

1 H.731

2 Introduced by Representatives Marcotte of Coventry and Botzow of Pownal

3 Referred to Committee on

4 Date:

5 Subject: Labor; workers' compensation; unemployment insurance;
6 classification of employees

7 Statement of purpose of bill as introduced: This bill proposes to prohibit
8 employers from providing persons who will be performing services for them
9 with substantial and material assistance related to the establishment of an
10 independent business in order to avoid their obligation under the workers'
11 compensation and unemployment insurance laws.

12 An act relating to ~~the classification of employees~~ *miscellaneous workers'*
13 *compensation and occupational safety amendments*

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

15 ~~Sec. 1. 21 V.S.A. § 625 is amended to read:~~

16 ~~§ 625. CONTRACTING OUT FORBIDDEN; PROHIBITED ACTS;~~

17 ~~PENALTIES~~

18 ~~(a) An employer shall not be relieved in whole or in part from liability~~
19 ~~created by the provisions of this chapter by any contract, rule, regulation, or~~
20 ~~device whatsoever.~~

1 ~~(b) A person who, for the purpose of avoiding its obligations under this~~
2 ~~chapter, provides an individual who is or will be performing services for the~~
3 ~~person with substantial and material assistance related to the establishment of~~
4 ~~an independent business, including the registration of an unincorporated~~
5 ~~business with the Vermont Secretary of State, the establishment of a~~
6 ~~corporation or L.L.C., or the acquisition of a federal Employer Identification~~
7 ~~Number, may, after notice and an opportunity for a hearing, be assessed an~~
8 ~~administrative penalty of not more than \$5,000.00. As used in this subsection,~~
9 ~~“substantial and material assistance” does not include:~~

10 ~~(1) inquiring about whether an unincorporated business, corporation, or~~
11 ~~L.L.C. is actively registered with the Secretary of State;~~

12 ~~(2) inquiring about whether an individual operates an unincorporated~~
13 ~~business, corporation, or L.L.C.; or~~

14 ~~(3) referring an individual to a State agency, department, or website~~
15 ~~related to the registration or establishment of an unincorporated business,~~
16 ~~corporation, or L.L.C.~~

17 Sec. 2. 21 V.S.A. § 1369 is amended to read:

18 § 1369. FALSE STATEMENTS TO AVOID UNEMPLOYMENT

19 PROGRAM OBLIGATIONS

20 (a) A person who willfully makes a material false statement or

21 representation to avoid becoming or remaining subject to this chapter, or to

1 ~~avoid or reduce a contribution or other payment required of an employer under~~
2 this chapter for either herself or himself or for any other person, after notice
3 and opportunity for hearing, may be assessed an administrative penalty of not
4 more than \$5,000.00.

5 (b) An employing unit or employer who, for the purpose of avoiding its
6 obligations under this chapter, provides an individual who is or will be
7 performing services for the employing unit or employer with substantial and
8 material assistance related to the establishment of an independent business,
9 including the registration of an unincorporated business with the Vermont
10 Secretary of State, the establishment of a corporation or L.L.C., or the
11 acquisition of a federal Employer Identification Number, may, after notice and
12 an opportunity for a hearing, be assessed an administrative penalty of not more
13 than \$5,000.00. As used in this subsection, “substantial and material
14 assistance” does not include:

15 (1) inquiring about whether an unincorporated business, corporation, or
16 L.L.C. is actively registered with the Secretary of State;

17 (2) inquiring about whether an individual operates an unincorporated
18 business, corporation, or L.L.C.; or

19 (3) referring an individual to a State agency, department, or website
20 related to the registration or establishment of an unincorporated business,
21 corporation, or L.L.C.

1 ~~Sec. 3. EFFECTIVE DATE~~

2 ~~This act shall take effect on July 1, 2018.~~

~~** * * Workers' Compensation: Protection Against Retaliation * * **~~

~~*Sec. 1. 21 V.S.A. § 710 is amended to read:*~~

~~*§ 710. UNLAWFUL DISCRIMINATION*~~

~~*(a) No person, firm, or corporation shall refuse to employ any applicant for employment because ~~such~~ the applicant asserted a claim for workers' compensation benefits under this chapter or under the law of any state or of the United States. Nothing in this section shall require a person to employ an applicant who does not meet the qualifications of the position sought.*~~

~~*(b) No person shall discharge or discriminate against an employee from employment because ~~such~~ the employee asserted or attempted to assert a claim for benefits under this chapter or under the law of any state or of the United States.*~~

