

MAINE STATE LEGISLATURE

The following document is provided by the
LAW AND LEGISLATIVE DIGITAL LIBRARY
at the Maine State Law and Legislative Reference Library
<http://legislature.maine.gov/lawlib>



Reproduced from electronic originals
(may include minor formatting differences from printed original)



L *Maine Department of Labor*
LEGISLATIVE
REPORT

**An Examination of the Laws and Practices
Regarding the Definition of “Employment” for
the Purposes of Unemployment Compensation**

January 29, 2007

MAINE
DEPARTMENT OF
LABOR

Table of Contents

	Page
Executive Summary.....	1
I. Background of Study.....	3
II. Conduct of Study	5
III. Survey Results.....	6
A. Employer Survey	6
B. Independent Contractor Survey.....	9
C. Attorney Survey	11
IV. Internal Review	13
A. Unemployment Compensation “ABC” Test	13
B. ABC Test Questionnaires	15
C. Internal Revenue Service (IRS) Employment Test.....	16
D. Maine Workers’ Compensation Employment Test	18
E. Montana Independent Contractor Pre-Certification Program	19
V. Conclusions	23
Appendices	

Executive Summary

- L.D. 1847 created a Resolve requiring the Department of Labor to examine the current employment definition and ABC test used for unemployment purposes, the adequacy of the ABC test questionnaires used with businesses and workers to gather information needed to determine covered employment for unemployment compensation purposes, to assess the need or benefit for adopting the IRS employment standard, to assess the need or benefit of adopting the employment standard under the Maine Workers' Compensation statute and to assess the need or benefit of instituting for Maine unemployment compensation purposes an independent contractor pre-certification program similar to that used in Montana. Upon completion of their study, the department was instructed to issue a report including findings and recommendations to the Joint Standing Committee on Labor. Contained herein is a copy of that report.
- Over a period of months, the Department of Labor invited 40,671 employers, 102,000 subcontractors and independent businesses and 221 attorneys practicing employment and labor law to provide input on the areas outlined in the resolve through a survey instrument. Approximately 3% of each population completed these surveys (1275 employers, 3,132 subcontractors and independent businesses, and 6 employment and labor attorneys). Additionally, the department conducted an internal review and analysis of each of the resolve mandates in consultation with legal staff from the Maine Attorney General's Office, the Maine Workers' Compensation Board and Agency and the Maine Unemployment Insurance Commission.
- An analysis of the IRS and Workers' Compensation employment tests showed that there were strong similarities to the Unemployment Compensation ABC test standards. However a significant and important difference is that the employment standard used for unemployment compensation purposes starts with a presumption of employment – neither of the other tests are based on this premise. The presumption of employment is the foundation of the Maine Unemployment Compensation Program and is key to its capacity to carry out its statutory function as protection against the hazards of unemployment for the unemployed worker, his or her family and the entire community.
- Additionally, both the IRS and Workers' Compensation employment tests require the examination of a number of separate factors, none of which are determinative or take precedence. There are no set parameters regarding how many of the factors must be present to ascertain that an individual is either an employee or independent contractor. This moves the process further away from the need for "certainty" expressed by the proponents for this study and opens the door to increased risk of inequity in the application of the law over similar sets of circumstances. It also provides a potential for increased litigation.
- Of major significance was the survey responses received on this issue. Only a small percentage indicated that the application of the ABC had ever negatively impacted them or their ability to operate a business. Additionally, when asked to compare the three tests currently used in Maine (the IRS and Maine Revenue Services use the same test), the respondents found them to be approximately equal in degree of difficulty in understanding and application – none represented a significant improvement over another. More importantly, when asked if the employment test used for unemployment purposes should be changed, the majority of the employers who responded voted "no." However, it is also evident from the survey responses that the department can, and should, take proactive measures to improve the effectiveness of its communications with both employers and subcontractors to reduce or

eliminate confusion around the ABC test, its application and the requirements and procedures associated with Unemployment Compensation tax laws. Recommended actions are included in the 'Conclusions' section of this report.

- Taking into consideration both the internal analysis and the opinions of the survey respondents, the department recommends maintaining the current statutory definition of employment and the ABC test for unemployment compensation purposes. However, the Workers' Compensation Board has indicated a willingness to consider adopting the same employment definition and ABC test used for unemployment compensation purposes for determining employment coverage under the Maine Workers' Compensation program. This would help alleviate the confusion created by the multiple employment definitions used in Maine. It would make both insurance and benefit programs consistent with one another in the determination of who should be covered and lessen the uncertainty currently experienced by employers in trying to ascertain whether an individual is an employee or independent contractor. However, before moving to adopt this plan, the Workers' Compensation Board would like to more closely examine the potential ramifications of such a move.

- The Department of Labor also consulted with the Montana Labor and Industry Department to examine their independent contractor pre-certification program for possible implementation in Maine. An analysis of that examination is included in this report. After examining the Montana model, the Department of Labor and Maine Workers' Compensation Board recommend against instituting such a program in Maine, nor do the majority of the employer and subcontractors who responded to the survey support such an action. Of concern for all groups is the binding nature of the certification, the waiving of one's rights to workers' compensation protection (one's rights to unemployment compensation cannot be waived), the high cost of administration and for the survey respondents in particular; the increased layer of government oversight that such a program would create. All of these factors outweighed any advantages or need identified for this type of program.

I. Background of Study:

During the second session of the 122nd Maine Legislature, the Standing Committee on Labor held a public hearing on L.D. 1847 which proposed a change to the statutory definition of “employment” used to determine potential protection coverage and employer tax liability under the Maine Unemployment Insurance Program. Proponents of the change argued that the current employment criteria (hereafter referred to as the “ABC” test in this report) was too restrictive in the treatment of contract employment and that it no longer met the needs of today’s workplace. Additionally they argued, the existence of multiple definitions of employment across different taxing and employee insurance programs (unemployment insurance and workers’ compensation) created confusion and added administrative burden and costs for employers. Opponents of the proposed change argued that the “presumption of employment” upon which the ABC test and the Maine Unemployment Insurance program is based, must be maintained in order to provide critical financial protection for Maine workers and for the Unemployment Insurance program to function effectively as an economic stabilizer for both the individual and Maine communities.

Compelling arguments were made on both sides of this complex issue – proponents for change seeking a greater degree of certainty and simplification of the worker classification process and opponents to change wanting to prevent a loss of critical worker protections and a possible cost shift of these protections and benefits from the employer to the worker. At the heart of the debate is the issue around the treatment of contract labor – whether they are indeed self-employed as independent contractors and therefore, responsible for their own taxes and protection coverage; or in actuality, misclassified workers hired under contract in order for the business to avoid costly payroll taxes and benefit premiums.

Complicating the discussion is the fact that there are multiple employment tests used in Maine to determine worker classification status. The Internal Revenue Service and the Maine Revenue Service use a three-part test that considers a set of 20 factors to determine whether an individual is an employee or independent contractor for federal and state withholding tax filing purposes. The Maine Workers’ Compensation Board uses an eight-factor test to determine coverage under the workers’ compensation program and the Maine Unemployment Insurance Program uses a conjunctive, three-prong test to determine “covered employment” for purposes of unemployment insurance protection and tax liability. All three tests are similar in many aspects but there are distinct differences that can result in an individual worker being treated differently for withholding tax or benefit coverage purposes.

After considerable testimony and debate, the Joint Standing Committee on Labor voted to amend L.D. 1847 to a Resolve requiring the Maine Department of Labor to examine the laws and practices regarding the definition of “employment” for purposes of Unemployment Compensation. The study was to include an examination of the following issues:

1. The adequacy of current laws and standards that define “employment” for purposes of unemployment compensation, including the Maine Revised Statutes, Title 26, section 1043, subsection 11, paragraph E, to distinguish accurately between persons who are bona fide independent contractors and those who should be considered employees;
2. The need for, or benefit of, revising the Department of Labor survey instrument used to determine who is a bona fide independent contractor;
3. The need for, or benefit of, the State’s adopting Internal Revenue Service guidelines for determining who is a bona fide independent contractor;

4. The need for, or benefit of, the State's adopting the same criteria for determining who is a bona fide independent contractor for purposes of unemployment compensation that it now follows for purposes of workers' compensation; and
5. The need for, or benefit of, the State's instituting a pre-certification program for bona fide independent contractors similar to programs in Montana and other states.

Upon completing the study, the Department of Labor was to submit a report to the Joint Standing Committee on Labor, which includes findings, recommendations and any proposed implementation legislation that may be warranted. The following is a report of the department's study and findings.

II. Conduct of Study:

The study resolve required that the Department of Labor call upon interested parties to participate and offer comment and to offer equal participation to representatives of both management and labor interests including contractors who employ the services of subcontractors; self-employed, unincorporated subcontractors; persons engaged in the installation of flooring materials; and attorneys who practice in labor law, including areas of unemployment compensation and workers' compensation law. To meet this requirement and ensure the broadest possible representation of individuals who might be impacted by any change in the definition of "employment" for unemployment compensation purposes, the department decided to survey all employers, independent contractors and labor attorneys to elicit their input into this complex issue.

Three survey instruments were developed. The first was written for the perspective of the employer, the second to independent contractors and the third, for labor attorneys. All three surveys instruments could be completed and submitted electronically via the Internet for employers and independent contractors, and by email for attorneys. Additionally, any of the parties could request paper copies of the surveys to complete and submit. All survey completion was voluntary and anonymous unless the respondent chose to identify him or herself. Copies of the survey letter notifying individuals of the purpose of the survey and opportunity to participate as well as copies of the survey instrument with response tallies to each question are included in the appendix of this study.

Survey request letters were sent to all **40,671** businesses registered as employers under the Maine Unemployment Insurance Program. Additionally, **221** letters were emailed to attorneys practicing labor and employment law in Maine through the Maine Bar Association. Sending letters to independent contractors proved a much more difficult task as these individuals are not identified as such in any specific database or mailing list that the department could find. However, the department worked with the Internal Revenue Service (IRS) who recommended that the department contact everyone who filed a Schedule C, Business Profit and Loss Statement with their federal withholding tax filing the previous year. This would likely be a broader group than the department hoped to reach and would probably include some crossover to the employer population already surveyed but it was the most likely instrument to reach self-employed individuals who rely on contract work for a living. Using a mailing list provided by the IRS solely for this purpose, the department mailed out approximately **102,000** letters notifying individuals of the issue and requesting their participation in this survey.

In addition to employer, subcontractor and labor attorney input, the department worked with the Maine Attorney General's office, the Workers' Compensation Agency, and the Unemployment Insurance Commission to discuss and examine these issues. The department also contacted other states to explore how this issue is being handled outside of Maine and in particular, worked with Montana, to examine their independent contractor pre-certification program.

III. Survey Results:

A. Employer Survey: 40,671 Employers Invited to Participate 1275 Responded

Of the approximately 41,000 survey invitations sent out, we received 1275 responses. The questionnaire and response summaries for each question are included in the appendix of this report. However, the key findings are also summarized here.

Although only a little over **3%** of the employers registered with the Unemployment Compensation Program responded, they represented businesses from a wide array of industries. The largest number of respondents came from the construction industry, which is not surprising as this industry relies heavily on contract labor. Also well represented were the retail trades, manufacturing, healthcare & social services, professional & technical services, and finance & insurance industries. 63% of the respondents represented small businesses with less than 10 employees, 86% of all respondents indicated employing less than 50. Of note is the fact that almost half of the respondents do not use contract labor at all but felt it important to weigh in on this issue either because they felt that the use of contract labor impacts their business (information elicited through the survey) or because they see this as an important issue.

Of the 648 respondents that indicated using contract labor, over half stated the use was 'seldom' or limited. Average duration of contracts varied from 1 week to 7 years with one week being the most frequently selected. Approximately 64% of the businesses using contract labor stated that the work differed from that of their regular employees. When asked how the work differed, one of the most common responses was that it was 'specialized' or not performed by existing staff. Other responses indicated that the difference was in work location or schedule, outside of the normal course of business; or that the subcontractor held special licenses, supplied their own equipment or had more freedom in how the work was carried out.

Respondents cited the need for specialized skills as the primary reason for using contract labor followed by seasonal or fluctuating work demands, need for supplementing their workforce, expanding service offerings to the public, or to reduce business costs. Other reasons mentioned included providing skills not needed continually, to take care of non-business needs (outside of usual course of business) and to limit liability. Respondents that were in favor of using contract workers highlighted benefits such as lower overhead costs due to reduced payroll taxes, workers compensation premiums and unemployment taxes; ability to attract skilled workers by paying higher hourly rates; ability to offer a wider array of, or specialized services to, their customers and improved ability to cover fluctuating workloads.

193 of the respondents indicated that the use of contract labor has a negative impact on their business. The most commonly cited impact was the belief that it creates a competitive disadvantage to their business in that businesses that rely on traditional employees rather than contract workers, cannot compete equally with those using contract labor because of the higher overhead costs associated with payroll taxes, workers compensation premiums and unemployment insurance taxes as well as other employee benefit costs. Also mentioned was that because fewer businesses were providing workers compensation coverage and paying unemployment taxes, that this meant the premiums and taxes were higher for businesses that did. Additionally it was mentioned that the use of contract labor was making it difficult to find skilled employees and that this practice was pressuring businesses who only wanted to hire employees to consider switching to contract labor as well in order to remain in business and compete on an equal playing field.

A significant part of the testimony heard on L.D. 1847 during the 122nd legislature raised concerns that employers in Maine are not aware that there are different tests for determining employment under the different taxing and benefit coverage programs and that this leads to employers making mistakes around worker classification. In particular, testimony was given indicating that neither employers nor independent contractors were aware of the “ABC” test used by the Unemployment Insurance Program and were caught by surprise in learning of its existence through an audit. The “ABC” test has been in place under Maine statute since 1935 but this reaction raised serious concerns for the Department of Labor as it highlights a need for stronger or more effective education and outreach around this important statute. As part of the survey, the respondents were asked if they were aware that there were differing definitions and tests to determine if an employment relationship exists between a business and a contract worker among the various taxing and insurance programs. Over **70%** of the respondents indicated that they *were* aware that there were different definitions and tests used to determine employment.

The department went on to identify the different tests and asked the respondents to indicate which ones they were familiar with. 734 respondents indicated they were familiar with the IRS employment test, 539 were familiar with the test used by the Maine Workers’ compensation program, 502 were familiar with the Unemployment program’s ABC test and only 400 were aware of the employment test used by Maine Revenue Services (of note is that the tests used by the IRS and the Maine Revenue Services are the same but employers were not as aware of this fact).

