

March 9, 2016

Revised April 7, 2016 after testimony on April 5, 2016

House Committee on Commerce and Economic Development
Vermont State House
115 State Street – Room 35
Montpelier, VT 05633-5301

RE: Independent Contractor vs Employee Status

Dear House Committee on Commerce and Economic Development:

Due to the current movement within Vermont State government to reclassify Independent Contractors as employees, I was recently required to give up my role as an independent consultant and become, instead, a temporary employee. I am writing to inform you of the negative consequences of such a move for me. And also to ask that you put in place a mechanism by which I can “certify” that I wish to perform my work *as an independent contractor* instead of as an employee; thereby eliminating the risk that my clients incur fines by engaging me as such.

I began providing sales and marketing services as an independent contractor in 2010. The number of hours per year for which I bill varies but generally is the equivalent of approximately 25% of full time. I take on projects as they become available and as they fit into our family schedule. Currently, my only client is a past employer although I anticipate that this will not always be the case. Even though I have been working as a 1099 and not as a W-2, this company has been paying Unemployment Insurance and Workers’ Comp Insurance for me for the last few years in order to avoid fines by the Vermont Department of Labor. Due to the State’s current reclassification campaign and the news that Vermont will begin sharing information with the IRS, my client informed me that they felt they could no longer assume the risk of engaging me as an independent contractor. I was informed that, if I wanted to continue providing services to them, I would need to become a temporary employee. This change was made effective January 2016.

By losing my self-employed status, I lose all the benefits of being self-employed. And, because I work only part-time, I gain no benefits by being an employee. The following are some of the negative consequences of being re-classified as an employee when you work part-time:

You lose your retirement plan. This is my biggest concern and the issue that keeps me up at night. As a self-employed individual, I contributed to a SEP IRA (in addition to my traditional and Roth IRAs). As of 2016, since I am no longer self-employed, I am not eligible to contribute to my SEP. I am in my 40s – prime retirement savings years – and the State has taken away my ability to save for retirement. (As a part-time employee, I do not have access to the company’s 401k plan.)

Lost tax deductions mean significantly less take-home pay. As a self-employed individual, work-related expenses such as mileage, home office, internet, etc. are tax deductible. As an employee, they are not. Working as a W-2, all of my pay is taxable; resulting in less overall annual income.

Lost tax deductions may mean less training. As a self-employed individual, work-related training expenses are 100% tax-deductible as a self-employment expense. (As a W-2 employee, work-related expenses are deductible only in excess of 2% of your adjusted gross income.) Courses and industry certifications are often many hundreds or thousands of dollars. When training is no longer tax-

deductible, the true cost is significantly higher. For me, this means that it is harder to justify taking a class or seeking a certification. For the State, this potentially means that the work force does not keep pace with evolving technologies or skill sets.

Less flexibility and control? Many of my colleagues who have left traditional W-2 employment for independent consulting did so in an effort to better balance having a career and raising a family. This was my reason as well. As an independent contractor, I accepted offers of work when I could fit the work effort into the family schedule. Since I am now classified as an employee, do I have the right to decline a project? As an independent contractor, I fit my billable work into my daily and weekly schedule; often working very untraditional hours. Since I am now classified as an employee, does my client (now my employer) have the right to insist that I work certain hours or that I work in the office? These are not issues that I have addressed with my client but I imagine, that even if these issues do not become a reality for me, they will be reality for other independent contractors who have been forced to become employees.

The overwhelming cost of health care gets even higher. This does not currently affect me as my husband accepted a salaried position with health care benefits at the end of last year but I feel that I should list it because this will be a significant negative consequence for many of those forced out of self-employment. As a self-employed person, the cost of medical and dental insurance is 100% tax deductible as a self-employment expense. If you are not self-employed, the cost of medical/dental insurance is deductible only in excess of 10% of your adjusted gross income. If you and your spouse have an AGI of \$100,000 then this means that – as an employee – your taxable income just increased by \$10,000. Again, losing independent contractor status means a reduction by thousands of dollars in your annual income.

I understand that there are situations in which workers are being taken advantage of by being classified as independent contractors. But this is not the situation for many of us. We worked very hard to build the necessary skill sets and to forge the necessary business relationships to allow us to leave traditional W-2 employment and be able to strive for a work/life balance as independent contractors. We have entered into contracts with our clients that specify the terms of our service and acknowledge that we are responsible for paying our own taxes, securing our own insurance, etc. As independent contractors, we understand that projects end and that we are responsible for finding our next job. We do not expect to collect unemployment insurance. We do not consider ourselves to be unemployed. We are simply “in between contracts.” We are independent contractors because we have chosen to be. I ask that the State provide a mechanism by which we can continue to work as independent contractors without our clients having to worry about being penalized for hiring us.

