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DELAWARE STATE SENATE
151st GENERAL ASSEMBLY

SENATE BILL NO. 35

AN ACT TO AMEND TITLE 11 AND TITLE 19 OF THE DELAWARE CODE RELATING TO LABOR.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Two-thirds of all members elected to each house thereof concurring therein):

Section 1. Amend Part D, Subchapter III, Chapter 5, Title 11 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 841D. Wage theft.

(a) A person is guilty of wage theft when the person violates paragraphs (a)(1), (a)(4), (a)(5), or (a)(6) of § 1102A of Title 19.

(b) For purposes of this section, a series of wage thefts committed by a person or group of persons may be aggregated into 1 count or charge, with the sum of the aggregate loss to employees and this State being the value considered in determining the degree of wage theft.

(c) In addition to the provisions under subsections (c) and (d) of § 841 of this title, if the person has twice before been convicted of wage theft, wage theft is a class E felony.

Section 2. Amend § 1101, Title 19 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows and redesignating accordingly:

§ 1101. Definition of terms.

(a) As used in For purposes of this chapter:

(1) "Check" means a draft drawn on a bank and payable on demand.

(2) "Department" means the Department of Labor or its authorized representatives.

(3) (1) "Employee" means any a person suffered or permitted to work by an employer under a contract of employment either made in Delaware or to be performed wholly or partly therein. in this State. This chapter does not apply to employees of the United States government, the State of Delaware or any political subdivision thereof. of this State.

(4) (2) "Employer" means any individual, partnership, association, joint stock company, trust, corporation, the administrator or executor of the estate of a deceased ~~individual~~ individual, or the receiver, ~~trustee~~ trustee, or successor of any of the same employing ~~any~~ a person. This chapter does not apply to employees of the United States government, the State of Delaware or any political subdivision ~~thereof~~ of this State.

(5) ~~"Wages" means compensation for labor or services rendered by an employee, whether the amount is fixed or determined on a time, task, piece, commission or other basis of calculation.~~

(3) "Independent Contractor" means an individual who meets all of the following:

a. Performs work in a personal capacity.

b. Does not employ anyone other than the individual's spouse, child, parent, or sibling.

c. Performs the work necessary to provide the desired result, without another person's direction and control over the means and manner of performing the work.

d. Furnishes the tools and equipment necessary to do the work.

e. Exercises complete control over the management and operations of the individual's business, including all of the following:

1. Owens all of the business' assets and profits.

2. Reports business income on the individual's personal income tax return and does not separately pay taxes for the business.

3. Either of the following apply:

A. Has sole, unlimited, personal liability for all debts and liabilities of the business.

B. If the business is organized as a single-person corporate entity, the individual must be the sole member of the single-person corporate entity.

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

Section 3. Amend Chapter 11, Title 19 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 1102A. Wage theft.

(a) An employer may not do any of the following:

(1) Employ an individual without reporting the individual's employment to all appropriate government agencies and paying all applicable taxes and fees for the individual.

(2) Fail to properly withhold state and federal taxes from an employee.

(3) Fail to forward money withheld from an employee's wages to the appropriate state or federal agency within 7 days of the applicable pay period.

(4) Pay an employee wages that are less than the minimum wage established under state and federal law for the work performed.

(5) Misclassify a worker as an independent contractor for purposes of avoiding wage, tax, or workers' compensation obligations under this title.

(6) Knowingly conspire to assist, advise, or facilitate a violation of this section.

(b) Following an investigation in which the Department makes an initial determination that an employer has violated 1 or more provisions of subsection (a) of this section, the Department may make a decision to impose a civil penalty.

(c) The Department shall notify the employer, in writing, of a decision to impose a civil penalty under subsection (b) of this section which must comply with § 10122 of Title 29 and include all of the following:

(1) The action to be taken.

(2) The grounds upon which the determination was made to take the action.

(3) Instructions to request a hearing.

(d)(1) A request for a hearing must be made in writing, addressed to the Director of Industrial Affairs or the Secretary, and made within 10 business days from the date of receipt of the notice under subsection (c) of this section.

(2) If a hearing is not requested under paragraph (d)(1) of this section, the determination made by the Department under subsection (b) of this section is final.

