

## **THE WORKPLACE FRAUD ACT (2009, with 2012 amendment)**

### **§ 3-901. Definitions**

**(a) In general.** -- In this subtitle the following words have the meanings indicated.

**(b) Construction services.** -- "Construction services" includes the following services provided in connection with real property:

- (1) building;
- (2) reconstructing;
- (3) improving;
- (4) enlarging;
- (5) painting;
- (6) altering;
- (7) maintaining; and
- (8) repairing.

**(c) Employer.** -- "Employer" means any person that employs an individual in the State.

**(d) Exempt person.** -- "Exempt person" means an individual who:

- (1) performs services in a personal capacity and employs no individuals other than:
  - (i) a spouse of the exempt person;
  - (ii) children of the exempt person; or
  - (iii) parents of the exempt person;
- (2) performs services free from direction and control over the means and manner of providing the services, subject only to the right of the person or entity for whom services are provided to specify the desired result;
- (3) furnishes the tools and equipment necessary to provide the service;
- (4) operates a business that is considered inseparable from the individual for purposes of taxes, profits, and liabilities:
  - (i) in which the individual:
    - 1. owns all of the assets and profits of the business; and
    - 2. has sole, unlimited, personal liability for all of the debts and liabilities of the business, unless the business is organized as a single-owned corporate entity, to which sole, unlimited personal liability does not apply; and
  - (ii) for which:
    - 1. the individual does not pay taxes for the business separately but reports business income and losses on the individual's personal tax return; and
    - 2. if the business is organized as a corporate entity and the individual otherwise qualifies as an exempt person under this subsection, the individual files a separate federal informational tax return for the entity as required by law;
- (5) exercises complete control over the management and operations of the business; and
- (6) exercises the right and opportunity on a continuing basis to perform the services of the business for multiple entities at the individual's sole choice and discretion.

**(e) Knowingly.** -- "Knowingly" means having actual knowledge, deliberate ignorance, or reckless disregard for the truth.

**(f) Landscaping services.** -- "Landscaping services" includes the following services:

- (1) garden maintenance and planting;
- (2) lawn care including fertilizing, mowing, mulching, seeding, and spraying;
- (3) seeding and mowing of highway strips;
- (4) sod laying;
- (5) turf installation, except artificial;
- (6) ornamental bush planting, pruning, bracing, spraying, and removal; and
- (7) ornamental tree planting, pruning, bracing, spraying, and removal.

**(g) Place of business.** --

- (1) "Place of business" means the office or headquarters of the employer.
- (2) "Place of business" does not include a work site at which the employer has been contracted to perform services.

**(h) Public body.** -- "Public body" means:

- (1) the State;
- (2) a unit of State government or an instrumentality of the State; or
- (3) any political subdivision, agency, person, or entity that is a party to a contract for which 50% or more of the money used is State money.

**§ 3-902. Scope**

This subtitle applies only to the following industries:

- (1) construction services; and
- (2) landscaping services.

**§ 3-903.1. Presumption that employer-employee relationship exists inapplicable in certain situations.**

The presumption that an employer-employee relationship exists under § 3-903(c)(1) of this subtitle **does not apply if:**

- (1) an employer produces for inspection by the Commissioner:
  - (i) a written contract, signed by the employer and business entity, that:
    - 1. describes the nature of the work to be performed by the business entity;
    - 2. describes the remuneration to be paid for the work performed by the business entity; and
    - 3. includes an acknowledgment by the business entity of the business entity's obligations under this article to:
      - A. withhold, report, and remit payroll taxes on behalf of all employees working for the business entity;
      - B. pay unemployment insurance taxes for all employees working for the business entity; and
      - C. maintain workers' compensation insurance;
  - (ii) an affidavit signed by the business entity indicating that the business entity is an independent contractor who is available to work for other business entities;
  - (iii) a current certificate of status of the business entity, issued by the State Department of Assessments and Taxation, indicating that the business entity is in good standing; and
  - (iv) proof that the business entity holds all occupational licenses required by State and local authorities for the work performed; and
- (2) the employer provided to each individual classified as an independent contractor or exempt person a written notice under § 3-914 of this subtitle.

