

# HOUSE BILL 1364

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CF SB 1005

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By: Delegates Schulz, Afzali, Bates, Clagett, Eckardt, Elliott, Frank, George, Haddaway-Riccio, Hershey, Hogan, Jacobs, Krebs, McComas, W. Miller, Minnick, Norman, O'Donnell, Otto, Schuh, Stifler, ~~and Vitale Vitale, Barkley, Davis, Feldman, Jameson, Love, McHale, Olszewski, and Vaughn~~

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Committee Report: Favorable with amendments

House action: Adopted

Read second time: March 19, 2012

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## CHAPTER \_\_\_\_\_

1 AN ACT concerning

2 **Labor and Employment – ~~Determination of Independent Contractor Status –~~**  
3 **Workplace Fraud Act and Unemployment Insurance – Revisions**

4 FOR the purpose of establishing an exception for an employer that produces certain  
5 documents for inspection to the presumption that an employer-employee  
6 relationship exists for purposes of the Workplace Fraud Act; ~~repealing the~~  
7 ~~requirement that the Commissioner of Labor and Industry consider certain~~  
8 ~~factors as strong evidence that an employer did not violate a certain provision of~~  
9 ~~law; providing for a presumption, under certain circumstances, that an~~  
10 ~~individual working for remuneration is an independent contractor under certain~~  
11 ~~circumstances; prohibiting the Commissioner, under certain circumstances,~~  
12 ~~from entering a place of business or work site to review and copy certain~~  
13 ~~records; authorizing an employer to comply with a certain requirement to~~  
14 ~~provide records by producing copies of the records; altering the number of days~~  
15 ~~within which an employer is required to produce certain records; ~~repealing a~~~~  
16 ~~certain provision of law regarding the issuance of citations by the Commissioner~~  
17 ~~for violations of the Workplace Fraud Act; requiring the Commissioner to take~~  
18 ~~certain action regarding an alleged violation of the Workplace Fraud Act within~~  
19 ~~a certain time after the Commissioner receives certain records from an~~  
20 ~~employer; providing that an employer is entitled to a certain hearing within a~~

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EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.

Underlining indicates amendments to bill.

~~Strike out~~ indicates matter stricken from the bill by amendment or deleted from the law by amendment.



1 certain number of days after the hearing is requested unless the right is waived;  
 2 ~~repealing a certain notification requirement~~; requiring that a copy of a certain  
 3 order be submitted to a public body under certain circumstances; altering the  
 4 requirement that a certain public body withhold certain funds from an  
 5 employer; ~~repealing the requirement that a certain public body release certain~~  
 6 ~~funds on issuance of a certain order~~; ~~establishing that certain work is not~~  
 7 ~~covered employment for the purposes of unemployment insurance if the~~  
 8 ~~Secretary of Labor, Licensing, and Regulation is satisfied that the individual~~  
 9 ~~performing the work entered into a certain contract with the employer~~; altering  
 10 a certain provision of law regarding the issuance of citations by the  
 11 Commissioner for violations of the Workplace Fraud Act; and generally relating  
 12 to the ~~determination of independent contractor status~~ Workplace Fraud Act.

13 BY repealing and reenacting, with amendments,  
 14 Article – Labor and Employment  
 15 Section 3–903 ~~through 3–906, 3–913, and 8–205~~ 3–905, 3–906, and 3–913  
 16 Annotated Code of Maryland  
 17 (2008 Replacement Volume and 2011 Supplement)

18 BY adding to  
 19 Article – Labor and Employment  
 20 Section 3–903.1  
 21 Annotated Code of Maryland  
 22 (2008 Replacement Volume and 2011 Supplement)

23 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF  
 24 MARYLAND, That the Laws of Maryland read as follows:

25 **Article – Labor and Employment**

26 3–903.

27 (a) An employer may not fail to properly classify an individual who performs  
 28 work for remuneration paid by the employer.

29 (b) An employer has failed to properly classify an individual when an  
 30 employer–employee relationship exists as determined under subsection (c) of this  
 31 section but the employer has not classified the individual as an employee.

