

# DEPARTMENT OF LABOR

## Division of Industrial Affairs

Statutory Authority: 19 Delaware Code, Sections 105(a)(8) and 3503(f); 29 Delaware Code, Section 8503(7) (19 **Del.C.** §§105(a)(8) & §3503(f); 29 **Del.C.** §8503(7))  
19 **DE Admin. Code** 1326

### FINAL

#### FINAL ORDER

#### **1326 Workplace Fraud Act Regulations**

##### **I. NATURE OF PROCEEDINGS**

Pursuant to its authority under 29 *Del. C.* § 8503(7), 19 *Del. C.* § 105(a)(8) and 19 *Del. C.* § 3503(f) the State of Delaware, Department of Labor's Division of Industrial Affairs (herein "the Division") proposed to amend its regulations. The Division's purpose in proposing these amendments was to explicitly prohibit labor brokers from providing construction services. The proposed amendments also allow general contractors, construction managers, and subcontractors to engage other construction companies in the same line of work as the general contractor, construction manager, or subcontractor. Minor amendments and changes were also inserted regarding definitions.

Notice of a public comment period of thirty (30) days on the Division's proposed amended regulations was published in the *Delaware Register of Regulations* for July 1, 2021 as well as in two Delaware newspapers of general circulation in accordance with 29 *Del. C.* § 10115. This is the Division's Decision and Order adopting the proposed amended regulations.

##### **II. PUBLIC COMMENTS**

The Division received no public comments in response to its notice of intention to adopt the proposed regulations apart from comments praising the Division's efforts. The Division did not receive written comments suggesting changes to the proposed regulations.

##### **III. FINDINGS AND CONCLUSIONS**

The public was given the required notice of the Division's intention to adopt the proposed amended regulations and was given ample opportunity to provide the Division with comments opposing the Division's plan. Thus, the Division concludes that its consideration of the proposed amended regulations was entirely within its prerogatives and statutory authority and, having received no comments opposed to adoption, is now free to adopt the proposed amended regulations. The final regulations are unchanged from the proposed regulations.

#### **IV. ORDER**

**AND NOW this 12th day of August 2021**, it is hereby ordered that:

1. The proposed amendments to the Division's regulations are adopted;
2. The text of the final regulations shall be in the form attached hereto as Exhibit A;
3. The effective date of this Order is ten days from the date of its publication in the *Delaware Register of Regulations* in accordance with 29 *Del. C.* §10118(e); and
4. The Division reserves to itself the authority to issue such order and further orders concerning its Regulations as it deems appropriate.

**IT IS SO ORDERED.**

**Department of Labor**

**Karryl Hubbard, Secretary of Labor**

### **1326 Workplace Fraud Act Regulations**

#### **1.0 General Provisions**

##### 1.1 Purpose and scope.

1.1.1 The regulations set forth in this part contain the procedures established by the Department of Labor for carrying out its responsibilities in the administration and enforcement of the Workplace Fraud Act.

##### 1.2 Address; office hours.

1.2.1 Questions may be addressed to "Office of Labor Law Enforcement - Administrator" at 4425 North Market Street, Wilmington Delaware 19802. The office is open daily from 8:00 a.m. to 4:30 p.m. except Saturdays, Sundays, and Legal Holidays.

##### 1.3 Definitions.

1.3.1 The terms “Construction Services”, “Contractor”, “Debarment”, “Employee”, “Employer”, “Exempt Person”, “General Contractor”, “Independent contractor”, “Knowingly”, “Labor Broker”, “Outside the usual course of business”, “Public body”, “Secretary”, “Secretary of Labor”, “Stop work order”, “Subcontractor” and “Violate”, when used in this regulation, shall have the meanings set forth in the Workplace Fraud Act

1.3.2 The following words and terms, when used in this regulation, shall have the following meanings:

"**Administrator**" means the Office of Labor Law Enforcement Administrator or their designee.

"**Corporate officer**" or "**officer of a corporation**" means any person who fills an office provided for in the corporate charter or articles of incorporation. As to persons engaged in the construction industry, the term "officer of a corporation," includes a member owning at least 10 percent of a limited liability company.

"**Day**" means calendar day unless otherwise specified.

"**Party**" means any employee, employer or the Department of Labor.

1.4 Attorneys; form of appearance on behalf of parties.

1.4.1 An attorney admitted to practice before the State of Delaware Supreme Court may appear on behalf of a party by providing written notice of appearance. To constitute an appearance, a form, letter, or document shall contain the names of the parties, the Department’s docket number if known, the name of the party that the attorney represents, and the attorney's address, telephone number, facsimile number, and e-mail address.

