

HOUSE BILL 1605

K2

6lr3119
CF 6lr3610

By: **Delegate Adams**

Introduced and read first time: February 25, 2016

Assigned to: Rules and Executive Nominations

A BILL ENTITLED

1 AN ACT concerning

2 **Unemployment Insurance – Safe Harbor – Establishment**

3 FOR the purpose of specifying that, except under certain circumstances, a worker is not an
4 employee for purposes of certain unemployment insurance obligations under certain
5 circumstances; specifying that a certain provision of this Act regarding classification
6 of a worker does not apply under certain circumstances; requiring the Secretary of
7 Labor, Licensing, and Regulation to consider certain information as evidence of a
8 reasonable basis for a certain classification of a certain worker; requiring the
9 Secretary, before or during a certain investigation or audit, to provide certain written
10 notice to an employer; specifying that a certain employer is not subject to certain
11 contribution or reimbursement payments, interest, or penalties under certain
12 circumstances; requiring the Secretary to adopt certain regulations; defining a
13 certain term; and generally relating to the classification of workers for
14 unemployment insurance purposes.

15 BY repealing and reenacting, without amendments,
16 Article – Labor and Employment
17 Section 8–101(a), (k), (l), (o), and (w) and 8–201
18 Annotated Code of Maryland
19 (2008 Replacement Volume and 2015 Supplement)

20 BY repealing and reenacting, with amendments,
21 Article – Labor and Employment
22 Section 8–201.1
23 Annotated Code of Maryland
24 (2008 Replacement Volume and 2015 Supplement)

25 BY adding to
26 Article – Labor and Employment
27 Section 8–201.2
28 Annotated Code of Maryland

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



(2008 Replacement Volume and 2015 Supplement)

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

Article – Labor and Employment

8–101.

(a) In this title the following words have the meanings indicated.

(k) “Contributions” means money required to be paid to the Unemployment Insurance Fund under § 8–607 of this title.

(l) “Covered employment” means work that an individual performs for an employing unit that is the basis for benefits.

(o) “Employer” means a person or governmental entity who employs at least 1 individual within the State.

(w) “Secretary” means the Secretary of Labor, Licensing, and Regulation.

8–201.

(a) Employment is presumed to be covered employment if:

(1) regardless of whether the employment is based on the common law relation of master and servant, the employment is performed:

(i) for wages; or

(ii) under a contract of hire that is written or oral or express or implied; and

(2) the employment is performed in accordance with § 8–202 of this subtitle.

(b) To overcome the presumption of employment, an employing unit shall establish that the person performing services is an independent contractor in accordance with § 8–205 of this subtitle or is specifically exempted under this subtitle.

8–201.1.

(a) In this section, “knowingly” means having actual knowledge, deliberate ignorance, or reckless disregard for the truth.

1 (b) [An] SUBJECT TO § 8-201.2 OF THIS SUBTITLE, AN employer may not fail
2 to properly classify an individual as an employee.

3 (c) (1) If the Secretary determines that an employing unit has failed to
4 properly classify an individual as an employee, any and all contribution or reimbursement
5 payments resulting from the failure to properly classify that are due and unpaid shall
6 accrue interest as provided in paragraph (2) of this subsection.

7 (2) An employer who fails to pay the contribution or reimbursement
8 payments within 45 days shall be assessed interest at the rate of 2% per month or part of
9 a month from the first due date following notice of the misclassification until the Secretary
10 receives the contribution or payment in lieu of contributions and interest.

11 (d) The Secretary shall consider, as strong evidence that an employer did not
12 knowingly fail to properly classify an individual, whether the employer:

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

15 (ii) reports the income of the workers to the Internal Revenue
16 Service as required by federal law; and

17 (2) has received a determination from the Internal Revenue Service that
18 the individual or a worker who performs the same or substantially the same tasks for the
19 employer is an independent contractor.

20 (e) If the Secretary determines that an employing unit has knowingly failed to
21 properly classify an individual as an employee, the employing unit shall be subject to a civil
22 penalty of not more than \$5,000 per employee.

23 (f) (1) A person may not knowingly advise an employing unit or a prospective
24 employing unit to take action for the purposes of violating this section.

25 (2) A person found in violation of this subsection shall be subject to a civil
26 penalty of not more than \$20,000.

27 (g) An employing unit found to have knowingly violated this section who has also
28 been found previously to have knowingly violated this section by a final order of a court or
29 administrative unit may be assessed double the administrative penalties set forth in
30 subsection (d) of this section for the new violation.

31 (h) (1) An employing unit may be assessed civil penalties by only one order of
32 a court or administrative unit for the same actions constituting a knowing failure to
33 properly classify an individual as an employee.

34 (2) Notwithstanding paragraph (1) of this subsection, an employing unit
35 may be ordered to make restitution, pay any interest due, and otherwise comply with all

1 applicable laws and regulations by orders of a court, the Secretary, and all other relevant
2 administrative units, including the Comptroller, the Workers' Compensation Commission,
3 the Insurance Administration, and the Division of Labor and Industry.

