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H.378

Introduced by Representatives Scheuermann of Stowe, Clarkson of
Woodstock, Conquest of Newbury, McCormack of Burlington,
Baser of Bristol, Beyor of Highgate, Branagan of Georgia,
Brennan of Colchester, Briglin of Thetford, Burditt of
West Rutland, Carr of Brandon, Connor of Fairfield, Corcoran
of Bennington, Cupoli of Rutland City, Devereux of
Mount Holly, Dickinson of St. Albans Town, Eastman of
Orwell, Grad of Moretown, Greshin of Warren, Hebert of
Vernon, Krebs of South Hero, LaClair of Barre Town, Myers of
Essex, Olsen of Londonderry, Parent of St. Albans City, Shaw
of Pittsford, Sibia of Dover, Tate of Mendon, Toll of Danville,
Trieber of Rockingham, Van Wyck of Ferrisburgh, Viens of
Newport City, Willhoit of St. Johnsbury, Woodward of
Johnson, Wright of Burlington, and Young of Glover

Referred to Committee on

Date:

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

1 Statement of purpose of bill as introduced: This bill proposes to establish a
2 common definition of “independent contractor” for the workers’ compensation
3 and unemployment insurance statutes.

4 An act relating to independent contractors

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

6 Sec. 1. 21 V.S.A. § 601 is amended to read:

7 § 601. DEFINITIONS

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

10 * * *

11 (14) “Worker” and “employee” means an individual who has entered
12 into the employment of, or works under contract of service or apprenticeship
13 with, an employer. Any reference to a worker who has died as the result of a
14 work injury shall include a reference to the worker’s dependents, and any
15 reference to a worker who is a minor or incompetent shall include a reference
16 to the minor’s committee, guardian, or next friend. The term “worker” or
17 “employee” does not include:

18 * * *

19 (F) The sole proprietor or partner owner or partner owners of an
20 unincorporated business ~~provided:~~

1 ~~(i) The individual performs work that is distinct and separate from~~
2 ~~that of the person with whom the individual contracts.~~

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

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

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

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

12 ~~(vi) The services are performed pursuant to a written agreement or~~
13 ~~contract between the individual and another person, and the written agreement~~
14 ~~or contract explicitly states that the individual is not considered to be an~~
15 ~~employee under this chapter, is working independently, has no employees, and~~
16 ~~has not contracted with other independent contractors. The written contract or~~
17 ~~agreement shall also include information regarding the right of the individual~~
18 ~~to purchase workers' compensation insurance coverage and the individual's~~
19 ~~election not to purchase that coverage. However, if the individual who is party~~
20 ~~to the agreement or contract under this subdivision is found to have employees,~~
21 ~~those employees may file a claim for benefits under this chapter against either~~

1 ~~or both parties to the agreement~~ unless the sole proprietor or partner notifies
2 the Commissioner that he or she is to be included within the provisions of this
3 chapter; the submission of an insurance contract or an amendment to an
4 insurance contract to elect coverage of the sole proprietor or partner owner
5 shall be considered sufficient notice.

6 * * *

7 (I) An independent contractor if it can be demonstrated that the
8 independent contractor is free from the essential direction and control of the
9 employer, both under the individual's contract and in fact, and the employer
10 proves that the individual meets all of the criteria in subdivision (i) and at least
11 two of the criteria in subdivision (ii) of this subdivision (14)(I).

12 (i) In order for an individual to be an independent contractor, the
13 following criteria must be met:

14 (I) The individual has the essential right to control the means
15 and progress of the work except as to the final results.

16 (II) The individual is customarily engaged in an independently
17 established trade, occupation, profession, or business.

18 (III) The individual has a substantive investment in the
19 facilities, tools, instruments, materials, and knowledge used by him or her to
20 complete the work.

1 (IV) The individual has the opportunity for profit and loss as a
2 result of the services being performed for the employer.

3 (V) The individual hires and pays his or her employees, if any,
4 and supervises the details of the employees' work.

5 (VI) The individual makes his or her services available to the
6 general public and is able to accept work for entities other than the employer,
7 whether or not he or she chooses to do so.

8 (ii) In order for an individual to be an independent contractor, at
9 least two of the following criteria must be met:

10 (I) The individual is responsible for satisfactory completion of
11 the work and may be held contractually responsible for failure to complete the
12 work.

13 (II) The parties have a written contract that defines the
14 relationship and gives the individual contractual rights in the event the contract
15 is terminated by the employer prior to completion of the work.

16 (III) Payment to the individual is based on factors directly
17 related to the work performed and not solely on the amount of time expended
18 by him or her.

19 (IV) The work is outside the usual course of business for which
20 the service is performed.

1 (V) The individual has elected to file taxes as an independent
2 contractor with the federal Internal Revenue Service.

3 * * *

4 Sec. 2. 21 V.S.A. § 1301 is amended to read:

5 § 1301. DEFINITIONS

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

8 * * *

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

1 ~~such employee~~, may treat the services covered by ~~said approved election~~ the
2 employee as having been performed wholly without the jurisdiction of
3 this State.

4 * * *

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

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

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

15 ~~(iii) Such individual is customarily engaged in an independently~~
16 ~~established trade, occupation, profession, or business~~ they are specifically
17 excluded pursuant to this chapter.

18 (C) The term “employment” shall not include:

19 * * *

20 (xxii) Services performed by an independent contractor if it can be
21 demonstrated that the independent contractor is free from the essential

1 direction and control of the person for whom the services are performed, both
2 under the individual's contract and in fact, and the person for whom the
3 services are performed proves that the individual meets all of the criteria in
4 subdivision (I) and at least two of the criteria in subdivision (II) of this
5 subdivision (6)(C)(xxii).

6 (I) In order for an individual to be an independent contractor,
7 the following criteria must be met:

8 (aa) The individual has the essential right to control the
9 means and progress of the work except as to the final results.

10 (bb) The individual is customarily engaged in an
11 independently established trade, occupation, profession, or business.

12 (cc) The individual has a substantive investment in the
13 facilities, tools, instruments, materials, and knowledge used by him or her to
14 complete the work.

15 (dd) The individual has the opportunity for profit and loss as
16 a result of the services being performed.

17 (ee) The individual hires and pays his or her employees, if
18 any, and supervises the details of the employees' work.

19 (ff) The individual makes his or her services available to the
20 general public and is able to accept work for entities other than the employer,
21 whether or not he or she chooses to do so.

