

1 H.773

2 Introduced by Representatives Botzow of Pownal and Marcotte of Coventry

3 Referred to Committee on

4 Date:

5 Subject: Labor; workers' compensation; unemployment insurance; employee

6 misclassification

7 Statement of purpose of bill as introduced: This bill proposes to amend

8 definitions related to independent contractors in the workers' compensation

9 and unemployment compensation statutes, to provide for notice of the

10 requirements regarding employee classification at worksites, to permit the

11 Department of Labor to enter an employer's premises for the purposes of

12 investigating compliance with the workers' compensation and unemployment

13 compensation statutes, to permit the Department to obtain an injunction to

14 enforce a stop-work order related to a violation of the workers' compensation

15 statute, and to clarify the requirements for consultation regarding debarment of

16 employers that have violated the wage and hour, workers' compensation, and

17 unemployment compensation statutes.

18 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 REMUNERATION 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,” and the applicable provisions of chapters 9 and 17 of this title.

9 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.

(c) An employer who violates the provisions of this section shall be subject 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

(a) So far as it is necessary in his or her examinations, and investigations and in the determination of matters within his or her jurisdiction, the ~~commissioner~~ Commissioner shall have power to subpoena witnesses, administer oaths, and to demand the production of books, papers, records, and documents for his or her examination. In addition, the Commissioner or his or her designee may, upon presenting appropriate credentials, at reasonable times and without disrupting critical business operations enter and inspect any place of business or employment, question any employees, and investigate any facts, conditions, or matters necessary and material to the administration of this chapter. The employer shall make its workers available to meet with the Commissioner or his or her designee, as required by the Commissioner. The Commissioner or his or her designee shall inform the employer of his or her right to refuse entry. If entry is refused, the Commissioner may apply to the Civil Division of the Superior Court for an order to enforce the rights given to the Commissioner under this section.

20 \* \* \*

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

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

3 \* \* \*

4 (b) Stop-work orders. If an employer fails to comply with the provisions of  
5 section 687 of this title after investigation by the Commissioner, the  
6 Commissioner shall issue an emergency order to that employer to stop work  
7 until the employer has secured workers' compensation insurance. If the  
8 Commissioner determines that issuing a stop-work order would immediately  
9 threaten the safety or health of the public, the Commissioner may permit work  
10 to continue until the immediate threat to public safety or health is removed.

11 The Commissioner shall document the reasons for permitting work to continue,  
12 and the document shall be available to the public. In addition, the employer  
13 shall be assessed an administrative penalty of not more than \$250.00 for every  
14 day that the employer fails to secure workers' compensation coverage after the  
15 Commissioner issues an order to obtain insurance and may also be assessed an  
16 administrative penalty of not more than \$250.00 for each employee for every  
17 day that the employer fails to secure workers' compensation coverage as  
18 required in section 687 of this title. When a stop-work order is issued, the  
19 Commissioner shall post a notice at a conspicuous place on the work site of the  
20 employer informing the employees that their employer failed to comply with  
21 the provisions of section 687 of this title and that work at the work site has

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

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

(e)(d) 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:

4                   (1) ~~a civil~~ an administrative penalty of not more than \$5,000.00 for the  
5 first violation and ~~a civil~~ an administrative penalty of not more than  
6 \$10,000.00 for a second or subsequent violation; or

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

9 Sec. 4. 21 V.S.A. § 7 is added to read:

## § 7. COLLECTION OF ADMINISTRATIVE PENALTIES

11       The Commissioner may collect any unpaid administrative penalty assessed  
12       pursuant to this title by filing an action in Superior Court, or through any other  
13       means available to State agencies.

14 Sec. 5. 4 V.S.A. § 1102 is amended to read:

15        § 1102. JUDICIAL BUREAU; JURISDICTION

16 \* \* \*

17 (b) The Judicial Bureau shall have jurisdiction of the following matters:

18 \* \* \*

19 (20) ~~Violations of 21 V.S.A. § 692(c)(1).~~ [Repealed.]

