Introduced by Committee on Commerce and Economic Development

Date:

Subject: Labor; workers’ compensation; unemployment insurance;

independent contractors

Statement of purpose of bill as introduced: This bill proposes to amend the definitions related to independent contractors in the workers’ compensation and unemployment insurance statutes.

An act relating to the classification of employees and independent contractors

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

Sec. 1. PURPOSE

By enacting this legislation, the General Assembly intends to support Vermont’s entrepreneurial spirit, adapt to emerging business and employment trends, strengthen and grow Vermont’s economy, make the State more competitive and affordable, support business growth and development, and maintain protections for Vermont’s workforce. In particular, this legislation is intended to update Vermont’s workers’ compensation and unemployment insurance laws to make them more simple, clear, and comprehensible in order to:
(1) ensure that Vermont’s workers’ compensation and unemployment insurance systems reflect and support the unique character and spirit of innovation that is inherent in Vermont’s entrepreneurs, businesses, workers, and economy;

(2) embrace, strengthen, and build upon the emerging entrepreneurial, independent, and collaborative sectors of Vermont’s workforce and economy;

(3) assist businesses, employees, independent contractors, and insurers in complying with the requirements for the proper classification of employees and independent contractors;

(4) reduce the frequency of misclassification and the related harmful effects of misclassification to individuals, businesses, and society;

(5) facilitate the proper classification of employees and independent contractors by establishing a common definition for “independent contractor” and clarifying the presumption that an individual who performs services for compensation is an employee;

(6) provide for the efficient and fair enforcement of Vermont’s workers’ compensation and unemployment insurance laws by the Department of Labor; and

(7) build on the more than 100-year evolution and improvement of the grand bargain in Vermont’s workers’ compensation law that provides
employees with a prompt, no-fault remedy for workplace injuries while

limiting the potential liability of employers.

Sec. 2. 21 V.S.A. § 601 is amended to read:

§ 601. DEFINITIONS

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

* * *

(3) “Employer” includes any body of persons, corporate or unincorporated, public or private, and the legal representative of a deceased employer, and includes the owner or lessee of premises or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workers there employed. If the employer is insured, the term “employer” includes the employer’s insurer so far as applicable. A person is not deemed to be an “employer” for the purposes of this chapter as the result of entering into a contract for services or labor with an individual a sole proprietor or partner owner who has knowingly and voluntarily waived coverage of this chapter pursuant to subdivision (14)(F) of this section, or an individual who is a corporate officer or L.L.C. member or manager who has filed, and had approved, an exclusion pursuant to subdivision 14(H) of this section and who meets the criteria set forth in that subdivision.
(14) “Worker” and “employee” means an individual who has entered
into the employment of, or works under contract of service or apprenticeship
with, an employer. Any reference to a worker who has died as the result of a
work injury shall include a reference to the worker’s dependents, and any
reference to a worker who is a minor or incompetent shall include a reference
to the minor’s committee, guardian, or next friend. The term “worker” or
“employee” does not include An individual who performs services for
compensation is presumed to be an employee unless he or she is one of the
following:

* * *

(B) An individual engaged in amateur sports, including a referee or
official who is paid on a per game or per event basis, even if an employer
contributes to the support of such sports.

* * *

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

(i)(I)(aa) The individual or partner owner is an independent
contractor who performs work that is distinct and separate from that of the
person with whom the individual or partner owner contracts; or
(bb) the individual or partner owner is an independent contractor and is either actively registered as a business with the Vermont Secretary of State or actively registered as a business in the state or country of domicile.

(ii) The individual controls the means and manner of the work performed.

(iii) The individual holds him or herself out as in business for him or herself.

(iv) The individual holds him or herself out for work for the general public and does not perform work exclusively for or with another person.

(v) The individual is not treated as an employee for purposes of income or employment taxation with regard to the work performed.

(vi)(II) The services are performed pursuant to a written agreement or contract between the individual or partner owner and another person that is providing compensation for the services, and the written agreement or contract explicitly states that the individual or partner owner is not considered to be an employee under this chapter, is working independently, has no employees, and has not contracted with other independent contractors. The written contract or agreement shall also include information regarding the right of the individual or partner owner to purchase...
workers’ compensation insurance coverage and the individual’s election not to purchase that coverage. However, if the individual or partner owner who is party to the agreement or contract under this subdivision is found to have employees, those employees may file a claim for benefits under this chapter against either or both parties to the agreement.

