

**HOUSE BILL No. 2131**

By Committee on Commerce and Economic Development

1-31

1 AN ACT concerning employment; relating to misclassification of  
2 employees; amending K.S.A. 2010 Supp. 79-3234 and repealing the  
3 existing section.

4  
5 *Be it enacted by the Legislature of the State of Kansas:*

6 New Section. 1. As used in sections 1 through 12, and amendments  
7 thereto:

8 (a) "Construction" means any constructing, altering, reconstructing,  
9 repairing, rehabilitating, refinishing, refurbishing, remodeling,  
10 remediating, renovating, custom fabricating, maintenance, landscaping,  
11 improving, wrecking, painting, decorating, demolishing and adding to or  
12 subtracting from any building, structure, highway, roadway, street, bridge,  
13 alley, sewer, ditch, sewage disposal plant, water works, parking facility,  
14 railroad, excavation or other structure, project, development, real property  
15 or improvement, or to do any part thereof, whether or not the  
16 performance of the work herein described involves the addition to, or  
17 fabrication into, any structure, project, development, real property or  
18 improvement herein described of any material or article of merchandise.  
19 Construction shall also include moving construction related materials on  
20 the job site or to or from the job site.

21 (b) "Contractor" means any sole proprietor, partnership, limited  
22 partnership, firm, corporation, limited liability company, association or  
23 other business entity that registers with the secretary of state who engages  
24 in construction. "Contractor" shall include a general contractor and a  
25 subcontractor.

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

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

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

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

31 (A) State of Kansas or its officers, agencies or political subdivisions;  
32 or

33 (B) federal government.

34 (f) (1) "Entity" means any contractor for which an individual is  
35 performing services and is not classified as an employee under section 2,  
36 and amendments thereto.

1 (2) "Entity" does not include the:

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

4 (B) federal government.

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

7 (h) "Performing services" means the performance of any  
8 construction.

9 (i) "Sole proprietor" means a person who solely owns an  
10 unincorporated business.

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

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

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

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

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

25 (c) The sole proprietor or partnership performing services for a  
26 contractor as a subcontractor is deemed legitimate if it is shown that:

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

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

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

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

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

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

43 (7) the sole proprietor or partnership performs services for the

1 contractor under the sole proprietorship's or partnership's name;

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

5 (9) the sole proprietor or partnership furnishes the tools and  
6 equipment necessary to provide the service;

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

11 (11) the contractor does not represent the sole proprietorship or  
12 partnership as an employee of the contractor to its customers; and

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

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

19 (e) Subcontractors or lower tiered contractors are subject to all  
20 provisions of sections 1 through 12, and amendments thereto.

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

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

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

1 and amendments thereto. The secretary or the secretary's representative  
2 may compel, by subpoena, the attendance and testimony of witnesses and  
3 the production of books, payrolls, records, papers and other evidence in  
4 any investigation and may administer oaths to witnesses.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 classification fund, which is hereby created, and the remainder to the  
2 department of labor employee classification fund, which is hereby  
3 created.

4 (b) Subject to appropriations, all expenditures from the attorney  
5 general employee classification fund shall be used by the office of the  
6 attorney general for investigation, prosecution and other expenses  
7 incurred in carrying out its powers and duties under sections 1 through  
8 12, and amendments thereto. All expenditures from the attorney general  
9 employee classification fund shall be made in accordance with  
10 appropriation acts upon warrants of the director of accounts and reports  
11 issued pursuant to vouchers approved by the attorney general.

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

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

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

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

32 (2) causing to be instituted any proceeding under or related to  
33 sections 1 through 12, and amendments thereto; or

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

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

1 person whose rights have been violated under sections 1 through 12, and  
2 amendments thereto, by an employer or entity is entitled to collect:

3 (1) The amount of any wages, salary, employment benefits or other  
4 compensation denied or lost to the person by reason of the violation, plus  
5 an equal amount in liquidated damages;

6 (2) compensatory damages in amount up to \$500 for each violation  
7 of sections 1 through 12, and amendments thereto, or any authorized rules  
8 and regulations;

9 (3) in the case of unlawful retaliation, all legal or equitable relief as  
10 may be appropriate; and

11 (4) reasonable attorney's fees and costs.