~~*(c) The Department shall not include in any publication or public report the name or contact information of any individual who has alleged that an employer has made a false statement or misclassified any employees, unless it is required by law or necessary to enable enforcement of this chapter.*~~

~~*(d) An employer shall not retaliate or take any other negative action against an individual because the employer knows or suspects that the individual has filed a complaint with the Department or other authority, or*~~

~~reported a violation of this chapter or has testified, assisted, or cooperated in any manner with the Department or other appropriate governmental agency or department in an investigation of misclassification, discrimination, or other violation of this chapter.~~

~~(e) The Attorney General or a State's Attorney may enforce the provisions of this section by restraining prohibited acts, seeking civil penalties, obtaining assurances of discontinuance, and conducting civil investigations in accordance with the procedures established in 9 V.S.A. §§ 2458-2461 as though discrimination under a violation of this section were an unfair act in commerce.~~

~~(f) The provisions against retaliation in subdivision 495(a)(8) of this title and the penalty and enforcement provisions of section 495b of this title shall apply to this subchapter section.~~

~~*** Workers' Compensation Administration Fund ***~~

~~Sec. 2. WORKERS' COMPENSATION RATE OF CONTRIBUTION~~

~~For fiscal year 2019, after consideration of the formula in 21 V.S.A. § 711(b) and historical rate trends, the General Assembly has established that the rate of contribution for the direct calendar year premium for workers' compensation insurance shall remain at the rate of 1.4 percent. The contribution rate for self-insured workers' compensation losses and workers' compensation losses of corporations approved under 21 V.S.A. Chapter 9 shall~~

~~remain at one percent~~

~~* * * Discontinuance of Workers' Compensation Benefits * * *~~

~~Sec. 3. 2014 Acts and Resolves No. 199, Sec. 54a is amended to read:~~

~~Sec. 54a. REPEAL~~

~~21 V.S.A. § 643a shall be repealed on July 1, ~~2018~~ 2023.~~

~~Sec. 4. 2014 Acts and Resolves No. 199, Sec. 69 is amended to read:~~

~~Sec. 69. EFFECTIVE DATES~~

~~* * *~~

~~(b) Sec. 54b (reinstatement of current law governing discontinuance of workers' compensation insurance benefits) shall take effect on July 1, ~~2018~~ 2023.~~

~~* * *~~

~~* * * Vermont Occupational Safety and Health Act * * *~~

~~Sec. 5. 21 V.S.A. § 225 is amended to read:~~

~~§ 225. CITATIONS~~

~~(a)(1) If, upon inspection or investigation, the Commissioner or the Director, or the agent of either of them, finds that an employer has violated a requirement of the VOSHA Code, the Commissioner shall with reasonable promptness issue a citation to the employer and serve it on the employer by certified mail or in the same manner as a summons to the Superior Court.~~

~~Each citation shall be in writing and shall describe with particularity the~~

~~nature of the violation, including a reference to the provisions of the statute, standard, rule, or order alleged to have been violated, as well as the penalty, if any, proposed to be assessed pursuant to section 210 of this title. In addition, the citation shall fix a reasonable time for the abatement of the violation.~~

~~(2) By rule, the Commissioner shall ~~prescribe~~ adopt procedures for issuance of a notice in lieu of a citation with respect to *de minimus minimis* violations ~~which~~ that have no direct or immediate relationship to safety or health, and for hearing interested parties before a civil penalty is assessed.~~

~~(b) Each citation issued under this section, or a copy or copies thereof of the citation, shall be prominently posted, as prescribed in rules ~~promulgated~~ adopted by the Commissioner, at or near each place a violation referred to in the citation occurred or existed.~~

* * *

Sec. 6. 21 V.S.A. § 226 is amended to read:

§ 226. ENFORCEMENT

~~(a)(1) After issuing a citation under section 225 of this title, the Commissioner shall notify the employer by certified mail or by service by an agent, of the penalty, if any, proposed to be assessed under section 210 of this title. The An employer shall ~~have~~, within 20 days after personal service or receipt of the notice within which to a citation issued under section 225 of this title, notify the Commissioner that he or she wishes to appeal the citation or~~

~~proposed assessment of penalty, and if no notice is filed by~~

~~(2) If an employer does not notify the Commissioner as provided in this subsection and an employee does not file a notice under subsection (c) of this section, the citation and assessment penalty, as proposed, shall be deemed a final order of the Review Board and not subject to review by any court or agency.~~

