

BILL ANALYSIS

C.S.H.B. 1925
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Economic & Small Business Development
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Interested parties assert that Texas employers in the construction business often do not include individuals who work for them on the recorded payroll and instead classify these individuals as independent contractors in an attempt to avoid paying unemployment insurance and federal income taxes. Critics of this practice maintain that this has serious consequences for the construction industry, its workforce, and taxpayers. C.S.H.B. 1925 seeks to address this issue by requiring the proper classification of the employment status of construction workers and by providing penalties for violations of this requirement.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the Texas Workforce Commission in SECTION 1 and SECTION 3 of this bill.

ANALYSIS

C.S.H.B. 1925 amends the Labor Code to require a construction employer, as defined by the bill, to properly report the employment status of each employee of the construction employer for the purposes of the Texas Unemployment Compensation Act and as required by Texas Workforce Commission (TWC) rule. The bill requires a construction employer who violates that requirement to pay to TWC a penalty in the amount of \$100 for each employee not properly reported for an initial violation by the employer and a penalty not to exceed \$1,000 for each employee not properly reported for each subsequent violation that occurs after an initial violation, in addition to any other specified employer penalties. The bill specifies the criteria TWC is required to consider in determining the amount of such a penalty and requires TWC, based on that criteria, by rule to adopt a schedule of penalties for a subsequent violation to ensure that the amount of a penalty imposed is appropriate to the violation.

C.S.H.B. 1925 requires TWC, for a construction employer's initial violation of the requirement to properly report such employment status, to assess a penalty against the employer for each violation determined by TWC to have occurred, regardless of the reporting period in which the violation occurred. The bill applies an unpaid penalty assessed under these provisions to a successor business entity that meets specified criteria. The bill limits liability to the employer of an employee who is not properly reported for a penalty assessed under the bill's provisions, with the exception of such a successor business entity.

C.S.H.B. 1925 authorizes the review and appeal of a determination that a construction employer has violated the bill's reporting requirements and any penalty assessed for such a violation in the same manner as a disputed claim under specified provisions of the Texas Unemployment Compensation Act. The bill requires the facts and circumstances supporting the construction employer's appeal to be considered in ruling on an appeal and specifies items and information to be included among those facts and circumstances.

C.S.H.B. 1925 requires TWC to maintain a file on each complaint received by telephone or

submitted through TWC's Internet website, in addition to a file on each written complaint filed with TWC. The bill, in a provision requiring such a file to include the name of the person who filed the complaint, specifies that this requirement is contingent on the name being available.

C.S.H.B. 1925, in statutory provisions regarding the general powers and duties of TWC and its executive director, establishes that it is state policy that each worker in the construction industry be properly classified as an employee or independent contractor. The bill requires TWC to review its policies and procedures for the enforcement of the Texas Unemployment Compensation Act and any TWC rule regarding the construction industry. The bill requires TWC to adopt rules and procedures to encourage and enforce the proper classification of workers in the construction industry as employees or independent contractors. The bill requires TWC, as soon as practicable after the end of each fiscal year, to submit a report to the governor and the legislature regarding the efforts of TWC to ensure the proper classification of workers in the construction industry and sets out information with respect to the construction industry to be included in the report. The bill prohibits the report from including identifying information about a complainant or about a person subject to the statutory provisions relating to employment services and unemployment. The bill requires TWC to submit the first report not later than December 1, 2014.

EFFECTIVE DATE

January 1, 2014.

COMPARISON OF ORIGINAL AND SUBSTITUTE

While C.S.H.B. 1925 may differ from the original in minor or nonsubstantive ways, the following comparison is organized and highlighted in a manner that indicates the substantial differences between the introduced and committee substitute versions of the bill.

