

1 Introduced by Committee on Commerce and Economic Development

2 Date:

3 Subject: Labor; workers' compensation; unemployment insurance;
4 independent contractors

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

8 An act relating to the classification of employees and independent
9 contractors

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

11 Sec. 1. PURPOSE

12 By enacting this legislation, the General Assembly intends to support
13 Vermont's entrepreneurial spirit, adapt to emerging business and employment
14 trends, strengthen and grow Vermont's economy, make the State more
15 competitive and affordable, support business growth and development, and
16 maintain protections for Vermont's workforce. In particular, this legislation is
17 intended to update Vermont's workers' compensation and unemployment
18 insurance laws to make them more simple, clear, and comprehensible in
19 order to:

1 (1) ensure that Vermont’s workers’ compensation and unemployment
2 insurance systems reflect and support the unique character and spirit of
3 innovation that is inherent in Vermont’s entrepreneurs, businesses, workers,
4 and economy;

5 (2) embrace, strengthen, and build upon the emerging entrepreneurial,
6 independent, and collaborative sectors of Vermont’s workforce and economy;

7 (3) assist businesses, employees, independent contractors, and insurers
8 in complying with the requirements for the proper classification of employees
9 and independent contractors;

10 (4) reduce the frequency of misclassification and the related harmful
11 effects of misclassification to individuals, businesses, and society;

12 (5) facilitate the proper classification of employees and independent
13 contractors by establishing a common definition for “independent contractor”
14 and clarifying the presumption that an individual who performs services for
15 compensation is an employee;

16 (6) provide for the efficient and fair enforcement of Vermont’s workers’
17 compensation and unemployment insurance laws by the Department of
18 Labor; and

19 (7) build on the more than 100-year evolution and improvement of the
20 grand bargain in Vermont’s workers’ compensation law that provides

1 employees with a prompt, no-fault remedy for workplace injuries while
2 limiting the potential liability of employers.

3 Sec. 2. 21 V.S.A. § 601 is amended to read:

4 § 601. DEFINITIONS

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

7 * * *

8 (3) “Employer” includes any body of persons, corporate or
9 unincorporated, public or private, and the legal representative of a deceased
10 employer, and includes the owner or lessee of premises or other person who is
11 virtually the proprietor or operator of the business there carried on, but who, by
12 reason of there being an independent contractor or for any other reason, is not
13 the direct employer of the workers there employed. If the employer is insured,
14 the term “employer” includes the employer’s insurer so far as applicable. A
15 person is not deemed to be an “employer” for the purposes of this chapter as
16 the result of entering into a contract for services or labor with an individual
17 a sole proprietor or partner owner who has knowingly and voluntarily waived
18 coverage of this chapter pursuant to subdivision (14)(F) of this section, or an
19 individual who is a corporate officer or L.L.C. member or manager who has
20 filed, and had approved, an exclusion pursuant to subdivision 14(H) of this
21 section and who meets the criteria set forth in that subdivision.

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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~~ An individual who performs services for compensation is presumed to be an employee unless he or she is one of the following:

* * *

(B) An individual engaged in amateur sports, including a referee or official who is paid on a per game or per event basis, even if an employer contributes to the support of such sports.

* * *

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

~~(i)(I)(aa)~~ 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; or

1 (bb) the individual or partner owner is an independent
2 contractor and is either actively registered as a business with the Vermont
3 Secretary of State or actively registered as a business in the state or country of
4 domicile.

5 ~~(ii) The individual controls the means and manner of the work~~
6 ~~performed.~~

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

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

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

14 ~~(vi)~~(II) The services are performed pursuant to a written
15 agreement or contract between the individual or partner owner and ~~another~~
16 ~~person~~ the person that is providing compensation for the services, and the
17 written agreement or contract explicitly states that the individual or partner
18 owner is not considered to be an employee under this chapter, is working
19 independently, has no employees, and has not contracted with other
20 independent contractors. The written contract or agreement shall also include
21 information regarding the right of the individual or partner owner to purchase

1 workers' compensation insurance coverage ~~and the individual's election not to~~
2 ~~purchase that coverage.~~ However, if the individual or partner owner who is
3 party to the agreement or contract under this subdivision is found to have
4 employees, those employees may file a claim for benefits under this chapter
5 against either or both parties to the agreement.

6 (ii)(I) An individual or partner owner that meets the conditions of
7 subdivision (i) of this subdivision (14)(F) may elect to file with the
8 Commissioner a notice to waive the right to make a claim for workers'
9 compensation against the person with whom the individual or partner owner
10 contracts.

11 (II) If, after filing a notice under subdivision (I) of this
12 subdivision (14)(F)(ii), the individual or partner owner suffers a personal
13 injury arising out of and in the course of his or her employment, he or she may
14 bring an action to recover damages for personal injury against the person who
15 is providing compensation for the services and, in such action, the person who
16 is providing compensation for the services shall have all of the defenses
17 available in a personal injury claim. However, this election shall not prevent
18 any other individual, other than the individual excluded pursuant to subdivision
19 (i) of this subdivision (14)(F), who is determined to be an employee of the
20 unincorporated business from claiming workers' compensation benefits under
21 this chapter from the unincorporated business or from a statutory employer.

1 (i) A person shall not be deemed to be an “employer” for purposes
2 of this chapter of corporate executive officers or L.L.C. managers or members
3 that are excluded under this subdivision (14)(H) if the following conditions
4 are met:

5 (I) The corporate executive officers or L.L.C. managers or
6 members operate a separate and distinct business that meets the requirements
7 to be an independent contractor, is actively registered with the Vermont
8 Secretary of State, and elects to file a corporate officer or L.L.C. member
9 exclusion from the provisions of this chapter.