~~(b)(1)(A) If the Commissioner on inspection or investigation finds that an employer has failed to correct a violation for which a citation has been issued within the period permitted for its correction (which period shall not begin to run until the entry of a final order by the Review Board in the case of any review proceedings under this section initiated by the employer in good faith and not solely for delay or avoidance of penalties, or on the day the citation and assessment becomes final under subsection (a) of this section), the Commissioner shall notify the employer by certified mail of such the failure and of the penalty proposed to be assessed under section 210 of this title by reason of such the failure.~~

~~(B) The period to correct a violation shall begin to run:~~

~~(i) when a final order is entered by the Review Board in relation to review proceedings under this section that are initiated by an employer in good faith and not solely for delay or avoidance of penalties; or~~

~~(ii) on the day the citation and penalty become final under~~

~~subsection (a) of this section~~

~~(2) The employer shall have 20 days after the receipt of the notice within which to notify the Commissioner that he or she wishes to appeal the Commissioner's ~~notification~~ citation or the proposed ~~assessment of penalty~~. If within 20 days from the receipt of the notification issued by the Commissioner, the employer fails to notify the Commissioner that he or she intends to appeal the ~~notification or proposed assessment of penalty~~, the ~~notification~~ citation and assessment, as proposed, shall be deemed a final order of the Review Board and not subject to review by any court or agency.~~

~~(c) If an employer notifies the Commissioner that he or she intends to contest a citation issued under section 225 of this title ~~or notification issued under subsection (a) or (b) of this section~~, or if, within 20 days ~~of~~ after the issuance of a citation issued under section 225 of this title, any employee or representative of employees files a notice with the Commissioner alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Commissioner shall immediately advise the Review Board of ~~such~~ the notification and the Review Board shall afford an opportunity for a hearing. Unless ~~the~~ a notice is timely filed, the proposed penalty and, in appropriate cases, the ~~notification of the Commissioner~~ citation shall be deemed a final order of the Review Board not subject to review by any court or agency.~~

~~(d) After hearing an appeal, the Review Board shall thereafter issue an order based on findings of fact affirming, modifying, or vacating that affirms, modifies, or vacates the Commissioner's citation or proposed penalty, or both, or directing provides other appropriate relief, and the. The order shall become final 30 days after its issuance unless judicial review is timely taken under section 227 of this title. The rules of procedure prescribed adopted by the Review Board shall provide affected employees or their representatives with an opportunity to participate as parties in hearings a hearing under this subsection.~~

** * * Effective Dates * * **

Sec. 7. EFFECTIVE DATES

~~*(a) This section and Secs. 3 and 4 shall take effect on passage.*~~

~~*(b) The remaining sections shall take effect on July 1, 2016.*~~

** * * Workers' Compensation; Protection Against Retaliation * * **

Sec. 1. 21 V.S.A. § 710 is amended to read:

§ 710. UNLAWFUL DISCRIMINATION

(a) No person, firm, or corporation shall refuse to employ any applicant for employment because ~~such~~ the applicant asserted a claim for workers' compensation benefits under this chapter or under the law of any state or of the United States. Nothing in this section shall require a person to employ an applicant who does not meet the qualifications of the position sought.

(b) No person shall discharge or discriminate against an employee from employment because ~~such~~ the employee asserted or attempted to assert a claim for benefits under this chapter or under the law of any state or of the United States.

(c) The Department shall not include in any publication or public report the name or contact information of any individual who has alleged that an employer has made a false statement or misclassified any employees, unless it is required by law or necessary to enable enforcement of this chapter.

(d) An employer shall not retaliate or take any other negative action against an individual because the employer knows or suspects that the individual has filed a complaint ~~with the Department or other authority~~, or reported a violation of this chapter, or has testified, assisted, or cooperated in any manner with the Department or other appropriate governmental agency or department in an investigation of misclassification, discrimination, or other violation of this chapter.

(e) The Attorney General or a State's Attorney may enforce the provisions of this section by restraining prohibited acts, seeking civil penalties, obtaining assurances of discontinuance, and conducting civil investigations in accordance with the procedures established in 9 V.S.A. §§ 2458-2461 as though ~~discrimination under~~ a violation of this section were an unfair act in commerce.

(f) The provisions against retaliation in subdivision 495(a)(8) of this title and the penalty and enforcement provisions of section 495b of this title shall apply to this subchapter section.