(ii)(I) An individual or partner owner that meets the conditions of subdivision (i) of this subdivision (14)(F) may elect to file with the Commissioner a notice to waive the right to make a claim for workers’ compensation against the person with whom the individual or partner owner contracts.

(II) If, after filing a notice under subdivision (I) of this subdivision (14)(F)(ii), the individual or partner owner suffers a personal injury arising out of and in the course of his or her employment, he or she may bring an action to recover damages for personal injury against the person who is providing compensation for the services and, in such action, the person who is providing compensation for the services shall have all of the defenses available in a personal injury claim. However, this election shall not prevent any other individual, other than the individual excluded pursuant to subdivision (i) of this subdivision (14)(F), who is determined to be an employee of the unincorporated business from claiming workers’ compensation benefits under this chapter from the unincorporated business or from a statutory employer.
An individual or partner owner who makes an election under subdivision (ii) of this subdivision (14)(F) shall collect and maintain documentation that any other person hired to perform services for the sole proprietor or partner owner’s unincorporated business has workers’ compensation coverage or is otherwise in compliance with the provisions of this chapter.

* * *

With the approval of the Commissioner, a corporation or a limited liability company (L.L.C.) may elect to file exclusions from the provisions of this chapter. A corporation or an L.L.C. may elect to exclude up to four corporate executive officers or four L.L.C. managers or members from coverage requirements under this chapter. If all officers of the corporation or all managers or members of an L.L.C. make such election, receive approval, and the business has no employees, the corporation or L.L.C. shall not be required to purchase workers’ compensation coverage. If after election, the officer, manager, or member experiences a personal injury and files a claim under this chapter, the employer shall have all the defenses available in a personal injury claim. However, this election shall not prevent any other individual, other than the individual excluded under this section, found to be an employee of the corporation or L.L.C. to recover workers’ compensation from either the corporation, L.L.C., or the statutory employer.
(i) A person shall not be deemed to be an “employer” for purposes of this chapter of corporate executive officers or L.L.C. managers or members that are excluded under this subdivision (14)(H) if the following conditions are met:

(I) The corporate executive officers or L.L.C. managers or members operate a separate and distinct business that meets the requirements to be an independent contractor, is actively registered with the Vermont Secretary of State, and elects to file a corporate officer or L.L.C. member exclusion from the provisions of this chapter.

(II) The services are performed pursuant to a written agreement or contract between the corporation or L.L.C. and the person who is providing compensation for the services, and the written agreement or contract explicitly states that the corporate executive officers or L.L.C. managers or members are not considered to be employees under this chapter and are working independently. The written contract or agreement shall also include information regarding the right of the corporation or L.L.C. to purchase workers’ compensation insurance coverage and of the corporate executive officers or the L.L.C. managers or members to elect not to exclude themselves from coverage.

(ii) If, after making an election under this subdivision (14)(H), the corporate officer or L.L.C. manager or member suffers a personal injury

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arising out of and in the course of his or her employment, he or she may bring
an action to recover damages for personal injury against the person that is
providing compensation for the services and, in such action, the person that is
providing compensation for the services shall have all of the defenses available
in a personal injury claim. However, this election shall not prevent any other
individual, other than the individual excluded pursuant to this subdivision, who
is determined to be an employee of the corporation or L.L.C. from claiming
workers’ compensation benefits under this chapter from the corporation or
L.L.C. or from a statutory employer.

(iii) A corporation or L.L.C. whose executive officers, members,
or managers make an election under this subdivision (14)(H) shall collect and
maintain documentation that any other person hired to perform services for the
corporation or L.L.C. has workers’ compensation coverage, or is otherwise in
compliance with this chapter.

