

House Bill 986

Date: March 5, 2021
Committee: Economic Matters Committee
Bill Title: Labor and Employment - Workplace Fraud Act - Rebuttable Presumption of the Employer-Employee Relationship
Re: Letter of Information

The Maryland Department of Labor (MDL) respectfully submits this letter of information on House Bill 986 - Labor and Employment - Workplace Fraud Act - Rebuttable Presumption of the Employer-Employee Relationship, which amends the Workplace Fraud Act to add a checklist of required factors that an employer must satisfy in order for an independent contractor to be able to be classified as a contractor instead of as an employee.

Maryland Department of Labor enforces the Workplace Fraud Act, which applies to only the construction and landscaping industries. The law presumes that an individual is an employee of the employer unless they have an independent business of their own. This bill does not lessen the requirements of the Workplace Fraud laws, but rather codifies the questions typically asked by investigators to determine whether or not an employee-employer relationship exists for purposes of the subtitle. The bill uses “and” in the list of requirements, which therefore requires every single element to be met in order for an individual to be classified as a contractor.

In existing §3-903, work performed by an individual for remuneration paid by an employer shall be presumed to create an employer-employee relationship, unless, among other things, “the individual who performs the work is free from control and direction over its performance both in fact and under the contract”. This bill adds fifteen elements that an employer must meet in order to demonstrate the “free from control and direction” path of §3-903. The possible confusion will stem from the fact that the bill requires all fifteen to be met, even though some of them may not be possible, relevant, or practical for the business.

Typically, these questions are used to evaluate, but not necessarily must *all* be met in every literal fashion in order to determine employee-employer relationship. A few examples of the fifteen elements an employer must show to demonstrate an individual is an independent contractor:

- §3-903.1(B)(2) “is not required to attend training sessions offered by the employer” - *many employers require safety training of all individuals who enter their worksite to perform work, some of them required by law such as confined space awareness, lockout/tagout procedures, general jobsite safety rules, etc.*
- §3-903.1(B)(4) “is not required to provide the services personally” - *sometimes an independent contractor is hired specifically for their unique talents or abilities and substitution would not be practical or some contractors do not allow tertiary contractors, such as when a subcontractor wins a bid but is prohibited from having other contractors not vetted by the general contractor perform the work.*
- §3-903.1(B)(9) “is not required to file regular status reports” - *status reports may be general in nature and used to determine if work is completed as prescribed in a contract.*