1.4.2 If a party appears through an attorney, all papers shall be served on the attorney with the same force and effect as though served on the client.

1.4.3 An attorney may withdraw his appearance by providing written notice of withdrawal to the Department, certifying that a copy of the notice of withdrawal was mailed to all parties.

1.5 Parties' obligation to keep department informed of change of address or status.

The parties shall promptly notify the Department of any change in address, telephone number, contact information, or other material change in business status while the charge is pending.

#### 1.6 Liberal construction of regulations.

These regulations shall be liberally construed by the administrator to permit the Department to discharge its statutory duties under the Workplace Fraud Act.

#### 1.7 Practice where regulations do not govern.

In any circumstance that arises not governed by these regulations, the administrator shall exercise his discretion in order to permit the Department to discharge its statutory duties under the Workplace Fraud Act while ensuring procedural due process to employers and other parties.

#### 1.8 Validity of regulations if any portion declared invalid.

If any portion of these regulations is adjudged by a court of competent jurisdiction to be invalid, or if by legislative action any portion loses its force and effect, the ruling or action will not affect, impair or void the remainder of these regulations.

#### 1.9 Amendment of regulations.

The administrator may rescind, amend or expand these regulations from time to time as necessary to comply with the purpose of the Workplace Fraud Act and such new regulations shall be submitted to the Registrar's office in accordance with the provisions of 29 **Del.C.** §10161(b).

1.10 Examples of Workplace Fraud. Pursuant to 19 **Del.C.** §3503(f), the following examples are provided to demonstrate violations of the Workplace Fraud Act. These examples are by no means exhaustive. These examples involve individuals and or entities who are not registered contractors under 19 **Del.C.** Ch. 36 Delaware's Contractor Registration Act or those individuals and entities who do not meet the definitions of Exempt Person/Independent Contractor as defined in 19 **Del.C.** § 3501(6), (7).

A. John Smith has an oral agreement with ABC Building Company (ABC) to do carpentry work on houses in a development designated by ABC. John Smith supplies his own hand tools and has his own business license. ABC supplies the material for each job. He has to do the work himself and he works on a full-time basis for the company. For some work he is paid on a piecework basis and for some work he is paid on an hourly basis. He does not have assistants, does not have an office, and does not advertise in newspapers or otherwise hold himself out to the public as being in the carpentry business. ABC can fire him any time before he finishes a job without contractual liability. John Smith is an employee of ABC. **Violation 3503(c).**

B. Sarah Green is a painting subcontractor who has contracted with XYZ General Contracting, Inc. (XYZ) to paint 264 houses. She in turn hired 40 painters to do the work for her and as condition of employment requires the 40 painters to obtain business licenses before they can start work and they will receive a 1099 tax document at the completion of the project, although only about 15 are on the job at any one time. She supplies all the paint, brushes, and ladders. She designates the house to be painted and either pays the painters per house or by the hour. Detailed instructions about the work are not necessary because of the painters' skill in their trade. Sarah Green inspects the work and requires them to repaint any unsatisfactory work. The painters cannot engage helpers without her consent. She can discharge them for any reason, and they are free to resign at any time. The painters assume no business risks and have no capital investment. The painters are employees of Sarah Green, not XYZ, and Sarah Green is an independent contractor, not an employee of XYZ. **Violation 3503(c).**

C. Chris Johnson, an experienced tile and terrazzo journeyman, orally agreed with Floor, Inc. (Floor) to perform full-time services at construction sites. He uses his own tools and performs services in the order designated by Floor, Inc. and according to its specifications. Floor, Inc. supplies all materials, makes frequent inspections of his work, pays him on a piecework basis, and carries workers' compensation insurance on him. He does not have a place of business or hold himself out to perform similar services for others. Either party can end the services at any time. Chris Johnson is an employee of Floor, Inc. **Violation 3503 (c).**

D. Person A employs workers from a temporary agency. These workers are never given a chance to become permanent hires. Their contracts are continually renewed by Person A, with no opportunity provided to become full-fledged employees. Person A classifies them as independent contractors. **Violation 3503 (c).**

E. Person A and Person B are co-owners of Construction Company X. At the suggestion of Person A, Person B assists in the incorporation of Subsidiary Company Y, nominally owned by his relative, Person C. When Construction Company X receives a contract, it sub-contracts the work on this contract to Subsidiary Company Y. Subsidiary Company Y hires the employees of Construction Company X, and treats them as independent contractors. **Violation 3503(d), 3503(e).**

