

SENATE BILL No. 229

By Committee on Federal and State Affairs

2-5

9 AN ACT concerning employment; relating to misclassification of em-
10 ployees; amending K.S.A. 2008 Supp. 79-3234 and repealing the ex-
11 isting section.

12

13 *Be it enacted by the Legislature of the State of Kansas:*

14 New Section 1. As used in sections 1 through 12, and amendments
15 thereto:

16 (a) "Construction" means any constructing, altering, reconstructing,
17 repairing, rehabilitating, refinishing, refurbishing, remodeling, remedi-
18 ating, renovating, custom fabricating, maintenance, landscaping, improv-
19 ing, wrecking, painting, decorating, demolishing and adding to or sub-
20 tracting from any building, structure, highway, roadway, street, bridge,
21 alley, sewer, ditch, sewage disposal plant, water works, parking facility,
22 railroad, excavation or other structure, project, development, real prop-
23 erty or improvement, or to do any part thereof, whether or not the per-
24 formance of the work herein described involves the addition to, or fab-
25 rication into, any structure, project, development, real property or
26 improvement herein described of any material or article of merchandise.
27 Construction shall also include moving construction related materials on
28 the job site or to or from the job site.

29 (b) "Contractor" means any sole proprietor, partnership, limited part-
30 nership, firm, corporation, limited liability company, association or other
31 business entity that registers with the secretary of state who engages in
32 construction. "Contractor" shall include a general contractor and a
33 subcontractor.

34 (c) "Department" means the department of labor.

35 (d) "Secretary" means the secretary of labor.

36 (e) (1) "Employer" means any contractor that employs individuals
37 deemed employees under section 2, and amendments thereto.

38 (2) "Employer" shall not include the:

39 (A) State of Kansas or its officers, agencies or political subdivisions;
40 or

41 (B) federal government.

42 (f) (1) "Entity" means any contractor for which an individual is per-
43 forming services and is not classified as an employee under section 2, and

1 amendments thereto.

2 (2) “Entity” does not include the:

3 (A) State of Kansas or its officers, agencies or political subdivisions;
4 or

5 (B) federal government.

6 (g) “Interested party” means a person with an interest in compliance
7 with sections 1 through 12, and amendments thereto.

8 (h) “Performing services” means the performance of any
9 construction.

10 New Sec. 2. (a) For the purposes of sections 1 through 12, and
11 amendments thereto, an individual performing services for a contractor
12 is deemed to be an employee of the employer except as provided in
13 subsections (b) and (c).

14 (b) An individual performing services for a contractor is deemed to
15 be an employee of the contractor unless it is shown that the:

16 (1) Individual has been and will continue to be free from control or
17 direction over the performance of the service for the contractor, both
18 under the contract of service and in fact;

19 (2) service performed by the individual is outside the usual course of
20 services performed by the contractor; and

21 (3) individual is engaged in an independently established trade, oc-
22 cupation, profession or business, or is deemed a legitimate sole proprietor
23 or partnership under subsection (c).

24 (c) The sole proprietor or partnership performing services for a con-
25 tractor as a subcontractor is deemed legitimate if it is shown that:

26 (1) The sole proprietor or partnership is performing the service free
27 from the direction or control over the means and manner of providing
28 the service, subject only to the right of the contractor for whom the serv-
29 ice is provided to specify the desired result;

30 (2) the sole proprietor or partnership is not subject to cancellation or
31 destruction upon severance of the relationship with the contractor;

32 (3) the sole proprietor or partnership has a substantial investment of
33 capital in the sole proprietorship or partnership beyond ordinary tools
34 and equipment and a personal vehicle;

35 (4) the sole proprietor or partnership owns the capital goods and
36 gains the profits and bears the losses of the sole proprietorship or
37 partnership;

38 (5) the sole proprietor or partnership makes its services available to
39 the general public or the business community on a continuing basis;

40 (6) the sole proprietor or partnership includes services rendered on
41 a federal income tax schedule as an independent business or profession;

42 (7) the sole proprietor or partnership performs services for the con-
43 tractor under the sole proprietorship’s or partnership’s name;

1 (8) when the services being provided require a license or permit, the
2 sole proprietor or partnership obtains and pays for the license or permit
3 in the sole proprietorship's or partnership's name;

4 (9) the sole proprietor or partnership furnishes the tools and equip-
5 ment necessary to provide the service;

6 (10) if necessary, the sole proprietor or partnership hires its own em-
7 ployees without contractor approval, pays the employees without reim-
8 bursement from the contractor and reports the employees' income to the
9 internal revenue service;

10 (11) the contractor does not represent the sole proprietorship or part-
11 nership as an employee of the contractor to its customers; and

12 (12) the sole proprietor or partnership has the right to perform sim-
13 ilar services for others on whatever basis and whenever it chooses.