10 (II) The services are performed pursuant to a written agreement
11 or contract between the corporation or L.L.C. and the person who is providing
12 compensation for the services, and the written agreement or contract explicitly
13 states that the corporate executive officers or L.L.C. managers or members are
14 not considered to be employees under this chapter and are working
15 independently. The written contract or agreement shall also include
16 information regarding the right of the corporation or L.L.C. to purchase
17 workers’ compensation insurance coverage and of the corporate executive
18 officers or the L.L.C. managers or members to elect not to exclude themselves
19 from coverage.

20 (ii) If, after making an election under this subdivision (14)(H), the
21 corporate officer or L.L.C. manager or member suffers a personal injury

1 arising out of and in the course of his or her employment, he or she may bring
2 an action to recover damages for personal injury against the person that is
3 providing compensation for the services and, in such action, the person that is
4 providing compensation for the services shall have all of the defenses available
5 in a personal injury claim. However, this election shall not prevent any other
6 individual, other than the individual excluded pursuant to this subdivision, who
7 is determined to be an employee of the corporation or L.L.C. from claiming
8 workers' compensation benefits under this chapter from the corporation or
9 L.L.C. or from a statutory employer.

10 (iii) A corporation or L.L.C. whose executive officers, members,
11 or managers make an election under this subdivision (14)(H) shall collect and
12 maintain documentation that any other person hired to perform services for the
13 corporation or L.L.C. has workers' compensation coverage, or is otherwise in
14 compliance with this chapter.

15 (I) An individual who provides services for which he or she receives
16 foster care payments that are specifically excluded from gross income pursuant
17 to Section 131 of the federal Internal Revenue Code, 26 U.S.C. § 131.

18 * * *

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

1 (i) whether the individual is free from the direction and control of
2 the employing unit with respect to the means and manner of the work
3 performed, both under the person’s contract of service and in fact;

4 (ii) whether the individual performs work that is an integral part of
5 the employing unit’s business;

6 (ii) whether the individual operates a separate and distinct
7 business from that of the employing unit and the extent to which the individual
8 is performing work that is an integral part of the employing unit’s business;

9 (iii) whether the individual controls his or her opportunity to
10 realize a profit or a loss;

11 (iv) whether the individual has a substantial investment in the
12 facilities, tool, instruments, materials, and knowledge used by him or her to
13 complete the work;

14 (v) whether the work performed requires specialized skills and
15 initiative;

16 (vi) whether the individual holds himself or herself out as in
17 business for himself or herself and competes to offer its services to the general
18 public; and

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

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

4 ~~(ii) Such service is either outside the usual course of the business~~
5 ~~for which such service is performed, or that such service is performed outside~~
6 ~~of all the places of business of the enterprise for which such service is~~
7 ~~performed; and~~

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

10 (I) whether the individual is free from the direction and control
11 of the employing unit with respect to the means and manner of the services
12 performed, both under the person’s contract of service and in fact;

13 (II) whether the individual performs work that is an integral
14 part of the employing unit’s business;

15 (II) whether the individual operates a separate and distinct
16 business from that of the employing unit and the extent to which the individual
17 is performing work that is an integral part of the employing unit’s business;

18 (III) whether the individual has an opportunity for profit or loss
19 depending on his or her managerial skill;

1 (III) whether the individual may realize a profit or suffer a loss
2 as a result of the application of his or her business acumen in performing the
3 services;

4 (IV) whether the individual has a substantial investment in the
5 facilities, tool, instruments, materials, and knowledge used by him or her to
6 complete the work;

7 (V) whether the work performed requires specialized skills and
8 initiative;

9 (VI) whether the individual holds himself or herself out as in
10 business for himself or herself and competes to offer his or her services to the
11 general public; and

12 (VII) whether the individual is not treated as an employee for
13 purposes of income or employment taxation with regard to the work performed
14 and either:

15 (aa) holds or has applied for a federal employer
16 identification number; or

17 (bb) has filed business or self-employment tax returns with
18 the federal Internal Revenue Service within the past year or will file business
19 or self-employment tax returns with the federal Internal Revenue Service for
20 the current year.

- 1 (1) the Secretary of Administration or designee;
- 2 (2) the Attorney General or designee;
- 3 (3) the Secretary of Transportation or designee;
- 4 (4) the Commissioner of Buildings and General Services or designee;
- 5 (5) the Commissioner of Labor or designee;
- 6 (6) the Commissioner of Financial Regulation or designee;
- 7 (7) the Secretary of Human Services or designee;
- 8 (8) the Commissioner of Taxes or designee;
- 9 (9) the Commissioner of Liquor Control or designee; and
- 10 (10) the Secretary, Commissioner, or designee of any other State
11 licensing agency or department as determined by the Secretary of
12 Administration.

13 (c)(1) The Task Force shall meet at least six times per year.

14 (2) The Secretary of Administration or designee and the Attorney
15 General or designee shall be Co-Chairs of the Task Force.

16 (d) The Secretary of Administration shall ensure that all State agencies do
17 the following:

18 (1) coordinate their efforts to combat employee misclassification in a
19 manner that increases the efficiency and effectiveness of those efforts; and

1 (2) In a central database accessible to all State agencies and
2 departments, share information concerning any employer determined to have
3 misclassified one or more employees as independent contractors.

4 (e) The Secretary shall adopt rules and procedures necessary to carry out
5 the duties set forth in subsection (d) of this section.