The survey also asked respondents to rate the different tests in terms of ease of understanding and application. **47%** of respondents stated that **none** were easy to understand or follow. Of the remaining respondents, the IRS test was rated as easiest to understand followed by workers compensation and then the unemployment test. The test used by the Maine Revenue Services was rated as the most difficult to understand – again however, it is the same test used by the IRS which was rated the easiest to understand and follow. When seeking help or guidance in understanding the various tests, respondents indicated that they relied most frequently on their accountants and almost equally sought help from attorneys, state or federal agencies and state or federal laws. Professional associations were also cited as helpful.

When respondents were asked to rate each test separately in terms of the degree of difficulty they had in understanding and applying the test – **all** tests rated essentially the same at around a **3** on a scale of 1 – 5 with 1 meaning ‘very difficult to understand and apply’ and 5 meaning ‘very easy to understand and apply’ (the point values ranged from 2.72 to 3.01). Therefore, in terms of ease of use, although the IRS test was selected as easiest, it was only minimally rated as such. In terms of difficulty, it was not found to be of significant improvement over the other tests by those responding to this survey.

Respondents were also asked about the adequacy of the current employment tests. Using the same 1 – 5 rating scale with one being not adequate for determining covered employment to 5 being very adequate, results ranged from a low of 2.65 with regard to the unemployment ABC test to a high of 3.1 for the IRS test. Slightly more variance than found in the difficulty rating but still rated as only minimal improvement over the ABC test.

The department then asked the respondents whether the “ABC” employment test used for unemployment compensation purposes has had a negative impact on their business. **18%** of the respondents answered ‘**yes**’, **30%** responded ‘**no**’ and the rest indicated they were ‘unsure’. When asked to describe the impact, the most frequently cited responses were additional costs, complexity and confusion. There were also a number of comments around inadequate or unequal enforcement of the current laws and about the difficulty in hiring subcontractors.

Since the resolve also asked the department to examine the feasibility of adopting the employment definition and test used by the Maine Workers' Compensation program, the department also asked respondents whether this test has had a negative impact on their business. **14%** answered 'yes', **33%** responded 'no', and the rest were 'unsure'. When asked to describe the negative impact the workers' compensation employment test had had on their business, respondents cited 'too much paperwork', additional costs, too high premiums, and unnecessary complexity, confusion and difficulty. There were also a number of comments about it being applied inequitably, its subjectivity and that it made it difficult to hire subcontractors.

Respondents were then asked whether they believed the employment definition and test used by the Unemployment Compensation Program in Maine should be changed. **42%** responded that it should be changed but the majority, **57%**, answered **no**, it should remain the same. 1% were unsure. When those that indicated that it should be changed were asked what change they would make and why, responses included a number of themes. They ranged from making it easier and less burdensome on employers to the need to ramp up enforcement of existing laws. Some respondents indicated they'd like to see the IRS definition adopted, others stated that we should adopt the workers' compensation definition and others voted for one standard definition for all agencies. Some advocated for easier ability to hire subcontractors while others wanted to require all subcontractors be licensed or pay into the system. Some respondents advocated keeping the ABC test but modifying the B prong.

The survey then asked respondents whether the employment test and definition used for unemployment compensation should be the same as those used by each of the other three entities. The largest number of respondents responded that it should be the same as used by the IRS, followed by the Workers' Compensation program. The lowest vote was to have it be the same as that used by the Maine Revenue Services (again note that this is the same test used by the IRS).

The survey then moved on to questions about the feasibility of instituting a 'pre-certification' application process that would enable a person to apply for and obtain a designation as an independent contractor for unemployment compensation purposes. **48%** responded in the affirmative but **52%** were either unsure or did not support this action. If a pre-certification were instituted the overwhelming majority of responses indicated that it should be applied for and obtained by the individual as opposed to the business and that any application fees should also be paid by the individual. Responses as to how long a certification should be valid, responses ranged from less than one year to 50 years or as long as the individual remained in business. The most frequently selected response was that it should be valid for 2 years.

Factors identified as important to consider in determining independent contractor status included (in order of priority) freedom from direction & control, degree to which individual is established as independent business, IRS tax-filing status, individual provides own tools & equipment, degree of liability for damages or losses, history of working for multiple companies within a year, degree of responsibility for unsatisfactory work, professional licenses held, whether or not individual has employees, whether individual pays for job-related expenses such as travel and degree to which individual pays for materials and/or supplies. None of the above received less than 362 checks, the highest receiving 1054. Location where contracted services are performed only received 184 checks by respondents. Additional suggestions included proof of insurance coverage (most common), nature and type of job performed, duration of work, and written contract between business and independent.

When asked what mechanism should be in place to monitor whether the standards of the pre-cert were being met and adhered to, the most common response was to require some sort of annual review or audit by either a state agency, board, consortium, etc. Also very popular were suggestions to conduct a check of the 1099 federal tax filing or require that all independent contractors be licensed (as opposed to pre-certification). There was a significant volume of responses in opposition to pre-certification indicating no need for this or seeing this as an unneeded and costly layer of additional governmental oversight on business and self-employed.

The employer survey ended with a space for respondents to include any additional comments. **97%** of the respondents included comments and representative examples of these are included in the survey response summary in the appendix of the report. It should be noted however, that for every response that indicated that this law should be changed or a pre-cert program be implemented, there were equally strong reactions against these actions, instead advocating for more or better enforcement of the existing laws. Very strong opposition was expressed to the idea of implementing a pre-certification program in the comment section despite the 48% that had responded in support of this action earlier. Comments in this section expressed serious concerns about the cost of such a program, increasing layers of government, the additional burden it represented for employers and independents, and increased complexity and restrictions it would likely bring to the workplace.

B. Independent Contractor Survey: 102,000 Invited to Participate 3,142 Responded

Of the close to 102,000 survey invitations sent out, we received 3,142 responses (**3%** which was the same level of response received from the employer contact). As mentioned earlier, the mailing list used to contact these individuals included everyone who had filed a Schedule C, Business Profit and Loss form with their federal tax withholding filing for 2005 so that it likely contained some degree of overlap with the population that received the earlier invitation to participate in the employer survey. It was apparent from some of the responses that there was some crossover as a number reported having between 50 and 1000 employees of their own. The questionnaire and response summaries for each question are included in the appendix of this report. However, the key findings are also summarized here.

As with the employer survey, a wide range of occupations and industries were represented in the respondent pool. Construction was largest group represented but was almost equaled by individuals in professional & technical services occupations. Significant numbers of respondents also came from healthcare & social assistance, manufacturing, other services except public administration, real estate, finance & insurance, educational services, retail and agriculture & forestry. When asked how they would define their status as a worker, almost **86%** defined themselves as self-employed as an independent contractor. **8%** defined themselves as employed by an employer and 6% selected 'other' – mostly indicating that they were both as they worked for an employer full or part time and performed contract work in addition.

When asked their reasons for becoming an independent contractor, **62%** indicated that they wanted to be their own boss and **21%** indicated that it was the only work available. 27.9% of the respondents either chose 'other' or expanded on their earlier selection with a text response. These responses could be grouped into 10 categories. The primary reason listed in the text responses for accepting contract employment was that it was the only way the job was offered or that tax codes categorized their work as an independent contractor. Other major reasons cited for being an independent contractor were the need for extra income, control over one's work environment, the need for a flexible work schedule or as a second job or career particularly after retirement.

When asked if the work performed as an independent contractor was the same work previously performed as an employee, the responses were split almost equally between 'yes' and 'no'. Those responding 'yes, the work was the same' were also asked whether the work was previously performed for the same business as currently contracted with. **20%** of the respondents to this question answered 'yes' and when asked why, the responses mirrored those cited as reasons for becoming an independent contractor.

The majority of the respondents indicated that they contract either with 'general contractors' or 'employers/business owners'. When asked how many businesses they contracted with during an average year, approximately **9%** indicated that they did not contract with any businesses. Of the 91% of the respondents that do contract, more than **27%** stated that they only contract with **one** business during an average year. **35%** contract with 2 to 4 businesses, **15%** contract with 5 to 9 businesses and **19%** answered that they contract with 10 or more businesses a year. The average duration of all contracts performed ranged from as little as 10 minutes to as long as 20 years with every kind of answer provided in between defined in minutes, hours, days, weeks, months and years. 'Indefinite', 'varies', and 'continual' also were frequently cited.

Respondents were also asked whether the work performed differed from the work being done by other workers on the worksite. **56%** of the respondents answered that it did differ and described the differences as being attributable to being the only one doing a particular function or task, or having a specialized skill or license, or that they were performing custom or more complex work, etc. **44%** indicated that their work was not different than that performed by other workers on the worksite.

The most popular reason provided for engaging their services as an independent contractor was for specialty work or skills needed by the business. Next was 'to expand service offerings to customers' followed almost equally by 'to reduce business costs', to address 'seasonal or fluctuating work demands, and 'to supplement the workforce'.

The department also asked this group to identify the advantages of being an independent contractor. The three most popular responses included being able to control one's hours and schedule, being one's own boss and controlling one's work conditions. Responses in the 'other' Category included such items as tax breaks, ability to live where one wants, availability of jobs, creative fulfillment, portability of work and ability to work after retirement. A number of respondents indicated that they did not see any or many advantages and found it be a disadvantage with no benefits and no choice.

When asked about disadvantages of being an independent contractor, 'no benefits' – particularly as it pertained to health insurance was the number one response. Lack of job security, higher costs (overhead, insurances, taxes, etc) and fluctuating income were also high on the list for disadvantages.

Like with the employer group, the department wanted to know if this group was aware that there were different tests for determining if an employment relationship exists between a business and a contract worker for different taxing or insurance coverage purposes. **54%** responded that they were aware there were different tests **46%** were not. When asked which tests they were familiar with, respondents were most familiar with the IRS test followed by the Maine Revenue test, then workers compensation and unemployment compensation. When asked to select which of the tests they find to be the easiest to understand and follow, **65%** answered **none**. Of those that selected tests, they found the IRS test to be the easiest followed almost equally by the Maine Revenue

Services and Workers' Compensation tests, then the unemployment compensation test. Only **12%** of respondents indicated that any of the employment tests had had a negative effect on their business. The most common effect described was the high costs of taxes and workers compensation and an inability or reluctance to hire people.

The department also questioned this group about any benefits or protection coverage they might have. **27%** indicated not having health insurance but **62%** indicated having either purchased it or had it provided to them elsewhere. **77%** stated that they were not covered by workers' compensation insurance and **81%** stated that they were not covered by unemployment compensation insurance. **70%** reported that they did not have disability insurance as well. The vast majority also reported **not** having vacation or sick pay available to them.

As with the employer group, the department questioned the independent contractor group about the advisability of instituting a pre-certification program to determine independent contractor status. **42%** responded in favor of such a program with the majority indicating no or unsure. If it were instituted, the majority of respondents felt it should be the individual as opposed to the business who should apply for the certification but that it should be funded by state revenues. The most common response to the duration of the certification was 2 years followed by longer than 2 years (responses ranged from 0 to 25 years or more).

In terms of factors to consider when determining independent contractor status, the top answer was degree to which an individual is established as an independent business followed closely by freedom from direction and control and IRS filing status. Their choices around other factors were very similar to those cited by the employer group.

Like the employer group, those that do not support a pre-cert program for independent contractors made their comments very visible. A large number of comments were included expressing disagreement with this approach and concerns about the additional costs, controls, and government oversight this would represent. Many felt that it would hinder small business and make it much more difficult to find work. Other comments ranged from not requiring sole proprietors to carry unemployment or workers compensation coverage to just the opposite and mandating such coverage. These respondents generally advocated more enforcement of existing laws rather than creation of another government 'layer'. Still, other respondents feel that being an independent contractor is a personal choice and if there is mutual agreement between the business and individual, then government should not intercede.

C. Attorney Survey: 221 Invited to Participate 6 Responded

The Maine Bar Association sent out 221 surveys for the department to attorneys who were registered as members of the Labor & Employment Law Section of the Maine State Bar Association. The department received 6 responses (**2.7%**) from this group. The survey instrument and a summary of the responses is included in the appendix to this report however, key findings are also summarized below.

The first few questions on the form asked the attorneys whether they were familiar with the various tests for determining the existence of an employment relationship in different contexts. All six attorneys who responded indicated that they are aware that differing tests exist. The survey provided a check-off to indicate their familiarity with each of the following: the IRS test, the Maine Revenue Service test, the workers' compensation test and the unemployment compensation test. Three of the responding attorneys indicated they were familiar with all tests listed. One attorney

checked the boxes for workers' compensation and unemployment compensation. The two remaining attorneys checked all of the boxes except for the Maine Revenue Service test.

With respect to which test is the "easiest to understand and follow" the attorneys' responses varied. Two of the attorneys responded "none," with one attorney stating that all the tests were "equally vague." One attorney stated in particular that the ABC test is "outdated and has an adverse effect on both businesses and individuals who hold themselves out as independent contractors." The respondent specified that the B prong was most problematic.

Two of the attorneys responding to this question indicated that both the workers' compensation and IRS tests were easiest to follow and understand. One respondent emphasized the workers' compensation test was favored "because the test is based on the activity of the employee, not on someone's interpretation of the relationship of the parties." The other attorney liked these tests because "they focus on control, which is a logical basis to make the distinction between employees and independent contractors."

The survey next asked the attorneys to state whether any clients had experienced negative effects from an application of the employment tests. Only one attorney responded "no." The other five had various responses. Two of the respondents noted that the tests made it difficult if not impossible to advise clients as to the status of a particular worker with any degree of certainty. Three of the responding attorneys pointed to the ABC test in particular as creating an issue for clients. Here are two of their comments:

- "I had a client who made an independent contractor deal with an individual at the individual's request because of his unique personal circumstances. When it became convenient for the contractor to ignore the independent contractor status, he did. MDOL made the client pay UI benefits and penalties."
- "For example, business such as an insurance agency or a timber management company or a bank, that have hired independent contractors to perform services NOT related to the business (e.g. lawn care, trash removal, custodial services, and computer networking systems) have been found to have "employees" under the ABC Test."

In responding to the question as to whether they were aware of any other tests that could apply, four of the responding attorneys answered "no." One identified the "economic realities test," which is used in determining liability in other contexts, such as in the application of the Fair Labor Standards Act. In this test, in order to determine whether an individual is an employee, the court will look to the economic realities of the relationship. The focus of this inquiry is whether the individual is economically dependent on the business to which he renders service or is, as a matter of economic fact, in business for himself, looking to the following factors: (1) the degree of control exercised by the employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business; (4) the degree of skill and independent initiative required to perform the work; (5) the permanence or duration of the working relationship; and (6) the extent to which the work is an integral part of the employer's business.¹

The attorneys were also asked whether Maine should use a pre-certification procedure for independent contractors that would apply in the unemployment context. Only one attorney responded "no." The other five favored the idea of such a process. Two of them thought that the

¹ This test is set out in *Bolduc v. National Semiconductor Corp.*, 35 F. Supp. 2d 106, 112 (D. Me. 1998).

individual only should be allowed to apply for the pre-certification. One thought the business should be able to apply for it. The remaining three thought both or either should be able to apply. Responses were split on who should pay for the certification with some of the respondents selecting more than one entity and as with the other surveys, two years or longer were the most popular recommendations for certification duration.

