

STATE OF KANSAS

HOUSE OF REPRESENTATIVES

MR. CHAIRMAN:

I move to amend **Substitute for HB 2135**, on page 1, by striking all in lines 7 through 36;

By striking all on pages 2 through 27;

On page 28, by striking all in lines 1 through 27; and inserting the following:

"New Section 1. As used in sections 1 through 12, and amendments thereto:

(a) "Construction" means any constructing, altering, reconstructing, repairing, rehabilitating, refinishing, refurbishing, remodeling, remediating, renovating, custom fabricating, maintenance, landscaping, improving, wrecking, painting, decorating, demolishing and adding to or subtracting from any building, structure, highway, roadway, street, bridge, alley, sewer, ditch, sewage disposal plant, water works, parking facility, railroad, excavation or other structure, project, development, real property or improvement, or to do any part thereof, whether or not the performance of the work herein described involves the addition to, or fabrication into, any structure, project, development, real property or improvement herein described of any material or article of merchandise. Construction shall also include moving construction related materials on the job site or to or from the job site.

(b) "Contractor" means any sole proprietor, partnership, limited partnership, firm, corporation, limited liability company, association or other business entity that registers with the secretary of state who engages in construction. "Contractor" shall include a general contractor and a subcontractor.

(c) "Department" means the department of labor.

(d) "Secretary" means the secretary of labor.

(e) (1) "Employer" means any contractor that employs individuals deemed employees under

section 2, and amendments thereto.

(2) "Employer" shall not include the:

(A) State of Kansas or its officers, agencies or political subdivisions; or

(B) federal government.

(f) (1) "Entity" means any contractor for which an individual is performing services and is not classified as an employee under section 2, and amendments thereto.

(2) "Entity" does not include the:

(A) State of Kansas or its officers, agencies or political subdivisions; or

(B) federal government.

(g) "Interested party" means a person with an interest in compliance with sections 1 through 12, and amendments thereto.

(h) "Performing services" means the performance of any construction.

(i) "Sole proprietor" means a person who solely owns an unincorporated business.

New Sec. 2. (a) For the purposes of sections 1 through 12, and amendments thereto, an individual performing services for a contractor is deemed to be an employee of the employer except as provided in subsections (b) and (c).

(b) An individual performing services for a contractor is deemed to be an employee of the contractor unless it is shown that the:

(1) Individual has been and will continue to be free from control or direction over the performance of the service for the contractor, both under the contract of service and in fact;

(2) service performed by the individual is outside the usual course of services performed by the contractor; and

(3) individual is engaged in an independently established trade, occupation, profession or business, or is deemed a legitimate sole proprietor or partnership under subsection (c).

(c) The sole proprietor or partnership performing services for a contractor as a subcontractor

is deemed legitimate if it is shown that:

(1) The sole proprietor or partnership is performing the service free from the direction or control over the means and manner of providing the service, subject only to the right of the contractor for whom the service is provided to specify the desired result;

(2) the sole proprietor or partnership is not subject to cancellation or destruction upon severance of the relationship with the contractor;

(3) the sole proprietor or partnership has a substantial investment of capital in the sole proprietorship or partnership beyond ordinary tools and equipment and a personal vehicle;

(4) the sole proprietor or partnership owns the capital goods and gains the profits and bears the losses of the sole proprietorship or partnership;

(5) the sole proprietor or partnership makes its services available to the general public or the business community on a continuing basis;

(6) the sole proprietor or partnership includes services rendered on a federal income tax schedule as an independent business or profession;

(7) the sole proprietor or partnership performs services for the contractor under the sole proprietorship's or partnership's name;

(8) when the services being provided require a license or permit, the sole proprietor or partnership obtains and pays for the license or permit in the sole proprietorship's or partnership's name;

(9) the sole proprietor or partnership furnishes the tools and equipment necessary to provide the service;

(10) if necessary, the sole proprietor or partnership hires its own employees without contractor approval, pays the employees without reimbursement from the contractor and reports the employees' income to the internal revenue service;

(11) the contractor does not represent the sole proprietorship or partnership as an employee of the contractor to its customers; and

(12) the sole proprietor or partnership has the right to perform similar services for others on whatever basis and whenever it chooses.

