

1 Introduced by Committee on Commerce and Economic Development

2 Date:

3 Subject: Labor; workers' compensation; unemployment insurance;
4 independent contractors

5 Statement of purpose of bill as introduced: This bill proposes to amend
6 definitions related to independent contractors in the workers' compensation
7 and unemployment compensation statutes, to provide for notice of the
8 requirements regarding employee classification at worksites, to permit the
9 Department of Labor to enter an employer's premises for the purposes of
10 investigating compliance with the workers' compensation and unemployment
11 compensation statutes, to permit the Department to obtain an injunction to
12 enforce a stop-work order related to a violation of the workers' compensation
13 statute, to clarify the requirements for consultation regarding debarment of
14 employers that have violated the wage and hour, workers' compensation, and
15 unemployment compensation statutes, and to create an Employee
16 Misclassification Task Force.

17 An act relating to classification of employees and independent contractors

1 It is hereby enacted by the General Assembly of the State of Vermont:

2 Sec. 1. 21 V.S.A. § 398 is added to read:

3 § 398. NOTICE TO PERSONS RECEIVING COMPENSATION AS AN
4 INDEPENDENT CONTRACTOR

5 (a)(1) Every employer shall post in a prominent and accessible place on a
6 site where work is performed a poster provided by the Department that shall
7 explain the differences between an “employee” and an “independent
8 contractor” pursuant to the applicable provisions of chapters 9 and 17 of this
9 title. The poster shall also include information regarding:

10 (A) the protections against retaliation provided by this title;

11 (B) the penalties provided pursuant to this title for failure to classify
12 an individual properly as an employee; and

13 (C) how an individual may file a complaint or inquiry with the
14 Commissioner about his or her employment classification status.

15 (2)(A) The information set forth on the poster shall be in English or
16 other languages as required by the Commissioner.

17 (B) If the poster is located outdoors, it shall be constructed of
18 materials capable of withstanding adverse weather conditions.

19 (b) On or before August 1, 2016, the Commissioner shall create the poster
20 required pursuant to subsection (a) of this section and shall make it available to
21 employers on the Department’s website.

1 (c) An employer who violates the provisions of this section shall be subject
2 to an administrative penalty of not more than \$100.00 per violation.

3 Sec. 2. 21 V.S.A. § 603 is amended to read:

4 § 603. WITNESSES, OATHS, BOOKS, PAPERS, RECORDS

5 (a) So far as it is necessary in his or her examinations; and investigations
6 and in the determination of matters within his or her jurisdiction, the
7 ~~commissioner~~ Commissioner shall have power to subpoena witnesses,
8 administer oaths, and to demand the production of books, papers, records, and
9 documents for his or her examination. In addition, the Commissioner or his or
10 her designee may, upon presenting appropriate credentials, at reasonable times
11 and without unduly disrupting business operations enter and inspect any place
12 of business or employment, question any employees, and investigate any facts,
13 conditions, or matters necessary and material to the administration of this
14 chapter. The employer shall, at reasonable times and without unduly
15 disrupting business operations, make its workers available to meet with the
16 Commissioner or designee, as required by the Commissioner. The
17 Commissioner or designee shall inform the employer of his or her rights to
18 refuse entry and to consult with legal counsel, and the Commissioner's rights
19 under this section. If entry is refused, the Commissioner may apply to the
20 Civil Division of the Superior Court for an order to enforce the rights given to
21 the Commissioner under this section.

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Sec. 3. 21 V.S.A. § 692 is amended to read:

§ 692. PENALTIES; FAILURE TO INSURE; STOP WORK ORDERS

(b) Stop-work orders. If an employer fails to comply with the provisions of section 687 of this title after investigation by the Commissioner, the Commissioner **shall may** issue an emergency order to that employer to stop work until the employer has secured workers' compensation insurance. If the Commissioner determines that issuing a stop-work order would immediately threaten the safety or health of the public, the Commissioner may permit work to continue until the immediate threat to public safety or health is removed. The Commissioner shall document the reasons for permitting work to continue, and the document shall be available to the public. In addition, the employer shall be assessed an administrative penalty of not more than \$250.00 for every day that the employer fails to secure workers' compensation coverage after the Commissioner issues an order to obtain insurance and may also be assessed an administrative penalty of not more than \$250.00 for each employee for every day that the employer fails to secure workers' compensation coverage as required in section 687 of this title. When a stop-work order is issued, the Commissioner shall post a notice at a conspicuous place on the work site of the employer informing the employees that their employer failed to comply with