20 \* \* \*

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 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

## PENALTIES

\* \* \*

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

8 \* \* \*

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

10 § 708. PENALTY FOR FALSE REPRESENTATION

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

1 up to three years following the date the employer was found to have made a  
2 false statement or misrepresentation of a material fact, as determined by the  
3 Commissioner in consultation with the Commissioner of Buildings and  
4 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. The consultation may be informal and shall occur~~  
~~within five days of the notification by the Commissioner. The outcome of the~~  
~~consultation shall be 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 made a false statement or representation for the purpose of  
13 obtaining a lower workers' compensation premium, the Department shall refer  
14 the alleged violation to the Commissioner of Financial Regulation for the  
15 Commissioner's consideration of enforcement pursuant to 8 V.S.A. § 3661(c).

16 \* \* \*

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 disrupting critical 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 make its workers available to meet with the  
12 Commissioner or his or her designee, as required by the Commissioner. The  
13 Commissioner or his or her designee shall inform the employer of his or her  
14 right to refuse entry. If entry is refused, the Commissioner may apply to the  
15 Civil Division of the Superior Court for an order to enforce the rights given to  
16 the Commissioner under this section.

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

18 § 601. DEFINITIONS

19 Unless the context otherwise requires, words and phrases used in this  
20 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 who has knowingly and voluntarily waived coverage of this chapter pursuant to subdivision (14)(F) of this section, or is a corporate officer or LLC member that 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~~ a person 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. A person who performs services for remuneration is presumed to be an employee unless the

employing unit proves that the person is free from the direction and control of  
the employing unit, both under the person's contract of service and in fact.

3 The term "worker" or "employee" does not include:

4 \* \* \*

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

(vi) The services are performed pursuant to a written agreement or contract between the individual or partner owner and another person, 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 or partner owner'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.

17 \* \* \*

18                             (H) With the approval of the Commissioner, a corporation or a  
19 limited liability company (L.L.C.) may elect to file exclusions from the  
20 provisions of this chapter. A corporation or an L.L.C. may elect to exclude up  
21 to four corporate executive officers or four L.L.C. managers or members from

1 coverage requirements under this chapter. If all officers of the corporation or  
2 all managers or members of an L.L.C. make such election, receive approval,  
3 and the business has no employees, the corporation or L.L.C. shall not be  
4 required to purchase workers' compensation coverage. ~~If after election, the~~  
5 ~~officer, manager, or member experiences a personal injury and files a claim~~  
6 ~~under this chapter, the employer shall have all the defenses available in a~~  
7 ~~personal injury claim. However, this election shall not prevent any other~~  
8 ~~individual, other than the individual excluded under this section, found to be an~~  
9 ~~employee of the corporation or L.L.C. to recover workers' compensation from~~  
10 either the corporation, L.L.C., or the statutory employer.

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

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

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

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

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

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

17                  (VI) The person with whom the corporation or L.L.C. has  
18                  contracted has not hired multiple sole proprietors, partnerships, or single  
19                  member corporations or L.L.C.s to perform the same work on a project or  
20                  jobsite.

13 § 1301. DEFINITIONS

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

\* \* \*

16  
17                 (6)(A)(i) “Employment,” subject to the other provisions of this  
18 subdivision (6), means service within the jurisdiction of this State, performed  
19 prior to January 1, 1978, which was employment as defined in this subdivision  
20 prior to such date and, subject to the other provisions of this subdivision,  
21 service performed after December 31, 1977, by an employee, as defined in

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

11 \* \* \*

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

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

18 (ii) Such service is either outside the usual course of the business  
19 for which such service is performed, ~~or that such service is performed outside~~  
20 ~~of all the places of business of the enterprise for which such service is~~  
21 ~~performed unless it can be demonstrated that such individual regularly~~

provides such service to multiple businesses and holds himself or herself out to the public as a provider of such service; and

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

11 \* \* \*

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

18 \* \* \*

## 19 Sec. 14. EFFECTIVE DATE

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