(d) Where a sole proprietor or partnership performing services for a contractor as a subcontractor is deemed not legitimate under subsection (c), the sole proprietorship or partnership shall be deemed an individual for purposes of sections 1 through 12, and amendments thereto. (e) Subcontractors or lower tiered contractors are subject to all provisions of sections 1 through 12, and amendments thereto.

(f) Except as provided in section 7, and amendments thereto, a contractor shall not be liable under sections 1 through 12, and amendments thereto, for any subcontractor's failure to properly classify persons performing services as employees, nor shall a subcontractor be liable for any lower tiered subcontractor's failure to properly classify persons performing services as employees.

New Sec. 3. It is unlawful for an employer or entity not to designate an individual as an employee under section 2, and amendments thereto, unless the employer or entity satisfies the provisions of section 2, and amendments thereto.

New Sec. 4. (a) Any interested party may file a complaint with the department against an entity or employer covered under sections 1 through 12, and amendments thereto, if there is a reasonable belief that the entity or employer is in violation of sections 1 through 12, and amendments thereto. It shall be the duty of the department to enforce the provisions of sections 1 through 12, and amendments thereto. The department shall have the power to conduct investigations in connection with the administration and enforcement of sections 1 through 12, and amendments thereto. Any investigator with the department shall be authorized to visit and inspect, at all reasonable times, any places covered by sections 1 through 12, and amendments thereto, and shall be authorized to inspect, at all reasonable times, documents related to the determination of whether an individual is an employee under section 2, and amendments thereto. The secretary or the secretary's representative may compel, by subpoena, the attendance and testimony of witnesses and the production of books, payrolls, records, papers and other

evidence in any investigation and may administer oaths to witnesses.

(b) Whenever the department believes upon investigation that there has been a violation of any of the provisions of sections 1 through 12, and amendments thereto, or any authorized rules or regulations, the department may:

(1) Issue and cause to be served on any party an order to cease and desist from further violation;

(2) take affirmative or other action as deemed reasonable to eliminate the effect of the violation;

(3) collect the amount of any wages, salary, employment benefits or other compensation denied or lost to the individual; and

(4) assess any civil penalty pursuant to section 7, and amendments thereto.

(c) The civil penalties assessed by the department as well as any other relief requested by the department shall be recoverable in an action brought by the attorney general.

New Sec. 5. Criminal violations of sections 1 through 12, and amendments thereto, may be prosecuted by the attorney general or the district or county attorney for the county in which the violation occurred. Upon determining that a criminal violation may have occurred, the department shall refer the matter to the attorney general or the district or county attorney for the county in which the violation may have occurred. In all other proceedings, the department shall be represented by the attorney general's office.

New Sec. 6. Whenever it appears that any employer or entity has violated a valid order of the department issued under sections 1 through 12, and amendments thereto, the secretary may commence an action and obtain from the court an order commanding the employer or entity to obey the order of the department or be found guilty of contempt of court.

New Sec. 7. (a) An employer or entity that violates any of the provisions of sections 1 through 12, and amendments thereto, or any authorized rules and regulations upon a first violation shall be

subject to a civil penalty not to exceed \$2,000 for each violation. An employer or entity shall be subject to a civil penalty not to exceed \$3,000 for each second or subsequent violation within a five-year period. For purposes of this section, each violation of sections 1 through 12, and amendments thereto, for each person and for each day the violation continues shall constitute a separate and distinct violation. In determining the amount of a penalty, the secretary shall consider the appropriateness of the penalty to the employer or entity charged, upon the determination of the gravity of the violations. The amount of the penalty, when finally determined, may be recovered in a civil action filed in any court by the secretary, or a person aggrieved by a violation of sections 1 through 12, and amendments thereto, or any authorized rules and regulations. In any civil action brought by an interested party pursuant to this section, the court shall award the interested party 10% of the amount recovered. In such case, the remaining amount recovered shall be credited to the employee classification fund.