32 (c) (1) ~~For~~ **EXCEPT AS PROVIDED IN § 3–903.1 OF THIS SUBTITLE,**  
 33 **FOR** purposes of enforcement of this subtitle only, work performed by an individual for  
 34 remuneration paid by an employer shall be presumed to create an employer–employee  
 35 relationship, unless:

36 (i) the individual is an exempt person; ~~for~~

37 (ii) an employer demonstrates that:

1                   1.     the individual who performs the work is free from  
2 control and direction over its performance both in fact and under the contract;

3                   2.     the individual customarily is engaged in an  
4 independent business or occupation of the same nature as that involved in the work;  
5 and

6                   3.     the work is:

7                   A.     outside of the usual course of business of the person  
8 for whom the work is performed; or

9                   B.     performed outside of any place of business of the  
10 person for whom the work is performed;~~OR.~~

11                   ~~(H) AN EMPLOYER PRODUCES FOR INSPECTION BY THE~~  
12 ~~COMMISSIONER;~~

13                   ~~1. A WRITTEN CONTRACT, SIGNED BY THE~~  
14 ~~EMPLOYER AND THE INDIVIDUAL, THAT:~~

15                   ~~A. DESCRIBES THE NATURE OF THE WORK TO BE~~  
16 ~~PERFORMED BY THE INDIVIDUAL;~~

17                   ~~B. DESCRIBES THE REMUNERATION TO BE PAID FOR~~  
18 ~~THE WORK PERFORMED BY THE INDIVIDUAL; AND~~

19                   ~~C. INCLUDES AN ACKNOWLEDGEMENT BY THE~~  
20 ~~INDIVIDUAL OF THE INDIVIDUAL'S OBLIGATIONS UNDER THIS ARTICLE;~~

21                   ~~2. AN AFFIDAVIT SIGNED BY THE INDIVIDUAL~~  
22 ~~INDICATING THAT THE INDIVIDUAL IS AN INDEPENDENT CONTRACTOR THAT~~  
23 ~~PERFORMS WORK FOR OTHER EMPLOYERS; AND~~

24                   ~~3. A CERTIFICATE OF STATUS OF THE INDIVIDUAL'S~~  
25 ~~BUSINESS THAT IS ISSUED BY THE STATE DEPARTMENT OF ASSESSMENTS AND~~  
26 ~~TAXATION.~~

27                   (2)     Work is outside of the usual course of business of the person for  
28 whom it is performed under paragraph (1) of this subsection if:

29                   (i)     the individual performs the work off the employer's  
30 premises;

1 (ii) the individual performs work that is not integrated into the  
2 employer's operation; or

3 (iii) the work performed is unrelated to the employer's business.

4 (3) By contract, an employer may engage another business entity,  
5 which may have its own employees, to do the same type of work in which the employer  
6 engages, at the same location where the employer is working, without establishing an  
7 employer–employee relationship between the two contracting entities.

8 (d) The Commissioner shall adopt regulations to explain further and provide  
9 specific examples of the application of subsection (c) of this section.

10 **3-903.1.**

11 **THE PRESUMPTION THAT AN EMPLOYER–EMPLOYEE RELATIONSHIP**  
12 **EXISTS UNDER § 3-903(C)(1) OF THIS SUBTITLE DOES NOT APPLY IF:**

13 **(1) AN EMPLOYER PRODUCES FOR INSPECTION BY THE**  
14 **COMMISSIONER:**

15 **(i) A WRITTEN CONTRACT, SIGNED BY THE EMPLOYER AND**  
16 **BUSINESS ENTITY, THAT:**

17 **1. DESCRIBES THE NATURE OF THE WORK TO BE**  
18 **PERFORMED BY THE BUSINESS ENTITY;**

19 **2. DESCRIBES THE REMUNERATION TO BE PAID FOR**  
20 **THE WORK PERFORMED BY THE BUSINESS ENTITY; AND**

21 **3. INCLUDES AN ACKNOWLEDGMENT BY THE**  
22 **BUSINESS ENTITY OF THE BUSINESS ENTITY'S OBLIGATIONS UNDER THIS**  
23 **ARTICLE TO:**

