

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

H

2

HOUSE BILL 1129
Committee Substitute Favorable 4/17/03

Short Title: 2003 Omnibus Labor Law Changes.

(Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

1 AN ACT TO REVISE SERVICE REQUIREMENTS TO CONFORM WITH RULE 4
2 OF THE NORTH CAROLINA RULES OF CIVIL PROCEDURE, AND TO
3 MAKE TECHNICAL AND OTHER CHANGES TO THE WAGE AND HOUR
4 ACT AND THE PRIVATE PERSONNEL SERVICES ACT.
5

6 The General Assembly of North Carolina enacts:

7 **SECTION 1.** G.S. 95-25.23(a) reads as rewritten:

8 "(a) Any employer who violates the provisions of G.S. 95-25.5 (Youth
9 Employment) or any regulation issued thereunder, shall be subject to a civil penalty not
10 to exceed two hundred fifty dollars (\$250.00) for each violation. In determining the
11 amount of such penalty, the appropriateness of such penalty to the size of the business
12 of the person charged and the gravity of the violation shall be considered. The
13 determination by the Commissioner shall be final, unless within 15 days after receipt of
14 notice thereof by certified mail or by a designated delivery service authorized pursuant
15 to 26 U.S.C. § 7502(f)(2) with delivery receipt, the person charged with the violation
16 takes exception to the determination, in which event final determination of the penalty
17 shall be made in an administrative proceeding pursuant to Article 3 of Chapter 150B
18 and in a judicial proceeding pursuant to Article 4 of Chapter 150B."

19 **SECTION 2.** G.S. 95-25.23A(a) reads as rewritten:

20 "(a) Any employer who violates the provisions of G.S. 95-25.15(b) or any
21 regulation issued pursuant to G.S. 95-25.15(b), shall be subject to a civil penalty of up
22 to two hundred fifty dollars (\$250.00) per employee with the maximum not to exceed
23 one thousand dollars (\$1,000) per investigation by the Commissioner or his authorized
24 representative. In determining the amount of the penalty, the Commissioner shall
25 consider:

- 26 (1) The appropriateness of the penalty for the size of the business of the
27 employer charged; and
28 (2) The gravity of the violation.

1 The determination by the Commissioner shall be final, unless within 15 days after
2 receipt of notice thereof by certified ~~mail~~, mail or by a designated delivery service
3 authorized pursuant to 26 U.S.C. § 7502(f)(2) with delivery receipt, the person charged
4 with the violation takes exception to the determination, in which event final
5 determination of the penalty shall be made in an administrative proceeding pursuant to
6 Article 3 of Chapter 150B and in a judicial proceeding pursuant to Article 4 of Chapter
7 150B."

8 **SECTION 3.** G.S. 95-110.10(e) reads as rewritten:

9 "(e) The determination of the amount of the penalty by the Commissioner shall be
10 final, unless within 15 days after receipt of notice thereof by certified mail or by a
11 designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) with delivery
12 receipt, the person charged with the violation takes exception to the determination in
13 which event the final determination of the penalty shall be made in an administrative
14 proceeding and in a judicial proceeding pursuant to Chapter 150B of the General
15 Statutes, the Administrative Procedure Act."

16 **SECTION 4.** G.S. 95-111.13(g) reads as rewritten:

17 "(g) The determination of the amount of the penalty by the Commissioner shall be
18 final, unless within 15 days after receipt of notice thereof by certified ~~mail~~, mail or by a
19 designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) with delivery
20 receipt, the person charged with the violation takes exception to the determination, in
21 which event final determination of the penalty shall be made in an administrative
22 proceeding and in a judicial proceeding pursuant to Chapter 150B of the General
23 Statutes, the Administrative Procedure Act."