#### **§ 3-904. Knowing failure to properly classify employee**

(a) **Prohibition.** -- An employer may not knowingly fail to properly classify an individual who performs work for remuneration paid by the employer.

(b) **What constitutes knowing failure to classify.** -- An employer has knowingly failed to properly classify an individual when:

(1) an employer-employee relationship exists as determined under § 3-903(c) of this subtitle; and

(2) the employer has knowingly failed to properly classify the individual as an employee.

(c) **Evidence.** -- The Commissioner shall consider, as strong evidence that the employer did not knowingly fail to properly classify an individual, whether:

(1) before a complaint was filed against the employer or the Commissioner began an investigation of the employer, the employer:

(i) sought and obtained evidence that the individual:

1. is an exempt person; or
2. as an independent contractor:

A. withholds, reports, and remits payroll taxes on behalf of all individuals working for the independent contractor;

B. pays unemployment insurance taxes for all individuals working for the independent contractor; and

C. maintains workers' compensation insurance; and

(ii) provided to the exempt person or independent contractor a written notice as required by § 3-914 of this subtitle; or

(2) the employer:

(i) 1. classifies all workers who perform the same or substantially the same tasks for the employer as independent contractors; and

2. reports the income of the workers to the Internal Revenue Service as required by federal law; and

(ii) has received a determination from the Internal Revenue Service that the individual or a worker who performs the same or substantially the same task as the individual is an independent contractor.

(d) **Regulations.** -- The Commissioner shall adopt regulations to provide guidance as to what constitutes the evidence relevant to the determination of whether an employer knowingly failed to properly classify an employee.

#### **§ 3-905. Investigation**

(a) **In general.** -- The Commissioner shall investigate as necessary to determine compliance with this subtitle and regulations adopted under this subtitle.

(b) **Confidentiality** of written or oral statement. --

(1) Any written or oral complaint or statement made by a person as part of an investigation under this section is confidential and may not be disclosed without the consent of the person until the investigation is concluded and a citation is issued.

(2) Any written or oral statement made by an individual alleged to be employed by the respondent as part of an investigation under this section is confidential and may not be disclosed without the consent of the individual.

(c) **Commissioner may enter place of business.** -- The Commissioner may enter a place of business or work site to:

- (1) observe work being performed;
- (2) interview individuals on the work site, including those identified as employees and independent contractors; and
- (3) review and copy records.

(d) **Production of records.** --

- (1) The Commissioner may require each employer to:
  - (i) subject to paragraph (2) of this subsection, identify and produce for copying or inspection all records relevant to the classification of each individual;
  - (ii) attest to the truthfulness of each record that is copied in accordance with subsection (c)(3) of this section or each copy of a record that is provided to the Commissioner under item (i) of this paragraph and to sign the copy; or
  - (iii) at the option of the employer, submit a written statement about the classification of each employee on the form provided by the Commissioner, with any relevant records attached.
- (2) An employer may comply with a requirement to produce records under paragraph (1)(i) of this subsection by producing copies of the records.

(e) **Fine for failure to produce records.** -- An employer that fails to produce records for copying or inspection or a written statement under subsection (d) of this section within 30 business days after the Commissioner's request, or an extension of time mutually agreed on by both parties, shall be subject to a fine not exceeding \$ 500 per day for each day the records are not produced.

(f) **Subpoena.** --

- (1) The Commissioner may issue a subpoena for testimony and the production of records.
- (2) If a person fails to comply with a subpoena issued under this subsection, the Commissioner may file a complaint in the circuit court for the county where the person resides, is employed, or has a place of business, requesting an order directing compliance with the subpoena.

## § 3-906. Citation

(a) **Issuance.** -- After the employer has provided all the records requested under § 3-905(d) of this subtitle, the Commissioner shall issue a citation to the employer or close the investigation within 90 days.

(b) **Contents.** -- Each citation shall:

- (1) describe in detail the nature of the alleged violation;
- (2) cite the provision of this subtitle or any regulation that the employer is alleged to have violated; and
- (3) state the civil penalty, if any, that the Commissioner proposes to assess.

(c) **Mailing to employer.** -- Within a reasonable time after issuance of a citation, the Commissioner shall send by certified mail to the employer:

- (1) a copy of the citation; and
- (2) notice of the opportunity to request a hearing.

