

Senate Bill 393

By: Senators Jackson of the 2nd, Henson of the 41st, Tate of the 38th, Harbison of the 15th, Rhett of the 33rd and others

A BILL TO BE ENTITLED
AN ACT

1 To amend Chapter 8 of Title 34 of the Official Code of Georgia Annotated, relating to
2 employment security, so as to change the definition of employment in order to provide that
3 services performed by an individual for wages shall be deemed to be employment unless the
4 Department of Labor makes a contrary determination based upon evidence submitted of
5 certain factors demonstrating that such individual has been, and will continue to be, free from
6 control or direction over the performance of such services; to repeal and reserve paragraph
7 (17) of subsection (n) of Code Section 34-8-35 of the Official Code of Georgia Annotated,
8 relating to the definition of employment applicable to the "Employment Security Law," so
9 as to remove the exemption for certain services performed for common carriers; to prohibit
10 retaliation by employers against individuals who report violations of or noncompliance with
11 the "Employment Security Law"; to provide for a civil cause of action for retaliation by
12 employers; to provide that the Department of Labor shall maintain a web based system for
13 notifying the department of employment that is improperly reported; to provide for
14 investigation of reports of misclassification; to provide for related matters; to repeal
15 conflicting laws; and for other purposes.

16 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

17 **SECTION 1.**

18 Chapter 8 of Title 34 of the Official Code of Georgia Annotated, relating to employment
19 security, is amended in Code Section 34-8-35, relating to the definition of employment
20 applicable to the "Employment Security Law," by revising subsection (f) as follows:

21 "(f) Services performed by an individual for wages shall be deemed to be employment
22 subject to this chapter unless and until it is shown that:

23 (1)(A) Such individual has been, and will continue to be, free from control or direction
24 over the performance of such services, both under the individual's contract of service
25 and in fact, as demonstrated by evidence timely submitted to the department. The
26 department shall make a determination based upon such evidence, and in so doing, the
27 department shall consider whether the individual:

- 28 (i) Is not prohibited from working for other companies or holding other employment
 29 contemporaneously;
 30 (ii) Is free to accept or reject work assignments without consequence;
 31 (iii) Is not prescribed minimum hours to work or, in the case of sales, does not have
 32 a minimum number of orders to be obtained;
 33 (iv) Has the discretion to set his or her own work schedule;
 34 (v) Receives only minimal instructions and no direct oversight or supervision
 35 regarding the services to be performed, such as the location where the services are to
 36 be performed and any requested deadlines;
 37 (vi) When applicable, has no territorial or geographic restrictions; and
 38 (vii) Is not required to perform, behave, or act or, alternatively, is compelled to
 39 perform, behave, or act in a manner related to the performance of services for wages
 40 which is determined by the Commissioner to demonstrate employment, in accordance
 41 with this Code section and such rules and regulations as the Commissioner may
 42 prescribe.
 43 The department's determination shall be based upon the totality of the circumstances
 44 described in divisions (i) through (vii) of this subparagraph. The department may give
 45 such weight to any one or more of such circumstances as the department deems
 46 appropriate; and
 47 (B) Such individual is customarily engaged in an independently established trade,
 48 occupation, profession, or business; or
 49 (2) Such individual and the services performed for wages are the subject of an SS-8
 50 determination by the Internal Revenue Service, which decided against employee status."

51 **SECTION 2.**

52 Said chapter is further amended by repealing and reserving paragraph (17) of subsection (n)
 53 of Code Section 34-8-35, relating to the definition of employment applicable to the
 54 "Employment Security Law," as follows:

55 "(n) The term 'employment' shall not include:

- 56 (1) Service not in the course of the employer's trade or business performed in any
 57 calendar quarter by an employee, unless the cash remuneration paid for such service is
 58 \$50.00 or more and such service is performed by an individual who is regularly employed
 59 by such employer to perform such service. For the purposes of this paragraph, an
 60 individual shall be deemed to be regularly employed by an employer during a calendar
 61 quarter only if:

62 (A) On each of some 24 days during such quarter such individual performs for such
63 employer for some portion of the day service not in the course of the employer's trade
64 or business; or

