

Statutory Definitions of Employee

Workers Compensation:

21 V.S.A. § 601(14):

(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. . . . The term “worker” or “employee” does not include:

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(F) The sole proprietor or partner owner or partner owners of an unincorporated business provided:

- (i) The individual performs work that is distinct and separate from that of the person with whom the individual contracts.
- (ii) The individual controls the means and manner of the work performed.
- (iii) The individual holds him- or herself out as in business for him- or herself.
- (iv) The individual holds him- or herself out for work for the general public and does not perform work exclusively for or with another person.
- (v) The individual is not treated as an employee for purposes of income or employment taxation with regard to the work performed.
- (vi) The services are performed pursuant to a written agreement or contract between the individual and another person, and the written agreement or contract explicitly states that the individual is not considered to be an employee under this chapter, is working independently, has no employees, and has not contracted with other independent contractors. The written contract or agreement shall also include information regarding the right of the individual to purchase workers’ compensation insurance coverage and the individual’s election not to purchase that coverage. However, if the individual who is

party to the agreement or contract under this subdivision is found to have employees, those employees may file a claim for benefits under this chapter against either or both parties to the agreement.

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(H) With the approval of the Commissioner, a corporation or a limited liability company (L.L.C.) may elect to file exclusions from the provisions of this chapter. A corporation or an L.L.C. may elect to exclude up to four executive officers or managers or members from coverage requirements under this chapter. If all officers of the corporation or all managers or members of an L.L.C. make such election, receive approval, and the business has no employees, the corporation or L.L.C. shall not be required to purchase workers' compensation coverage. If after election, the officer, manager, or member experiences a personal injury and files a claim under this chapter, the employer shall have all the defenses available in a personal injury claim. However, this election shall not prevent any other individual, other than the individual excluded under this section, found to be an employee of the corporation or L.L.C. to recover workers' compensation from either the corporation, L.L.C., or the statutory employer.

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Unemployment Compensation:

21 V.S.A. § 1301(6)(B)

(B) Services performed by an individual for wages shall be deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the Commissioner that:

(i) Such individual has been and will continue to be free from control or direction over the performance of such services, both under his or her contract of service and in fact; and

(ii) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(iii) Such individual is customarily engaged in an independently established trade, occupation, profession, or business.

Significant Recent Vermont Cases Related to Employee Classification

Workers' Compensation

In re Chatham Woods Holdings, LLC, 2008 VT 70, 184 Vt. 163.

- Decided under a prior version of the statute.
- Chatham Woods was a real estate development company that did not normally build the units related to its developments. However, for the project at issue in this case, it began building and selling residential units itself.
 - Except for excavation, Chatham Woods subcontracted the construction work to various construction companies.
- Among the subcontractors was a sole proprietor framing company, a sole proprietor roofing company, and a single member corporation roofing company.
 - Sole proprietors had excluded themselves from workers compensation coverage and single member corporation had elected to exclude its sole corporate officer from coverage.
- Following an audit, Chatham Woods' insurance company classified these subcontractors as employees of Chatham Woods for purposes of workers' compensation insurance.
- Following a series of appeals, the case reached the Vermont Supreme Court.
- The Court found that the exclusions for the three subcontractors only affected their obligation to provide coverage for themselves and did not affect the obligation of Chatham Woods to provide coverage for them while they were working for Chatham Woods.
- The Court determined that the subcontractors were employees of Chatham Woods based on the "nature of the business" test because the work that they performed was a part of Chatham Woods' business as the developer and builder for that particular project.

Marcum v. State of Vermont Agency of Human Services, 2012 VT 3, 191 Vt. 573.

- Nurse was a licensed practical nurse who worked as a home-caregiver for a young child.
- Nurse received Medicaid payments for home care services through the Vermont Agency of Human Services.
- Nurse injured her arm while working in the child's home and filed a workers' compensation claim against the Agency.
- Following rulings by the Commissioner of Labor and Superior Court that she was not a State employee for purposes of workers' compensation, the nurse appealed to the Supreme Court.
- The Court explained that the statutory definition of employer includes businesses who hire contractors to carry out the business' own "regular trade or business" in an attempt to avoid workers' compensation liability for employees.
- In reaching its decision, the Court noted that a "[s]hared commonality of interest with associated businesses is insufficient to render a proprietor a statutory employer of the associate's employees."
- It determined that the nurse was not a State employee because:
 - the Agency's business of administering a welfare program was different from the nurse's work of personal care delivery; and
 - the State's operation of the Medicaid program to secure payment to health care providers did not make the providers statutory employees of the State.