1 the provisions of section 687 of this title and that work at the work site has
2 been ordered to cease until workers' compensation insurance is secured. If an
3 employer fails to comply with a stop-work order, the Commissioner may seek
4 an order from the Civil Division of the Superior Court to enjoin the employer
5 from employing any individual. The stop-work order shall be rescinded as
6 soon as the Commissioner determines that the employer is in compliance with
7 section 687 of this title.

8 (c) Debarment. An employer ~~against whom a stop work order has been~~
9 ~~issued~~ who has not been in compliance with section 687 of this chapter, unless
10 the Commissioner determines that the failure to comply was inadvertent or
11 excusable, is prohibited from contracting, directly or indirectly, with the State
12 or any of its subdivisions for a period of up to three years following the date of
13 the issuance of ~~the stop work order~~ an administrative citation, as determined
14 by the Commissioner in consultation with the Commissioner of Buildings and
15 General Services or the Secretary of Transportation, as appropriate. Either the
16 Secretary or the Commissioner, as appropriate, shall be consulted in any
17 ~~contest of the prohibition of the employer from contracting with the State or its~~
18 ~~subdivisions~~ Secretary of Administration. The consultation shall be informal
19 and shall occur within five business days of the notification by the
20 Commissioner. The results of the consultation shall be documented.

1 Sec. 6. 21 V.S.A. § 690 is amended to read:

2 § 690. CERTIFICATE, FORM; COPY OF POLICY

3 * * *

4 (b)(1) In addition to any other authority provided to the ~~commissioner~~
5 Commissioner pursuant to this chapter, the ~~commissioner~~ Commissioner may
6 issue a written request to an employer subject to the provisions of this chapter
7 to provide a workers' compensation compliance statement on a form provided
8 by the ~~commissioner~~ Commissioner. The employer shall provide the
9 compliance statement to the Commissioner within 30 days of the request. For
10 the purposes of this subsection, an employer includes subcontractors and
11 independent contractors. The form shall require all the following information
12 sorted by job site:

13 * * *

14 (c) An employer's agent or broker or the authorized representative of an
15 insurance or guarantee company shall provide any contract or policy
16 information requested by the Commissioner pursuant to this section within **five**
17 **business days** after receiving the request.

18 Sec. 7. 21 V.S.A. § 625 is amended to read:

19 § 625. CONTRACTING OUT FORBIDDEN

20 (a) ~~An~~ Except as provided in subdivisions 601(3) and (14) of this chapter,
21 an employer shall not be relieved in whole or in part from liability created by

1 the provisions of this chapter by any contract, rule, regulation, or device
2 whatsoever.

3 (b) Any person who, for the purpose of avoiding its obligations under this
4 title, coerces an employee or prospective employee into becoming an
5 independent contractor, after notice and an opportunity for a hearing, may be
6 assessed an administrative penalty of not more than \$5,000.00.

7 (c) Any administrative penalty imposed pursuant to this section may be in
8 addition to other penalties authorized pursuant to chapters 9 and 17 of this title.

9 Sec. 8. 8 V.S.A. § 3661 is amended to read:

10 § 3661. CEASE AND DESIST POWERS; PROSECUTIONS AND
11 PENALTIES

12 * * *

13 (c) An employer who purposefully makes a false statement or
14 representation that results in a lower workers' compensation premium, after
15 notice and opportunity for hearing before the Commissioner, may be assessed
16 an administrative penalty of not more than \$20,000.00 in addition to any other
17 appropriate penalty. In addition, an employer found to have violated this
18 section is prohibited from contracting, directly or indirectly, with the State or
19 any of its subdivisions for up to three years following the date the employer
20 was found to have made a false statement or misrepresentation, as determined
21 by the Commissioner in consultation with the Commissioner of Buildings and

1 ~~General Services or the Secretary of Transportation~~, as appropriate. ~~Either the~~
2 ~~Secretary or the Commissioner~~, as appropriate, shall be consulted in any appeal
3 relating to prohibiting the employer from contracting with the State or its
4 subdivisions Secretary of Administration. The consultation may be informal
5 and shall occur within five business days of the notification by the
6 Commissioner. The outcome of the consultation shall be documented.

