

Summary of Certain Statutes and Bills Related to Independent Contractors

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Statutory Provisions:

Workers Compensation:

§ 601. DEFINITIONS

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

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(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, “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.

(4) “Employment” includes public employment, and, in the case of private employers, includes all employment in any trade or occupation notwithstanding that an employer may be a nonprofit corporation, institution, association, partnership, or proprietorship.

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(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:

* * *

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

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

(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) The services are performed pursuant to a written agreement or contract between the individual and another person, and the written agreement or contract explicitly states that the individual 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 to purchase workers' compensation insurance coverage and the individual's election not to purchase that coverage. However, if the individual 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.

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(H) 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 executive officers or 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.

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Unemployment Insurance:

§ 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 approved election as having been performed wholly without the jurisdiction of this State.

* * *

(B) 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:

(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.

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Bills Related to Independent Contractors:

H.168: An Act Relating to Contingent Employees. Introduced by Rep. Botzow, et al.

- Section 1 includes findings.
- Section 2 creates a new subchapter 14 in 21 V.S.A. chapter 5 (employment practices)
 - 21 V.S.A. § 581 adds definitions, including:
 - “Contingent employee”: a temporary employee, leased employee, or home worker.
 - “Home worker”: an individual employed to work from his or her home by an employer for whom he or she provides services or manufactures goods according to specifications furnished by the employer that are required to be delivered upon completion to the employer or a person designated by the employer.
 - “Leased employee”: an individual employed by an employee leasing company, as that term is defined in 21 V.S.A. § 1031, who is provided to a client company to perform ongoing services for an indefinite time pursuant to one or more employee leasing agreements executed between the leasing company and the client company.
 - “Temporary employee”: an individual employed by a client company pursuant to an agreement with a temporary help company.
 - “Temporary help company”: a person, corporation, or association engaged in the business of hiring its own employees and assigning them to clients to

support or supplement the client's workforce in certain situations, including employee absences, temporary skill shortages, seasonal workloads, and special assignments and projects.

- 21 V.S.A. § 582 requires temporary help companies to provide temporary employees with written notice of information related to each new assignment, including information regarding required clothing, equipment, training or licenses; compensation; and workers' compensation coverage.
 - Requires employers to keep a copy of the notice for 3 years and to provide a copy to the temporary employee upon request.
 - Requires a temporary help company to post a notice of employee rights.
- 21 V.S.A. § 583 applies the provisions against retaliation in § 495(a)(8) and the penalty and enforcement provisions of § 495b to the subchapter.
- Section 3 directs the Commissioner of Labor to study the prevalence, type, and distribution of contingent work in Vermont, as well as the efficacy of existing employment laws with respect to contingent workers.

H.216: An Act Relating to Workers Compensation. Introduced by McCormack, et al.

- Section 1 amends 21 V.S.A. § 601(14)(F) to eliminate the requirement that an individual "perform work that is distinct and separate from that of the person with whom the individual contracts" in order to be considered a sole proprietor and not a worker or employee subject to workers' compensation coverage.

H.331: An Act Relating to Workers Compensation. Introduced by Rep. Masland, et al.

- Section 1 makes two amendments to the definitions for Vermont's workers' compensation statutes in 21 V.S.A. § 601.
 - § 601(3) is amended to provide that a person will not be deemed to be an employer of an individual whom the person has contracted with if the individual is either (1) a sole proprietor as defined by § 601(14)(F) or (2) an officer, member, or manager of a corporation or LLC that is excluded from workers' compensation coverage pursuant to § 601(14)(H).
 - Both exceptions are made regardless of whether the services provided "are a part of, or process in the trade, business, or occupation of the person."
 - § 601(14)(F) is amended to eliminate the requirement that an individual "perform work that is distinct and separate from that of the person with whom the individual contracts" in order to be considered a sole proprietor and not a worker or employee subject to workers' compensation coverage.

H.332: An Act Relating to Workers' Compensation. Introduced by Reps. Botzow and Marcotte.

- Section 1 amends 21 V.S.A. § 603 to add a new subdivision (c) to provide authority for the Commissioner of Labor, the Director of Workers' Compensation, or one of their agents to enter a place of business to investigate potential violations of the workers' compensation statutes, and also provide the Department with a right to seek a Court order enforcing the right of entry.
- Section 2 requires the Commissioner of Labor, in consultation with the Commissioner of DAIL to study the effectiveness of the screening process for injured workers eligible for vocational rehabilitation, and requires a report recommending legislative, regulatory, or administrative changes to improve the process.

H.335: An Act Relating to Sole Authorized Contractors. Introduced by Rep. Botzow.