(d) **Written request for hearing.** -- Within 15 days after an employer receives a notice under subsection (c) of this section, the employer may submit a written request for a hearing on the citation and proposed penalty.

(e) **Citation becomes final order if hearing not requested within time period.** -- If a hearing is not requested within 15 days, the citation, including any penalties, shall become a final order of the Commissioner.

**(f) Delegation of authority to hold hearing; time of hearing. --**

(1) If the employer requests a hearing, the Commissioner shall delegate to the Office of Administrative Hearings the authority to hold a hearing and issue findings of fact, conclusions of law, and an order, and assess a penalty under § 3-909 of this subtitle in accordance with Title 10, Subtitle 2 of the State Government Article.

(2) The employer is entitled to a hearing within 90 days after a timely request is made under this subsection, unless the employer waives that right.

**(g) Copies of all relevant evidence. --** Within 15 days after a request, in accordance with Title 10, Subtitle 6 of the State Government Article and the applicable regulations of the Department and the Office of Administrative Hearings, the Commissioner shall provide copies of all relevant evidence, including a list of potential witnesses, on which the Commissioner intends to rely at any administrative hearing under this subtitle.

**(h) Burden of proof. --** The Commissioner has the burden of proof to show that an employer has knowingly failed to properly classify an individual as an employee.

**(i) Final order. --** A decision of an administrative law judge issued in accordance with Title 10, Subtitle 2 of the State Government Article shall become a final order of the Commissioner.

**(j) Judicial review. --** Any party aggrieved by a final order of the Commissioner under subsection (i) of this section may seek judicial review and appeal under §§ 10-222 and 10-223 of the State Government Article.

**§ 3-907. Finding of violation and compliance**

**(a) Notice to other agencies. --** If, after investigation, the Commissioner determines that an employer failed to properly classify an individual as an employee in violation of § 3-903 of this subtitle, or knowingly failed to properly classify as an employee an employee in violation of § 3-904 of this subtitle, and issues a citation, the Commissioner shall notify the Comptroller, the Office of Unemployment Insurance, the Insurance Administration, and the Workers' Compensation Commission to enable these agencies to assure an employer's compliance with their laws, utilizing their own definitions, standards, and procedures.

**(b) Compliance requirements for violation of § 3-903. --**

(1) An employer found in violation of § 3-903 of this subtitle by a final order of a court or an administrative unit shall be required, within 45 days after the final order:

(i) to pay restitution to any individual not properly classified; and

(ii) to otherwise come into compliance with all applicable labor laws, including those related to income tax withholding, unemployment insurance, wage laws, and workers' compensation.

(2) The requirement for compliance with applicable labor laws under paragraph (1)(ii) of this subsection may include requiring the employer to enter into an agreement, within 45 days after the final order, with a governmental unit for payment of any amounts owed by the employer to the unit.

(3) The requirement for compliance with applicable labor laws under paragraph (1)(ii) of this subsection:

(i) may not require payments for more than a 12-month period; and

(ii) may not require payments due for a period before the 12-month period before the citation was issued.

**(c) Compliance requirements for violation of § 3-904. --** An employer found in violation of § 3-904 of this subtitle by a final order of a court or an administrative unit shall be required, within 45 days after the final order:

(1) to pay restitution to any individual not properly classified; and

(2) to otherwise come into compliance with all applicable labor laws, including those related to income tax withholding, unemployment insurance, wage laws, and workers' compensation.

### **§ 3-908. Civil penalty -- Violation of § 3-903**

(a) **No penalty for timely compliance.** -- An employer in violation of § 3-903 of this subtitle who comes into timely compliance with all applicable labor laws as required by § 3-907(b) of this subtitle may not be assessed a civil penalty.

(b) **Amount.** --

(1) An employer in violation of § 3-903 of this subtitle who fails to come into timely compliance with all applicable labor laws as required by § 3-907(b) of this subtitle shall be assessed a civil penalty of up to \$ 1,000 for each employee for whom the employer is not in compliance.

(2) In determining the amount of the penalty, the Commissioner shall consider the factors set forth in § 3-909(b) of this subtitle.

