

1 H.335

2 Introduced by Representatives Botzow of Pownal

3 Referred to Committee on

4 Date:

5 Subject: Labor; workers' compensation; unemployment insurance;

6 independent contractors

7 Statement of purpose of bill as introduced: This bill proposes to create an
8 authorized sole contractor program under the Department of Labor, to provide
9 for notice of the requirements regarding employee classification at worksites,
10 to permit the Department to enter an employer's premises for the purposes of
11 investigating compliance with the workers' compensation and unemployment
12 compensation statutes, to permit the Department to obtain an injunction to
13 enforce a stop-work order related to a violation of the workers' compensation
14 statute, and to clarify the requirements for consultation regarding debarment of
15 employers that have violated the workers' compensation and unemployment
16 compensation statutes.

17 An act relating to authorized sole contractors

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

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

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

4 (a) Every employer shall post in a prominent and accessible place in the
5 workplace, a notice provided by the Commissioner that shall contain the
6 following information:

7 (1) the difference between an “employee” and an “independent
8 contractor,” including the applicable provisions of the unemployment
9 insurance and workers’ compensation laws;

10 (2) the protections against retaliation that are provided pursuant to this
11 title for an employee who reports the misclassification of an employee as an
12 independent contractor;

13 (3) the penalties that are provided pursuant to this title for an employer
14 improperly classifying an employee as an independent contractor;

15 (4) information regarding how an individual may file a complaint
16 against an employer improperly classifying an employee as an independent
17 contractor; and

18 (5) information regarding how an individual may request information
19 from the Department of Labor about employee classification.

1 (b) This information shall be provided in English or other languages
2 required by the Commissioner. If the notice is displayed outside it shall be
3 constructed of materials capable of withstanding adverse weather conditions.

4 (c) Within 30 days of the effective date of this section, the Commissioner
5 shall create the notice described in subsection (a) of this section and make the
6 notice available to the public on the Department's website.

7 (d) An employer who violates this section shall be subject to an
8 administrative penalty of up to \$100.00 per violation.

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

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

11 (a) So far as it is necessary in his or her examinations, or investigations and
12 in the determination of matters within his or her jurisdiction, the ~~commissioner~~
13 Commissioner shall have power to subpoena witnesses, administer oaths, and
14 to demand the production of books, papers, records, and documents for his or
15 her examination. Additionally, the Commissioner or his or her designee may,
16 upon presenting appropriate credentials, at reasonable times, and without
17 disrupting critical business operations, enter and inspect any place of business
18 or employment, question any employee, and investigate any fact, condition, or
19 matter necessary and material to the administration of this chapter. The
20 employer shall make its workers available to meet with the Commissioner or
21 his or her designee, as required by the Commissioner. The Commissioner or

1 his or her designee shall inform the employer of his or her right to refuse entry.
2 If entry is refused, the Commissioner may apply to the Civil Division of the
3 Superior Court for an order to enforce the rights given to the Commissioner
4 under this section.

5 * * *

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

7 § 692. PENALTIES; FAILURE TO INSURE; STOP-WORK ORDERS

8 * * *

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

1 day that the employer fails to secure workers' compensation coverage as
2 required in section 687 of this title. When a stop-work order is issued, the
3 Commissioner shall post a notice at a conspicuous place on the work site of the
4 employer informing the employees that their employer failed to comply with
5 the provisions of section 687 of this title and that work at the work site has
6 been ordered to cease until workers' compensation insurance is secured. If an
7 employer fails to comply with a stop-work order, the Commissioner may file a
8 complaint in the Civil Division of the Superior Court seeking an order to
9 enjoin the employer from employing any individual. The stop-work order
10 shall be rescinded as soon as the Commissioner determines that the employer
11 is in compliance with section 687 of this title. An employer against whom a
12 stop-work order has been issued, or who is not in compliance with section 687
13 of this title, unless the Commissioner determines that the failure to comply is
14 inadvertent or excusable, is prohibited from contracting, directly or indirectly,
15 with the State or any of its subdivisions for a period of up to three years
16 following the date of the issuance of the stop-work order, as determined by the
17 Commissioner in consultation with the Commissioner of Buildings and
18 General Services or the Secretary of Transportation, ~~as appropriate. Either the~~
19 ~~Secretary or the Commissioner, as appropriate, shall be consulted in any~~
20 ~~contest of the prohibition of the employer from contracting with the State or its~~
21 ~~subdivisions.~~ The consultation may be informal and shall occur within five

1 days of a notification of intent to debar by the Commissioner. The outcome of
2 the consultation shall be documented.

