

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 (iii) An individual or partner owner who makes an election under
2 subdivision (ii) of this subdivision (14)(F) shall collect and maintain
3 documentation that any other person hired to perform services for the sole
4 proprietor or partner owner’s unincorporated business has workers’
5 compensation coverage or is otherwise in compliance with the provisions of
6 this chapter.

7 * * *

8 (H) With the approval of the Commissioner, a corporation or a
9 limited liability company (L.L.C.) may elect to file exclusions from the
10 provisions of this chapter. A corporation or an L.L.C. may elect to exclude up
11 to four corporate executive officers or four L.L.C. managers or members from
12 coverage requirements under this chapter. If all officers of the corporation or
13 all managers or members of an L.L.C. make such election, receive approval,
14 and the business has no employees, the corporation or L.L.C. shall not be
15 required to purchase workers’ compensation coverage. ~~If after election, the~~
16 ~~officer, manager, or member experiences a personal injury and files a claim~~
17 ~~under this chapter, the employer shall have all the defenses available in a~~
18 ~~personal injury claim. However, this election shall not prevent any other~~
19 ~~individual, other than the individual excluded under this section, found to be an~~
20 ~~employee of the corporation or L.L.C. to recover workers’ compensation from~~
21 ~~either the corporation, L.L.C., or the 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 services
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 (iii) whether the individual has an opportunity for profit or loss
7 depending on his or her managerial skill;

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

11 (v) whether the work performed requires specialized skills and
12 initiative;

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

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

19 (I) holds or has applied for a federal employer identification
20 number; or

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

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

8 (C) If multiple persons are performing the same work on a project or
9 jobsite, the determination of whether the person is economically independent
10 of the employing unit shall take into account the relationship between the
11 specific services performed by the person and the circumstances of the project
12 or job in relation to which the person is providing services.

13 (D) An independent contractor shall purchase workers’ compensation
14 coverage for its employees as provided in this chapter.

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

16 § 1301. DEFINITIONS

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

19 * * *

20 (6)(A)(i) “Employment,” subject to the other provisions of this
21 subdivision (6), means service within the jurisdiction of this State, performed

1 prior to January 1, 1978, which was employment as defined in this subdivision
2 prior to ~~such~~ that date and, subject to the other provisions of this subdivision,
3 service performed after December 31, 1977, by an employee, as defined in
4 subsections 3306(i) and (o) of the Federal Unemployment Tax Act, including
5 service in interstate commerce, performed for wages or under any contract of
6 hire, written or oral, expressed or implied. Services partly within and partly
7 without this State may by election as hereinbefore provided be treated as if
8 wholly within the jurisdiction of this State. And whenever an employing unit
9 shall have elected to come under the provisions of a similar act of a state where
10 a part of the services of an employee are performed, the Commissioner, upon
11 his or her approval of ~~said~~ the election as to any such employee, may treat the
12 services covered by ~~said~~ the approved election as having been performed
13 wholly without the jurisdiction of this State.

14 * * *

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

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

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

20 (V) whether the work performed requires specialized skills and
21 initiative;

1 (VI) whether the individual holds himself or herself out as in
2 business for himself or herself and competes to offer its services to the general
3 public; and

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

7 (aa) holds or has applied for a federal employer
8 identification number; or

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

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

16 (iii) If multiple individuals are performing the same work on a
17 project or jobsite, the determination of whether an individual is economically
18 independent of the employing unit shall take into account the relationship
19 between the specific services performed by the individual and the
20 circumstances of the project or job in relation to which he or she is providing
21 services.

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Sec. X. EFFECTIVE DATE

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This act shall take effect on July 1, 2017.

DRAFT