

SUBJECT: Creating penalties for employee misclassification of construction workers

COMMITTEE: Business and Industry — committee substitute recommended

VOTE: 6 ayes — C. Turner, Crockett, Lambert, Ordaz Perez, Shine, S. Thompson
3 nays — Hefner, Cain, Patterson

WITNESSES: For — Gary Warren, Central South Carpenters Regional Council; Stephanie Gharakhanian, Workers Defense Action Fund; (*Registered, but did not testify*: Jonathan Lewis, Every Texan; CJ Tredway, IEC of Texas; Elizabeth Colvin, RAISE Texas; Mario A. Martinez, Regional Hispanic Contractors Association; Rene Lara, Texas AFL-CIO; Ann Baddour, Texas Appleseed; Ashley Harris, United Ways of Texas)

Against — None

On — Ned Muñoz, Texas Association of Builders; Chris Oakley, Texas Workforce Commission

BACKGROUND: Some have expressed concerns about employee misclassification within the construction industry in Texas. Some suggest explicitly providing for the classification of construction workers and eligibility of those workers for unemployment benefits in statute.

DIGEST: CSHB 3656 would require contractors to classify each individual providing construction services as an employee or independent contractor and would create penalties for contractors who did not properly classify the employee status of workers.

Employee status. The bill would require a contractor to properly classify each individual providing construction services as either an employee or an independent contractor in accordance with Texas Workforce Commission (TWC) rules.

The bill would exclude construction performed by an individual as an

independent contractor from the term "employment" for purposes of the Texas Unemployment Compensation Act.

Construction defined. The bill would define "construction" as work related to the erection, improvement, alteration, repair, renovation, maintenance, or remodeling of a building, structure, appurtenance, road, highway, bridge, dam, levee, canal, jetty, or other improvement to or on real property, including moving, demolishing, dredging, shoring, scaffolding, drilling, blasting, and excavating real property.

Applicability. An individual could not be considered an employee based solely on the fact that the person for whom the individual was providing construction services required that any employee had to submit to a criminal background check or preemployment drug screening or possess a certain license or certification.

A person for whom an individual was providing construction services would not be required to report to TWC that the individual was an employee if the person showed that the individual was an independent contractor, provided them an Internal Revenue Service (IRS) 1099 form, and filed the form with the IRS.

The bill would not apply to services performed by an individual in the employ of a state, political subdivision, Indian tribe, or instrumentality of such, or a religious, charitable, educational, or other organization, provided that the services were excluded from employment as defined by federal law.

Reporting complaints online. TWC would have to provide on its website information regarding the procedure for the public to report violations of CSHB 3656.

Penalties. TWC could impose an administrative penalty on a contractor who violated the provisions of the bill in an amount that could not exceed:

- \$100 for each individual who was not properly classified; and

- \$1,000 for each individual who was not properly classified for each subsequent violation.

A penalty would apply to a successor business entity that had one or more owners who jointly controlled at least 50 percent of the original employer and successor business entity and was engaged in the same or similar business activity.

A penalty would have to be imposed in the same manner as TWC imposes other administrative penalties.

Notification. If TWC determined that a contractor had violated the provisions of the bill, TWC would have to provide notice to each governmental entity that TWC reasonably believed had received construction services by the contractor. The notice would have to identify the contractor and specify the type of service provided and the location, if known.

Annual report. TWC would have to issue an annual report regarding compliance with and enforcement of the provisions of the bill. The report would have to include:

- the number of complaints received from the public;
- the number of investigated complaints and any findings; and
- the amount of unemployment taxes, interest, administrative penalties, and fines actually collected as a result of violations of this bill or the exclusion of construction performed by an individual from the Texas Unemployment Compensation Act.

The bill would take effect September 1, 2021, and would apply only to a claim for unemployment compensation benefits filed on or after that date.