F. Attorney A advises Contractor B to create a corporation separate and distinct from his primary business. When his primary business receives contracts,

Attorney A advises him to employ the employees from his primary business in the separate corporation as independent contractors. **Violation 3503(e).**

G. Person A enters into a "sub-contracting agreement" with "Worker B, LLC" and "Worker C, LLC." These workers are paid once per week at an hourly rate by Person A. Person A provides all materials and tools for them to complete the project. Person A provides them with the truck they use for hauling materials, and they report to Person A's business location at the start of the workday to receive instruction from Person A concerning the work they will perform. No sub-contracting agreements are drafted or signed. As a condition of entry into these "sub-contracting agreements" and of employment on the project, Workers B and C are required to obtain business licenses through the efforts of Person B, who is employed by Person A. Bid forms do not list any of the sub-contractors. **Violation 3503(c), 3503(d), 3503(e).**

H. Contractor A advertises their company provides various construction services, such as drywall installation, and bids on and is awarded the drywall portion of a construction project. Contractor A will not perform any portion of the drywall work but will contact Contractor B to provide workers for the project with negotiated hourly wages. Contractor A asks Contractor B how many workers they are capable of supplying? Contractor B states "we can bring up to 10 workers". Contractor B states the workers they will bring for the drywall installation will be on the project every day until finished and will work 55 hours per week paid at a straight hourly rate with no overtime payments. Contractor B classifies the workers as independent contractors and provides the workers 1099 miscellaneous tax forms. **Violation 3503 (a), (b), (c), (d).**

### **21 DE Reg. 237 (09/01/17)**

## **2.0 Commencement of Actions**

### 2.1 Manner of commencing actions.

An action may be commenced by the filing of a complaint with the Department's Office of Labor Law Enforcement.

### 2.2 Who may file a complaint.

An employee or the Department on its own may file a complaint alleging a violation of the Workplace Fraud Act.

### 2.3 Preparation and contents of a complaint.

2.3.1 A complaint shall be filed on a printed form approved by the administrator.

2.3.2 The Department shall assist the employee in the completion of the complaint where necessary.

2.3.3 The complaint shall indicate that it is filed with the Department, and shall set forth the following:

2.3.3.1 The employee's full name, address, and telephone number;

2.3.3.2 The employer's full name, address, and telephone number if known;

2.3.3.3 A brief statement of jurisdiction identifying the nature, date of, and location of the employment relationship;

2.3.3.4 The specific prohibited basis or bases that gave rise to the filing of the complaint; or

2.3.3.5 A brief statement of the facts deemed to constitute the alleged violation;

2.4 Filing a complaint.

The filing of a complaint is perfected when received by an official of the Office of Labor Law Enforcement.

**21 DE Reg. 237 (09/01/17)**

**3.0 Investigation**

3.1 Timing of investigations.

3.1.1 The Department shall promptly initiate an investigation into alleged violations when:

3.1.1.1 The Department received a complaint; or

3.1.1.2 The Department, on its own motion, determines to initiate an investigation.

3.1.2 The Department shall complete its investigation as promptly as possible.

3.2 Investigatory procedures.

3.2.1 All investigatory powers granted by 19 **Del.C.** §3504 shall be available to the Department. In its discretion, the Department may conduct investigations using, among other things, written requests for information, investigatory conferences, subpoenas, on-site visits, interviews, and depositions as provided by these regulations.

3.2.2 In connection with an investigation, the Department may require the submission of information relating to:

3.2.2.1 The employer's books and records;

3.2.2.2 The employment records of employees;

3.2.2.3 The employer's accounts and payroll records;

3.2.2.4 The employer's procedures for hiring and selecting employees;  
and

3.2.2.5 Such other information as the department determines to be reasonably necessary to carry out the provisions of the Workplace Fraud Act.

### 3.3 Requests for Information.

The Department may serve requests for information to assist the Department in its investigation. Unless otherwise specified in a request for information, the response shall be due to the Department within 15 days from the date of the request.

### 3.4 On-Site Visits.

3.4.1 The Department may conduct on-site visits to assist in the investigatory process for the purpose of gathering evidence, interviewing witnesses, observing a employer's place of business or work site, and reviewing documents.

3.4.2 The Department is not required to provide the employer with any notice prior to its on-site visit.

3.4.3 The employer shall grant access to its premises, documents, and employees during the Department's on-site visit.

### 3.5 Subpoenas

3.5.1 The administrator may issue a subpoena as he deems necessary to assist the investigatory process. The administrator shall issue a subpoena in the name of the Department, and the subpoena shall direct the person designated to personally appear and bring any books, records, documents and any other evidence that relates to any violation under investigation, or, in lieu of personal appearance, to produce any books, records, documents and any other evidence which relates to any violation under investigation.