24 **SECTION 5.** G.S. 95-123 reads as rewritten:

25 **"§ 95-123. Orders.**

26 If, after investigation, the Commissioner finds that a violation of any of his rules and
27 regulations exists, or that there is a condition in passenger tramway construction,
28 operation, or maintenance which endangers the safety of the public, the Commissioner
29 shall forthwith issue his written order setting forth his findings, the corrective action to
30 be taken, and fixing a reasonable time for compliance therewith. The order shall be sent
31 to the affected operator by certified mail or by a designated delivery service authorized
32 pursuant to 26 U.S.C. § 7502(f)(2) with delivery receipt and shall become final unless
33 the operator contests the order by filing a petition for a contested case under G.S.
34 150B-23 within 20 days after receiving the order. The Commissioner shall have the
35 power to institute injunctive proceedings in any court of competent jurisdiction of the
36 district court district as defined in G.S. 7A-133 or superior court district or set of
37 districts as defined in G.S. 7A-41.1, as the case may be, in which the passenger tramway
38 is located for the purpose of restraining the operation of said tramway or for compelling
39 compliance with any lawful order of the Commissioner. Judicial review of a final
40 decision under this section may be obtained under Article 4 of Chapter 150B of the
41 General Statutes."

42 **SECTION 6.** G.S. 95-137(b) reads as rewritten:

43 "(b) Procedure for Enforcement. –

1 (1) If, after an inspection or investigation, the Director issues a citation
2 under any provisions of this Article, the Director shall, within a
3 reasonable time after the termination of such inspection or
4 investigation, notify the employer by certified ~~mail~~ mail, by a
5 designated delivery service authorized pursuant to 26 U.S.C. §
6 7502(f)(2) with delivery receipt, or via hand delivery of any penalty, if
7 any, the Director has recommended to the Commissioner to be
8 proposed under the provisions of this Article and that the employer has
9 15 working days within which to notify the Director that the employer
10 wishes to:

- 11 a. Contest the citation or proposed assessment of penalty; or
12 b. Request an informal conference.

13 Following an informal conference, unless the employer and
14 Department have entered into a settlement agreement, the Director
15 shall send the employer an amended citation or notice of no change.
16 The employer has 15 working days from the receipt of the amended
17 citation or notice of no change to notify the Director that the employer
18 wishes to contest the citation or proposed assessment of penalty,
19 whether or not amended. If, within 15 working days from the receipt
20 of the notice issued by the Director, the employer fails to notify the
21 Director that the employer requires an informal conference to be held
22 or intends to contest the citation or proposed assessment of penalty,
23 and no notice is filed by any employee or representative of employees
24 under the provisions of this Article within such time, the citation and
25 the assessment as proposed to the Commissioner shall be deemed final
26 and not subject to review by any court.

27 (2) If the Director has reason to believe that an employer has failed to
28 correct a violation for which a citation has been issued within the
29 period permitted for its correction (which period shall not begin to run
30 until the entry of a final order by the Board in case of any review
31 proceedings under this Article initiated by the employer in good faith
32 and not solely for a delay or avoidance of penalties), the Director shall
33 notify the employer by certified ~~mail~~ mail, by a designated delivery
34 service authorized pursuant to 26 U.S.C. § 7502(f)(2) with delivery
35 receipt, or via hand delivery of such failure and of the penalty
36 proposed to be assessed under this Article by reason of such failure
37 and that the employer has 15 working days within which to notify the
38 Director that the employer wishes to contest the Director's notification
39 of the proposed assessment of penalty. If, within 15 working days from
40 the receipt of notification issued by the Director, an employer fails to
41 notify the Director that the employer intends to contest the notification
42 or proposed recommendation of penalty, the notification and the
43 proposed assessment made by the Director shall be final and not
44 subject to review by any court.