7 * * *

8 Sec. 9. 21 V.S.A. § 1314a is amended to read:

9 § 1314a. QUARTERLY WAGE REPORTING; MISCLASSIFICATION;

10 PENALTIES

11 * * *

12 (f)(1) Any employing unit or employer that fails to:

13 (A) File any report required by this section shall be subject to ~~a~~ an
14 administrative penalty of \$100.00 for each report not received by the
15 prescribed due dates.

16 (B) Properly classify an individual regarding the status of
17 employment is subject to ~~a~~ an administrative penalty of not more than
18 \$5,000.00 for each improperly classified employee. In addition, an employer
19 found to have violated this section is prohibited from contracting, directly or
20 indirectly, with the State or any of its subdivisions for up to three years
21 following the date the employer was found to have failed to properly classify,

1 as determined by the Commissioner in consultation with the Commissioner of
2 Buildings and General Services or the Secretary of Transportation, ~~as~~
3 ~~appropriate. Either the Secretary or the Commissioner, as appropriate, shall be~~
4 ~~consulted in any appeal relating to prohibiting the employer from contracting~~
5 ~~with the State or its subdivisions.~~ The consultation may be informal and shall
6 occur within **five business days** of the notification by the Commissioner. The
7 outcome of the consultation shall be documented.

8 Sec. 10. 21 V.S.A. § 708 is amended to read:

9 § 708. PENALTY FOR FALSE REPRESENTATION

10 (a) Action by the Commissioner of Labor. A person who ~~willfully~~
11 purposefully makes a false statement or representation, ~~for the purpose of~~
12 ~~obtaining to obtain~~ any benefit or payment under the provisions of this chapter,
13 either for herself or himself or for any other person, after notice and
14 opportunity for hearing, may be assessed an administrative penalty of not more
15 than \$20,000.00, and shall forfeit all or a portion of any right to compensation
16 under the provisions of this chapter, as determined to be appropriate by the
17 Commissioner after a determination by the Commissioner that the person has
18 ~~willfully~~ purposefully made a false statement or representation of a material
19 fact. In addition, an employer found to have violated this section is prohibited
20 from contracting, directly or indirectly, with the State or any of its subdivisions
21 for up to three years following the date the employer was found to have made a

1 purposeful false statement or misrepresentation of a material fact, as
2 determined by the Commissioner in consultation with the Commissioner of
3 Buildings and General Services or the Secretary of Transportation, as
4 appropriate. ~~Either the Secretary or the Commissioner, as appropriate, shall be~~
5 ~~consulted in any contest relating to the prohibition of the employer from~~
6 ~~contracting with the State or its subdivisions~~ Secretary of Administration. The
7 consultation may be informal and shall occur within five business days of the
8 notification by the Commissioner. The outcome of the consultation shall be
9 documented.

10 (b) ~~When~~ In addition to any penalties assessed pursuant to subsection (a) of
11 this section, when the Department of Labor has sufficient reason to believe that
12 an employer has purposefully made a false statement or representation for the
13 purpose of obtaining to obtain a lower workers' compensation premium, the
14 Department shall refer the alleged violation to the Commissioner of Financial
15 Regulation for the Commissioner's consideration of enforcement pursuant to
16 8 V.S.A. § 3661(c).

17 Sec. 11. 21 V.S.A. § 1307 is amended to read:

18 § 1307. COMMISSIONER OF LABOR, DUTIES AND POWERS OF

19 ~~The commissioner of labor~~ Commissioner of Labor shall administer this
20 chapter. ~~The commissioner~~ Commissioner may employ such persons, make
21 such expenditures, require such reports, make such investigations, and take

