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STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2014

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A N A C T

RELATING TO LABOR AND LABOR RELATIONS -- EMPLOYEE CLASSIFICATION

Introduced By: Senators McCaffrey, and Lombardi

Date Introduced: February 27, 2014

Referred To: Senate Labor

It is enacted by the General Assembly as follows:

1           SECTION 1. Section 28-14-19 of the General Laws in Chapter 28-14 entitled "Payment  
2 of Wages" is hereby amended to read as follows:

3           **28-14-19. Enforcement powers and duties of director of labor and training.** -- (a) It  
4 shall be the duty of the director to insure compliance with the provisions of this chapter 28-14 and  
5 28-12. The director or his or her designee may investigate any violations thereof, institute or  
6 cause to be instituted actions for the collection of wages and institute action for penalties or other  
7 relief as provided for within and pursuant to those chapters. The director or his or her authorized  
8 representatives are empowered to hold hearings and he or she shall cooperate with any employee  
9 in the enforcement of a claim against his or her employer in any case whenever, in his or her  
10 opinion, the claim is just and valid.

11           (b) Upon receipt of a complaint or conducting an inspection under applicable law, the  
12 director or his or her appropriate departmental designee is authorized to investigate to determine  
13 compliance with the chapters 28-12 and/or 28-14.

14           (c) With respect to all complaints deemed just and valid, the director or his or her  
15 designee shall order a hearing thereon at a time and place to be specified, and shall give notice  
16 thereof, together with a copy of the complaint or the purpose thereof, or a statement of the facts  
17 disclosed upon investigation, which notice shall be served personally or by mail on any person,  
18 business, corporation, or entity of any kind affected thereby. The hearing shall be scheduled  
19 within thirty (30) days of service of a formal complaint as provided herein. The person, business,

1 corporation, or entity shall have an opportunity to be heard in respect to the matters complained  
2 of at the time and place specified in the notice. The hearing shall be conducted by the director or  
3 his or her designee. The hearing officer in the hearing shall be deemed to be acting in a judicial  
4 capacity, and shall have the right to issue subpoenas, administer oaths, and examine witnesses.  
5 The enforcement of a subpoena issued under this section shall be regulated by Rhode Island civil  
6 practice law and rules. The hearing shall be expeditiously conducted and upon such hearing the  
7 hearing officer shall determine the issues raised thereon and shall make a determination and enter  
8 an order within thirty (30) days of the close of the hearing, and forthwith serve a copy of the  
9 order, with a notice of the filing thereof, upon the parties to the proceeding, personally or by mail.  
10 In the event that any person and/or entity asserts as a related claim or defense of a formal  
11 investigation, complaint, and/or claim, the absence of an employer-employee relationship or that  
12 the agent or operative employed by the contractor is an independent contractor, the director of the  
13 department of labor and training or his or her designee shall refer the matter forthwith to the  
14 Rhode Island workers' compensation court for an evidentiary hearing and determination of  
15 employment status in accordance with § 28-30-13(c). The order shall dismiss the complaint or  
16 direct payment of any wages and/or benefits found to be due and/or award such other appropriate  
17 relief or penalties authorized under chapter 28-12 and/or 28-14, and the order may direct payment  
18 of reasonable attorneys' fees and costs to the complaining party. Interest at the rate of twelve  
19 percent (12%) per annum shall be awarded in the order from the date of the nonpayment to the  
20 date of payment.

21 (d) The order shall also require payment of a further sum as a civil penalty in an amount  
22 up to two (2) times the total wages and/or benefits found to be due, exclusive of interest, which  
23 shall be shared equally between the department and the aggrieved party. In determining the  
24 amount of any penalty to impose, the director or his or her designee shall consider the size of the  
25 employer's business, the good faith of the employer, the gravity of the violation, the previous  
26 violations and whether or not the violation was an innocent mistake or willful.

27 (e) The director may institute any action to recover unpaid wages or other compensation  
28 or obtain relief as provided under this section with or without the consent of the employee or  
29 employees affected.

30 (f) No agreement between the employee and employer to work for less than the  
31 applicable wage and/or benefit rate or to otherwise work under and/or conditions in violation of  
32 applicable law is a defense to an action brought pursuant to this section.

33 (g) The director shall notify the contractors' registration board of any order issued or any  
34 determination hereunder that an employer has violated chapters 28-12, 28-14 and/or 37-13. The

1 director shall notify the tax administrator of any determination hereunder that may affect liability  
2 for an employer's payment of wages and/or payroll taxes.