65 (B) Such individual was regularly employed, as determined under subparagraph (A)
66 of this paragraph, by such employer in the performance of such service during the
67 preceding calendar quarter;

68 (2) Service performed in the employ of a hospital, if such service is performed by a
69 patient of a hospital;

70 (3) Service performed by an individual in the employ of the individual's son, daughter,
71 or spouse and service performed by a child under the age of 21 years in the employ of his
72 or her father or mother;

73 (4) Service performed in the employ of the United States government or of an
74 instrumentality wholly owned by the United States; except that, if the Congress of the
75 United States shall permit states to require any instrumentalities of the United States to
76 make payments into an unemployment fund under a state unemployment compensation
77 law or act, then, to the extent permitted by Congress and from and after the date as of
78 which such permission becomes effective, all of the provisions of this chapter shall be
79 applicable to such instrumentalities and to services performed by employees for such
80 instrumentalities in the same manner, to the same extent, and on the same terms as to all
81 other employers and employing units;

82 (5) Service performed in the employ of an employer, as defined by the federal Railroad
83 Unemployment Insurance Act, or as an 'employee representative,' as defined by the
84 federal Railroad Unemployment Insurance Act, and service with respect to which
85 unemployment compensation is payable under an unemployment compensation system
86 for maritime employees or under any other unemployment compensation system
87 established by an act of Congress; provided, however, that the Commissioner is
88 authorized and directed to enter into agreements with the proper agencies under such act
89 or acts of Congress, which agreements shall become effective ten days after publication
90 thereof in the manner provided in Code Section 34-8-71 for general rules, to provide
91 reciprocal treatment to individuals who have, after acquiring potential rights to benefits
92 under this chapter, acquired rights to unemployment compensation under such act or acts
93 of Congress or who have, after acquiring potential rights to unemployment compensation
94 under such act or acts of Congress, acquired rights to benefits under this chapter;

95 (6) Service performed in any calendar quarter in the employ of any organization exempt
96 from income tax under 26 U.S.C. Section 501:

97 (A) The remuneration for which does not exceed \$50.00; or

98 (B) In the employ of a school, college, or university, if such service is performed by
99 a student who is enrolled and is regularly attending classes at such school, college, or
100 university or by the spouse of such a student, if such spouse is advised, at the time such
101 spouse commences to perform such service, that (i) the employment of such spouse to
102 perform such service is provided under a program to provide financial assistance to
103 such student by such school, college, or university and (ii) such employment will not
104 be covered by any program of unemployment insurance;

105 (7) Services performed as a student nurse in the employ of a hospital or a nurses' training
106 school by an individual who is enrolled and is regularly attending classes in a nurses'
107 training school chartered or approved pursuant to state law; and service performed in the
108 employ of a hospital in a clinical training program for a period of one year by an
109 individual immediately following the completion of a four-year course in a medical
110 school chartered or approved pursuant to state law;

111 (8) Service performed by an individual under the age of 18 years in the delivery or
112 distribution of newspapers or shopping news, not including delivery or distribution to any
113 point for subsequent delivery or distribution;

114 (9) Service performed by an individual for an employer as an insurance agent or as an
115 insurance solicitor or as a licensed real estate salesperson, if all such service performed
116 by such individual for such employer is performed for remuneration solely by way of
117 commission;

118 (10) Services performed for an employer who is a common carrier of persons or property
119 by an individual, firm, or corporation, as commission agent, in disseminating information
120 with respect to and selling transportation of persons or property, and in maintaining
121 facilities incidental thereto, including waiting areas, dining rooms, and rest rooms for
122 passengers and storage space for property; provided, however, that:

123 (A) All such services are performed by such individual, firm, or corporation as an
124 independent contractor for such employer and are remunerated solely by way of
125 commissions on the sale price of such transportation;

126 (B) The employer exercises no general control over such commission agent but only
127 such control as is necessary to assure compliance with its filed tariffs and with the laws
128 of the United States and the State of Georgia and the rules and regulations of the
129 Department of Public Safety, the Federal Motor Carrier Safety Administration, and all
130 other regulatory bodies having jurisdiction of the premises; and