(b) For any second or subsequent violation which is within five years of an earlier violation, the department shall add the employer or entity's name to a list to be posted on the department's official website. Upon such notice, the department shall notify the violating employer or entity. No state contract shall be awarded to an employer or entity appearing on the list until four years have elapsed from the date of the last violation.

(c) Any person who willfully violates any of the provisions of sections 1 through 12, and amendments thereto, or any authorized rules and regulations, or obstructs the secretary, or the secretary's representatives, or any other person authorized to inspect places of employment under sections 1 through 12, and amendments thereto, shall be liable for civil penalties up to double the amounts specified in subsection (a). Any person who willfully violates any of the provisions of sections 1 through 12, and amendments thereto, or any authorized rules and regulations, shall be liable to the employee for punitive damages in an amount equal to the penalties assessed in subsection (a). The penalties established pursuant to this subsection shall be imposed in cases in which an employer or entity's conduct is proven by a preponderance of the evidence to be willful.

(d) An entity or employer that willfully violates any provision of sections 1 through 12, and amendments thereto, or that knowingly conspires with, aids and abets or assists another entity or employer in violating any provision of sections 1 through 12, and amendments thereto, is guilty of a class C nonperson misdemeanor. An entity or employer that commits a second or subsequent violation within a five-year period is guilty of a severity level 10, nonperson felony.

New Sec. 8. (a) All moneys received by the department pursuant to sections 1 through 12, and amendments thereto, shall be remitted to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. The state treasurer shall deposit the entire amount of the remittance in the state treasury and credit that portion of the remittance necessary to pay the expenses incurred by the office of the attorney general in carrying out its powers and duties under sections 1 through 12, and amendments thereto, to the attorney general employee classification fund, which is hereby created, and the remainder to the department of labor employee classification fund, which is hereby created.

(b) Subject to appropriations, all expenditures from the attorney general employee classification fund shall be used by the office of the attorney general for investigation, prosecution and other expenses incurred in carrying out its powers and duties under sections 1 through 12, and amendments thereto. All expenditures from the attorney general employee classification fund shall be made in accordance with appropriation acts upon warrants of the director of accounts and reports issued pursuant to vouchers approved by the attorney general.

(c) Subject to appropriations, all expenditures from the department of labor employee classification fund shall be used by the department for administration, investigation and other expenses incurred in carrying out its powers and duties under sections 1 through 12, and amendments thereto. All expenditures from the department of labor employee classification fund shall be made in accordance with appropriation acts upon warrants of the director of accounts and reports issued pursuant to vouchers approved by the secretary.

New Sec. 9. (a) It is unlawful for an employer or entity, or any agent of an employer or entity,

to retaliate through discharge or in any other manner against any person for exercising any rights granted under sections 1 through 12, and amendments thereto. Such retaliation shall subject an employer or entity to civil penalties pursuant to section 7, and amendments thereto, or a private cause of action, or both.

(b) It is unlawful for an employer or entity to retaliate against a person for:

(1) Making a complaint to an employer or entity, to a co-worker, to a community organization, before a public hearing, or to a state or federal agency that rights guaranteed under sections 1 through 12, and amendments thereto, have been violated;

(2) causing to be instituted any proceeding under or related to sections 1 through 12, and amendments thereto; or

(3) testifying or preparing to testify in an investigation or proceeding under sections 1 through 12, and amendments thereto.

New Sec. 10. (a) An interested party or person aggrieved by a violation of sections 1 through 12, and amendments thereto, or any authorized rules and regulations, by an employer or entity may file suit in court, in the county where the alleged offense occurred or where any person who is party to the action resides, without regard to exhaustion of any alternative administrative remedies provided in sections 1 through 12, and amendments thereto. Actions may be brought by one or more persons for and on behalf of themselves and other persons similarly situated. A person whose rights have been violated under sections 1 through 12, and amendments thereto, by an employer or entity is entitled to collect:

(1) The amount of any wages, salary, employment benefits or other compensation denied or lost to the person by reason of the violation, plus an equal amount in liquidated damages;

(2) compensatory damages in amount up to \$500 for each violation of sections 1 through 12, and amendments thereto, or any authorized rules and regulations;

(3) in the case of unlawful retaliation, all legal or equitable relief as may be appropriate; and

(4) reasonable attorney's fees and costs.

