

SPONSOR: Sen. Walsh & Rep. Osienski
Sens. Ennis, Mantzavinos, Sokola, Townsend; Reps. Cooke, Griffith, Longhurst, Matthews, Mitchell, Morrison, K. Williams

DELAWARE STATE SENATE
151st GENERAL ASSEMBLY

SENATE SUBSTITUTE NO. 1
FOR
SENATE BILL NO. 35
AS AMENDED BY
SENATE AMENDMENT NO. 1

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) Wage theft is punishable under subsections (c) and (d) of § 841 of this title, except that if the person has 2 or more convictions for 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.~~ Labor.

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

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~~(3)~~ (4) "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~~ any of the following:

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

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

c. Independent contractors.

~~(4)~~ (5) "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.

(6) "Independent contractor" means as defined in § 3501 of this title. "Independent contractor" includes any of the following:

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

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

1. A broker-dealer.

2. An agent.

3. An investment adviser.

4. An investment adviser representative.

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

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

~~(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.~~

(8) "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) 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 final 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 final 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.