

House Bill 389 (AS PASSED HOUSE AND SENATE)

By: Representatives Jones of the 25th, Burchett of the 176th, Holly of the 111th, Gilligan of the 24th, Park of the 101st, 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 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
6 considerations as to whether an individual has been, and will continue to be, free from
7 control and direction over the performance of services performed for wages; to provide for
8 the Department of Labor to consider evidence submitted in response to an investigation when
9 making a determination as to whether an employing unit has properly classified an
10 individual's service as employment; to provide for an exception to the definition of
11 employment for certain music industry professionals and network companies under certain
12 conditions; to provide for definitions; to provide for civil penalties for improper
13 classifications under certain circumstances; to provide for the deposit and use of any such
14 civil penalties collected; to provide for related matters; to repeal conflicting laws; and for
15 other purposes.

16 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

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

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

(1)(A) Such individual has been, and will continue to be, free from control or direction over the performance of such services, both under the individual's contract of service and in fact, as demonstrated by whether the individual:

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

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

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

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

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

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

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

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

45 (2) Such individual and the services performed for wages are the subject of an SS-8
46 determination by the Internal Revenue Service, which decided against employee status."

47 "(15.1)(A) Services performed by a music industry professional provided that:

48 (i) The services are provided by the music industry professional under contract with
49 an individual or entity that is in compliance with said contract that expressly provides
50 that such music industry professional:

51 (I) Has the ability to set his or her own hours and work schedule provided that
52 completion dates are met; and

53 (II) Shall not be treated as an employee for federal and state tax purposes; and

54 (ii) The music industry professional customarily and regularly exercises discretion
55 and independent judgment in the performance of the services provided for in such
56 contract.

57 (B) As used in this paragraph, the term 'music industry professional' means an
58 individual engaged to render any creative, production, marketing, or distribution
59 services related to a sound recording or musical composition. Such term shall include,
60 but shall not be limited to, the following individuals when so engaged: a recording
61 artist, songwriter, lyricist, composer, composition proofer, recording producer,
62 recording director, musical engineer, musical mixer, musician, or vocalist; a music
63 publicist; a radio promoter, or a photographer who works on recording photo shoots,
64 album covers, or other press or publicity purposes;"

65 "(16.1)(A) Services performed by or facilitated through a network company, provided
66 that the network company has a written contract with the individual, with which said
67 network company is in compliance, that expressly provides that the network company
68 shall not:

69 (i) Unilaterally prescribe specific dates, times of day, or a minimum number of hours
70 during which an individual is required to be logged into the network company's online
71 enabled application or platform;

72 (ii) Terminate such contract for not accepting, and shall not require an individual to
73 accept, any specific transportation service request or delivery service request for
74 services as a condition of maintaining access to the network company's online enabled
75 application or platform; provided, however, that such network company may require,
76 as part of such contract, a certain percentage of transportation service requests or
77 delivery service requests to be accepted;

78 (iii) Restrict an individual from performing transportation or delivery services
79 through other network companies, except while the individual is performing services
80 through the network company; and

81 (iv) Contractually restrict an individual from working in any other lawful occupation
82 or business.

83 (B) As used in this paragraph, the term:

84 (i) 'Ride share network service' shall have the same meaning as provided in Code
85 Section 40-1-190.

86 (ii) 'Network company' means a ride share network service or a business entity that
87 maintains an online enabled application or platform used to facilitate delivery services
88 in this state;"

89 "(o) When determining whether an employing unit has properly classified an individual's
90 service as employment, as such term is defined in this Code section, the department shall
91 make a determination demonstrated by evidence timely submitted in response to an
92 investigation conducted by the department. The department shall make such determination
93 based upon the totality of the circumstances as applied to the provisions of this Code
94 section that include and exclude certain services as employment.

95 (p) This Code section shall not apply to Chapter 9 of this title."

SECTION 2.

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

"34-8-257.

(a) Notwithstanding any other provision of law and in addition to any other penalties, fines, or offenses prescribed under this chapter, an employing unit that violates this chapter by failing to provide any contributions or administrative assessment owed for individuals whose service is described in subsection (f) of Code Section 34-8-35 shall pay to the Commissioner a civil penalty. For employing units with less than 100 employees, as determined by the Commissioner, the civil penalty shall be in an amount not to exceed \$2,500.00 for each such individual. For employing units with 100 or more employees, as determined by the Commissioner, the civil penalty shall be in an amount not to exceed \$7,500.00 for each such individual. In determining the amount of the civil penalty to be imposed, the Commissioner shall consider such factors as the number of individuals not properly classified such that the contributions and administrative assessments were not paid and the frequency of improper classifications by such employing unit.

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

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

(1) An amount sufficient to cover the reasonable expense of investigation conducted by the department; and

122 (2) Interest at the rate of 1 percent per month on any delinquent fine or assessment until
123 such fine or assessment has been paid. Such interest shall commence on the day the fine
124 or assessment becomes delinquent.
125 (d) The Commissioner may waive any penalty, fine, or assessment provided for in this
126 Code section."

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SECTION 3.

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