No. 142. An act relating to misclassification of employees to lower premiums for workers' compensation and unemployment compensation.

(H.647)

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

Sec. 1. DEPARTMENT OF LABOR MISCLASSIFICATION;

ENFORCEMENT PERSONNEL; FUNDING

(a) No later than August 1, 2010, the department of labor shall have a total of four limited service workers' compensation fraud investigator employees to investigate classifications and enforce the laws relating to worker, business, and job duty classifications.

(b) In addition to the percentage of premiums to be paid by employers into the workers' compensation administration fund pursuant to 21 V.S.A. § 711, employers shall pay an additional 0.055 percent to fund one of the investigator positions required pursuant to subsection (a) of this section.

Sec. 2. 13 V.S.A. § 2024 is amended to read:

§ 2024. WORKERS' COMPENSATION FRAUD; CRIMINAL PENALTIES

Any person, including an employee, employer, medical case manager, health care provider, vocational rehabilitation provider, or workers' compensation insurance carrier who, knowingly and with intent to defraud makes a false statement or representation for the purpose of obtaining, affecting, or denying any benefit or payment under the provisions of chapter 9 of Title 21 or the provisions of Part 3, relating to Insurance, of Title 8, either

for ~~her~~ herself or himself or for any other person, shall forfeit all benefits or payments obtained as a result of the false statement or representation and all or a portion of any right to compensation under the provisions of chapter 9 of Title 21 as determined by the commissioner and:

(1) For fraud involving $10,000.00 or more, be fined not more than $100,000.00 or imprisoned not more than three years, or both.

(2) For fraud involving less than $10,000.00, be fined not more than $10,000.00 or imprisoned not more than two years, or both.

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

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

(a) Failure to insure. If after a hearing under section 688 of this title, the commissioner determines that an employer has failed to comply with the provisions of section 687 of this title, the employer shall be assessed an administrative penalty of not more than $100.00 for ~~every day~~ the first seven days the employer neglected to secure liability and not more than $150.00 for every day thereafter.

(b) Stop-work orders. ~~Additionally,~~ If an employer ~~who~~ fails to comply with the provisions of section 687 of this title ~~for a period of five days~~ after ~~notice from~~ investigation by the commissioner, the commissioner shall 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 ~~after five days~~ 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. ~~The~~ When a stop-work order is issued, the commissioner ~~may, after giving notice and after the expiration of the five-day period,~~ shall post a notice at a conspicuous place on the ~~premises~~ work site of the employer informing the employees that their employer ~~has~~ failed to comply with the provisions of section 687 of this title and ~~ordering the premises closed~~ that work at the work site has been ordered to cease until workers' compensation insurance is secured. The stop-work order shall be rescinded as soon as the commissioner determines that the employer is in compliance with section 687 of this title. An employer against whom a stop-work order has been issued is prohibited from contracting, directly or indirectly, with the state or any of its subdivisions for a period of up to three years following the date of

the issuance of the stop-work order, as determined by the commissioner in consultation with the commissioner of buildings and general services or the secretary of transportation, as appropriate. Either the secretary or the commissioner, as appropriate, shall be consulted in any contest of the prohibition of the employer from contracting with the state or its subdivisions.

(c) ~~If any employer fails to secure or retain workers' compensation insurance within two years after receiving an order to obtain insurance or a notice that the commissioner intends to order the premises closed as described in subsection (b) of this section, without further notice the commissioner shall order the premises of that employer closed and that all business operations cease until the employer has secured workers' compensation insurance.~~ Penalty for violation of stop-work order. In addition to any other penalties, an employer who violates a stop-work order described in subsection (b) of this section is subject to:

(1) A civil penalty of not more than $5,000.00 for the first violation and a civil penalty of not more than $10,000.00 for a second or subsequent violation; or

(2) A criminal fine of not more than $10,000.00 or imprisonment for not more than 180 days, or both.