3 SECTION 2. Section 28-30-13 of the General Laws in Chapter 28-30 entitled "Workers'  
4 Compensation Court" is hereby amended to read as follows:

5 **28-30-13. Controversies submitted to court.** -- (a) Any controversy over which the  
6 workers' compensation court has jurisdiction in accordance with chapters 29 -- 38 and chapter 53  
7 of this title, including compensation, reasonableness of medical and hospital bills, degree of  
8 functional impairment and/or disability, a dispute between an insurance carrier and an employer  
9 under a workers' compensation insurance contract, except disputes under the jurisdiction of the  
10 workers' compensation appeals board established pursuant to section 27-9-29, failure of an  
11 employer to secure the payment of compensation under chapters 29 -- 38 and chapter 53 of this  
12 title and any controversy in which the state or any of its political subdivisions is a party, and  
13 appeals from an order of the retirement board pursuant to Rhode Island general law section 45-  
14 21.2-9 shall be submitted to the court in the manner provided in chapters 33 and 35 of this title.

15 (b) Disputes between an insurance carrier and an employer under a workers'  
16 compensation insurance contract shall not be subject to a pretrial conference in accordance with  
17 section 28-35-20, but shall be assigned consistent with the rules and regulations of the workers'  
18 compensation court.

19 (c) Where any person and/or entity asserts as a related claim or defense of a formal  
20 investigation, complaint, and/or claim to the director of the department of labor and training or  
21 his or her designee, pursuant to §§ 28-14-19, 28-40-11 and 37-13-14, the absence of an employer-  
22 employee relationship or the existence of an independent contractor relationship, the director of  
23 the department of labor and training or his or her designee shall refer the matter to the workers'  
24 compensation court for an evidentiary hearing and determination of employment status. Such  
25 disputes shall not be subject to a pretrial conference in accordance with § 28-35-20. Rather, the  
26 court shall assign the matter for trial within twenty-one (21) days of the date on which the matter  
27 is docketed at the court. The judge to whom the matter is assigned shall hear and decide all  
28 questions of law and fact relating to the disputed employment status and shall render a decision in  
29 accordance with the workers' compensation laws regarding the determination of employment  
30 status. The Judge's decision shall be based on, but is not limited to the following criteria:

31 Is the worker required to possess unique knowledge, skill, training, or tools.

32 Does the worker produce a product or provide a service that is customarily provided by  
33 the employer.

34 Does the worker receive training.

1 Does the worker receive instructions about when, where, or how he or she is to perform  
2 duties.

3 Does the worker hire, supervise and pay his or her own assistant.

4 Is the worker paid for business and travel expense.

5 Is the worker provided with tools and materials.

6 Is the worker paid on a time basis.

7 Is the worker required to work full time.

8 Is the relationship a continuing one or a sporadic one.

9 Must the worker personally provide the services.

10 Does the worker coordinate efforts with other workers.

11 Is the success of the business dependent on the worker.

12 Is the worker restricted from performing services for others.

13 Can the worker make his or her availability for services known to the general public.

14 Can the worker be discharged.

15 Does the employer set the hours and days of work.

16 Was a contract for a single job and not a series of jobs.

17 How is the worker paid; is the worker paid every week or is the worker paid several lump  
18 sums at certain stages of job completion.

19 The tax treatment of the worker.

20 How does the employer report the worker's status to government agencies.

21 The Judge shall enter an order reflecting his or her findings and decisions. Upon the entry  
22 of a final order of the court, the matter shall be remanded to the department of labor and training  
23 for further proceedings consistent with the court's order.

24 (d) Judicial review of regulations. – Any interested person who may be aggrieved by any  
25 order issued by the director under this chapter may obtain the review of the order in the superior  
26 court for Providence and Bristol counties by filing in the court within thirty (30) days after the  
27 date of publication of the order a written petition praying that the order be modified or set aside.  
28 A copy of the petition shall be served upon the director of labor and training. The findings of  
29 facts shall be conclusive upon the court. The court shall determine whether the order or regulation  
30 is in accordance with law.

31 (e) Hearings in the superior court on all appeals taken under the provisions of this chapter  
32 shall take precedence over all matters, except matters of the same character. The jurisdiction of  
33 the court shall be exclusive and its judgment and decree shall be final except that the judgment  
34 and decree shall be subject to review by the supreme court.

