

House Commerce and Economic Development Committee
H. 119 – Common Definition for Independent Contractor
Rep. Heidi E. Scheuermann
February 15, 2017

Thank you for inviting me here today to present H. 119.

For those of you who don't know, I spent six years on this Committee and worked diligently throughout those years to bring in line our labor laws with the 21st Century economy in which we are all trying to work and prosper.

In fact, I began my quest alongside Rep. Chip Conquest throughout the summer of 2011. We spent months meeting with the Department of Labor and other stakeholders in the hopes of coming to a resolution. Unfortunately, even with all of this work through all of these years, we have been unsuccessful in coming to a resolution.

So, let's back up a bit, and start with a story.

Jessica is a website developer. After years of working for a company, she leaves that employ to open her own website development business, where she finds success in obtaining contracts with various entities to do website design work. One of these entities is her former employer. That former employer contracts with her to do work on their website, newsletter, and blog. The only direction she receives from that company is a deadline to get the job done, and the content that is to be used. How and when the items are completed are her decisions.

Do you know that because Jessica had done this type of work for her former employer in the past, she must be classified as an employee of the company now?

Do you realize that, although Jessica has hung her own shingle and contracts with several other entities, that she cannot be considered an independent contractor in this case?

This is the new dilemma we are facing. And, I can assure you that Jessica is not alone. She joins independent workers in the software industry, in the arts community, in the construction industry, in the agriculture industry, in industries throughout the state. And, we need to do something.

As Vermonters know very well, our state has a long tradition of independence. One manifestation of that independence throughout the years has been in work.

For greater flexibility and autonomy, and greater control over their destinies, many Vermonters have chosen to work for themselves, and be what we now call independent contractors.

Over the course of years, conflict has arisen with our worker's compensation and unemployment insurance laws. In the past, this conflict has mostly been in the construction industry – with general contractors hiring sub contractors to do specific parts of the job. The Department of Labor or insurance companies themselves then determine through an audit that that subcontractor should have been classified as an employee.

Now, I want to be clear here. My goal has always been to ensure businesses are following the laws and that employees are being treated fairly; that when an individual works for somebody, and is, in fact, an employee, that that person is employed as such by the business and covered under workers compensation and unemployment insurance.

However, this conflict has now reared its head in our new economy as well. This new 21st century economy is fast growing, but is very different. Instead of the traditional economy of an employer with many employees, in many ways it is an independent workforce coming together to collaborate on projects.

Couple this with the sharing economy, and we've got a new kind of independent workforce around which we must tailor our laws.

Every state in the country is trying to address this issue, but I would like Vermont to lead the charge as much as possible. If we can position ourselves as the place to come to work both independently and collaboratively, and do so successfully, we can attract this new workforce and start to address our significant demographic challenges.

One critical way to do this is to establish a common definition for independent contractor under both workers compensation and unemployment insurance. This would do three things: 1) alleviate some of the incredible confusion among employers surrounding the various definitions and bring absolute clarity to the definition; 2) encourage and grow the independent workforce; and 3) ensure that those who should be classified as employees are classified as such by their employers.

So, what would H. 119 do?

It would explicitly define an independent contractor by requiring that six criteria be met by the individual:

1. He/she has the essential right to control the means and progress of the work except as to the final results.
2. He/She is customarily engaged in an independently established trade, occupation, profession, or business.
3. He/She has a substantive investment in the facilities, tools, instruments, materials, and knowledge used by him or her to complete the work.

4. He/She has the opportunity for profit and loss as a result of the services being performed for the employer.
5. He/She hires and pays his or her employees, if any, and supervises the details of the employees' work.
6. He/She makes his or her services available to the general public and is able to accept work for entities other than the employer, whether or not he or she chooses to do so.

In addition, at least two of the following five criteria have to be met as well:

1. The individual is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work.
2. The parties have a written contract that defines the relationship and gives the individual contractual rights in the event the contract is terminated by the employer prior to completion of the work.
3. Payment to the individual is based on factors directly related to the work performed and not solely on the amount of time expended by him or her.
4. The work is outside the usual course of business for which the service is performed.
5. The individual has elected to file taxes as an independent contractor with the federal Internal Revenue Service.

I know this has been a tough row to hoe over the years, but I am hopeful there will be a different outcome this year. I encourage you all to consider seriously this piece of legislation, as I think it is the right, sound way forward on this issue, and will allow us to really move the economic dial in Vermont.

Thank you again for inviting me in today. If I can be of any assistance as you move forward on this bill, I am certainly available.