- Section 1 creates 21 V.S.A. § 398 requiring employers to post a notice explaining the differences between an employee and independent contractor, the penalties for worker misclassification, and how to report worker misclassification in a prominent and accessible place in their workplace.
- Sections 2 and 7 amend 21 V.S.A. §§ 603 and 1307 to provide authority for the Commissioner of Labor to enter a place of business to investigate potential violations of the workers' compensation or unemployment insurance statutes, and also provide the Commissioner with a right to seek a Court order enforcing the right of entry.
- Section 3 amends 21 V.S.A. § 692 to add authority for the Commissioner to seek a Court order enjoining an employer from employing anyone if the employer has violated a stop-work order issued for a violation of the workers' compensation statutes.
- Sections 3–6 amend 21 V.S.A. §§ 692, 708, and 1314a, and 8 V.S.A. § 3661 in relation to the debarment of an employer that has violated the workers' compensation or unemployment insurance statutes by clarifying the consultation process between the Commissioner of Labor, the Commissioner of Buildings and General Services and the Secretary of Transportation.
- Section 8 creates 21 V.S.A. chapter 23 relating to authorized sole contractors.
 - Pursuant to 21 V.S.A. § 1801, the authorized sole contractor program would permit individuals to receive authorization to operate as independent contractors without the protections provided by the workers' compensation and unemployment insurance statutes.
 - Sole contractor authorization under this chapter would not be necessary to work as an independent contractor.
 - 21 V.S.A. § 1802 contains new definitions, and permits an individual, a single member LLC, or a single shareholder corporation to be authorized as a sole contractor.

- 21 V.S.A. § 1803 governs the criteria for receiving sole contractor authorization.
 - An individual that has applied for sole contractor status must supply certain documentation to the Department and meet the independent contractor criteria in the workers' compensation and unemployment insurance statutes to receive the authorization.
- 21 V.S.A. § 1804 creates a rebuttable presumption that an individual that obtains sole contractor authorization is not an employee when they are doing work within the scope of their authorization.
- 21 V.S.A. § 1805 provides a right to appeal a decision of the Commissioner to the Supreme Court within 30 days.
- 21 V.S.A. § 1806 requires the Commissioner to conduct an educational campaign regarding the authorized sole contractor program for at least 12 months after it begins and to maintain a registry of current and previously authorized sole contractors. It also requires the Department to notify employers about the authorized sole contractor program and prohibits employers from hiring a sole contractor until they have acknowledged receipt of the information.
- 21 V.S.A. § 1807 provides the Department with the right to investigate and enforce the statutes governing authorized sole contractors.
- 21 V.S.A. § 1808 creates an administrative penalty of up to \$5,000 for a misrepresentation used to obtain sole contractor authorization, for the violation of sole contractor authorization, or for coercing an employee into becoming a sole contractor.
 - An individual seeking sole contractor authorization that has made a false statement to obtain the authorization can also lose their authorization for up to 2 years.
 - Penalties are in addition to any penalties available for a violation of the workers' compensation or unemployment insurance statutes, and can be appealed to the Supreme Court within 30 days.
- 21 V.S.A. § 1809 creates an application fee of \$200 and makes a sole contractor authorization good for 2 years.
 - The program would require one limited service position to administer it.
- 21 V.S.A. § 1810 provides the Commissioner with authority to make rules necessary to implement the chapter.

H.378: An Act Relating to Independent Contractors. Introduced by Rep. Scheuermann, et al.

- The bill creates a new, uniform definition of independent contractor in the workers' compensation and unemployment insurance statutes.

- Section 1 amends 21 V.S.A. § 601 to provide that a sole proprietor under subdivision (14)(F) is not an employee unless that individual notifies the Commissioner that they wish to be covered by the provisions of the chapter.
- Section 1 also adds a new subdivision (I) that excludes independent contractors from the definition of employee. An independent contractor is an individual that is free from the essential direction and control of the employer who
 - Meets all of the following:
 - 1 Has the essential right to control the means and progress of the work except for the final results.
 - 2 Is customarily engaged in an independently established business.
 - 3 Has a substantive investment in the facilities, tools, instruments, materials, and knowledge he or she uses to complete the work.
 - 4 Has the opportunity for profit and loss from the services provided.
 - 5 Hires and pays his or her employees, if any, and supervises their work.
 - 6 Makes his or her services available to the general public and is able to accept work for entities other than the employer, whether or not he or she chooses to do so.
 - Meets at least 2 of the following:
 - 1 Is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work.
 - 2 Has a written contract with the employer that defines the relationship and gives the individual contractual rights if the employer terminates the contract prior to completion of the work.
 - 3 The individual's pay is based on factors directly related to the work performed and not solely on the amount of time expended by him or her.
 - 4 The work is outside the usual course of business for which the service is performed.
 - 5 The individual has elected to file taxes as an independent contractor with the federal Internal Revenue Service.
- Section 2 amends 21 V.S.A. § 1301 to delete the existing test for an independent contractor under § 1301(6)(B) and add a new subdivision (6)(C)(xxii) that excludes services performed by an independent contractor from the definition of employment.
 - The test for an independent contractor created by this section is identical to the new test created in Section 1.