INTRODUCED	HOUSE COMMITTEE SUBSTITUTE
SECTION 1. Subchapter E, Chapter 201, Labor Code, is amended by adding Section 201.079 to read as follows: <u>Sec. 201.079. SERVICE BY INDEPENDENT CONTRACTOR IN CONSTRUCTION. (a) In this section, "construction" and "independent contractor" have the meanings assigned by Section 301.201.</u> <u>(b) In this subtitle, "employment" does not include construction performed by an individual as an independent contractor.</u>	No equivalent provision.
SECTION 2. Chapter 301, Labor Code, is amended by adding Subchapter L to read as follows: <u>SUBCHAPTER L. CLASSIFICATION OF INDIVIDUAL EMPLOYED IN CONSTRUCTION</u>	No equivalent provision.
<u>Sec. 301.201. DEFINITIONS. In this subchapter:</u> <u>(1) "Construction" means work related to the</u>	No equivalent provision.

erection, improvement, alteration, repair, renovation, maintenance, or remodeling of a building, structure, appurtenance, road, highway, bridge, dam, levee, canal, jetty, or other improvement to or on real property, including moving, demolishing, dredging, shoring, scaffolding, drilling, blasting, and excavating real property.

(2) "Contractor" means a person who contracts to perform construction.

(3) "Employee" means an individual who performs services for another under an express or implied contract of hire.

(4) "Independent contractor" means an individual who is an independent contractor as provided by Section 301.202.

Sec. 301.202. INDEPENDENT CONTRACTOR. For purposes of this subchapter, an individual is an independent contractor if the individual satisfies at least five of the following conditions:

(1) the individual performs a service under a written contract with the person for whom the service is performed that states that the relationship of the individual to the person for whom the service is performed is that of an independent contractor and not an employee;

(2) the individual represents that the individual is an independent contractor and not an employee;

(3) the individual is required to submit to the person for whom a service is performed an Internal Revenue Service Form W-9 or a similar form providing the same information;

(4) the individual operates a business entity in which the individual shares in the profits or losses of the entity;

(5) the individual is not prohibited from hiring employees and acting as the employer of any employee of the individual by paying wages, directing activities, and performing other similar functions characteristic of an employer-employee relationship;

(6) the individual has substantially invested in, and is required to furnish, necessary tools, supplies, or materials to perform a service;

(7) the individual obtains and pays for any occupational license required by this state to perform a service;

(8) the individual is free to perform services for any other person; or

(9) the individual submits to the person for whom a service is performed evidence of any

No equivalent provision.

insurance coverage required by law to perform a construction service.

Sec. 301.203. APPLICABILITY; REBUTTABLE PRESUMPTION. (a) An individual may not be considered an employee based solely on the fact that the person for whom the individual is providing a service requires that any employee hired by the individual must:

(1) submit to a criminal background check or preemployment drug screening; or

(2) possess a certain license or certification relating to the work the employee will perform.

(b) It is a rebuttable presumption that an individual providing construction services is an employee if the individual is not an independent contractor as provided by Section 301.202.

(c) A person for whom an individual is providing construction services is not required to report to the commission under Subtitle A that the individual is an employee of the person if the person:

(1) shows that the individual is an independent contractor as provided by Section 301.202;

(2) provides to the individual an Internal Revenue Service Form 1099, or a similar form issued by, or that meets the compliance guidelines of, the Internal Revenue Service, on which the person reports the amount paid to the individual in accordance with Internal Revenue Service requirements; and

(3) files the form described by Subdivision (2) with the Internal Revenue Service in accordance with Internal Revenue Service requirements.

Sec. 301.204. EMPLOYEE STATUS. A contractor shall properly classify each person providing construction services as either an employee or an independent contractor.

Sec. 301.205. INFORMATION REGARDING COMPLAINTS. The commission shall provide on its Internet website information regarding the procedure for the public to report violations of this subchapter.

Sec. 301.206. ADMINISTRATIVE PENALTY. (a) The commission may impose an administrative penalty on a contractor

No equivalent provision.

No equivalent provision.

No equivalent provision.

No equivalent provision.

who violates Section 301.204. The amount of the penalty may not exceed:

(1) \$100 for each individual who is not properly classified; and

(2) \$1,000 for each individual who is not properly classified for each subsequent violation that occurs after the imposition of a penalty for a prior violation.

(b) Any penalty issued under this section applies to a successor business entity that:

(1) has one or more owners who jointly control at least 50 percent of the:

(A) original employer; and

(B) successor business entity; and

(2) is engaged in the same or similar business activity.

(c) An administrative penalty imposed under this section shall be imposed in the same manner as the commission imposes an administrative penalty under other law.

