

MAINE STATE LEGISLATURE

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(New Draft of H.P. 982, L.D. 1329)
(New Title)
FIRST REGULAR SESSION

ONE HUNDRED AND THIRTEENTH LEGISLATURE

Legislative Document

NO. 1844

H.P. 1350 House of Representatives, June 12, 1987
Reported by Representative WILLEY from the Committee on
Labor and printed under Joint Rule 2.

EDWIN H. PERT, Clerk
Original bill sponsored by Representative MANNING of
Portland. Cosponsored by Representatives SIMPSON of Casco,
CURRAN of Westbrook, and RYDELL of Brunswick.

STATE OF MAINE

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

AN ACT Relating to Independent Contractors
under the Workers' Compensation Act.

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

Sec. 1. 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 admiralty
6 law or the laws of the United States; and persons
7 operating as sternmen as defined in Title 36,
8 section 5102, subsection 8-A;

10 (2) Firefighters, including volunteer fire-
11 fighters who are active members of a volunteer
12 fire fighters' association, as defined in Title
13 30, section 3771; volunteer emergency medical
14 services' persons, as defined in Title 32,
15 section 83, subsection 12; and policemen shall
16 be deemed employees within the meaning of this
17 Act. In computing the average weekly wage of an
18 injured volunteer firefighter or volunteer emer-
19 gency services' person, the average weekly wage
20 shall be taken to be the earning capacity of the
21 injured employee in the occupation in which he
22 is regularly engaged. Employers who hire
23 workmen within this State to work outside
24 the State may agree with such workmen that
25 the remedies under this Act shall be exclu-
26 sive as regards injuries received outside
27 this State arising out of and in the course
28 of that employment; and all contracts of
29 hiring in this State, unless otherwise spec-
30 ified, shall be presumed to include such an
31 agreement. Any reference to an employee who
32 has been injured shall, when the employee is
33 dead, include his legal representatives, de-
34 pendants and other persons to whom compensa-
35 tion may be payable;

37 (3) Notwithstanding any other provisions of
38 this Act any charitable, religious, educa-
39 tional or other nonprofit corporation that
40 may be or may become an assenting employer
41 under this Act may cause any duly elected or
42 appointed executive officer to be an employ-
43 ee of the corporation by specifically in-
44 cluding the executive officer among those to

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whom the corporation secures payment of compensation in conformity with subchapter II; and the executive officer shall remain an employee of the corporation under this Act while such payment is so secured. With respect to any corporation that secures compensation by making a contract of workers' compensation insurance, specific inclusion of the executive officer in the contract shall cause the officer to be an employee of the corporation under this Act;

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(4) Any person who states in writing to the commission that he waives all the benefits and privileges provided by the workers' compensation laws, provided that the commission shall have found that person to be a bona fide owner of at least 20% of the outstanding voting stock of the corporation by which he is employed and that this waiver was not a prerequisite condition to employment.

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Any person may revoke or rescind his waiver upon 30 days' written notice to the commission and his employer. The parent, spouse or child of a person who has made a waiver under the previous sentence may state, in writing, that he waives all the benefits and privileges provided by the workers' compensation laws if the commissioner finds that the waiver is not a prerequisite condition to employment and if the parent, spouse or child is employed by the same corporation which employs the person who has made the first waiver;

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(5) The parent, spouse or child of a sole proprietor who is employed by that sole proprietor or the parent, spouse or child of a partner who is employed by the partnership of that partner may state, in writing, that he waives all the benefits and privileges provided by the workers' compensation laws if the commission finds that the waiver is not a prerequisite condition to employment;

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

7 (7) An independent contractor; or

8 (8) If a person employs an independent con-
9 tractor, any employee of the independent
10 contractor is not considered an employee of
11 that person for the purposes of this Act.
12 The person who employs an independent con-
13 tractor is not responsible for providing
14 workers' compensation insurance covering the
15 payment of compensation and benefits to the
16 employees of the independent contractor. No
17 insurance company may charge a premium to
18 any person for any employee excluded by this
19 subparagraph.

20 Sec. 2. 39 MRSA §2, sub-§13 is enacted to read:

21 13. Independent contractor. "Independent con-
22 tractor" means a person who performs services for an-
23 other under contract, but who is not under the essen-
24 tial control or superintendence of the other person
25 while performing those services. In determining
26 whether such a relationship exists, the commission
27 shall consider the following factors:

28 A. Whether or not a contract exists for the per-
29 son to perform a certain piece or kind of work at
30 a fixed price;

31 B. Whether or not the person employs assistants
32 with the right to supervise their activities;

33 C. Whether or not the person has an obligation
34 to furnish any necessary tools, supplies and ma-
35 terials;

36 D. Whether or not the person has the right to
37 control the progress of the work, except as to
38 final results;

1 E. Whether or not the work is part of the regu-
2 lar business of the employer;

3 F. Whether or not the person's business or occu-
4 pation is typically of an independent nature;

5 G. The amount of time for which the person is
6 employed; and

7 H. The method of payment, whether by time or by
8 job.

9 In applying these factors, the commission shall not
10 give any particular factor a greater weight than any
11 other factor, nor shall the existence or absence of
12 any one factor be decisive. The commission shall
13 consider the totality of the relationship in deter-
14 mining whether an employer exercises essential con-
15 trol or superintendence of the person.

16 STATEMENT OF FACT

17 This new draft retains the clarification of ex-
18 isting law contained in the original bill. That
19 provision clarifies that the employees of an indepen-
20 dent contractor are not considered employees of the
21 person who employs the independent contractor to per-
22 form work and prohibits an insurance company from
23 charging any premium to the employer for wages paid
24 to an independent contractor's employees.

25 The new draft also codifies the traditional com-
26 mon law control test for defining the independent
27 contractor exception in the Workers' Compensation
28 Act. The definition of independent contractor is de-
29 rived directly from Law Court cases decided prior to
30 Timberlake v. Frigon & Frigon, 438 A.2d 1294 (Me.
31 1982). In the Timberlake decision, the court placed
32 special emphasis upon the single factor of whether
33 the work performed by a person was part of the em-
34 ployer's regular business. The Legislature reacted
35 with disapproval to that emphasis by repealing the
36 so-called "nonbusiness exemption" of the Workers'
37 Compensation Act, as was recognized by the court in
38 their decision in Brubach v. Almy, 520 A.2d 334, at

1 339 (Me. 1987). The addition of an express defini-
2 tion of independent contractor in the Workers' Com-
3 pensation Act will ensure that the traditional common
4 law test for independent contractor status will be
5 followed by the commission and the courts and no spe-
6 cial emphasis will be placed upon any single factor
7 of the test.

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