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An Act To Standardize the Definition of "Independent Contractor"

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 1 MRSA §1012, sub-§9, as amended by PL 1991, c. 885, Pt. E, §1 and affected by §47, is further amended to read:

9. Self-employed. "Self-employed" means that the person qualifies as an independent contractor under Title 39-A, section 102, subsection †313-A.

Sec. 2. 5 MRSA §19, sub-§1, ¶J, as amended by PL 1991, c. 885, Pt. E, §6 and affected by §47, is further amended to read:

J. "Self-employed" means that the person qualifies as an independent contractor under Title 39-A, section 102, subsection †313-A.

Sec. 3. 26 MRSA §591, sub-§2, as amended by PL 1985, c. 112, §1, is further amended to read:

2. Employer. "Employer" means an individual, partnership, association, corporation, legal representative, trustee, receiver, trustee in bankruptcy and any common carrier by rail, motor, water, air or express company doing business in or operating within the State; and

Sec. 4. 26 MRSA §591, sub-§3 is enacted to read:

3. Independent contractor. "Independent contractor" means an individual who qualifies as an independent contractor under section 1043, subsection 11, paragraph E.

Sec. 5. 26 MRSA §591-A is enacted to read:

§ 591-A. Employee misclassification

An employer that intentionally or knowingly misclassifies an employee as an independent contractor commits a civil violation for which a fine of not less than \$2,000 and not more than \$10,000 per violation may be adjudged.

A determination of misclassification of a worker as an independent contractor may result in the assessment of penalties under section 1051, 1082 or 1225 or Title 39-A, section 105-A or 324.

Sec. 6. 26 MRSA §1043, sub-§11, ¶E, as amended by PL 2011, c. 292, §1, is repealed and the following enacted in its place:

E. Services performed by an individual for remuneration are considered to be employment subject to this chapter unless it is shown to the satisfaction of the bureau that the individual is free from the essential direction and control of the employing unit, both under the individual's contract of service

and in fact, and the employing unit proves that the individual meets all of the criteria in subparagraph (1) and criteria of at least 3 divisions of subparagraph (2). In order for an individual to be considered an independent contractor:

(1) The following criteria must be met:

(a) The individual has the essential right to control the means and progress of the work except as to final results;

(b) The individual is customarily engaged in an independently established trade, occupation, profession or business;

(c) The individual has the opportunity for profit and loss as a result of the services being performed for the other individual or entity;

(d) The individual hires and pays the individual's assistants, if any, and, to the extent such assistants are employees, supervises the details of the assistants' work; and

(e) The individual makes the individual's services available to some client or customer community even if the individual's right to do so is voluntarily not exercised or is temporarily restricted; and

(2) At least 3 of the following criteria must be met:

(a) The individual has a substantive investment in the facilities, tools, instruments, materials and knowledge used by the individual to complete the work;

(b) The individual is not required to work exclusively for the other individual or entity;

(c) The individual is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work;

(d) The parties have a contract that defines the relationship and gives contractual rights in the event the contract is terminated by the other individual or entity prior to completion of the work;

(e) Payment to the individual is based on factors directly related to the work performed and not solely on the amount of time expended by the individual;

(f) The work is outside the usual course of business for which the service is performed; or

(g) The individual has been determined to be an independent contractor by the federal Internal Revenue Service.

Sec. 7. 39-A MRSA §102, sub-§13, as amended by PL 2009, c. 452, §4, is repealed.