6 (f) The Secretary of Administration shall report annually on or before January
7 15 of each year to the House Committees on Commerce and Economic
8 Development and on Ways and Means and the Senate Committee on Finance
9 regarding activities that he or she has undertaken pursuant to this section and
10 any additional tax revenue and unemployment insurance contributions, as well
11 as any reduction in workers' compensation premiums and costs, realized as a
12 result of the efforts undertaken by the Secretary pursuant to this section. The
13 provisions of 2 V.S.A. § 20(d) (expiration of required reports) shall not apply
14 to the report to be made under this subsection.

15 [H.323] Sec. 4. 3 V.S.A. § 2222d is added to read:

16 § 2222d. VERMONT EMPLOYEE CLASSIFICATION TASK FORCE

17 (a) Creation and purpose. The Vermont Employee Classification Task
18 Force is created in the Agency of Administration to reduce the frequency of
19 employee misclassification through enhanced education, improved
20 coordination of State resources, and increased collaboration among State
21 government, businesses, labor, and other stakeholders.

1 (b) Membership. The Task Force shall be composed of the following nine
2 members:

3 (1) the Secretary of Administration or designee;

4 (2) the Commissioner of Labor or designee;

5 (3) the Secretary of Transportation or designee;

6 (4) the Commissioner of Buildings and General Services or designee;

7 (5) the Commissioner of Financial Regulation or designee;

8 (6) the Secretary of Human Services or designee;

9 (7) the Commissioner of Taxes or designee;

10 (8) the Attorney General or designee; and

11 (9) the Commissioner of Liquor Control or designee.

12 (c) Meetings.

13 (1) The Task Force shall meet at least six times per year.

14 (2) The Secretary of Administration or designee shall be the Chair.

15 (3) A majority of the membership of the Task Force shall constitute a

16 quorum.

17 (d) Duties.

18 (1) The Task Force shall have the following duties:

19 (A) to develop and implement an ongoing outreach program to

20 educate and inform employers, workers, and the general public about the

21 proper classification of employees and independent contractors;

1 (B) to examine and evaluate existing misclassification enforcement
2 by State agencies and departments;

3 (C) to develop and implement strategies to improve coordination,
4 cooperation, and information sharing among State agencies and departments in
5 relation to the investigation and enforcement of employee misclassification;

6 (D) to review and establish reasonable mechanisms to accept
7 complaints and reports of noncompliance;

8 (E) to ensure that State agencies and departments are engaged in
9 timely enforcement;

10 (F) to ensure that penalties and debarment periods are posted on a
11 publicly available website in a timely manner, to the extent permitted by law;

12 (G) to review and recommend additional methods to provide public
13 notice and share information regarding enforcement, penalties, and debarment
14 periods;

15 (H) to develop strategies and programs to assist businesses in
16 complying with Vermont’s requirements for the proper classification of
17 employees and independent contractors, and to reduce the frequency of
18 employee misclassification; and

19 (I) to recommend legislative, regulatory, and administrative measures
20 to reduce the frequency of employee misclassification.

1 (2) The Task Force shall consult and collaborate with businesses, labor,
2 and other interested stakeholders to accomplish the duties set forth in
3 subdivision (1) of this subsection, and may appoint representatives of business,
4 labor, and other interested stakeholders to subcommittees as the Task Force
5 deems appropriate.

6 (e) Reports.

7 (1) The Task Force shall report annually on or before January 15 to the
8 House Committee on Commerce and Economic Development and the Senate
9 Committee on Finance regarding the activities that it has undertaken pursuant
10 to this section, the progress of the Task Force’s ongoing education and
11 outreach programs, the number and results of the employer audits conducted
12 during the previous calendar year, and any barriers or impediments to the
13 proper classification of employees and independent contractors that the Task
14 Force has identified. The report may recommend legislative, regulatory, and
15 administrative measures to reduce the frequency of employee misclassification.
16 The provisions of 2 V.S.A. § 20(d) (expiration of required reports) shall not
17 apply to the report to be made under this subsection.

18 (2) The Task Force shall examine the issue of comprehensive
19 enforcement of employee misclassification within Vermont’s workers’
20 compensation system and potential measures to improve the efficacy of the
21 State’s misclassification enforcement mechanisms, including by transferring

1 the responsibility for the investigation and enforcement of misclassification to
2 the Office of the Attorney General. The Task Force shall develop and
3 establish performance measures to evaluate the efficacy of efforts to enforce
4 the requirements for classification of employees and independent contractors,
5 and any improvement in the outcomes of the State’s enforcement efforts over
6 time. On or before February 15, 2018, the Task Force shall report to the House
7 Committee on Commerce and Economic Development and the Senate
8 Committee on Finance with a recommendation for a comprehensive plan to
9 improve the State’s misclassification enforcement mechanisms and any
10 legislative, regulatory, or administrative measures necessary to implement
11 the plan.

12 (3) The Task Force shall study the use of multiple independent
13 contractors to perform the same work on a project or jobsite to determine how
14 often employee misclassification occurs in such situations. In performing its
15 study, the Task Force shall review documented instances of misclassification
16 and may consult with businesses, labor, and other interested stakeholders. On
17 or before February 15, 2018, the Task Force shall submit a written report to the
18 General Assembly with its findings and any recommendations for legislative
19 action.

20 (4) The Task Force shall examine the issue of whether all workers in
21 certain industries should be required to be covered by workers’ compensation

1 insurance. On or before February 15, 2018, the Task Force shall submit a
2 written report to the General Assembly with its findings and any
3 recommendations for legislative action.

4 (f) Definition. As used in this section, “employee misclassification” means
5 the improper classification of employees as independent contractors.

