

# MAINE STATE LEGISLATURE

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(After Deadline)  
FIRST REGULAR SESSION

ONE HUNDRED AND THIRTEENTH LEGISLATURE

Legislative Document

NO. 1732

H.P. 1266 House of Representatives, June 2, 1987  
Approved for introduction by a majority of the  
Legislative Council pursuant to Joint Rule 27.  
Referred to the Committee on Labor and ordered printed.  
Sent up for concurrence. Ordered sent forthwith.  
EDWIN H. PERT, Clerk  
Presented by Representative STEVENS of Bangor.  
Cosponsored by Representatives RYDELL of Brunswick, CLARK  
of Millinocket and Senator BUSTIN of Kennebec.

STATE OF MAINE

IN THE YEAR OF OUR LORD  
NINETEEN HUNDRED AND EIGHTY-SEVEN

AN ACT to Clarify the Definition of  
Independent Contractor for the  
Purposes of Workers' Compensation.

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

39 MRSA §2, sub-§5, ¶A, as amended by PL 1985, c.  
819, Pt. A, §44, is further amended to read:

A. "Employee" includes officials of the State,  
counties, cities, towns, water districts and all  
other quasi-public corporations of a similar  
character, every duly elected or appointed execu-  
tive officer of a private corporation, other than  
a charitable, religious, educational or other  
nonprofit corporation, and every person in the

1 service of another under any contract of hire,  
2 express or implied, oral or written, except:

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

10 (1-A) Any person whose employment is not in  
11 the usual course of the business, profes-  
12 sion, trade or occupation of his employer;  
13

14 (2) Firefighters, including volunteer fire-  
15 fighters who are active members of a volun-  
16 teer fire fighters' association, as defined  
17 in Title 30, section 3771; volunteer emer-  
18 gency medical services' persons, as defined  
19 in Title 32, section 83, subsection 12; and  
20 policemen shall be deemed employees within  
21 the meaning of this Act. In computing the  
22 average weekly wage of an injured volunteer  
23 firefighter or volunteer emergency services'  
24 person, the average weekly wage shall be  
25 taken to be the earning capacity of the in-  
26 jured employee in the occupation in which he  
27 is regularly engaged. Employers who hire  
28 workmen within this State to work outside  
29 the State may agree with such workmen that  
30 the remedies under this Act shall be exclu-  
31 sive as regards injuries received outside  
32 this State arising out of and in the course  
33 of that employment; and all contracts of  
34 hiring in this State, unless otherwise spec-  
35 ified, shall be presumed to include such an  
36 agreement. Any reference to an employee who  
37 has been injured shall, when the employee is  
38 dead, include his legal representatives, de-  
39 pendants and other persons to whom compensa-  
40 tion may be payable;

41 (3) Notwithstanding any other provisions of  
42 this Act any charitable, religious, educa-  
43 tional or other nonprofit corporation that

1 may be or may become an assenting employer  
2 under this Act may cause any duly elected or  
3 appointed executive officer to be an employ-  
4 ee of the corporation by specifically in-  
5 cluding the executive officer among those to  
6 whom the corporation secures payment of com-  
7 pensation in conformity with subchapter II;  
8 and the executive officer shall remain an  
9 employee of the corporation under this Act  
10 while such payment is so secured. With re-  
11 spect to any corporation that secures com-  
12 pensation by making a contract of workers'  
13 compensation insurance, specific inclusion  
14 of the executive officer in the contract  
15 shall cause the officer to be an employee of  
16 the corporation under this Act;

17 (4) Any person who states in writing to the  
18 commission that he waives all the benefits  
19 and privileges provided by the workers' com-  
20 pensation laws, provided that the commission  
21 shall have found that person to be a bona  
22 fide owner of at least 20% of the outstand-  
23 ing voting stock of the corporation by which  
24 he is employed and that this waiver was not  
25 a prerequisite condition to employment.

26 Any person may revoke or rescind his waiver  
27 upon 30 days' written notice to the commis-  
28 sion and his employer. The parent, spouse or  
29 child of a person who has made a waiver un-  
30 der the previous sentence may state, in  
31 writing, that he waives all the benefits and  
32 privileges provided by the workers' compen-  
33 sation laws if the commissioner finds that  
34 the waiver is not a prerequisite condition  
35 to employment and if the parent, spouse or  
36 child is employed by the same corporation  
37 which employs the person who has made the  
38 first waiver;

39 (5) The parent, spouse or child of a sole  
40 proprietor who is employed by that sole pro-  
41 prietor or the parent, spouse or child of a  
42 partner who is employed by the partnership  
43 of that partner may state, in writing, that  
44 he waives all the benefits and privileges