Sec. 8. 39-A MRSA §102, sub-§13-A is enacted to read:

13-A. Independent contractor. A person who performs services for remuneration is presumed to be an employee unless the employing unit proves that the person is free from the essential direction and control of the employing unit, both under the person's contract of service and in fact and the person meets specific criteria. In order for a person to be an independent contractor:

A. The following criteria must be met:

(1) The person has the essential right to control the means and progress of the work except as to final results;

(2) The person is customarily engaged in an independently established trade, occupation, profession or business;

(3) The person has the opportunity for profit and loss as a result of the services being performed for the other individual or entity;

(4) The person hires and pays the person's assistants, if any, and, to the extent such assistants are employees, supervises the details of the assistants' work; and

(5) The person makes the person's services available to some client or customer community even if the person's right to do so is voluntarily not exercised or is temporarily restricted; and

B. At least 3 of the following criteria must be met:

(1) The person has a substantive investment in the facilities, tools, instruments, materials and knowledge used by the person to complete the work;

(2) The person is not required to work exclusively for the other individual or entity;

(3) The person is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work;

(4) The parties have a contract that defines the relationship and gives contractual rights in the event the contract is terminated by the other individual or entity prior to completion of the work;

(5) Payment to the person is based on factors directly related to the work performed and not solely on the amount of time expended by the person;

(6) The work is outside the usual course of business for which the service is performed; or

(7) The person has been determined to be an independent contractor by the federal Internal Revenue Service.

Sec. 9. 39-A MRSA §105-A, sub-§1, ¶B, as enacted by PL 2009, c. 452, §5, is repealed and the following enacted in its place:

B. "Construction subcontractor" means an independent contractor if the construction subcontractor meets the definition of independent contractor in section 102, subsection 13-A.

Sec. 10. 39-A MRSA §114, as enacted by PL 2011, c. 176, §1, is repealed.

Sec. 11. 39-A MRSA §401, sub-§1, as amended by PL 2001, c. 235, §§2 and 3, is further amended to read:

1. Private employers. Every private employer, including an independent contractor who hires and pays employees, is subject to this Act and shall secure the payment of compensation in conformity with this section and sections 402 to 407 with respect to all employees, subject to the provisions of this section. Unless employed by a private employer, a person engaged in harvesting forest products is subject to this Act and shall secure the payment of compensation in conformity with this section and sections 402 to 407 with respect to that person individually if that person is an employee as defined in section 102, subsection 11, paragraph B-1.

A private employer who has not secured the payment of compensation under this section and sections 402 to 407 is not entitled, in a civil action brought by an employee or the employee's representative for personal injuries or death arising out of and in the course of employment, to the defense set forth in section 103. The employee of any such employer may, instead of bringing a civil action, claim compensation from the employer under this Act.

The following employers are not liable under this section for securing the payment of compensation in conformity with this section and sections 402 to 407 with respect to the employees listed, nor deprived of the defenses listed in section 103:

A. Employers of employees engaged in domestic service;

B. Employers of employees engaged in agriculture or aquaculture as seasonal or casual laborers, if the employer maintains coverage by an employer's liability insurance policy with total limits of not less than \$25,000 and medical payment coverage of not less than \$5,000.

(1) As used in this subsection, "casual" means occasional or incidental. "Seasonal" refers to laborers engaged in agricultural or aquacultural employment beginning at or after the commencement of the planting or seeding season and ending at or before the completion of the harvest season; and

C. Employers of agricultural or aquacultural laborers, if:

(3) The employer has 6 or fewer agricultural or aquacultural laborers or the employer has more than 6 such laborers but the total number of hours worked by all such laborers in a week does not exceed 240 and has not exceeded 240 at any time during the 52 weeks immediately preceding the injury; and

(4) The employer maintains an employer's liability insurance policy with total limits of not less than \$100,000 multiplied by the number of full-time equivalent agricultural or aquacultural laborers employed by that employer and medical payment coverage of not less than \$5,000.

For purposes of this paragraph, seasonal and casual workers, immediate family members of unincorporated employers and immediate family members of bona fide owners of at least 20% of the voting stock of an incorporated employer are not considered agricultural or aquacultural laborers. "Immediate family members" means parents, spouses, brothers, sisters and children.

The burden of proof to establish an exempt status under this subsection is on the employer claiming the exemption.

