



126th MAINE LEGISLATURE

FIRST REGULAR SESSION-2013

Legislative Document

No. 418

H.P. 290

House of Representatives, February 14, 2013

An Act To Enforce Wage Laws by Preventing Misclassification of Employees

Reference to the Committee on Labor, Commerce, Research and Economic Development suggested and ordered printed.

Millicent M. MacFarland
MILLICENT M. MacFARLAND
Clerk

Presented by Representative RUSSELL of Portland.
Cosponsored by Representatives: GILBERT of Jay, GOODE of Bangor.

1 **Be it enacted by the People of the State of Maine as follows:**

2 **Sec. 1. 26 MRSA §620** is enacted to read:

3 **§620. Definitions**

4 As used in this subchapter, unless the context otherwise indicates, the following
5 terms have the following meanings.

6 **1. Employee.** "Employee" means an individual who is employed in this State by an
7 employer, including an individual who is in receipt of or is entitled to any compensation
8 for labor performed for an employer. "Employee" also includes a commission salesperson
9 who takes orders from or performs services on behalf of a principal and who is paid on
10 the basis of commissions, but does not include individuals who purchase for their own
11 account for resale. "Employee" does not include an independent contractor.

12 **2. Employer.** "Employer" means an individual, firm, corporation, agent, manager,
13 representative, contractor, subcontractor or principal or a person acting directly or
14 indirectly in the interest of an employer to permit an employee to work.

15 **3. Independent contractor.** "Independent contractor" means an individual who:

16 A. Provides services free from direction and control over the means and manner of
17 providing the services, subject only to the right of the person or entity for whom
18 services are provided to specify the desired result, and furnishes the tools and
19 equipment necessary to provide the services;

20 B. Operates a business that is considered inseparable from the individual for
21 purposes of taxes, profits and liabilities:

22 (1) In which the individual:

23 (a) Owns all of the assets and profits of the business; and

24 (b) Has sole, unlimited personal liability for all of the debts and liabilities of
25 the business, unless the business is organized as a corporate entity to which
26 sole, unlimited personal liability does not apply; and

27 (2) For which:

28 (a) The individual does not pay taxes separately but reports business income
29 and losses on the individual's personal tax return; and

30 (b) If the business is organized as a corporate entity and the individual
31 otherwise qualifies as an independent contractor under this subsection, the
32 individual files a separate federal informational tax return as required by law;
33 and

34 C. Exercises complete control over the management and operations of the business
35 under paragraph B and exercises the right and opportunity on a continuing basis to
36 perform the services of the business for multiple entities at the individual's sole
37 choice and discretion.

1 **Sec. 2. 26 MRSA §621-A, sub-§5**, as amended by PL 2005, c. 103, §1, is further
2 amended to read:

3 **5. Change in rate of pay.** Notwithstanding the provision of section 623 exempting
4 salaried employees as defined in section 663, subsection 3, paragraph K, payment of
5 wages or salary must be made at the rate previously established by the employer, except
6 that the employer may decrease the rate of pay, effective the next ~~working-day~~ pay
7 period, if the employer gives notice to all affected employees one pay period prior to the
8 change. When an employer has temporarily increased an employee's wage rate to comply
9 with the prevailing wage requirements of chapter 15; the federal Davis-Bacon Act, 40
10 United States Code, Section 276a et seq.; or other applicable federal or state law, an
11 employer need not provide advance notice prior to returning the employee to the
12 employee's regular wage rate, as long as the employer is in compliance with all posting
13 and notice provisions of the applicable law. Changes of rates of pay made under a
14 collective bargaining agreement are exempt from this requirement. All notices must be
15 either given to each employee in writing or posted at a place where employee notices are
16 routinely posted.

17 **Sec. 3. 26 MRSA §621-A, sub-§7** is enacted to read:

18 **7. Notification.** An employer shall notify its employees in writing at the time of
19 hiring of the wages and regular paydays that are designated by the employer.