131 (C) Such services are not rendered in an establishment devoted primarily to use as a
132 waiting room for the passengers or as a storage room for the property carried or to be
133 carried by such common carrier;

134 (11) Service performed by an individual who is enrolled as a student at a nonprofit or
135 public educational institution which normally maintains a regular faculty and curriculum
136 and normally has a regularly organized body of students in attendance at the place where
137 its educational activities are carried on, in a full-time program taken for credit at such
138 institution, which program combines academic instruction with work experience, if such
139 service is an integral part of such program and such institution has so certified to the
140 employer, except that this paragraph shall not apply to service performed in a program
141 established for or on behalf of an employer or group of employers;

142 (12) Service performed by an individual in or as an officer or member of the crew of a
143 vessel while it is engaged in the catching, taking, harvesting, cultivating, or farming of
144 any kind of fish, shellfish, crustacea, sponges, seaweed, or other aquatic forms of animal
145 and vegetable life, including service performed by any such individual as an ordinary
146 incident to any such activity, except:

147 (A) Service performed in connection with the catching or taking of salmon or halibut
148 for commercial purposes; and

149 (B) Service performed on or in connection with a vessel of more than ten net tons,
150 which tonnage shall be determined in the manner provided for determining the
151 registered tonnage of merchant vessels under the laws of the United States;

152 (13) Service, other than service performed by a child under the age of 18 years in the
153 employ of his or her father or mother, performed by an individual on a boat engaged in
154 catching fish or other forms of aquatic animal life under an arrangement with the owner
155 or operator of such boat pursuant to which:

156 (A) Such individual does not receive any cash remuneration other than as provided in
157 subparagraph (B) of this paragraph;

158 (B) Such individual receives a share of the boat's catch or, in the case of a fishing
159 operation involving more than one boat, the boats' catch of fish or other forms of
160 aquatic animal life or a share of the proceeds from the sale of such catch; and

161 (C) The amount of such individual's share depends on the amount of the boat's catch
162 or, in the case of a fishing operation involving more than one boat, the boats' catch of
163 fish or other forms of aquatic animal life,

164 but only if the operating crew of such boat or, in the case of a fishing operation involving
165 more than one boat, the operating crew of each boat from which the individual receives
166 a share is normally made up of fewer than ten individuals;

167 (14) Service performed in the employ of a foreign government;

168 (15) If the services performed during one-half or more of any pay period by an employee
169 for the employing unit employing him or her constitute employment, all the services of
170 such employee for such period shall be deemed to be employment; but, if the services

171 performed during more than one-half of any such pay period by an employee for the
 172 employing unit employing him or her do not constitute employment, then none of the
 173 services of such employee for such period shall be deemed to be employment. As used
 174 in this Code section, the term 'pay period' means a period of not more than 31 consecutive
 175 days for which payment of remuneration is ordinarily made to the employee by the
 176 employing unit employing him or her. This Code section shall not be applicable with
 177 respect to services performed in a pay period by an employee for the employing unit
 178 employing him or her where any of such service is excepted by paragraph (5) of this
 179 subsection;

180 (16) Services performed by an independent contract carrier for an employer who is a
 181 publisher or distributor of printed materials by an individual, firm, or corporation in
 182 transporting, assembling, delivering, or distributing printed materials and in maintaining
 183 any facilities or equipment incidental thereto, provided that:

184 (A) The independent contract carrier has with the employer a written contract as an
 185 independent contractor;

186 (B) Remuneration for the independent contract carrier is on the basis of the number of
 187 deliveries accomplished;

188 (C) With exception to providing the area or route which an independent contract carrier
 189 may or may not service, or providing materials or direction for the packaging or
 190 assembly of printed materials, the employer exercises no general control regarding the
 191 method of transporting, assembling, delivering, or distributing the printed materials;
 192 and

193 (D) The contract entered by the independent contract carrier for such services does not
 194 prohibit it from the transportation, delivery, assembly, or distribution of printed
 195 materials for more than one employer.