14 (d) Where a sole proprietor or partnership performing services for a
15 contractor as a subcontractor is deemed not legitimate under subsection
16 (c), the sole proprietorship or partnership shall be deemed an individual
17 for purposes of sections 1 through 12, and amendments thereto.

18 (e) Subcontractors or lower tiered contractors are subject to all pro-
19 visions of sections 1 through 12, and amendments thereto.

20 (f) Except as provided in section 7, and amendments thereto, a con-
21 tractor shall not be liable under sections 1 through 12, and amendments
22 thereto, for any subcontractor's failure to properly classify persons per-
23 forming services as employees, nor shall a subcontractor be liable for any
24 lower tiered subcontractor's failure to properly classify persons perform-
25 ing services as employees.

26 New Sec. 3. It is unlawful for an employer or entity not to designate
27 an individual as an employee under section 2, and amendments thereto,
28 unless the employer or entity satisfies the provisions of section 2, and
29 amendments thereto.

30 New Sec. 4. (a) Any interested party may file a complaint with the
31 department against an entity or employer covered under sections 1
32 through 12, and amendments thereto, if there is a reasonable belief that
33 the entity or employer is in violation of sections 1 through 12, and amend-
34 ments thereto. It shall be the duty of the department to enforce the
35 provisions of sections 1 through 12, and amendments thereto. The de-
36 partment shall have the power to conduct investigations in connection
37 with the administration and enforcement of sections 1 through 12, and
38 amendments thereto. Any investigator with the department shall be au-
39 thorized to visit and inspect, at all reasonable times, any places covered
40 by sections 1 through 12, and amendments thereto, and shall be author-
41 ized to inspect, at all reasonable times, documents related to the deter-
42 mination of whether an individual is an employee under section 2, and
43 amendments thereto. The secretary or the secretary's representative may

1 compel, by subpoena, the attendance and testimony of witnesses and the
2 production of books, payrolls, records, papers and other evidence in any
3 investigation and may administer oaths to witnesses.

4 (b) Whenever the department believes upon investigation that there
5 has been a violation of any of the provisions of sections 1 through 12, and
6 amendments thereto, or any authorized rules or regulations, the depart-
7 ment may:

8 (1) Issue and cause to be served on any party an order to cease and
9 desist from further violation;

10 (2) take affirmative or other action as deemed reasonable to eliminate
11 the effect of the violation;

12 (3) collect the amount of any wages, salary, employment benefits or
13 other compensation denied or lost to the individual; and

14 (4) assess any civil penalty pursuant to section 7, and amendments
15 thereto.

16 (c) The civil penalties assessed by the department as well as any other
17 relief requested by the department shall be recoverable in an action
18 brought by the attorney general.

19 New Sec. 5. Criminal violations of sections 1 through 12, and amend-
20 ments thereto, may be prosecuted by the attorney general or the district
21 or county attorney for the county in which the violation occurred. Upon
22 determining that a criminal violation may have occurred, the department
23 shall refer the matter to the attorney general or the district or county
24 attorney for the county in which the violation may have occurred. In all
25 other proceedings, the department shall be represented by the attorney
26 general's office.

27 New Sec. 6. Whenever it appears that any employer or entity has
28 violated a valid order of the department issued under sections 1 through
29 12, and amendments thereto, the secretary may commence an action and
30 obtain from the court an order commanding the employer or entity to
31 obey the order of the department or be found guilty of contempt of court.

32 New Sec. 7. (a) An employer or entity that violates any of the pro-
33 visions of sections 1 through 12, and amendments thereto, or any au-
34 thorized rules and regulations upon a first violation shall be subject to a
35 civil penalty not to exceed \$2,000 for each violation. An employer or entity
36 shall be subject to a civil penalty not to exceed \$3,000 for each second or
37 subsequent violation within a five-year period. For purposes of this sec-
38 tion, each violation of sections 1 through 12, and amendments thereto,
39 for each person and for each day the violation continues shall constitute
40 a separate and distinct violation. In determining the amount of a penalty,
41 the secretary shall consider the appropriateness of the penalty to the
42 employer or entity charged, upon the determination of the gravity of the
43 violations. The amount of the penalty, when finally determined, may be

1 recovered in a civil action filed in any court by the secretary, or a person
2 aggrieved by a violation of sections 1 through 12, and amendments
3 thereto, or any authorized rules and regulations. In any civil action
4 brought by an interested party pursuant to this section, the court shall
5 award the interested party 10% of the amount recovered. In such case,
6 the remaining amount recovered shall be credited to the employee clas-
7 sification fund.