Sec. 4. 4 V.S.A. § 1102(b) is amended to read:

(b) The judicial bureau shall have jurisdiction of the following matters:

* * *

(19) Violations of 21 V.S.A. § 692(c)(1).

Sec. 5. 21 V.S.A. § 708 is amended to read:

§ 708. PENALTY FOR FALSE REPRESENTATION

(a) Action by the commissioner of labor. A person who willfully makes a false statement or representation, for the purpose of obtaining any benefit or payment under the provisions of this chapter, either for ~~her~~ herself or himself or for any other person, after notice and opportunity for hearing, may be assessed an administrative penalty of not more than ~~$5,000.00 total~~ $20,000.00, and shall forfeit all or a portion of any right to compensation under the provisions of this chapter, as determined to be appropriate by the commissioner after a determination by the commissioner that the person has willfully made a false statement or representation of a material fact. In addition, an employer found to have violated this section is prohibited from contracting, directly or indirectly, with the state or any of its subdivisions for up to three years following the date the employer was found to have made a false statement or misrepresentation of a material fact, as determined by the commissioner in consultation with the commissioner of buildings and general services or the secretary of transportation, as appropriate. Either the secretary or the commissioner, as appropriate, shall be consulted in any contest relating

to the prohibition of the employer from contracting with the state or its subdivisions.

(b) When the department of labor has sufficient reason to believe that an employer has made a false statement or representation for the purpose of obtaining a lower workers' compensation premium, the department shall refer the alleged violation to the commissioner of banking, insurance, securities, and health care administration for the commissioner's consideration of enforcement pursuant to 8 V.S.A. § 3661(c).

(c) Any penalty assessed or order issued under this chapter or 8 V.S.A. § 3661 shall continue in effect against any successor employer that has one or more of the same principals or corporate officers as the employer against which the penalties were assessed or order issued and is engaged in the same or similar business.

(d) Notwithstanding the assessment of an administrative penalty under this section, a person may be prosecuted under 13 V.S.A. § 2024.

Sec. 5a. 8 V.S.A. § 3661(c) is amended to read:

(c) An employer who makes a false statement or representation that results in a lower workers' compensation premium, after notice and opportunity for hearing before the commissioner, may be assessed an administrative penalty of not more than $20,000.00 in addition to any other appropriate penalty. In addition, an employer found to have violated this section is prohibited from

contracting, directly or indirectly, with the state or any of its subdivisions for up to three years following the date the employer was found to have made a false statement or misrepresentation, as determined by the commissioner in consultation with the commissioner of buildings and general services or the secretary of transportation, as appropriate. Either the secretary or the commissioner, as appropriate, shall be consulted in any appeal relating to prohibiting the employer from contracting with the state or its subdivisions.

Sec. 5b. 29 V.S.A. § 161 is amended to read:

§ 161. REQUIREMENTS ON STATE CONSTRUCTION PROJECTS

(a) Bids; selection.

* * *

(d) ~~This~~ Subsections (a) through (c) of this section shall not apply to maintenance or construction projects carried out by the agency of transportation and by the department of forests, parks and recreation.

(e) The agency of administration shall ensure that the state and any of its subdivisions do not contract, directly or indirectly, with employers who are prohibited from contracting by the commissioner of labor pursuant to 21 V.S.A. § § 692, 708, and 1314a or the commissioner of banking, insurance, securities, and health care administration pursuant to 8 V.S.A. § 3661.

(f) The agency of administration shall maintain a current list of employers that have been prohibited from contracting with the state or any of its

subdivisions, and the agencies of administration and of transportation shall publish that list on their websites.

Sec. 6. 21 V.S.A. § 1314 is amended to read:

§ 1314. —REPORTS AND RECORDS; FAILURE TO REPORT EMPLOYMENT INFORMATION

* * *

(h) Any employing unit ~~which~~ that fails to report employment and separation information with respect to a claimant and wages paid to a claimant required under subsection (b) of this section shall be subject to a penalty of ~~$35.00~~ $100.00 for each ~~such~~ report not received by the prescribed due date, which penalty shall be collected in the manner provided for the collection of contributions in section 1329 of this title and shall be paid into the contingent fund provided in section 1365 of this title. If the employing unit demonstrates that its failure was due to a reasonable cause, the commissioner may~~, in his or her discretion,~~ waive the penalty.