24 **A. WITHHOLD, REPORT AND REMIT PAYROLL TAXES**  
25 **ON BEHALF OF ALL EMPLOYEES WORKING FOR THE BUSINESS ENTITY;**

26 **B. PAY UNEMPLOYMENT INSURANCE TAXES FOR ALL**  
27 **EMPLOYEES WORKING FOR THE BUSINESS ENTITY; AND**

28 **C. MAINTAIN WORKERS' COMPENSATION**  
29 **INSURANCE;**

1                   (II) AN AFFIDAVIT SIGNED BY THE BUSINESS ENTITY  
 2 INDICATING THAT THE BUSINESS ENTITY IS AN INDEPENDENT CONTRACTOR  
 3 WHO IS AVAILABLE TO WORK FOR OTHER BUSINESS ENTITIES;

4                   (III) A CURRENT CERTIFICATE OF STATUS OF THE BUSINESS  
 5 ENTITY, ISSUED BY THE STATE DEPARTMENT OF ASSESSMENTS AND TAXATION,  
 6 INDICATING THAT THE BUSINESS ENTITY IS IN GOOD STANDING; AND

7                   (IV) PROOF THAT THE BUSINESS ENTITY HOLDS ALL  
 8 OCCUPATIONAL LICENSES REQUIRED BY STATE AND LOCAL AUTHORITIES FOR  
 9 THE WORK PERFORMED; AND

10                   (2) THE EMPLOYER PROVIDED TO EACH INDIVIDUAL CLASSIFIED  
 11 AS AN INDEPENDENT CONTRACTOR OR EXEMPT PERSON A WRITTEN NOTICE  
 12 UNDER § 3-914 OF THIS SUBTITLE.

13 ~~§ 904.~~

14                   ~~(a) An employer may not knowingly fail to properly classify an individual~~  
 15 ~~who performs work for remuneration paid by the employer.~~

16                   ~~(b) An employer has knowingly failed to properly classify an individual~~  
 17 ~~when:~~

18                   ~~(1) an employer-employee relationship exists as determined under §~~  
 19 ~~3-903(e) of this subtitle; and~~

20                   ~~(2) the employer has knowingly failed to properly classify the~~  
 21 ~~individual as an employee.~~

22                   ~~[(e) The Commissioner shall consider, as strong evidence that the employer~~  
 23 ~~did not knowingly fail to properly classify an individual, whether:~~

24                   ~~(1) before a complaint was filed against the employer or the~~  
 25 ~~Commissioner began an investigation of the employer, the employer:~~

26                   ~~(i) sought and obtained evidence that the individual:~~

27                   ~~1. is an exempt person; or~~

28                   ~~2. as an independent contractor;~~

29                   ~~A. withholds, reports, and remits payroll taxes on behalf~~  
 30 ~~of all individuals working for the independent contractor;~~

~~B. pays unemployment insurance taxes for all individuals working for the independent contractor; and~~

~~C. maintains workers' compensation insurance; and~~

~~(ii) provided to the exempt person or independent contractor a written notice as required by § 3-914 of this subtitle; or~~

~~(2) the employer:~~

~~(i) 1. classifies all workers who perform the same or substantially the same tasks for the employer as independent contractors; and~~

~~2. reports the income of the workers to the Internal Revenue Service as required by federal law; and~~

~~(ii) has received a determination from the Internal Revenue Service that the individual or a worker who performs the same or substantially the same task as the individual is an independent contractor.]~~

~~(C) IT SHALL BE PRESUMED THAT AN INDIVIDUAL WORKING FOR REMUNERATION IS AN INDEPENDENT CONTRACTOR OF THE EMPLOYER IF, BEFORE A COMPLAINT WAS FILED AGAINST THE EMPLOYER OR THE COMMISSIONER BEGAN AN INVESTIGATION OF THE EMPLOYER, THE EMPLOYER:~~

