

AMENDED IN ASSEMBLY AUGUST 15, 2011

AMENDED IN ASSEMBLY JULY 12, 2011

AMENDED IN SENATE MAY 27, 2011

AMENDED IN SENATE MARCH 23, 2011

SENATE BILL

No. 459

Introduced by Senator Corbett

February 16, 2011

An act to ~~amend Sections 1174.5 and 1175 of, and to add Sections 226.8, 1174.1, and 2753 to, the Labor Code, and to add Section 9620 to the Unemployment Insurance 226.8 and 2753 to the Labor Code,~~ relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

SB 459, as amended, Corbett. Employment: independent contractors.

~~(1) Existing~~

Existing law prescribes comprehensive requirements relating to minimum wages, overtime compensation, and standards for working conditions for the protection of employees applicable to an employment relationship.

This bill would prohibit willful misclassification, as defined, of individuals as independent contractors. The bill would authorize the Labor and Workforce Development Agency to assess specified civil penalties from, *and would require the agency to take other specified disciplinary actions against*, persons or employers violating the bill. *It would also require the agency to notify the Contractors' State License Board of a violator that is a licensed contractor, and require the board to initiate an action against the licensee.*

This bill would provide that a person who, for money or other valuable consideration, knowingly advises an employer to treat an individual as an independent contractor to avoid employee status for the individual shall be jointly and severally liable with the employer if the individual is not found to be an independent contractor. This bill would exempt from the provisions regarding joint and several liability a person who provides advice to his or her employer or an attorney who provides legal advice in the course of practicing law.

~~(2) Existing law requires every person employing labor in this state to furnish reports or information to the Industrial Welfare Commission. Existing law requires that person to permit a member of the commission or employees of the Division of Labor Standards Enforcement within the Department of Industrial Relations free access to the place of business or employment of that person to secure information or make an authorized investigation. That person is required to keep a record showing the names and addresses of all employees employed, and keep, for a period of not less than 2 years, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to employees employed at the respective plants and establishments. Under existing law, a person who willfully fails to maintain these records or permit a member of the commission or employees of the division to inspect records is subject to a civil penalty of \$500. A person who neglects or refuses to furnish the information requested by the commission, refuses access to his or her place of business, hinders the commission or employees of the division, or fails to keep any records required by this provision is guilty of a misdemeanor.~~

~~This bill would require a person employing labor in this state to provide to an individual retained as an independent contractor, when that individual is retained, a form that includes a notice that the individual has been retained as an independent contractor, a statement explaining the impact that the individual's status as an independent contractor has on his or her tax obligations and eligibility for labor and employment protections, and a notice of the individual's ability to seek advice from the Employment Development Department or the Labor Commissioner as to whether the individual is properly classified as an independent contractor. The bill would require the person employing labor in this state to maintain, for a period of no less than 2 years, records of the independent contractors retained by that person which include specified information concerning each independent contractor,~~

and to make these records available for inspection by a member of the commission or an employee of the Department of Industrial Relations or the Employment Development Department. The bill would provide that a person who willfully fails to maintain these records or permit a member of the commission or employees of those departments to inspect those records is subject to a civil penalty of \$500. The bill would also provide that a person who neglects or refuses to furnish information requested under this provision, refuses access to his or her place of business, hinders the commission or employees of those departments, or fails to keep any records required by this provision is guilty of a misdemeanor. By expanding the definition of an existing crime, the bill would impose a state-mandated local program:

(3) Under existing law, the Employment Development Department has the powers and duties necessary to administer the reporting, collection, refunding to the employer, and enforcement of taxes required to be withheld by employers.

The bill would additionally require the Employment Development Department to develop a form that includes a notice to an independent contractor regarding the impact that status as an independent contractor has on the individual's tax obligations and eligibility for labor and employment protections, and a notice that the independent contractor may seek advice from the Employment Development Department or Labor Commissioner as to whether the individual is properly classified as an independent contractor. The bill would require the Employment Development Department to process a request for advice by an individual regarding whether that individual is an independent contractor or employee, and to take all steps reasonably necessary to carry out the duties described in these provisions:

(4) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason:

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: *yes-no*.

The people of the State of California do enact as follows:

1 SECTION 1. Section 226.8 is added to the Labor Code, to
2 read:

1 226.8. (a) It is unlawful for any person or employer to engage
2 in any of the following activities:

3 (1) Willful misclassification of an individual as an independent
4 contractor.