Sec. 7. DEPARTMENT OF LABOR; EMPLOYEE MISCLASSIFICATION REPORTING SYSTEM

The department of labor shall create and maintain an online employee misclassification reporting system. The system shall be designed to allow individuals to report suspected cases of employee misclassification, failure to have appropriate insurance coverage, and claimant fraud to the department to

ensure that this information is distributed to appropriate departments and agencies. The department shall keep the name of the complainant confidential.

Sec. 8. 21 V.S.A. § 710 is amended to read:

§ 710. UNLAWFUL DISCRIMINATION

* * *

(c) The department shall not include in any publication or public report the name or contact information of any individual who has alleged that an employer has made a false statement or misclassified any employees, unless it is required by law or necessary to enable enforcement of this chapter.

(d) An employer shall not retaliate or take any other negative action against an individual because the employer knows or suspects that the individual has filed a complaint with the department or other authority, or reported a violation of this chapter, or cooperated in an investigation of misclassification, discrimination, or other violation of this chapter.

(e) The attorney general or a state's attorney may enforce the provisions of this section by restraining prohibited acts, seeking civil penalties, obtaining assurance and conducting civil investigations in accordance with the procedures established in ~~sections 2458-2461 of Title 9~~ 9 V.S.A. §§ 2458–2461 as though discrimination under this section were an unfair act in commerce.

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

§ 1314a. —QUARTERLY WAGE REPORTING ~~REQUIRED~~;

MISCLASSIFICATION; PENALTIES

* * *

(f)(1) Any employing unit or employer ~~which~~ that fails to ~~file~~:

(A) File any report required by this section shall be subject to a penalty of ~~$35.00~~ $100.00 for each ~~such~~ report not received by the prescribed due dates~~, which~~.

(B) Properly classify an individual regarding the status of employment is subject to a penalty of not more than $5,000.00 for each improperly classified employee. In addition, an employer found to have violated this section is prohibited from contracting, directly or indirectly, with the state or any of its subdivisions for up to three years following the date the employer was found to have failed to properly classify, as determined by the commissioner in consultation with the commissioner of buildings and general services or the secretary of transportation, as appropriate. Either the secretary or the commissioner, as appropriate, shall be consulted in any appeal relating to prohibiting the employer from contracting with the state or its subdivisions.

(2) Penalties under this subsection shall be collected in the manner provided for the collection of contributions in section 1329 of this title and shall be paid into the contingent fund provided in section 1365 of this title. If

the employing unit demonstrates that its failure was due to a reasonable cause, the commissioner may waive or reduce the penalty.

* * *

Sec. 10. 21 V.S.A. § 1328 is amended to read:

§ 1328. FILING EMPLOYER QUARTERLY TAX CONTRIBUTION REPORTS; FAILURE

The commissioner shall impose a penalty of ~~$35.00~~ $100.00 for each failure by an employer to file any contribution report required under section 1322 of this title on or before the date on which the report is due, which shall be collected in the manner provided for the collection of contributions in section 1329 of this title and shall be paid into the contingent fund provided in section 1365 of this title. If the employer demonstrates that its failure was due to a reasonable cause, the commissioner may waive or reduce the penalty.

Sec. 11. 21 V.S.A. § 1369 is amended to read:

§ 1369. FALSE STATEMENTS TO AVOID ~~CHAPTER~~ UNEMPLOYMENT PROGRAM OBLIGATIONS

A person ~~shall not~~ who wilfully ~~and intentionally make~~ makes a material false statement or representation to avoid becoming or remaining subject to this chapter, or to avoid or reduce a contribution or other payment required of an employer under this chapter for either herself or himself or for any other

person, after notice and opportunity for hearing, may be assessed an administrative penalty of not more than $5,000.00.