8 (b) For any second or subsequent violation which is within five-years
9 of an earlier violation, the department shall add the employer or entity's
10 name to a list to be posted on the department's official website. Upon
11 such notice, the department shall notify the violating employer or entity.
12 No state contract shall be awarded to an employer or entity appearing on
13 the list until four years have elapsed from the date of the last violation.

14 (c) Any person who willfully violates any of the provisions of sections
15 1 through 12, and amendments thereto, or any authorized rules and reg-
16 ulations, or obstructs the secretary, or the secretary's representatives, or
17 any other person authorized to inspect places of employment under sec-
18 tions 1 through 12, and amendments thereto, shall be liable for civil pen-
19 alties up to double the amounts specified in subsection (a). Any person
20 who willfully violates any of the provisions of sections 1 through 12, and
21 amendments thereto, or any authorized rules and regulations, shall be
22 liable to the employee for punitive damages in an amount equal to the
23 penalties assessed in subsection (a). The penalties established pursuant
24 to this subsection shall be imposed in cases in which an employer or
25 entity's conduct is proven by a preponderance of the evidence to be
26 willful.

27 (d) An entity or employer that willfully violates any provision of sec-
28 tions 1 through 12, and amendments thereto, or that knowingly conspires
29 with, aids and abets or assists another entity or employer in violating any
30 provision of sections 1 through 12, and amendments thereto, is guilty of
31 a class C nonperson misdemeanor. An entity or employer that commits
32 a second or subsequent violation within a five-year period is guilty of a
33 severity level 10, nonperson felony.

34 New Sec. 8. (a) All moneys received by the department pursuant to
35 sections 1 through 12, and amendments thereto, shall be remitted to the
36 state treasurer in accordance with the provisions of K.S.A. 75-4215, and
37 amendments thereto. The state treasurer shall deposit the entire amount
38 of the remittance in the state treasury and credit that portion of the
39 remittance necessary to pay the expenses incurred by the office of the
40 attorney general in carrying out its powers and duties under sections 1
41 through 12, and amendments thereto, to the attorney general employee
42 classification fund, which is hereby created, and the remainder to the
43 department of labor employee classification fund, which is hereby

1 created.

2 (b) Subject to appropriations, all expenditures from the attorney gen-
3 eral employee classification fund shall be used by the office of the attorney
4 general for investigation, prosecution and other expenses incurred in car-
5 rying out its powers and duties under sections 1 through 12, and amend-
6 ments thereto. All expenditures from the attorney general employee clas-
7 sification fund shall be made in accordance with appropriation acts upon
8 warrants of the director of accounts and reports issued pursuant to vouch-
9 ers approved by the attorney general.

10 (c) Subject to appropriations, all expenditures from the department
11 of labor employee classification fund shall be used by the department for
12 administration, investigation and other expenses incurred in carrying out
13 its powers and duties under sections 1 through 12, and amendments
14 thereto. All expenditures from the department of labor employee classi-
15 fication fund shall be made in accordance with appropriation acts upon
16 warrants of the director of accounts and reports issued pursuant to vouch-
17 ers approved by the secretary.

18 New Sec. 9. (a) It is unlawful for an employer or entity, or any agent
19 of an employer or entity, to retaliate through discharge or in any other
20 manner against any person for exercising any rights granted under sec-
21 tions 1 through 12, and amendments thereto. Such retaliation shall sub-
22 ject an employer or entity to civil penalties pursuant to section 7, and
23 amendments thereto, or a private cause of action, or both.

24 (b) It is unlawful for an employer or entity to retaliate against a person
25 for:

26 (1) Making a complaint to an employer or entity, to a co-worker, to
27 a community organization, before a public hearing, or to a state or federal
28 agency that rights guaranteed under sections 1 through 12, and amend-
29 ments thereto, have been violated;

30 (2) causing to be instituted any proceeding under or related to sec-
31 tions 1 through 12, and amendments thereto; or

32 (3) testifying or preparing to testify in an investigation or proceeding
33 under sections 1 through 12, and amendments thereto.