~~(1) SOUGHT AND OBTAINED EVIDENCE THAT THE INDIVIDUAL:~~

~~(I) IS AN EXEMPT PERSON; OR~~

~~(II) AS AN INDEPENDENT CONTRACTOR:~~

~~1. WITHHOLDS, REPORTS, AND REMITS PAYROLL TAXES ON BEHALF OF ALL INDIVIDUALS WORKING FOR THE INDEPENDENT CONTRACTOR;~~

~~2. PAYS UNEMPLOYMENT INSURANCE TAXES FOR ALL INDIVIDUALS WORKING FOR THE INDEPENDENT CONTRACTOR; AND~~

~~3. MAINTAINS WORKERS' COMPENSATION INSURANCE; AND~~

~~(2) PROVIDED TO THE INDIVIDUAL A WRITTEN NOTICE AS REQUIRED BY § 3-914 OF THIS SUBTITLE.~~

~~(d) The Commissioner shall adopt regulations to provide guidance as to what constitutes the evidence relevant to the determination of whether an employer knowingly failed to properly classify an employee.~~

3-905.

(a) The Commissioner shall investigate as necessary to determine compliance with this subtitle and regulations adopted under this subtitle.

(b) (1) Any written or oral complaint or statement made by a person as part of an investigation under this section is confidential and may not be disclosed without the consent of the person until the investigation is concluded and a citation is issued.

(2) Any written or oral statement made by an individual alleged to be employed by the respondent as part of an investigation under this section is confidential and may not be disclosed without the consent of the individual.

(c) ~~(I)~~ The Commissioner may enter a place of business or work site to:

~~[(1)] (I)~~ observe work being performed;

~~[(2)] (II)~~ interview individuals on the work site, including those identified as employees and independent contractors; and

~~[(3)] (III) SUBJECT TO PARAGRAPH (2) OF THIS SUBSECTION,~~ review and copy records.

~~(2) THE COMMISSIONER MAY NOT ENTER A PLACE OF BUSINESS OR WORK SITE TO REVIEW AND COPY RECORDS IF THE EMPLOYER CHOOSES TO PROVIDE COPIES OF THE RECORDS TO THE COMMISSIONER FOR REVIEW WITHOUT ALLOWING THE COMMISSIONER TO ENTER THE PLACE OF BUSINESS OR WORK SITE.~~

(d) (1) The Commissioner may require each employer to:

~~[(1)] (I) SUBJECT TO PARAGRAPH (2) OF THIS SUBSECTION,~~ identify and produce FOR COPYING OR INSPECTION all records relevant to the classification of each individual;

~~[(2)] (II)~~ attest to the truthfulness of each record that is copied in accordance with ~~[(subsection (c)(3)] SUBSECTION (C)(1)(III)~~ of this section OR EACH COPY OF A RECORD THAT IS PROVIDED TO THE COMMISSIONER UNDER SUBSECTION (C)(2) OF THIS SECTION ITEM (I) OF THIS PARAGRAPH and to sign the copy; or

1            ~~[(3)]~~ **(III)** at the option of the employer, submit a written statement  
 2 about the classification of each employee on the form provided by the Commissioner,  
 3 with any relevant records attached.

4            **(2) AN EMPLOYER MAY COMPLY WITH A REQUIREMENT TO**  
 5 **PRODUCE RECORDS UNDER PARAGRAPH (1)(I) OF THIS SUBSECTION BY**  
 6 **PRODUCING COPIES OF THE RECORDS.**

7            (e) An employer that fails to produce records ~~OR COPIES OF RECORDS FOR~~  
 8 COPYING OR INSPECTION or a written statement under subsection (d) of this section  
 9 within ~~[15]~~ **30** business days after the Commissioner's request, OR AN EXTENSION  
 10 OF TIME MUTUALLY AGREED ON BY BOTH PARTIES, shall be subject to a fine not  
 11 exceeding \$500 per day for each day the records are not produced.

12            (f) (1) The Commissioner may issue a subpoena for testimony and the  
 13 production of records.