4 (i) If the Secretary determines that an employing unit has failed to properly
5 classify an individual as an employee, the Secretary shall promptly notify the Workers'
6 Compensation Commission, the Division of Labor and Industry, the Insurance
7 Administration, and the Comptroller.

8 (j) As authorized by State and federal law, units within the Department of Labor,
9 Licensing, and Regulation and the Department of Budget and Management, the Secretary
10 of State, the Comptroller, the Insurance Administration, and other State agencies shall
11 cooperate and share information concerning any suspected violation of this title.

12 (k) (1) The Secretary shall adopt regulations to carry out this section.

13 (2) The regulations shall:

14 (i) require that the Secretary provide an employer with the factual
15 basis for any violations charged;

16 (ii) establish procedures regarding the audit process and any agency
17 level review available before appeal; and

18 (iii) provide guidance as to what constitutes the evidence relevant to
19 the determination of whether an employer knowingly failed to properly classify an
20 individual as an employee.

21 **8-201.2.**

22 (A) IN THIS SECTION, "EMPLOYER" DOES NOT INCLUDE A NONPROFIT
23 ORGANIZATION OR A GOVERNMENTAL ENTITY.

24 (B) NOTWITHSTANDING ANY OTHER PROVISION OF LAW AND EXCEPT AS
25 PROVIDED IN SUBSECTION (C) OF THIS SECTION, A WORKER IS NOT AN EMPLOYEE,
26 FOR PURPOSES OF THIS SUBTITLE ONLY IF THE EMPLOYER:

27 (1) CONSISTENTLY TREATED THE WORKER AND ANY OTHER WORKERS
28 WHO PERFORM THE SAME OR SUBSTANTIALLY SIMILAR TASKS FOR THE EMPLOYER
29 AS INDEPENDENT CONTRACTORS IN ANY REQUIRED TAX FILINGS; AND

30 (2) OTHERWISE CONSISTENTLY TREATED THE WORKER AND ANY
31 OTHER WORKERS WHO PERFORM THE SAME OR SUBSTANTIALLY SIMILAR TASKS FOR
32 THE EMPLOYER AS INDEPENDENT CONTRACTORS.

1 **(C) (1) SUBSECTION (B) OF THIS SECTION DOES NOT APPLY IF THE**
2 **EMPLOYER HAD NO REASONABLE BASIS FOR TREATING THE WORKER AND ANY**
3 **OTHER WORKERS WHO PERFORM THE SAME OR SUBSTANTIALLY SIMILAR TASKS FOR**
4 **THE EMPLOYER AS INDEPENDENT CONTRACTORS.**

5 **(2) THE SECRETARY SHALL CONSIDER AS EVIDENCE OF A**
6 **REASONABLE BASIS:**

7 **(I) STATE COURT RULINGS, PUBLISHED STATE**
8 **ADMINISTRATIVE RULINGS, TECHNICAL ADVICE, OR OTHER INFORMATION THAT**
9 **THE SECRETARY HAS PROVIDED TO THE EMPLOYER THAT SUPPORTS THE**
10 **CLASSIFICATION;**

11 **(II) PAST AUDITS THE SECRETARY CONDUCTED THAT DID NOT**
12 **REQUIRE THE EMPLOYER TO RECLASSIFY THE WORKER OR OTHER WORKERS WHO**
13 **PERFORM THE SAME OR SUBSTANTIALLY SIMILAR TASKS FOR THE EMPLOYER;**

14 **(III) WHETHER THE CLASSIFICATION IS A LONG-STANDING**
15 **RECOGNIZED PRACTICE OF A SIGNIFICANT SEGMENT OF THE INDUSTRY IN WHICH**
16 **THE WORKER AND ANY OTHER WORKERS WHO PERFORM THE SAME OR**
17 **SUBSTANTIALLY SIMILAR TASKS FOR THE EMPLOYER ARE ENGAGED; AND**

18 **(IV) ANY OTHER BASIS THAT THE SECRETARY DEEMS TO BE**
19 **REASONABLE.**

20 **(D) NOTWITHSTANDING ANY OTHER PROVISION OF LAW, AN EMPLOYER IS**
21 **NOT SUBJECT TO CONTRIBUTION OR REIMBURSEMENT PAYMENTS, INTEREST, OR**
22 **PENALTIES UNDER THIS TITLE IF THE SECRETARY DETERMINES THAT A WORKER IS**
23 **NOT AN EMPLOYEE UNDER SUBSECTION (B) OF THIS SECTION.**

24 **(E) BEFORE OR DURING AN INVESTIGATION OR AN AUDIT UNDER § 8-306 OF**
25 **THIS TITLE, THE SECRETARY SHALL PROVIDE AN EMPLOYER WITH A WRITTEN**
26 **NOTICE OF THE PROVISIONS OF THIS SECTION.**

27 **(F) THE SECRETARY SHALL ADOPT REGULATIONS TO IMPLEMENT THIS**
28 **SECTION.**

29 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect
30 October 1, 2016.