6 **[H.223 and 323]** Sec. 5. 21 V.S.A. § 398 is added to read:

7 § 398. NOTICE TO PERSON RECEIVING COMPENSATION AS AN
8 INDEPENDENT CONTRACTOR

9 (a)(1) Every employer shall post in a prominent and accessible place on a
10 site where work is performed a poster provided by the Department that shall
11 explain the differences between an “employee” and an “independent
12 contractor” pursuant to the applicable provisions of chapters 9 and 17 of this
13 title. The poster shall also include information regarding:

14 (A) the protections against retaliation provided by this title;

15 (B) the penalties provided pursuant to this title for failure to classify
16 an individual properly as an employee;

17 (C) how an individual may file a complaint or inquiry with the
18 Commissioner about his or her employment classification status; and

19 (D) how an employer may obtain guidance or information from the
20 Department with respect to the proper classification of employees and
21 independent contractors.

1 (2)(A) The information set forth on the poster shall be in English or
2 other languages as required by the Commissioner.

3 (B) If the poster is located outdoors, it shall be constructed of
4 materials capable of withstanding adverse weather conditions.

5 (3) An employer shall, at the time of hiring, provide home-based
6 employees and employees that do not work at a fixed worksite with the
7 information required under subdivision (1) of this subsection. The information
8 shall be provided in a format provided by the Department.

9 (b) On or before August 1, 2017, the Commissioner shall create the poster
10 required pursuant to subsection (a) of this section and shall make it available to
11 employers on the Department's website.

12 (c) An employer who violates the provisions of this section shall be subject
13 to an administrative penalty of not more than \$100.00 per violation.

14 [H.223 and H.323] Sec. 6. 21 V.S.A. § 603 is amended to read:

15 § 603. WITNESSES, OATHS, BOOKS, PAPERS, RECORDS

16 (a) So far as it is necessary in his or her examinations and investigations
17 and in the determination of matters within his or her jurisdiction, the
18 Commissioner shall have power to subpoena witnesses, administer oaths, and
19 to demand the production of books, papers, records, and documents for his or
20 her examination. In addition, the Commissioner or designee may, upon
21 presenting appropriate credentials, at reasonable times and without unduly

1 disrupting business operations enter and inspect any place of business or
2 employment, question any employees, and investigate any facts, conditions, or
3 matters necessary and material to the administration of this chapter. The
4 employer shall, at reasonable times and without unduly disrupting business
5 operations, make its workers available to meet with the Commissioner or
6 designee, as required by the Commissioner. The Commissioner or designee
7 shall inform the employer of the employer's rights to refuse entry and to
8 consult with legal counsel, and of the Commissioner's rights under this
9 section. If entry is refused, the Commissioner may apply to the Civil Division
10 of the Superior Court for an order to enforce the rights given to the
11 Commissioner under this section.

12 * * *

13 [H.223] Sec. 7. 21 V.S.A. § 692 is amended to read:

14 § 692. PENALTIES; FAILURE TO INSURE; ~~STOP WORK~~ STOP-WORK
15 ORDERS

16 (a)(1) Failure to insure. If after a hearing under section 688 of this title, the
17 Commissioner determines that an employer has failed to comply with the
18 provisions of section 687 of this title, the employer shall be assessed an
19 administrative penalty of not more than \$100.00 for every day for the first
20 seven days the employer neglected to secure liability and not more than
21 \$150.00 for every day thereafter.

1 (2) Purposeful violation. If the Commissioner determines that the
2 employer purposefully violated section 687 of this title:

3 (A) any penalties assessed pursuant to subdivision (1) of this
4 subsection shall be doubled; and

5 (B) the employer may be liable for punitive damages in an amount
6 equal to any penalties assessed pursuant to this subsection in an action related
7 to the employer's purposeful violation of section 687 that is brought pursuant
8 to section 712 of this chapter.

9 (b) Stop-work orders. If an employer fails to comply with the provisions of
10 section 687 of this title after investigation by the Commissioner, the
11 Commissioner ~~shall~~ may issue an emergency order to that employer to stop
12 work until the employer has secured workers' compensation insurance. If the
13 Commissioner determines that issuing a stop-work order would immediately
14 threaten the safety or health of the public, the Commissioner may permit work
15 to continue until the immediate threat to public safety or health is removed.

16 The Commissioner shall document the reasons for permitting work to continue,
17 and the document shall be available to the public. In addition, the employer
18 shall be assessed an administrative penalty of not more than \$250.00 for every
19 day that the employer fails to secure workers' compensation coverage after the
20 Commissioner issues an order to obtain insurance and may also be assessed an
21 administrative penalty of not more than \$250.00 for each employee for every

1 day that the employer fails to secure workers' compensation coverage as
2 required in section 687 of this title. When a stop-work order is issued, the
3 Commissioner shall post a notice at a conspicuous place on the work site of the
4 employer informing the employees that their employer failed to comply with
5 the provisions of section 687 of this title and that work at the work site has
6 been ordered to cease until workers' compensation insurance is secured. If an
7 employer fails to comply with a stop-work order, the Commissioner may seek
8 an order from the Civil Division of the Superior Court to enjoin the employer
9 from employing any individual. The stop-work order shall be rescinded as
10 soon as the Commissioner determines that the employer is in compliance with
11 section 687 of this title.

12 (c) Debarment. An employer ~~against whom a stop-work order has been~~
13 ~~issued~~ who has not been in compliance with section 687 of this title, unless the
14 Commissioner determines that the failure to comply was inadvertent or
15 excusable, is prohibited from ~~contracting~~ entering into subsequent contracts,
16 directly or indirectly, with the State or any of its subdivisions for a period of up
17 to three years following the date of the issuance of ~~the stop-work order a~~
18 citation, as determined by the Commissioner in consultation with the
19 ~~Commissioner of Buildings and General Services or the Secretary of~~
20 ~~Transportation, as appropriate. Either the Secretary or the Commissioner, as~~
21 ~~appropriate, shall be consulted in any contest of the prohibition of the~~

1 ~~employer from contracting with the State or its subdivisions~~ Secretary of
2 Administration. The consultation shall be informal and shall occur within five
3 business days of the notification by the Commissioner. The results of the
4 consultation shall be documented.