All of the respondents felt that the degree to which the individual is established as an independent business, degree of responsibility if the work is unsatisfactory and the IRS tax filing status of the individual are factors that should be considered in determining independent contractor status. Answers varied on the other factors listed. With respect to “location,” one attorney noted that “this standard has been misused under the ABC test.” Surprisingly, two of the attorneys did not check the box for “freedom from control,” despite the fact that the control element is an important consideration in virtually all of the tests for employment. One attorney noted that any of the factors could be considered, but no single factor should be determinative. This responder thought the test that was most accurate was the “economic realities” test described above. Two of the attorneys thought tools/equipment ownership should not be considered. One attorney thought the question of liability should not be considered, nor should the existence of a professional license.

When asked for additional comments, the attorneys offered the following:

- “The issue with regard to freedom from control is difficult to evaluate for many clients. The relationship between a business and an independent contractor is often governed by a contract or agreement. To the extent that either directs or controls the performance of the contractor, answering the questions on this matter is difficult.”
- “A pre-certification program would create a level of administration within state government that is unnecessary. Making the definition more clear and workable by businesses and independent contractors would go a long way toward resolution of the issues.”
- “The ABC test is unusually onerous and unfriendly to businesses. Use of a less expansive test would be helpful to businesses and contractors alike.”
- “I think the certification process is only worthwhile if it applies to more than just the UI laws – i.e., a business should not be led to believe that it has an independent contractor relationship for UI purposes only to find out that, after a workplace injury, it is responsible for (uninsured) workers’ compensation benefits because the individual does not meet the independent contractor standards for purposes of the workers’ compensation laws.”

IV. Internal Review:

The Department of Labor also examined the issues identified in the study resolve internally and in conjunction with legal counsel from the state’s Attorney General’s office, the Workers’ Compensation Agency and the Unemployment Insurance Commission. The department also worked closely with the Montana Labor department to understand their independent contractor pre-certification program in order to explore whether such a program might be of benefit in Maine. A summary of this work follows.

A. Unemployment Compensation “ABC” Test

The study resolve required the Department of Labor to examine the adequacy of the current laws and standards that define “employment” for purposes of unemployment compensation to distinguish accurately between persons who are bona fide independent contractors and those who should be considered employees.

Maine Employment Security Law does not include a definition of either “employee” or “independent contractor” for purposes of determining liability for unemployment compensation. The law sets forth a three-part standard (or test) that the reputed employer must meet in order to prove that services being performed by an individual are not being performed under an employment relationship. This is commonly known as the “ABC” test, which provides that:

Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the Bureau that:

- 1) Such individual has been and will continue to be free from control or direction over the performance of such services, both under this contract of service and in fact; and
- 2) Such service is either outside the usual course of 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
- 3) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

[26 M.R.S.A. § 1043(11)(E)]

Maine is one of more than 20 states that use the ABC test in its full form. Other states use variations on the ABC test. An important component of the ABC test is that it sets up a presumption of employment, which is the foundation upon which the Maine Unemployment Compensation Program is built. The reputed employer has the burden of meeting each prong of the test in order to show the absence of an employment relationship. It is a conjunctive test – failure to meet any one prong will result in a finding of an employment relationship. This presumption supports the policy behind the provision of unemployment compensation benefits, which is set forth explicitly in the statute as follows:

Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this State. Unemployment is therefore a subject of general interest and concern, which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which may fall upon the unemployed worker, his family and the entire community. The achievement of social security requires protection against this greatest hazard of our economic life. This objective can be furthered by operating free public employment offices in affiliation with a nation-wide system of public employment services; by devising appropriate methods for reducing the volume of unemployment; and by the systematic accumulation of funds during the periods of employment from which benefits may be paid for periods of unemployment, thus maintaining purchasing power, promoting the use of

the highest skills of unemployed workers and limiting the serious social consequences of unemployment.

[26 M.R.S.A. § 1042]

Maine's highest court, the Maine Supreme Judicial Court (the "Law Court"), has upheld the ABC test on numerous occasions. Because the test is conjunctive, the Law Court frequently does not analyze every part of the ABC test, but rather will decide a case based on only one of the three prongs. The A prong, which deals with control, has not been difficult for the courts to interpret, and usually involves analysis of whether the employer had the right to control the way that the worker provided the services, such as hours of employment, instructions and training, payment of expenses and dictating the terms of payment. As will be noted below with respect to other legal tests, the element of control is the most frequently cited and relied upon factor in determining the existence of an employment relationship in any context.

The C prong addresses the services being offered by the worker – does the worker hold him or herself out to the world as offering those services? Does the worker provide services to a wide market, or does the worker provide services to just the contracting or hiring business? The prong that has generated the most concern is the B prong, which allows the reputed employer to prove either that the services being performed are outside the usual course of the business or that the services were performed outside all the usual places of business. The first part of the analysis requires a showing that the services being performed are not integral to the business. For example, a bank could show that the cleaning contractor is not providing services that are integral to the business of banking.

The second part of the B prong test has been questioned most closely. The Law Court has held that the "places of business" are not limited to the home office or headquarters. The Law Court has also held that the places of business can include the business territory in which it operates so long as there is a "significant and business related presence at the location in dispute, it may be found to have a place of business there."

The Resolve asked the department to assess the adequacy of the ABC test. It has been in operation since the inception of the Employment Security Law in 1935 and has been a mainstay of protecting the rights of workers. The presumption of employment indeed makes it difficult for an employer to show that services performed in furtherance of its business were the result of a purely independent contract. This is because the intent behind the statute is to protect workers who have lost employment on which they depend through no fault of their own. Maine is in the majority of states that rely on the ABC test and its presumption of employment to keep as many workers covered by the unemployment compensation system as was intended by the original enacting legislation. From the department's perspective, the ABC test has adequately served the interests set forth in the Employment Security Law in protecting Maine workers, their families and communities.

B. ABC Test Questionnaires:

In addition to examining the ABC test used to determine 'covered employment' for unemployment compensation purposes, the study resolve instructed the department to assess the need for, or benefit of, revising the survey instrument used to determine who is an independent contractor. Copies of the questionnaires used with both the hiring business and the contract worker are included in the appendix of this report. The questions asked in these documents provide the

necessary information to assess the relationship between the business and the worker for each prong of the ABC test. Additionally, they mirror all of the factors that were identified as valuable by respondents to both the employer and the subcontractor surveys in determining whether an individual is an independent contractor or in covered employment including some of the additional factors suggested by survey respondents such as whether the individual is covered by workers' compensation insurance. Based on this examination, the department does not see a need to change the content of the questionnaires currently being used in a covered employment determination process. However, the department is reviewing the wording of the questionnaires and accompanying notices to make these materials easier to read and understand.

C. Internal Revenue Service (IRS) Employment Test

The study resolve also required the department to examine the need for, or benefit of, adopting the IRS guidelines for determining who is an independent contractor.

For years the Internal Revenue Service employed a 20-factor test (commonly known as the IRS common law test) in determining whether there is an employment relationship between a business and an individual. The twenty factors used are:

- Instructions – worker is required to comply with instructions
- Training – any method of training that would show the person for whom the services are performed wants them performed in a particular way
- Integration of the worker's services into the business operations – does the continuation of the business depend to an appreciable degree on the performance of the services?
- Services must be rendered personally and cannot be subcontracted
- Hiring, supervising and payment of assistants – if the worker is doing this, stronger likelihood that he/she is independent contractor; if the hiring agent is doing this, stronger likelihood of an employment relationship
- Continuing relationship between the worker and the person for whom services are performed
- Set hours of work
- Full time required – if the worker is required to devote substantially full time to the business, more likely to be employment relationship
- Doing work on premises but depends on nature of the work involved
- Order or sequence set by the hiring agent
- Oral or written reports required of worker
- Payment by hour, week, month rather than lump sum
- Payment of business and/or traveling expenses
- Furnishing of tools and materials
- Significant investment – if the worker has invested in the facility, such as renting office space, tends to show an independent business.
- Realization of profit or loss – a worker who may enjoy a profit or suffer a loss from the work tends to show an independent business. This does not include risk of not being paid for the services.
- Working for more than one firm at a time supports a finding of independent contractor
- Making services available to the general public on a regular and consistent basis
- Right to discharge shows an employment relationship by exercising control through the threat of dismissal. An independent contractor cannot be fired so long as the result is produced that meets contract specifications.

- Right to terminate the relationship at any time without incurring liability tends to show an employment relationship.

In more recent years, the IRS has shifted their determination process to a three-clustered analysis, rather than a 20-factor test.² The first cluster focuses on “behavioral control” and looks at many of the factors set forth in the list above that examine whether the reputed employer is controlling how the worker performs the services, i.e., instructions, training, set hours of work, full time required, order or sequence set, requiring reports, where the work is done, services rendered personally, who hires, supervises and pays assistants, and the right to discharge.

The second cluster focuses on “financial control” and looks at how the worker is paid, who pays for expenses and tools, whether the worker has invested in his business and whether the worker is able to realize a profit, or risk a loss. The third cluster deals with the “relationship of the parties” and focuses on the integration of the services into the reputed employer’s business, whether there is a continuing relationship, whether the worker works for more than one firm at a time, and whether the worker makes services available to general public. Again these are all categories contained in the 20-factor test. But the IRS lists two additional categories for consideration under this cluster: the existence of a written contract that sets forth the intent of the parties and whether the worker is receiving benefits in addition to payment, such as insurance coverage.

The department carefully examined the need for, or a benefit of, adopting the IRS test for purposes of determining liability for unemployment compensation. The IRS test, whether referring to the 20 factors or the three clusters, emphasizes the same factors that are present in the ABC test, namely the element of control and the reality of the relationship between the worker and the hiring agent. Many of the questions that IRS asks in an SS-8 determination for the determination of status for purposes of federal income tax liability, are the same questions that the Department of Labor field advisor asks in determining liability for unemployment compensation. As in the workers’ compensation context, the IRS test has little emphasis on the location of the work. The second alternative of the B prong regarding is therefore not represented in the IRS test.

As in workers’ compensation, the IRS test does not include a presumption of employment. The IRS is not a benefits program but is focused on the collection of employment taxes. It is therefore not concerned necessarily with the protection of workers’ rights when they lose their employment. The IRS emphasizes in its brochures and guides that classifying workers appropriately is important, and there are consequences for those who intentionally misclassify employment status. Nevertheless, so long as IRS is collecting the tax on the services, whether through withholding by an employer, or reporting and paying through the 1099 process, there is unlikely to be examination of an existing employment relationship as there is no claims process that would trigger such an examination.

In addition, use of the IRS test requires examination of several separate factors, none of which are determinative or take precedence. It is likely that analysis would be more extensive and involved than the current investigation process using the ABC test. As there are no set parameters regarding how many of the factors must be present to ascertain that an individual is either an employee or independent contractor, the process itself at higher risk for subjective application and interpretation by different examiners. This moves the process further away from the need for “certainty” for employers, which was a stated desire of proponents for changing the ABC test, and

² These three clusters are found as parts I, II and III on the IRS form SS-8 “Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding.”

opens the door to increased risk of inequity in application of the law and the potential for increased appeals and litigation.

D. Maine Workers' Compensation Employment Test:

The study resolve also required the department to examine the need for, or benefit of, adopting the same criteria for determining who is a bona fide independent contractor for purposes for workers' compensation.

The workers' compensation statute defines an employee to include "every person in the service of another under any contract of hire, express or implied, oral or written, except ... an independent contractor."³ The statute defines an independent contractor as a "person who performs services for another under contract, but who is not under the essential control or superintendence of the other person while performing these services, and then goes on to enumerate the following factors, which are applied to determine whether the worker is an independent contractor:⁴

- Whether or not a contract exists for the person to perform a certain piece or kind of work at a fixed price;
- Whether or not the person employs assistants with the right to supervise their activities;
- Whether or not the person has an obligation to furnish any necessary tools, supplies and materials;
- Whether or not the person has the right to control the progress of the work, except as to final results;
- Whether or not the work is part of the regular business of the employer;
- Whether or not the person's business or occupation is typically of an independent nature;
- The amount of time for which the person is employed; and
- he method of payment, whether by time or by job.

The statute states that the Workers' Compensation Board may not give any particular factor a greater weight than any other factor, nor may the existence or absence of any one factor be decisive. The board must consider the totality of the relationship in determining whether an employer exercises essential control over the person.

There are important distinctions between the workers' compensation test and the ABC test. First, there is no presumption of employment, nor is there a presumption of independent status. In workers' compensation, the worker (rather than the employer) has the burden of showing he is or is not an employee. Second, the test is not conjunctive – no one factor takes precedence or is determinative and the analysis must consider all the factors. As with the IRS employment test, this can introduce the issue of subjectivity by different examiners and raise the possible risk of inequitable application of the law to similar situations.

There are similarities in the definitions. Elements of the A prong of the ABC test (the right to control) and part 1 of the B prong (whether the work performed as a part of the reputed employer's regular business) are found in the workers' compensation definition of independent contractor. The C prong, which deals with the worker holding him or herself out as independent, is addressed in the factor that deals with whether the person's business or occupation is typically of an independent nature. Indeed, much of the analysis that is done in either the workers' compensation

³ 39-A M.R.S.A. § 102(11)(A)(7).

⁴ 39-A M.R.S.A. § 102(13).

or unemployment context involves looking at the relationship between the worker and the entity for whom services are being performed. The same questions are asked and answered and, frequently, the result is the same.

The difference, however, arises with the application of the presumption in the unemployment context. When a reputed employer can meet two of the three parts of the ABC test, but can't meet the final part, the result is a finding of an employment relationship. In the workers' compensation context, if the weight of factors leans towards a finding of independence, the result will be a conclusion that the worker is an independent contractor. And, in the workers' compensation context, the worker bears the burden of proof, whether he's trying to prove he's in an employment relationship, or trying to show he's an independent contractor.

As set forth above, there are similarities between the tests, particularly with respect to the analysis of control and independent occupation (Prongs A and C). The only part of the ABC test that is not examined in the workers' compensation test is the second part of the B prong, which calls for proof that the work is done outside all the reputed employer's places of business. If the workers' compensation test were adopted for purposes of unemployment liability, there would no longer be any dispute on these kinds of cases, and thus, some employment relationships that are currently covered as employment relationships would no longer be subject to unemployment compensation. It is difficult to predict how far-reaching this consequence would be to the protection of workers. Many employment relationships would have to be reexamined.

