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DELAWARE STATE SENATE  
151st GENERAL ASSEMBLY

SENATE SUBSTITUTE NO. 1  
FOR  
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):

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

3 § 841D. Wage theft.

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

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

9 (c) Wage theft is punishable under subsections (c) and (d) of § 841 of this title, except that if the person has 2 or  
10 more convictions for wage theft, wage theft is a class E felony.

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

13 § 1101. Definition of terms.

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

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

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

17 (3) "Employ" means to suffer or permit to work.

18           (3) (4) "Employee" means ~~any a person suffered or permitted to work by an employer under a contract of~~  
19 ~~employment either made in Delaware or to be performed wholly or partly therein. in this State.~~ This chapter does not  
20 apply to ~~employees any of the following:~~

21           a. ~~Employees of the United States government, the government.~~

22           b. ~~Employees of the State of Delaware or any political subdivision thereof. of this State.~~

23           c. ~~Independent contractors.~~

24           (4) (5) "Employer" means any individual, partnership, association, joint stock company, trust, corporation, the  
25 administrator or executor of the estate of a deceased ~~individual individual,~~ or the receiver, ~~trustee trustee,~~ or successor  
26 of any of the same employing ~~any a person.~~ This chapter does not apply to employees of the United States government,  
27 the State of Delaware or any political subdivision ~~thereof. of this State.~~

28           (6) "Independent contractor" means as defined in § 3501 of this title. "Independent contractor" does not  
29 include any of the following:

30           a. A person licensed by the Department of Insurance under Title 18.

31           b. A person registered under Chapter 73 of Title 6 as any of the following:

32                 1. A broker-dealer.

33                 2. An agent.

34                 3. An investment adviser.

35                 4. An investment adviser representative.

36           c. A person designated as an "independent contractor" by the Department through regulations.

37           (7) "Secretary" or "Secretary of Labor" means the Secretary of the Department of Labor or the Secretary's  
38 authorized designee.

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

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

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

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

49 § 1102A. Wage theft.

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

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

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

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

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

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

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

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

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

66 (1) The action to be taken.

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

68 (3) Instructions to request a hearing.

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

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

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

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

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

81 (h) Any final decision by a court or administrative agency that contains a finding of fact or conclusion of law that a  
82 violation of this section occurred, is conclusive on all parties to an action under this section. For purposes of this  
83 subsection, a decision is final if it has been fully determined on appeal to the appropriate court, if all time for filing an  
84 appeal of the decision has expired, or if the decision is not subject to judicial review.

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

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

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

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

91 (1)a. An employer who violates subsection (a) of this section is subject to a civil penalty of not less than  
92 \$2,000 and not more than \$20,000 for each violation.

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

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

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

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

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

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

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

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

- 107                    (1) A state or federal agency from pursuing a remedy against an employer for a violation of a different law.
- 108                    (2) An employee or the Department from pursuing a remedy against an employer under § 1113 of this title.

#### SYNOPSIS

Like Senate Bill No. 35, this Act defines specific violations of wage payment and collection laws under Chapter 11 of Title 19 as wage theft, providing specific penalties for these violations, and creates 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.

Senate Substitute No. 1 for Senate Bill No. 35 differs from Senate Bill No. 35 as follows:

- Clarifies that Chapter 11 of Title 19 does not apply to independent contractors.
- Defines the term "independent contractor" using the same definition that is used in Chapter 35 of Title 19 and specifically identifying as "independent contractors" a person licensed by the Department of Insurance or registered under Chapter 73 of Title 6 as a broker-dealer, agent, investment adviser, or investment adviser representative. It also allows the Department of Labor to designate additional occupations as an “independent contractor” through regulations.
- Does not make any changes to the definitions sections of other chapters in Title 19.
- Adds terms and definitions to § 1101 of Title 19 that are used in Chapter 11, with the same definitions for the terms as would have applied under the revisions to § 101 of Title 19 in SB 35.

Like Senate Bill No. 35, this Act also makes technical corrections to conform existing law to the standards of the Delaware Legislative Drafting Manual and 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