

# House Bill 2890

Sponsored by Representative SCHAUFLER (at the request of Joint Council of Teamsters Number 37)

## SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Establishes meaning of "employee" for purposes of classification of workers. Establishes crime of misclassification of employee. Imposes civil penalties and criminal sanctions for certain violations. Authorizes debarment of and imposition of stop-work orders against certain violators. Prohibits discrimination against individual exercising rights established by Act.

Declares emergency, effective on passage.

## A BILL FOR AN ACT

1  
2 Relating to classification of employees; and declaring an emergency.

3       Whereas the Seventy-fifth Legislative Assembly finds that employers who improperly classify  
4 employees as independent contractors deprive these misclassified workers of proper Social Security  
5 benefits and numerous other benefits afforded employees under the laws of this state, including  
6 workers' compensation, unemployment benefits, prevailing wages on public projects, and minimum  
7 wage and hour protections; and

8       Whereas such misclassification improperly denies the federal and state governments of tax re-  
9 venues and increases the tax burden for the public in general and law-abiding businesses in partic-  
10 ular; and

11       Whereas the practice of misclassifying employees puts law-abiding businesses who properly  
12 classify their workers at a competitive disadvantage; now, therefore,

13 **Be It Enacted by the People of the State of Oregon:**

14       **SECTION 1.** **Sections 1 to 11 of this 2009 Act may be cited as the "Worker Misclassifica-**  
15 **tion Act."**

16       **SECTION 2.** **As used in sections 1 to 11 of this 2009 Act, unless the context requires**  
17 **otherwise:**

18       (1) **"Employer" means any individual, partnership, association, joint stock company,**  
19 **corporation, business trust or any other person or groups of persons acting directly or indi-**  
20 **rectly in the interest of an employer in relation to an employee.**

21       (2) **"Performing services" means the performance of any task related to the business**  
22 **engaged in by an employer.**

23       **SECTION 3.** **(1) If an individual performs services for an employer for remuneration, the**  
24 **individual receiving the remuneration shall be classified as an employee of the party that**  
25 **pays the remuneration unless the Bureau of Labor and Industries determines that the indi-**  
26 **vidual receiving remuneration:**

27       (a) **Has been, and will continue to be, free from direction and control of the employer,**  
28 **both under the employee's contract of service and in fact;**

29       (b) **Performs service for the employer that is outside the usual course of the business**  
30 **of the employer; and**

**NOTE:** Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

1 (c) Is customarily engaged in an independently established trade, occupation, profession  
 2 or business, both under the employee's contract of service and in fact.

3 (2) The failure to withhold federal or state income taxes or to pay unemployment com-  
 4 pensation contributions or workers' compensation insurance premiums with respect to an  
 5 individual's wages may not be considered by the bureau in making a determination under this  
 6 section. In making determinations under this section, the bureau shall find employee status  
 7 if the control exercised by the party paying remuneration is a general one, exercised directly  
 8 or indirectly, over the physical activities of the individual being remunerated and need not  
 9 extend to all the details of the physical performance of the duties performed for the em-  
 10 ployer.

11 **SECTION 4.** (1) An employer or an officer or agent of an employer commits the crime  
 12 of misclassification of an employee if the employer or officer or agent of the employer fails  
 13 to:

14 (a) Properly classify an individual as an employee in accordance with section 3 of this  
 15 2009 Act; and

16 (b) Pay benefits or make other contributions required by law on behalf of an employee.

17 (2)(a) Knowingly misclassifying an employee is a Class C felony.

18 (b) Notwithstanding paragraph (a) of this subsection, knowingly misclassifying an em-  
 19 ployee is a Class B felony if the employer or officer or agent of the employer, has a prior  
 20 conviction for knowingly misclassifying an employee.

21 (3)(a) Unintentionally misclassifying an employee is a Class B misdemeanor.