3 * * *

4 Sec. 4. 8 V.S.A. § 3661 is amended to read:

5 § 3661. CEASE AND DESIST POWERS; PROSECUTIONS AND
6 PENALTIES

7 * * *

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

1 notification of intent to debar by the Commissioner. The outcome of the
2 consultation shall be documented.

3 * * *

4 Sec. 5. 21 V.S.A. § 1314a is amended to read:

5 § 1314a. QUARTERLY WAGE REPORTING; MISCLASSIFICATION;
6 PENALTIES

7 * * *

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

9 * * *

10 (B) Properly classify an individual regarding the status of
11 employment is subject to a penalty of not more than \$5,000.00 for each
12 improperly classified employee. In addition, an employer found to have
13 violated this section is prohibited from contracting, directly or indirectly, with
14 the State or any of its subdivisions for up to three years following the date the
15 employer was found to have failed to properly classify the individual, as
16 determined by the Commissioner in consultation with the Commissioner of
17 Buildings and General Services or the Secretary of Transportation, as
18 appropriate. ~~Either the Secretary or the Commissioner, as appropriate, shall be~~
19 ~~consulted in any appeal relating to prohibiting the employer from contracting~~
20 ~~with the State or its subdivisions. The consultation may be informal and shall~~

1 occur within five days of a notification of intent to debar by the Commissioner.

2 The outcome of the consultation shall be documented.

3 * * *

4 Sec. 6. 21 V.S.A. § 708 is amended to read:

5 § 708. PENALTY FOR FALSE REPRESENTATION

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

1 ~~contest relating to the prohibition of the employer from contracting with the~~
2 ~~State or its subdivisions.~~ The consultation may be informal and shall occur
3 within five days of a notification of intent to debar by the Commissioner. The
4 outcome of the consultation shall be documented.

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

11 * * *

12 Sec. 7. 21 V.S.A. § 1307 is amended to read:

13 § 1307. COMMISSIONER OF LABOR, DUTIES AND POWERS OF

14 ~~The commissioner of labor~~ Commissioner of Labor shall administer this
15 chapter. ~~The commissioner~~ Commissioner may employ such persons, make
16 such expenditures, require such reports, make such investigations, and take
17 such other action as he or she considers necessary or suitable to that end. In
18 the discharge of his or her duties imposed by this chapter, ~~the commissioner~~
19 Commissioner may administer oaths, take depositions, certify to official acts,
20 and subpoena witnesses and compel the production of books, papers,
21 correspondence, memoranda, and other records necessary and material to the

1 administration of this chapter. In addition, the Commissioner or his or her
2 designee may, upon presenting appropriate credentials, at reasonable times and
3 without disrupting critical business operations, enter and inspect any place of
4 business or employment, question any employee, and investigate any fact,
5 condition, or matter necessary and material to the administration of this
6 chapter. The employer shall make its workers available to meet with the
7 Commissioner or his or her designee, as required by the Commissioner. The
8 Commissioner or his or her designee shall inform the employer of his or her
9 right to refuse entry. If entry is refused, the Commissioner may apply to the
10 Civil Division of the Superior Court for an order to enforce the rights given to
11 the Commissioner under this section.

12 Sec. 8. 21 V.S.A. chapter 23 is added to read:

13 CHAPTER 23. AUTHORIZED SOLE CONTRACTORS

14 § 1801. PURPOSE

15 (a) An individual who seeks to work as the sole operator of his or her own
16 business and who can meet the standards and criteria set forth in this chapter
17 may voluntarily request a sole contractor authorization from the Department of
18 Labor allowing him or her to operate independently and without the benefits
19 and protections afforded to employees under chapters 9 and 17 of this title
20 when working within the scope of the sole contractor authorization.

