

1 H.574

2 Introduced by Representative Poirier of Barre City

3 Referred to Committee on

4 Date:

5 Subject: Workers' compensation; unemployment insurance; employee  
6 classification; independent contractors

7 Statement of purpose of bill as introduced: This bill proposes to amend the  
8 definitions related to independent contractors in the workers' compensation  
9 and unemployment insurance laws.

10 An act relating to employee classification

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

12 Sec. 1. 21 V.S.A. § 601 is amended to read:

13 § 601. DEFINITIONS

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

16 \* \* \*

17 (3) "Employer" includes any body of persons, corporate or  
18 unincorporated, public or private, and the legal representative of a deceased  
19 employer, and includes the owner or lessee of premises or any other person  
20 who is virtually the proprietor or operator of the business there carried on, but

1 who, by reason of there being an independent contractor or for any other  
2 reason, is not the direct employer of the workers there employed. If the  
3 employer is insured, the term “employer” includes the employer’s insurer so  
4 far as applicable. A person is not deemed to be an “employer” for the purposes  
5 of this chapter as the result of entering into a contract for services or labor with  
6 ~~an individual~~ a sole proprietor or partner owner who has knowingly and  
7 voluntarily waived coverage of this chapter pursuant to subdivision (14)(F) of  
8 this section, or an individual who is a corporate officer or L.L.C. member or  
9 manager who has filed, and had approved, an exclusion pursuant to subdivision  
10 (14)(H) of this section and who meets the criteria set forth in that subdivision.

11 \* \* \*

12 (14) “Worker” and “employee” ~~means an individual~~ mean a person who  
13 has entered into the employment of, or works under contract of service or  
14 apprenticeship with, an employer. Any reference to a worker who has died as  
15 the result of a work injury shall include a reference to the worker’s dependents,  
16 and any reference to a worker who is a minor or incompetent shall include a  
17 reference to the minor’s committee, guardian, or next friend. ~~The term~~  
18 ~~“worker” or “employee” does not include~~ A person who performs services for  
19 compensation is presumed to be an employee unless the person is one of the  
20 following:

21 \* \* \*

1           (F)(i) ~~The~~ A sole proprietor or a partner owner or the partner owners  
2 of an unincorporated business, provided the following conditions are met:

3           ~~(i)(I)(aa)~~ The the individual or partner owner is an independent  
4 contractor who performs work that is distinct and separate from that of the  
5 person with whom the individual or partner owner contracts; or

6           (bb) the individual or partner owner is an independent  
7 contractor and is either actively registered as a business with the Vermont  
8 Secretary of State or actively registered as a business in the state or country of  
9 domicile.

10          ~~(ii) The individual controls the means and manner of the work~~  
11 ~~performed.~~

12          ~~(iii) The individual holds him or herself out as in business for~~  
13 ~~him or herself.~~

14          ~~(iv) The individual holds him or herself out for work for the~~  
15 ~~general public and does not perform work exclusively for or with another~~  
16 ~~person.~~

17          ~~(v) The individual is not treated as an employee for purposes of~~  
18 ~~income or employment taxation with regard to the work performed.~~

19          ~~(vi)(II)(aa)~~ The services are performed pursuant to a written  
20 agreement or contract between the individual or partner owner and another the  
21 person who is providing compensation for the services, and the written

1 agreement or contract explicitly states that the individual or partner owner is  
2 not considered to be an employee under this chapter, is working independently,  
3 has no employees, and has not contracted with other independent contractors.

4 The written contract or agreement shall also include information regarding the  
5 right of the individual or partner owner to purchase workers' compensation  
6 insurance coverage ~~and the individual's election not to purchase that coverage.~~

7 The contract or agreement shall provide that any claim related to a personal  
8 injury arising out of and in the course of the individual or partner owner's  
9 employment shall be brought in a Vermont Superior Court.

10 (bb) ~~However, if~~ If the individual or partner owner who is  
11 party to the agreement or contract under this subdivision is found to have  
12 employees, those employees may file a claim for benefits under this chapter  
13 against either or both parties to the agreement.

14 (ii)(I) An individual or partner owner who meets the conditions of  
15 subdivision (i) of this subdivision (14)(F) may elect to file with the  
16 Commissioner a notice to waive the right to make a claim for workers'  
17 compensation against the person with whom the individual or partner owner  
18 contracts.

19 (II) If, after filing a notice under subdivision (I) of this  
20 subdivision (14)(F)(ii), the individual or partner owner suffers a personal  
21 injury arising out of and in the course of his or her employment, he or she may

1 bring an action to recover damages for personal injury against the person who  
2 is providing compensation for the services and, in that action, the person who  
3 is providing compensation for the services shall have all of the defenses  
4 available in a personal injury claim. This election shall not prevent any  
5 individual, other than the individual excluded pursuant to subdivision (i) of this  
6 subdivision (14)(F), who is determined to be an employee of the  
7 unincorporated business from claiming workers' compensation benefits under  
8 this chapter from the business or a statutory employer.