Additional thoughts post-testimony: After meeting with the committee on April 5, 2016 and after review of the bill and suggested amendments as posted on the committee’s website, I have the following additional comments, concerns, and requests:

1. Requirement that the nature of an independent contractor’s work be different than that of the company to which he/she contracts. There seem to be several different lists of qualifications you must meet in order to deem yourself to be an independent contractor; one of which reads:

“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 . . .”
(dr req 16-844 – draft 7.1, page 3 of 27, begin line 15)

If this is saying that a person cannot be considered an independent contractor if they perform work similar to that of his or her client, then I urge the committee to strike this requirement for the following reasons:

The Vermont Department of Labor applies very broad service categories to this concept. When I personally spoke with VDOL, I was told that I offer “professional services” and that my client offers “professional services” therefore, I cannot be an independent contractor. My client offers IT consulting, design, and implementation services. I offer sales and marketing consulting services. People in the industry would consider these very different services. VDOL does not.

As another example, I recently met with a roofer to get a quote for a new roof. We began discussing the IC vs employee misclassification issue. As background, this a full-fledged roofing company – not just “a guy who does roofing.” He has a team of 11 people; all of which are employees. He carries insurances including liability and workers’ compensation. On a recent roofing project, he noticed that the chimney required repair. He brought in a mason who completed the necessary repair in 1-2 days and whom he paid \$5,000 as a 1099. The Vermont Department of Labor took issue with this, informing the roofing company that it must pay for workers’ compensation coverage for the mason as the mason meets the definition of an employee. A roofer does not consider roofing and masonry to be the same work. A mason would not consider roofing and masonry to be the same work. Even I, as an ordinary person, do not consider roofing and masonry to be the same thing. The VDOL, however, considers them to be the same.

Even if the bill’s language were modified to allow for each industry’s perspective on how services are “distinct” from one another, I still urge the committee to strike this requirement. I have spent most of my career in Vermont’s IT industry, an industry that Vermont State government has stated they would like to help grow, and can offer firsthand knowledge that it is vital to Vermont’s IT companies to be able to expand and reduce resources to meet project demands and to be able to provide world-class IT solutions. A successful business model necessitates an employee base that can be supplemented in terms of capacity and/or skill set when the workload demands it. For example, if during the course of delivering a project, the company realizes that the project would benefit from an additional project manager – and all employee project managers are currently booked – then the company would go to its pool of 1099 project managers. If a customer decides that they need a new IT system sooner than originally anticipated, then the IT company would expand its team of software developers by supplementing its employee development team with additional software developers who are independent contractors. In these examples, the independent contractors would not be offering services that are different from those services being supplied by employees of the company. But I can tell you that this ability to supplement a project team with 1099 resources is vital to delivering a successful end product as well as being vital to the business success of the IT company. This business model is necessary for Vermont IT companies to compete with national and global IT firms. And, just as important, there is already an established pool of professionals in Vermont who offer their IT-related services as independent contractors. This model works well for both Vermont’s IT businesses and for Vermont’s IT professionals who have chosen to work as independent contractors.

2. Requirement that independent contractors carry worker’s compensation insurance. There seem to be a couple different statements in the bill and related amendments with regard to a requirement that independent contractors – in order to be deemed as such – carry workers’ compensation coverage. One states that an independent contractor must purchase “workers’

compensation coverage for itself” (Draft No. 1.2 – H.867, page 1 of 3, begin line 17) while another states that “An independent contractor shall purchase workers’ compensation coverage for its employees . . .” (dr req 16-844 – draft 7.1, page 9 of 27, begin line 7).

I urge the committee not to make workers’ compensation insurance a requirement for all independent contractors. The need for workers’ compensation coverage is industry-specific. In my line of work, part-time professional services working out of my home office, workers’ comp coverage is no more necessary or applicable than a liquor license. If I were to injure myself in my home office to the extent that I needed medical attention, and even if I had worker’s comp coverage, I cannot imagine a situation where I would be granted benefits. How could I ever prove that I injured myself during one of my work hours versus all the other non-work hours that I spend in my home? If, however, I were to expand my business and bring on employees then I would acquire the necessary insurances to cover my employees.

As I mentioned in my testimony, I am available to answer any questions you may have and I offer myself as a “test case” if the committee would like to test any proposed requirements against my specific situation. I can be reached at the contact information below.

Thank you for your time,

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