20 **Sec. 4. 26 MRSA §622**, as repealed and replaced by PL 1999, c. 465, §3, is
21 repealed and the following enacted in its place:

22 **§622. Notification; records**

23 **1. Notification.** An employer shall make available to its employees, upon written
24 request, a written statement enumerating employment agreements and policies with
25 regard to vacation pay, sick leave, reimbursement for expenses, retirement benefits,
26 severance pay or other matters with respect to wages. Notice of the availability of the
27 agreements and policies must be given to each employee in writing or by a notice posted
28 at a place where employee notices are routinely posted.

29 **2. Records.** An employer shall:

30 A. Within 10 working days of a request by an employee, furnish to the employee a
31 written, itemized statement or access to a written, itemized statement listing the
32 wages and deductions made from the employee's wages for each pay period in which
33 the deductions were made together with an explanation of how the wages and
34 deductions were computed;

35 B. On each regular payday, send to each employee by mail or provide at the
36 employee's normal place of employment during normal employment hours a
37 statement showing the hours the employee worked, the wages earned by the
38 employee and deductions made for the employee;

39 C. Establish, maintain and preserve for 3 calendar years the payroll records showing
40 the hours worked, wages earned and deductions made for each employee and any

1 employment agreement entered into between the employer and employee. Failure to
2 maintain these records raises a rebuttable presumption that the employer did not pay
3 the required minimum wage rate; and

4 D. Make available records required to be kept by this section to any representative of
5 the Department of Labor at any reasonable hour. This section and sections 621-A
6 and 623 do not excuse any employer subject to section 702 from keeping the records
7 required by that section. A representative of the department may, consistent with due
8 process of law, enter any place of employment to inspect the records concerning
9 wages and payrolls, question the employer and employees and investigate such facts,
10 conditions or matters as are considered appropriate in determining whether any
11 person has violated the provisions of this subchapter. The name of any employee
12 identified in a complaint to the department must be kept confidential as long as
13 possible. When the department determines that an employee's name must be
14 disclosed in order to investigate the complaint further, it may do so only with the
15 employee's consent. The Commissioner of Labor shall adopt any rules necessary to
16 carry out the provisions of this subchapter. Rules adopted pursuant to this paragraph
17 are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

18 **Sec. 5. 26 MRSA §623**, as amended by PL 2005, c. 18, §2, is further amended to
19 read:

20 **§623. Exemptions**

21 This section and ~~sections~~ section 621-A and ~~622~~ do not apply to family members and
22 salaried employees as defined in section 663, subsection 3, paragraphs J and K. ~~Sections~~
23 Section 621-A and 622 do does not apply to an employee of a cooperative corporation or
24 association if the employee is a stockholder of the corporation or association, unless the
25 employee requests the association or corporation to pay that employee in accordance with
26 section 621-A. Except as provided in section 621-A, subsections 3, 4 and 5, a
27 corporation, contractor, person or partnership may not by a special contract with an
28 employee or by any other means exempt itself from this section and sections 621-A and
29 622.

30 **Sec. 6. 26 MRSA §626, 2nd ¶**, as enacted by PL 1991, c. 162, is repealed.

31 **Sec. 7. 26 MRSA §626-A**, as amended by PL 1999, c. 465, §5, is further amended
32 to read:

33 **§626-A. Penalties**

34 Whoever violates any of the provisions of sections 621-A to 623 or section 626,
35 ~~626-C~~, 628, 629 or 629-B is subject to a ~~forfeiture~~ fine of not less than \$100 nor more
36 than \$500 for each violation.

37 Any employer is liable to the employee or employees for the amount of unpaid wages
38 and health benefits. Upon a judgment being rendered in favor of any employee or
39 employees, in any action brought to recover unpaid wages or health benefits under this
40 subchapter, such judgment includes, in addition to the unpaid wages or health benefits
41 adjudged to be due, a reasonable rate of interest, costs of suit including a reasonable

1 attorney's fee, and an additional amount equal to twice the amount of unpaid wages as
2 liquidated damages.