1 [\(f\) The commencement of proceedings under subsection \(a\) of this section shall not](#)  
2 [operate as a stay of wage order or of an administrative regulation issued under the provisions of](#)  
3 [this chapter.](#)

4 [\(g\) Actors, comedians, and dancers performing in an entertainment venue shall not be](#)  
5 [deemed employees.](#)

6 SECTION 3. Section 28-40-11 of the General Laws in Chapter 28-40 entitled  
7 "Temporary Disability Insurance - Contributions" is hereby amended to read as follows:

8 **28-40-11. Determination of unreported contributions due.** -- If an employer for any  
9 reporting period fails to make any report used for the purpose of determining the amount of  
10 contributions payable under chapters 39 -- 41 of this title at the time and in the manner required  
11 by the prescribed rules and regulations, or if those reports when filed are incorrect or insufficient,  
12 and the employer fails to file a corrected or sufficient report within twenty (20) days after the  
13 director has required it by written notice, the director shall determine on the basis of such  
14 information as the director may be able to obtain, the amount of contributions due from that  
15 employer, and the director shall give written notice to any employer of the amount of  
16 contributions so determined. That determination shall finally and irrevocably fix the amount of  
17 contributions due unless the employer, within twenty (20) days after the giving of that notice,  
18 applies to the board of review for a hearing, or unless the director on his or her own volition  
19 reduces the amount. [In the event that any person and/or entity asserts as a related claim or defense](#)  
20 [of a formal investigation, complaint, and/or claim, the absence of an employer-employee](#)  
21 [relationship or that the agent or operative employed by the contractor is an independent](#)  
22 [contractor, the director of the department of labor and training or his or her designee shall refer](#)  
23 [the matter forthwith to the Rhode Island workers' compensation court for an evidentiary hearing](#)  
24 [and determination of employment status in accordance with § 28-30-13\(c\).](#)

25 SECTION 4. Section 28-42-7 of the General Laws in Chapter 28-42 entitled  
26 "Employment Security - General Provisions" is hereby amended to read as follows:

27 **28-42-7. Independent contractor and employee distinguished.** -- The determination of  
28 independent contractor or employee status for purposes of chapters 42 -- 44 of this title shall be  
29 [made by the Rhode Island workers' compensation court in accordance with § 28-30-13\(c\) ~~the~~](#)  
30 [~~same as those factors used by the Internal Revenue Service in its code and regulations.~~](#)

31 SECTION 5. Section 37-13-14.1 of the General Laws in Chapter 37-13 entitled "Labor  
32 and Payment of Debts by Contractors" is hereby amended to read as follows:

33 **37-13-14.1. Enforcement -- Hearings.** -- (a) Before issuing an order or determination,  
34 the director of labor and training shall order a hearing thereon at a time and place to be specified,

1 and shall give notice thereof, together with a copy of the complaint or the purpose thereof, or a  
2 statement of the facts disclosed upon investigation, which notice shall be served personally or by  
3 mail on any person, firm, or corporation affected thereby. The person, firm, or corporation shall  
4 have an opportunity to be heard in respect to the matters complained of at the time and place  
5 specified in the notice, which time shall be not less than five (5) days from the service of the  
6 notice personally or by mail. The hearing shall be held within ten (10) days from the order of  
7 hearing. The hearing shall be conducted by the director of labor and training or his or her  
8 designee. The hearing officer in the hearing shall be deemed to be acting in a judicial capacity,  
9 and shall have the right to issue subpoenas, administer oaths, and examine witnesses. The  
10 enforcement of a subpoena issued under this section shall be regulated by Rhode Island civil  
11 practice law and rules. The hearing shall be expeditiously conducted and upon such hearing the  
12 hearing officer shall determine the issues raised thereon and shall make a determination and enter  
13 an order within ten (10) days of the close of the hearing, and forthwith serve a copy of the order,  
14 with a notice of the filing thereof, upon the parties to the proceeding, personally or by mail. [In the](#)  
15 [event that any person and/or entity asserts as a related claim or defense of a formal investigation,](#)  
16 [complaint, and/or claim, the absence of an employer-employee relationship or that the agent or](#)  
17 [operative employed by the contractor is an independent contractor, the director of the department](#)  
18 [of labor and training or his or her designee shall refer the matter forthwith to the Rhode Island](#)  
19 [workers' compensation court for an evidentiary hearing and determination of employment status](#)  
20 [in accordance with § 28-30-13\(c\).](#) The order shall dismiss the charges or direct payment of wages  
21 or supplements found to be due, including interest at the rate of twelve ~~percentum~~ [percent](#) (12%)  
22 per annum from the date of the underpayment to the date of payment, and may direct payment of  
23 reasonable attorney's fees and costs to the complaining party.