14            (2) If a person fails to comply with a subpoena issued under this  
 15 subsection, the Commissioner may file a complaint in the circuit court for the county  
 16 where the person resides, is employed, or has a place of business, requesting an order  
 17 directing compliance with the subpoena.

18 3-906.

19            (a) ~~[If, after investigation] WITHIN 45 DAYS AFTER THE COMMISSIONER~~  
 20 ~~RECEIVES COPIES OF AN EMPLOYER'S RECORDS OR INSPECTS AN EMPLOYER'S~~  
 21 ~~RECORDS, the Commissioner [determines] SHALL:~~

22            ~~(1) MAKE A DETERMINATION that [an] THE employer has violated~~  
 23 ~~this subtitle or a regulation adopted under this subtitle[, the Commissioner shall~~  
 24 ~~promptly] AND issue a citation to the employer; OR~~

25            ~~(2) CLOSE THE CASE.~~

26            **(A) AFTER THE EMPLOYER HAS PROVIDED ALL THE RECORDS**  
 27 **REQUESTED UNDER § 3-905(D) OF THIS SUBTITLE, THE COMMISSIONER SHALL**  
 28 **ISSUE A CITATION TO THE EMPLOYER OR CLOSE THE INVESTIGATION WITHIN 90**  
 29 **DAYS.**

30            (b) ~~[Each] A citation ISSUED UNDER SUBSECTION (A) OF THIS SECTION~~  
 31 ~~shall:~~

32            **(B) EACH CITATION SHALL:**

33            (1) describe in detail the nature of the alleged violation;



1 (2) cite the provision of this subtitle or any regulation that the  
2 employer is alleged to have violated; and

3 (3) state the civil penalty, if any, that the Commissioner proposes to  
4 assess.

5 (c) Within a reasonable time after issuance of a citation, the Commissioner  
6 shall send by certified mail to the employer:

7 (1) a copy of the citation; and

8 (2) notice of the opportunity to request a hearing.

9 (d) Within 15 days after an employer receives a notice under subsection (c) of  
10 this section, the employer may submit a written request for a hearing on the citation  
11 and proposed penalty.

12 (e) If a hearing is not requested within 15 days, the citation, including any  
13 penalties, shall become a final order of the Commissioner.

14 (f) (1) If the employer requests a hearing, the Commissioner shall  
15 delegate to the Office of Administrative Hearings the authority to hold a hearing and  
16 issue findings of fact, conclusions of law, and an order, and assess a penalty under §  
17 3-909 of this subtitle in accordance with Title 10, Subtitle 2 of the State Government  
18 Article.

19 (2) ~~IF THE EMPLOYER REQUESTS A HEARING, THE~~ THE  
20 EMPLOYER IS ENTITLED TO A HEARING WITHIN 90 DAYS AFTER THE REQUEST IS  
21 SUBMITTED UNDER SUBSECTION (D) OF THIS SECTION UNLESS THE RIGHT IS  
22 WAIVED A TIMELY REQUEST IS MADE UNDER THIS SUBSECTION, UNLESS THE  
23 EMPLOYER WAIVES THAT RIGHT.

24 (g) Within 15 days after a request, in accordance with Title 10, Subtitle 6 of  
25 the State Government Article and the applicable regulations of the Department and  
26 the Office of Administrative Hearings, the Commissioner shall provide copies of all  
27 relevant evidence, including a list of potential witnesses, on which the Commissioner  
28 intends to rely at any administrative hearing under this subtitle.

29 (h) The Commissioner has the burden of proof to show that an employer has  
30 knowingly failed to properly classify an individual as an employee.

31 (i) A decision of an administrative law judge issued in accordance with Title  
32 10, Subtitle 2 of the State Government Article shall become a final order of the  
33 Commissioner.

1 (j) Any party aggrieved by a final order of the Commissioner under  
 2 subsection (i) of this section may seek judicial review and appeal under §§ 10–222 and  
 3 10–223 of the State Government Article.

4 3–913.

