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H.773

Introduced by Representatives Botzow of Pownal and Marcotte of Coventry

Referred to Committee on

Date:

Subject: Labor; workers' compensation; unemployment insurance; employee
misclassification

Statement of purpose of bill as introduced: This bill proposes to amend definitions related to independent contractors in the workers' compensation and unemployment compensation statutes, to provide for notice of the requirements regarding employee classification at worksites, to permit the Department of Labor to enter an employer's premises for the purposes of investigating compliance with the workers' compensation and unemployment compensation statutes, to permit the Department to obtain an injunction to enforce a stop-work order related to a violation of the workers' compensation statute, and to clarify the requirements for consultation regarding debarment of employers that have violated the wage and hour, workers' compensation, and unemployment compensation statutes.

An act relating to classification of employees and independent contractors

1 It is hereby enacted by the General Assembly of the State of Vermont:

2 Sec. 1. 21 V.S.A. § 398 is added to read:

3 § 398. NOTICE TO PERSONS RECEIVING REMUNERATION AS AN
4 INDEPENDENT CONTRACTOR

5 (a)(1) Every employer shall post in a prominent and accessible place on a
6 site where work is performed a poster provided by the Department that shall
7 explain the differences between an “employee” and an “independent
8 contractor,” and the applicable provisions of chapters 9 and 17 of this title.

9 The poster shall also include information regarding:

10 (A) the protections against retaliation provided by this title;

11 (B) the penalties provided pursuant to this title for failure to classify
12 an individual properly as an employee; and

13 (C) how an individual may file a complaint or inquiry with the
14 Commissioner about his or her employment classification status.

15 (2)(A) The information set forth on the poster shall be in English or
16 other languages as required by the Commissioner.

17 (B) If the poster is located outdoors, it shall be constructed of
18 materials capable of withstanding adverse weather conditions.

19 (b) On or before August 1, 2016, the Commissioner shall create the poster
20 required pursuant to subsection (a) of this section and shall make it available to
21 employers on the Department’s website.

1 (c) An employer who violates the provisions of this section shall be subject
2 to an administrative penalty of not more than \$100.00 per violation.

3 Sec. 2. 21 V.S.A. § 603 is amended to read:

4 § 603. WITNESSES, OATHS, BOOKS, PAPERS, RECORDS

5 (a) So far as it is necessary in his or her examinations; and investigations
6 and in the determination of matters within his or her jurisdiction, the
7 ~~commissioner~~ Commissioner shall have power to subpoena witnesses,
8 administer oaths, and ~~to~~ demand the production of books, papers, records, and
9 documents for his or her examination. In addition, the Commissioner or his or
10 her designee may, upon presenting appropriate credentials, at reasonable times
11 and without disrupting critical business operations enter and inspect any place
12 of business or employment, question any employees, and investigate any facts,
13 conditions, or matters necessary and material to the administration of this
14 chapter. The employer shall make its workers available to meet with the
15 Commissioner or his or her designee, as required by the Commissioner. The
16 Commissioner or his or her designee shall inform the employer of his or her
17 right to refuse entry. If entry is refused, the Commissioner may apply to the
18 Civil Division of the Superior Court for an order to enforce the rights given to
19 the Commissioner under this section.

20 * * *

1 Sec. 3. 21 V.S.A. § 692 is amended to read:

2 § 692. PENALTIES; FAILURE TO INSURE; STOP WORK ORDERS

3 * * *

4 (b) Stop-work orders. If an employer fails to comply with the provisions of
5 section 687 of this title after investigation by the Commissioner, the
6 Commissioner shall issue an emergency order to that employer to stop work
7 until the employer has secured workers' compensation insurance. If the
8 Commissioner determines that issuing a stop-work order would immediately
9 threaten the safety or health of the public, the Commissioner may permit work
10 to continue until the immediate threat to public safety or health is removed.
11 The Commissioner shall document the reasons for permitting work to continue,
12 and the document shall be available to the public. In addition, the employer
13 shall be assessed an administrative penalty of not more than \$250.00 for every
14 day that the employer fails to secure workers' compensation coverage after the
15 Commissioner issues an order to obtain insurance and may also be assessed an
16 administrative penalty of not more than \$250.00 for each employee for every
17 day that the employer fails to secure workers' compensation coverage as
18 required in section 687 of this title. When a stop-work order is issued, the
19 Commissioner shall post a notice at a conspicuous place on the work site of the
20 employer informing the employees that their employer failed to comply with
21 the provisions of section 687 of this title and that work at the work site has

1 been ordered to cease until workers' compensation insurance is secured. If an
2 employer fails to comply with a stop-work order, the Commissioner may seek
3 an order from the Civil Division of the Superior Court to enjoin the employer
4 from employing any individual. The stop-work order shall be rescinded as
5 soon as the Commissioner determines that the employer is in compliance with
6 section 687 of this title.