Sec. 301.207. NOTIFICATION TO GOVERNMENTAL ENTITY. If the commission determines that a contractor has violated this subchapter, the commission shall provide notice of the violation to each governmental entity that the commission reasonably believes has received construction services provided by the contractor. The notice must identify the contractor and, for each violation, specify the type of service provided and the location at which the service was provided, if known to the commission. In this section, "governmental entity" has the meaning assigned by Section 406.096.

No equivalent provision.

Sec. 301.208. ANNUAL REPORT. The commission shall issue an annual report regarding compliance with and enforcement of this subchapter. The report must include:

(1) the number of complaints received from the public;

(2) the number of investigated complaints and any resulting findings; and

(3) the amount of unemployment taxes, interest, administrative penalties, and fines actually collected as a result of:

(A) violations of this subchapter; or

(B) the exclusion of construction performed by an individual from the application of Subtitle A, unless the services are excluded by application of Section 201.079.

No equivalent provision.

No equivalent provision.

SECTION 1. Subchapter B, Chapter 213,

Labor Code, is amended by adding Sections 213.026 and 213.027 to read as follows:

No equivalent provision.

Sec. 213.026. CONSTRUCTION EMPLOYER REQUIREMENT TO REPORT EMPLOYEES; PENALTY.

No equivalent provision.

(a) In this section, "construction employer" means an employer who employs an individual to provide services directly related to the erection, alteration, repair, renovation, maintenance, or remodeling of a building, structure, appurtenance, road, highway, bridge, dam, levee, canal, jetty, or other improvement to or on real property, including moving, demolishing, dredging, shoring, scaffolding, drilling, blasting, or excavating real property.

No equivalent provision.

(b) A construction employer shall properly report the employment status of each employee of the construction employer for the purposes of this subtitle and as required by commission rule.

No equivalent provision.

(c) In addition to any other penalty under this subchapter, a construction employer who violates this section shall pay to the commission:
(1) a penalty in the amount of \$100 for each employee not properly reported for an initial violation by the employer; and
(2) a penalty not to exceed \$1,000 for each employee not properly reported for each subsequent violation that occurs after an initial violation by the employer.

No equivalent provision.

(d) In determining the amount of a penalty under Subsection (c)(2), the commission shall consider:
(1) the seriousness of the violation, including the nature, circumstances, consequences, extent, and gravity of the violation;
(2) any history of previous violations by the construction employer;
(3) the demonstrated good faith of the construction employer, including actions taken to rectify the consequences of the violation;
(4) the amount of a penalty necessary to deter future violations; and
(5) any other matter that justice may require.

No equivalent provision.

(e) Based on the criteria listed in Subsection (d), the commission by rule shall adopt a schedule of penalties for a violation described by Subsection (c)(2) to ensure that the amount of a penalty imposed is appropriate to the violation.

No equivalent provision.

(f) For a construction employer's initial violation of this section, the commission shall assess a penalty against the employer as provided by Subsection (c)(1) for each violation determined by the commission to have occurred, regardless of the reporting period in which the violation occurred.

No equivalent provision.

(g) An unpaid penalty assessed under this section applies to a successor business entity that:

(1) has one or more owners who jointly control at least 50 percent of the:

(A) original employer; and

(B) successor business entity; and

(2) is engaged in the same or a similar business activity as the original employer.

No equivalent provision.

(h) Except as provided by Subsection (g), the employer of an employee who is not properly reported is the only person liable for a penalty assessed under this section.

No equivalent provision.

Sec. 213.027. APPEAL REGARDING CONSTRUCTION EMPLOYER REQUIREMENT TO REPORT EMPLOYEES.

No equivalent provision.

(a) In this section, "construction employer" has the meaning assigned by Section 213.026.

No equivalent provision.

(b) A determination that a construction employer has violated Section 213.026 and any penalty assessed for the violation may be reviewed and appealed in the same manner as a disputed claim under Subchapters C, D, and E, Chapter 212.

No equivalent provision.