5 (a) ~~¶~~Where, after investigation, the Commissioner issues a citation for a  
 6 KNOWING violation of this subtitle or regulations adopted under this subtitle by an  
 7 employer engaged in work on a contract with a public body, the Commissioner shall  
 8 promptly notify the public body. ~~¶~~ ~~IF A COURT OR AN ADMINISTRATIVE UNIT FINDS~~  
 9 ~~A VIOLATION OF THIS SUBTITLE BY AN EMPLOYER ENGAGED IN WORK ON A~~  
 10 ~~CONTRACT WITH A PUBLIC BODY, A COPY OF THE FINAL ORDER ISSUED BY THE~~  
 11 ~~COURT OR ADMINISTRATIVE UNIT SHALL BE SUBMITTED TO THE PUBLIC BODY.~~

12 (b) (1) On ~~¶~~notification, ~~¶~~ ~~RECEIPT OF A COPY OF A FINAL ORDER~~  
 13 ~~SUBMITTED TO A PUBLIC BODY UNDER SUBSECTION (A) OF THIS SECTION,~~ the  
 14 public body shall withhold from payment due the employer an amount that is  
 15 sufficient to:

16 (i) pay restitution to each employee for the full amount of  
 17 wages due; and

18 (ii) pay any benefits, taxes, or other contributions that are  
 19 required by law to be paid on behalf of the employee.

20 (2) The public body shall release~~¶~~:

21 (i) on issuance of a favorable final order of a court or an  
 22 administrative unit, the full amount of the withheld funds; and

23 (ii) on an adverse final order of a court or an administrative  
 24 unit, ~~¶~~ the balance of the withheld funds after all obligations are satisfied under  
 25 paragraph (1) of this subsection.

26 ~~§ 205.~~

27 (a) ~~Work that an individual performs under any contract of hire is not~~  
 28 ~~covered employment if the Secretary is satisfied that:~~

29 ~~(1) (I) the individual who performs the work is free from control~~  
 30 ~~and direction over its performance both in fact and under the contract;~~

31 ~~[(2)] (II) the individual customarily is engaged in an independent~~  
 32 ~~business or occupation of the same nature as that involved in the work; and~~

33 ~~[(3)] (III) the work is:~~

1 ~~[(i)] 1. outside of the usual course of business of the person~~  
2 ~~for whom the work is performed; or~~

3 ~~[(ii)] 2. performed outside of any place of business of the~~  
4 ~~person for whom the work is performed; OR~~

5 ~~(2) THE INDIVIDUAL WHO PERFORMS THE WORK HAS ENTERED~~  
6 ~~INTO A WRITTEN CONTRACT THAT STATES EXPRESSLY AND PROMINENTLY THAT~~  
7 ~~THE INDIVIDUAL KNOWS AND UNDERSTANDS THAT:~~

8 ~~(i) THE INDIVIDUAL IS RESPONSIBLE FOR PAYING~~  
9 ~~ESTIMATED SOCIAL SECURITY TAXES FOR SELF EMPLOYMENT AND FOR PAYING~~  
10 ~~STATE AND FEDERAL INCOME TAXES; AND~~

11 ~~(ii) THE WORK IS NOT COVERED EMPLOYMENT AND THE~~  
12 ~~INDIVIDUAL IS RESPONSIBLE FOR COMPLIANCE WITH TITLES 8 AND 9 OF THIS~~  
13 ~~ARTICLE.~~

14 ~~(b) The Secretary shall adopt regulations to provide:~~

15 ~~(1) general guidance about the application of subsection (a) of this~~  
16 ~~section; and~~

17 ~~(2) specific examples of how subsection (a) of this section is applied to~~  
18 ~~certain industries, including the construction industry, the landscaping industry, and~~  
19 ~~the home care services industry.~~

20 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect  
21 ~~October~~ July 1, 2012.

Approved:

\_\_\_\_\_  
Governor.

\_\_\_\_\_  
Speaker of the House of Delegates.

\_\_\_\_\_  
President of the Senate.