- 1 (3) No citation may be issued under this section after the expiration of six
2 months following the occurrence of any violation.
- 3 (4) If an employer notifies the Director that the employer intends to
4 contest a citation issued under the provisions of this Article or
5 notification issued under the provisions of this Article, or if, within 15
6 working days of the receipt of a citation under this Article, any
7 employee or representative thereof files a notice with the Director
8 alleging that the period of time fixed in the citation for the abatement
9 of the violation is unreasonable, the Director shall immediately advise
10 the Board of such notification, and the Board shall afford an
11 opportunity for a hearing. The Board shall thereafter issue an order,
12 based on findings of fact, affirming, modifying, or vacating the
13 Director's citation or the proposed penalty fixed by the Commissioner,
14 or directing other appropriate relief, and such order shall become final
15 30 days after its issuance. Upon showing by an employer of a good
16 faith effort to comply with the abatement requirements of a citation,
17 and that an abatement has not been completed because of factors
18 beyond the employer's reasonable control, the Director, after an
19 opportunity for a hearing as provided in this Article, shall issue an
20 order affirming or modifying the abatement requirements in such
21 citation. The rules of procedure prescribed by the chairman of the
22 Board shall provide affected employees or representatives of affected
23 employees an opportunity to participate as parties to hearings under
24 this section.
- 25 (5) Repealed by Session Laws 1993, c. 300, s. 2.
- 26 (6) Each local unit of government shall report each violation for which it
27 is issued a citation to its local governing board at its next public
28 meeting and to its workers compensation insurance carrier or to the
29 risk pool of which it is a member pursuant to Article 23 of Chapter 58
30 of the General Statutes."

31 **SECTION 7.** G.S. 95-234(a) reads as rewritten:

32 **"§ 95-234. Violation of controlled substance examination regulations; civil penalty.**

33 (a) Any examiner who violates the provisions of this Article shall be subject to a
34 civil penalty of up to two hundred fifty dollars (\$250.00) per affected examinee with the
35 maximum not to exceed one thousand dollars (\$1,000) per investigation by the
36 Commissioner of Labor or his authorized representative. In determining the amount of
37 the penalty, the Commissioner shall consider:

- 38 (1) The appropriateness of the penalty for the size of the business of the
39 employer charged; and
40 (2) The gravity of the violation.

41 The determination by the Commissioner shall be final, unless within 15 days after
42 receipt of notice thereof by certified ~~mail~~, mail or by a designated delivery service
43 authorized pursuant to 26 U.S.C. § 7502(f)(2) with delivery receipt, the person charged
44 with the violation takes exception to the determination, in which event final

1 determination of the penalty shall be made in an administrative proceeding pursuant to
2 Article 3 of Chapter 150B and which final determination shall be subject to judicial
3 review in a judicial proceeding pursuant to Article 4 of Chapter 150B."

4 **SECTION 8.** G.S. 95-25.3A is repealed.

5 **SECTION 9.** G.S. 95-47.2 reads as rewritten:

6 **"§ 95-47.2. Licensing procedures.**

7 (a) No person shall open, keep, maintain, own, operate or carry on a private
8 personnel service unless the person has first procured a license therefor as provided in
9 this Article.

10 (b) An application for license shall be made to the Commissioner. If the private
11 personnel service is owned by an individual, the application shall be made by that
12 individual; if the service is owned by a partnership, the application shall be made by all
13 partners; if the service is owned by a corporation, the application shall be made by all
14 stockholders who own at least twenty percent (20%) of the issued and outstanding
15 voting stock of the corporation, or if the service is owned by an association, society, or
16 corporation in which no one individual owns at least twenty percent (20%) of the issued
17 and outstanding voting stock, the application shall be made by the president,
18 vice-president, secretary and treasurer of the owner, by whatever title designated. The
19 application shall state the name and address of the individual who is responsible for the
20 direction and operation of the placement activities of the private personnel service
21 whether that individual be one of the applicants or another person; whether or not that
22 individual has ever been employed in a private personnel service; the name and address
23 of each of the license applicant's prior employers during the five years immediately
24 preceding the license application; and such other information relating to the good moral
25 character of that individual as the Commissioner may require. No change in such
26 persons shall take place without prior notification to the Commissioner.

27 (c) Each application for license shall be in writing and in the form prescribed by
28 the Commissioner, and shall state truthfully the name under which the business is to be
29 conducted; the street and number of the building or place where the business is to be
30 conducted.