1 provided by the workers' compensation laws  
2 if the commission finds that the waiver is  
3 not a prerequisite condition to employment;

4 (6) Employees of an agricultural employer  
5 when harvesting 150 cords of wood or less  
6 each year from farm wood lots, provided that  
7 the employer is covered under an employer's  
8 liability insurance policy as required in  
9 subsection 1-A; or

10 (7) An independent contractor. That status  
11 shall be determined by considering the fol-  
12 lowing factors which, to the extent they ex-  
13 ist, shall be weighed evenly in making the  
14 determination of the existence of the inde-  
15 pendent contractor status:

16 (a) The existence of a contract for  
17 the performance by a person of a cer-  
18 tain piece or kind of work at a fixed  
19 price;

20 (b) The independent nature of the  
21 worker's business or his distinct call-  
22 ing;

23 (c) The worker's employment of assist-  
24 ants with the right to supervise their  
25 activities;

26 (d) The worker's obligation to furnish  
27 necessary tools, supplies and materi-  
28 als;

29 (e) The worker's right to control the  
30 process of the work except as to final  
31 results;

32 (f) The time for which the worker is  
33 employed;

34 (g) The method of payment to the work-  
35 er, including whether it is by time or  
36 by job or whether it is a lump sum or  
37 with deductions taken out; and

1 (h) Whether the work done by the work-  
2 er is in fact part of the regular busi-  
3 ness of the employer.

4 STATEMENT OF FACT

5 Public Law 1983, chapter 402, AN ACT to Clarify  
6 Independent Contractor Status Under the Workers' Com-  
7 pensation Act, deleted language found in the Maine  
8 Revised Statutes, Title 39, section 2, subsection 5,  
9 paragraph A, subparagraph (2), which said that the  
10 term an "employee" shall not include: "Any person  
11 whose employment is not in the usual course of the  
12 business, profession, trade or occupation of his em-  
13 ployer." Apparently, the reason for this deletion was  
14 to bolster what was then a recent extension and fur-  
15 ther emasculatation of the doctrine of independent con-  
16 tractor by the Court. In Timberlake v. Frigon, 438  
17 A.2d 1294 (Me. 1982), the Court had emphasized this  
18 exception to the employee-employer relationship. The  
19 Law Court was recently at pains to point out that its  
20 reference to Title 39, section 2, subsection 5, para-  
21 graph A, subparagraph (2), in Timberlake was "simply  
22 to show that our emphasis upon business purpose was  
23 in substantial conformity with the ultimate purposes  
24 of the Workers' Compensation Act as likewise mani-  
25 fested in its nonbusiness exemption." Brubach v.  
26 Almy (Slip opinion decided on January 16, 1987) at p.  
27 11, n. 6.

28 The Legislature then responded to Timberlake by  
29 removing the "nonbusiness exemption" which protects  
30 citizens from claims arising out of situations such  
31 as when the teenager who mows a lawn is injured or  
32 the painter who comes and paints a room in a house is  
33 injured or the carpenter or roofer who comes to re-  
34 pair a leak is injured. None of these people were  
35 "employees" before the enactment of Public Law 1983,  
36 chapter 402; however, under current interpretation of  
37 the law, they may be "employees." A simple inquiry  
38 with a local insurance agent will confirm that a home  
39 owner has no insurance, and in all probability can  
40 get no insurance, to cover the risk of such injury.

1 The enactment of Title 39, section 2, subsection  
2 5, paragraph A, subparagraph (1-A), merely replaces  
3 the "nonbusiness exemption" and gives the citizens of  
4 this State the protection they had before chapter 402  
5 was enacted.

6 The addition to Title 39, section 2, subsection  
7 5, paragraph A, subparagraph (7), addresses the prob-  
8 lem of independent contractors' status. It makes  
9 clear and reaffirms the Legislature's intent not to  
10 emasculate the concept that an independent contractor  
11 is not an "employee" under the Workers' Compensation  
12 Act. This bill goes further to indicate the  
13 Legislature's express repudiation of what has become  
14 known as the "relative nature of the work" test to  
15 determine whether one is or is not an independent  
16 contractor. This bill will assist the public by de-  
17 fining the term "independent contractor" which ap-  
18 pears in Title 39, section 2, subsection 5, paragraph  
19 A, subparagraph (7), by adopting the so-called "com-  
20 mon law analysis," (see Brubach v. Almy, supra, at p.  
21 11) as found in earlier Court decisions such as  
22 Madore v. Liberty National Bank, 289 A.2d 38 (Me.  
23 1972). The public will have a more clearly defined  
24 set of criteria by which to guide their employment  
25 relationships.

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