1 such other action as he or she considers necessary or suitable to that end. In
2 the discharge of his or her duties imposed by this chapter, the ~~commissioner~~
3 Commissioner may administer oaths, take depositions, certify to official acts,
4 and subpoena witnesses and compel the production of books, papers,
5 correspondence, memoranda, and other records necessary and material to the
6 administration of this chapter. In addition, the Commissioner or his or her
7 designee may, upon presenting appropriate credentials, at reasonable times and
8 without unduly disrupting business operations, enter and inspect any place of
9 business or employment, question any employee, and investigate any fact,
10 condition, or matter necessary and material to the administration of this
11 chapter. The employer shall, at reasonable times and without unduly
12 disrupting business operations, make its workers available to meet with the
13 Commissioner or his or her designee, as required by the Commissioner. The
14 Commissioner or his or her designee shall inform the employer of his or her
15 rights to refuse entry and to consult with legal counsel, and the
16 Commissioner's rights under this section. If entry is refused, the
17 Commissioner may apply to the Civil Division of the Superior Court for an
18 order to enforce the rights given to the Commissioner under this section.

19 Sec. 12. 21 V.S.A. § 601 is amended to read:

20 § 601. DEFINITIONS

1 Unless the context otherwise requires, words and phrases used in this
2 chapter shall be construed as follows:

3 * * *

4 (3) “Employer” includes any body of persons, corporate or
5 unincorporated, public or private, and the legal representative of a deceased
6 employer, and includes the owner or lessee of premises or other person who is
7 virtually the proprietor or operator of the business there carried on, but who, by
8 reason of there being an independent contractor or for any other reason, is not
9 the direct employer of the workers there employed. If the employer is insured,
10 the term “employer” includes the employer’s insurer so far as applicable. A
11 person is not deemed to be an “employer” for the purposes of this chapter as
12 the result of entering into a contract for services or labor with an individual
13 who has knowingly and voluntarily waived coverage of this chapter pursuant
14 to subdivision (14)(F) of this section, or is a corporate officer or LLC member
15 that has filed, and had approved, an exclusion pursuant to subdivision 14(H) of
16 this section and who meets the criteria set forth in that subdivision.

17 * * *

18 (14) “Worker” and “employee” means ~~an individual~~ a person who has
19 entered into the employment of, or works under contract of service or
20 apprenticeship with, an employer. Any reference to a worker who has died as
21 the result of a work injury shall include a reference to the worker’s dependents,

1 and any reference to a worker who is a minor or incompetent shall include a
2 reference to the minor’s committee, guardian, or next friend. A person who
3 performs services for remuneration is presumed to be an employee unless the
4 employing unit proves that the person is free from the direction and control of
5 the employing unit, both under the person’s contract of service and in fact.

6 The term “worker” or “employee” does not include:

7 * * *

8 (F) The sole proprietor or partner owner or partner owners of an
9 unincorporated business provided all of the following are met:

10 (i) The individual or partner owner performs work that is distinct
11 and separate from that of the person with whom the individual ~~contracts~~ or
12 partner owner contracts or the individual or partner owner operates a separate
13 and distinct business from that of the person with whom he or she contracts,
14 and is actively registered with the Vermont Secretary of State.

15 (ii) The individual or partner owner controls the means and
16 manner of the work performed.

17 (iii) The individual or partner owner holds ~~him~~ him- or herself out
18 as in business for ~~him~~ him- or herself.

19 (iv) The individual or partner owner holds ~~him~~ him- or herself out
20 for work for the general public and does not perform work exclusively for or
21 with another person.

1 (H) With the approval of the Commissioner, a corporation or a
2 limited liability company (L.L.C.) may elect to file exclusions from the
3 provisions of this chapter. A corporation or an L.L.C. may elect to exclude up
4 to four corporate executive officers or four L.L.C. managers or members from
5 coverage requirements under this chapter. If all officers of the corporation or
6 all managers or members of an L.L.C. make such election, receive approval,
7 and the business has no employees, the corporation or L.L.C. shall not be
8 required to purchase workers' compensation coverage. ~~If after election, the~~
9 ~~officer, manager, or member experiences a personal injury and files a claim~~
10 ~~under this chapter, the employer shall have all the defenses available in a~~
11 ~~personal injury claim. However, this election shall not prevent any other~~
12 ~~individual, other than the individual excluded under this section, found to be an~~
13 ~~employee of the corporation or L.L.C. to recover workers' compensation from~~
14 ~~either the corporation, L.L.C., or the statutory employer.~~

15 (i) A person shall not be deemed to be an "employer" for purposes
16 of this chapter of corporate executive officers or L.L.C. managers or members
17 that are excluded under this subdivision if all of the following are met:

18 (I) The corporate executive officers or L.L.C. managers or
19 members operate a separate and distinct business from that of the person with
20 whom the corporation or L.L.C. contracts, and the corporation or L.L.C. is
21 actively registered with the Vermont Secretary of State.