7 (c) Debarment. An employer against whom a stop-work order has been
8 issued, or who has not been in compliance with section 687 of this chapter,
9 unless the Commissioner determines that the failure to comply was inadvertent
10 or excusable, is prohibited from contracting, directly or indirectly, with the
11 State or any of its subdivisions for a period of up to three years following the
12 date of the issuance of ~~the stop-work order~~ an administrative citation, as
13 determined by the Commissioner in consultation with the Commissioner of
14 Buildings and General Services or the Secretary of Transportation, ~~as~~
15 appropriate. ~~Either the Secretary or the Commissioner, as appropriate, shall be~~
16 ~~consulted in any contest of the prohibition of the employer from contracting~~
17 ~~with the State or its subdivisions.~~ The consultation shall be informal and shall
18 occur within five days of the notification by the Commissioner. The results of
19 the consultation shall be documented.

1 ~~(e)~~(d) Penalty for violation of stop-work order. In addition to any other
2 penalties, an employer who violates a stop-work order described in subsection
3 (b) of this section is subject to:

4 (1) ~~a civil~~ an administrative penalty of not more than \$5,000.00 for the
5 first violation and ~~a civil~~ an administrative penalty of not more than
6 \$10,000.00 for a second or subsequent violation; or

7 (2) a criminal fine of not more than \$10,000.00 or imprisonment for not
8 more than 180 days, or both.

9 Sec. 4. 21 V.S.A. § 7 is added to read:

10 § 7. COLLECTION OF ADMINISTRATIVE PENALTIES

11 The Commissioner may collect any unpaid administrative penalty assessed
12 pursuant to this title by filing an action in Superior Court, or through any other
13 means available to State agencies.

14 Sec. 5. 4 V.S.A. § 1102 is amended to read:

15 § 1102. JUDICIAL BUREAU; JURISDICTION

16 * * *

17 (b) The Judicial Bureau shall have jurisdiction of the following matters:

18 * * *

19 (20) ~~Violations of 21 V.S.A. § 692(e)(1).~~ [Repealed.]

20 * * *

1 Sec. 6. 21 V.S.A. § 690 is amended to read:

2 § 690. CERTIFICATE, FORM; COPY OF POLICY

3 * * *

4 (b)(1) In addition to any other authority provided to the ~~commissioner~~
5 Commissioner pursuant to this chapter, the ~~commissioner~~ Commissioner may
6 issue a written request to an employer subject to the provisions of this chapter
7 to provide a workers' compensation compliance statement on a form provided
8 by the ~~commissioner~~ Commissioner. The employer shall provide the
9 compliance statement to the Commissioner within 30 days of the request. For
10 the purposes of this subsection, an employer includes subcontractors and
11 independent contractors. The form shall require all the following information
12 sorted by job site:

13 * * *

14 (c) An employer's agent or broker or the authorized representative of an
15 insurance or guarantee company shall provide any contract or policy
16 information requested by the Commissioner pursuant to this section within five
17 days after receiving the request.

18 Sec. 7. 21 V.S.A. § 625 is amended to read:

19 § 625. CONTRACTING OUT FORBIDDEN

20 (a) An Except as provided in subdivisions 601(3) and (14) of this chapter,
21 an employer shall not be relieved in whole or in part from liability created by

1 the provisions of this chapter by any contract, rule, regulation, or device
2 whatsoever.

3 (b) Any person who, for the purpose of avoiding its obligations under this
4 title, coerces an employee or prospective employee into becoming an
5 independent contractor, after notice and an opportunity for a hearing, may be
6 assessed an administrative penalty of not more than \$5,000.00.

7 (c) Any administrative penalty imposed pursuant to this section may be in
8 addition to other penalties authorized pursuant to chapters 9 and 17 of this title.

9 Sec. 8. 8 V.S.A. § 3661 is amended to read:

10 § 3661. CEASE AND DESIST POWERS; PROSECUTIONS AND
11 PENALTIES

12 * * *

13 (c) An employer who makes a false statement or representation that results
14 in a lower workers' compensation premium, after notice and opportunity for
15 hearing before the Commissioner, may be assessed an administrative penalty
16 of not more than \$20,000.00 in addition to any other appropriate penalty. In
17 addition, an employer found to have violated this section is prohibited from
18 contracting, directly or indirectly, with the State or any of its subdivisions for
19 up to three years following the date the employer was found to have made a
20 false statement or misrepresentation, as determined by the Commissioner in
21 consultation with the Commissioner of Buildings and General Services or the

1 Secretary of Transportation, ~~as appropriate. Either the Secretary or the~~
2 ~~Commissioner, as appropriate, shall be consulted in any appeal relating to~~
3 ~~prohibiting the employer from contracting with the State or its subdivisions.~~
4 The consultation may be informal and shall occur within five days of the
5 notification by the Commissioner. The outcome of the consultation shall be
6 documented.