22 (b) Notwithstanding paragraph (a) of this subsection, unintentionally misclassifying an  
 23 employee is a Class A misdemeanor if the employer or officer or agent of the employer has  
 24 a prior conviction for unintentionally misclassifying an employee.

25 **SECTION 5.** (1)(a) If the Commissioner of the Bureau of Labor and Industries deter-  
 26 mines, after notice and opportunity for hearing as provided by ORS chapter 183, that an  
 27 employer, or an officer or agent of the employer, has failed to properly classify an individual  
 28 as an employee in accordance with section 3 of this 2009 Act and failed to pay required ben-  
 29 efits or other required contributions or, if a final conviction and disposition of a violation of  
 30 section 3 of this 2009 Act is made in accordance with section 4 of this 2009 Act, the com-  
 31 missioner shall notify all public bodies of the name of the employer. A public body may not  
 32 award a contract to the employer or to any firm, corporation or partnership in which the  
 33 employer has an interest for a period determined by the commissioner.

34 (b) The period of debarment imposed under this subsection may not exceed three years  
 35 from the date notice was provided to public bodies under this subsection.

36 (2) In addition to any other civil remedy or criminal penalty provided for by sections 1  
 37 to 11 of this 2009 Act, the commissioner, after notice and opportunity for hearing as provided  
 38 by ORS chapter 183, may levy a civil penalty of up to \$1,000 per violation on any employer  
 39 who violates any provision of sections 1 to 11 of this 2009 Act.

40 (3)(a) An individual who has not been properly classified by an employer as an employee  
 41 may bring a civil action for damages against the employer for failing to properly classify the  
 42 individual if the employer had knowledge of the misclassification. An individual's represen-  
 43 tative, including a labor organization, may bring the action on behalf of the individual or as  
 44 a class action.

45 (b) If the court finds that the employer has violated any provision of sections 1 to 11 of

1 this 2009 Act, the court may award the individual or class of employees damages in the  
 2 amount of wages, salary, employment benefits, including expenses incurred by the individual  
 3 or members of the class that would otherwise have been covered by insurance, or other  
 4 compensation lost to the individual or class of employees, as well as reasonable attorney fees  
 5 and the costs incurred by the individual in bringing the action.

6 **SECTION 6.** (1)(a) If the Commissioner of the Bureau of Labor and Industries deter-  
 7 mines, after notice and opportunity for hearing as provided by ORS chapter 183, that an  
 8 employer failed to properly classify an individual as an employee in accordance with section  
 9 3 of this 2009 Act, the commissioner shall issue a stop-work order requiring the employer to  
 10 cease all business operations of the employer within 72 hours of the determination.

11 (b) The order shall take effect when served upon the employer or, for a particular em-  
 12 ployer work site, when served at that work site.

13 (c) The order shall remain in effect until the commissioner issues an order releasing the  
 14 stop-work order upon finding that the employer has properly classified the individual as an  
 15 employee and has paid any penalty assessed under this section.

16 (d) As a condition of release from a stop-work order, the commissioner may require the  
 17 employer to file with the Bureau of Labor and Industries periodic reports for a period that  
 18 may not exceed two years from the date the stop-work order was issued that demonstrate  
 19 the employer's compliance with the requirements of section 3 of this 2009 Act.

20 (e) The bureau shall adopt by rule requirements for the contents of and filing time for  
 21 reports required under this subsection.

22 (2) Stop-work orders issued and penalties assessed pursuant to this section against an  
 23 employer shall be in effect against any successor corporation or business entity that has one  
 24 or more of the same principals or officers and that is engaged in the same or equivalent  
 25 trade or activity as the employer against whom the stop-work order was issued and penalty  
 26 was assessed.

27 (3) The commissioner shall assess a penalty of \$1,000 per day against an employer for  
 28 each day that the employer conducts business operations that are in violation of a stop-work  
 29 order issued pursuant to this section.

