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## Labor & Workforce Development Committee

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### HB 2334

**Brief Description:** Simplifying and enforcing employee status under employment laws to ensure fairness to employers and employees and address the underground economy.

**Sponsors:** Representatives Riccelli, Sells, Moscoso, Seaquist, S. Hunt, Green, Appleton, Ryu, Reykdal, Bergquist, Takko, Goodman, Pollet and Ormsby.

#### Brief Summary of Bill

- Creates the Employment Fair Classification Act, which prohibits misclassification of employees as independent contractors and creates remedies, including civil penalties and damages.
- Defines "independent contractor" for purposes of the Employee Fair Classification Act and establishes the same definition for purposes of the Minimum Wage Act, unemployment insurance, industrial insurance, and other employment laws.

**Hearing Date:** 1/21/14

**Staff:** Joan Elgee (786-7106).

#### Background:

Employment standards and benefits generally apply only if an employer-employee relationship exists rather than an independent contractor relationship. Various multi-part tests are used to determine whether an individual is an independent contractor. For purposes of prevailing wage, industrial insurance, and unemployment insurance, a six-part statutory independent contractor test is applied. This test requires that:

- The individual has been and will be free from direction and control, both under the contract and in fact,

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

- The individual's services are outside the usual course of business for which the service is performed, or outside all the places of business, or the individual must pay the costs of the principal place of business where the services are performed;
- The individual has an independently established business, or a principal place of business that qualifies for an Internal Revenue Service (IRS) deduction;
- The individual is responsible for filing a schedule of expenses with the IRS;
- The individual has a separate set of books and records that reflect all items of income and expenses; and
- The individual has an active and valid registration with the Department of Revenue, has a unified business identifier number, and has any other required state accounts for the payment of taxes.

In the construction industry, a seventh required element is that the individual be registered as a contractor or licensed as an electrical contractor. (For industrial insurance, a threshold question is whether a person under contract brings more than their personal labor to the job and for unemployment insurance, persons outside construction may also be independent contractors under an alternative three part test.) For purposes of the Minimum Wage Act, which also addresses overtime, a common law economic dependence test applies. The inquiry under this test is whether the worker is economically dependent on the alleged employer or is instead in business for himself or herself. Other wage laws also do not have statutory tests.

If an employer treats a worker as an independent contractor rather than as an employee, the employer may be liable under the various employment laws. Some employment laws address the liability of general contractors for violations of a subcontractor. For example, for purposes of unemployment insurance and industrial insurance, a general construction contractor is not liable for a subcontractor's taxes under certain circumstances.

### **Summary of Bill:**

**Employee Fair Classification Act.** The Employee Fair Classification Act (EFCA) is adopted.

Prohibitions and requirements. Certain actions by employers and other persons are prohibited. These are:

- Willfully misclassifying an employee as an independent contractor. "Misclassification" is designating an employee as a nonemployee. "Willful" is a knowing and intentional action that is not accidental or the result of a bona fide dispute.
- Charging a misclassified employee a fee or making unlawful deductions from compensation.
- Requiring or requesting an employee to agree to or sign a document that results in misclassification.
- Forming, assisting in, or inducing the formation of a business entity; or paying or collecting a fee for the use of a business entity, for the purpose of facilitating or evading detection of a violation of the EFCA.
- Conspiring with, aiding and abetting, assisting, or advising an employer (for remuneration) with the intent of violating the EFCA.

Employers who engage independent contractors must post a notice stating that a worker has a right to be classified as an employee if the worker does not meet independent contractor

requirements and that a complaint may be filed with the Department of Labor and Industries (Department) or in court if a person believes misclassification has occurred. The notice must be in English, Spanish, and any other language primarily spoken by the majority of the workforce.

Bona fide independent contractors, commissioned outside salespeople, individuals employed on a casual and sporadic basis, and volunteers are not employees under the EFCA.

Employer-employee relationship. An employer-employee relationship exists when an individual performs labor or services for an employer. Proof that an individual is not an employee must be established by a preponderance of the evidence.