(c) In ruling on an appeal, the facts and circumstances supporting the construction employer's appeal must be considered, including:

(1) the contents of any written contract between the construction employer and the individual whose employment status was not properly reported;

(2) documentation that the individual

represents that the individual is an independent contractor;
(3) an Internal Revenue Service Form W-9 pertaining to the individual or a similar form providing the same information as that form;
(4) an Internal Revenue Service Form 1099, or similar form issued by, or that meets the compliance guidelines of, the Internal Revenue Service, on which the construction employer has reported the amount paid to the individual and that was filed in accordance with Internal Revenue Service requirements;
(5) whether the individual is not prohibited from hiring employees;
(6) whether the individual has a substantial investment in, and is required to furnish, necessary equipment;
(7) whether the individual is free to perform services for others;
(8) whether the individual has provided evidence of any insurance for the individual's business activity;
(9) the construction employer's need to control the work of the individual if:
(A) customary to the type of work being performed; or
(B) required by a general contractor or construction project owner in order that the general contractor or owner may maintain specific control and direction of the worksite or the flow of work being performed; or
(10) whether the failure to properly report the employment status was intentional.

No equivalent provision.

SECTION 2. Section 301.023, Labor Code, is amended to read as follows:

No equivalent provision.

Sec. 301.023. COMPLAINTS AGAINST COMMISSION.

No equivalent provision.

(a) The commission shall maintain a file on each written complaint filed with the commission and each complaint received by telephone or submitted through the commission's Internet website. The file must include:
(1) the name of the person who filed the complaint, if available;
(2) the date the complaint is received by the commission;
(3) the subject matter of the complaint;
(4) the name of each person contacted in

relation to the complaint;
(5) a summary of the results of the review or investigation of the complaint; and
(6) an explanation of the reason the file was closed, if the commission closed the file without taking action other than to investigate the complaint.

No equivalent provision.

(b) The commission shall provide to the person filing the complaint, if the person's name and contact information are available, and to each person who is a subject of the complaint a copy of the commission's policies and procedures relating to complaint investigation and resolution.

No equivalent provision.

(c) The commission, at least quarterly until final disposition of the complaint, shall notify the person filing the complaint, if the person's name and contact information are available, and each person who is a subject of the complaint of the status of the investigation unless the notice would jeopardize an undercover investigation.

No equivalent provision.

SECTION 3. Subchapter D, Chapter 301, Labor Code, is amended by adding Section 301.0612 to read as follows:

No equivalent provision.

Sec. 301.0612. DUTIES REGARDING CONSTRUCTION INDUSTRY.

No equivalent provision.

(a) It is the policy of this state that each worker in the construction industry must be properly classified as an employee or independent contractor.

No equivalent provision.

(b) The commission shall review its policies and procedures for the enforcement of Subtitle A and any commission rule regarding the construction industry. The commission shall adopt rules and procedures to encourage and enforce the proper classification of workers in the construction industry as employees or independent contractors.

No equivalent provision.

(c) As soon as practicable after the end of each fiscal year, the commission shall submit a report to the governor and the legislature regarding the efforts of the commission to ensure the proper classification of workers in the construction industry. The report must include with respect to the construction industry:

(1) the number of investigated complaints by the commission and any findings; and
(2) the amount of unemployment taxes, interest, and administrative penalties collected as a result of enforcement actions taken under Chapter 213.

No equivalent provision.

(d) The report under Subsection (c) may not include identifying information about a person subject to this title or a complainant.

No equivalent provision.

SECTION 3. The change in law made by this Act applies only to a claim for unemployment compensation benefits that is filed with the Texas Workforce Commission on or after the effective date of this Act. A claim filed before the effective date of this Act is governed by the law in effect on the date the claim was filed, and the former law is continued in effect for that purpose.

No equivalent provision.

SECTION 4. Section 213.026, Labor Code, as added by this Act, applies only to conduct that occurs on or after the effective date of this Act. Conduct that occurs before the effective date of this Act is governed by the law in effect immediately before the effective date of this Act, and the former law is continued in effect for that purpose.

No equivalent provision.

SECTION 5. The Texas Workforce Commission shall submit the first report required by Section 301.0612, Labor Code, as added by this Act, not later than December 1, 2014.

SECTION 4. This Act takes effect September 1, 2013.

SECTION 6. This Act takes effect January 1, 2014.