31 (d) Upon the receipt of an application for a license the Commissioner:

- 32 (1) Shall publish a notice of the pending application in a newspaper of
33 general circulation in the area of the proposed location of the
34 employment agency and may publish the notice in a newspaper of
35 general circulation in each area in which the applicant (or if a
36 corporation, the president and majority shareholder) has resided during
37 the five years preceding the time of the application. The applicant shall
38 incur the cost associated with the publication of this legal
39 advertisement. The notice shall include a statement informing
40 individuals of their right to protest the issuance of a license by filing
41 within 10 days written comments with the Commissioner. The protest
42 shall be in writing and signed by the person filing the protest or by his
43 authorized agent or attorney, and shall state reasons why the license
44 should not be granted. Upon the filing of a protest, the Commissioner,

1 if he determines the protest to be of such a nature that a hearing should
2 be conducted and that the protest is for a cause on which denial of a
3 license may properly be based, shall appoint a time and place for a
4 hearing on the application and shall give at least seven days' notice of
5 that time and place to the license applicant and to the person filing the
6 protest. The hearing shall be conducted in accordance with the
7 provisions of the rules of the Administrative Procedure ~~Act~~; Act.

8 (2) Shall investigate the character, criminal record and business integrity
9 of each applicant for agency license and shall investigate the criminal
10 records of all persons listed as agency owners, officers, directors or
11 managers. The applicant and all agency owners, officers, directors and
12 managers shall assist the department in obtaining necessary
13 information by authorizing the release of all relevant
14 ~~information;~~ information. The applicant shall incur the cost associated
15 with this background investigation.

16 (2a) The Department of Justice may provide a criminal record check to the
17 Commissioner for a person or agency who has applied for a license
18 through the Commissioner. The Commissioner shall provide to the
19 Department of Justice, along with the request, the fingerprints of all
20 applicants, any additional information required by the Department of
21 Justice, and a form signed by the applicants consenting to the check of
22 the criminal record and to the use of the fingerprints and other
23 identifying information required by the State or national repositories.
24 The applicants' fingerprints shall be forwarded to the State Bureau of
25 Investigation for a search of the State's criminal history record file, and
26 the State Bureau of Investigation shall forward a set of the fingerprints
27 to the Federal Bureau of Investigation for a national criminal history
28 check. The Commissioner shall keep all information pursuant to this
29 subdivision privileged, in accordance with applicable State law and
30 federal guidelines, and the information shall be confidential and shall
31 not be a public record under Chapter 132 of the General Statutes.

32 The Department of Justice may charge each applicant a fee for
33 conducting the checks of criminal history records authorized by this
34 subdivision.

35 (3) Upon completion of the investigation, or ~~30 days~~ 60 days after the
36 application was received, whichever is later, but in no case more than
37 ~~45 days~~ 75 days after the application was received, shall determine
38 whether or not a license should be issued. The license shall be denied
39 for any of the following reasons:

40 a. If the applicant for agency license, or the president or majority
41 shareholder of a corporate applicant, omits or falsifies any
42 material information asked for in the application and required
43 by the ~~Commissioner~~; Commissioner.

- 1 b. If any owner, officer, director or manager of the employment
2 agency:
3 1. Has been convicted in any state of the criminal offense
4 of embezzlement, obtaining money under false
5 pretenses, forgery, conspiracy to defraud or any similar
6 offense involving fraud or moral turpitude;
7 2. Was an owner, officer, director or manager of an
8 employment agency or other business whose license was
9 revoked or that was otherwise caused to cease operation
10 by action of any State or federal agency or court because
11 of violations of law or regulation relating to deceptive or
12 unfair practices in the conduct of business;
13 3. As an owner or manager of an employment agency or
14 other business or as an employment counselor was found
15 by any State or federal agency or court to have violated
16 any law or regulation relating to deceptive or unfair
17 practices in the conduct of business; or
18 4. In any other demonstrable way engaged in deceptive or
19 unfair practices in the conduct of ~~business;~~business.
20 c. If the employment agency will be operated on the same
21 premises as a loan agency (as defined in G.S. 105-88) or
22 collection agency (as defined in G.S. 58-70-15).