3.5.2 A subpoena shall state the time and place where the person designated is directed to appear.

3.5.3 A subpoena shall be served either by personal service by any person 18 or more years of age by delivery of a copy thereof to the person named therein, by overnight delivery by commercial courier, or by registered or certified mail, return receipt requested.

### 3.6 Depositions.

The Department may take depositions of witnesses under oath as part of any investigation when, in the discretion of the administrator, such depositions will aid the investigatory process.

### 3.7 Enforcement of subpoenas.

If any person fails to comply with a subpoena issued by the Department, they shall be subject to the appropriate enforcement provisions of the Workplace Fraud Act.

### 3.8 Final Determinations

#### 3.8.1 Issuance of findings.

3.8.1.1 Following the completion of an investigation, the administrator shall determine whether or not the employer violated or committed an unlawful employment practice in violation of the Workplace Fraud Act.

3.8.1.2 If the administrator determines after completion of an investigation that the employer has violated one (1) or more of the provisions of the Workplace Fraud Act, the administrator will issue a violation determination. This determination will specify the violations which occurred and will specify which penalties will be imposed pursuant to the Workplace Fraud Act.

3.8.1.3 If the administrator determines after completion of an investigation that no violations of the provisions of the Workplace Fraud Act have occurred, the administrator will issue a no violation determination.

3.8.1.4 If the administrator determines after completion of an investigation that the employer has violated some but not all of the alleged violations, the administrator will issue a violation determination as to those violations which the Department has determined has occurred, and a no violation determination as to those violations which the Department

determines no violation has occurred. This determination will also specify which penalties will be imposed pursuant to the Workplace Fraud Act.

3.8.1.5 The final determination will be sent to the parties by certified mail, return receipt, and shall include notice to the employer of the opportunity to appeal in accordance with applicable law and these regulations.

### 3.9 Administrative Hearings.

3.9.1 Administrative hearings may be requested by either the Department of Labor or the employer. The opportunity to request such a hearing shall occur once the employer has received formal written notification from the Department of Labor that it has found the employer in violation of one or more of the provisions of the Workplace Fraud Act. The notification letter shall also inform the employer of the deadline for them to request an administrative hearing. The deadline shall be 20 days from the date of the issuance of the written notification.

3.9.2 The Secretary of the Department of Labor may serve as hearing officer in the hearing, or may appoint a designee to serve as hearing officer in his or her behalf. The hearing officer will rule upon all motions and questions relating to the administrative hearing.

3.9.3 The hearing officer is empowered to:

3.9.3.1 Issue subpoenas for witnesses and other sources of evidence, either on the agency's initiative or at the request of any party;

3.9.3.2 Administer oaths to witnesses;

3.9.3.3 Exclude plainly irrelevant, immaterial, insubstantial, cumulative and privileged evidence;

3.9.3.4 Limit unduly repetitive proof, rebuttal and cross-examination; and

3.9.3.5 Cause interrogatories to issue and depositions to be taken.

3.9.4 At least two weeks before the scheduled administrative hearing, counsel (or the parties themselves, if pro se) shall participate in a scheduled status conference with the hearing officer. Status conferences may be in person or by telephone. The purposes of this conference will be to resolve any outstanding scheduling matters; to simplify factual and legal issues by stipulation; to resolve any discovery disputes or other preliminary or procedural matters; to pre-mark for identification and admission into evidence all stipulated exhibits; and to afford the parties the opportunity to discuss the admissibility or exclusion of any outstanding evidentiary issues.

The hearing officer will permit the parties to argue their positions, and may issue a ruling either during the conference or by subsequent written decision. The status conference may be waived by the written stipulation of the opposing parties. In the absence of such a stipulation, failure to participate in the status conference may result in a finding contrary to the party which fails to participate in the status conference.

3.9.5 Prior to the administrative hearing, or at any time when directed by the hearing officer, the Department of Labor will make available to the employer all documents and records relevant to its decision, unless prohibited by statute or the confidentiality rights of others, or the documents in question are protected by attorney-client or other evidentiary privilege. Personal identifying information and confidential sources shall be redacted from any such disclosure. The hearing officer may at any time also direct the employer to make available to the Department any appropriate documents and records requested by the Department, and any evidence the employer intends to introduce during the administrative hearing. Failure to comply with this directive by the Department may result in dismissal of the alleged violation upon application of the employer to the hearing officer, who shall give the Department the opportunity to respond prior to reaching a decision upon the dismissal. Failure to comply with this directive by the employer may result in the dismissal of their appeal, and the hearing officer may then impose statutory penalties in accordance with the Workplace Fraud Act, upon application of the Department to the hearing officer, who shall give the employer the opportunity to respond prior to reaching a decision upon the dismissal.

