

House Bill 389

By: Representatives Jones of the 25<sup>th</sup> and Burchett of the 176<sup>th</sup>

A BILL TO BE ENTITLED  
AN ACT

1 To amend Chapter 8 of Title 34 of the Official Code of Georgia Annotated, relating to  
2 employment security, so as to change the definition of employment to include services  
3 performed by an individual for wages unless the Department of Labor makes a contrary  
4 determination based upon evidence that such individual has been, and will continue to be,  
5 free from control or direction over the performance of such services; to provide for civil  
6 penalties; to prohibit retaliation by employers against individuals who report violations of  
7 or noncompliance with the "Employment Security Law"; to provide for a civil cause of  
8 action for retaliation by employers; to provide for related matters; to repeal conflicting laws;  
9 and for other purposes.

10 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

11 **SECTION 1.**

12 Chapter 8 of Title 34 of the Official Code of Georgia Annotated, relating to employment  
13 security, is amended in Code Section 34-8-35, relating to the definition of employment  
14 applicable to the "Employment Security Law," by revising subsection (f) as follows:

15 "(f) Services performed by an individual for wages shall be deemed to be employment  
16 subject to this chapter unless and until it is shown that:

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17 (1)(A) Such individual has been, and will continue to be, free from control or direction  
18 over the performance of such services, both under the individual's contract of service  
19 and in fact, as demonstrated by evidence timely submitted to the department. The  
20 department shall make a determination based upon such evidence, and in so doing, the  
21 department shall consider whether the individual:

22 (i) Is not prohibited from working for other companies or holding other employment  
23 contemporaneously;

24 (ii) Is free to accept or reject work assignments without consequence;

25 (iii) Is not prescribed minimum hours to work or, in the case of sales, does not have  
26 a minimum number of orders to be obtained;

27 (iv) Has the discretion to set his or her own work schedule;

28 (v) Receives only minimal instructions and no direct oversight or supervision  
29 regarding the services to be performed, such as the location where the services are to  
30 be performed and any requested deadlines;

31 (vi) When applicable, has no territorial or geographic restrictions; and

32 (vii) Is not required to perform, behave, or act or, alternatively, is compelled to  
33 perform, behave, or act in a manner related to the performance of services for wages  
34 which is determined by the Commissioner to demonstrate employment, in accordance  
35 with this Code section and such rules and regulations as the Commissioner may  
36 prescribe.

37 The department's determination shall be based upon the totality of the circumstances  
38 described in divisions (i) through (vii) of this subparagraph. The department may give  
39 such weight to any one or more of such circumstances as the department deems  
40 appropriate; and

41 (B) Such individual is customarily engaged in an independently established trade,  
42 occupation, profession, or business; or

43 (2) Such individual and the services performed for wages are the subject of an SS-8  
44 determination by the Internal Revenue Service, which decided against employee status."

45 **SECTION 2.**

46 Said chapter is further amended by adding new Code sections to read as follows:

47 "34-8-257.

48 (a) Notwithstanding any other provision of law and in addition to any other penalties,  
49 finer, or offenses prescribed under this chapter, an employing unit that fails to properly  
50 classify an individual as required by subsection (f) of Code Section 34-8-35 shall pay to  
51 the Commissioner a civil penalty equal to \$10,000.00 for each individual that such  
52 employer has not properly classified.

53 (b) The Commissioner shall be authorized to deposit all funds received pursuant to  
54 subsection (a) of this Code section into the general fund of the state treasury in compliance  
55 with Part 1 of Article 4 of Chapter 12 of Title 45, the 'Budget Act.' It is the intention of the  
56 General Assembly, subject to the appropriations process, that an amount equal to the  
57 amount deposited into the general fund of the state treasury as provided in this subsection  
58 be appropriated each year to the department for the purpose of enforcing subsection (f) of  
59 Code Section 34-8-35.

60 (c) The department may assess the employing unit found to be in violation of  
61 subsection (f) of Code Section 34-8-35:

62 (1) An amount sufficient to cover the reasonable expense of investigation conducted by  
63 the department; and

64 (2) Interest at the rate of 1 percent per month on any delinquent fine or assessment until  
65 such fine or assessment has been paid. Such interest shall commence on the day the fine  
66 or assessment becomes delinquent.

67 (d) The Commissioner may waive any penalty, fine, or assessment provided for in this  
68 Code section.

69 34-8-258.

70 (a) For purposes of this Code section, the term 'retaliate' or 'retaliation' refers to the  
71 discharge, suspension, or demotion by an employer of an individual or any other adverse  
72 action taken by an employer against an individual in the terms or conditions of employment  
73 or in the terms or conditions of the individual's contract of service.

74 (b) No employer shall retaliate against an individual for reporting a violation of or  
75 noncompliance with this chapter or any rule or regulation of the department or for  
76 objecting to, or refusing to participate in, any activity, policy, or practice such individual  
77 has reasonable cause to believe is in violation of or noncompliant with this chapter or any  
78 rule or regulation of the department.

79 (c)(1) An individual who has been the object of retaliation in violation of this Code  
80 section may institute a civil action in superior court for relief as set forth in paragraph (2)  
81 of this subsection within one year after discovering the retaliation or within three years  
82 after the retaliation, whichever is earlier.

83 (2) In any action brought pursuant to this subsection, the court may order any or all of  
84 the following relief:

85 (A) An injunction restraining continued violation of this Code section;

86 (B) Reinstatement of the individual to the same position held with the employer before  
87 the retaliation or to an equivalent position;

88 (C) Reinstatement of full fringe benefits and seniority rights;

89 (D) Compensation for lost wages, benefits, and other remuneration;

90 (E) Any other compensatory damages allowable at law;

91 (F) Where it is proven that the violation was willful, treble damages and punitive  
92 damages; and

93 (G) Reasonable attorney's fees, court costs, and expenses."

94

**SECTION 3.**

95 All laws and parts of laws in conflict with this Act are repealed.