1 (II) The corporation or L.L.C. controls the means and manner
2 of the work performed.

3 (III) The corporation or L.L.C. holds itself out as in business
4 for itself, performs work for the general public, and does not work exclusively
5 for or with another person.

6 (IV) The person that the corporation or L.L.C. contracts with
7 does not treat the corporate executive officers or L.L.C. managers or members
8 as employees for purposes of income or employment taxation in relation to the
9 work performed.

10 (V) The services are performed pursuant to a written agreement
11 or contract between the corporation or L.L.C. and another person, and the
12 written agreement or contract explicitly states that the corporate executive
13 officers or L.L.C. managers or members are not considered to be employees
14 under this chapter and are working independently. The written contract or
15 agreement shall also include information regarding the right of the corporation
16 or L.L.C. to purchase workers' compensation insurance coverage and of the
17 corporate executive officers or the L.L.C. managers or members to elect not to
18 exclude themselves from coverage.

19 (VI) The person with whom the corporation or L.L.C. has
20 contracted has not hired multiple sole proprietors, partnerships, or single

1 member corporations or L.L.C.s to perform the same work on a project or
2 jobsite.

3 (ii) If after making an election under this subdivision, the
4 corporate officer or L.L.C. manager or member suffers a personal injury
5 arising out of and in the course of his or her employment, he or she may bring
6 an action to recover damages for personal injury against the employer, and in
7 such action the employer shall have all of the defenses available in a personal
8 injury claim. However, this election shall not prevent any other individual,
9 other than the individual excluded pursuant to this subdivision, who is
10 determined to be an employee of the corporation or L.L.C. from claiming
11 workers' compensation benefits under this chapter from the corporation or
12 L.L.C., or from a statutory employer.

13 (I) An individual who provides services for which he or she receives
14 foster care payments that are specifically excluded from gross income pursuant
15 to Section 131 of the federal Internal Revenue Code, 26 U.S.C. § 131.

16 (J) An individual that is a direct seller provided all of the following
17 are met:

18 (i) The individual is engaged in the trade or business of selling or
19 soliciting the sale of consumer products, including services or other intangibles
20 in the home or a location other than in a permanent retail establishment. For
21 purposes of this subdivision, "the trade or business of selling or soliciting the

1 sale of consumer products” includes the sale or solicitation of a sale to any
2 buyer on a buy-sell basis, a deposit-commission basis, or any similar basis for
3 resale by the buyer or any other person.

4 (ii) Substantially all of the compensation, whether or not received
5 in cash, that the individual receives for the performance of the services
6 described in subdivision (i) of this subdivision (14)(J) is directly related to
7 sales or other output, including the performance of services, rather than to the
8 number of hours worked.

9 (iii) The services performed by the individual are performed
10 pursuant to a written contract between the individual and the person for whom
11 the services are performed, and the contract provides that the individual will
12 not be treated as an employee for federal and State tax purposes.

13 * * *

14 Sec. 13. 21 V.S.A. § 1301 is amended as follows:

15 § 1301. DEFINITIONS

16 The following words and phrases, as used in this chapter, shall have the
17 following meanings unless the context clearly requires otherwise:

18 * * *

19 (6)(A)(i) “Employment,” subject to the other provisions of this
20 subdivision (6), means service within the jurisdiction of this State, performed
21 prior to January 1, 1978, which was employment as defined in this subdivision

1 prior to such date and, subject to the other provisions of this subdivision,
2 service performed after December 31, 1977, by an employee, as defined in
3 subsections 3306(i) and (o) of the Federal Unemployment Tax Act, including
4 service in interstate commerce, performed for wages or under any contract of
5 hire, written or oral, expressed or implied. Services partly within and partly
6 without this State may by election as hereinbefore provided be treated as if
7 wholly within the jurisdiction of this State. And whenever an employing unit
8 shall have elected to come under the provisions of a similar act of a state where
9 a part of the services of an employee are performed, the Commissioner, upon
10 his or her approval of said election as to any such employee, may treat the
11 services covered by said approved election as having been performed wholly
12 without the jurisdiction of this State.