Unemployment Insurance

Fleece on Earth v. Department of Employment and Training, 2007 VT 29, 181 Vt. 458

- Appeal from decision that home knitters and sewers who made clothing for FOE were employees for purposes of unemployment insurance.
- The Court rendered its decision based on part A of the ABC test, finding that the home knitters and sewers were employees under the direction and control of FOE because they performed a unique job for just one company by producing the only products the company sells pursuant to specifications provided by the company.

Bradford's Trucking, Inc. v. Department of Labor, 2015 VT 85, 199 Vt. 504

- Appeal from assessment of unpaid unemployment contributions for three individuals.
- First individual was an officer of company and had done payroll/bookkeeping for company on and off for roughly 20 years except for a period when she was out of State. In 2008, she formed her own bookkeeping business, which had three clients including the company. She continued to be paid hourly by company for her services.
- 2 other individuals were hired for a few years to help with books when first individual started working full-time for another employer. After they left employment, first individual resumed doing all of the company's bookkeeping.
- Court found that the 2 other individuals were employees based on part C of the ABC test because they were not customarily engaged in an independently established bookkeeping business.
- Court found that the first individual was an employee because as a corporate officer she effectively managed all bookkeeping services for the company and had directed and controlled herself when she performed those functions.

Great Northern Construction, Inc. v. Department of Labor, 2016 VT 126 (December 9, 2016)

- Construction company appealed from a determination that it improperly classified two workers as independent contractors rather than employees.
- Both individuals were skilled workers that the company contracted with for certain jobs.
- First worker operates as an LLC, specializes in historic restoration work, owns a significant amount of specialized equipment, and takes numerous jobs with employer. During the period in question he:
 - set his day-to-day schedule and decided when to arrive at and depart from job sites;
 - did not receive direction from employer about how to complete projects, and occasionally provided input as to ‘the methods and techniques’ that a project required;
 - did not coordinate with other contractors except to occasionally supply them with materials or loan them equipment;
 - did not have a written contract, but negotiated/bid on a job by job basis;
 - supplied his own materials;
 - was paid based on invoices submitted to the employer;
 - filed taxes as a self-employed individual; and
 - had previously turned down a permanent position with company.
- Second worker also specializes in historic restoration work and owns some specialized equipment. During the period in question he:
 - was free to accept or decline work on projects and could accept work for other businesses;
 - set his own schedule;
 - was not directly supervised but did receive a punch list from the company for incomplete work;
 - was paid hourly instead of on a job by job basis;
 - did not supply his own materials,
 - was not registered as an independent business;
 - did not file taxes as a self-employed individual; and
 - worked for only one other business whose name he could not remember.

- Court determined that first worker was not an employee.
 - He satisfied part A of the ABC test because he
 - had no formal employment contract;
 - declined an offer of employment;
 - set his own schedule;
 - worked without supervision;
 - was free to work with the company or other businesses;
 - used his own specialized equipment;
 - purchased all of the materials that he used with his LLC's credit card; and
 - was paid on a project-to-project basis.
 - He satisfied part B of the ABC test because:
 - the company does general remodeling and construction projects without his help but needs his expertise to do highly specialized restoration work;
 - worker owns specialized equipment necessary for the company to perform restoration work that is outside the scope of its normal general contracting business.
 - Employment Security Board's conclusion that first worker met part C of the ABC test was not challenged and therefore not addressed by the Court.
- Court determined that second worker was an employee after he failed to satisfy part C of the ABC test because:
 - his work for others was sporadic and subordinate to his work for the company;
 - he was not registered as an independent business;
 - he did not file self-employment tax returns; and
 - he advertised his services only by word-of-mouth.