

The House Committee on Industry and Labor offers the following substitute to HB 389:

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 to include services  
3 performed by an individual for wages unless the Department of Labor makes a contrary  
4 determination based upon evidence that such individual has been, and will continue to be,  
5 free from control or direction over the performance of such services; to provide for civil  
6 penalties; to provide for related matters; to repeal conflicting laws; and for other purposes.

7 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

8 **SECTION 1.**

9 Chapter 8 of Title 34 of the Official Code of Georgia Annotated, relating to employment  
10 security, is amended in Code Section 34-8-35, relating to the definition of employment  
11 applicable to the "Employment Security Law," by revising subsection (f) and adding a new  
12 subsection to read as follows:

13 "(f) Except as otherwise provided in this Code section, services ~~Services~~ performed by an  
14 individual for wages shall be deemed to be employment subject to this chapter unless and  
15 until it is shown that:

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

21 (i) Is not prohibited from working for other companies or holding other employment  
22 contemporaneously;

23 (ii) Is free to accept or reject work assignments without consequence;

24 (iii) Is not prescribed minimum hours to work or, in the case of sales, does not have  
25 a minimum number of orders to be obtained;

26 (iv) Has the discretion to set his or her own work schedule;

27 (v) Receives only minimal instructions and no direct oversight or supervision  
28 regarding the services to be performed, such as the location where the services are to  
29 be performed and any requested deadlines;

30 (vi) When applicable, has no territorial or geographic restrictions; and

31 (vii) Is not required to perform, behave, or act or, alternatively, is compelled to  
32 perform, behave, or act in a manner related to the performance of services for wages  
33 which is determined by the Commissioner to demonstrate employment, in accordance  
34 with this Code section and such rules and regulations as the Commissioner may  
35 prescribe.

36 The department's determination shall be based upon the totality of the circumstances  
37 described in divisions (i) through (vii) of this subparagraph. The department may give  
38 such weight to any one or more of such circumstances as the department deems  
39 appropriate; and

40 (B) Such individual is customarily engaged in an independently established trade,  
41 occupation, profession, or business; or

42 (2) Such individual and the services performed for wages are the subject of an SS-8  
43 determination by the Internal Revenue Service, which decided against employee status."  
44 "(o) This Code section shall not apply to Chapter 9 of this title."

45 **SECTION 2.**

46 Said chapter is further amended by adding a new Code section to read as follows:

47 "34-8-257.

48 (a) Notwithstanding any other provision of law and in addition to any other penalties,  
49 finer, or offenses prescribed under this chapter, an employing unit that fails to properly  
50 classify an individual as required by subsection (f) of Code Section 34-8-35 shall pay to  
51 the Commissioner a civil penalty. For employing units with less than 100 employees, as  
52 determined by the Commissioner, the civil penalty shall be in an amount not to exceed  
53 \$2,500.00 for each individual that such employer has not properly classified. For  
54 employing units with 100 or more employees, as determined by the Commissioner, the  
55 civil penalty shall be in an amount not to exceed \$7,500.00 for each individual that such  
56 employer has not properly classified. In determining the amount of the civil penalty to be  
57 imposed, the Commissioner shall consider such factors as the number of individuals not  
58 properly classified and the frequency of improper classifications by such employing unit.

59 (b) The Commissioner shall be authorized to deposit all funds received pursuant to  
60 subsection (a) of this Code section into the general fund of the state treasury in compliance  
61 with Part 1 of Article 4 of Chapter 12 of Title 45, the 'Budget Act.' It is the intention of the  
62 General Assembly, subject to the appropriations process, that an amount equal to the  
63 amount deposited into the general fund of the state treasury as provided in this subsection  
64 be appropriated each year to the department for the purpose of enforcing subsection (f) of  
65 Code Section 34-8-35.

66 (c) The department may assess the employing unit found to be in violation of  
67 subsection (f) of Code Section 34-8-35:

- 68 (1) An amount sufficient to cover the reasonable expense of investigation conducted by  
69 the department; and
- 70 (2) Interest at the rate of 1 percent per month on any delinquent fine or assessment until  
71 such fine or assessment has been paid. Such interest shall commence on the day the fine  
72 or assessment becomes delinquent.
- 73 (d) The Commissioner may waive any penalty, fine, or assessment provided for in this  
74 Code section."

75 **SECTION 3.**

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