24 (b) In addition to directing payment of wages or supplements including interest found to  
25 be due, the order shall also require payment of a further sum as a civil penalty in an amount up to  
26 three times the total amount found to be due. Further, if the amount of salary owed to an  
27 employee pursuant to this chapter but not paid to the employee in violation of thereof exceeds  
28 five thousand dollars (\$5,000), it shall constitute a misdemeanor and shall be referred to the office  
29 of the attorney general. The misdemeanor shall be punishable for a period of not more than one  
30 year in prison and/or fined not more than one thousand dollars (\$1,000). In assessing the amount  
31 of the penalty, due consideration shall be given to the size of the employer's business, the good  
32 faith of the employer, the gravity of the violation, the history of previous violations and the  
33 failure to comply with recordkeeping or other nonwage requirements. The surety of the person,  
34 firm, or corporation found to be in violation of the provisions of this chapter shall be bound to

1 pay any penalties assessed on such person, firm, or corporation. The penalty shall be paid to the  
2 department of labor and training for deposit in the state treasury; provided, however, it is hereby  
3 provided that the general treasurer shall establish a dedicated "prevailing wages enforcement  
4 fund" for the purpose of depositing the penalties paid as provided herein. There is hereby  
5 appropriated to the annual budget of the department of labor and training the amount of the fund  
6 collected annually under this section, to be used at the direction of the director of labor and  
7 training for the sole purpose of enforcing prevailing wage rates as provided in this chapter.

8 (c) For the purposes of this chapter, each day or part thereof of violation of any provision  
9 of this chapter by a person, firm, or corporation, whether the violation is continuous or  
10 intermittent, shall constitute a separate and succeeding violation.

11 (d) In addition to the above, any person, firm, or corporation found in violation of any of  
12 the provisions of this chapter by the director of labor and training, an awarding authority, or the  
13 hearing officer, shall be ineligible to bid on or be awarded work by an awarding authority or  
14 perform any such work for a period of no less than eighteen (18) months and no more than thirty-  
15 six (36) months from the date of the order entered by the hearing officer. Once a person, firm, or  
16 corporation is found to be in violation of this chapter, all pending bids with any awarding  
17 authority shall be revoked, and any bid awarded by an awarding authority prior to the  
18 commencement of the work shall also be revoked.

19 (e) In addition to the above, any person, firm, or corporation found to have committed  
20 two (2) or more willful violations in any period of eighteen (18) months of any of the provisions  
21 of this chapter by the hearing officer, which violations are not arising from the same incident,  
22 shall be ineligible to bid on or be awarded work by an awarding authority or perform any work  
23 for a period of sixty (60) months from the date of the second violation.

24 (f) The order of the hearing officer shall remain in full force and effect unless stayed by  
25 order of the superior court.

26 (g) The director of labor and training, awarding authority, or hearing officer shall notify  
27 the bonding company of any person, firm, or corporation suspected of violating any section of  
28 this chapter. The notice shall be mailed certified mail, and shall enumerate the alleged violations  
29 being investigated.

30 (h) In addition to the above, any person, firm, or corporation found to have willfully  
31 made a false or fraudulent representation on certified payroll records shall be referred to the  
32 office of the attorney general. The false or fraudulent representation shall be considered a  
33 misdemeanor and shall be punishable for a period of not more than one year in prison and/or  
34 fined one thousand dollars (\$1,000). Further, any person, firm, or corporation found to have

1 willfully made a false or fraudulent representation on certified payroll records shall be required to  
2 pay a civil penalty to the department of labor and training in an amount of no less than two  
3 thousand dollars (\$2,000) and not greater than fifteen thousand dollars (\$15,000) per  
4 representation.

5 SECTION 6. This act shall take effect upon passage.

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EXPLANATION  
BY THE LEGISLATIVE COUNCIL  
OF  
A N A C T  
RELATING TO LABOR AND LABOR RELATIONS -- EMPLOYEE CLASSIFICATION

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- 1           This act would grant jurisdiction to the workers' compensation court to decide whether an
- 2 individual is an employee or an independent contractor in a number of various labor contexts.
- 3           This act would take effect upon passage.

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