13 * * *

14 (B) Services performed by an individual for wages shall be deemed
15 to be employment subject to this chapter unless and until it is shown to the
16 satisfaction of the Commissioner that:

17 (i) Such individual has been and will continue to be free from
18 control or direction over the performance of such services, both under his or
19 her contract of service and in fact; and

20 (ii) Such service is ~~either~~ outside the usual course of the business
21 for which such service is performed, ~~or that such service is performed outside~~

1 ~~of all the places of business of the enterprise for which such service is~~
2 ~~performed~~ unless it can be demonstrated that such individual regularly
3 provides such service to multiple businesses and holds himself or herself out to
4 the public as a provider of such service; and

5 (iii) Such individual is customarily engaged in an independently
6 established trade, occupation, profession, or business and that independently
7 established trade, occupation, profession, or business is actively registered with
8 the Vermont Secretary of State.

9 (C) Notwithstanding any provision of subdivision (B) of this
10 subdivision (6), multiple individuals performing the same work on a project or
11 job site shall be deemed to be performing services in employment.

12 (D) The term “employment” shall not include:

13 * * *

14 (D)(E) Notwithstanding any other provisions of this subdivision,
15 service with respect to which a tax is required to be paid under any federal law
16 imposing a tax against which credit may be taken for contributions required to
17 be paid into a state unemployment fund or which as a condition for full tax
18 credit against the tax imposed by the Federal Unemployment Tax Act is
19 required to be covered under this chapter.

20 * * *

21 Sec. 14. 3 V.S.A. § 2222d is added to read:

1 § 2222d. INTERAGENCY AND DEPARTMENTAL EMPLOYEE

2 MISCLASSIFICATION TASK FORCE; INVESTIGATION AND

3 ENFORCEMENT

4 (a) As used in this section, “employee misclassification” means improperly
5 classifying employees as independent contractors.

6 (b) The Agency of Administration shall create an interagency and
7 departmental task force to coordinate efforts to combat misclassification of
8 workers and to ensure enforcement of all related laws and regulations. The
9 task force shall be overseen by the Agency of Administration and shall be
10 composed of the following members:

11 (1) the Secretary of Administration or designee;

12 (2) the Secretary of Transportation or designee;

13 (3) the Commissioner of Buildings and General Services or designee;

14 (4) the Commissioner of Labor or designee;

15 (5) the Commissioner of Financial Regulation or designee;

16 (6) the Secretary of Human Services or designee;

17 (7) the Commissioner of Taxes or designee;

18 (8) the Attorney General or designee;

19 (9) the Commissioner of Liquor Control or designee; and

1 (10) the Secretary, Commissioner, or designee of any other State
2 licensing agency or department as determined by the Secretary of
3 Administration.

4 (c) The Task Force shall meet at least six times per year.

5 (d) The Secretary of Administration shall ensure that all State agencies do
6 the following:

7 (1) coordinate their efforts to combat employee misclassification in a
8 manner that increases the efficiency and effectiveness of those efforts; and

9 (2) share information concerning any employer determined to have
10 misclassified one or more employees as independent contractors in a central
11 database accessible to all State agencies and departments.

12 (e) The Secretary shall adopt rules and procedures necessary to carry out
13 the duties set forth in subsection (d) of this section.

14 (f) The Secretary of Administration shall report annually on or before
15 January 15 of each year to the House Committee on Commerce and Economic
16 Development, House Committee on Ways and Means and the Senate
17 Committee on Finance regarding activities that he or she has undertaken
18 pursuant to this section and any additional tax revenue and unemployment
19 insurance contributions, as well as any reduction in workers' compensation
20 premiums and costs realized as a result of the efforts undertaken by the
21 Secretary pursuant to this section. The provisions of 2 V.S.A. § 20(d)

1 (expiration of required reports) shall not apply to the report to be made under
2 this subsection.

3 Sec. 15. EFFECTIVE DATE

4 This act shall take effect on July 1, 2016.

DRAFT