

# BURTON

March 15, 2017

To: Vermont House Committee on Commerce and Economic Development  
From: Justin Worthley, Vice President of Human Resources, Burton Corporation  
Re: Unemployment Insurance Liability / classifications of employees vs. independent contractors

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I would like to thank you for this opportunity to share our perspective with the Committee. My name is Justin Worthley and I am the Vice President of Human Resources at Burton, based in Burlington, Vermont. Burton is a privately-owned global company, with nearly 1,000 employees spread across North America, Europe and in the Asia-Pacific region. We were founded in Vermont in 1977 by Jake Carpenter, and have been headquartered in Burlington, Vermont since 1992. We currently have 350 employees in Burlington, with operations in 13 other US states.

Since August of 2014 we have had been engaged in active dialogue with the Department of Labor regarding classification of employees vs. independent contractors as it relates to unemployment insurance liability. This started with an audit, where the DOL concluded that Burton should have treated 23 individuals as employees instead of independent contractors over a three year period. Of the 23 cited, 4 actually had no earnings over the 3 year period so that reduced the number to 19. Of those 19:

- 8 met the DOL condition around performing 'overflow' work. However they were all supporting short term spikes/business needs, several were registered with the state of Vermont as single-member LLCs, and all either strongly preferred to be hired as an independent contractor, or did not object to or question this classification.
- 7 were doing unique creative work (i.e. not 'overflow') but did not have an established legal entity (e.g. LLC). Some of these were current employees who were performing a completely separate function (i.e. producing art for a specific product or marketing campaign).
- 4 we agree should have been classified as employees.

We met with Department of Labor attorneys and Commission Noonan on multiple occasions to request clarification about the reasons for their findings for the 15 individuals noted above. The DOL did not specifically address our concerns about overflow work or creative contractors, but did clarify their position regarding LLCs, as stated in a February 2015 letter from Commissioner Annie Noonan. This letter is included in my written testimony submission, and I urge you all to read this. As a 20+ year HR professional, I consider myself fairly well versed in these matters, but it takes my full concentration and the opinion of our General Counsel to actually understand what the letter states. I'll cover this with some more detailed comments, but this is really the key point I'd like to stress to the Committee this morning. The current rules governing the definition of independent contractors vs. employees regarding unemployment insurance liability are complex, difficult to understand and outdated. And we have learned that these rules are not aligned with other definitions of independent contractors as they relate

to workers' compensation and IRS status, and the DOL has advised us that we need to navigate through these various definitions in order to make a determination about who we can hire as an independent contractor vs. an employee. This time and energy is a distraction from our focus on sustaining and growing Burton's footprint in Vermont, and therefore we request this Committee to take steps to streamline and simplify this whole mess in a way that recognizes the nature of work as it exists in 2017.

Back to the audit we went through for just a moment... As a result of the audit and the DOL's guidance, there have been some practical implications for us at Burton. These include:

- In several circumstances, we have diverted work from Vermont-based artists to individuals based in other states. As noted earlier, we are operating in 13 other states, and the rules regarding independent contractors in all of these states, including California, are less cumbersome than the rules in Vermont. As a 7<sup>th</sup> generation Vermonter myself, it's really hard for me to turn work away from qualified talent individuals in Vermont but the current rules make it impractical for us to do otherwise.
- We have created a new internal employment category called 'Occasional Employee' to supplement our current categories of full time, part time and temporary. We did this to streamline some of our internal processes to be able to more efficiently hire these individuals in question as employees vs. independent contractors, however the complexities associated with hiring (vs. contracting) have made this new classification much more challenging. The complexities include:
  - o Because of ACA rules, we need to closely monitor the hours worked by employees in this classification because it affects benefit eligibility, ACA reporting requirements and penalty calculations.
  - o Because of ERISA rules, we also need to closely monitor the hours worked as it pertains to eligibility for our retirement plan. Like the ACA rules, the rules governing ERISA plans are completely independent of our internal definitions.
  - o While Vermont is technically an 'at-will' employment state, the administrative rulings of the Department of Labor, and the judicial rulings of the courts, have established that it is virtually impossible to fire 'at-will' and this places more administrative burden on us as an employer regarding these occasional employees than necessary.
  - o These administrative requirements place an extra demand on Burton that does not add any value for us, and it doesn't add any value for the individuals either. In fact we've had some individuals refuse to work as an occasional employee because they are adamant that they do not want to be put on payroll or be considered benefit-eligible for their own personal reasons.

To make all of this a whole lot easier, we are recommending three changes for this Committee to consider. They are:

- 1. Confirm that Limited Liability Corporations are not individuals, and therefore not subject to the ABC test.**
- 2. Eliminate Part B of the ABC test.**
- 3. As an alternative to eliminating Part B of the ABC test, create an exemption for individuals hired to produce unique creative works, i.e. creative contractors.**

Here is some additional insight regarding these recommendations:

**1. Confirm that Limited Liability Corporations are not individuals, and therefore not subject to the ABC test.**

As noted previously, the Department of Labor has told us that single-member LLC's need to be treated as individuals and are therefore subject to the ABC test. In the recent Vermont Supreme Court ruling in *Great Northern Construction, Inc. v. the Department of Labor*, the court reinforced that the legislature needs to clarify this:

We do not in this decision address the question whether "individual" includes a single member LLC like O'Connor's LLC. The statutory language applying the ABC test to "individuals" performing services for wages predates, by many decades, the creation of the limited liability company (LLC) business form. Compare 1957, No. 105, § 1 (establishing ABC test), with Limited Liability Company Act, 1995, No. 179 (Adj. Sess.), § 4 (recognizing the LLC form). For that reason, whether "individual" includes this relatively newer business form is a difficult question that has not yet been addressed directly by this Court, or the Legislature. **Given the popularity of the LLC business form, this question should be addressed by the Legislature.**

This is a small, but necessary step that we strongly urge this Committee and the broader House and Senate take to clear up the confusion about LLCs. It's sort of shocking to us that this hasn't been sorted out and clarified yet. The court may call LLC's 'relatively newer', but it's been 20+ years since LLCs were created as a business form in Vermont. Personally I don't consider that to be 'newer'.