(b) The right of an interested party or aggrieved person to bring an action under this section terminates upon the passing of three years from the final date of performing services to the employer or entity. This limitations period is tolled if an employer or entity has deterred a person's exercise of rights under sections 1 through 12, and amendments thereto.

New Sec. 11. (a) The department may adopt rules and regulations to implement and administer sections 1 through 12, and amendments thereto.

(b) Any finding made pursuant to sections 1 through 12, and amendments thereto, is for the purpose of enforcing sections 1 through 12, and amendments thereto, and may not be admissible or binding against a party in any other proceeding.

(c) The provisions of the Kansas administrative procedure act, K.S.A. 77-501 et seq., and amendments thereto, shall govern all administrative proceedings initiated under this section.

New Sec. 12. (a) There shall be no waiver of any provision of sections 1 through 12, and amendments thereto.

(b) It is a class C nonperson misdemeanor for an employer or entity to attempt to induce any individual to waive any provision of sections 1 through 12, and amendments thereto.

Sec. 13. K.S.A. 2010 Supp. 79-3234 is hereby amended to read as follows: 79-3234. (a) All reports and returns required by this act shall be preserved for three years and thereafter until the director orders them to be destroyed.

(b) Except in accordance with proper judicial order, or as provided in subsection (c) or in K.S.A. 17-7511, subsection (g) of K.S.A. 46-1106, K.S.A. 46-1114, or K.S.A. 79-32,153a, and amendments thereto, it shall be unlawful for the secretary, the director, any deputy, agent, clerk or other officer, employee or former employee of the department of revenue or any other state officer or employee or former state officer or employee to divulge, or to make known in any way, the amount of income or any particulars set forth or disclosed in any report, return, federal return or federal return

information required under this act; and it shall be unlawful for the secretary, the director, any deputy, agent, clerk or other officer or employee engaged in the administration of this act to engage in the business or profession of tax accounting or to accept employment, with or without consideration, from any person, firm or corporation for the purpose, directly or indirectly, of preparing tax returns or reports required by the laws of the state of Kansas, by any other state or by the United States government, or to accept any employment for the purpose of advising, preparing material or data, or the auditing of books or records to be used in an effort to defeat or cancel any tax or part thereof that has been assessed by the state of Kansas, any other state or by the United States government.

(c) The secretary or the secretary's designee may: (1) Publish statistics, so classified as to prevent the identification of particular reports or returns and the items thereof;

(2) allow the inspection of returns by the attorney general or other legal representatives of the state;

(3) provide the post auditor access to all income tax reports or returns in accordance with and subject to the provisions of subsection (g) of K.S.A. 46-1106 or K.S.A. 46-1114, and amendments thereto;

(4) disclose taxpayer information from income tax returns to persons or entities contracting with the secretary of revenue where the secretary has determined disclosure of such information is essential for completion of the contract and has taken appropriate steps to preserve confidentiality;

(5) disclose to the secretary of commerce the following: (A) Specific taxpayer information related to financial information previously submitted by the taxpayer to the secretary of commerce concerning or relevant to any income tax credits, for purposes of verification of such information or evaluating the effectiveness of any tax credit or economic incentive program administered by the secretary of commerce; (B) the amount of payroll withholding taxes an employer is retaining pursuant to K.S.A. 2010 Supp. 74-50,212, and amendments thereto; (C) information received from businesses completing the form required by K.S.A. 2010 Supp. 74-50,217, and amendments thereto; and (D)

findings related to a compliance audit conducted by the department of revenue upon the request of the secretary of commerce pursuant to K.S.A. 2010 Supp. 74-50,215, and amendments thereto;