9 (iii) An individual or partner owner that makes an election under  
10 subdivision (ii) of this subdivision (14)(F) shall document that any person  
11 hired to perform services for the individual or partner owner's unincorporated  
12 business has workers' compensation coverage or is otherwise in compliance  
13 with the provisions of this chapter.

14 \* \* \*

15 (H) With the approval of the Commissioner, a corporation or a  
16 limited liability company (L.L.C.) ~~may elect to file exclusions from the~~  
17 ~~provisions of this chapter. A corporation or an L.L.C. may elect to exclude up~~  
18 ~~to four corporate executive officers or four L.L.C. managers or members from~~  
19 ~~coverage requirements under this chapter. If all officers of the corporation or~~  
20 ~~all managers or members of an L.L.C. make such the election, and receive~~  
21 ~~approval from the Commissioner, and the business has no employees, the~~

1 corporation or L.L.C. shall not be required to purchase workers' compensation  
2 coverage. ~~If after election, the officer, manager, or member experiences a~~  
3 ~~personal injury and files a claim under this chapter, the employer shall have all~~  
4 ~~the defenses available in a personal injury claim. However, this election shall~~  
5 ~~not prevent any other individual, other than the individual excluded under this~~  
6 ~~section, found to be an employee of the corporation or L.L.C. to recover~~  
7 ~~workers' compensation from either the corporation, L.L.C., or the statutory~~  
8 ~~employer.~~

9 (i) For purposes of this chapter, a person shall not be deemed to be  
10 an "employer" of corporate executive officers or L.L.C. managers or members  
11 that are excluded under this subdivision (14)(H) if the following conditions  
12 are met:

13 (I) The corporate executive officers or L.L.C. managers or  
14 members operate a separate and distinct business that is an independent  
15 contractor and is actively registered with the Vermont Secretary of State.

16 (II) The services are performed pursuant to a written contract or  
17 agreement between the corporation or L.L.C. and the person who is providing  
18 compensation for the services, and the contract or agreement explicitly states  
19 that the corporate executive officers or L.L.C. managers or members are not  
20 considered to be employees under this chapter and are working independently.  
21 The contract or agreement shall also include information regarding the right of

1 the corporation or L.L.C. to purchase workers' compensation insurance  
2 coverage and the right of the corporate executive officers or the L.L.C.  
3 managers or members to elect not to exclude themselves from coverage. The  
4 contract or agreement shall provide that any claim related to a personal injury  
5 arising out of and in the course of the individual or partner owner's  
6 employment shall be brought in a Vermont Superior Court.

7 (ii) If, after making an election under this subdivision (14)(H), the  
8 corporate officer or L.L.C. manager or member suffers a personal injury  
9 arising out of and in the course of his or her employment, he or she may bring  
10 an action to recover damages for personal injury against the person who is  
11 providing compensation for the services and, in that action, the person who is  
12 providing compensation for the services shall have all of the defenses available  
13 in a personal injury claim. This election shall not prevent any individual, other  
14 than the individual excluded pursuant to this subdivision, who is determined to  
15 be an employee of the corporation or L.L.C. from claiming workers'  
16 compensation benefits under this chapter from the corporation or L.L.C. or  
17 from a statutory employer.

18 (iii) A corporation or L.L.C. whose executive officers, members,  
19 or managers make an election under this subdivision (14)(H) shall document  
20 that any person hired to perform services for the corporation or L.L.C. has

1 workers' compensation coverage or is otherwise in compliance with this  
2 chapter.

3 \* \* \*

4 (31)(A) "Independent contractor" means a person that is economically  
5 independent of the person's employing unit under the totality of the  
6 circumstances based on an assessment of the following factors:

7 (i) whether the person is free from the direction and control of the  
8 employing unit with respect to the means and manner of the services  
9 performed, both under the person's contract of service and in fact;

10 (ii) whether the person operates a separate and distinct business  
11 from that of the employing unit and the extent to which the person is  
12 performing work that is not a substantial, essential, and recurring part of the  
13 core services, functions, or activities of the employing unit;

14 (iii) whether the person's contract of service provides for the  
15 performance of specific services for specified amounts of compensation and  
16 does not provide that the services will be performed on an ongoing or  
17 indefinite basis, and whether the person may realize a profit or suffer a loss  
18 under the contract of service;

19 (iv) the extent of the person's investment in the resources, assets,  
20 or equipment necessary to perform the services contracted for; whether the  
21 person possesses specialized skills or knowledge necessary to perform the



1 services contracted for; and whether the person has continuing and recurring  
2 business liabilities and obligations;

3 (v) whether the person holds itself out as in business for itself and  
4 offers its services to the general public; and

5 (vi) whether the person is not treated as an employee for purposes  
6 of income or employment taxation with regard to the work performed and  
7 either:

8 (I) holds or has applied for a federal employer identification  
9 number; or

10 (II) has filed business or self-employment tax returns with the  
11 federal Internal Revenue Service within the past year or will file business or  
12 self-employment tax returns with the federal Internal Revenue Service for the  
13 current year.