34 New Sec. 10. (a) An interested party or person aggrieved by a vio-
35 lation of sections 1 through 12, and amendments thereto, or any author-
36 ized rules and regulations, by an employer or entity may file suit in court,
37 in the county where the alleged offense occurred or where any person
38 who is party to the action resides, without regard to exhaustion of any
39 alternative administrative remedies provided in sections 1 through 12,
40 and amendments thereto. Actions may be brought by one or more persons
41 for and on behalf of themselves and other persons similarly situated. A
42 person whose rights have been violated under sections 1 through 12, and
43 amendments thereto, by an employer or entity is entitled to collect:

- 1 (1) The amount of any wages, salary, employment benefits or other
2 compensation denied or lost to the person by reason of the violation, plus
3 an equal amount in liquidated damages;
- 4 (2) compensatory damages and in amount up to \$500 for each vio-
5 lation of sections 1 through 12, and amendments thereto, or any author-
6 ized rules and regulations;
- 7 (3) in the case of unlawful retaliation, all legal or equitable relief as
8 may be appropriate; and
- 9 (4) reasonable attorney's fees and costs.
- 10 (b) The right of an interested party or aggrieved person to bring an
11 action under this section terminates upon the passing of three years from
12 the final date of performing services to the employer or entity. This lim-
13 itations period is tolled if an employer or entity has deterred a person's
14 exercise of rights under sections 1 through 12, and amendments thereto.
- 15 New Sec. 11. (a) The department may adopt rules and regulations
16 to implement and administer sections 1 through 12, and amendments
17 thereto.
- 18 (b) Any finding made pursuant to sections 1 through 12, and amend-
19 ments thereto, is for the purpose of enforcing sections 1 through 12, and
20 amendments thereto, and may not be admissible or binding against a
21 party in any other proceeding.
- 22 (c) The provisions of the Kansas administrative procedure act, K.S.A.
23 77-501 et seq., and amendments thereto, shall govern all administrative
24 proceedings initiated under this section.
- 25 New Sec. 12. (a) There shall be no waiver of any provision of sections
26 1 through 12, and amendments thereto.
- 27 (b) It is a class C nonperson misdemeanor for an employer or entity
28 to attempt to induce any individual to waive any provision of sections 1
29 through 12, and amendments thereto.
- 30 Sec. 13. K.S.A. 2008 Supp. 79-3234 is hereby amended to read as
31 follows: 79-3234. (a) All reports and returns required by this act shall be
32 preserved for three years and thereafter until the director orders them
33 to be destroyed.
- 34 (b) Except in accordance with proper judicial order, or as provided
35 in subsection (c) or in K.S.A. 17-7511, subsection (g) of K.S.A. 46-1106,
36 K.S.A. 46-1114, or K.S.A. 79-32,153a, and amendments thereto, it shall
37 be unlawful for the secretary, the director, any deputy, agent, clerk or
38 other officer, employee or former employee of the department of revenue
39 or any other state officer or employee or former state officer or employee
40 to divulge, or to make known in any way, the amount of income or any
41 particulars set forth or disclosed in any report, return, federal return or
42 federal return information required under this act; and it shall be unlawful
43 for the secretary, the director, any deputy, agent, clerk or other officer

1 or employee engaged in the administration of this act to engage in the
2 business or profession of tax accounting or to accept employment, with
3 or without consideration, from any person, firm or corporation for the
4 purpose, directly or indirectly, of preparing tax returns or reports required
5 by the laws of the state of Kansas, by any other state or by the United
6 States government, or to accept any employment for the purpose of ad-
7 vising, preparing material or data, or the auditing of books or records to
8 be used in an effort to defeat or cancel any tax or part thereof that has
9 been assessed by the state of Kansas, any other state or by the United
10 States government.

11 (c) The secretary or the secretary's designee may: (1) Publish statis-
12 tics, so classified as to prevent the identification of particular reports or
13 returns and the items thereof;

14 (2) allow the inspection of returns by the attorney general or other
15 legal representatives of the state;

16 (3) provide the post auditor access to all income tax reports or returns
17 in accordance with and subject to the provisions of subsection (g) of
18 K.S.A. 46-1106 or K.S.A. 46-1114, and amendments thereto;

19 (4) disclose taxpayer information from income tax returns to persons
20 or entities contracting with the secretary of revenue where the secretary
21 has determined disclosure of such information is essential for completion
22 of the contract and has taken appropriate steps to preserve confidentiality;

23 (5) disclose to the secretary of commerce specific taxpayer informa-
24 tion related to financial information previously submitted by the taxpayer
25 to the secretary of commerce concerning or relevant to any income tax
26 credits, for purposes of verification of such information or evaluating the
27 effectiveness of any tax credit program administered by the secretary of
28 commerce;