Sec. 12. 39-A MRSA §401, sub-§4, as amended by PL 1999, c. 364, §6, is further amended to read:

4. Liability of landowner. A landowner subject to this Act who contracts to have wood harvested from the landowner's property by a contractor who, as an employer, is subject to this Act and who has not complied with the provisions of this section and who does not comply with the provisions of this section prior to the date of an injury or death for which a claim is made is liable to pay to any person employed by the contractor in the execution of the work any compensation under this Act that the landowner would have been liable to pay if that person had been immediately employed by the landowner.

A landowner is not liable for compensation if at the time the landowner enters into the contract with the contractor, the landowner applies for and receives a predetermination of the independent status of the contractor as set forth in section 105, the landowner requests and receives a certificate of independent status, issued by the board on an annual basis to a contractor, certifying that the contractor harvests forest products in a manner that would not make the contractor an employee of the landowner or the landowner requests and receives a certificate of insurance, issued by the contractor's insurance carrier, certifying that the contractor has obtained the required coverage and indicating the effective dates of the policy, and if the landowner requests and receives at least annually similar certificates indicating continuing coverage during the performance of the work. A landowner who receives a predetermination of the contractor's status as independent contractor or a certificate of independent status is only relieved of liability under this paragraph if the contract for wood harvesting expressly states that the independent contractor will not hire any employees to assist in the wood harvesting without first providing the required certificate of insurance to the landowner.

Notwithstanding section 105, subsection 1, paragraph A, a predetermination under section 105 related only to a person engaged in harvesting forest products is a conclusive presumption that the determination is correct and section 105, subsection 2 does not apply to that determination. Each party involved in or affected by the predetermination must be provided information on the workers' compensation laws and the effect of independent contractor status in relation to those laws. A predetermination under section 105 related to a person engaged in harvesting forest products is effective for one calendar year or the duration of the contract, whichever is shorter.

A landowner required to pay compensation under this section is entitled to be indemnified by the contractor and may recover the amount paid in an action against that contractor. A landowner may demand that the contractor enter into a written agreement to reimburse the landowner for any loss incurred under this section due to a claim filed for compensation and other benefits. The employee is not entitled to recover at common law against the landowner for any damages arising from such injury if the employee takes compensation from that landowner.

Landowners willfully acting to circumvent the provisions of this section by using coercion, intimidation, deceit or other means to encourage persons who would otherwise be considered employees within the meaning of this Act to pose as contractors for the purpose of evading this section are liable subject to the provisions of section 324, subsection 3. Nothing in this section may be construed to prohibit an employee from becoming a contractor subject to the provisions of section 102, subsection ~~1~~13-A.

Sec. 13. Reports. The Commissioner of Labor or the commissioner's designee in cooperation with the Executive Director of the Workers' Compensation Board or the executive director's designee shall submit 2 interim reports and one comprehensive final report to the joint standing committee of the Legislature having jurisdiction over labor matters. The first interim report is due February 1, 2013 and must include a review of the implementation of the independent contractor criteria under this Act. This report must include a break down of information by industry and include agency audit finding data for 2011 and 2012; the number of workers misclassified as independent contractors;

and, specifically for unemployment insurance, the overreporting and underreporting of wages and unemployment contributions credited or due. The 2nd report is due June 2, 2014 and must include agency audit finding data for 2013, the effects of the criteria on misclassification and an update of the information required in the initial report.

The comprehensive final report must break information down by industry and is due to the joint standing committee of the Legislature having jurisdiction over labor matters by February 1, 2015. This report must include the following:

1. An analysis of the new criteria in comparison with previous criteria for both workers' compensation and unemployment insurance;
2. The identification of any issues with the interpretation or the understanding of the new criteria language by agency staff, businesses and workers;
3. The identification of any issues in the application of the criteria across different industries and occupations;
4. Data, to the extent possible, on the potential effect of identified misclassification on the affected workers with regard to loss of fringe benefits or other workplace benefits; and
5. Data on the effects of the use of the new misclassification penalty.

Sec. 14. Effective date. This Act takes effect December 31, 2012.

Effective 90 days following adjournment of the 125th
Legislature, Second Regular Session, unless otherwise indicated.