

ASSOCIATED INDUSTRIES OF VERMONT

REPRESENTING THE VERMONT INDUSTRIAL AND BUSINESS COMMUNITY SINCE 1920

Comments on Classification and Draft 17-1183

House Commerce and Economic Development Committee

April 5, 2017

AIV appreciates the continued work of the Committee on legislation to address concerns with the statutory definitions of employees and independent contractors for the purposes of worker's compensation and unemployment insurance.

At this point in its development, the current draft of the bill (5.1, VT LEG #323706 v.7) would not sufficiently address the core problem with current law and could increase uncertainty and confusion. However, with modest amendments we believe the bill could be beneficial and we strongly encourage the Committee and stakeholders interested in working toward an effective solution to the core problem to continue their work.

Core Problem

The fundamental problem at the heart of this debate is that clearly separate and distinct businesses operating independently from client businesses are nevertheless being determined to be statutory employees for the purposes of workers' compensation and unemployment insurance because the current statutory tests include questions that are not relevant to establishing true independence, most problematically the nature of the business.

This can violate the spirit and intent of workers' compensation and unemployment insurance.

Most damaging, however, it undermines the ability of independent contractors to compete for work, discourages businesses from hiring independent contractors, and creates unwarranted liabilities and penalties for businesses that do hire independent contractors in good faith.

Additional Purposes

The following are some additional items that could be included in the purposes section to clearly identify the core problem that needs to be addressed:

(3) affirm that, under Vermont's workers' compensation and unemployment insurance laws, employers are responsible for providing workers' compensation and paying unemployment insurance taxes for their own employees, and not for separate, distinct, and independent businesses with which they might contract for goods or services.

(4) recognize that making businesses responsible for providing workers' compensation and paying unemployment insurance taxes for separate, distinct, and independent businesses with which they might contract for goods or services undermines the ability of independent contractors to thrive in Vermont and the competitiveness of the state's economic environment.

Core Solution

If the core problem is truly to be solved, we need statutory tests for workers' compensation and unemployment insurance that have only clear questions that speak to the independence of a business to

business relationship. If the questions are clear and logical, a simple check-list model can be the easiest to understand.

Totality

A totality model inherently creates uncertainty as to how different questions will be weighted. To the extent that all questions are clear and make sense to apply to any independent contractor regardless of weighting, this is less of a concern. However, the inclusion of questions that could invalidate legitimate independent contractors leads to confusion and risk.

Nature of the Business/Integral to the Business

The nature of the business test can invalidate independent contractors that are clearly separate, distinct, and independent businesses that should not be considered employees for the purposes of workers' compensation and unemployment insurance. It appears from a recent presentation by Legislative Council that in Vermont "integral to the business" can be very broad and is not a significant narrowing of the term.

A totality approach does not mitigate problems with the nature of the business because there will always be uncertainty and risk for whether and how it might be applied.

If it is the intent of the legislation that failing the nature of the business test alone should never invalidate an independent contractor, that needs to be made more clear and explicit. However, the continued presence of the question itself can still create confusion and uncertainty that could discourage businesses from hiring independent contractors that might fail that test, and could similarly lead insurance companies to push for covering such independent contractors to mitigate risk. They can reasonably be expected to ask themselves why the question is there if it might not be applied, and therefor assume that there is still a degree of risk.

If proponents of including a nature of the business question can clearly articulate scenarios where they feel that test is necessary for identifying legitimate independent contractors or true employees, it should be possible to demonstrate that other questions can address those scenarios.

Comments on the Test Questions in the Current Draft

Considering the points above, we would offer the following comments on the test questions in the current draft. The provisions referenced below are from pages 8 and 9 of the current draft and comments are similarly applicable to the test on pages 12 to 13.

Because of the fundamental problems with the nature of the business test, including "integral" to the business, we would recommend amending (ii) accordingly:

(ii) the individual operates a separate and distinct business from that of the employing unit ~~and the extent to which the individual is performing work that is an integral part of the employing unit's business;~~

With regard to (iii), the question of profit or loss is arguably redundant in the context of other questions and conditions that would establish whether an individual is operating as a business. If retained, however, the following amendment could eliminate potential confusion over conditions outside an individual's control that impact profit or loss:

(iii) the individual ~~controls his or her~~ **has the** opportunity to realize a profit or a loss;

Some lines of work independent contractors might engage in might not require "substantial" investment in "facilities, tools, instruments, materials, and knowledge". Similarly, some might not require "specialized" skills. To avoid disqualification of or perceived risk in hiring such independent contractors, we would recommend eliminating (v) entirely and modifying (iv) as follows:

(iv) the individual has a substantial investment in the **any applicable** facilities, tools, instruments, materials, and or knowledge used by him or her to complete the work;

Finally, it is difficult to see any meaning in (C), regarding multiple independent contractors, and its inclusion could be confusing. We would recommend deleting it.

Potential Additional/Alternative Test Questions Not Already Included

We believe that the test questions as amended above, combined with the conditions required in (F) on page 5, are sufficient to properly distinguish between employees and independent contractors, preferably in a simple checklist model rather than a totality model. However, there are other questions that have been used or proposed that could be added if the above seems insufficient to others.

The following are some additional questions that could be included in a clear and logical test:

1. The individual controls the means and manner of the work performed.
2. The individual is customarily engaged in an independently established trade, occupation profession or business.
3. The individual hires and pays his or her employees, if any, and supervises the details of the employees' work.
4. The individual is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work.

Other Provisions

Misclassification Task Force. It is not clear that the duties of the existing Task Force require that it be made permanent in statute; it could be more appropriate for it to continue under the existing executive order. We do not object to the reports required in pages 16 to 18; however, we would defer to the Department of Labor regarding any suggested changes in due dates.

Penalties. It is not clear what the justification or basis is for the provisions in the current draft that would double certain penalties for "purposeful" violations. The existing penalties were presumably proposed and enacted with the expectation that they were appropriate for purposeful violations. We do not object to, and would likely support, different penalties for purposeful and inadvertent violations in principle, but there should be some demonstration of need and appropriateness in doubling the existing penalties as opposed to some other differentiation.

Debarment/Prohibiting from Contracting. The current draft includes in the debarment provision (c) on page 23 exceptions for inadvertent or excusable violations. We believe it would be appropriate to be consistent with such exception language throughout other provisions addressing debarment or prohibitions from contacting for violations.