(6) disclose income tax returns to the state gaming agency to be used solely for the purpose of determining qualifications of licensees of and applicants for licensure in tribal gaming. Any information received by the state gaming agency shall be confidential and shall not be disclosed except to the executive director, employees of the state gaming agency and members and employees of the tribal gaming commission;

(7) disclose the taxpayer's name, last known address and residency status to the department of wildlife and parks to be used solely in its license fraud investigations;

(8) disclose the name, residence address, employer or Kansas adjusted gross income of a taxpayer who may have a duty of support in a title IV-D case to the secretary of the Kansas department of social and rehabilitation services for use solely in administrative or judicial proceedings to establish, modify or enforce such support obligation in a title IV-D case. In addition to any other limits on use, such use shall be allowed only where subject to a protective order which prohibits disclosure outside of the title IV-D proceeding. As used in this section, "title IV-D case" means a case being administered pursuant to part D of title IV of the federal social security act (42 U.S.C. §651 et seq.) and amendments thereto. Any person receiving any information under the provisions of this subsection shall be subject to the confidentiality provisions of subsection (b) and to the penalty provisions of subsection (e);

(9) permit the commissioner of internal revenue of the United States, or the proper official of any state imposing an income tax, or the authorized representative of either, to inspect the income tax returns made under this act and the secretary of revenue may make available or furnish to the taxing officials of any other state or the commissioner of internal revenue of the United States or other taxing officials of the federal government, or their authorized representatives, information contained in income tax reports or returns or any audit thereof or the report of any investigation made with respect thereto, filed pursuant to the income tax laws, as the secretary may consider proper, but such

information shall not be used for any other purpose than that of the administration of tax laws of such state, the state of Kansas or of the United States;

(10) communicate to the executive director of the Kansas lottery information as to whether a person, partnership or corporation is current in the filing of all applicable tax returns and in the payment of all taxes, interest and penalties to the state of Kansas, excluding items under formal appeal, for the purpose of determining whether such person, partnership or corporation is eligible to be selected as a lottery retailer;

(11) communicate to the executive director of the Kansas racing commission as to whether a person, partnership or corporation has failed to meet any tax obligation to the state of Kansas for the purpose of determining whether such person, partnership or corporation is eligible for a facility owner license or facility manager license pursuant to the Kansas parimutuel racing act;

(12) provide such information to the executive director of the Kansas public employees retirement system for the purpose of determining that certain individuals' reported compensation is in compliance with the Kansas public employees retirement act at K.S.A. 74-4901 et seq., and amendments thereto; and

(13) provide taxpayer information of persons suspected of violating sections 1 through 12 or K.S.A. 2010 Supp. 44-766, and amendments thereto, to the staff attorneys of the department of labor for the purpose of determining compliance by any person with the provisions of sections 1 through 12 or K.S.A. 2010 Supp. 44-766, and amendments thereto, which information shall be limited to withholding tax and payroll information, the identity of any person that has been or is currently being audited or investigated in connection with the administration and enforcement of the withholding and declaration of estimated tax act, K.S.A. 79-3294 et seq., as amended, and the results or status of such audit or investigation.

(d) Any person receiving information under the provisions of subsection (c) shall be subject to the confidentiality provisions of subsection (b) and to the penalty provisions of subsection (e).

(e) Any violation of subsection (b) or (c) is a class A nonperson misdemeanor and, if the offender is an officer or employee of the state, such officer or employee shall be dismissed from office.

(f) Nothing in this section shall be construed to allow disclosure of the amount of income or any particulars set forth or disclosed in any report, return, federal return or federal return information, where such disclosure is prohibited by the federal internal revenue code as in effect on September 1, 1996, and amendments thereto, related federal internal revenue rules or regulations, or other federal law.";

And by renumbering sections accordingly;

Also on page 28, in line 28, by striking "44-703, 44-766 and"; also in line 28, by striking "are" and inserting "is";

On page 1, in the title, in line 1, by striking "certain"; in line 2, by striking "to avoid tax withholding, contributions and reporting"; in line 3, by striking "requirements"; also in line 3, by striking "44-703, 44-766 and"; in line 4, by striking "sections" and inserting "section"

_____ District.