The most significant change that would come about as a result of adopting the workers' compensation definition would be the loss of the presumption of employment. In the workers' compensation analysis, the burden is on the worker to demonstrate the nature of the relationship. This favors the reputed employer and offers a lower level of protection for the worker. It also creates uncertainty in that each factor must be examined and because no one factor is determinative or weighted over another, the analysis may be more involved and require an increased level of fact-finding and potential litigation. In the unemployment context, the reputed employer must come forward with strong evidence of the absence of an employment relationship. The worker is presumed to be entitled to benefits in the event of loss of employment, assuming that the loss was not attributable to the worker. There is no question that adopting the workers' compensation standard would result in fewer workers being eligible to collect benefits in the event they lose their jobs. This would undermine the statutorily stated role of the Maine Unemployment Compensation program to provide protection against economic uncertainty for the "unemployed worker, his family and the entire community."⁵

E. Montana Independent Contractor Pre-Certification Program:

The study resolve also required the department to examine the need for, or benefit of, instituting a pre-certification program for independent contractors similar to programs in Montana and other states. Montana is the only state that the department was able to identify that has instituted a pre-certification program for determining who is an independent contractor.

Montana has recently experienced a significant change to the way it determines employment status in both its workers' compensation and unemployment compensation systems. Prior to 2004, Montana statute provided businesses with a binding determination of an individual's status as an independent contractor for purposes of workers' compensation and unemployment compensation

⁵ 26 M.R.S.A. §1042

based on very limited criteria. In 2003, the Montana Supreme Court issued a decision holding that the certification of independent contractor status was not binding.⁶ The case involved an individual who had agreed to work for a roofing company as an independent contractor and had, in fact, formal exemption from workers' compensation coverage from the Montana Department of Labor and Industry.⁷ The roofer was injured on the job and filed for workers' compensation benefits. The court held that the roofer was, in fact, an employee of the roofing company, despite having been certified as exempt.

In response to this case, the Montana legislature passed a statute in 2004 that changed the way that independent contractor exemptions were granted.⁸ The statute provides that an applicant can obtain an independent contractor exemption by submitting an "Independent Contractor Exemption Certificate Affidavit," in which the applicant must swear to and acknowledge (1) that the applicant has been and will continue to be free from control or direction over the performance of services, both under contract and in fact; and (2) that the applicant is engaged in an independently established trade, occupation, profession, or business. The applicant is required to submit documentation to demonstrate the latter point.

The Department charges a \$125.00 fee for application.⁹ In analyzing the application, the Department asks for documentation to support 26 separate criteria, and assigns a point value to each criterion. For example, the existence of workers' compensation, unemployment and taxation accounts will yield the applicant 10 points. The existence of a liability insurance policy is worth 6 points. Proof of printed invoices, cards, or brochures is worth 1.5 points. The applicant must score at least 15 points to receive a certificate of independent contractor exemption. The certification is binding for purposes of both workers' compensation and unemployment compensation for a period of two years.

The Resolve asks the Department to examine whether instituting a binding pre-certification program similar to Montana's is feasible or advisable in Maine. Currently under Maine law, an individual, an employer, or an insurance carrier can apply to obtain a non-binding determination of independent contractor status from the Maine Workers' Compensation Board. The application asks a series of questions regarding the nature of the relationship between the hiring agent and the potential independent contractor, such as how payment will be made, the hiring of assistants, the supply of tools and equipment, day-to-day decision-making, the existence of similar contracts, and whether there are any tax or insurance withholdings. The applicant must certify to the accuracy of the statement. If the Board approves the application, it creates a rebuttable presumption that the worker is an independent contractor. In the event there is an injury, the injured worker may file a claim for workers' compensation benefits and rebut the presumption that he is not an employee.¹⁰

Conversely, the Montana pre-certification program is conclusive and represents a binding waiver of workers' compensation coverage. If a worker is injured, he cannot file a claim for workers' compensation coverage because he has affirmatively waived his right to receive benefits. Even in a situation where it is discovered that despite the pre-certification, the worker was actually in an employment relationship, he would not be eligible for coverage for workers' compensation. If such

⁶ The case is *Wild v. Fregein Construction*, 68 P.3d 855 (Mt. 2003).

⁷ In Montana, the workers' compensation and unemployment laws are enforced by the Montana Department of Labor and Industry.

⁸ The statute can be found at 39-71-417 of the Montana Code Annotated 2005.

⁹ A copy of the application and affidavit is attached to this report.

¹⁰ The statute does provide for conclusive predetermination of independent contractor status for workers in the harvesting of forest products. 39-A M.R.S.A. § 401.

information came to light, the exemption would most likely be revoked, but such revocation would not have retroactive application. If it was found that the exemption had been obtained through providing false information, the employer in such a situation might also be subject to a fine, but it would not be required to pay premiums or benefits.

This would represent a marked departure to the current workers' compensation program in Maine. If Maine adopted a similar pre-certification/exemption process, it would mean that for a period of at least two years, a worker would be waiving all rights to collect workers' compensation benefits in the event of injury. If the facts presented at the time of the pre-certification application that resulted in a grant of exemption change over the course of that two-year period such that the worker is no longer truly independent, this worker should be covered by workers' compensation. However, unless the worker or the hiring agent report such change, there is no way to monitor and audit each of these independent contractor exemptions over the course of that two-year period to ensure that the facts have not changed. Moreover, in light of the waiver, if the worker were injured, there would be no incentive to come forward and report the injury because the worker has waived his right to receive benefits.

One important issue that must be noted with regard to unemployment compensation coverage is that neither state nor federal law allows a worker to waive his or her rights to unemployment benefits. Maine Employment Security Law specifically provides that "any agreement by an individual to waive, release or commute his rights to benefits or any other rights under this chapter shall be void."¹¹ To the extent that Maine adopts a pre-certification process that is binding on both workers' compensation and unemployment, it could not require a worker to waive his or her rights to unemployment benefits without changing state law. However, since federal law also prohibits an individual from waiving his or her rights to unemployment protection, changing Maine statute in this area would constitute a federal conformity issue and could not be allowed. Therefore, if a worker were to file a claim for benefits at any point during the two-year process, the Department of Labor must investigate the relationship between the worker and the hiring agent. If the investigation reveals that there was an employment relationship, the worker would be entitled to collect benefits. The employer would have the exemption revoked. This would, of course, not give the reputed employer the certainty it would be seeking from such a pre-certification process, but waiver of unemployment benefits is not permissible under current law.

In addition to the legal difficulties identified with the Montana pre-certification program, is one of administration cost and creation of duplicative layers of administration. Demographically, Montana is similar to Maine in terms of numbers of employers and workers. In Montana, the unit that processes the independent contractor pre-certification applications is separate from both the workers' compensation and unemployment compensation divisions, although it is still housed in the Department of Labor and Industry (workers' compensation and unemployment insurance are part of the same department in Montana). The Independent Contractor Central Unit is comprised of a 13-member staff: a supervisor, 3 investigators and 3 clerical staff in the central office and 6 investigators in the field.

The central office investigators are involved in the determination and acceptance of the applications and in researching and writing decisions. The field investigators conduct audits and deliver education around the program and laws to employers and independent contractors. Pre-certifications issued are binding for both workers' compensation and unemployment insurance programs in Montana but the unit investigators are in addition to, rather than a replacement of, unemployment tax field auditors. The investigators in this unit only deal with determinations of

¹¹ 26 M.R.S.A. § 1044(1).

independent contractor status for the pre-certification process. If, in the course of an unemployment audit (either regular audit or one resulting from a blocked benefit claim), the unemployment tax auditor identifies a potential issue with an independent contractor certification (one or the other party does not appear to be operating in compliance with the agreed upon certification requirements), this is reported to the Independent Contractor Central Unit for a field investigator to investigate. If the field investigator determines that the certification is invalid, the unemployment tax auditor is notified to assess appropriate unemployment taxes due. The independent contractor pre-certification program did not reduce or change the need for an audit program or staff in Montana's Unemployment Insurance program.

The annual cost to administer the Independent Contractor Central Unit in Montana is just under \$1.3 million. An additional \$500,000 in one-time cost was required to get the unit set up and the program operational. This was mostly for data processing expenditures and was spread over a two-year time period. For revenue, Montana issued 11,000 applications the first year and approximately 9,000 the second year. The application cost is currently \$125.00 although if a person fails to qualify, the department only keeps \$25.00 as a processing fee except in circumstances where they find that the individual should not have applied at all. In these instances, the department refunds the full \$125.00. Montana needs to issue a minimum of 10,400 certificates a year in order to fully cover the current cost of administering this program. If the application volume drops below this level, the unit will need an alternate source of revenue or be required to increase its fees.

When approached with this idea, the Maine Workers' Compensation Board indicated that they are opposed to adopting a pre-certification program that would require an individual to waive all rights to workers' compensation protection in the event of injury. The Department of Labor shares this concern. Additionally, the department agrees with the majority of the employer and independent contractor survey respondents that were opposed or unsure about the feasibility of adopting such a program due in large part to the increased administration costs associated with creating an additional employment determination program.

V. Conclusions:

L.D. 1847 Resolve directed the Department of Labor to examine five items to determine whether changes should be made to the current definition of employment used to determine who is potentially protected under the Maine Unemployment Compensation Program and whether a business is liable to pay unemployment taxes on the services provided by individuals under contract to that business. The five areas for examination included:

- The adequacy of the ABC test for determining 'covered employment' for unemployment compensation purposes
- The adequacy of the ABC survey instruments used to determine whether an individual is an independent contractor or in covered employment with a business
- The need or benefit of adopting the IRS test of employment
- The need or benefit of adopting the Maine Workers' Compensation test of employment
- The need or benefit of adopting an independent pre-certification program similar to that used in Montana.

The Department solicited input from approximately 42,000 Maine employers, 102,000 self-employed subcontractors and 221 Labor and Employment attorneys on these issues and received responses from approximately 3% of each population contacted. Additionally, the department in consultation with the Maine Attorney General's office, the Maine Workers' Compensation Board and agency staff, and the Maine Unemployment Insurance Commission researched and studied the five directives of the Resolve.

Although much comment was provided by both employers and subcontractors concerning the complexity of the ABC test used for unemployment purposes, few of those who responded indicated that the test had had a negative impact on them or their business, and the majority of the employers who responded recommended that the current criteria under the statute **not** be changed. In fact, most respondents under both surveys indicated that all three tests currently used in Maine (the IRS and the Maine Revenue Services tests being the same test) were almost equal in degree of difficulty in understanding or application so that no one test represented a significant improvement over another. The data generated from surveying both employers and subcontractors did not provide adequate evidence supporting the need to eliminate the use of the ABC test for determining covered employment for unemployment purposes.

After conducting an intensive internal examination of the various employment tests, the potential loss of the presumption of employment currently provided by the ABC test and upon which the Maine Unemployment Compensation Program is based, the department finds that it cannot recommend getting rid of this test. The department and the Unemployment Insurance Commission in its totality are opposed to taking any action that would further reduce worker protections in Maine. The department also would have concerns about adopting either the IRS or Workers' Compensation tests as they exist because of the potential for increased subjectivity in the application of the law and therefore, potential for increased litigation. For these reasons, the department recommends that the criteria and definition used to determine covered employment for unemployment purposes be maintained.

However, the department also recognizes that it has a responsibility to be proactive in improving the clarity of its communications with employers and subcontractors, including all written notices, forms, and informational materials explaining the law and unemployment tax procedures. To this end, the department recommends setting up a work group that would include representatives of the business community to review its unemployment employer tax notices and informational

materials to identify ways to reduce confusion and improve understanding of information being provided or requested.

The department also cannot recommend the creation of an independent contractor pre-certification program at this time nor does the majority of the employer and subcontractor survey respondents support such a measure. Again, for both the Department of Labor and the Workers' Compensation Board, the binding nature of the pre-certification requiring the waiver of one's rights to coverage under either insurance program is problematic. Additionally, we agree with the concerns raised by both employer and subcontractor groups as to the increased costs and potentially redundant layer of government the addition of such a program would represent. The Workers' Compensation Board is not interested in pursuing a binding pre-certification program and if the program were designed to serve just one program, its value would not justify either the added expense or increased administration. Although the Board is not interested in pursuing a binding pre-certification program for independent contractors, they are open to requiring that all independent contractors obtain workers' compensation coverage for themselves (and of course, any employees they hire). Additionally, the Board would support a statutory amendment stating that any individuals working with a contracting business are employees of that contractor unless they have their own workers' compensation policy. This would help provide more certainty for employers, which was one of the requested outcomes sought last during the last legislative session.

One of the valid concerns raised by proponents for change concerned the confusion and extra administrative burden caused for employers as a result of multiple definitions of employment used by various taxing and insurance programs in Maine. To this end, the Maine Workers' Compensation Board has stated a willingness to consider adopting the ABC test currently used by the Unemployment Compensation Program for use in determining workers' compensation coverage. This would result in a single definition and set of criteria used to determine employment for both programs, which would go far in addressing the concerns around multiple employment tests. However, before moving to adopt such a plan, the Workers' Compensation Board would like to more closely examine the potential ramifications of such a move.

Appendix I

Survey Notification Letters for Employers, Subcontractors and
Employment & Labor Attorneys

Survey Instruments for Employers, Subcontractors and
Employment & Labor Attorneys
with Summary Tallies of Responses



JOHN ELIAS BALDACCI
GOVERNOR

STATE OF MAINE
DEPARTMENT OF LABOR
BUREAU OF UNEMPLOYMENT COMPENSATION
19 UNION STREET, P.O. BOX 259
AUGUSTA, MAINE 04332-0259

TTY (DEAF / HARD OF HEARING): 1-800-794-1110
TELEPHONE: (207) 287-2316

LAURA A. FORTMAN
COMMISSIONER

LAURA L. BOYETT
DIRECTOR

November 13, 2006

<<Name1>>
<<Name2>>
<<Address1>>
<<Address2>>
<<City>>, <<State>> <<Zip>>

Dear Maine Employer:

During the 122nd Session of the Maine Legislature, a Resolve was passed requiring the Maine Department of Labor, in consultation with interested parties, to examine the laws and definitions used to define "employment" for purposes of the Maine Unemployment Insurance Program. As an employer doing business in Maine, your input is critical to the validity and outcome of this study. We are seeking your input by asking that you complete a brief online survey questionnaire describing your experience and thoughts about the definition and test currently used to determine who may be covered by the Unemployment Insurance Program.

There are no identifiers on this survey questionnaire unless you wish to provide this information voluntarily. You can access this survey through the following website:

<http://www.maine.gov/labor/empsurvey.html>

It will be available for response through **November 29, 2006**. Please complete this survey prior to this date to ensure your information is included in the study findings.