5 ~~(e)~~(d) Penalty for violation of stop-work order. In addition to any other
6 penalties, an employer who violates a stop-work order described in subsection
7 (b) of this section is subject to:

8 (1) ~~a civil~~ an administrative penalty of not more than \$5,000.00 for the
9 first violation and ~~a civil~~ an administrative penalty of not more than
10 \$10,000.00 for a second or subsequent violation; or

11 (2) a criminal fine of not more than \$10,000.00 or imprisonment for not
12 more than 180 days, or both.

13 (e) The Commissioner shall be represented by the Attorney General in any
14 action related to a purposeful violation of the provisions of this section.

15 [H.323] Sec. 7. 21 V.S.A. § 692 is amended to read:

16 § 692. PENALTIES; FAILURE TO INSURE; ~~STOP WORK~~ STOP-WORK
17 ORDERS

18 * * *

19 (b) Stop-work orders. If an employer fails to comply with the provisions of
20 section 687 of this title after investigation by the Commissioner, the
21 Commissioner ~~shall~~ may issue an emergency order to that employer to stop

1 work until the employer has secured workers' compensation insurance. If the
2 Commissioner determines that issuing a stop-work order would immediately
3 threaten the safety or health of the public, the Commissioner may permit work
4 to continue until the immediate threat to public safety or health is removed.
5 The Commissioner shall document the reasons for permitting work to continue,
6 and the document shall be available to the public. In addition, the employer
7 shall be assessed an administrative penalty of not more than \$250.00 for every
8 day that the employer fails to secure workers' compensation coverage after the
9 Commissioner issues an order to obtain insurance and may also be assessed an
10 administrative penalty of not more than \$250.00 for each employee for every
11 day that the employer fails to secure workers' compensation coverage as
12 required in section 687 of this title. When a stop-work order is issued, the
13 Commissioner shall post a notice at a conspicuous place on the work site of the
14 employer informing the employees that their employer failed to comply with
15 the provisions of section 687 of this title and that work at the work site has
16 been ordered to cease until workers' compensation insurance is secured. If an
17 employer fails to comply with a stop-work order, the Commissioner may seek
18 an order from the Civil Division of the Superior Court to enjoin the employer
19 from employing any individual. The stop-work order shall be rescinded as
20 soon as the Commissioner determines that the employer is in compliance with
21 section 687 of this title.

1 (c) Debarment. An employer ~~against whom a stop-work order has been~~
2 ~~issued~~ who has not been in compliance with section 687 of this chapter, unless
3 the Commissioner determines that the failure to comply was inadvertent or
4 excusable, is prohibited from ~~contracting~~ entering into subsequent contracts,
5 directly or indirectly, with the State or any of its subdivisions for a period of up
6 to three years following the date of the issuance of ~~the stop-work order~~ an
7 administrative citation, as determined by the Commissioner in consultation
8 with the ~~Commissioner of Buildings and General Services or the Secretary of~~
9 ~~Transportation, as appropriate. Either the Secretary or the Commissioner, as~~
10 ~~appropriate, shall be consulted in any contest of the prohibition of the~~
11 ~~employer from contracting with the State or its subdivisions~~ Secretary of
12 Administration. The consultation shall be informal and shall occur within five
13 business days of the notification by the Commissioner. The results of the
14 consultation shall be documented.

15 ~~(e)~~(d) Penalty for violation of stop-work order. In addition to any other
16 penalties, an employer who violates a stop-work order described in subsection
17 (b) of this section is subject to:

18 (1) ~~a civil~~ an administrative penalty of not more than \$5,000.00 for the
19 first violation and ~~a civil~~ an administrative penalty of not more than
20 \$10,000.00 for a second or subsequent violation; or

1 (2) a criminal fine of not more than \$10,000.00 or imprisonment for not
2 more than 180 days, or both.

3 [H.223 and H.323] Sec. 8. 21 V.S.A. § 7 is added to read:

4 § 7. COLLECTION OF ADMINISTRATIVE PENALTIES

5 The Commissioner may collect any unpaid administrative penalty assessed
6 pursuant to this title by filing an action in Superior Court or through any other
7 means available to State agencies.

8 [H.223 and H.323] Sec. 9. 4 V.S.A. § 1102 is amended to read:

9 § 1102. JUDICIAL BUREAU; JURISDICTION

10 * * *

11 (b) The Judicial Bureau shall have jurisdiction of the following matters:

12 * * *

13 (20) ~~Violations of 21 V.S.A. § 692(c)(1).~~ [Repealed.]

14 * * *

15 [H.223] Sec. 10. 21 V.S.A. § 690 is amended to read:

16 § 690. CERTIFICATE, FORM; COPY OF POLICY

17 * * *

18 (b)(1) In addition to any other authority provided to the Commissioner
19 pursuant to this chapter, the Commissioner may issue a written request to an
20 employer subject to the provisions of this chapter to provide a workers'
21 compensation compliance statement on a form provided by the Commissioner.

1 The employer shall provide the compliance statement to the Commissioner
2 within 30 days of the request. For the purposes of this subsection, an employer
3 includes subcontractors and independent contractors. The form shall require
4 all the following information sorted by job site:

5 * * *

6 (2)(A) ~~Any~~ If an employer who fails to comply with this subsection or
7 falsifies information on the compliance statement the Commissioner may be
8 ~~assessed~~ assess an administrative penalty of not more than \$5,000.00 for each
9 week during which the noncompliance or falsification occurred and any costs
10 and attorney's fees required to enforce this subsection against the employer.