** * * Workers' Compensation Administration Fund * * **

Sec. 2. WORKERS' COMPENSATION RATE OF CONTRIBUTION

For fiscal year 2019, after consideration of the formula in 21 V.S.A. § 711(b) and historical rate trends, the General Assembly has established that the rate of contribution for the direct calendar year premium for workers' compensation insurance shall remain at the rate of 1.4 percent. The contribution rate for self-insured workers' compensation losses and workers' compensation losses of corporations approved under 21 V.S.A. chapter 9 shall remain at one percent.

Sec. 3. POTENTIAL DELEGATION OF RATE SETTING AUTHORITY;

REPORT

On or before January 15, 2019, the Commissioner of Labor shall submit a written report to the House Committees on Commerce and Economic Development and on Ways and Means and the Senate Committees on Economic Development, Housing and General Affairs and on Finance regarding the potential for delegating the authority to set the Workers' Compensation Administration Fund rate of contribution for the direct calendar year premium for workers' compensation insurance to the Commissioner of

Labor. In particular, the report shall:

(1) describe how the Department calculates the rate of contribution that it annually proposes to the General Assembly pursuant to 21 V.S.A. § 711(b);

(2) identify any advantages and disadvantages of the General Assembly's delegating to the Commissioner of Labor authority to establish annually the rate of contribution for the direct calendar year premium for workers' compensation insurance; and

(3) identify any legislative, regulatory, and administrative changes that would need to be made in order to delegate to the Commissioner the authority to establish annually the rate of contribution for the direct calendar year premium for workers' compensation insurance.

** * * Discontinuance of Workers' Compensation Benefits * * **

Sec. 4. 2014 Acts and Resolves No. 199, Sec. 54a is amended to read:

Sec. 54a. REPEAL

21 V.S.A. § 643a shall be repealed on July 1, 2018 2023.

Sec. 5. 2014 Acts and Resolves No. 199, Sec. 69 is amended to read:

Sec. 69. EFFECTIVE DATES

** * **

(b) Sec. 54b (reinstatement of current law governing discontinuance of workers' compensation insurance benefits) shall take effect on July 1, 2018 2023.

* * *

* * * *Vermont Occupational Safety and Health Act* * * *

Sec. 6. 21 V.S.A. § 225 is amended to read:

§ 225. CITATIONS

(a)(1) If, upon inspection or investigation, the Commissioner or the Director, or the agent of either of them, finds that an employer has violated a requirement of the VOSHA Code, the Commissioner shall with reasonable promptness issue a citation to the employer and serve it on the employer by certified mail or in the same manner as a summons to the Superior Court. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provisions of the statute, standard, rule, or order alleged to have been violated, as well as the penalty, if any, proposed to be assessed pursuant to section 210 of this title. In addition, the citation shall fix a reasonable time for the abatement of the violation.

(2) By rule, the Commissioner shall ~~prescribe~~ adopt procedures for issuance of a notice in lieu of a citation with respect to ~~de minimus~~ de minimis violations ~~which~~ that have no direct or immediate relationship to safety or health, and for hearing interested parties before a civil penalty is assessed.

(b) Each citation issued under this section, or a copy or copies ~~thereof~~ of the citation, shall be prominently posted, as prescribed in rules ~~promulgated~~ adopted by the Commissioner, at or near each place a violation referred to in

the citation occurred or existed.

** * **

Sec. 7. 21 V.S.A. § 226 is amended to read:

§ 226. ENFORCEMENT

~~(a)(1) After issuing a citation under section 225 of this title, the Commissioner shall notify the employer by certified mail or by service by an agent, of the penalty, if any, proposed to be assessed under section 210 of this title. The An employer shall ~~have, within~~ 20 days after personal service or receipt of the notice within which to a citation issued under section 225 of this title, notify the Commissioner that he or she wishes to appeal the citation or proposed assessment of penalty, and if no notice is filed by.~~

~~(2) If an employer does not notify the Commissioner as provided in this subsection and an employee does not file a notice under subsection (c) of this section, the citation and assessment penalty, as proposed, shall be deemed a final order of the Review Board and not subject to review by any court or agency.~~

~~(b)(1)(A) If the Commissioner on inspection or investigation finds that an employer has failed to correct a violation for which a citation has been issued within the period permitted for its correction (which period shall not begin to run until the entry of a final order by the Review Board in the case of any review proceedings under this section initiated by the employer in good faith~~

~~and not solely for delay or avoidance of penalties, or on the day the citation and assessment becomes final under subsection (a) of this section), the Commissioner shall notify the employer by certified mail of ~~such~~ the failure and of the penalty proposed to be assessed under section 210 of this title by reason of ~~such~~ the failure.~~

(B) The period to correct a violation shall begin to run:

(i) when a final order is entered by the Review Board in relation to review proceedings under this section that are initiated by an employer in good faith and not solely for delay or avoidance of penalties; or

(ii) on the day the citation and penalty become final under subsection (a) of this section.

