

# MAINE STATE LEGISLATURE

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1 (New Draft of H.P. 893, L.D. 1158)

2 FIRST REGULAR SESSION  
3

4 ONE HUNDRED AND ELEVENTH LEGISLATURE  
5

6 Legislative Document

No. 1635

7  
8 H.P. 1231

House of Representatives, May 18, 1983

9 Reported by Representative Pouliot from the Committee on Business  
10 Legislation and printed under Joint Rule 2.

Original bill presented by Representative Hall of Sangerville.

11 EDWIN H. PERT, Clerk

12  
13 STATE OF MAINE  
14

15 IN THE YEAR OF OUR LORD  
16 NINETEEN HUNDRED AND EIGHTY-THREE  
17

18 AN ACT to Clarify Independent Contractor  
19 Status Under the Workers' Compensation Act.  
20

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

23 39 MRSA §2, sub-§5, ¶A, as amended by PL 1981, c.  
24 283, §2, is further amended to read:

25 A. "Employee" shall include officials of the  
26 State, counties, cities, towns, water districts  
27 and all other quasi-public corporations of a  
28 similar character, every duly elected or  
29 appointed executive officer of a private corpora-  
30 tion, other than a charitable, religious, educa-  
31 tional or other nonprofit corporation, and every  
32 person in the service of another under any con-  
33 tract of hire, express or implied, oral or writ-  
34 ten, except:

1 (1) Persons engaged in maritime employment,  
2 or in interstate or foreign commerce, who  
3 are within the exclusive jurisdiction of  
4 admiralty law or the laws of the United  
5 States; and persons operating as sternmen as  
6 defined in Title 36, section 5102, subsec-  
7 tion 8-A-;

8 (2) Any person whose employment is not in  
9 the usual course of the business, profes-  
10 sion, trade or occupation of his employer.  
11 An independent contractor. Firefighters and  
12 policemen shall be deemed employees within  
13 the meaning of this Act. Employers who hire  
14 workmen within this State to work outside  
15 the State may agree with such workmen that  
16 the remedies under this Act shall be exclu-  
17 sive as regards injuries received outside  
18 this State arising out of and in the course  
19 of such employment; and all contracts of  
20 hiring in this State, unless otherwise  
21 specified, shall be presumed to include such  
22 agreement. Any reference to an employee who  
23 has been injured shall, when the employee is  
24 dead, include his legal representatives,  
25 dependents and other persons to whom compen-  
26 sation may be payable-;

27 (3) Notwithstanding any other provisions of  
28 this Act, any charitable, religious, educa-  
29 tional or other nonprofit corporation that  
30 may be or become an assenting employer under  
31 this Act, may cause any duly elected or  
32 appointed executive officer to be an  
33 employee of such corporation by specifically  
34 including such executive officer among those  
35 to whom such corporation secures payment of  
36 compensation in conformity with subchapter  
37 II; and such executive officer shall remain  
38 an employee of such corporation under this  
39 Act while such payment is so secured. With  
40 respect to any such corporation that secures  
41 compensation by making a contract of work-  
42 ers' compensation insurance, specific inclu-  
43 sion of such executive officer in such con-  
44 tract shall cause such officer to be an  
45 employee of such corporation under this  
46 Act-;

1 (4) Any person who states in writing to the  
2 commission that he waives all the benefits  
3 and privileges provided by the workers' com-  
4 pensation laws, provided that the commission  
5 shall have found such person to be a bona  
6 fide owner of at least 20% of the outstand-  
7 ing voting stock of the corporation by which  
8 he is employed and that this waiver was not  
9 a prerequisite condition to employment.