(c) **Number of final orders.** --

(1) An employer may be assessed civil penalties under this section by only one final order of a court or administrative unit for the same actions constituting noncompliance with applicable labor laws as required by § 3-907(b) and (c) of this subtitle.

(2) Notwithstanding paragraph (1) of this subsection, an employer may be ordered to make restitution, pay any interest due, and otherwise comply with all applicable laws and regulations by multiple final orders of a court and all relevant administrative units, including the Comptroller, the Office of Unemployment Insurance, the Insurance Administration, and the Workers' Compensation Commission.

(d) **Prospective effect of penalty.** -- Any penalty issued under this section against an employer shall be in effect against any successor corporation or business entity that:

- (1) has one or more of the same principals or officers as the employer against whom the penalty was assessed; and
- (2) is engaged in the same or equivalent trade or activity.

### **§ 3-909. Civil penalty -- Violation of § 3-904**

(a) **Amount.** -- An employer found to have knowingly failed to properly classify an individual in violation of § 3-904 of this subtitle shall be assessed a civil penalty of up to \$ 5,000 for each employee who was not properly classified.

(b) **Considerations.** -- In determining the amount of the penalty, the Commissioner or the administrative law judge shall consider:

- (1) the gravity of the violation;
- (2) the size of the employer's business;
- (3) the employer's good faith;
- (4) the employer's history of violations under this subtitle; and
- (5) whether the employer:

(i) has been found, by a court or an administrative unit, to have deprived the employee of any rights to which the employee would have been entitled under a State protective labor law, including but not limited to:

1. any provision of this article;
2. the State prevailing wage law, under §§ 17-221 and 17-222 of the

State Finance and Procurement Article; or

3. the living wage law, under § 18-108 of the State Finance and Procurement Article; and

(ii) has made restitution and come into compliance with all such State protective labor laws with respect to the employee.

(c) **Restitution.** -- If the court or an administrative unit determines that an individual or class of individuals is entitled to restitution as a result of the employer's violation of § 3-904 of this subtitle, the court or administrative unit:

- (1) shall award each individual any restitution to which the individual may be entitled; and
- (2) may award each individual an additional amount up to three times the amount of such restitution.

(d) **Double administrative penalties.** -- An employer in violation of § 3-904 of this subtitle may be assessed double the administrative penalties set forth in subsection (a) of this section if the employer has been found previously to have violated this subtitle by a final order of a court or an administrative unit.

(e) **Administrative penalty for three or more violations.** -- An employer who has been found by a final order of a court or an administrative unit to have violated § 3-904 of this subtitle three or more times may be assessed an administrative penalty of up to \$ 20,000 for each employee.

(f) **Number of final orders.** --

(1) An employer may be assessed civil penalties under this section or § 8-201.1 or § 9-402.1 of this article by only one final order of a court or administrative unit for the same actions constituting a violation of this subtitle.

(2) Notwithstanding paragraph (1) of this subsection, an employer may be ordered to make restitution, pay any interest due, and otherwise comply with all applicable laws and regulations by orders of a court and all relevant administrative units, including the Comptroller, the Office of Unemployment Insurance, the Insurance Administration, and the Workers' Compensation Commission.

(g) **Prospective effect of penalty.** -- Any penalty issued under this section against an employer shall be in effect against any successor corporation or business entity that:

(1) has one or more of the same principals or officers as the employer against whom the penalty was assessed, unless the principal or officer did not or with the exercise of reasonable diligence could not know of the violation for which the penalty was imposed; and

(2) is engaged in the same or equivalent trade or activity.

### § 3-910. Cooperation among various agencies

As authorized by State and federal law, units within the Department of Labor, Licensing, and Regulation and the Department of Budget and Management, the Secretary of State, the Comptroller, the Maryland Insurance Administration, and other State agencies shall cooperate and share information concerning any suspected failure to properly classify an individual as an employee.

### § 3-911. Civil action

(a) **In general.** --

(1) Except as provided in paragraph (2) of this subsection, an individual who has not been properly classified as an employee may bring a civil action for economic damages against the employer for any violation of this subtitle.

(2) An individual may not bring a civil action under this section if a final order of an administrative unit or of a court has been issued under § 3-906 of this subtitle.

(b) **Timing.** -- An action filed under this section shall be filed within 3 years after the date the cause of action accrues.