(e) The Director of Industrial Affairs shall review a request for a hearing under paragraph (d)(1) of this section and may schedule an informal settlement conference. The Director of Industrial Affairs shall forward the hearing request to the Secretary to schedule a hearing if no settlement is reached at the informal settlement conference or an informal settlement conference is not held.

(f) The Secretary shall issue a final case decision at the conclusion of a hearing held under this section as required under Chapter 101 of Title 29.

(g) An employer may seek judicial review of the Secretary's final case decision by commencing an action in Superior Court, within 30 days of the date of the final decision under subsection (f) of this section.

(h) Any decision by a court or administrative agency that contains a finding of fact or conclusion of law that a violation of this section occurred, is conclusive on all parties to an action under this section. For purposes of this

subsection, a decision is final if it has been fully determined on appeal to the appropriate court, if all time for filing an appeal of the decision has expired, or if the decision is not subject to judicial review.

(i) An employer who violates subsection (a) of this section shall do all of the following within 30 days of a decision under subsection (h) of this section:

(1) Pay restitution to or on behalf of the employee.

(2) Come into compliance with all applicable labor laws, including laws governing income tax withholding, unemployment insurance, wage laws, and workers' compensation.

(j) The following penalties apply in addition to restitution required under paragraph (i)(1) of this section:

(1)a. An employer who violates subsection (a) of this section is subject to a civil penalty of not less than \$2,000 and not more than \$20,000 for each violation.

b. Each instance of a violation of subsection (a) of this section per employee is a separate violation.

(2) An employer is subject to a civil penalty of not less than \$20,000 and not more than \$50,000 for each violation if the employer discharges or in any manner retaliates or discriminates against an individual because that individual does any of the following under this section:

a. Made a complaint or provided information to the Department.

b. Caused, or is going to cause, an investigation to be instituted.

c. Testified, or is going to testify, in a hearing.

(k) All civil penalties collected under this section are payable to the Department of Labor and must be used for the administration and enforcement of this chapter, which may include expenses incurred by the Department of Justice in connection with activities under this chapter, including prosecutions under § 841D of Title 11.

(l) In addition to pursuing penalties under this section, the Department may provide findings, and supporting evidence, from a completed investigation under this section to the Department of Justice for consideration of prosecution under § 841D of Title 11.

(m) Nothing in this section precludes any of the following:

(1) A state or federal agency from pursuing a remedy against an employer for a violation of a different law.

(2) An employee or the Department from pursuing a remedy against an employer under § 1113 of this title.

Section 4. Amend § 101, Title 19 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows and redesignating accordingly:

§ 101. Definitions; exclusions.

(a) ~~As used in this chapter:~~ For purposes of this title, unless otherwise defined in a chapter:

(1) ~~“Board” means the Industrial Accident Board.~~ “Check” means a draft drawn on a bank and payable on demand.

(2) “Department” means the Department of Labor.

(3) “Emergency” means an unpredictable or unavoidable occurrence at unscheduled intervals requiring immediate action.

(4) “Employ” means to suffer or permit to work.

(3) (5) “Employer” includes any person, excepting those provided for in subsection (b) of this section, acting directly or indirectly, in the interest of any an employer in relation to any an employee except as otherwise provided. “Employer” does but shall not include the United States or the this State or any political subdivision thereof of this State.

(6) “Occupation” means any job, service, trade, business, industry, or branch or group of industries, or employment or class of employment in which employees are gainfully employed.

(4) (7) “Person” means an individual, partnership, association, corporation, statutory trust, business trust, legal representative representative, or any an organized group of persons.

(5) (8) “Secretary” or “Secretary of Labor” shall mean means the Secretary of the Department of Labor or the Secretary’s authorized designee, provided, that any such delegation of authority is consistent with under Chapter 85 of Title 29.

(9) “Wage” means compensation due to an employee by reason of the employee’s employment, payable in legal tender of the United States or check or bank draft convertible into cash on demand at full face value, subject to such deductions, charges, or allowances as may be permitted by the regulations of the Department under this title.