All information obtained will be collected and included in a study report to the Maine Legislature in the upcoming legislative session. The information you provide will be valuable in helping to assess whether the current employment definitions for the Unemployment Insurance Program are still applicable to today's business and workforce environments.

We hope you will take time to complete this important online survey questionnaire. If you have any questions regarding the completion of the survey or experience difficulties with the online form, please contact Lloyd Black by calling (207) 287-1246. If you do not have access to the Internet and wish a copy of the questionnaire to be sent to you, please contact our office by calling (207) 287-2316. Thank you.

Sincerely,

Laura L. Boyett, Director
Bureau of Unemployment Compensation



JOHN ELIAS BALDACCI
GOVERNOR

STATE OF MAINE
DEPARTMENT OF LABOR
BUREAU OF UNEMPLOYMENT COMPENSATION
19 UNION STREET, P.O. BOX 259
AUGUSTA, MAINE 04332-0259

TTY (DEAF / HARD OF HEARING): 1-800-794-1110
TELEPHONE: (207) 287-2316

LAURA A. FORTMAN
COMMISSIONER

LAURA L. BOYETT
DIRECTOR

November 20, 2006

<<Name1>>
<<Name2>>
<<Address1>>
<<Address2>>
<<City>>, <<State>> <<Zip>>

Dear Independent Contractor or Contract Worker:

Re: **Independent Contractor Survey**

During the 122nd Session of the Maine Legislature, a Resolve was passed requiring the Maine Department of Labor, in consultation with interested parties, to examine the laws and definitions used to define "employment" for purposes of the Maine Unemployment Insurance Program. As an individual who works as an independent contractor or contracts with businesses for work in Maine, your input is critical to the validity and outcome of this study. We are seeking your input by asking you to complete a brief online survey questionnaire describing your experience and thoughts about the definition and test currently used to determine who may be covered by the Unemployment Insurance Program.

There are no identifiers on this survey questionnaire unless you wish to provide this information voluntarily. You can access this survey through the following website:

<http://www.maine.gov/labor/icsurvey.html>

It will be available for response through **December 13, 2006**. Please complete this survey prior to this date to ensure your information is included in the study findings.

All information obtained will be collected and included in a study report to the Maine Legislature in the upcoming legislative session. The information you provide will be valuable in helping to assess whether the current employment definitions for the Unemployment Insurance Program are still applicable to today's business and workforce environments.

We hope you will take time to complete this important online survey questionnaire. If you have any questions regarding the completion of the survey or experience difficulties with the online form, please contact Lloyd Black by calling (207) 287-1246. If you do not have access to the Internet and wish a copy of the questionnaire to be sent to you, please contact our office by calling (207) 287-2316. Thank you.

Sincerely,

Laura L. Boyett, Director
Bureau of Unemployment Compensation



JOHN ELIAS BALDACCI
GOVERNOR

STATE OF MAINE
DEPARTMENT OF LABOR
BUREAU OF UNEMPLOYMENT COMPENSATION
19 UNION STREET, P.O. BOX 259
AUGUSTA, MAINE 04332-0259

TTY (DEAF / HARD OF HEARING): 1-800-794-1110
TELEPHONE: (207) 287-2316

LAURA A. FORTMAN
COMMISSIONER

LAURA L. BOYETT
DIRECTOR

November 16, 2006

Dear Attorney:

During the 122nd Session of the Maine Legislature, a Resolve was passed requiring the Maine Department of Labor, in consultation with interested parties, to examine the laws and definitions used to define "employment" for purposes of the Maine Unemployment Insurance Program. As an attorney dealing with employment issues in Maine, your input is critical to the validity and outcome of this study. We are seeking your input by asking that you complete a brief survey questionnaire describing your experience and thoughts about the definition and test currently used to determine who may be covered by the Unemployment Insurance Program.

There are no identifiers on this survey questionnaire unless you wish to provide this information voluntarily. The survey is attached to this email and can be completed and returned by email to me at the following email address:

Laura.L.Boyett@Maine.gov
(please put "ABC Survey" in the subject line)

Of if you prefer, the survey can be printed and faxed to my attention at 207-287-2305 or mailed to the following address:

Maine Department of Labor
BUC – Survey
P.O. Box 259
Augusta, ME 04332-0259

We are asking that you please complete and return this survey no later than **December 1, 2006** to ensure your information is included in the study findings.

All information obtained will be collected and included in a study report to the Maine Legislature in the upcoming legislative session. The information you provide will be valuable in helping to assess whether the current employment definitions for the Unemployment Insurance Program are still applicable to today's business and workforce environments.

We hope you will take time to complete this important survey questionnaire. If you have any questions regarding the completion of the survey or the study, please feel free to contact me at 287-8521 or Lloyd Black at 287-1246. Thank you.

Sincerely,

Laura L. Boyett, Director
Bureau of Unemployment Compensation

Maine Department of Labor
Bureau of Unemployment Compensation
19 Union Street P.O. Box 259
Augusta, ME 04332-0259

Survey on the Laws & Employment Definitions Used to Determine Coverage & Tax Liability
under the Maine Unemployment Insurance Program

To be completed by Employers

1. What type of business do you have? (please choose answer that is closest to your business type).

Agriculture, Forestry, Fishing – 18
Mining – 1
Utilities – 12
Construction – 261
Manufacturing – 113
Retail Trade – 137
Transportation & Warehousing – 21
Information – 9
Finance & Insurance – 74
Real Estate & Rental/Leasing – 3
Professional & Technical Svcs – 95
Administrative & Waste Services – 2
Educational Services – 39
Healthcare & Social Services – 101
Arts, Entertainment & Recreation – 1
Accommodation & Food Services – 53
Public Administration – 49
Miscellaneous – 286

Total - 1275

2. How many employees do you have in Maine?

1 – 10: 802 11 – 49: 297 50 – 99: 82 100 – 249: 63
250 – 999: 28 1000+: 2

3. How often do you use contract employment/workers?

Never 627 (skip to question #7) Seldom 351 Regularly 225 Continually 71

4. What is the **average** duration of your contracts with these workers?

1 week or less <u>163</u>	1 week+ to 2 weeks <u>37</u>	2+ weeks to 4 weeks <u>36</u>
4+ weeks to 8 weeks <u>20</u>	8+ weeks to 16 weeks <u>52</u>	16+ weeks to 24 weeks <u>29</u>
6 months to 12 months <u>88</u>	18 months <u>3</u>	24 months <u>8</u>
36 months <u>5</u>	60 months <u>4</u>	72 months <u>1</u>
84 months <u>1</u>		

5. Does the work performed by contract employment differ from that of your employees?

Yes 414 In what way? Response themes:

Specialized work not performed by regular employees
Work location different – i.e. offsite, at home
Cleaning or physical labor contracts
Consulting
Hours of work differ
Contractors supply own equipment/tools
Different job descriptions, requirements, work, trade
Hold specialized licenses
Contractors perform installation work
Non-administrative
Outside usual course of business
Less or no supervision
Project-based or job specific work
Specialized skills, knowledges
Services not offered regularly
More freedom regarding work conditions, i.e. where, how, what, when

No 247 Don't know 1

6. For what reasons do you use contract employment? (check all that apply)

To supplement workforce 198 Seasonal or fluctuating work demands 220
To reduce business costs 80 Specialty work/skills needed 345
To expand service offerings to customers 136

Other: Special licenses, skills not needed continually, to limit liability, non-business needs, Only feasible way to conduct business, repair work, cover vacations

7. Are you aware of other businesses in your industry that use contract employment?

Yes 748 No 524

If yes, do you feel this has an impact on your business in any way? Yes 193

If you answered 'yes', please describe the impact:

Small business can't avail itself of the benefits – too small, can't compete equally, competitors avoid tax and workers compensation, cheat the system, undermines good contractors, businesses that don't pay workers comp can cut prices, competitive disadvantage, cost competitiveness, costs me sales, drains the workforce seasonally, erodes our ability to hire at wages we can afford to give, I pay Fica, UI, WC – they do not, costs me more to do business, raises the rates of unemployment insurance, takes work from my skilled workers, makes finding contractual employees competitive, makes it less likely we can afford to provide employment w/benefits, negative impact if done illegally, undermines fair contracting laws,
negative – they're usually captured employees, some abuse, feel pressured to use contract labor

14. Do you believe that the employment definition and test used by the Maine Unemployment Insurance Program has had a negative impact on your business?

Yes 232 No 378 Unsure 665

If you answered 'yes', please describe the impact?

Representative responses include:

added costs,
additional complexity,
decisions always in favor of employee,
difficult to explain/understand different employment tests/systems,
inadequate distinction between employee and independent contractors,
unemployment benefits are paid to people who do not want to work – teaches them how
not to be productive citizens if they can collect beyond 4 weeks –
people get benefits too easily,
caused a shortage of skilled labor available for temp work,
did not expand business because of cost of having employees,
confusing laws and regulations,
definitions mean nothing without proper enforcement,
difficult to let substandard employees go,
does not allow contract workers,
not applied equally, drives insurance costs up, taxes have big impact on small businesses,
employees have the advantage, expensive, extra paperwork,
Many people covered that should not be,
I pay for myself but can't collect,
too stringent around independent contractors, out of touch with business needs,
other businesses abuse this to avoid taxes – laws not enforced adequately,
overburdensome,
seasonal workers should not be eligible for benefits,
rates are collected for people who cannot collect,
forces people to incorporate

15. Do you believe that the employment definition and test used by the Maine Workers Compensation Program has had a negative impact on your business?

Yes 180 No 425 Unsure 670

If you answered 'yes', please describe the impact? (Response themes, not all-inclusive)

Too much paperwork
Able workers should not be able to get wc
Unnecessary complexity and expense
Added costs
All contractors not licensed
All service contractors should carry wc
Allowing people to unjustly collect benefits raises rates for all employers
Disallowing benefits for self-employed leaves us vulnerable to shifts in the market

Premiums have enormous negative impact on businesses, cost way out of reach, costs a lot even if you don't use it, costs go up every year
Difficult to understand, explain, apply, judge liability
Covers people who should not be covered
Causes me to shy away from contract workers, everyone is an employee no matter what
Hard to compete with those that don't have to pay
High costs mean fewer employees
Can't afford employees – go with independent contractors
Do not hire employee construction labor because of wc regs
Cumbersome and confusing
I want my employees to be covered if they get hurt
Will no longer hire subcontractors that are not incorporated
A lot of independent contractors by not having wc are not in tune to safety issues
Employer always loses
Too strict
Basically has put me out of business
Difficult to control liability with an independent
Poorly enforced – unfair competition, lack of enforcement, lack of oversight by state, not equally enforced
Keeps people from actively seeking work
Very subjective
Pre-certification process is burdensome and of questionable value
Rates reflect the group and not the individual – get high rate even if never claimed
Should be one test for all coverages

16. Do you believe the employment definition and test for the Maine Unemployment Insurance Program should be changed? Yes 540 No 721 Unsure 14

If you answered 'yes', what change would you make and why?

Representative Responses include:

Don't know enough about it
Need more stringent eligibility standards
Standard definition for all state agencies, consistent, all government use same
Subcontracted labor should be responsible for their own UI taxes at their option
Only payrolled employees should be covered
Adopt the IRS standard
All contractors that aren't, should be licensed – then determined either IC or not upon application
Allow written contract between employer and worker to stand – file with Labor dept
Allow continual use of subcontractors without repercussion, allow latitude for temps, allow outsourcing for labor skills, allow more leeway for independents, allow independents to perform same work as employees or usual course of business,
Independents should not expect to collect UI between jobs
Make it easier
Sole proprietors should not be under UI plan or pay into it
Broader exemptions
Businesses should not be penalized for needing to ramp up seasonally
Clarify, simplify, use clear language, easier to understand

Apply consistently, equal for all industries

Decrease burden on employers

Education is needed

Eliminate direction and control test

Employers who knowingly hire short term or seasonal employees should pay for this knowing their employees can expect to collect benefits

Enforcement needs to be ramped up, poorly enforced.

Like to see independent contractors certified on individual basis not by each business

Require ICs to be licensed

Should be same as wc

Lower rates

Second prong should be clarified

17. Do you believe that the employment definition and test used for the Maine Unemployment Insurance Program should be the same test used by the:

Workers Compensation Program? Yes 520 No 494 Unsure 261

IRS? Yes 651 No 403 Unsure 221

MRS? Yes 518 No 477 Unsure 280

If you answered "yes" to any of the programs listed, please explain why these tests should be the same: Themes were – would simplify process, makes process easier to understand and apply, makes programs more equal, improves uniformity, consistency, continuity, less red tape, standardization, makes doing business simpler, reduces confusion, more equitable, KISS

18. Do you believe that Maine Unemployment Insurance Program should institute a 'pre-certification' application process that would enable a person to apply for and obtain a certification that states he or she is an Independent Contractor for Unemployment Insurance Program purposes? (The individual would have to meet specific criteria to prove he or she is an independent contractor rather than an employee).

Yes 614 No 265 Unsure 392

19. If an Independent Contractor pre-certification program were adopted for the purpose of determining whether an individual should be covered by Maine's Unemployment Insurance program, should it be obtained by the business based on the relationship the business intends to have with those individuals the business contracts with or by the individual who wants to be considered an independent contractor?

Business 256 Individual 1005 Both 2 Unsure 3

20. Considering your answer to the previous question, what factors should be considered in determining whether an Independent Contractor pre-certification be granted? (check all that you believe should be considered)

Freedom from the direction & control of the contracting business 1054

Degree to which individual is established as independent business 951

History of working for multiple companies within a year 512

Whether or not the individual has employees of his or her own 471
Location where contracted services are performed 184
Whether or not the individual provides his or her own tools and equipment 581
Degree to which the individual pays for materials and/or supplies 362
Degree to which the individual pays for job-related expenses, such as travel 430
Degree of responsibility if the work performed is unsatisfactory 505
Degree of liability for damages or losses incurred by the individual 529
Professional licenses the individual must hold to perform work 482
Individual files business tax returns with the IRS 648
Other: Factors suggested include nature/type of job performed, proof of insurances (liability, workers comp, etc) , written contract between business and individual, duration of work, written release, level of autonomy (speaks to direction & control) – proof of insurance coverage was the most common response under ‘other’

21. What mechanism or process should be put in place to monitor whether the standards warranting the pre-certification are being maintained?