23 (e) If it appears upon the hearing or from the inspection, examination or
24 investigation made by the Commissioner that the owners, partners, corporation officers
25 or the agency manager are not persons of good moral character or that the license
26 applicant has not complied with the provisions of this Article, the application shall be
27 denied and a license shall not be granted. The Commissioner shall find facts to
28 substantiate his denial of the issuance of a license. Each application shall be granted or
29 refused within ~~30 days~~ 60 days from the date of its filing, or if a hearing is held, within
30 ~~45 days~~ 75 days. Any license heretofore or hereafter issued shall expire 12 months from
31 the date of its issuance, and shall be renewed as hereinafter provided unless sooner
32 revoked by the Commissioner.

33 (f) No license shall be granted to a person to operate as a private personnel
34 service where the name of the business is similar or identical to that of any existing
35 licensed business (except where a franchiser has licensed two or more persons to use the
36 same name within the State) or directly or indirectly expresses or connotes any
37 limitation, specification or discrimination contrary to current State or federal laws
38 against discrimination in employment.

39 (g) Every license shall contain the name of the person licensed and shall
40 designate the city in which the license is issued, the name of the manager and date of the
41 license. The license shall be displayed in a conspicuous place in the area where job
42 applicants are received by the agency.

43 (h) A license granted as provided in this Article shall not be valid for any person
44 other than the person to whom it is issued or for any place other than that designated in

1 the license and shall not be assigned or transferred without the consent of the
2 Commissioner, whose consent must be based on the standards contained in this Article.
3 Applications for consent to assign or transfer shall be made in the same manner as an
4 application for a license, and all the provisions of this Article shall apply to applications
5 for consent. The location of a private personnel service shall not be changed without
6 notice to the Commissioner, and any change of location shall be endorsed upon the
7 license. A person who has obtained a license in accordance with the provisions of this
8 Article may apply for additional licenses to conduct additional private personnel
9 services in accordance with the provisions of this Article. The manner of application,
10 and the conditions and terms applicable to the issuance of the additional licenses shall
11 be the same as for an original license. The same agency manager may be designated in
12 all such licenses.

13 (i) Temporary license. – If ownership of a licensed private personnel service is
14 transferred, the department shall issue a temporary license to any new owner or
15 successor if it appears to the department that issuance of such a license would serve the
16 public interest. A temporary license shall be effective for a period of 90 days and shall
17 not be renewed.

18 (j) Each licensee shall, before the license is issued or renewed, deposit with the
19 department a bond payable to the State of North Carolina and executed by a surety
20 company duly authorized to transact business in the State of North Carolina in the
21 amount of ten thousand dollars (\$10,000) and upon condition that the private personnel
22 service will pay to applicants all refunds due under this Article and regulations adopted
23 hereunder if the private personnel service terminates its business."

24 **SECTION 10.** G.S. 95-47.7 is repealed.

25 **SECTION 11.** G.S. 95-47.8 is repealed.

26 **SECTION 12.** G.S. 95-47.9 reads as rewritten:

27 **"§ 95-47.9. Enforcement of Article; rules; hearing; penalty; criminal penalties.**

28 (a) This Article shall be enforced by the Commissioner. The Commissioner or
29 any duly authorized agent, deputies or assistants designated by the Commissioner, may
30 upon receipt of a complaint that a private personnel service has violated a specific
31 section of this Article, inspect those records relevant to the complaint which this Article
32 requires the private personnel service to retain. The Commissioner may also subpoena
33 those records and witnesses and may conduct investigations of any employer or other
34 person where the Commissioner has reasonable grounds for believing that the employer
35 or person has conspired or is conspiring with a private personnel service to violate this
36 Article.

37 (b) ~~The Commissioner may make reasonable administrative rules within the~~
38 ~~standards set in this Article. Before such rules are presented to the Advisory Council,~~
39 ~~the Commissioner shall conduct a public hearing, giving due notice thereof to all~~
40 ~~interested parties and shall afford the opportunity for written comments. No rule shall~~
41 ~~become effective until 60 days after the public hearing and Advisory Council approval,~~
42 ~~and copies thereof shall be furnished to all private personnel services at least 30 days~~
43 ~~prior to the effective date of the rule.~~The Commissioner shall adopt rules necessary to
44 carry out and administer the provisions of this Article.

1 (c) Complaints against any licensed person shall be made in writing to the
2 Commissioner, ~~or be sent in affidavit form without a personal appearance of the~~
3 ~~complainant.~~ Commissioner.