(b) ~~Persons~~ A person in any of the following occupations, and employers of persons occupations and an employer of a person engaged in these occupations to the extent thereof, shall not be is not within the scope of this chapter and are is specifically excepted from all the provisions of this chapter: Baby-sitting, domestic help, agriculture, fishing and hunting.

(1) Baby-sitting.

(2) Domestic help.

(3) Agriculture.

(4) Fishing.

(5) Hunting.

Section 5. Amend § 502, Title 19 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows and redesignating accordingly:

§ 502. Definitions.

~~As used in this chapter, the following words have the meanings indicated:~~ For purposes of this chapter:

~~(1) “Department” or “Department of Labor” means the Department of Labor of the State.~~

~~(5) “Secretary” means the Secretary of Labor for the State or the Secretary’s authorized representative.~~

Section 6. Amend § 710, Title 19 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows and redesignating accordingly:

§ 710. Definitions.

For ~~the~~ purposes of this subchapter:

~~(26) “Secretary” means the Secretary of the Department of Labor or the Secretary’s designee.~~

Section 7. Amend § 722, Title 19 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 722. Definitions.

~~As used in~~ For purposes of this subchapter, unless the context otherwise requires:

~~(1) The terms “person,” “employee,” “employment agency,” “labor organizations,” “Secretary” and “review board” are~~ The following terms mean as defined in § 710 of this title title:

a. “Person”.

b. “Employee”.

c. “Employment agency”.

d. “Labor organizations”.

Section 8. Amend § 1903, Title 19 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows and redesignating accordingly:

§ 1903. Definitions.

(a) For purposes of this chapter:

~~(3) “Department” means the Delaware Department of Labor.~~

Section 9. Amend § 2301, Title 19 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows and redesignating accordingly:

§ 2301. Definitions.

~~As used in~~ For purposes of this chapter:

~~(8) “Department” means the Department of Labor.~~

Section 10. Amend § 3302, Title 19 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 3302. Definitions.

~~As used in~~ For purposes of this chapter, unless the context clearly requires otherwise, ~~the following terms shall have the meanings designated in this section:~~ otherwise:

(7) ~~“Department” means the Department of Labor.~~

Section 11. Amend § 3501, Title 19 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows and redesignating accordingly:

§ 3501. Definitions [Effective upon fulfillment of 82 Del. Laws, c. 168, § 6, as amended by 82 Del. Laws, c. 291, § 2].

(a) ~~As used in~~ For purposes of this chapter:

(4) ~~“Department” shall have the meaning set forth in § 101(a)(2) of this title.~~

(15) ~~“Secretary” or “Secretary of Labor” shall have the meaning set forth in § 101(a)(5) of this title.~~

Section 12. Amend § 3602, Title 19 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows and redesignating accordingly:

§ 3602. Definitions.

For purposes of this chapter:

(4) ~~“Department” means the Department of Labor.~~

(8) ~~“Secretary” means the Secretary of Labor, or the Secretary’s authorized designee.~~

SYNOPSIS

This Act defines specific violations of wage payment and collection laws under Chapter 11 of Title 19, as wage theft and provides specific penalties for these violations, including a new a new criminal offense of wage theft, with a mechanism for the Department of Labor to refer completed investigations to the Department of Justice for prosecution. Clearly defining wage theft protects Delaware workers and Delaware taxpayers from employers who pay their employees “under the table” because this practice results in lost tax revenue to this State and exposes employees to personal risk in the areas of unemployment compensation and workplace injuries. The civil penalties collected for violations that are wage theft must be used for the enforcement of wage payment and collection laws under Chapter 11 of Title 19 and prosecution of the offense of wage theft under § 841D of Title 11.

This Act also adds a definition of the term “independent contractor” to Chapter 11 of Title 19 to clarify when an individual is not an employee. In addition, this Act makes non-substantive changes to the definitions sections of several chapters in Title 19, so that terms that are used consistently with the same meaning are not repeatedly defined in multiple chapters and makes technical corrections to conform existing law to the standards of the Delaware Legislative Drafting Manual.

This Act requires a greater than majority vote for passage because § 28 of Article IV of the Delaware Constitution requires the affirmative vote of two-thirds of the members elected to each house of the General Assembly to give criminal jurisdiction to inferior courts.

Author: Senator Walsh