Representative responses included:

annual review (suggestions included agency, by board made up of other contractors, compliance board, consortium of business owners & independent tradesmen, separate agency, etc) **Annual review/audit of some type or renewal of pre-cert most common response**

annual confirmation of 1040 & 1099 business tax forms – **1099 check very common response**

Auditing system that makes both parties accountable/ one that makes only the independent accountable - **responses varied back and forth between business & independent in terms of who should carry the burden of proof**

bi-annual review/re-certification, periodic renewal of certification (suggested timeframes varied from 6 months to 5 years),

legally binding contracts signed by independent waiving future claims,

questionnaires filled out by independents, questionnaires completed by business

random audits of contract laborers to review work projects from the year,

state department (Labor, Unemployment Office, special agency specifically monitoring independents, state audit office with teeth, state board, state oversight, Workers Comp system

Private agency review

adjudication at time of UC claim,

Licensing is only answer – not pre-certification – verify licenses at jobsite (**very popular response**)

Pre-cert won't work – everyone works for someone, relationship with business is key & it changes from job to job

Inspections, monitoring, on-line questionnaires, spot checks

Other very common answers were “I don't know” or “I do not support or see need for pre-cert program – too costly, not needed” or “no opinion”

22. How do you believe the administrative costs of an Independent Contractor pre-certification program should be funded?

Application fees paid by the business 126

Application fees paid by the individual 845

Legislative appropriation (state revenues) 288 Don't Know 1

23. If an Independent Contractor pre-certification were adopted, should it be valid for:

Less than one year 26 One year 371 Two years 504
Longer than 2 years 357, if so, for how long? Answers ranged from 3 – 50 years or as long as the individual was in business

24. Do you have additional comments you wish to make about this issue?

There were 1239 comments for consideration – representative examples include:

Summary of all the relevant rules written like sales brochure for employers

One set of rules and enforcement by existing DOL auditors

Don't reinvent the wheel

Pre-cert sounds like very bad idea – negative impact/burden on business & independents

Independents create unfair competition

Independents are self-employed – should be treated like any other business

Pre-cert – another tax grab?

Fees and administrative costs – another name for taxes

Make system fair for everyone – can't compete w/companies that do not pay for UI & WC

Small business – daunting task to answer to so many different agencies – need fewer hoops

Licenses - help in checking if individual or contractor following good business practices

Make business and independents follow existing rules

As long as contractor is in business & filing tax return – do yearly renewal form

Simplify process – certifications would eliminate many phone calls and questions

Common sense says single definition for IC makes sense

Current UC IC test hurts Maine business due to extra costs – too much red tape

Need to be exception for true general contractor

Deal with this case by case – we have enough laws already

Do not believe there should be pre-cert/ no pre-cert/ do not consider pre-cert

Do not need another layer of state government – don't make state government bigger

Enforce the rules – too many start own companies and break every employment rule

Enforce WC laws

Every time law is passed w/weak enforcement – legitimate businesses that comply, lose

Find a way to help the process work properly – not police it after the fact

Give control to the people to operate as independent contractors

Good idea (pre-cert)/ Good luck instituting it

Here's another example where State is proposing making doing business more complicated and expensive/How much money would be spent on administration for how much revenue?

I agree with the need for change – currently unfair competition exists between treating employees as such or as subs – should be all or none – either strongly enforce existing laws or change them

Should be addressing the issue that UI is way to easy to obtain and sides with employee

Many of the problems that exist are the result of abuse

State needs to adopt some type of licensing system for building contractors

I believe pre-cert is a serious work restriction – do not want further restrictions

Independent contractor status has a lot of gray areas – UC laws make it black and white which is not always correct

Too many regulations on small business

I commend the Department of Labor for asking us what we who are in the field dealing with these issues think. I advocate a simple process to determine if a person is a sub or a sub who should be an employee

Pre-cert program not useful/ not necessary – go after the business that pays cash, no taxes, no insurances

No more layers of bureaucracy

I don't believe the ABC test is right or fair.

I feel UI and WC should be left up to the individual contractor – not the business who hires them

I know that there are companies I compete with who I believe abuse the existing system. There is not enough policing of this now.

I personally believe there is a huge underground economy that avoids paying any of these taxes or insurances and may be as large as 20% of local economies

I think a pre-cert program would be wonderful.

I think a pre-cert program would be unnecessary as the laws are clear enough to establish independent contractor status.

I think its time to initiate a licensing program for all contractors and craftsmen.

I think it would be great if independent contractors could have unemployment benefits.

I think this is a very difficult issue. There are many that would have you believe that the business community wants independent contractors so they can cut costs when in fact the majority of businesses would rather have these workers as employees.

We don't need anymore fees put on businesses or individuals

Urge the process be uniform, centralized

I would like to see some sort of listing so a business could determine ahead of time whether someone is an independent contractor

Independents should be subject to the same scrutiny as any other business

Is this a solution in search of a problem?

It really makes more sense to remove the economic incentive to avoid employment status. Impose unemployment tax on the self-employed and avoid all the disputes and enforcement costs.

Just keep it as simplistic as possible.

Leave it alone/Leave businesses alone/Less government is better

On the surface this (pre-cert) appears to be a good idea. Underneath, it is another hurdle in our industry. Asking for pre-cert before hire and then keeping the records is for the birds.

One definition, one application, single determination for all agencies

Please license building contractors to put all involved on a even playing field

Please reconsider doing this – it would put contractors under unnecessary hardship.

Tests that involve direction and control issues are difficult to administer, explain and enforce

Thank you for seeking employer input on this issue

The issue is the people who don't bother to get certifications or insurance or anything and ruin the market

The real problem is in the definitions for workmens comp, not unemployment insurance

The rules are so confusing that we decided to avoid using independent contractors many years ago

The reason why there are so many independent contractors now is because the insurances (wc, ui) are so expensive.

The more regulations and restrictions the state places on people and businesses, the less attractive the state is to both

There are a number of independent contractors that do not want to be employees which is very frustrating to the business owner. I believe that independent contractors chose this status to circumvent child support, WC/GL and taxes.

There is a problem that many businesses force workers to declare independent status even though in reality, they are employees of the company without the autonomy of a true independent contractor.

We (small business) need independent contractors to survive.

This is an enormous issue and I am glad to see it being addressed. The individual and the employer should be equally culpable for noncompliance.

This issue would be minimal if Workman's Comp costs were considerably less

This may open the way for abuses by companies who do not wish to pay SUTA/FUTA.

People who really need the benefits of unemployment may have to sign that away just to get any kind of work.

This sounds like an expense that has no basis for existing except expanding government.

We are supporting an under the table economy because workers do not want to pay taxes and will not work for wages. The shortage of workers gives them the decisive hand.

Find a solution so workers pay their fair share.

We are trying to cut taxes and expenses – why add more state jobs?

We find that in order to do business on the coast and in order to find qualified workers, that we need to use subcontractors who wind up doing the same work as an employee.

We had an audit several years ago, we paid the fine. You then shared the info with the IRS.

They send us a bill for thousands.

25. **OPTIONAL:** Company name: _____ Contact Name: _____
Email Address: _____

Thank you very much for taking the time to respond to this important survey.

Survey on the Laws & Employment Definitions Used to Determine Coverage & Tax Liability under the Maine Unemployment Insurance Program

To be completed by Independent or Contract Workers

1. How would you define your status as a worker? Check one:

Self-employed as an independent contractor 2683

Employed by an employer 248

Other (please describe) 206 – although only 206 respondents actually checked this option, 349 comments were submitted. The vast majority of the comments stated that the individual considered him or herself both an employee and self-employed as they worked either part or full time for an employer and did contract work in addition to this employment.

2. If your answer to question 1 was independent contractor, what were your reasons for becoming an independent contractor? (Please check all that apply):

Wanted to be my own boss 1934

Only work available 654

Other (please describe) There were 879 text responses to this question that could be categorized into approximately 9 areas. The reason categories in order of highest response volume to lowest were:

- a. 153 - only way the job was offered or categorized as such by tax codes
- b. 140 - pay, needed extra income
- c. 137 - alone, control one's total work environment
- d. 129 - flexible hours or being able to work from home/be with their children ability to work
- e. 92 - second job or career, particularly after retirement
- f. 75 - had a special skill or talent that they wanted to explore/exploit/leverage
- g. 72 - could not find any other employment
- h. 61 - miscellaneous – included comments like "it just happened", volunteers, wanted to work for multiple business, burned out from traditional employment, family business, work for business out of state, etc.
- i. 15 - Disability, illness makes working in traditional employment difficult
- j. 5 - Tax advantages associated with being an independent contract, avoiding workers compensation costs

3. If you are an independent contractor, had you previously performed the same work you are doing now but as an employee?

Yes 1502

No 1506

If yes, was the work performed for the same business or businesses that you currently contract with? Yes 372 No 1483

If yes, why did you become an independent contractor instead of remaining an employee? Respondents did not understand that this question was limited to just those who remained with the same employer as an independent contractor. Almost all responded to this question and answers mostly mirrored responses to Question #2

4. What type of service do you perform? (Please choose answer that is closest to your business type).

Agriculture, Forestry, Fishing & Hunting 101

Mining 1

Utilities 17

Construction 626

Manufacturing 237

Wholesale 6

Retail 116

Transportation & warehousing 74

Information 81

Finance & Insurance 171

Real Estate, Rental & Leasing 118

Professional & Technical Services 611

Management (companies & enterprises) 3

Administrative & Waste Services 86

Educational Services 139

Healthcare & Social Assistance 256

Arts, Entertainment & Recreation 74

Accommodation & Food Services 35

Other Services except public Admin 206

Public Administration 38

Unknown 5

5. For whom do you perform services? (Check all that apply)

General public 328

Employers/business owners 1410

General contractors 1770

Government 328

Other (please describe) 495 respondents selected "other" as well. Many wanted to indicate that they perform services for all of the above. Many of the responses fall into one of the categories above but others listed that may warrant further description were educational institutions, churches, research facilities, hospitals, carnivals/fairs and non-profit organizations.

6. With how many businesses do you contract with during an average year?

None 271

1 787

2 – 4 1015

5 – 9 430

10+ 558

7. What is the average duration of the contracts you perform? The answers to this question ranged from as little as 10 minutes to as long as 20 years with every kind of

answer in between defined in minutes, hours, days, weeks, months and years.
'Indefinite' was also used fairly regularly as a response as was 'varies', and 'continual'.

8. Does the work you are performing differ from the work being done by other workers (or contractors?) on the worksite?

Yes 1676 In what way? Responses varied – ranged from “only one” doing a particular function or task, to specialized skill, independents have less restrictions, to licensure makes work different, custom work, more difficult or complex work, different roles, techniques, services, positions.

No 1342

9. For what reasons are you being engaged to perform services as an independent contractor? (check all that apply)

To supplement workforce 478 Seasonal or fluctuating work demands 525
To reduce business costs 558 Specialty work/skills needed 1860
To expand service offerings to customers 631

Other – Respondents checking “other” category primarily listed reasons they were contracting as independent versus reasons the business was contracting with them – repeated many of the reasons listed in response to #2 above. Reasons listed that were different from the 5 choices offered included: licensure needed, business liability, reputation of IC, availability or safety reasons.

10. What are the advantages to being an independent contractor? (Check all that apply).

You control your hours and schedule 2262

You control your work conditions 1734

You are your own boss 1928

Your pay/or profit is better 893

Other: Representative responses include:

all of the above,

tax breaks,

collaboration/team playing,

serve as needed, make a difference

grow professionally,

provides ability to live where I want,

availability of jobs,

ability to telecommute,

creative/personal fulfillment, enjoyable/love what I do,

greater range of experience,

don't have to deal with incompetent boss/people,

more interesting, variety of work

portability of work,

opportunities,

ability to work after retirement,

no office politics

do not see (any, many) advantages, see it as disadvantage,

no advantages/no benefits,

less stress,
no choice, none – prefer to remain employed,

11. What are the disadvantages to being an independent contractor? (Check all that apply).

Difficulty finding work 706

Lack of job security 1347

Lower pay 490

Higher costs (overhead, insurances, taxes, etc) 1327

No benefits 1561

Other: Representative Responses include:

all of the above, no benefits, no retirement, no safety net – **(most common response - particularly around health insurance)**

state business taxation – **(higher taxes in general was probably the second most frequently cited response)**,

unfriendly business environment,

24/7 demand, long hours, no vacation/holidays/time off, less freedom/more responsibility

fluctuating income, can't plan on work, lack job security, sporadic work, downtime

between jobs **(frequently cited response)**

collecting fees/payments,

deadline stresses, work demands, wear too many hats

Paperwork, business administrative tasks

market conditions, economy shifts

weather

travel,

difficulty finding skilled workers, ,

government regulations & interference,

no representation

no disadvantages – don't find any, None

12. Do you use other workers to help you perform services?

Yes 729

No 2343

13. If the answer to question 12 was yes, how many workers do you use as a regular part of performing your services?

1 – 10: 667

11 – 49: 33

50 – 99: 9

100 – 249: 7

250 – 999: 1

1000+: 1

14. Are you aware that there are different tests for determining if an employment relationship exists between a business and a contract worker for different taxing or insurance coverage purposes?

Yes 1657

No 1414

15. With which of the following employment relationship tests are you familiar? (check all that apply)

Internal Revenue Services (IRS) 1622
Maine Revenue Services (MRS) 889
Maine Workers Compensation (WC) 644
Maine Unemployment Insurance (UI) 441
None 1180

16. Which of these tests do you find to be the easiest to understand and follow?

IRS 862 MRS 91 WC 99 UI 37 None 2047

17. Have any of the employment tests listed in question 15 had an effect on your business?

Yes 333 No 2412

If you answered 'yes', please describe the effect? Response Patterns include:

Additional costs – taxes & workers compensation, (**Most common response – workers comp cost cited repeatedly**)

Inability to hire people, higher hiring costs, afraid/reluctant to hire people – only hire Subs (**again, very common response**)

Annoyance, frustration, worry

Audits

Time costs – dealing with paperwork, audits

Complicated tax forms

Added costs for CPAs, accountants cut into profits

Don't want to pay benefits or other coverages

Expensive to compete

State and federal taxes – too high, limited deductions, very cumbersome

Unemployment & IRS laws – find employment rather than ICs, paying UI for subs, use only ICs now because of IRS and WC laws

IRS & State taxes too high

Uneven business climate – uneven playing field, inconsistent enforcement of laws

Unemployment not available to me

What tests?

18. Please identify which, if any, of the following benefits you have and indicate whether it is provided by the business you contract with, available through the business but you pay for it or whether you obtained it on your own elsewhere (i.e. privately, through professional association, etc).