4 (1) If the complaint alleges a violation of this Article, the Commissioner
5 shall cause an investigation to be made. If, as a result of the
6 investigation, the Commissioner has reason to believe that a material
7 violation of this Article has been committed by a private personnel
8 service, the Commissioner ~~may hold a hearing. Reasonable notice~~
9 ~~thereof, not less than 10 days, shall be given in writing to the licensed~~
10 ~~person involved by serving upon him either personally, by registered~~
11 ~~or certified mail, or by leaving the same with the manager, a copy of~~
12 ~~the complaint. A hearing shall be held before the Commissioner with~~
13 ~~reasonable promptness but in no event later than 30 calendar days from~~
14 ~~the date of the filing of the complaint. The Commissioner, when~~
15 ~~investigating any matters pertaining to the granting, issuing,~~
16 ~~transferring, renewing, revoking, suspending or canceling of any~~
17 ~~license may take such testimony as he deems necessary on which to~~
18 ~~base official action. When taking such testimony he may subpoena~~
19 ~~witnesses and also direct the production before him of necessary and~~
20 ~~material books and papers. A daily calendar of all hearings shall be~~
21 ~~kept by the Commissioner and shall be posted in a conspicuous place~~
22 ~~in his public office for at least one day before the date of the hearings.~~
23 ~~The Commissioner shall render his decision within eight calendar days~~
24 ~~from the date of the completion of the hearing. The Commissioner~~
25 ~~shall keep a record of all such complaints and hearings.~~ may, after
26 compliance with Chapter 150B of the General Statutes, deny, suspend,
27 or revoke a license issued under this Article if it is determined that the
28 licensee or any employee of the licensee is guilty of violating the
29 provisions of this Article. In addition, the Commissioner may issue
30 warnings or levy a fine against the private personnel service that shall
31 not exceed two hundred fifty dollars (\$250.00).

32 (2) The denial, revocation, or suspension of a license or the issuance of a
33 warning or fine by the Commissioner shall be in writing, shall be
34 signed by the Commissioner or the Commissioner's designee, and shall
35 state the grounds upon which the decision is based. The aggrieved
36 person shall have the right to appeal from the decision as provided by
37 Chapter 150B of the General Statutes.

38 (d) ~~If at the hearing conducted pursuant to subsection (c) of this section, it has~~
39 ~~been shown that the private personnel service or any employee of that personnel service~~
40 ~~is guilty of violating the provisions of this Article, the Commissioner may issue~~
41 ~~warnings, or levy a fine against the personnel service which shall not exceed two~~
42 ~~hundred and fifty dollars (\$250.00), and, for repeated willful violations, may suspend or~~
43 ~~revoke the license of the personnel service. Whenever the Commissioner suspends or~~
44 ~~revokes the license of any private personnel service, or levies a fine against a service,~~

1 ~~the determination is subject to judicial review in proceedings brought pursuant to the~~
2 ~~Administrative Procedure Act. Whenever a license is revoked, revoked pursuant to~~
3 ~~subsection (c) of this section, another license shall not be issued to the same person~~
4 ~~within three years from the date of the revocation. The Commissioner, Deputy~~
5 ~~Commissioner, or Director, Private Personnel Service Division may conduct hearings~~
6 ~~and act upon applications for licenses, and may revoke or suspend such licenses, or levy~~
7 ~~finer.~~

8 (e) Any person who operates as a private personnel service without first
9 obtaining the appropriate license (i) shall be guilty of a Class 1 misdemeanor; and (ii) be
10 subject to a civil penalty of not less than fifty dollars (\$50.00) nor more than one
11 hundred dollars (\$100.00) for each day the private personnel service operates without a
12 license, the penalty not to exceed a total of two thousand dollars (\$2,000). Actions to
13 recover civil penalties shall be initiated by the Attorney General. The clear proceeds of
14 civil penalties provided for in this section shall be remitted to the Civil Penalty and
15 Forfeiture Fund in accordance with G.S. 115C-457.2."

16 **SECTION 13.** This act becomes effective July 1, 2003.