14 (B) In considering whether a person is economically independent  
15 pursuant to subdivision (A) of this subdivision (31), no single factor in and of  
16 itself shall be dispositive.

17 (C) If multiple persons are performing the same work on a project or  
18 job site, the determination of whether the person is economically independent  
19 of the employing unit shall take into account the relationship between the  
20 specific services performed by the person and the circumstances of the project  
21 or job in relation to which the person is providing services.

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

3           Sec. 2. 21 V.S.A. § 1301 is amended to read:

4           § 1301. DEFINITIONS

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

7   \* \* \*

8           (6)(A)(i) "Employment," subject to the other provisions of this  
9           subdivision (6), means service within the jurisdiction of this State, ~~performed~~  
10          ~~prior to January 1, 1978, which was employment as defined in this subdivision~~  
11          ~~prior to such date and, subject to the other provisions of this subdivision,~~  
12          service performed ~~after December 31, 1977,~~ by an employee, as defined in  
13          subsections 3306(i) and (o) of the Federal Unemployment Tax Act, including  
14          service in interstate commerce, performed for wages or under any contract of  
15          hire, written or oral, expressed or implied. Services partly within and partly  
16          ~~without~~ outside this State may by election as ~~hereinbefore~~ provided in  
17          subdivision (5)(E)(i) of this section be treated as if wholly within the  
18          jurisdiction of this State. ~~And whenever~~ Whenever an employing unit shall  
19          have elected to come under the provisions of a similar act of a state where a  
20          part of the services of an employee ~~are~~ is performed, the Commissioner, upon  
21          his or her approval of ~~said~~ the election as to any such employee, may treat the

1 services covered by ~~said~~ the approved election as having been performed  
2 wholly ~~without~~ outside the jurisdiction of this State.

3 \* \* \*

4 (B)(i) Services performed by an individual for wages shall be deemed  
5 to be employment subject to this chapter unless and until it is shown to the  
6 satisfaction of the Commissioner that the individual is economically  
7 independent of his or her employing unit under the totality of the  
8 circumstances in light of the following factors:

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

12 (ii) ~~Such service is either outside the usual course of the business~~  
13 ~~for which such service is performed, or that such service is performed outside~~  
14 ~~of all the places of business of the enterprise for which such service is~~  
15 ~~performed; and~~

16 (iii) ~~Such individual is customarily engaged in an independently~~  
17 ~~established trade, occupation, profession, or business.~~

18 (I) whether the individual is free from the direction and control  
19 of his or her employing unit with respect to the means and manner of the  
20 services performed, both under his or her contract of service and in fact;

1                   (II) whether the individual operates a separate and distinct  
2 business from that of the employing unit and the extent to which he or she is  
3 performing work that is not a substantial, essential, and recurring part of the  
4 core services, functions, or activities of the employing unit;

5                   (III) whether the individual's contract of service provides for  
6 the performance of specific services for specified amounts of compensation  
7 and does not provide that the services will be performed on an ongoing or  
8 indefinite basis, and whether the individual may realize a profit or suffer a loss  
9 under the contract of service;

10                  (IV) the extent of the individual's investment in the resources,  
11 assets, and equipment, as well as the specialized skills or knowledge necessary  
12 to perform the services contracted for, and whether he or she has continuing  
13 and recurring business liabilities and obligations;

14                  (V) whether the individual holds himself or herself out as in  
15 business for himself or herself and offers his or her services to the general  
16 public; and

17                  (VI) whether the individual is not treated as an employee for  
18 purposes of income or employment taxation with regard to the work performed  
19 and either:

20                    (aa) holds or has applied for a federal employer  
21 identification number; or

1                    (bb) has filed business or self-employment tax returns with  
2                    the federal Internal Revenue Service within the past year or will file business  
3                    or self-employment tax returns with the federal Internal Revenue Service for  
4                    the current year.

5                    (ii) In considering whether an individual is economically  
6                    independent pursuant to subdivision (i) of this subdivision (6)(B), no single  
7                    factor in and of itself shall be dispositive.

8                    (iii) If multiple individuals are performing the same work on a  
9                    project or job site, the determination of whether an individual is economically  
10                   independent of the employing unit shall take into account the relationship  
11                   between the specific services performed by the individual and the  
12                   circumstances of the project or job in relation to which he or she is providing  
13                   services.

14                   (iv) As used in this subdivision (6)(B), the term “individual”  
15                   means:

16                   (I) a natural person;

17                   (II) a single-member L.L.C. that does not have any employees  
18                   other than the member; or

19                   (III) a corporation with a single shareholder that does not have  
20                   any employees other than the shareholder.

21                   \* \* \*

1       Sec. 3. EFFECTIVE DATE

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