Health insurance:

 Provided by the business 101

 Self-purchased through the business contractor 28

 Self-purchased/provided elsewhere 1924

 Do not have 832

 (236 respondents indicated N/A not applicable)

Workers' compensation coverage:

Provided by the business 168
Self-purchased through the business contractor 28
Self-purchased/provided elsewhere 268
Do not have 2428
(245 respondents indicated N/A)

Unemployment coverage:

Provided by the business 116
Self-purchased through the business contractor 8
Self-purchased/provided elsewhere 223
Do not have 2531
(259 respondents indicated N/A)

Disability insurance:

Provided by the business 62
Self-purchased through the business contractor 34
Self-purchased/provided elsewhere 568
Do not have 2192
(281 respondents indicated N/A)

Vacation pay:

Provided by the business 173
Do not have 2705
(259 respondents indicated N/A)

Sick pay:

Provided by the business 116
Do not have 2755
(266 respondents indicated N/A)

19. Do you believe that the Maine Unemployment Insurance Program in the Department of Labor should institute a "pre-certification" application process that would enable a person to apply for and obtain a certification that states he or she is an Independent Contractor for Unemployment Insurance Program purposes? (The individual would have to meet specific criteria to prove he or she is an Independent Contractor rather than an employee).

Yes 1302 No 958 Unsure 806

20. If an Independent Contractor pre-certification program were adopted for the purpose of determining whether an individual should be covered by Maine's Unemployment Insurance program, should it be obtained by the business based on the relationship the business intends to have with those individuals the business contracts with or by the individual who wants to be considered an independent contractor?

Business 701 Individual 2182

21. If an Independent Contractor pre-certification program were created, what factors should be considered in determining whether an Independent Contractor pre-certification should be granted? (check all that you believe should be considered)

Freedom from the direction and control of the contracting business 1242
Degree to which the individual is established as independent business 1434
History of working for multiple companies within a year 819
Whether or not the individual has employees of his or her own 594
Location where contracted services are performed 401
Whether or not the individual provides his or her own tools and equipment 985
Degree to which the individual pays for materials and/or supplies 824
Degree to which the individual pays for job-related expenses, such as travel 895
Degree of responsibility if the work performed is unsatisfactory 777
Degree of liability for damages or losses incurred by the individual 779
Professional licenses the individual must hold to perform work 761
Individual files business tax returns with the IRS 1280
Other: Responses included comment patterns such as:

“should not be all – allow some,
ability to refuse work,
all of the above/all suggested,
amount of \$ contractor handles,
good safety record,
degree to which the business could or could not do the work if didn’t hire the IC,
degree to which the IC’s livelihood depends on their business,
factors used should be same as IRS Pub 15 & MRSA 39-A, sect 102,
if you have Maine license, licensed by professional board,
mutual agreement;
Have own liability insurance, own workers compensation insurance, proof of insurance
coverage

Majority of responses indicate opposition to or are unsure about pre-cert. Answers cited included statements such as:

do not think pre-cert should be implemented
don’t want this
don’t want state intervention – don’t do it
against this/opposed
not good idea,
don’t know if this is good idea,
just a way of collecting more money,
don’t understand issue well enough to know if this would be good,
should be up to individual whether or not to work for someone else,
government should put no conditions on it if individual wants to work this way,
lousy idea, should not be adopted,
just more bureaucracy,
enforce existing laws - make sure relationship is real not scam to avoid taxes,
shouldn’t exist, waste of time and money,
please abandon this idea

22. How should the administrative costs of an Independent Contractor pre-certification program be funded?

Application fees paid by the business 494

Application fees paid by the individual 879
Legislative appropriation (state revenues) 1451
(310 respondents indicated N/A)

23. If an Independent Contractor pre-certification were adopted, should it be valid for:

Less than one year 68 One year 623 Two years 1115
Longer than 2 years 952, if so, for how long? Answers ranged from '0' to 25 or more years to as long as the person does business

24. Do you have additional comments you wish to make about this issue?

There were 1854 additional comments. Patterns/Themes expressed:

Many indicated that they weren't sure the questionnaire pertained to them.

A large number mirrored and expanded on comments made in # 21 in opposition to a pre-cert program and why it would be a bad idea. A great many feel it would hinder small business and make it much harder for people to find jobs.

Other comments ranged from not requiring sole proprietors to carry UI or WC coverage to just the opposite in requiring them to carry them and finding ways to provide these benefits to self-employed individuals because so many independents have no protections at all.

Another common response was about the large numbers of people who call themselves independents (or who are labeled such by the business) when they are not – particularly as they only work for the one business. These respondents generally advocated more enforcement of existing laws rather than creation of another government layer.

Many feel that being an independent contractor is a personal choice and if there is mutual agreement between the business and the individual, government should not intercede.

25. **OPTIONAL:** Contact Name: _____
Email Address: _____

Thank you very much for taking the time to respond to this important survey.

Please complete and return this survey **no later than December 13, 2006** to:

Maine Department of Labor
BUC – IC Survey
19 Union Street P.O. Box 259
Augusta, ME 04332-0259

or FAX it to (207) 287-2305

Maine Department of Labor
Bureau of Unemployment Compensation
19 Union Street P.O. Box 259
Augusta, ME 04332-0259

Survey on the Laws & Employment Definitions Used to Determine Coverage & Tax Liability
under the Maine Unemployment Insurance Program

To be completed by attorneys engaged in labor and employment law

1. Are you aware that there are different tests for determining if an employment relationship exists between a business and a contract worker for different taxing or insurance coverage purposes?

Yes 6 No 0

2. With which of the following employment tests are you familiar? (check all that apply)

Internal Revenue Services (IRS) 5
Maine Revenue Services (MRS) 3
Maine Workers Compensation (WC) 6
Maine Unemployment Insurance (UI) 6

3. Which of these tests do you find to be the easiest to understand and follow?

IRS 2 MRS 0 WC 3 UI 0 None 3

With respect to the test you chose from the options above, explain why you believe the test is the easiest to understand and follow?

Worker's Comp because the test is based on the activity of the employee, not on someone's interpretation of the relationship of the parties

Checked IRS & WC – ABC test is simply ambiguous. All the tests are interrelated to some degree. To aptly answer the questions regarding the ABC test, I use the IRS Category and 20 factor test with clients. I use the results of those tests to go back into an assessment under the ABC test.

Checked IRS & WC – they focus on control, which is a logical basis to make the distinction between employees and independent contractors. The IRS test is easier to work with because of the enumerated subparts.

None – all equally vague

None – The ABC test is outdated and has an adverse effect on both businesses and individuals who hold themselves out as independent contractors. The test, as it is currently written, requires an employer to meet all three prongs. Particularly problematic in this regard is the second prong of the test. Moreover, the ABC test offers no inquiry into the business itself, it does not inquire as to the intent or agreement (if any) of the parties. The IRS/MRS 20 Factor test, while similar to the ABC Test and somewhat less restrictive in application, is also problematic in that it too fails to consider the nature of

the business and/or relationship between the contracting parties. Maine's Workers' Compensation test at least requires a consideration of the totality of the relationship. None - but offered an alternative: "I believe the test that is easiest to understand and apply is the test used for determining whether there is an employer-employee relationship for purposes of the anti-discrimination laws, such as Title VII or the ADA, i.e., the so-called economic reality test, which uses many of the same elements as the UI test but puts the emphasis on the economic reality of the relationship.

4. Have any of your clients been negatively impacted by the ABC test?

Yes 5 No 1 If Yes, please describe the impact:

I had a client who made an independent contractor deal with an individual at the individual's request because of his unique personal circumstances. When it became convenient for the contractor to ignore the independent contractor status, he did. MDOL made the client pay UI benefits and penalties. [Note – the attorney does not specify what the "unique personal circumstances"]

Impossibility of advising client as to status of one entity vis a vis another with any degree of certainty.

Businesses which use independent contractors, who meet the tests for all other purposes, have been required to withhold and pay unemployment under the ABC test.

It is not always clear to clients whether an individual is – or should be – an independent contractor.

For example, business such as an insurance agency or a timber management company or a bank, that have hired independent contractors to perform services NOT related to the business (e.g. lawn care, trash removal, custodial services, and computer networking systems) have been found to have "employees" under the ABC Test. [note – It would be interesting to see these "examples" of such findings because the scenario described is covered by B1 – if the putative employer can show that the I/C is engaged in business that is outside of the normal course of its business, such as snowplowing or lawncare for a bank, then there shouldn't be an issue.]

4. Are there other employment tests that you aware of that could be applied for taxing or insurance coverage purposes?

Yes 2 No 4

If you answered yes, please describe the test(s):

Yes - The Economic Reality test

Yes - Several states, including Oregon, use a variation of the ABC test (omitting the B prong).

5. Do you believe that Maine Unemployment Insurance Program in the Department of Labor should institute a "pre-certification" application process that would enable a person to apply for and obtain a certification that states he or she is an Independent Contractor

for Unemployment Insurance program purposes? (The individual would have to meet specific criteria to prove he or she is an Independent Contractor rather than an employee.)

Yes 5 No 1

6. If an Independent Contractor pre-certification program were adopted for the purpose of determining whether an individual should be covered by Maine's Unemployment Insurance program, should it be obtained by the business based on the relationship the business intends to have with those individuals the business contracts with or by the individual who wants to be considered an independent contractor?

Business 1 Individual 2 Both 2 Either 1

7. If an Independent Contractor pre-certification program were created, what factors should be considered in determining whether an Independent Contractor pre-certification should be granted? (check all that you believe should be considered)

Freedom from the direction and control of the contracting business 4
Degree to which individual is established as independent business 6
History of working for multiple companies within a year 5
Whether or not the individual has employees of his or her own 5
Location where contracted services are performed 3
Whether or not the individual provides his or her own tools and equipment 3
Degree to which the individual pays for materials and/or supplies 4
Degree to which the individual pays for job-related expenses, such as travel 4
Degree of responsibility if the work performed is unsatisfactory 6
Degree of liability for damages or losses incurred by the individual 4
Professional licenses the individual must hold to perform work 3
Individual files business tax returns with the IRS 6

Other Factors to consider: Economic realities of the parties (is the contractor essentially relying on the company for his/her livelihood or is the contractor free to provide similar services to others?), and nature of the company's business and the contractor's business (i.e. whether the contractor is providing services that are unrelated to the company's own business)

8. How should the administrative costs of an Independent Contractor pre-certification program be funded?

Application fees paid by the business 4 Application fees paid by the individual 4

Legislative appropriation (state revenues) 2

9. If an Independent Contractor pre-certification were adopted, should it be valid for:

Less than one year 0 One year 1 Two years 3
Longer than 2 years 3, if so, for how long? 1 stated for 3 years, 1 stated for the
duration of the relationship. One also stated that this should be valid for WC as well as
other taxing entities in addition to UI.

10. Do you have additional comments you wish to make about this issue?

The issue with regard to freedom from control is difficult to evaluate for many clients. The relationship between a business and an independent contractor is often governed by a contract or agreement. To the extent that either directs or controls the performance of the contractor, answering the questions on this matter is difficult.

A pre-certification program would create a level of administration within state government that is unnecessary. Making the definition more clear and workable by businesses and independent contractors would go a long way toward resolution of the issues.”

The ABC test is unusually onerous and unfriendly to businesses. Use of a less expansive test would be helpful to businesses and contractors alike.

I think the certification process is only worthwhile if it applies to more than just the UI laws – i.e., a business should not be led to believe that it has an independent contractor relationship for UI purposes only to find out that, after a workplace injury, it is responsible for (uninsured) workers’ compensation benefits because the individual does not meet the independent contractor standards for purposes of the workers’ compensation laws.

11. **OPTIONAL:** Firm name: _____ Contact Name: _____
Email Address: _____

Thank you very much for taking the time to respond to this important survey.

*(if sent out as hard copy, include: “**Please complete and return survey in postage paid envelope no later than November 22, 2006**”)*

Appendix II

Copies of the ABC Test Questionnaires Used with Business Owners
and Contract Workers to Determine Covered Employment Status
for Unemployment Compensation

MAINE DEPARTMENT OF LABOR
 Bureau of Unemployment Compensation
 19 Union Street, P.O. Box 259
 Augusta, ME 04332-0259

QUESTIONNAIRE REGARDING EMPLOYMENT RELATIONSHIP WITH WORKER

Directions: Please complete the following questions so that we may determine if the services provided to you are considered covered employment.

Company	Worker
Business Name	Social Security Number
Business Address	Worker's Address
Business Telephone Number	Worker's Telephone Number

1. Describe the company's business: _____
2. Describe the worker's duties with the company: _____
3. Beginning date of worker's employment: _____
 Ending date of worker's employment: _____
4. Where are the worker's services performed? _____
5. How did you come to hire this worker? _____
6. What type of the work did this person do before working for you? _____
7. Who obtained contracts with customers for work performed by this worker?
 The worker
 The company
 Other (please explain) _____
8. How does the company pay this worker? Commissions; Hourly; Salary;
 Hourly plus commissions; Salary plus commissions; Other (please explain): _____
9. How often does the company pay this worker? Weekly; Every other week; Monthly;
 Other (please explain): _____
10. Was the amount paid negotiated with the worker? Yes No
11. Did the worker receive training by the company? Yes No
12. How often does this person work for you? Full-time, year-round; Part-time, year-round;
 Full-time, seasonal; Part-time, seasonal; Contractual; Other (please explain): _____
13. Does the worker hire, supervise, or train other workers at the company's expense? Yes No
14. Does the worker have his or her own workers? Yes No
15. Does the worker use/pay subcontractors? Yes No

16. Who furnishes the tools and equipment for the work performed?
 The worker
 The company
 Other (please explain): _____
17. Does the company set this worker's employment schedule? Yes No
18. Does the company require this worker to report each day to a certain location? Yes No
19. Does the company cover this worker under its Workers' Compensation Insurance?..... Yes No
20. Does the worker advertise his or her services to the general public?..... Yes No
21. Does the worker have his or her own place of business?..... Yes No
22. Who pays for work the worker performs that must be done over?
 The worker
 The company
 The customer
 Other (please explain): _____
23. Is the worker required to provide insurance for loss or damage that he or she might cause while working? Yes No
24. Does the worker have a license to perform his or her work? Yes No
25. May the worker end the relationship with the company without any obligation to the company? Yes No
26. May the company end its relationship with the worker without any obligation?..... Yes No
27. Who pays for the materials and supplies used by the worker?
 The worker
 The company
 The customer
 Other (please explain): _____
28. Who pays for the worker's job-related expenses, such as travel?
 The worker
 The company
 Other (please explain) _____
29. Can the worker lose money by working for the company? Yes No
30. Does the company provide benefits to the worker, such as health insurance or sick pay?..... Yes No

Please attach and submit with this questionnaire copies of all written agreements between your company and the worker:

Signature of Company Representative	Title of Company Representative	Date

QUESTIONS?