7 * * *

8 Sec. 9. 21 V.S.A. § 1314a is amended to read:

9 § 1314a. QUARTERLY WAGE REPORTING; MISCLASSIFICATION;

10 PENALTIES

11 * * *

12 (f)(1) Any employing unit or employer that fails to:

13 (A) File any report required by this section shall be subject to ~~a~~ an
14 administrative penalty of \$100.00 for each report not received by the
15 prescribed due dates.

16 (B) Properly classify an individual regarding the status of
17 employment is subject to ~~a~~ an administrative penalty of not more than
18 \$5,000.00 for each improperly classified employee. In addition, an employer
19 found to have violated this section is prohibited from contracting, directly or
20 indirectly, with the State or any of its subdivisions for up to three years
21 following the date the employer was found to have failed to properly classify,

1 as determined by the Commissioner in consultation with the Commissioner of
2 Buildings and General Services or the Secretary of Transportation, ~~as~~
3 ~~appropriate. Either the Secretary or the Commissioner, as appropriate, shall be~~
4 ~~consulted in any appeal relating to prohibiting the employer from contracting~~
5 ~~with the State or its subdivisions.~~ The consultation may be informal and shall
6 occur within five days of the notification by the Commissioner. The outcome
7 of the consultation shall be documented.

8 * * *

9 Sec. 10. 21 V.S.A. § 708 is amended to read:

10 § 708. PENALTY FOR FALSE REPRESENTATION

11 (a) Action by the Commissioner of Labor. A person who ~~willfully~~
12 purposefully makes a false statement or representation, ~~for the purpose of~~
13 ~~obtaining~~ to obtain any benefit or payment under the provisions of this chapter,
14 either for herself or himself or for any other person, after notice and
15 opportunity for hearing, may be assessed an administrative penalty of not more
16 than \$20,000.00, and shall forfeit all or a portion of any right to compensation
17 under the provisions of this chapter, as determined to be appropriate by the
18 Commissioner after a determination by the Commissioner that the person has
19 ~~willfully~~ made a false statement or representation of a material fact. In
20 addition, an employer found to have violated this section is prohibited from
21 contracting, directly or indirectly, with the State or any of its subdivisions for

1 up to three years following the date the employer was found to have made a
2 false statement or misrepresentation of a material fact, as determined by the
3 Commissioner in consultation with the Commissioner of Buildings and
4 General Services or the Secretary of Transportation, ~~as appropriate. Either the~~
5 ~~Secretary or the Commissioner, as appropriate, shall be consulted in any~~
6 ~~contest relating to the prohibition of the employer from contracting with the~~
7 ~~State or its subdivisions.~~ The consultation may be informal and shall occur
8 within five days of the notification by the Commissioner. The outcome of the
9 consultation shall be documented.

10 (b) ~~When~~ In addition to any penalties assessed pursuant to subsection (a) of
11 this section, when the Department of Labor has sufficient reason to believe that
12 an employer has made a false statement or representation for the purpose of
13 obtaining a lower workers' compensation premium, the Department shall refer
14 the alleged violation to the Commissioner of Financial Regulation for the
15 Commissioner's consideration of enforcement pursuant to 8 V.S.A. § 3661(c).

16 * * *

17 Sec. 11. 21 V.S.A. § 1307 is amended to read:

18 § 1307. COMMISSIONER OF LABOR, DUTIES AND POWERS OF

19 ~~The commissioner of labor~~ Commissioner of Labor shall administer this
20 chapter. ~~The commissioner~~ Commissioner may employ such persons, make
21 such expenditures, require such reports, make such investigations, and take

1 such other action as he or she considers necessary or suitable to that end. In
2 the discharge of his or her duties imposed by this chapter, the ~~commissioner~~
3 Commissioner may administer oaths, take depositions, certify to official acts,
4 and subpoena witnesses and compel the production of books, papers,
5 correspondence, memoranda, and other records necessary and material to the
6 administration of this chapter. In addition, the Commissioner or his or her
7 designee may, upon presenting appropriate credentials, at reasonable times and
8 without disrupting critical business operations, enter and inspect any place of
9 business or employment, question any employee, and investigate any fact,
10 condition, or matter necessary and material to the administration of this
11 chapter. The employer shall make its workers available to meet with the
12 Commissioner or his or her designee, as required by the Commissioner. The
13 Commissioner or his or her designee shall inform the employer of his or her
14 right to refuse entry. If entry is refused, the Commissioner may apply to the
15 Civil Division of the Superior Court for an order to enforce the rights given to
16 the Commissioner under this section.