30 (4) In addition to the penalty provided for in subsection (3) of this section, the commis-  
 31 sioner may assess a penalty of \$5,000 for each individual that the employer failed to properly  
 32 classify as an employee.

33 **SECTION 7.** (1) The Bureau of Labor and Industries shall create and distribute posters  
 34 that summarize the requirements of sections 1 to 11 of this 2009 Act.

35 (2)(a) An electronic version of the posters described in subsection (1) of this section shall  
 36 be posted on the bureau's website; and

37 (b) Hard copies of the posters shall be posted on the bulletin boards in the offices of  
 38 public agencies.

39 (3) Posters required under this section shall be published in English, Spanish and any  
 40 other languages the bureau deems appropriate.

41 (4) Upon request, the bureau shall provide posters required under this section without  
 42 charge to employers.

43 (5) If an employer is found to have violated any provision of sections 1 to 11 of this 2009  
 44 Act or of rules adopted under section 11 of this 2009 Act, the employer shall post the English,  
 45 Spanish and any other versions of the poster that the Commissioner of the Bureau of Labor

1 and Industries deems appropriate in conspicuous locations at the places where notices to  
 2 employees of the employer are normally posted at each job site and office of the employer.

3 **SECTION 8.** (1) Actions taken under sections 5 and 6 of this 2009 Act are subject to the  
 4 right of notice and adjudication and the right of appeal in accordance with the provisions of  
 5 ORS chapter 183.

6 (2) The Bureau of Labor and Industries may subpoena witnesses, administer oaths, ex-  
 7 amine witnesses and take testimony or compel the production of documents. Upon applica-  
 8 tion of an attorney for the bureau, the bureau may issue an investigative subpoena to compel  
 9 the production of documents, computer records and information relating to compliance with  
 10 sections 1 to 11 of this 2009 Act.

11 **SECTION 9.** A person may not require or request an individual to enter into an agree-  
 12 ment or sign a document that results in the misclassification of the individual as an inde-  
 13 pendent contractor or otherwise does not accurately reflect the relationship with the  
 14 employer.

15 **SECTION 10.** (1) An employer or any other person may not discriminate in any manner  
 16 or take adverse action against any person in retaliation for exercising rights protected under  
 17 sections 1 to 11 of this 2009 Act.

18 (2) As used in this section, “rights protected” includes, but is not limited to:

19 (a) Filing a complaint with the Bureau of Labor and Industries regarding a violation of  
 20 any provision of sections 1 to 11 of this 2009 Act by an employer;

21 (b) Testifying or cooperating in an investigation or proceeding under sections 1 to 11 of  
 22 this 2009 Act;

23 (c) Informing an individual of the individual’s rights under sections 1 to 11 of this 2009  
 24 Act;

25 (d) Informing an individual of an employer’s noncompliance with the provisions of  
 26 sections 1 to 11 of this 2009 Act; and

27 (e) Otherwise assisting an individual in asserting the individual’s rights under sections 1  
 28 to 11 of this 2009 Act.

29 (3) An individual who makes a good faith allegation of a violation of the provisions of  
 30 sections 1 to 11 of this 2009 Act is afforded the rights provided by sections 1 to 11 of this 2009  
 31 Act, regardless of the outcome of the determination of the merits of the allegation.

32 (4) An employer or an agent of the employer that takes an adverse employment action  
 33 against a individual within 90 days of the individual having exercised rights protected under  
 34 sections 1 to 11 of this 2009 Act creates a rebuttable presumption that the action was taken  
 35 in retaliation for the exercise of those rights.

36 **SECTION 11.** The Commissioner of the Bureau of Labor and Industries may adopt rules  
 37 necessary for the implementation and administration of sections 1 to 11 of this 2009 Act.

38 **SECTION 12.** This 2009 Act being necessary for the immediate preservation of the public  
 39 peace, health and safety, an emergency is declared to exist, and this 2009 Act takes effect  
 40 on its passage.