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

* * *

(31)(A) “Independent contractor” means a person that is economically
independent of the person’s employing unit under the totality of the
circumstances based on an assessment of the following factors:
(i) whether the individual is free from the direction and control of
the employing unit with respect to the means and manner of the services
performed, both under the person’s contract of service and in fact;

(ii) whether the individual performs work that is an integral part of
the employing unit’s business;

(iii) whether the individual has an opportunity for profit or loss
depending on his or her managerial skill;

(iv) whether the individual has a substantial investment in the
facilities, tool, instruments, materials, and knowledge used by him or her to
complete the work;

(v) whether the work performed requires specialized skills and
initiative;

(vi) whether the individual holds himself or herself out as in
business for himself or herself and competes to offer its services to the general
public; and

(vii) whether the individual is not treated as an employee for
purposes of income or employment taxation with regard to the work performed
and either:

(I) holds or has applied for a federal employer identification
number; or
(II) has filed business or self-employment tax returns with the federal Internal Revenue Service within the past year or will file business or self-employment tax returns with the federal Internal Revenue Service for the current year.

(B) In considering whether a person is economically independent pursuant to subdivision (A) of this subdivision (31), no single factor in and of itself shall be dispositive.

(C) If multiple persons are performing the same work on a project or jobsite, the determination of whether the person is economically independent of the employing unit shall take into account the relationship between the specific services performed by the person and the circumstances of the project or job in relation to which the person is providing services.

(D) An independent contractor shall purchase workers’ compensation coverage for its employees as provided in this chapter.

Sec. 3. 21 V.S.A. § 1301 is amended to read:

§ 1301. DEFINITIONS

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

* * *

(6)(A)(i) “Employment,” subject to the other provisions of this subdivision (6), means service within the jurisdiction of this State, performed
prior to January 1, 1978, which was employment as defined in this subdivision
prior to such date and, subject to the other provisions of this subdivision,
service performed after December 31, 1977, by an employee, as defined in
subsections 3306(i) and (o) of the Federal Unemployment Tax Act, including
service in interstate commerce, performed for wages or under any contract of
hire, written or oral, expressed or implied. Services partly within and partly
without this State may by election as hereinbefore provided be treated as if
wholly within the jurisdiction of this State. And whenever an employing unit
shall have elected to come under the provisions of a similar act of a state where
a part of the services of an employee are performed, the Commissioner, upon
his or her approval of said election as to any such employee, may treat the
services covered by said the approved election as having been performed
wholly without the jurisdiction of this State.

* * *

(B)(i) Services performed by an individual for wages shall be deemed
to be employment subject to this chapter unless and until it is shown to the
satisfaction of the Commissioner that the individual is economically
independent of his or her employing unit under the totality of the
circumstances in light of the following factors:
(i) Such individual has been and will continue to be free from
control or direction over the performance of such services, both under his or
her contract of service and in fact; and

(ii) Such service is either outside the usual course of the business
for which such service is performed, or that such service is performed outside
of all the places of business of the enterprise for which such service is
performed; and

(iii) Such individual is customarily engaged in an independently
established trade, occupation, profession, or business.

(I) whether the individual is free from the direction and control
of the employing unit with respect to the means and manner of the services
performed, both under the person’s contract of service and in fact;

(II) whether the individual performs work that is an integral
part of the employing unit’s business;

(III) whether the individual has an opportunity for profit or loss
depending on his or her managerial skill;

(IV) whether the individual has a substantial investment in the
facilities, tool, instruments, materials, and knowledge used by him or her to
complete the work;

(V) whether the work performed requires specialized skills and
initiative;
(VI) whether the individual holds himself or herself out as in
business for himself or herself and competes to offer its services to the general
public; and

(VII) whether the individual is not treated as an employee for
purposes of income or employment taxation with regard to the work performed
and either:

(aa) holds or has applied for a federal employer
identification number; or

(bb) has filed business or self-employment tax returns with
the federal Internal Revenue Service within the past year or will file business
or self-employment tax returns with the federal Internal Revenue Service for
the current year.

(ii) In considering whether an individual is economically
independent pursuant to subdivision (i) of this subdivision (6)(B), no single
factor in and of itself shall be dispositive.

(iii) If multiple individuals are performing the same work on a
project or jobsite, the determination of whether an individual is economically
independent of the employing unit shall take into account the relationship
between the specific services performed by the individual and the
circumstances of the project or job in relation to which he or she is providing
services.
Sec. X. EFFECTIVE DATE

This act shall take effect on July 1, 2017.