Definition of independent contractor. An "independent contractor" is an individual who performs labor or services under either of two tests:

- The individual is and will continue to be free from control or direction, both under the contract and in fact. Control or direction includes the right to control or direct as well as general control or direction over the individual's physical activities,
- The labor or service is either outside the usual course of business for which the labor or service is performed or outside of all the places of business of the enterprise for which the labor or service is performed, and
- The individual is customarily engaged in an independently established trade, occupation, business, or profession that is of the same nature as that involved in the contract.

or:

- The individual is and will continue to be free from control or direction, both under the contract and in fact. Control or direction includes the right to control or direct as well as general control or direction over the individual's physical activities.
- The individual's business is not financially dependent on the relationship with the party engaging the individual and the business continues after the relationship ends.
- The individual has a substantial investment of capital in the business.
- The individual gains profits and bears losses as a result of managerial skills and capital investment.
- The individual makes his or her labor or services available to the public or business community on a continuing basis.
- The individual files a schedule of expenses with the IRS.
- The party engaging the individual does not represent the individual as an employee.
- The individual has the right to perform similar labor or services for others.
- The individual has an active and valid registration with the Department of Revenue and any other state agencies for purposes of taxes.
- The individual has a separate set of books and records.

Acts taken to comply with laws are not proof of independent contractor status.

Enforcement. Administrative enforcement as well as a private cause of action are authorized under the EFCA.

*Administrative.* The Department of Labor and Industries may investigate violations and for any of the prohibited acts may order payment of:

- A civil penalty of \$1,000 to \$10,000 per employee, or \$10,000 to \$25,000 if the person has engaged in a pattern or practice.

- Damages of three times the wages and benefits denied or withheld and reimbursement for taxes and the value of benefits paid by the employee. Liability is joint and several for employers and other persons.
- Taxes owed.

The Department may also order reinstatement and reclassification of the employee, or front pay in lieu of reinstatement.

For a notice violation, the Department may order payment of a civil penalty of \$1,000 to \$10,000.

*Cause of action.* Individual and class actions are authorized. If the court determines that a person, including an employer, engaged in any of the prohibited acts, the court must order payment of damages of: (1) three times the wages and benefits unlawfully denied or withheld or statutory damages of: \$1,000 to \$10,000 per employee or \$10,000 to \$25,000 per employee if a pattern or practice is shown, whichever is greater; and (2) attorneys' fees and costs. The court may also order employers and other persons to reimburse the employee for taxes and the value of benefits paid by the employee. Liability is joint and several for employers and other persons.

Employers may also be ordered to pay taxes, and be subject to injunctive or other relief, including reinstatement and reclassification or front pay in lieu of reinstatement.

*Other enforcement provisions.* A three year statute of limitations for both administrative and court actions is tolled during any period that an employer deterred an action. A "pattern or practice" means that within the previous 10 years, the employer was convicted for nonpayment of wages or delinquent in payment of a court ordered or administrative assessment for nonpayment of wages. The Department may initiate collection procedures for unpaid premiums and may send its determination to the Employment Security Department.

A general construction contractor is liable for violations of an independent contractor or subcontractor only when the general exerts substantial control over the day-to-day work of the subcontractor or independent contractor.

Account. The Employee Fair Classification Account is created. Civil penalties must be deposited into the account, which is appropriated, and moneys in the account may be used only for enforcement of the EFCA.

Implementation. The Department has rule-making authority and may develop a plan for strategic enforcement of the EFCA, prioritizing industries and workplaces with a high concentration of violations.

### **Existing employment laws.**

The EFCA independent contractor tests apply to prevailing wage, wage deductions, the Wage Payment Act, the Minimum Wage Act, unemployment insurance, and industrial insurance. Most existing statutory tests are repealed. The EFCA provisions on employer employee relationship also apply to these other laws.

The EFCA provisions on general construction contractor liability also apply to wage deductions, the Wage Payment Act, and the Minimum Wage Act.

A contractor who violates prevailing wage laws or the EFCA, or both laws, for a second time within a five year period is barred from bidding on a public works contract for one year and is also subject to other sanctions.

**Appropriation:** None.

**Fiscal Note:** Requested on January 15, 2014.

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.