(c) **Relief.** -- If the court determines that an individual or class of individuals is entitled to judgment in an action against an employer filed in accordance with this section, the court may award each individual:

- (1) any damages to which the individual may be entitled under subsection (a) of this section;
- (2) an additional amount up to three times the amount of any such damages, if the employer knowingly failed to properly classify the individual;
- (3) reasonable counsel fees and other costs of the action; and
- (4) any other appropriate relief.

### **§ 3-912. Discriminatory action by employer**

(a) **Prohibition.** -- An employer may not discriminate in any manner or take adverse action against an individual because the individual:

- (1) files a complaint with the employer or the Commissioner alleging that the employer violated any provision of this subtitle or any regulation adopted under this subtitle;
- (2) brings an action under this subtitle or a proceeding involving a violation of this subtitle; or
- (3) testifies in an action authorized under this subtitle or a proceeding involving a violation of this subtitle.

(b) **Written complaint.** --

- (1) An individual who believes that an employer has discriminated in any manner or taken adverse action against the individual in violation of subsection (a) of this section may submit to the Commissioner a written complaint that alleges the discrimination and that includes the signature of the individual.
- (2) An individual shall file a complaint under this subsection within 180 days after the alleged discrimination occurs.

(c) **Investigation; opportunity to respond; injunction of violation; notice of determination.** --

- (1) On receipt of a complaint under subsection (c) of this section, the Commissioner may investigate.
- (2) The Commissioner shall provide the employer with an opportunity to respond to the allegations in the complaint.
- (3) If, after investigation and consideration of any response from the employer, the Commissioner determines that an employer or other person has violated subsection (a) of this section, the Commissioner shall file a complaint to enjoin the violation, to reinstate the employee to the former position with back pay, and to award any other appropriate damages or other relief in the circuit court for:
  - (i) the county in which the alleged violation occurred;
  - (ii) the county in which the employer has its principal office; or
  - (iii) Baltimore City.

(4) Within 120 days after the Commissioner receives a complaint, the Commissioner shall notify the employee of the determination under this subsection.

### **§ 3-913. Violation by employer engaged in contract work with public body**

(a) **Notice of citation to public body.** -- Where, after investigation, the Commissioner issues a citation for a knowing violation of this subtitle or regulations adopted under this subtitle by an employer engaged in work on a contract with a public body, the Commissioner shall promptly notify the public body.

(b) **Withholding of payment.** --

(1) On notification, the public body shall withhold from payment due the employer an amount that is sufficient to:

(i) pay restitution to each employee for the full amount of wages due; and  
(ii) pay any benefits, taxes, or other contributions that are required by law to be paid on behalf of the employee.

(2) The public body shall release:

- (i) on issuance of a favorable final order of a court or an administrative unit, the full amount of the withheld funds; and
- (ii) on an adverse final order of a court or an administrative unit, the balance of the withheld funds after all obligations are satisfied under paragraph (1) of this subsection.

#### **§ 3-914. Records; notice to independent contractor or exempt person**

(a) **Records.** -- An employer shall keep, for at least 3 years, in or about its place of business, records of the employer containing the following information:

- (1) the name, address, occupation, and classification of each employee or independent contractor;
- (2) the rate of pay of each employee or method of payment for the independent contractor;
- (3) the amount that is paid each pay period to each employee or, if applicable, independent contractor;
- (4) the hours that each employee or independent contractor works each day and each workweek;
- (5) for all individuals who are not classified as employees, evidence that each individual is an exempt person or an independent contractor or its employee; and
- (6) other information that the Commissioner requires, by regulation, as necessary to enforce this subtitle.

(b) **Notice to independent contractor or exempt person.** -- An employer shall provide each individual classified as an independent contractor or exempt person with written notice of the classification of the individual at the time the individual is hired.

(c) **Contents of notice.** -- The written notice shall:

- (1) include an explanation of the implications of the individual's classification as an independent contractor or exempt person rather than as an employee; and
- (2) be provided in English and Spanish.

(d) **Regulations regarding notice.** -- The Commissioner shall adopt regulations establishing the specific requirements for the contents and form of the notice.