12 (b) The right of an interested party or aggrieved person to bring an  
13 action under this section terminates upon the passing of three years from  
14 the final date of performing services to the employer or entity. This  
15 limitations period is tolled if an employer or entity has deterred a person's  
16 exercise of rights under sections 1 through 12, and amendments thereto.

17 New Sec. 11. (a) The department may adopt rules and regulations to  
18 implement and administer sections 1 through 12, and amendments  
19 thereto.

20 (b) Any finding made pursuant to sections 1 through 12, and  
21 amendments thereto, is for the purpose of enforcing sections 1 through  
22 12, and amendments thereto, and may not be admissible or binding  
23 against a party in any other proceeding.

24 (c) The provisions of the Kansas administrative procedure act,  
25 K.S.A. 77-501 et seq., and amendments thereto, shall govern all  
26 administrative proceedings initiated under this section.

27 New Sec. 12. (a) There shall be no waiver of any provision of  
28 sections 1 through 12, and amendments thereto.

29 (b) It is a class C nonperson misdemeanor for an employer or entity  
30 to attempt to induce any individual to waive any provision of sections 1  
31 through 12, and amendments thereto.

32 Sec. 13. K.S.A. 2010 Supp. 79-3234 is hereby amended to read as  
33 follows: 79-3234. (a) All reports and returns required by this act shall be  
34 preserved for three years and thereafter until the director orders them to  
35 be destroyed.

36 (b) Except in accordance with proper judicial order, or as provided  
37 in subsection (c) or in K.S.A. 17-7511, subsection (g) of K.S.A. 46-1106,  
38 K.S.A. 46-1114, or K.S.A. 79-32,153a, and amendments thereto, it shall  
39 be unlawful for the secretary, the director, any deputy, agent, clerk or  
40 other officer, employee or former employee of the department of revenue  
41 or any other state officer or employee or former state officer or employee  
42 to divulge, or to make known in any way, the amount of income or any  
43 particulars set forth or disclosed in any report, return, federal return or

1 federal return information required under this act; and it shall be unlawful  
2 for the secretary, the director, any deputy, agent, clerk or other officer or  
3 employee engaged in the administration of this act to engage in the  
4 business or profession of tax accounting or to accept employment, with or  
5 without consideration, from any person, firm or corporation for the  
6 purpose, directly or indirectly, of preparing tax returns or reports required  
7 by the laws of the state of Kansas, by any other state or by the United  
8 States government, or to accept any employment for the purpose of  
9 advising, preparing material or data, or the auditing of books or records to  
10 be used in an effort to defeat or cancel any tax or part thereof that has  
11 been assessed by the state of Kansas, any other state or by the United  
12 States government.

13 (c) The secretary or the secretary's designee may: (1) Publish  
14 statistics, so classified as to prevent the identification of particular reports  
15 or returns and the items thereof;

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

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

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

25 (5) disclose to the secretary of commerce the following: (A) Specific  
26 taxpayer information related to financial information previously  
27 submitted by the taxpayer to the secretary of commerce concerning or  
28 relevant to any income tax credits, for purposes of verification of such  
29 information or evaluating the effectiveness of any tax credit or economic  
30 incentive program administered by the secretary of commerce; (B) the  
31 amount of payroll withholding taxes an employer is retaining pursuant to  
32 K.S.A. 2010 Supp. 74-50,212, and amendments thereto; (C) information  
33 received from businesses completing the form required by K.S.A. 2010  
34 Supp. 74-50,217, and amendments thereto; and (D) findings related to a  
35 compliance audit conducted by the department of revenue upon the  
36 request of the secretary of commerce pursuant to K.S.A. 2010 Supp. 74-  
37 50,215, and amendments thereto;