17 Sec. 12. 21 V.S.A. § 601 is amended to read:

18 § 601. DEFINITIONS

19 Unless the context otherwise requires, words and phrases used in this
20 chapter shall be construed as follows:

21 * * *

1 employing unit proves that the person is free from the direction and control of
2 the employing unit, both under the person's contract of service and in fact.

3 The term "worker" or "employee" does not include:

4 * * *

5 (F) The sole proprietor or partner owner or partner owners of an
6 unincorporated business provided all of the following are met:

7 (i) The individual or partner owner performs work that is distinct
8 and separate from that of the person with whom the individual ~~contracts~~ or
9 partner owner contracts or the individual or partner owner operates a separate
10 and distinct business from that of the person with whom he or she contracts,
11 and is actively registered with the Vermont Secretary of State.

12 (ii) The individual or partner owner controls the means and
13 manner of the work performed.

14 (iii) The individual or partner owner holds him or herself out as in
15 business for him or herself.

16 (iv) The individual or partner owner holds him or herself out for
17 work for the general public and does not perform work exclusively for or with
18 another person.

19 (v) The individual or partner owner is not treated as an employee
20 for purposes of income or employment taxation with regard to the work
21 performed.

1 coverage requirements under this chapter. If all officers of the corporation or
2 all managers or members of an L.L.C. make such election, receive approval,
3 and the business has no employees, the corporation or L.L.C. shall not be
4 required to purchase workers' compensation coverage. ~~If after election, the~~
5 ~~officer, manager, or member experiences a personal injury and files a claim~~
6 ~~under this chapter, the employer shall have all the defenses available in a~~
7 ~~personal injury claim. However, this election shall not prevent any other~~
8 ~~individual, other than the individual excluded under this section, found to be an~~
9 ~~employee of the corporation or L.L.C. to recover workers' compensation from~~
10 ~~either the corporation, L.L.C., or the statutory employer.~~

11 (i) A person shall not be deemed to be an "employer" for purposes
12 of this chapter of corporate executive officers or L.L.C. managers or members
13 that are excluded under this subdivision if all of the following are met:

14 (I) The corporate executive officers or L.L.C. managers or
15 members operate a separate and distinct business from that of the person with
16 whom the corporation or L.L.C. contracts, and the corporation or L.L.C. is
17 actively registered with the Vermont Secretary of State.

18 (II) The corporation or L.L.C. controls the means and manner
19 of the work performed.

1 (III) The corporation or L.L.C. holds itself out as in business
2 for itself, performs work for the general public, and does not work exclusively
3 for or with another person.

4 (IV) The person that the corporation or L.L.C. contracts with
5 does not treat the corporate executive officers or L.L.C. managers or members
6 as employees for purposes of income or employment taxation in relation to the
7 work performed.

8 (V) The services are performed pursuant to a written agreement
9 or contract between the corporation or L.L.C. and another person, and the
10 written agreement or contract explicitly states that the corporate executive
11 officers or L.L.C. managers or members are not considered to be employees
12 under this chapter and are working independently. The written contract or
13 agreement shall also include information regarding the right of the corporation
14 or L.L.C. to purchase workers' compensation insurance coverage and of the
15 corporate executive officers or the L.L.C. managers or members to elect not to
16 exclude themselves from coverage.

17 (VI) The person with whom the corporation or L.L.C. has
18 contracted has not hired multiple sole proprietors, partnerships, or single
19 member corporations or L.L.C.s to perform the same work on a project or
20 jobsite.

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

11 * * *

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

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

18 (ii) Such service is ~~either~~ outside the usual course of the business
19 for which such service is performed, ~~or that such service is performed outside~~
20 ~~of all the places of business of the enterprise for which such service is~~
21 ~~performed~~ unless it can be demonstrated that such individual regularly

1 provides such service to multiple businesses and holds himself or herself out to
2 the public as a provider of such service; and

3 (iii) Such individual is customarily engaged in an independently
4 established trade, occupation, profession, or business and that independently
5 established trade, occupation, profession, or business is actively registered with
6 the Vermont Secretary of State.

7 (C) Notwithstanding any provision of subdivision (B) of this
8 subdivision (6), multiple individuals performing the same work on a project or
9 job site shall be deemed to be performing services in employment.

10 (D) The term “employment” shall not include:

11 * * *

12 ~~(D)~~(E) Notwithstanding any other provisions of this subdivision,
13 service with respect to which a tax is required to be paid under any federal law
14 imposing a tax against which credit may be taken for contributions required to
15 be paid into a state unemployment fund or which as a condition for full tax
16 credit against the tax imposed by the Federal Unemployment Tax Act is
17 required to be covered under this chapter.

18 * * *

19 Sec. 14. EFFECTIVE DATE

20 This act shall take effect on July 1, 2016.