5 (2) Charging an individual who has been willfully misclassified
6 as an independent contractor a fee, or making any deductions from
7 compensation, for any purpose, including for goods, materials,
8 space rental, services, government licenses, repairs, equipment
9 maintenance, or fines arising from the individual's employment
10 where the employer would have been in violation of the law if the
11 individual had not been misclassified.

12 (b) If the Labor and Workforce Development Agency, or any
13 of its departments, divisions, commissions, boards, or agencies,
14 or a court finds that ~~person~~ *a person or employer* has engaged in
15 any of the enumerated violations of subdivision (a), a civil penalty
16 of not less than five thousand dollars (\$5,000) and not more than
17 fifteen thousand dollars (\$15,000) shall be assessed against the
18 *person or employer* for each violation, in addition to any other
19 penalties or fines permitted by law.

20 (c) If the Labor and Workforce Development Agency, or any
21 of its departments, divisions, commissions, boards, or agencies,
22 or a court finds that ~~person~~ *a person or employer* has engaged in
23 any of the enumerated violations of subdivision (a) and the *person*
24 *or employer* has engaged in or is engaging in a pattern or practice
25 of these behaviors, a civil penalty of not less than ten thousand
26 dollars (\$10,000) and not more than twenty-five thousand dollars
27 (\$25,000) shall be assessed against the *person or employer* for
28 each violation, in addition to any other penalties or fines permitted
29 by law.

30 (d) (1) *If the Labor and Workforce Development Agency, or*
31 *any of its departments, divisions, commissions, boards, or agencies,*
32 *or a court finds that a person or employer that is a licensed*
33 *contractor pursuant to the Contractors' State License Law has*
34 *violated subdivision (a), the agency, in addition to any other*
35 *remedy that has been ordered, shall transmit a certified copy of*
36 *the finding to the Contractors' State License Board.*

37 (2) *The registrar of the Contractors' State License Board shall*
38 *initiate disciplinary action against a licensee within 30 days of*
39 *receiving a certified copy of an agency or court finding pursuant*
40 *to paragraph (1).*

1 (e) If the Labor and Workforce Development Agency, or any of
2 its departments, divisions, commissions, boards, or agencies, or
3 a court finds that a person or employer has violated subdivision
4 (a), the agency, in addition to any other remedy that has been
5 ordered, shall order the person or employer to display prominently
6 on its Internet Web site, in an area which is accessible to all
7 employees and the general public, a notice that sets forth all of
8 the following:

9 (1) That the Labor and Workforce Development Agency or a
10 court, as applicable, has found that the person or employer has
11 committed a serious violation of the law by engaging in the willful
12 misclassification of employees.

13 (2) That the person or employer has changed its business
14 practices in order to avoid committing further violations of this
15 section.

16 (3) That any employee who believes that he or she is being
17 misclassified as an independent contractor may contact the
18 Division of Labor Standards Enforcement, the Employment
19 Development Department, or the Franchise Tax Board. The notice
20 shall include the mailing address, e-mail address, and telephone
21 number of each agency.

22 (4) That the notice is being posted pursuant to a state order.

23 (f) In addition to including the information specified in
24 subdivision (e), a person or employer also shall satisfy the
25 following requirements in preparing the notice:

26 (1) The chief executive officer, president, or other highest
27 ranking officer shall sign the notice.

28 (2) It shall post the notice for two years commencing with the
29 date of the final decision and order.

30 (3) If the person or employer does not have an Internet Web
31 site, it shall post a copy of the order at each place where its
32 employees report for work within the state, and that order shall
33 be prominently displayed in an area which is accessible to all
34 employees and the general public.

35 (g) Any civil penalty pursuant to subdivision (b) or (c) or
36 disciplinary action pursuant to subdivision (d) or (e) shall remain
37 in effect against any successor corporation or business entity that
38 satisfies both of the following:

39 (1) Has one or more of the same principals or officers as the
40 person or employer subject to the penalty or action.

1 (2) *Is engaged in the same or equivalent trade or activity as the*
2 *person or employer subject to the penalty or action.*

3 ~~(d)~~

4 (h) For purposes of this section, “willful” means voluntarily
5 and knowingly to avoid employee status for that individual.

6 ~~(e)~~

7 (i) Nothing in this section is intended to limit any rights or
8 remedies otherwise available at law.