29 (6) disclose income tax returns to the state gaming agency to be used
30 solely for the purpose of determining qualifications of licensees of and
31 applicants for licensure in tribal gaming. Any information received by the
32 state gaming agency shall be confidential and shall not be disclosed except
33 to the executive director, employees of the state gaming agency and mem-
34 bers and employees of the tribal gaming commission;

35 (7) disclose the taxpayer's name, last known address and residency
36 status to the department of wildlife and parks to be used solely in its
37 license fraud investigations;

38 (8) disclose the name, residence address, employer or Kansas ad-
39 justed gross income of a taxpayer who may have a duty of support in a
40 title IV-D case to the secretary of the Kansas department of social and
41 rehabilitation services for use solely in administrative or judicial proceed-
42 ings to establish, modify or enforce such support obligation in a title IV-
43 D case. In addition to any other limits on use, such use shall be allowed

1 only where subject to a protective order which prohibits disclosure out-
2 side of the title IV-D proceeding. As used in this section, “title IV-D
3 case” means a case being administered pursuant to part D of title IV of
4 the federal social security act (42 U.S.C. §651 et seq.) and amendments
5 thereto. Any person receiving any information under the provisions of
6 this subsection shall be subject to the confidentiality provisions of sub-
7 section (b) and to the penalty provisions of subsection (e);

8 (9) permit the commissioner of internal revenue of the United States,
9 or the proper official of any state imposing an income tax, or the author-
10 ized representative of either, to inspect the income tax returns made
11 under this act and the secretary of revenue may make available or furnish
12 to the taxing officials of any other state or the commissioner of internal
13 revenue of the United States or other taxing officials of the federal gov-
14 ernment, or their authorized representatives, information contained in
15 income tax reports or returns or any audit thereof or the report of any
16 investigation made with respect thereto, filed pursuant to the income tax
17 laws, as the secretary may consider proper, but such information shall not
18 be used for any other purpose than that of the administration of tax laws
19 of such state, the state of Kansas or of the United States;

20 (10) communicate to the executive director of the Kansas lottery in-
21 formation as to whether a person, partnership or corporation is current
22 in the filing of all applicable tax returns and in the payment of all taxes,
23 interest and penalties to the state of Kansas, excluding items under formal
24 appeal, for the purpose of determining whether such person, partnership
25 or corporation is eligible to be selected as a lottery retailer;

26 (11) communicate to the executive director of the Kansas racing com-
27 mission as to whether a person, partnership or corporation has failed to
28 meet any tax obligation to the state of Kansas for the purpose of deter-
29 mining whether such person, partnership or corporation is eligible for a
30 facility owner license or facility manager license pursuant to the Kansas
31 parimutuel racing act;

32 (12) provide such information to the executive director of the Kansas
33 public employees retirement system for the purpose of determining that
34 certain individuals’ reported compensation is in compliance with the Kan-
35 sas public employees retirement act at K.S.A. 74-4901 et seq., and amend-
36 ments thereto; and

37 (13) provide taxpayer information of persons suspected of violating
38 *sections 1 through 12 or* K.S.A. 2008 Supp. 44-766, and amendments
39 thereto, to the staff attorneys of the department of labor for the purpose
40 of determining compliance by any person with the provisions of *sections*
41 *1 through 12 or* K.S.A. 2008 Supp. 44-766, and amendments thereto,
42 which information shall be limited to withholding tax and payroll infor-
43 mation, the identity of any person that has been or is currently being

1 audited or investigated in connection with the administration and en-
2 forcement of the withholding and declaration of estimated tax act, K.S.A.
3 79-3294 et seq., as amended, and the results or status of such audit or
4 investigation.

5 (d) Any person receiving information under the provisions of subsec-
6 tion (c) shall be subject to the confidentiality provisions of subsection (b)
7 and to the penalty provisions of subsection (e).

8 (e) Any violation of subsection (b) or (c) is a class A nonperson mis-
9 demeanor and, if the offender is an officer or employee of the state, such
10 officer or employee shall be dismissed from office.

11 (f) Nothing in this section shall be construed to allow disclosure of
12 the amount of income or any particulars set forth or disclosed in any
13 report, return, federal return or federal return information, where such
14 disclosure is prohibited by the federal internal revenue code as in effect
15 on September 1, 1996, and amendments thereto, related federal internal
16 revenue rules or regulations, or other federal law.

17 Sec. 14. K.S.A. 2008 Supp. 79-3234 is hereby repealed.

18 Sec. 15. This act shall take effect and be in force from and after its
19 publication in the statute book.