196 Provided, however, that the exclusion provided in this paragraph shall not apply to any
 197 such employment on behalf of an employing unit defined in subsection (h) or (i) of this
 198 Code section;

199 ~~(17) Services performed for a common carrier of property, persons, or property and~~
 200 ~~persons by an individual consisting of the pickup, transportation, and delivery of~~
 201 ~~property, persons, or property and persons; provided that:~~

202 ~~(A) The individual is free to accept or reject assignments from the common carrier;~~

203 ~~(B) Remuneration for the individual is on the basis of commissions, trips, or deliveries~~
 204 ~~accomplished;~~

205 ~~(C) Such individual personally provides the vehicle used in the pickup, transportation,~~
 206 ~~and delivery of the property, persons, or property and persons;~~

207 ~~(D) Such individual has a written contract with the common carrier;~~

- 208 ~~(E) The written contract states expressly and prominently that the individual knows:~~
 209 ~~(i) Of the responsibility to pay estimated social security taxes and state and federal~~
 210 ~~income taxes;~~
 211 ~~(ii) That the social security tax the individual must pay is higher than the social~~
 212 ~~security tax the individual would pay if he or she were an employee; and~~
 213 ~~(iii) That the work is not covered by the unemployment compensation laws of~~
 214 ~~Georgia; and~~
 215 ~~(F) The written contract does not prohibit such individual from the pickup,~~
 216 ~~transportation, or delivery of property, persons, or property and persons for more than~~
 217 ~~one common carrier or any other person or entity; or Reserved; or~~
 218 (18) Services performed by a direct seller, provided that:
 219 (A) Such individual:
 220 (i) Is engaged in the trade or business of selling or soliciting the sale of consumer
 221 products, including services or other intangibles, to any buyer on a buy-sell basis, a
 222 deposit-commission basis, or any similar basis for resale by the buyer or any other
 223 person in the home or otherwise than in a permanent retail establishment; or
 224 (ii) Is engaged in the trade or business of selling or soliciting the sale of consumer
 225 products, including services or other intangibles, in the home or otherwise than in a
 226 permanent retail establishment;
 227 (B) Substantially all the remuneration, whether or not paid in cash, for the performance
 228 of the services described in subparagraph (A) of this paragraph is directly related to
 229 sales or other output, including the performance of services, rather than to the number
 230 of hours worked; and
 231 (C) The services performed by the individual are performed pursuant to a written
 232 contract between such individual and the person for whom the services are performed
 233 and such contract provides that the individual will not be treated as an employee for
 234 federal and state tax purposes."

235 **SECTION 3.**

236 Said chapter is further amended by adding two new Code sections to read as follows:

237 "34-8-257.

- 238 (a) For purposes of this Code section, the term 'retaliate' or 'retaliation' refers to the
 239 discharge, suspension, or demotion by an employer of an individual or any other adverse
 240 action taken by an employer against an individual in the terms or conditions of employment
 241 or in the terms or conditions of the individual's contract of service.
 242 (b) No employer shall retaliate against an individual for reporting a violation of or
 243 noncompliance with this chapter or any rule or regulation of the department or for

244 objecting to, or refusing to participate in, any activity, policy, or practice such individual
245 has reasonable cause to believe is in violation of or noncompliant with this chapter or any
246 rule or regulation of the department.

247 (c)(1) An individual who has been the object of retaliation in violation of this Code
248 section may institute a civil action in superior court for relief as set forth in paragraph (2)
249 of this subsection within one year after discovering the retaliation or within three years
250 after the retaliation, whichever is earlier.

251 (2) In any action brought pursuant to this subsection, the court may order any or all of
252 the following relief:

253 (A) An injunction restraining continued violation of this Code section;

254 (B) Reinstatement of the individual to the same position held with the employer before
255 the retaliation or to an equivalent position;

256 (C) Reinstatement of full fringe benefits and seniority rights;

257 (D) Compensation for lost wages, benefits, and other remuneration;

258 (E) Any other compensatory damages allowable at law;

259 (F) Where it is proven that the violation was willful, treble damages and punitive
260 damages; and

261 (G) Reasonable attorney's fees, court costs, and expenses.

262 34-8-258.

263 The department shall create a web based reporting system by which instances of
264 improperly reported employment may be submitted to the department. The department
265 shall investigate each credible report."

266 **SECTION 4.**

267 All laws and parts of laws in conflict with this Act are repealed.