

MAINE STATE LEGISLATURE

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116th MAINE LEGISLATURE

SECOND REGULAR SESSION-1994

Legislative Document

No. 1745

S.P. 626

In Senate, January 19, 1994

An Act Concerning Independent Contractors.

Approved for introduction by a majority of the Legislative Council pursuant to Joint Rule 26.
Reference to the Committee on Labor suggested and ordered printed.

A handwritten signature in cursive script that reads "Joy J. O'Brien".

JOY J. O'BRIEN
Secretary of the Senate

Presented by Senator HANDY of Androscoggin.
Cosponsored by Senator: ESTY of Cumberland.

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

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Sec. 1. 1 MRSA §72, sub-§6-B is enacted to read:

6-B. Independent contractor. "Independent contractor" means an individual or business entity that provides labor or services for compensation if:

A. The individual or business entity is free from direction or control over the means and manner of providing the labor or services, subject only to the right of the person for whom the labor or services are provided to specify the desired results;

B. The individual or business entity is responsible for obtaining all business registrations or professional occupational licenses required by state law or municipal ordinance for the individual or entity to conduct the business;

C. The individual or business entity furnishes the tools or equipment necessary to perform the contracted labor or services;

D. The individual or business entity has the authority to hire and fire employees to perform the labor or services;

E. Payment for the labor or services is made upon completion of the performance of specified portions of a project or is made on the basis of an annual or other periodic retainer;

F. Federal and state income tax returns in the name of the business entity or a business Schedule C or farm Schedule F as part of the individual's personal income tax return were filed for the previous year if the individual or business entity performed labor or services for compensation as an independent contractor in the previous year; and

G. The individual or business entity represents to the public that the labor or services are to be provided by an independently established business. Except when an individual or business entity files a Schedule F as part of a personal income tax return or the individual or business entity performs farm labor or services that are reportable on Schedule C, an individual or business entity is considered to be representing the individual or business entity as an independently established business only when 4 or more of the following circumstances exist:

2 (1) The labor or services are primarily carried out at
3 a location that is separate from the residence of the
4 individual who performs the labor or services or are
5 primarily carried out in a specific portion of the
6 residence that is set aside as the location of the
7 business;

8 (2) Commercial advertising or business cards as are
9 customary in operating similar businesses are purchased
10 for the business, or the individual or business entity
11 is a member of a trade association of persons
12 performing similar work;

13 (3) The listing and service of any telephone used for
14 the business are distinct from the personal residence
15 listing and service used by the individual who performs
16 the labor or services;

17 (4) Labor or services are performed only pursuant to
18 written contracts;

19 (5) Labor or services are performed for 2 or more
20 different persons within a period of one year; or

21 (6) The individual or business entity assumes
22 financial responsibility for defective workmanship or
23 for service not provided as evidenced by the ownership
24 of performance bonds, warranties, errors and omission
25 insurance or liability insurance relating to the labor
26 or services provided.

27 This definition does not apply to the Uniform Commercial Code or
28 the Maine Revised Uniform Limited Partnership Act.

29 A state executive agency's determination regarding an
30 individual's or business entity's status as an independent
31 contractor, as defined in this subsection, is binding upon all
32 state executive agencies and may be challenged only on the basis
33 that the facts underlying that determination have changed in such
34 a way as to alter the status of the individual or business entity
35 as an independent contractor. The party challenging a prior
36 determination must produce clear and convincing evidence of these
37 changes. Any party may seek judicial review of an agency's legal
38 conclusions as provided by the Maine Administrative Procedure
39 Act. A party is not precluded from seeking judicial review of
40 determination of independent contractor status even if that
41 determination was governed by adherence to a prior determination
42 made by a state executive agency.

2 **Sec. 2. 1 MRSA §1012, sub-§9**, as amended by PL 1991, c. 885,
Pt. E, §1 and affected by §47, is further amended to read:

4 **9. Self-employed.** "Self-employed" means that the person
qualifies as an independent contractor ~~under Title 39-A, section~~
6 ~~102, subsection 13.~~

8 **Sec. 3. 5 MRSA §19, sub-§1, ¶J**, as amended by PL 1991, c. 885,
Pt. E, §6 and affected by §47, is further amended to read:

10 J. "Self-employed" means that the person qualifies as an
12 independent contractor ~~under Title 39-A, section 102,~~
~~subsection 13.~~

14 **Sec. 4. 26 MRSA §1043, sub-§11, ¶E**, as amended by PL 1979, c.
16 651, §45, is repealed and the following enacted in its place:

18 E. Any labor or service performed by an individual for
20 remuneration is employment subject to this chapter unless it
is demonstrated that an individual or business entity is an
22 independent contractor, as defined in Title 1, section 72,
subsection 6-B.