**2. Eliminate Part B of the ABC test.**

Part B of the test is about whether the individual does work performed by our business. Eliminating Part B would be more in line with federal rules (such as IRS and FLSA rules), which are most concerned with the "Right to Control" and "Independent Trade" factors (parts A and C of the test). Moreover, other states, such as Montana, have eliminated the "B" part of the test or simply follow federal rules (Alabama).

The Department of Labor has also established a very broad interpretation of Part B of the test, applying the standard of 'overflow' work. As an example, in the DOL's view, if we have graphic designers on staff, then any other graphic designer must be treated as an employee under Part B of the test. We disagree with this interpretation because graphic design work may require different experience and creative direction based on a number of factors which may include the project, the medium, the market need, etc. And often times we consider hiring positions such as graphic designers through contract when we are working on a specific, shorter-term project or deliverable that our in-house team does not have the bandwidth or specialized skills and experience to handle. And our strong preference is to hire through contract because the project is not an ongoing need, and we don't want or need to manage all the ensuing requirements that come along with hiring an employee vs. independent contractor for a short-term need.

Eliminating Part B would provide employers like Burton the flexibility to add short-term resources based in Vermont (vs. other states) quickly and efficiently to capitalize on business opportunities. If/when those opportunities turn into stable/ongoing work, then the remaining Parts A and C of the test would steer our long-term resource needs towards employment and away from contract. Expand rapidly and

with flexible contract resources, and then transition to high-quality employees as growth proves to be sustainable; this is the business cycle that will allow us to continue to thrive and grow in Vermont.

**3. As an alternative to eliminating Part B of the ABC test, create an exemption for individuals hired to produce unique creative works, i.e. creative contractors.**

While eliminating Part B makes the most sense to us, our next preference would be to get an explicit exemption regarding creative contractors. We would seek an exemption for “creative” contractors, such as artists, graphic designers, photographers, videographers, etc. The exemption could even contain some type of limit; by way of example only, this limit could be any creative contractor who is paid less than \$5,000 in a year. This type of exemption would recognize the fact that Burton requires unique, short-term, project specific, creative resources that are common in the “new economy” of 2017.

Wrapping up, it is our opinion that these recommendations will support the goal of providing appropriate flexibility to key employers like Burton to meet short-term business needs, while ensuring that Vermonters working as independent contractors are not excluded from these opportunities. It’s time for the Legislature to create rules that will work for the vast majority of businesses like Burton that follow with rules with an intent to build and create great companies and great jobs here in Vermont, and stop focusing all the attention on the very small minority who skirt the rules; no matter how you structure the rules, some will still find ways to bend and break them – so deal with them separately and don’t punish the rest of Vermont’s great companies with laws and rules that remain out-dated, complex and confusing.

Thank you for your consideration and you are welcome to contact me for any follow-up.

Respectfully submitted,



Justin Worthley | VP – Human Resources | (802) 651-0499 | (802) 922-0713 mobile

Addendum: Letter from DOL Commissioner Annie Noonan to Burton, February 21, 2015



Mr. Larry Foster  
The Burton Corporation  
80 Industrial Parkway  
Burlington, VT 05401

February 21, 2015

Dear Mr. Foster:

I understand that your company is currently the subject of an unemployment insurance audit by this Department. I am also aware that some of your employees met separately a few months ago with representatives of this Department, specifically General Counsel Dirk Anderson, Workers' Compensation Director Stephen Monahan, and Workforce Education and Training Coordinator Michelle Kupersmith. It has been brought to my attention that there may still be some confusion regarding the Unemployment Insurance program and the status of various business entities.

With the exception noted below, payments made by a sole proprietorship, partnership, LLC, L3C, or LLP to its respective owner or owners/members are not considered to be "wages" for unemployment insurance purposes. These payments are not reportable, cannot be used to qualify for unemployment benefits, and are not taxable for unemployment insurance purposes. Therefore, when a sole proprietor or a single-member LLC that is operating without employees performs services for another business, they would be viewed as an "individual" and the ABC Test would be applied to determine if the amounts paid by the business would be considered covered wages and taxable for the purpose of Unemployment Insurance.

However, the owners/members of a multi-member LLC, L3C, or LLP may elect recognition and classification as a corporation with the Internal Revenue Service (IRS). If such an election is made, payments made by such an entity to its respective members will be treated as wages. To have payments to members of an LLC, L3C, or LLP treated as wages, the LLC, L3C, or LLP must provide this Department with a copy of their IRS election (Form 8832 - Entity Classification and Election) or (Form 2553 - Election by Small Business Companies) and be registered with the Secretary of State accordingly. Once this has been confirmed and the appropriate documentation has been received, all remuneration paid by it for services performed by the member(s)/manager(s) are reportable and taxable and may be used in determining unemployment benefit eligibility.

This letter is not intended to reflect my opinion regarding the ongoing Unemployment Insurance Division's audit of your company. I am writing it in the hopes that it will help to better explain the manner in which the Department treats various business entities for unemployment insurance tax purposes. If you have additional questions, please feel free to contact either our UI Director Tracy Phillips at 802-828-4242 or General Counsel Dirk Anderson at 802-828-4391.

Sincerely,

A handwritten signature in cursive script, appearing to read "Anne M. Noonan".

Anne M. Noonan  
Commissioner