3.9.6 The hearing officer shall rule on requests for changing the timing, manner, or location of the hearing. Such requests shall be made to the hearing officer within a reasonable time prior to the hearing. The opposing party shall have the right to oppose such a request. In ruling on such a request the hearing officer shall include consideration of the sufficiency of the grounds for the request, the length of time appropriate for a continuance, and the degree of prejudice, if any, to the party opposing the request.

3.9.7 At the administrative hearing, any party or his or her representative shall have the opportunity to produce witnesses and cross-examine adverse witnesses; to express all pertinent facts and circumstances through evidence, oral or written; to advance any arguments without undue interference; and to question or refute any testimony or evidence.

3.9.8 The burden of proving facts alleged as the basis for its decision shall be on the Department by a preponderance of the evidence. The burden of proof regarding any affirmative defenses shall be on the employer by a preponderance of the evidence.

3.9.9 The rules of evidence applied in civil cases by the courts of the State of Delaware shall not be strictly followed. The hearing officer may allow evidence not admissible under these rules of evidence where, in his or her judgment, application of the exclusionary rule would result in unnecessary hardship and the evidence offered is of a kind commonly relied upon by reasonably prudent persons in the conduct of their affairs. Hearsay may be admissible in administrative hearings, but may not constitute the sole basis for the hearing officer's determination upon the factual issue addressed by the hearsay evidence.

**21 DE Reg. 237 (09/01/17)**

**4.0 Administrative Dismissal**

4.1 The administrator or hearing officer may in his discretion administratively dismiss a complaint for reasons including but not limited to the following:

4.1.1 Lack of jurisdiction;

4.1.2 The employee is unavailable or unwilling to participate in the investigation, or to attend a scheduled conference, deposition or hearing;

4.1.3 Relief is precluded by special circumstances as determined by the administrator or hearing officer;

4.1.4 The complaint on its face fails to state a claim under the Workplace Fraud Act.

4.2 Prior to administratively dismissing a complaint, the administrator or hearing officer shall notify the employee of the reason for the proposed dismissal and shall offer the employee the opportunity to respond.

The administrator or hearing officer shall make his final determination, considering all responses received within 15 days of the date of notice to the employee.

**21 DE Reg. 237 (09/01/17)**

**5.0 Enforceability of Settlement Agreements**

5.1 A settlement agreement reached during an investigation shall be set forth in writing and signed by the parties.

5.2 Allegations of breach of a settlement agreement shall be brought to the attention of the administrator or hearing officer, depending upon which is responsible for enforcing settlement agreements in the matter at the time of the alleged breach. The administrator or hearing officer shall review and investigate the allegations of breach of a settlement agreement to determine whether a breach has occurred.

5.3 The administrator or hearing officer shall issue written findings to the parties with regard to the allegation of breach of a settlement agreement.

5.4 The administrator or hearing officer in his discretion will determine whether to forward allegations of breach of the settlement agreement to the Attorney General for review.

**21 DE Reg. 237 (09/01/17)**

**6.0 Access to Department's Investigatory Files**

6.1 Confidentiality of Department's investigatory files.

The Department's investigatory records are confidential and exempt from public access under 29 **Del.C.** Ch. 100 except to the extent required by subsections 3.9.5 and 3.9.8 of this regulation.

6.2 Discovery of Department's investigatory files by non-parties.

Non-parties to an investigation shall not have access to the material in the Department's investigatory files.

6.3 Copying Costs.

6.3.1 The Department's fee for copying documents requested under this section shall be the same fee as is applicable to requests granted pursuant to 29 **Del.C.** Ch. 100. The administrator or hearing officer may waive or modify this fee in the case of an indigent party or in other extraordinary situations for good cause.

**21 DE Reg. 237 (09/01/17)**

**7.0 Retention of Investigatory Files**

The Department shall retain investigatory files for three years after the end of the administrative process or longer if the Department deems necessary.

**13 DE Reg. 1342 (04/01/10)**

**21 DE Reg. 237 (09/01/17)**

**25 DE Reg. 287 (09/01/21) (Final)**