11 (B) The Commissioner may also seek injunctive relief in Washington
12 Superior Court.

13 (C) If the Commissioner determines that the employer has
14 purposefully failed to comply with this subsection or purposefully falsified
15 information on the compliance statement, any penalties assessed pursuant to
16 subdivision (b)(2)(A) of this subsection shall be doubled.

17 * * *

18 (c) Upon receiving written authorization from an employer to release
19 information to the Commissioner, the employer's agent or broker or the
20 authorized representative of an insurance or guarantee company shall provide
21 within five business days any contract or policy information, including an

1 insurance application, binder, or reported payroll, that is requested by the
2 Commissioner pursuant to this section.

3 (d) The Commissioner shall be represented by the Attorney General in any
4 action related to a purposeful violation of the provisions of this section.

5 [H.323] Sec. 10. 21 V.S.A. § 690 is amended to read:

6 § 690. CERTIFICATE, FORM; COPY OF POLICY

7 * * *

8 (b)(1) In addition to any other authority provided to the Commissioner
9 pursuant to this chapter, the Commissioner may issue a written request to an
10 employer subject to the provisions of this chapter to provide a workers'
11 compensation compliance statement on a form provided by the Commissioner.
12 The employer shall provide the compliance statement to the Commissioner
13 within 30 days of the request. For the purposes of this subsection, an employer
14 includes subcontractors and independent contractors. The form shall require
15 all the following information sorted by job site:

16 * * *

17 (c) Upon receiving written authorization from an employer to release
18 information to the Commissioner, the employer's agent or broker or the
19 authorized representative of an insurance or guarantee company shall provide
20 within five business days any contract or policy information, including an

1 insurance application, binder, or reported payroll, that is requested by the
2 Commissioner pursuant to this section.

3 **[H.223]** Sec. 11. 21 V.S.A. § 625 is amended to read:

4 § 625. CONTRACTING OUT FORBIDDEN; PROHIBITED ACTS;

5 PENALTIES

6 (a) ~~An~~ Except as provided in subdivisions 601(3) and (14) of this chapter,
7 an employer shall not be relieved in whole or in part from liability created by
8 the provisions of this chapter by any contract, rule, regulation, or device
9 whatsoever.

10 (b) The Commissioner may investigate complaints that an employee has
11 been improperly classified and determine whether a person meets the
12 requirements to be an independent contractor as set forth in subdivision
13 601(31) of this title.

14 (c) Unless the improper classification was inadvertent or due to excusable
15 neglect, any person that, for the purpose of avoiding its obligations under this
16 title, improperly classifies an employee as an independent contractor:

17 (A) shall be subject to an administrative penalty of not more than
18 \$5,000.00; and

19 (B) may be liable for punitive damages in an amount equal to any
20 penalties assessed pursuant to this subsection in an action related to the

1 improper classification of the employee that is brought pursuant to section 712
2 of this chapter.

3 (d)(1) If, following an investigation, the Commissioner determines that a
4 person has improperly classified an employee as an independent contractor, the
5 Commissioner shall notify the Commissioners of Financial Regulation and of
6 Taxes of the determination.

7 (2) Upon receiving notification of the determination, the Commissioners
8 of Financial Regulation and of Taxes shall conduct an investigation to
9 determine whether the person has also misclassified the employee pursuant to
10 the applicable provisions of law under his or her jurisdiction.

1 (e) Any person who, for the purpose of avoiding its obligations under this
2 title, coerces an employee or prospective employee into becoming an
3 independent contractor, after notice and an opportunity for a hearing, may be
4 assessed an administrative penalty of not more than \$5,000.00 and may be
5 liable to the employee or prospective employee for punitive damages in an
6 amount equal to any penalty assessed pursuant to this subdivision in an action
7 brought pursuant to section 712 of this chapter.

8 [H.323] Sec. 11. 21 V.S.A. § 625 is amended to read:

9 § 625. CONTRACTING OUT FORBIDDEN; PROHIBITED ACTS;

10 PENALTIES

11 (a) ~~An~~ Except as provided in subdivisions 601(3) and (14) of this chapter,
12 an employer shall not be relieved in whole or in part from liability created by
13 the provisions of this chapter by any contract, rule, regulation, or device
14 whatsoever.

15 (b) The Commissioner may investigate complaints and determine whether
16 the requirements to be an independent contractor set forth in subdivision
17 601(31) of this title are met. Unless the Commissioner determines that the
18 improper classification was inadvertent or excusable, any person that, for the
19 purpose of avoiding its obligations under this title, improperly classifies an
20 employee as an independent contractor may, after notice and an opportunity

1 for a hearing, be assessed an administrative penalty of not more than
2 \$5,000.00.

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

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

14 (2) inquiring about whether an individual that is or will be performing
15 services operates an unincorporated business, corporation, or L.L.C.; or

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

1 [H.223 and H.323] Sec. 12. 8 V.S.A. § 3661 is amended to read:

2 § 3661. CEASE AND DESIST POWERS; PROSECUTIONS AND
3 PENALTIES

4 * * *

5 (c) An employer who makes a false statement or representation that results
6 in a lower workers' compensation premium, after notice and opportunity for
7 hearing before the Commissioner, may be assessed an administrative penalty
8 of not more than \$20,000.00 in addition to any other appropriate penalty. In
9 addition, an employer found to have violated this section is prohibited from
10 ~~contracting~~ entering into subsequent contracts, directly or indirectly, with the
11 State or any of its subdivisions for up to three years following the date the
12 employer was found to have made a false statement or misrepresentation, as
13 determined by the Commissioner in consultation with the ~~Commissioner of~~
14 ~~Buildings and General Services or the Secretary of Transportation~~, as
15 appropriate. ~~Either the Secretary or the Commissioner, as appropriate, shall be~~
16 ~~consulted in any appeal relating to prohibiting the employer from contracting~~
17 ~~with the State or its subdivisions~~ Secretary of Administration. The
18 consultation may be informal and shall occur within five business days of the
19 notification by the Commissioner. The outcome of the consultation shall be
20 documented.