#### **§ 3-915. Prohibited activities for the purpose of violating this subtitle**

(a) **Knowing incorporation or formation.** -- A person may not knowingly incorporate or form, or assist in the incorporation or formation of, a corporation, partnership, limited liability corporation, or other entity, or pay or collect a fee for use of a foreign or domestic corporation, partnership, limited liability corporation, or other entity for the purpose of facilitating, or evading detection of, a violation of this subtitle.

(b) **Knowing conspiracy.** -- A person may not knowingly conspire with, aid and abet, assist, advise, or facilitate an employer with the intent of violating this subtitle.

**(c) Civil penalty; exception. --**

(1) Except as provided in paragraph (2) of this subsection, a person that violates this section shall be subject to a civil penalty not exceeding \$ 20,000.

(2) A person that violates this section may not be subject to a civil penalty under this section if the person:

- (i) holds a professional license as a lawyer or a certified public accountant; and
- (ii) was performing an activity in the ordinary course of that person's license when the violation occurred.

(3) If the person is exempt from sanction under paragraph (2) of this subsection, the Commissioner shall promptly refer the person for investigation and possible sanction to the unit of State government that has regulatory jurisdiction over the business activities of that person.

**(d) Procedures set forth in §§ 3-905 and 3-906 applicable. --** The procedures governing investigations, citations, and administrative and judicial review of an alleged violation under this section shall be the same as those set forth in §§ 3-905 and 3-906 of this subtitle.

**(e) One final order. --** A person may be assessed civil penalties under this section by only one final order of a court or administrative unit for the same actions constituting the violation.

**§ 3-916. Groundless or malicious complaint and bad faith actions; administrative penalty; attorneys' fees**

**(a) Groundless or malicious complaint and bad faith actions prohibited. --** A person may not:

- (1) make or cause to be made a groundless or malicious complaint to the Commissioner or an authorized representative of the Commissioner;
- (2) in bad faith, bring an action under this subtitle or a proceeding related to the subject of this subtitle; or
- (3) in bad faith, testify in an action under this subtitle or a proceeding related to the subject of this subtitle.

**(b) Investigation. --** The Commissioner shall investigate any allegations that a person has violated any provision of this section.

**(c) Administrative penalty; notice and hearing; disclosure of complainant. --**

(1) If the Commissioner determines that a person has violated any provision of this section, that person may be subject to an administrative penalty of up to \$ 1,000, assessed by the Commissioner.

(2) A sanction under paragraph (1) of this subsection shall be subject to the notice and hearing requirements of § 3-906 of this subtitle.

(3) If the person found in violation of this section is a person alleged to be employed by the respondent, the Commissioner shall disclose the identity of the complainant.

**(d) Attorneys' fees. --** Any person who must defend an action taken as a result of a groundless or malicious complaint may be entitled to recover attorneys' fees.

**§ 3-917. Regulations**

The Commissioner shall adopt regulations to carry out this subtitle.

**§ 3-918. Payment of civil penalty into General Fund**

Each civil penalty under this subtitle shall be paid into the General Fund of the State.

### **§ 3-919. Budget and costs**

(a) **Appropriation from Workers' Compensation Commission.** -- The proposed budget of the Division of Labor and Industry shall include an appropriation from the Workers' Compensation Commission to cover the cost of administering this subtitle.

(b) **Administration costs.** -- The Workers' Compensation Commission shall pay the cost of administering this subtitle from money that the Commission receives under § 9-316 of this article.

### **§ 3-920. Annual report**

(a) **In general.** -- The Commissioner shall prepare an annual report for the Secretary on the administration and enforcement of this subtitle, that shall include:

- (1) the number and nature of complaints received;
- (2) the number of investigations conducted;
- (3) the number of citations issued;
- (4) the number of informal resolutions of the citations;
- (5) the number of final administrative orders, with a description, that shall include:
  - (i) whether the alleged violation was found; and
  - (ii) whether the order affirmed or overturned a proposed decision of the Office of Administrative Hearings;
- (6) the number of orders of the Commissioner reviewed by the Secretary and whether they were affirmed or overturned; and
- (7) the number of requests for judicial review of administrative orders and whether the orders were affirmed or overturned.

(b) **Public record.** -- The Commissioner's report shall be a public record.