

BILL ANALYSIS

C.S.H.B. 3656
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Business & Industry
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Employee misclassification, also known as payroll fraud, is a common practice in the Texas construction industry. When an employer commits payroll fraud, they avoid paying state and federal payroll and unemployment taxes, which denies their workers essential rights and benefits, including the right to minimum wage and overtime pay, workers' compensation, and unemployment insurance. It is estimated that payroll fraud in the construction industry robs the state of roughly \$50 million in lost unemployment tax revenue each year. Responsible contractors who follow the law simply cannot compete against the many unscrupulous employers who do not play by the rules. C.S.H.B. 3656 seeks to address these issues by providing for the classification of certain construction workers and the eligibility of those workers for unemployment benefits.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 3656 amends the Labor Code to require a contractor to properly classify each individual providing construction services as either an employee or an independent contractor in accordance with Texas Workforce Commission (TWC) rules and to exclude construction, as defined by the bill, performed by an individual as an independent contractor from the term "employment" for purposes of the Texas Unemployment Compensation Act. An individual may not be considered an employee based solely on the fact that the person for whom the individual is providing construction services requires that any hired employee submit to a criminal background check or preemployment drug screening or possess a certain license or certification relating to the work the employee will perform. The bill establishes that a person for whom an individual is providing construction services is not required to report to the TWC under the act that the individual is the person's employee if the person does the following:

- shows that the individual is an independent contractor;
- provides to the individual a certain form on which the person reports the amount paid to the individual in accordance with IRS requirements; and
- files the form with the IRS in accordance with IRS requirements.

The bill exempts from its provisions certain services that are performed by an individual in the employ of a state, political subdivision, certain Indian tribes, and certain religious, charitable, educational, or other organizations and that are excluded from employment as defined in the Federal Unemployment Tax Act.

C.S.H.B. 3656 requires the TWC to provide on its website information regarding the procedure for the public to report violations of the classification requirement and authorizes the TWC to impose an administrative penalty on a contractor who violates the classification requirement in maximum amounts of \$100 for each individual who is not properly classified and \$1,000 for each such individual for each subsequent violation that occurs. Any issued penalty applies to a successor business entity that meets certain ownership criteria and that is engaged in the same or similar business activity. The bill requires the TWC, on the determination that a contractor has violated the classification requirement, to provide notice of the violation to each governmental entity that the TWC reasonably believes has received construction services provided by the contractor and sets out the required contents of the notice.

C.S.H.B. 3656 requires the TWC to issue an annual report regarding compliance with and enforcement of the classification requirement that includes the following information:

- the number of complaints received from the public;
- the number of investigated complaints and any resulting findings; and
- the amount of unemployment taxes, interest, administrative penalties, and fines actually collected as a result of the following:
 - violations of the classification requirement; or
 - the exclusion of construction performed by an individual from the act, unless those services are excluded because the individual is an independent contractor.

EFFECTIVE DATE

September 1, 2021.

COMPARISON OF ORIGINAL AND SUBSTITUTE

While C.S.H.B. 3656 may differ from the original in minor or nonsubstantive ways, the following summarizes the substantial differences between the introduced and committee substitute versions of the bill.

The substitute does not include the original's provisions setting out the conditions under which an individual is considered an independent contractor and defining "independent contractor." The substitute includes a provision absent from the original exempting certain services from the bill's provisions.

The substitute does not include the original's rebuttable presumption that an individual providing construction services is an employee if the individual is not considered an independent contractor.

The substitute includes a specification absent from the original that a contractor's duty to properly classify each individual providing construction services as either an employee or an independent contractor is in accordance with TWC rules.

The substitute defines "employee" by reference as an individual who is employed by an employer for compensation, excluding an independent contractor and certain persons related to the employer or employer's spouse, whereas the original defined the term as an individual who performs services for another under an express or implied contract of hire.