21 * * *

1 [H.223 and H.323] Sec. 13. 21 V.S.A. § 1314a is amended to read:

2 § 1314a. QUARTERLY WAGE REPORTING; MISCLASSIFICATION;

3 PENALTIES

4 * * *

5 (f)(1) Any employing unit or employer that fails to:

6 (A) File any report required by this section shall be subject to a an
7 administrative penalty of \$100.00 for each report not received by the
8 prescribed due dates.

9 (B) Properly classify an individual regarding the status of
10 employment is subject to a an administrative penalty of not more than
11 \$5,000.00 for each improperly classified employee. In addition, an employer
12 found to have violated this section is prohibited from ~~contracting~~ entering into
13 subsequent contracts, directly or indirectly, with the State or any of its
14 subdivisions for up to three years following the date the employer was found to
15 have failed to properly classify, as determined by the Commissioner in
16 consultation with the ~~Commissioner of Buildings and General Services or the~~
17 ~~Secretary of Transportation, as appropriate. Either the Secretary or the~~
18 ~~Commissioner, as appropriate, shall be consulted in any appeal relating to~~
19 ~~prohibiting the employer from contracting with the State or its subdivisions~~
20 Secretary of Administration. The consultation may be informal and shall occur

1 within five business days of the notification by the Commissioner. The
2 outcome of the consultation shall be documented.

3 * * *

4 [H.223] Sec. 14. 21 V.S.A. § 708 is amended to read:

5 § 708. PENALTY FOR FALSE REPRESENTATION

6 (a)(1)(A) ~~Action by the Commissioner of Labor. A person who willfully~~ If
7 a person purposefully makes a false statement or representation, ~~for the~~
8 ~~purpose of obtaining~~ to obtain any benefit or payment under the provisions of
9 this chapter, either for herself or himself or for any other person, the
10 Commissioner may, after notice and opportunity for hearing, ~~may be assessed~~
11 assess an administrative penalty of not more than \$20,000.00, ~~and~~ against the
12 person.

13 (B) In addition to any penalty imposed pursuant to subdivision (1)(A)
14 of this subsection (a), the person shall forfeit all or a portion of any right to
15 compensation under the provisions of this chapter, as determined to be
16 appropriate by the Commissioner after a determination by the Commissioner
17 that the person has ~~willfully~~ purposefully made a false statement or
18 representation of a material fact.

19 (2)(A) In addition, an employer found to have violated this section is
20 prohibited from ~~contracting~~ entering into subsequent contracts, directly or
21 indirectly, with the State or any of its subdivisions for up to three years

1 following the date the employer was found to have made a purposeful false
2 statement or misrepresentation of a material fact, as determined by the
3 Commissioner in consultation with the ~~Commissioner of Buildings and~~
4 ~~General Services or the Secretary of Transportation, as appropriate. Either the~~
5 ~~Secretary or the Commissioner, as appropriate, shall be consulted in any~~
6 ~~contest relating to the prohibition of the employer from contracting with the~~
7 ~~State or its subdivisions~~ Secretary of Administration. The consultation may be
8 informal and shall occur within five business days of the notification by the
9 Commissioner. The outcome of the consultation shall be documented.

10 (B) The employer may also be liable for punitive damages in an
11 amount equal to any administrative penalty assessed pursuant to subsection (a)
12 of this section in an action related to the employer's violation of this section
13 that is brought pursuant to section 712 of this chapter.

14 (b) When In addition to any penalties assessed pursuant to subsection (a) of
15 this section, when the Department Commissioner of Labor has sufficient
16 reason to believe that an employer has purposefully made a false statement or
17 representation for the purpose of obtaining to obtain a lower workers'
18 compensation premium, the Department Commissioner shall refer the alleged
19 violation to the Commissioner of Financial Regulation for the Commissioner's
20 consideration of enforcement pursuant to 8 V.S.A. § 3661(c).

21 * * *

1 **[H.323]** Sec. 14. 21 V.S.A. § 708 is amended to read:

2 § 708. PENALTY FOR FALSE REPRESENTATION

3 (a) Action by the Commissioner of Labor. A person who ~~willfully~~
4 purposefully makes a false statement or representation, ~~for the purpose of~~
5 ~~obtaining to obtain~~ any benefit or payment under the provisions of this chapter,
6 either for herself or himself or for any other person, after notice and
7 opportunity for hearing, may be assessed an administrative penalty of not more
8 than \$20,000.00, and shall forfeit all or a portion of any right to compensation
9 under the provisions of this chapter, as determined to be appropriate by the
10 Commissioner after a determination by the Commissioner that the person has
11 ~~willfully~~ purposefully made a false statement or representation of a material
12 fact. In addition, an employer found to have violated this section is prohibited
13 from ~~contracting~~ entering into subsequent contracts, directly or indirectly, with
14 the State or any of its subdivisions for up to three years following the date the
15 employer was found to have made a purposeful false statement or
16 misrepresentation of a material fact, as determined by the Commissioner in
17 consultation with the ~~Commissioner of Buildings and General Services or the~~
18 ~~Secretary of Transportation~~, as appropriate. ~~Either the Secretary or the~~
19 ~~Commissioner~~, as appropriate, ~~shall be consulted in any contest relating to the~~
20 ~~prohibition of the employer from contracting with the State or its subdivisions~~
21 Secretary of Administration. The consultation may be informal and shall occur

1 within five business days of the notification by the Commissioner. The
2 outcome of the consultation shall be documented.