9 ~~SEC. 2. Section 1174.1 is added to the Labor Code, to read:~~

10 ~~1174.1. (a) A person employing labor in this state shall provide~~
11 ~~to an individual retained as an independent contractor, when the~~
12 ~~individual is retained, a form developed by the Employment~~
13 ~~Development Department that includes all of the following:~~

14 ~~(1) A notice that the individual has been retained as an~~
15 ~~independent contractor.~~

16 ~~(2) The factors the Employment Development Department uses~~
17 ~~to determine whether an individual is an employee or an~~
18 ~~independent contractor.~~

19 ~~(3) A statement explaining the impact that the individual’s status~~
20 ~~as an independent contractor has on his or her tax obligations and~~
21 ~~his or her eligibility for labor and employment protections.~~

22 ~~(4) A notice of the individual’s ability to seek advice from the~~
23 ~~Employment Development Department or the Labor Commissioner~~
24 ~~as to whether that individual is properly classified as an~~
25 ~~independent contractor. The notice shall provide the telephone~~
26 ~~number for both the Employment Development Department and~~
27 ~~the Labor Commissioner.~~

28 ~~(b) (1) A person employing labor in this state shall maintain,~~
29 ~~for not less than two years, records of all independent contractors~~
30 ~~retained by that person. The records shall include the name,~~
31 ~~address, social security number, and, if applicable, federal tax~~
32 ~~identification number of each independent contractor.~~

33 ~~(2) A person employing labor in this state shall make the records~~
34 ~~described in paragraph (1) available, upon request, for inspection~~
35 ~~by a member of the commission or an employee of the Department~~
36 ~~of Industrial Relations or the Employment Development~~
37 ~~Department.~~

38 ~~SEC. 3. Section 1174.5 of the Labor Code is amended to read:~~

39 ~~1174.5. A person employing labor who willfully fails to~~
40 ~~maintain, in an accurate and complete fashion, the records required~~

1 by subdivision (e) or (d) of Section 1174 or subdivision (b) of
2 Section 1174.1, or to allow a member of the commission or
3 employees of the Division of Labor Standards Enforcement to
4 inspect records pursuant to subdivision (b) of Section 1174 or a
5 member of the commission or employees of the Department of
6 Industrial Relations or the Employment Development Department
7 to inspect records pursuant to subdivision (b) of Section 1174.1,
8 shall be subject to a civil penalty of five hundred dollars (\$500).

9 SEC. 4. Section 1175 of the Labor Code is amended to read:

10 1175. A person, or officer or agent thereof, is guilty of a
11 misdemeanor who does any of the following:

12 (a) Neglects or refuses to furnish information requested pursuant
13 to Section 1174 or 1174.1.

14 (b) Refuses access to his or her place of business or employment
15 to any member of the commission or employee of the Department
16 of Industrial Relations or the Employment Development
17 Department when the member or employee is administering or
18 enforcing this chapter.

19 (c) Hinders that member or employee from securing information
20 authorized by Section 1174 or 1174.1.

21 (d) Fails to keep any of the records required by Section 1174
22 or 1174.1.

23 SEC. 5.

24 SEC. 2. Section 2753 is added to the Labor Code, to read:

25 2753. (a) A person who, for money or other valuable
26 consideration, knowingly advises an employer to treat an individual
27 as an independent contractor to avoid employee status for that
28 individual shall be jointly and severally liable with the employer
29 if the individual is found not to be an independent contractor.

30 (b) This section does not apply to the following persons:

31 (1) A person who provides advice to his or her employer.

32 (2) An attorney authorized to practice law in California or
33 another United States jurisdiction who provides legal advice in
34 the course of the practice of law.

35 SEC. 6. Section 9620 is added to the Unemployment Insurance
36 Code, to read:

37 9620. The Employment Development Department also has the
38 following power and duties:

39 (a) To develop the form described in subdivision (a) of Section
40 1174.1 of the Labor Code.

1 ~~(b) To process a request for advice by an individual as to~~
2 ~~whether that individual is an independent contractor or employee.~~

3 ~~(c) To take all steps reasonably necessary to carry out the duties~~
4 ~~described in Section 1174.1 of the Labor Code.~~

5 ~~SEC. 7. No reimbursement is required by this act pursuant to~~
6 ~~Section 6 of Article XIII B of the California Constitution because~~
7 ~~the only costs that may be incurred by a local agency or school~~
8 ~~district will be incurred because this act creates a new crime or~~
9 ~~infraction, eliminates a crime or infraction, or changes the penalty~~
10 ~~for a crime or infraction, within the meaning of Section 17556 of~~
11 ~~the Government Code, or changes the definition of a crime within~~
12 ~~the meaning of Section 6 of Article XIII B of the California~~
13 ~~Constitution.~~