(2) The employer shall have 20 days after the receipt of the notice ~~within which~~ to notify the Commissioner that he or she wishes to appeal the Commissioner's ~~notification~~ citation or the proposed assessment of penalty. If within 20 days from the receipt of the notification issued by the Commissioner, the employer fails to notify the Commissioner that he or she intends to appeal ~~the notification or proposed assessment of penalty~~, the ~~notification~~ citation and assessment, as proposed, shall be deemed a final order of the Review Board and not subject to review by any court or agency.

(c) If an employer notifies the Commissioner that he or she intends to contest a citation issued under section 225 of this title ~~or notification issued~~

~~under subsection (a) or (b) of this section, or if, within 20 days of after the issuance of a citation issued under section 225 of this title, any employee or representative of employees files a notice with the Commissioner alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Commissioner shall immediately advise the Review Board of such the notification and the Review Board shall afford an opportunity for a hearing. Unless the a notice is timely filed, the proposed penalty and, in appropriate cases, the notification of the Commissioner citation shall be deemed a final order of the Review Board not subject to review by any court or agency.~~

~~(d) After hearing an appeal, the Review Board shall thereafter issue an order based on findings of fact affirming, modifying, or vacating that affirms, modifies, or vacates the Commissioner's citation or proposed penalty, or both, or directing provides other appropriate relief, and the. The order shall become final 30 days after its issuance unless judicial review is timely taken under section 227 of this title. The rules of procedure prescribed adopted by the Review Board shall provide affected employees or their representatives with an opportunity to participate as parties in hearings a hearing under this subsection.~~

* * * Report on Debarment * * *

Sec. 8. DEBARMENT; OFFICE OF LEGISLATIVE COUNCIL; REPORT

(a) On or before January 15, 2019, the Office of Legislative Council shall submit to the Senate Committee on Economic Development, Housing and General Affairs and the House Committee on Commerce and Economic Development a written report on the use of debarment in relation to the laws against employee misclassification. In particular, the report shall:

(1) summarize Vermont's laws, rules, and procedures related to debarment, including the violations that can trigger a debarment proceeding;

(2) describe the use of Vermont's debarment procedures and why they have not been used more frequently to date;

(3) identify any obstacles that prevent or hinder the use of Vermont's debarment procedures;

(4) summarize the actions taken by the Agencies of Administration and of Transportation and the Departments of Labor, of Financial Regulation, and of Buildings and General Services to utilize debarment to ensure that the State is not contracting with employers that misclassify employees in violation of Vermont law;

(5) identify other states that utilize debarment as a means of enforcing the laws against employee misclassification and summarize the manner and frequency of debarment proceedings in those states;

(6) summarize specific characteristics of other states' laws, rules, and procedures related to debarment that have been identified as either enhancing

or limiting their effectiveness in enforcing those states' laws against employee misclassification; and

(7) summarize any legislative, regulatory, or administrative changes that are identified by the Agency of Administration, Agency of Transportation, Department of Labor, Department of Financial Regulation, or Department of Buildings and General Services as necessary to make debarment a more effective tool for reducing the occurrence of and enforcing the laws against employee misclassification.

(b) In preparing the report, the Office of Legislative Council shall consult with the Agencies of Administration and of Transportation and the Departments of Labor, of Financial Regulation, and of Buildings and General Services.

(c) The Secretaries of Administration and of Transportation and the Commissioners of Labor, of Financial Regulation, and of Buildings and General Services shall, upon request, promptly provide the Office of Legislative Council with any pertinent information related to debarment procedures and the use of debarment as a means of enforcing Vermont's laws against employee misclassification.

** * * Effective Dates * * **

Sec. 9. EFFECTIVE DATES

(a) This section and Secs. 4, 5, 6, and 7 shall take effect on passage.

(b) The remaining sections shall take effect on July 1, 2018.