3 (b) ~~When~~ In addition to any penalties assessed pursuant to subsection (a) of
4 this section, when the Department of Labor has sufficient reason to believe that
5 an employer has purposefully made a false statement or representation ~~for the~~
6 ~~purpose of obtaining~~ to obtain a lower workers' compensation premium, the
7 Department shall refer the alleged violation to the Commissioner of Financial
8 Regulation for the Commissioner's consideration of enforcement pursuant to
9 8 V.S.A. § 3661(c).

10 * * *

11 [H.223 and H.323] Sec. 15. 21 V.S.A. § 1307 is amended to read:

12 § 1307. COMMISSIONER OF LABOR, DUTIES AND POWERS OF

13 The Commissioner of Labor shall administer this chapter. The
14 Commissioner may employ ~~such~~ persons, make ~~such~~ expenditures, require
15 ~~such~~ reports, make ~~such~~ investigations, and take ~~such~~ other action as he or she
16 considers necessary or suitable to that end. In the discharge of his or her duties
17 imposed by this chapter, the Commissioner may administer oaths, take
18 depositions, certify to official acts, and subpoena witnesses and compel the
19 production of books, papers, correspondence, memoranda, and other records
20 necessary and material to the administration of this chapter. In addition, the
21 Commissioner or designee may, upon presenting appropriate credentials, at

1 reasonable times and without unduly disrupting business operations enter and
2 inspect any place of business or employment, question any employee, and
3 investigate any fact, condition, or matter necessary and material to the
4 administration of this chapter. The employer shall, at reasonable times and
5 without unduly disrupting business operations, make its workers available to
6 meet with the Commissioner or designee, as required by the Commissioner.
7 The Commissioner or designee shall inform the employer of the employer’s
8 rights to refuse entry and to consult with legal counsel, and of the
9 Commissioner’s rights under this section. If entry is refused, the
10 Commissioner may apply to the Civil Division of the Superior Court for an
11 order to enforce the rights given to the Commissioner under this section.

12 **[H.323]** Sec. 16. DEPARTMENT OF FINANCIAL REGULATION AND

13 DEPARTMENT OF LABOR; EDUCATION; OUTREACH

14 On or before October 1, 2017, the Commissioners of Financial Regulation
15 and of Labor shall develop an education and outreach program for workers’
16 compensation insurance companies, agents, auditors, and adjusters, as well as
17 employers, workers, attorneys, and tax professionals, regarding:

18 (1) the definition of “independent contractor” that is added to 21 V.S.A.
19 §§ 601 and 1301 by this act; and

- 1 accordance with the procedures established in 9 V.S.A. §§ 2458-2461 as
- 2 though discrimination under this section were an unfair act in commerce.

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

4 **[H.223]** Sec. 18. 21 V.S.A. § 712 is added to read:

5 § 712. PRIVATE RIGHT OF ACTION

6 (a) If an employer fails to comply with the provisions of sections 603, 625,
7 692, 708, or 710 of this chapter, a person harmed by the employer's failure
8 may bring an action in the Civil Division of the Superior Court seeking:

9 (1) compensatory damages;

10 (2) punitive damages,

11 (3) additional damages not more than \$500.00 for each violation of
12 sections 603, 625, 692, 708, and 710 of this chapter;

13 (4) equitable relief, including restraint of prohibited acts and
14 reinstatement;

15 (5) restitution of wages, benefits, and other compensation;

16 (6) costs and reasonable attorney's fees;

17 (7) and any other appropriate relief.

18 (b) An action pursuant to this section may be brought by one or more
19 persons on behalf of themselves and other persons similarly situated.

20 (c) An action under this section must be brought within three years after the
21 final date on which the person performed services for the employer.

1 **[H.223]** Sec. 19. 21 V.S.A. § 713 is added to read:

2 § 713. INDIVIDUAL LIABILITY OF OFFICERS AND AGENTS

3 An officer or agent of an employer that knowingly permits the employer to
4 violate the provisions of sections 603, 625, 692, 708, or 710 of this chapter
5 may be held individually liable for each violation and any penalties assessed
6 for that violation.

7 **[H.223]** Sec. 20. 2010 Acts and Resolves No. 142, Sec. 7 is amended to read:

8 Sec. 7. DEPARTMENT OF LABOR; EMPLOYEE

9 MISCLASSIFICATION REPORTING SYSTEM

10 The ~~department of labor~~ Department of Labor shall create and maintain an
11 online employee misclassification reporting system. The system shall be
12 designed to allow individuals to report suspected cases of employee
13 misclassification, failure to have appropriate insurance coverage, and claimant
14 fraud to the ~~department~~ Department to ensure that this information is
15 distributed to appropriate departments and agencies, including the Office of the
16 Attorney General. The ~~department~~ Department and any agency or department
17 that the information is distributed to, including the Office of the Attorney
18 General, shall keep the name of the complainant confidential.

19 Sec. 20. RULEMAKING

20 The Department of Labor shall adopt rules as necessary to implement this
21 act.

1 [H.223] Sec. 21. EFFECTIVE DATE

2 This act shall take effect on July 1, 2017.

3 [H.323] Sec. 21. EFFECTIVE DATES

4 (a) This section and Secs. 1, 4, and 16 shall take effect on July 1, 2017.

5 (b) In Sec. 5, 21 V.S.A. § 398(b) shall take effect on July 1, 2017, and the
6 remainder of the section shall take effect on October 1, 2017.

7 (c) The remaining sections shall take effect on October 1, 2017.

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