

NEW LAW TARGETS EMPLOYEE MISCLASSIFICATION; MORE VIGOROUS ENFORCEMENT ANTICIPATED

On August 11, Governor Cooper signed [SB 407 \(Employee Misclassification/IC Changes\)](#) into law. The new law largely codifies an executive order issued on December 18, 2015, by former Governor McCrory, which established the Employee Classification Section within the North Carolina Industrial Commission.

The “Employee Fair Classification Act” is designed to respond to the practice of those employers who hire an individual to work under the business’s control as an employee but classifies the individual as an independent contractor. This is done to avoid employer requirements for income tax withholding, federal payroll taxes, state unemployment insurance taxes, state workers’ compensation insurance coverage, minimum wage and overtime pay, and responsibility for the protection and conduct of employees.

The new law specifically empowers the Employee Classification Section within the Industrial Commission to receive and investigate reports of employee misclassification and to coordinate with the four major state agencies which have jurisdiction to independently investigate employee misclassification as it affects their specific area of responsibility (i.e., Department of Labor—Wage & Hour Act; Division of Employment Security—Unemployment Taxes; Industrial Commission—Workers’ Comp Act; and Department of Revenue—Withholding & Payroll Taxes). It is anticipated that this new law will cause increased, and more vigorous, enforcement by the agencies noted.

NCHBA, along with other major employer associations, supported this bill because employee misclassification not only harms workers but it also creates an uneven playing field where employers who follow the law are at a distinct competitive disadvantage with those who engage in this illegal activity. NCHBA led efforts to ensure that the current definition of “employer” and “employee” were not changed nor were independent causes of action authorized as some groups advocated.

Generally speaking, the primary difference between an “employee” and a legitimate “independent contractor” is the level of control exerted by the employer over the work performed (e.g., GS 96-1(b)(19) defines an “independent contractor” as “an individual who contracts to do work for a person and is not subject to that person’s control or direction with respect to the manner in which the details of the work are to be performed or what the individual must do as the work progresses.”).

Occupational licensing boards are directed to require licensees to certify that they have read a public notice defining employee misclassification. Further, these boards are directed to discipline licensees who fail to disclose misclassification investigations.

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