Sec. 12. 21 V.S.A. § 1373 is amended to read:

§ 1373. GENERAL PENALTY; CIVIL

A person who violates a provision of this chapter or any lawful rule or regulation of the board, for which no other penalty is provided, shall be ~~fined~~ assessed an administrative penalty of not more than ~~$50.00 or be imprisoned not more than 30 days, or both~~ $5,000.00.

Sec. 13. EMPLOYEE MISCLASSIFICATION; INVESTIGATION AND ENFORCEMENT; INTERAGENCY REPORT

(a) The agency of administration shall ensure that all state agencies and departments do the following:

(1) Coordinate to increase the efficiency and effectiveness of efforts to combat employee misclassification.

(2) Receive information concerning any employer determined to have misclassified one or more employees as independent contractors.

(b) The department of banking, insurance, securities, and health care administration and the department of labor shall report on or before January 15, 2011, and again on January 15, 2012, to the house committee on commerce and economic development and the senate committee on economic development, housing and general affairs regarding their investigation and

enforcement efforts as they relate to employee misclassification and the enforcement of Vermont labor standards, including all the following:

(1) The number and outcome of departmental audits and investigations.

(2) An assessment of the efficacy of the new workers' compensation fraud staff positions created in Sec. 106 of No. 54 of the Acts of 2009.

(3) The financial costs of misclassification and miscoding.

(4) The success of the employee misclassification public education and outreach program.

Sec. 14. 21 V.S.A. § 643a is amended to read:

§ 643a. DISCONTINUANCE OF BENEFITS

Unless an injured worker has successfully returned to work, an employer shall notify both the commissioner and the employee prior to terminating benefits under either section 642 or 646 of this title. The notice of intention to discontinue payments shall be filed on forms prescribed by the commissioner and shall include the date of the proposed discontinuance ~~and~~, the reasons for it, and, if the employee has been out of work for 90 days, a verification that the employer offered vocational rehabilitation screening and services as required under this chapter. All relevant evidence, including evidence that does not support discontinuance in the possession of the employer not already filed, shall be filed with the notice. The liability for the payments shall continue for seven days after the notice is received by the commissioner and the employee.

Those payments shall be made without prejudice to the employer and may be deducted from any amounts due pursuant to section 648 of this title if the commissioner determines that the discontinuance is warranted or if otherwise ordered by the commissioner. Every notice shall be reviewed by the commissioner to determine the sufficiency of the basis for the proposed discontinuance. If, ~~upon~~ after review of all the evidence in the file, the commissioner finds that a preponderance of all the evidence in the file does not reasonably support the proposed discontinuance, the commissioner shall order that payments continue until a hearing is held and a decision is rendered. Prior to a formal hearing, an injured worker may request reinstatement of benefits by providing additional new evidence to the department that establishes that a preponderance of all evidence now supports the claim. If the commissioner's decision, after a hearing, is that the employee was not entitled to any or all benefits paid between the discontinuance and the final decision, upon request of the employer, the commissioner may order that the employee repay all benefits to which the employee was not entitled. The employer may enforce ~~such~~ a repayment order in any court of law having jurisdiction ~~of the amount involved~~.

Sec. 15. 21 V.S.A. § 650 is amended to read:

§ 650. PAYMENT; AVERAGE WAGE; COMPUTATION

* * *

(e) If weekly compensation benefits or weekly accrued benefits are not paid within 21 days after becoming due and payable pursuant to an order of the commissioner, or in cases in which the overdue benefit is not in dispute, 10 percent of the overdue amount shall be added and paid to the employee, in addition to interest and any other penalties. In the case of an initial claim, benefits are due and payable upon entering into an agreement pursuant to subsection 662(a) of this title, upon issuance of an order of the commissioner pursuant to subsection 662(b) of this title, or if the employer has not denied the claim within 21 days after the claim is filed. Benefits are in dispute if the claimant has been provided actual written notice of the dispute within 21 days of the benefit being due and payable and the evidence reasonably supports the denial. Interest shall accrue and be paid on benefits that are found to be compensable during the period of nonpayment. The commissioner shall promptly review requests for payment under this section and, consistent with ~~the criteria in department rule 10.13~~ subsection 678(d) of this title, shall allow for the recovery of reasonable attorney fees associated with an employee's successful request for payment under this subsection.