Contact a Status Representative at (207) 287-3176; Fax at (207) 287-3733,
 TTY (Deaf / Hard of Hearing): 1-800-794-1110, e-mail at division.uctax@Maine.gov or
 contact a Field Advisor and Examiner at one of the numbers below:

Augusta..... (207) 287-6456	Bangor.....(207) 561-4094	Lewiston..... (207) 753-2897
Machias..... (207) 255-1934	Portland.....(207) 822-0212	Presque Isle (207) 768-6813
Saco.....(207) 286-2677	Wilton(207) 645-5825	

MAINE DEPARTMENT OF LABOR
 Bureau of Unemployment Compensation
 19 Union Street, P.O. Box 259
 Augusta, ME 04332-0259

QUESTIONNAIRE REGARDING EMPLOYMENT RELATIONSHIP WITH COMPANY

Directions: Please complete the following questions so that we may determine if the services you provide are considered covered employment.

Worker	Company
Social Security Number	Business Name
Address	Business Address
Telephone Number	Business Telephone Number

1. Describe the type of business the company has: _____
2. Describe your job with the company: _____
3. Beginning date of employment with company: _____
 Ending date of employment with company: _____
4. What type of the work did you do before working for this company? _____
 What type of work did you do after working for this company? _____
5. How did you get the job with this company? _____
6. How often does the company pay you? Weekly; Every other week; Monthly;
 Other (please explain): _____
7. Are you paid? Commissions; Hourly; Salary; Hourly plus commissions;
 Salary plus commissions; Other (please explain): _____
8. Was the amount of wages you were paid negotiated with the company? Yes No
9. Who obtained the contract with customer for work you performed for the company?
 I obtained my own contracts with customers
 The company obtained contracts with customers
 Other (please explain): _____
10. If there were a problem with the work you did, whom would the customer contact?
 The worker
 The company
 An official customer service representative of the company
 Other (please explain): _____
11. Did you receive any training from the company? Yes No
12. How often did you work for the company? Full-time, year-round; Part-time, year-round;
 Full-time, seasonal; Part-time, seasonal; Contractual; Other (please explain): _____
13. Do you hire, supervise, or train other workers at the company's expense? Yes No
14. Do you have any workers of your own? Yes No
15. Do you use/pay subcontractors? Yes No

16. Do you furnish **all** of your own tools and equipment? Yes No
17. Does the company set the hours that you work? Yes No
18. Are you required by the company each day to report to a certain location? Yes No
19. Are you covered by the company's Workers' Compensation Insurance? Yes No
20. Do you have your own place of business? Yes No
21. Do you file business tax returns with the IRS? Yes No
22. Do you make it known to the public that you have an established business? Yes No

If "Yes," please give examples of how you do this: _____
 Also, if "Yes," please provide the names of two (2) customers that you obtained on your own:
 Customer #1 _____
 Customer #2 _____

23. Who pays for work that must be done over?
 You, the worker
 The company
 The customer
 Other (please explain): _____
24. Are you required to provide and pay for insurance for losses or damages that you may cause when working? Yes No
25. Do you have a license to perform your work? Yes No
26. May you end your relationship with the company at any time without any obligation to the company? Yes No
27. May the company end its relationship with you at any time without any obligation to you? Yes No
28. Who pays for the materials and/or supplies used in your work?
 You, the worker
 The company
 The customer
 Other (please explain): _____
29. Who pays for your job-related expenses, such as travel?
 You, the worker
 The company
 The customer
 Other (please explain) _____
30. Can you lose money because of this work? Yes No
31. Do you share in any company-paid benefits plan, such as health insurance or sick pay? Yes No

Please attach and submit with this questionnaire copies of all written agreements between you and the company.

Signature of Worker	Date
---------------------	------

QUESTIONS?

Contact a Status Representative at (207) 287-3176; Fax at (207) 287-3733,
 TTY (Deaf / Hard of Hearing): 1-800-794-1110, e-mail at division.uctax@Maine.gov or
 contact a Field Advisor and Examiner at one of the numbers below:

Augusta (207) 287-6456	Bangor (207) 561-4094	Lewiston (207) 753-2897
Machias (207) 255-1934	Portland (207) 822-0212	Presque Isle (207) 768-6813
Saco (207) 286-2677	Wilton (207) 645-5825	

Appendix III

The Montana Law Code for Independent Contractors

The Montana Independent Contractor Application and Affidavit

Montana Code Annotated 2005

[Previous Section](#) [MCA Contents](#) [Part Contents](#) [Search](#) [Help](#) [Next Section](#)

39-71-417. Independent contractor certification. (1) (a) A person who regularly and customarily performs services at a location other than the person's own fixed business location shall apply to the department for an independent contractor exemption certificate unless the person has elected to be bound personally and individually by the provisions of compensation plan No. 1, 2, or 3.

(b) A person who meets the requirements of this section and receives an independent contractor exemption certificate is not required to obtain a personal workers' compensation insurance policy.

(c) For the purposes of this section, "person" means a sole proprietor, a working member of a partnership, a working member of a limited liability partnership, or a working member of a member-managed limited liability company.

(2) The department shall adopt rules relating to an original application for or renewal of an independent contractor exemption certificate. The department shall adopt by rule the amount of the fee for an application or certificate renewal. The application or renewal must be accompanied by the fee.

(3) The department shall deposit the application or renewal fee in an account in the state special revenue fund to pay the costs of administering the program.

(4) (a) To obtain an independent contractor exemption certificate, the applicant shall swear to and acknowledge the following:

(i) that the applicant has been and will continue to be free from control or direction over the performance of the person's own services, both under contract and in fact; and

(ii) that the applicant is engaged in an independently established trade, occupation, profession, or business and will provide sufficient documentation of that fact to the department.

(b) For the purposes of subsection (4)(a)(i), an endorsement required for licensure, as provided in 37-47-303, does not imply or constitute control.

(5) An applicant for an independent contractor exemption certificate shall submit an application under oath on a form prescribed by the department and containing the following:

(a) the applicant's name and address;

(b) the applicant's social security number;

(c) each occupation for which the applicant is seeking independent contractor certification; and

(d) other documentation as provided by department rule to assist in determining if the applicant has an independently established business.

(6) The department shall issue an independent contractor exemption certificate to an applicant if the department determines that an applicant meets the requirements of this section.

(7) (a) When the department approves an application for an independent contractor exemption certificate and the person is working under the independent contractor exemption certificate, the person's status is conclusively presumed to be that of an independent contractor.

(b) A person working under an approved independent contractor exemption certificate has waived all rights and benefits under the Workers' Compensation Act and is precluded from obtaining benefits unless the person has elected to be bound personally and individually by the provisions of compensation plan No. 1, 2, or 3.

(c) For the purposes of the Workers' Compensation Act, a person is working under an independent contractor exemption certificate if:

(i) the person is performing work in the trade, business, occupation, or profession listed on the person's independent contractor exemption certificate; and

(ii) the hiring agent and the person holding the independent contractor exemption certificate do not have a written or an oral agreement that the independent contractor exemption certificate holder's status with respect to that hiring agent is that of an employee.

(8) Once issued, an independent contractor exemption certificate remains in effect for 2 years unless:

(a) suspended or revoked pursuant to 39-71-418; or

(b) canceled by the independent contractor.

(9) If the department denies an application for an independent contractor exemption certificate, the applicant may contest the denial by petitioning the workers' compensation court within 30 days of the mailing of the denial.

History: En. Sec. 1, Ch. 448, L. 2005.

Provided by Montana Legislative Services

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
INDEPENDENT CONTRACTOR EXEMPTION CERTIFICATE AFFIDAVIT
APPLICATION FOR TWO (2) YEAR EXEMPTION
FEE \$125

State of _____)
County of _____) : SS

I, _____, being first duly sworn, state:
(applicant's name)

1. I am making these statements and representations in order to apply for an independent contractor exemption certificate with the Montana Department of Labor and Industry (Department). I understand the Department is relying on the truth and accuracy of these statements when approving my independent contractor exemption certificate.

2. My business structure is: ___ Sole Proprietor ___ Partnership or LLP ___ Member of a Member-Managed LLC

My name is: _____
(Last) (First) (Middle)

My mailing address is: _____
(Street or PO Box) (City) (State) (Zip)

I do business as (DBA) _____
(Name of business)

My DBA physical address is: _____
(Street or directions to physical location) (City) (State) (Zip)

My telephone number is: (____) _____ My social security number is: _____
You are required to notify the Department if any of the above information changes after the certificate is granted.

3. I have an independently established trade, occupation, profession or business. My occupation(s) for which I am applying is/are: _____

I am providing documentation to the Department that demonstrates I have an established business for each occupation listed above. (See Instructions on back)

4. When acting as an independent contractor I must be free from control or direction over the performance of my services and the details of my work, both under contract and in fact. The hiring agent only offers direction and exercises control in matters essential to specifying the end result.

5. I understand and agree that if my Independent Contractor Exemption Certificate is granted, I waive all rights and benefits under the Workers' Compensation Act of Montana (Act). I understand I am precluded from obtaining benefits under the Act from the hiring agent related to my work performance as an independent contractor. I understand and agree that I am responsible for all taxes related to my work as an independent contractor. I understand as an independent contractor I will not be afforded protections under the Wage Payment Act, the Human Rights Act, the provisions of the Unemployment Insurance Laws, or the Workers' Compensation Act.

6. I also understand that if granted, the Independent Contractor Exemption Certificate will remain in effect for TWO years for the occupations listed on the certificate, unless I notify the Department in writing that I want to have the exemption cancelled, or the Department revokes or suspends the Independent Contractor Exemption Certificate. I understand that if I want to maintain my independent contractor exemption, I will have to re-qualify every two years.

Notice to Applicants: Montana law provides for a civil penalty of up to \$1,000 for each violation of the following: A person may not perform work as an independent contractor without obtaining either workers' compensation insurance or an Independent Contractor Exemption Certificate; perform work as an independent contractor when the Department has revoked or denied the Independent Contractor's Exemption Certificate; transfer to another person or allow another person to use an Independent Contractor Exemption Certificate that was not issued to that person; alter or falsify an Independent Contractor Exemption Certificate; and/or misrepresent the person's status as an independent contractor. The Department has the authority to investigate your working relationships as an independent contractor. If through investigation, the Department determines you are acting as an employee, this exemption may be suspended or revoked.

Notice to Employers: Montana law prohibits employers from avoiding their responsibility to provide workers' compensation insurance for employees. An employer may not require an employee through coercion, misrepresentation, or fraudulent means to adopt independent contractor status or exert control to a degree that destroys the independent contractor relationship. In addition to any other penalty or sanction, a person or employer who violates a provision of the law is subject to a fine to be assessed by the Department of up to \$1,000 for each violation.

Notice to Hiring Agents: You can be found to be an employer if you have the right to control or exercise control over the worker. A person who violates a provision of the law is subject to a fine to be assessed by the Department of up to \$1,000 for each violation.

By signing this affidavit and the associated waiver form, I understand and agree that if my Independent Contractor Exemption Certificate is granted I WAIVE ALL RIGHTS AND BENEFITS THAT I HAVE UNDER MONTANA'S WORKERS' COMPENSATION ACT. I further declare that I am 18 years old or older, and that all of the information I have supplied in and with this Affidavit is true.

By: _____
Applicant Signature

SUBSCRIBED AND SWORN before me this _____ day of _____, 20____.

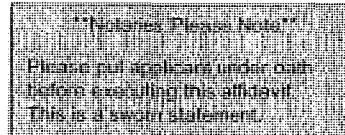
Signature of Notary Public

Printed Name of Notary Public

(Notarial seal)

Residing at _____

My commission expires _____



Complete this form only if you are a sole proprietor, a working member of a partnership or a limited liability partnership (If claiming to be a partnership, you must provide a signed partnership agreement), or a member of a member-managed limited liability company and do not want workers' compensation on yourself. Independent contractor exemption certificates are issued individually. Each person requesting an exemption completes his or her own form.

If you have any questions about completing this affidavit or the waiver, or determining if you are an independent contractor, please call the Independent Contractor Central Unit in Helena at (406) 444-9029. You may visit our website at www.mtcontractor.com

INSTRUCTIONS

1. Read the entire affidavit and the entire accompanying waiver before signing. NOTE: The waiver is a legal document that when signed waives statutory workers' compensation benefits.

2. If you understand all of the statements on both forms and believe you qualify as an independent contractor, complete the affidavit and the waiver in the manner identified below.

3. In paragraph 2 of the affidavit, provide the following information:

- my business structure is (mark the appropriate blank with a check or X)
- my name is (include your full individual name)
- my mailing address is (include the number, street, box, city, state and zip code)
- I Do Business As (DBA) (business name)
- DBA physical address (include the number, street, directions, city, state and zip code)
- telephone number
- social security number

4. In paragraph 3 of the affidavit, you must list trades, occupations, professions, or businesses for which you are claiming an independent contractor exemption certificate.

5. Individuals who submit documentation for each trade, occupation, profession, or business that totals 15 points will receive an Independent Contractor Exemption Certificate. A maximum of two items may be submitted for consideration in each category. The Department may award points for items submitted up to the total points in each category. Items provided for certification may receive up to the following point value:

WC, UI, Revenue accounts for employees (all three)	10 pts	List of equipment & tools with approximate value	6 pts
Memo of Understanding or Contract evidencing independent contractor status	6 pts	Liability insurance policy	6 pts
Business location, lease or rental agreement	6 pts	Bonding	6 pts
Trucking company lease agreement	6 pts	Business Tax form or records Sched C, E, F, or K	6 pts
Valid, current Partnership Agreement	3 pts	Form 1099's / business tax receipt	3 pts
Professional License	3 pts	Application or business license permit	3 pts
Registered name of business with SOS	3 pts	Business structure registered with the SOS	3 pts
Internet, on a professional list, or affiliation	3 pts	Education certification	3 pts
Fed Employer Identification Number FEIN	1.5 pts	Advertises services in a newspaper, phone book	3 pts
Business bank account	1.5 pts	Two or more bids or estimates	3 pts
Credit card - charge account in business name	1.5 pts	Telephone bill in business name	1.5 pts
Advertises using sign on vehicle, in yard, bulletin boards, corner lamp post, flyers	1.5 pts	Printed invoices, cards, brochures	1.5 pts
		Proof of orders for printed hats or shirts	1.5 pts
		Standard billing invoices	1.5 pts

6. Sign at the bottom of the affidavit and have your signature notarized. In addition to confirming your identity, the notary must require you to verbally swear to the truth of the information supplied in and with your affidavit. If you agree to waive your rights as detailed in the waiver, sign the waiver and have your signature notarized.

7. Both the waiver and affidavit must be completed or your application will be denied.

8. Pay special attention to the civil penalty for misrepresentations made concerning a person's status as an independent contractor.

9. Make checks payable to Montana Department of Labor & Industry in the amount of \$125.

10. Mail the completed waiver, affidavit, attached documentation, and \$125 fee to:

Montana Department of Labor and Industry
 Employment Relations Division
 Independent Contractor Central Unit
 P.O. Box 8011
 Helena, MT 59604-8011