10 Any person may revoke or rescind his waiver  
11 upon 30 days' written notice to the commis-  
12 sion and his employer. The parent, spouse,  
13 or child of a person who has made a waiver  
14 under the previous sentence may state, in  
15 writing, that he waives all the benefits and  
16 privileges provided by the workers' compen-  
17 sation laws if the commissioner finds that  
18 the waiver is not a prerequisite condition  
19 to employment and if the parent, spouse or  
20 child is employed by the same corporation  
21 which employs the person who has made the  
22 first waiver-;

23 (5) The parent, spouse or child of a sole  
24 proprietor who is employed by that sole pro-  
25 prietor or the parent, spouse or child of a  
26 partner who is employed by the partnership  
27 of that partner may state, in writing, that  
28 he waives all the benefits and privileges  
29 provided by the workers' compensation laws  
30 if the commission finds that the waiver is  
31 not a prerequisite condition to employment-;  
32 or

33 (6) Employees of an agricultural employer  
34 when harvesting 150 cords of wood or less  
35 each year from farm wood lots, provided that  
36 the employer is covered under an employer's  
37 liability insurance policy as required in  
38 subsection 1-A.

1 STATEMENT OF FACT

2 The purpose of this new draft, like the original  
3 bill, is to address concerns which have been raised  
4 as a result of a recent decision of the Law Court in  
5 Timberlake v. Frigon & Frigon, 438 A.2d 1294 (Me.,  
6 1982). In that case, it appears that the court has  
7 signaled a new approach in the determination of inde-  
8 pendent contractor status under the Workers' Compem-  
9 sation Act. A result of that decision has been to  
10 cast doubt upon long-standing work arrangements which  
11 presumed the existence of independent contractor  
12 relationships.

13 The judicially-developed concept of the independ-  
14 ent contractor has come about in an attempt to define  
15 the responsibilities of employers with respect to  
16 their employees and others, with whom they contract  
17 for services. Traditionally, the decision of whether  
18 a person is an independent contractor has involved a  
19 combined factual and legal determination made with  
20 reference to a list of 8 criteria. These 8 tradi-  
21 tional tests, as set out in the Timberlake decision,  
22 are:

23 "(1) the existence of a contract for the perfor-  
24 mance by a person of a certain piece or kind of  
25 work at a fixed price; (2) independent nature of  
26 his business or his distinct calling; (3) his  
27 employment of assistants with the right to super-  
28 vise their activities; (4) his obligation to fur-  
29 nish necessary tools, supplies, and materials;  
30 (5) his right to control the progress of the work  
31 except as to final results; (6) the time for  
32 which the workman is employed; (7) the method of  
33 payment, whether by time or by job; (8) whether  
34 the work is part of the regular business of the  
35 employer."

36 Timberlake, 438 A.2d at 1296. Of these 8 tests, no  
37 single factor was decisive; a decision was based on a  
38 delicate balancing of a number of factors.

39 The opinion in Timberlake (at page 1298) indi-  
40 cates that "under the traditional control test the  
41 factors weight heavily towards an employer-employee  
42 relationship." However, the opinion also states that

1 the court will assign "special importance" to a sin-  
2 gle factor: The nature of the person's work and its  
3 relation to the employer's business.

4 The effect of this special emphasis in the  
5 court's opinion on one of the 8 factors has been to  
6 create a perceived narrowing of the definition of  
7 independent contractor and a correlative broadening  
8 of the definition of employee under the Workers' Com-  
9 pensation Act. Such a change would produce signifi-  
10 cant and sometimes costly changes in the relation-  
11 ships between businesses and those with whom they  
12 contract for services.

13 This new draft is an attempt to address the basis  
14 for the court's approach, by removing language in the  
15 Act which gave rise to this special emphasis. Placed  
16 in context, the relevant language currently reads:

17 "5. Employee

18 A. "Employee" shall include...every person in  
19 the service of another under any contract of  
20 hire, express or implied, oral or written,  
21 except:

22  
23 (2) Any person whose employment is not in  
24 the usual course of the business, profes-  
25 sion, trade or occupation of his employer."

26 (Title 39, section 2, subsection 5, paragraph A,  
27 subparagraph 2; emphasis added). By removing this  
28 language and inserting in its place the language "an  
29 independent contractor," this measure would express  
30 the legislative intent not to give special emphasis  
31 to this single factor, but to maintain the tradi-  
32 tional approach used before Timberlake, in determin-  
33 ing employment status under the Workers' Compensation  
34 Act.

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