24 **Sec. 5. 26 MRSA §1194, sub-§12**, as enacted by PL 1989, c. 691,
is amended to read:

26 **12. Collateral estoppel.** Except for proceedings under this
28 chapter, no finding of fact or conclusion of law contained in a
decision of a deputy, an administrative hearing officer, the
30 Unemployment Insurance Commission or a court, obtained under this
chapter, has preclusive effect in any other action or
32 proceeding. This subsection does not apply to determinations of
independent contractor status as provided in Title 1, section 72,
34 subsection 6-B.

36 This provision applies to decisions issued on or after the
effective date of this subsection.

38 **Sec. 6. 39-A MRSA §102, sub-§13**, as enacted by PL 1991, c.
40 885, Pt. A, §8 and affected by §§9 to 11, is repealed.

42 **Sec. 7. 39-A MRSA §401, sub-§4**, as amended by PL 1993, c. 120,
§2, is further amended to read:

44 **4. Liability of landowner.** A landowner subject to this Act
46 who contracts to have wood harvested from the landowner's
property by a contractor who, as an employer, is subject to this
48 Act and who has not complied with the provisions of this section
and who does not comply with the provisions of this section prior

2 to the date of an injury or death for which a claim is made is
3 liable to pay to any person employed by the contractor in the
4 execution of the work any compensation under this Act that the
5 landowner would have been liable to pay if that person had been
6 immediately employed by the landowner.

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8 A landowner is not liable for compensation if at the time the
9 landowner enters into the contract with the contractor, the
10 landowner obtains or is provided a determination by any state
11 agency that the person performing the work is an independent
12 contractor under Title 1, section 72, subsection 6-B, or the
13 landowner applies for and receives a predetermination of the
14 independent status of the contractor as set forth in section 105,
15 or the landowner requests and receives a certificate of
16 insurance, issued by the contractor's insurance carrier,
17 certifying that the contractor has obtained the required coverage
18 and indicating the effective dates of the policy, and if the
19 landowner requests and receives at least annually similar
20 certificates indicating continuing coverage during the
21 performance of the work. A landowner who receives a
22 predetermination of the contractor's status as independent
23 contractor is only relieved of liability under this paragraph if
24 the contract for wood harvesting expressly states that the
25 independent contractor will not hire any employees to assist in
26 the wood harvesting without first providing the required
27 certificate of insurance to the landowner.

28 Notwithstanding section 105, subsection 1, paragraph A, a
29 predetermination under section 105 related only to parties
30 subject to this subsection is a conclusive presumption that the
31 determination is correct and section 105, subsection 2 does not
32 apply to that determination. Each party involved in or affected
33 by the predetermination must be provided information on the
34 workers' compensation laws and the effect of independent
35 contractor status in relation to those laws. A predetermination
36 under section 105 related to parties subject to this subsection
37 is effective for one calendar year or the duration of the
38 contract, whichever is shorter.

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40 A landowner required to pay compensation under this section is
41 entitled to be indemnified by the contractor and may recover the
42 amount paid in an action against that contractor. A landowner
43 may demand that the contractor enter into a written agreement to
44 reimburse the landowner for any loss incurred under this section
45 due to a claim filed for compensation and other benefits. The
46 employee is not entitled to recover at common law against the
47 landowner for any damages arising from such injury if the
48 employee takes compensation from that landowner.

Landowners willfully acting to circumvent the provisions of this section by using coercion, intimidation, deceit or other means to encourage persons who would otherwise be considered employees within the meaning of this Act to pose as contractors for the purpose of evading this section are liable subject to the provisions of section 324, subsection 3. Nothing in this section may be construed to prohibit an employee from becoming a an independent contractor subject to the provisions of section 102, subsection 13 as defined in Title 1, section 72, subsection 6-B.

STATEMENT OF FACT

This bill is intended to simplify the determination of independent contractor status and to establish a greater degree of uniformity and certainty within State Government on the issue of independent contractor status. It creates a single uniform definition of independent contractor to apply throughout the Maine Revised Statutes. Certain minor exceptions are made for uniform state laws to maintain consistency with interpretive decisions from other states that apply the traditional definition of independent contractor.

The definition is based on a similar law in the State of Oregon and is designed to maximize certainty and predictability. It specifies the criteria that must be met before an individual can be found to be an independent contractor. The bill also provides that a determination of independent contractor status, made by any state agency, is binding on all other state agencies unless a party can show by clear and convincing evidence that the employment relationship has changed since the prior determination. A party may not challenge the legal conclusion of a prior state agency but may introduce evidence to show that the underlying factual circumstances have changed. An aggrieved party retains the right to seek review of an agency's legal conclusions by court appeal, even if an agency's action is predicated upon an earlier determination by another agency that was not appealed when originally made.

This document has not yet been reviewed to determine the need for cross-reference, stylistic and other technical amendments to conform existing law to current drafting standards.