3 The 10 largest shareholders, as determined by the fair value of their beneficial
4 interest as of the beginning of the period during which the unpaid services referred to in
5 this subchapter are performed, of a corporation that does not have shares listed on a
6 national securities exchange or regularly quoted on an over-the-counter market by one or
7 more members of a national or affiliated securities association registered under Section
8 15A of the federal Securities Exchange Act of 1934 are, jointly and severally, personally
9 liable for all debts, wages or salaries due and owing to any of the corporation's employees
10 for services performed by them for that corporation. Civil action may be brought against
11 a shareholder liable for wages due under this subchapter instead of and in addition to the
12 employer. For the purposes of this paragraph, "corporation" does not include an
13 investment company registered as such under the federal Investment Company Act of
14 1940, 15 United States Code, Sections 80a-1 to 80a-64.

15 Remedies for unpaid wages do not become available to the employee except as
16 follows. If the wages are clearly due without a bona fide dispute, remedies are available
17 to the employee 8 days after the due date for payment. If there is a bona fide dispute at
18 the time payment is due, remedies become available to the employee 8 days after demand
19 when the wages are, in fact, due and remain unpaid.

20 The action for unpaid wages or health benefits may be brought by either the affected
21 employee or employees or by the Department of Labor. The Department of Labor is
22 further authorized to supervise the payment of the judgment, collect the judgment on
23 behalf of the employee or employees and collect fines incurred through violation of this
24 subchapter. The Department of Labor shall retain any penalties, except those penalties
25 due employees, in a nonlapsing account to be used for enforcement of this subchapter.
26 When the Department of Labor brings an action for unpaid wages or health benefits, this
27 action and an action to collect a civil ~~forfeiture~~ fine may both be joined in the same
28 proceeding.

29 For purposes of calculating penalties pursuant to this section, each violation of this
30 subchapter that occurs during a separate week, including discriminatory or retaliatory
31 practices, is considered a separate violation.

32 **Sec. 8. 26 MRSA §626-C** is enacted to read:

33 **§626-C. Preventing retaliation against employees**

34 **1. Prohibition.** An employer or individual may not discharge or in any other
35 manner discriminate or retaliate against an employee or other individual for exercising a
36 right under this subchapter or any rule implementing its provisions, or against an
37 individual for providing assistance to an employee or information regarding the exercise
38 of that right, or for testifying or planning to testify in any investigation or proceeding
39 regarding the exercise of that right.

40 **2. Presumption of retaliation.** An employer or individual that takes an adverse
41 action against an individual within 90 days of that individual's engaging in the activities

1 specified in subsection 1 raises a presumption that the action was retaliation. This
2 presumption may be rebutted by clear and convincing evidence that the action was taken
3 for other permissible reasons.

4 **3. Complaint.** An employee or other individual may file a complaint with the
5 Department of Labor against an employer or individual alleging retaliation as described
6 in subsection 2 within 30 days after the alleged retaliation occurs. Upon receipt of the
7 complaint, the department shall cause an investigation to be made to the extent
8 considered appropriate. If the department determines from the investigation that the
9 provisions of this section have been violated, the department shall bring an action in the
10 appropriate District Court against that employer or individual. The District Court may,
11 for cause shown, restrain violations of this section and order all appropriate relief,
12 including rehiring or reinstatement of the employee to the former position with back pay.
13 A civil action to enforce this section may also be maintained in any court of competent
14 jurisdiction by the State or by any party injured by a violation of this section. The court
15 shall require an employer or individual that retaliates against an employee or other
16 individual in violation of this subchapter to pay the employee or other individual an
17 amount set by the department or a court sufficient to compensate the employee or other
18 individual and deter future violations but not less than \$150 for each day that the
19 violation continued or until judgment is final.

20 SUMMARY

21 This bill defines "employee," "employer" and "independent contractor" for the
22 purposes of the wages and medium of payment provisions of the labor laws in order to
23 prevent misclassification of employees and their exclusion from wage law protection. It
24 strengthens notification and reporting requirements. The bill includes shareholders'
25 liability to protect employees who are hired by corporations that use bankruptcy law to
26 evade payment. It makes each violation of the wage and medium of payment provisions
27 that occurs during a separate week, including discriminatory or retaliatory practices, a
28 separate violation. The bill also prohibits employer retaliation against employees or
29 others who bring complaints under the law.