



Aaron Frank, Deputy Town Manager, Town of Colchester
Testimony on March 3, 2017 on Independent Contractor Issues
Vermont House Commerce and Economic Development Committee

What goals should we set for this work?

Legislation should be:

- Self-explanatory: not reliant on attorneys, experts, specialized training, or calls to State
- Understandable to new business owners, employees, and contracting businesses
- Simple to administer without taking hours over the course of weeks to gather information to make a decision
- Clear as to when a current contractor, reclassified as an employee for purposes of workers compensation, is working as an employee. For example, our cemetery mowing contractor could be reclassified as a Town employee for workers compensation. If he cuts his hand sharpening a blade in his garage, is he working for us as an employee?
- Cognizant of insurance markets which have \$1,000 minimums for workers comp. We hire a sole proprietor to repair garage doors for \$1,000 in parts and labor. She knowingly chooses not to buy insurance. Town should not be held responsible for injuries.
- Consider people starting small businesses and who may not be able to afford the coverage at first

What principles should inform this work?

- Define classification criteria for use by employers, employees, contractees and contractors
- Address major concerns within current legislation
- Definition of “employee” may be different for workers’ compensation vs. unemployment, IRS/State taxes, health care, and more
- Consider employer’s ability to perform loss control on contractors reclassified as employees
 - With responsibility should come authority for training, notice of injury, and requirement to use safety equipment and follow safety procedures
- Defining contractors as employees may result in less flexibility for people performing specialty services and increase their costs, due to inability to write off equipment, training, services, and transportation expenses as with our animal control officer
 - Companies may continue to pay contractors under contracts even if they cover them under workers comp
- Consider effect of uncertainty on economy
- Understand effect on small and emerging business

What comments do you have on the proposals before us?

- ***Thanks to the Committee for Evaluating Changes***
 - Current legislation is workable but can require more money spent classifying than expended for service performed by contractor.
 - Advertising classification has heightened awareness but process is complex to use
 - Legislation needs decision making without attorneys, advanced degrees, calling for interpretations, specialized training, or four hours over two weeks per contract
- ***H 119: Preferred Solution and Improvement***
 - + Simpler and only 9 pages would make it more likely to be followed
 - + More clearly defined classification criteria
 - Combines unemployment and workers compensation
 - Could muddy employer/contractor relationship under taxation laws
 - Doesn't address sports officials
- ***H 223: May be more complex than current legislation***
 - The terms "distinct and separate" will not be easily defined and thus be subject to considerable interpretation and litigation
 - Building maintenance vs. finish carpentry, roof repair, and project mgmt.
 - Vehicle maintenance vs. towing and transmission rebuilding
 - Offers no safe harbor for employers who want to do the right thing
 - Task force of state agencies is not an inclusive enough group to address classification as it relates to smaller organizations. Contracting and contractor businesses need voices.
 - Classification database may oversimplify as classification can be situation dependent
 - Classification is not necessarily the same for all state and federal regulations
 - Notice required is not viable in many contracting situations
 - Length of 37 pages makes it unlikely to be followed by all but larger organizations
- ***H 323: May be more complex than current legislation***
 - + Excluding sports officials is helpful given lack of employer control
 - The terms "distinct and separate" will not be easily defined and thus be subject to considerable interpretation and litigation
 - Exclusions only include Corporations or LLC's; Exclusions do not address individuals, sole proprietors, PLLC's, or C-Corporations
 - Defining independent contractor separately could create confusion in interpretation
 - Using the non-specific requirement "totality of the circumstances" for seven criteria means many possible interpretations; litigation will define meaning of legislation
 - "Economic independence" may present challenges for contractors who choose to perform contract work for a single entity.
 - Offers no safe harbor for employers who want to do the right thing
 - Length of 32 pages makes it unlikely to be followed by all but larger organizations

Town of Colchester Approach to Workers Compensation

Town of Colchester Perspective

- Nine external service departments ranging from library to police
- 375 W-2's to document payroll taxes deducted
- 5,000 active vendors who receive payments without deductions
 - 39 vendors who provide about \$230,000 in services receive 1099's
 - Sole proprietors, LLP's, LLC's, LLC – single owner, S-Corps
- Workers' Compensation insurance provider audits 1099's
 - Determines if we are paying for coverage on all workers' comp liabilities

Guidance to departments

- Be clear on purchasing documents what is a product or service, or combination
- Classification will likely take four hours over two weeks to complete
- Avoid classification
 - Hire service vendors with proof of workers' comp
 - Consider price preference of 15% for service vendors with workers comp
 - Do work in house if we have qualified staff

Advise departments on exempt services: Challenging given Town's scope

- Performers, polygraphy, counselors, interpreters, contracted Town attorney
- Towing, transmission rebuilder
- Roof repair, finish carpenter, construction project management
- Long range planning consultant
- Recreation program contractors for 20 specialty classes/camps who develop courses, make profit or loss, schedule and buy materials vs 280 provided by employees

Internal guidance for classification by department heads

- Obtain W-9's
 - Determine if C Corporation
 - If Individual/Sole Proprietor/Single Member LLC, obtain clarification in writing
- Complete Right to Control Test
 - Attach licenses, in state or out of state business registrations, contracts, picture of signage, Yellow Pages, brochures, advertisements, bid specification, proof of other insurance and actual bids
- Complete Nature of Business Test
- Determine if work is within scope of a Town employee job description
- Obtain Form 29,
 - Time consuming and burdensome as must be countersigned by VT DOL
 - Valid only for certain classes of independent contractors
- Review documents provided and make ruling classification after collecting above
- Obtain written non-employee work agreement