(f) When benefits have been awarded or are not in dispute as provided in subsection (e) of this section, the employer shall establish a weekday on which payment shall be mailed or deposited and notify the claimant and the department of that day. The employer shall ensure that each weekly payment

is mailed or deposited on or before the day established. If the benefit payment is not mailed or deposited on the day established, the employer shall pay to the claimant a late fee of $10.00 or five percent of the benefit amount, whichever is greater, for each weekly payment that is made after the established day. For the purposes of this subsection, "paid" means the payment is mailed to the claimant's mailing address or, in the case of direct deposit, transferred into the designated account. In the event of a dispute, proof of payment shall be established by affidavit.

Sec. 16. 21 V.S.A. § 655 is amended to read:

§ 655. PROCEDURE IN OBTAINING COMPENSATION; MEDICAL EXAMINATION; VIDEO AND AUDIO RECORDING

After an injury and during the period of disability, if so requested by his or her employer, or ordered by the commissioner, the employee shall submit ~~himself or herself~~ to examination, at reasonable times and places, ~~to~~ by a duly licensed physician or surgeon designated and paid by the employer. The employee ~~shall have the right to~~ may make a video or audio recording of any examination performed by the insurer's physician or surgeon or have a ~~physician or surgeon~~ licensed health care provider designated and paid by ~~himself or herself~~ the employee present at ~~such~~ the examination. ~~Such~~ The employer may make an audio recording of the examination. The right~~,~~ ~~however,~~ of the employee to record the examination shall not be construed to

deny to the employer's physician the right to visit the injured employee at all reasonable times and under all reasonable conditions during total disability. If an employee refuses to submit ~~himself or herself~~ to or in any way obstructs ~~such~~ the examination, ~~his or her~~ the employee's right to ~~take or~~ prosecute any proceeding under the provisions of this chapter shall be suspended until ~~such~~ the refusal or obstruction ceases, and compensation shall not be payable for the period which ~~such~~ the refusal or obstruction continues.

Sec. 17. Sec. 32(b) of No. 54 of the Acts of 2009 is amended to read:

(b) The agencies shall ~~require by rule or by~~ develop a procedure that ensures enforcement of the prohibition against any contractor that ~~violates classification requirements shall be~~ has been prohibited or restricted from bidding on future state contracts for a period of time that corresponds to the seriousness of the classification violation by the commissioner of labor or the commissioner of banking, insurance, securities, and health care administration. ~~The rules or procedures shall also provide for an appeal process from any such prohibition or restriction consistent with existing law.~~

Sec. 18. 18 V.S.A. § 906(8) is amended to read:

(8) Establishing, by rule, levels of individual certification and application forms for advanced emergency medical care. The commissioner ~~may~~ shall use the guidelines established by the National Highway ~~Transportation~~ Traffic Safety Administration (NHTSA) in the U.S. Department

of Transportation as a standard or other comparable standards, except that a felony conviction shall not necessarily disqualify an applicant. The rules shall also provide that:

(A) An individual may apply for and obtain one or more additional certifications, including certification as an advanced emergency medical technician or as a paramedic.

(B) An individual certified by the commissioner as an emergency medical technician, advanced emergency medical technician, or a paramedic, who is affiliated with a licensed ambulance service, fire department, or rescue service, shall be able to practice fully within the ~~statewide~~ scope of practice for such level of certification as ~~established by the commissioner by rule, which shall be adopted and implemented on a statewide basis no later than January 1, 2011, provided that such person is affiliated with a rescue service, fire department, or licensed ambulance service, or other state licensed medical facility~~ defined by NHTSA's National EMS Scope of Practice Model notwithstanding any law or rule to the contrary, and subject to the medical direction of the commissioner or designee.

