this Act.

§ 3506. Provisions of law may not be waived by agreement.

Except as provided in this chapter, no provision of this chapter may in any way be contravened or set aside by private agreement.

§ 3507. Department Collaboration With Other State Agencies.

As authorized by State and federal law, divisions within the Department, the Division of Unemployment Insurance, the Office of Workers' Compensation, the Department of Insurance, the Office of the Attorney General, the Division of Revenue and other departments, agencies, or divisions of the state shall cooperate and share information concerning any suspected failure to properly classify an individual as an employee.

§ 3508. Cause of Action by Employees or Other Individuals for Violations of Certain Provisions of this Act

(a) An employee or other individual who alleges a violation of § 3503 or § 3509 of this Act must first notify the Department in writing and request an investigation by the Department, pursuant to § 3504 or § 3509(b)(2), as applicable, of the alleged violation. If the Department fails to investigate or fails to commence an action in the Superior Court pursuant to § 3504(d) or § 3509(b)(2) ,within ninety days of receipt of written notice of an alleged violation of § 3503 or § 3509, the person alleging a violation of said section may bring a civil action for appropriate declaratory relief, or actual damages, or both. A civil action pursuant to this Section must be brought within 3 years after the occurrence of the alleged violation of the applicable provision(s) of this Act.

(b) An action commenced pursuant to subsection (a) of this section may be brought in the Superior Court in the county where the alleged violation occurred, the county where the

complainant resides, or the county where the employer against whom the civil complaint is filed resides or where the employer's principal place of business is located.

(c) As used in subsection (a) of this section, 'damages' means treble damages for lost wages or benefits caused by each violation of this chapter. 'Damages' also includes the payment of back wages, fringe benefits, seniority rights, actual damages, litigation costs and attorney(s) fees, or any combination of these remedies.

§ 3509. Retaliation Prohibited.

(a) An employer may not discriminate in any manner or take adverse action against any person because the person:

(1) Files a complaint with the employer or the Department alleging that the employer violated any provision of this Act or any regulation adopted under this Act;

(2) Brings an action under this Act or a proceeding involving a violation of this Act;

(3) Testifies in an action authorized under this chapter or a proceeding involving a violation of the provisions of this Act or any regulation adopted by this chapter; or

(4) Assists in an investigation by providing information to a litigant in a civil action, the Department or another State agency in proceedings as provided by this Act.

(b) A person who believes that an employer has discriminated in any manner or taken adverse action against the person in violation of subsection (a) of this Section:

(1) May submit to the Department a written verified complaint that alleges the discrimination and that includes the signature of the complainant; and

(2) Upon receipt of a complaint pursuant to this Section, the Department will determine if an investigation is warranted.

§ 3510. Provisions Relating to Contracts with Public Bodies.

(a) Where, after investigation, the Department determines that an employer engaged in work on a public works project is in violation of this chapter or regulations adopted pursuant to this chapter, the Department shall promptly notify the public body.

(b) The public body shall:

(1) On notification of the violation pursuant to paragraph A of this section, withhold from payment due the employer an amount that is sufficient to:

(A) Pay restitution to each employee for the full amount of wages due; and

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

(2) Release:

(A) On issuance of a final order of a court or the Department, the full amount of the withheld funds; and

(B) On an adverse final order of a court or the Department, the balance of the withheld funds after all obligations is satisfied pursuant to paragraph (1) of this Section.

(c) Subject to the process set forth in this Section:

(1) An employer found to be in violation of this Chapter more than twice in a two year period may be subject to debarment.

(2) The Department shall file with the Office of Management and Budget, the Division of Revenue, the Division of Unemployment Insurance, the Department of Insurance,

the Office of Workers' Compensation, and the Office of the Attorney General, a list of employers who are subject to debarment.

A debarment under this Section shall be in effect against any successor corporation or business entity that:

(A) Has one or more of the same principals or officers as the employer against whom the debarment was imposed; and

(B) Is engaged in the same or equivalent trade or activity.

§ 3511. Employer Record Keeping Requirements.

(a) An employer shall keep, for at least three (3) years, in or about its place of business, records of the employer containing the following information:

(1) The name, address, occupation, and classification of each employee or independent contractor;

(2) The rate of pay of each employee or method of payment for the independent contractor;

(3) The amount that is paid each pay period to each employee;

(4) The hours that each employee works each day and each work week;

(5) For all individuals who are not classified as employees, evidence including the written notice required by subsection(c) of this Section and any other evidence in the employer's possession which the employer believes is relevant to determine whether each individual is an Exempt Person, an independent contractor or an employee; and

(b) An employer shall provide each individual classified as an independent contractor or Exempt Person with written notice of such classification at the time the individual is hired.

(c) The written notice shall:

(1) Include an explanation of the implications of the individual's classification as an independent contractor or Exempt Person rather than as an employee;

(2) Include contact information for the Department;

(3) Be provided in English and Spanish; and

(4) Be signed by both the employer and the independent contractor or by the employer and the Exempt Person, as the case may be.

(d) Failure to comply with the written notice requirement in subsection (c) of this Section shall be evidence of a knowing violation by the employer of § 3503 of this Act. The employer shall be liable for an administrative penalty of \$500.00 for each individual that the employer failed to notify.

(e) An employer who complies with the written notice requirement in subsection (c) of this Section shall be presumed to have acted in good faith in determining whether to classify an individual as an employee, an independent contractor or an Exempt Person pursuant to § 3503 of this Act.

(f) The Department shall adopt regulations establishing specific requirements for the content and form of the notice within one year of the effective date of this Act, and, notwithstanding the provisions of subsection (b) of this Section, the adoption of such regulations shall be a prerequisite to an employer's obligation to furnish the notice.

§ 3512. Regulations.

The Department shall have the power to make and revise or rescind such regulations as it may deem necessary or appropriate to administer or enforce the provisions of this Act and any such regulations shall, except as may be otherwise provided by the Department, take effect upon publication.

§ 3513. Distribution of Proceeds from Civil Penalties Obtained Pursuant to this Chapter

(a) All civil penalties and other revenue collected pursuant to this Act shall be paid to the General Fund of the State of Delaware.

§ 3514. Short title.

This chapter shall be known as the ‘Workplace Fraud Act.’”

Section 2. This Act shall take effect ninety days after its enactment into law.

Approved July 31, 2009