38 (6) disclose income tax returns to the state gaming agency to be used  
39 solely for the purpose of determining qualifications of licensees of and  
40 applicants for licensure in tribal gaming. Any information received by the  
41 state gaming agency shall be confidential and shall not be disclosed  
42 except to the executive director, employees of the state gaming agency  
43 and members and employees of the tribal gaming commission;

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

4 (8) disclose the name, residence address, employer or Kansas  
5 adjusted gross income of a taxpayer who may have a duty of support in a  
6 title IV-D case to the secretary of the Kansas department of social and  
7 rehabilitation services for use solely in administrative or judicial  
8 proceedings to establish, modify or enforce such support obligation in a  
9 title IV-D case. In addition to any other limits on use, such use shall be  
10 allowed only where subject to a protective order which prohibits  
11 disclosure outside of the title IV-D proceeding. As used in this section,  
12 "title IV-D case" means a case being administered pursuant to part D of  
13 title IV of the federal social security act (42 U.S.C. § 651 et seq.) and  
14 amendments thereto. Any person receiving any information under the  
15 provisions of this subsection shall be subject to the confidentiality  
16 provisions of subsection (b) and to the penalty provisions of subsection  
17 (e);

18 (9) permit the commissioner of internal revenue of the United States,  
19 or the proper official of any state imposing an income tax, or the  
20 authorized representative of either, to inspect the income tax returns made  
21 under this act and the secretary of revenue may make available or furnish  
22 to the taxing officials of any other state or the commissioner of internal  
23 revenue of the United States or other taxing officials of the federal  
24 government, or their authorized representatives, information contained in  
25 income tax reports or returns or any audit thereof or the report of any  
26 investigation made with respect thereto, filed pursuant to the income tax  
27 laws, as the secretary may consider proper, but such information shall not  
28 be used for any other purpose than that of the administration of tax laws  
29 of such state, the state of Kansas or of the United States;

30 (10) communicate to the executive director of the Kansas lottery  
31 information as to whether a person, partnership or corporation is current  
32 in the filing of all applicable tax returns and in the payment of all taxes,  
33 interest and penalties to the state of Kansas, excluding items under formal  
34 appeal, for the purpose of determining whether such person, partnership  
35 or corporation is eligible to be selected as a lottery retailer;

36 (11) communicate to the executive director of the Kansas racing  
37 commission as to whether a person, partnership or corporation has failed  
38 to meet any tax obligation to the state of Kansas for the purpose of  
39 determining whether such person, partnership or corporation is eligible  
40 for a facility owner license or facility manager license pursuant to the  
41 Kansas parimutuel racing act;

42 (12) provide such information to the executive director of the  
43 Kansas public employees retirement system for the purpose of

1 determining that certain individuals' reported compensation is in  
2 compliance with the Kansas public employees retirement act at K.S.A.  
3 74-4901 et seq., and amendments thereto; and

4 (13) provide taxpayer information of persons suspected of violating  
5 *sections 1 through 12 or* K.S.A. 2010 Supp. 44-766, and amendments  
6 thereto, to the staff attorneys of the department of labor for the purpose of  
7 determining compliance by any person with the provisions of *sections 1*  
8 *through 12 or* K.S.A. 2010 Supp. 44-766, and amendments thereto, which  
9 information shall be limited to withholding tax and payroll information,  
10 the identity of any person that has been or is currently being audited or  
11 investigated in connection with the administration and enforcement of the  
12 withholding and declaration of estimated tax act, K.S.A. 79-3294 et seq.,  
13 as amended, and the results or status of such audit or investigation.

14 (d) Any person receiving information under the provisions of  
15 subsection (c) shall be subject to the confidentiality provisions of  
16 subsection (b) and to the penalty provisions of subsection (e).

17 (e) Any violation of subsection (b) or (c) is a class A nonperson  
18 misdemeanor and, if the offender is an officer or employee of the state,  
19 such officer or employee shall be dismissed from office.

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

26 Sec. 14. K.S.A. 2010 Supp. 79-3234 is hereby repealed.

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

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