(C) ~~An~~ Unless otherwise provided under this section, an individual seeking any level of certification shall be required to pass an examination approved by the commissioner for that level of certification. Written and practical examinations shall not be required for recertification; however, to

maintain certification, all individuals shall complete a specified number of hours of continuing education as established by rule by the commissioner.

(D) If there is a hardship imposed on any applicant for a certification under this section because of unusual circumstances, the applicant may apply to the commissioner for a temporary or permanent waiver of one or more of the certification requirements, which the commissioner may ~~waive~~ grant for good cause.

(E) An applicant who has served as an advanced emergency medical technician, such as a hospital corpsman or a medic in the United States Armed Forces, or who is licensed as a registered nurse or a physician's assistant shall be granted a permanent waiver of the training requirements to become a certified emergency medical technician, an advanced emergency medical technician, or a paramedic, provided the applicant passes the applicable examination approved by the commissioner for that level of certification and further provided that the applicant is affiliated with a rescue service, fire department, or licensed ambulance service.

(F) An applicant who is certified on the National Registry of Emergency Medical Technicians as an EMT-basic, EMT-intermediate, or a paramedic shall be granted certification as a Vermont EMT-basic, EMT-intermediate, or paramedic without the need for further testing, provided

he or she is affiliated with an ambulance service, fire department, or rescue service, or is serving as a medic with the Vermont National Guard.

~~(E)~~(G) No advanced certification shall be required for a trainee in established advanced training programs leading to certification as an advanced emergency medical technician, provided that the trainee is supervised by an individual holding a level of certification for which the trainee is training and the student is enrolled in an approved certification program.

Sec. 19. UPDATED RULES FOR ADVANCED EMERGENCY MEDICAL CARE

No later than March 1, 2011, the commissioner of health shall adopt, repeal, or amend any existing departmental rules on emergency medical care to ensure they are in compliance with the provisions of 18 V.S.A. § 906(8).

Sec. 20. STUDY; STATEWIDE LICENSING OF EMS PROVIDERS

(a) The commissioner of health, in consultation with the Vermont secretary of state's office of professional regulation, the Professional Firefighters of Vermont, the Vermont Career Fire Chiefs Association, the Vermont State Firefighters' Association, the Vermont Ambulance Association, the Vermont Association of Hospitals and Health Systems, a representative from the Initiative for Rural Emergency Medical Services program at the University of Vermont, and a representative of three of Vermont's existing 13 EMS districts chosen jointly by the speaker of the house and the president pro tempore of the

senate, one of whom shall be a medical director and one of whom shall be a volunteer certified emergency medical technician, shall develop a proposal for a statewide licensing mechanism for emergency medical services (EMS) providers and shall assess the state's EMS capabilities and training requirements. In addition, the commissioner, also in consultation with the entities referenced in this subsection, shall study whether an individual may provide emergency medical services that exceed the scope of practice for the license level of the service or department with which the individual is affiliated if the individual is licensed and certified at a more advanced level.

(b) The commissioner of health shall prepare a proposal on a statewide licensing mechanism in the form of draft legislation and shall submit that proposal along with findings and recommendations related to the other topics itemized in subsection (a) of this section to the house committee on commerce and economic development and the senate committee on economic development, housing and general affairs no later than January 15, 2012.

(c) Pending the results of the study required under this section and any subsequent legislative action, an individual may provide emergency medical services that exceed the scope of practice for the license level of the service or department with which the individual is affiliated if the individual is licensed and certified at a more advanced level provided the emergency medical

services are in accordance with a protocol cooperatively developed by the individual and the district medical advisor.

Sec. 21. EFFECTIVE DATES

This act shall take effect on July 1, 2010, except for this section and Secs. 7, 8, 14, 18, 19, and 20, which shall take effect on passage.

Approved: June 1, 2010