1 (b) The sole contractor authorization is limited to activities that are within
2 the scope of the authorization applied for by the individual. If an authorized
3 sole contractor engages in activities outside the scope of the authorization, the
4 sole contractor shall be presumed to be the statutory employee of the hiring
5 entity.

6 (c) This chapter is not intended to change the existing laws governing
7 employees and employers. The chapter applies only to individuals who have
8 received a sole contractor authorization.

9 (d) Nothing in this chapter shall prohibit an individual from working as an
10 independent contractor without the sole contractor authorization, provided the
11 individual meets the test for an independent contractor under law.

12 § 1802. DEFINITIONS

13 As used in this chapter:

14 (1) “Commissioner” means the Commissioner of Labor.

15 (2) “Department” means the Department of Labor.

16 (3) “Hiring entity” means any person hiring an authorized sole
17 contractor to perform work.

18 (4) “Sole contractor” means an individual who is approved by the
19 Department pursuant to this chapter. A sole contractor may be an individual, a
20 single-member limited liability company, or a single shareholder corporation.

1 § 1803. SOLE CONTRACTOR CRITERIA

2 (a) The Department of Labor shall determine if an individual is eligible for
3 sole contractor authorization pursuant to the criteria for determining whether a
4 person is an independent contractor set forth in chapters 9 and 17 of this title.
5 An individual operating an existing business or starting a new business and
6 seeking authorization shall provide the Department with information
7 demonstrating that he or she meets the criteria for sole contractor
8 authorization. The applicant shall provide:

9 (1) a sworn statement from the individual seeking authorization
10 affirming that he or she has not been coerced into falsely claiming to be a sole
11 contractor;

12 (2) the federal employer identification number (FEIN) that he or she
13 uses for federal tax reporting purposes;

14 (3) his or her Social Security number or work visa;

15 (4) proof of registration with the Vermont Secretary of State as a single
16 individual with a trade name, as a single member limited liability company, or
17 as a single shareholder corporation;

18 (5) an affidavit attesting that he or she is and will be free to control and
19 direct his or her work, hours of work, and the means and manner of the
20 performance of his or her work, subject only to the broad framework of the
21 project goals and completion date;

1 (6) an affidavit attesting that he or she has no employees or assistants
2 and will not have any employees or assistants as a sole contractor, whether
3 paid or unpaid, and does not engage in any joint ventures or associations with
4 other sole contractors to perform work; and

5 (7) information that demonstrates that he or she does not have any
6 outstanding child support obligations or taxes.

7 (b) In addition to the information required pursuant to subsection (a) of this
8 section, the Department may require an applicant to provide additional
9 information that is reasonably necessary to demonstrate that he or she meets
10 the criteria for sole contractor authorization, which may include:

11 (1) evidence that the individual is customarily engaged in the operation
12 of an established business, including tax returns and recurring business
13 expenditures such as equipment purchases, shop rent, or charge accounts for
14 supplies;

15 (2) evidence that demonstrates that he or she works for multiple
16 employers in the course of his or her business;

17 (3) evidence of past work, including written contracts, agreements,
18 invoices, or competitive bids, on a per job basis;

19 (4) evidence that he or she is fully and solely responsible for the work
20 he or she produces;

1 (5) evidence that he or she possesses his or her own tools, equipment,
2 and instruments of trade; and

3 (6) evidence that he or she normally provides the materials and supplies
4 necessary to complete his or her work.

5 § 1804. PRESUMPTION OF STATUS

6 (a) An individual who obtains sole contractor authorization pursuant to this
7 chapter shall not be presumed to be an employee when operating under the
8 provisions of this chapter, and the person hiring the sole contractor shall not be
9 considered the statutory employer of the sole contractor. Notwithstanding this
10 presumption, if the sole contractor is working for the employer or a
11 subcontractor in a capacity that is outside of the scope of the sole contractor
12 authorization, then all provisions of chapters 5 (employment practices),
13 9 (employer's liability and workers' compensation), and 17 (unemployment
14 compensation) of this title shall apply.

15 (b) A person shall not hire multiple authorized sole contractors to do the
16 same work on a project or at a job site.

17 § 1805. APPEAL

18 An applicant may appeal a decision of the Commissioner made pursuant to
19 this chapter to the Supreme Court within 30 days of the date of the decision.

