

## Summary of H.867

### Overview

The goal of this bill is to:

1. establish clear, consistent standards for determining who is an employer and who is an independent contractor for both the unemployment and workers' compensation statutes.

Under current law workers' compensation and unemployment have different legal standards defining employment. In addition, court decisions broadly interpreting each provision have created confusion, frequently making owners of businesses who thought they were independent entities, employees of the company hiring them

The amendments establish the same legal test for UI and WC, and provide a limited exemption from statutory employer liability under workers compensation

Create a narrow exception to statutory employer liability under workers' compensation for established business that comply with specific provisions

2. Codify the Misclassification taskforce created by executive order
3. Improve enforcement provisions available to the department including creating specific right to enter and investigate employment, pursue penalties for improperly classifying a worker as an independent contractor

The bill attempts to maintain the existing social safety net so important to Vermont workers, while also addressing the legitimate need of Vermont's employers to have clarity of direction in their use of employees and independent contractors.

### Sec. 1 covers the Workers' Compensation Statutes

**(3)** Adds language to the definition of "employer" to remove statutory employer responsibility for Workers' Compensation if the Independent Contractor fully complies with the exemption provisions of 14(F) and 14(H).

**(14)** and strengthens the definition of "worker" establish a presumption that persons paid for services are employees unless it is demonstrated that one of the specific exceptions is met.

**(B)** clarifies an exemption for referees at amateur sporting events like youth sports, recreation leagues, etc.

**(F)** A sole proprietor or a partner owner will not be an employee of a contractor provided the following are met:

The individual or partner owner is an independent contractor as defined further in the bill (section 31) who performs work that is distinct and separate from that of the person with whom the individual or partner owner contracts;

or the individual or partner owner is an independent contractor as defined further in the bill (section 31) 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.

The services are performed pursuant to a written agreement or contract between the individual or partner owner 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.

However, if the individual or partner owner who is party to the agreement or contract under this subdivision subsequently is found to have employees, those employees may file a claim for benefits under this chapter against either or both parties to the agreement.

An individual or partner owner that meets the conditions above 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. By waiving the right to claim compensation the person retains the right to sue in a private civil action

The sole proprietor or partnership must be able to document that any person working for them is covered by workers' compensation insurance or is otherwise exempt under the workers' compensation act

**(H)** A corporation or LLC still may elect to exclude no more than 4 corporate officers or 4 LLC members

Corporate officers or LLC members that exclude themselves will not be the statutory employee of an employer hiring them if all of the following conditions are met

The corporate executive officers or L.L.C. managers or members operate a separate and distinct business that is an independent contractor as defined further in the bill (section 31), is actively registered with the Vermont Secretary of State, and elects to file a corporate officer or L.L.C. member exclusion.

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.

Excluded corporate officers or LLC members retain the right to bring a personal injury action if injured.

A corporation or L.L.C. must be able to document that any person working for them is covered by workers' compensation insurance or is otherwise exempt under the workers' compensation act

(I) Foster care providers meeting a specific IRS definition are not considered employees

(31) Establishes a clear, established definition of an Independent Contractor. The identical test is established for UI in section 2 below

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

controls the means and manner of the work performed

operates a separate and distinct business from that of the person with whom it contracts

holds itself out as in business for itself

offers its services to the general public; and

is not treated as an employee for purposes of income or employment taxation with regard to the work performed

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

**Sec. 2 changes the Unemployment Insurance definition of covered employment from the so-called "ABC" test to the same six-part test proposed for the workers' compensation chapter. The primary change from existing law is that an individual who is otherwise independently established as an independent contractor will not be deemed to be an employee solely because he or she is performing work that is not outside the usual course of the employer's business.**

(B) An individual shall be deemed an employee unless it is shown to the satisfaction of the commissioner that the individual:

(i) is free from the direction and control of the employing unit, both under the individual's contract of service and in fact;

(ii) controls the means and manner of the services performed

(iii) operates a separate and distinct business from that of the person with whom he or she contracts

(iv) holds him- or herself out as in business for him- or herself

(v) offers his or her services to the general public; and

(vi) is not treated as an employee for purposes of income or employment taxation with regard to the services performed

**Section 3 codifies the Misclassification taskforce originally established by executive order, and assigns specific issues for examination and specific reports to be filed with the legislature.**

#### **Enforcement provisions**

**Section 4 creates a posting requirement providing notice of the differences in employment and independent contractor status and where to file complaints or more information. For home workers or workers without fixed worksites the employer is to provide notice at the time of hire**

**Section 5 authorizes the WC investigator to enter a worksite and investigate employment status and if need be obtain a warrant to do so.**

**Section 6 authorizes the Commissioner to seek an injunction against non-complying employers; and,**

**Provides the commissioner with some discretion when debaring an employer if it demonstrates that noncompliance was the result of mistake or excusable neglect**

**Changes consultation to Secretary of Administration rather than BGS or VTrans because many state agencies enter into contracts and are prohibited from contracting with debarred businesses.**

**Section 7 permits the Commissioner to collect unpaid penalties through the Superior Court or through the tax department.**

**Section 8 removes reference to judicial bureau which was not changed when statute was amended a few years ago.**

**Section 9 permits the Commissioner to obtain information from insurance agents or brokers with a release from the employer**

**Section 10 permits the Commissioner to pursue penalties when a business improperly classifies a person as an independent contractor for the purpose of avoiding WC responsibilities**

**Section 11 amends Dept. Fin. Reg. statute so that debarment consultation is with Secretary of Admin. rather than BGS or VTrans.**

**Section 12 amends UI debarment consultation provision - consultation is with Secretary of Admin. rather than BGS or VTrans.**

**Section 13 same as section 11 and 12**

**Section 14 authorizes the UI auditor to enter a worksite and investigate employment status and if need be obtain a warrant to do so.**