1 § 1806. INFORMATION AND EDUCATION

2 (a) The Commissioner of Labor shall conduct a comprehensive information
3 and education campaign regarding the provisions of this chapter for a
4 minimum of 12 months after commencing the authorized sole contractor
5 program pursuant to this chapter and shall continue to provide regular
6 information to the labor and business communities about the authorized sole
7 contractor program and the issues of misclassification and miscoding.

8 (b) The Commissioner shall create and maintain a registry of authorized
9 sole contractors on the Department's website that lists the names of current
10 authorized sole contractors and the names of individuals that have previously
11 received authorization pursuant to this chapter.

12 (c) The Department shall provide all employers with notice and
13 information about the provisions relating to sole contractor authorization and
14 hiring. The Department shall establish a simple method for employers
15 utilizing sole contractors to acknowledge receipt of the information, including
16 by electronic means. An employer shall not hire a sole contractor until
17 acknowledging receipt of the information with the Department. An employer
18 hiring a sole contractor shall make the acknowledgment annually.

19 § 1807. INVESTIGATION AND ENFORCEMENT

20 (a) The Commissioner is authorized to investigate and enforce the
21 provisions of this chapter, including whether a sole contractor or a hiring entity

1 is in compliance with the provisions of this title, including workers'
2 compensation, unemployment insurance compensation, wage and hour laws,
3 and employment practices.

4 (b) Upon request, a sole contractor shall provide the Department with
5 books, records, or other documentation or evidence establishing his or her
6 qualifications to be a sole contractor and evidence that all work he or she
7 performed as a sole contractor was performed in accordance with this chapter.

8 (c) The Department shall list any person found to have engaged in
9 misrepresentation or fraudulent activities in relation to this chapter on the
10 Department's website and debarment list.

11 § 1808. PENALTIES

12 (a) A person who purposefully makes a false statement or representation to
13 obtain or to assist an individual in obtaining sole contractor authorization may,
14 after notice and opportunity for hearing, be assessed an administrative penalty
15 of up to \$5,000.00. The individual seeking sole contractor authorization may
16 lose the authorization for up to two years.

17 (b) A sole contractor who violates the terms and conditions of his or her
18 authorization may, after notice and opportunity for hearing, be assessed an
19 administrative penalty of up to \$5,000.00 and may lose his or her authorization
20 for up to one year.

1 (c) Any person who coerces an employee or prospective employee into
2 becoming a sole contractor for the purpose of avoiding its obligations under
3 this title or Title 32 may, after notice and opportunity for hearing, be assessed
4 an administrative penalty of up to \$5,000.00.

5 (d) An administrative penalty assessed pursuant to this section may be in
6 addition to other penalties authorized by chapters 9 and 17 of this title.

7 (e) Administrative hearings pursuant to this chapter shall be conducted in
8 accordance with the Vermont Administrative Procedure Act, 3 V.S.A.
9 chapter 25.

10 (f) An administrative penalty assessed pursuant to this section may be
11 appealed to the Vermont Supreme Court within 30 days of the day it is
12 assessed.

13 § 1809. FEES AND COSTS

14 (a) The application fee for a sole contractor authorization shall be \$100.00,
15 which shall be deposited into the Sole Contractor Registry Special Fund. The
16 authorization shall be valid for two years and may be renewed for subsequent
17 two-year periods upon reapplication and payment of the fee. The Department
18 shall utilize the funds to administer the authorized sole contractor program.

19 (b) There is created a Sole Contractor Registry Special Fund pursuant to
20 32 V.S.A. chapter 7, subchapter 5, to be funded by registration fees charged

1 pursuant to subdivision (a) of this section and expended by the Commissioner
2 consistent with the provisions of this section.

3 (c) The Commissioner is authorized to hire and employ one limited service
4 position for a term of three years for program administration.

5 (d) The program, including the position created pursuant to subsection (c)
6 of this section, shall be funded by the fees collected pursuant to this chapter
7 and supplemented by the General Fund when the collected fees are insufficient
8 to fund the full cost of the program.

9 § 1810. RULEMAKING

10 The Commissioner may adopt rules to implement the provisions of this
11 chapter.

12 Sec. 9. EFFECTIVE DATE

13 This act shall take effect on July 1, 2015.