

MAINE STATE LEGISLATURE

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123rd MAINE LEGISLATURE

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Legislative Document

No. 1275

H.P. 903

House of Representatives, March 8, 2007

**An Act To Promote Workplace Safety and Certainty within the
Construction Industry by Authorizing the Workers' Compensation
Board To Issue Construction Contractor Certificates**

Reference to the Committee on Labor suggested and ordered printed.

Millicent M. MacFarland
MILLICENT M. MacFARLAND
Clerk

Presented by Representative WATSON of Bath.

Cosponsored by Representatives: BERRY of Bowdoinham, CLARK of Millinocket, DILL of Cape Elizabeth, PRIEST of Brunswick, Senators: BARTLETT of Cumberland, MILLS of Somerset, PERRY of Penobscot.

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

2 **Sec. 1. 39-A MRSA §102, sub-§11, ¶A,** as amended by PL 2003, c. 344, Pt. D,
3 §27 and c. 423, §4 and affected by §5, is further amended to read:

4 A. "Employee" includes officials of the State and officials of counties, cities, towns,
5 water districts and all other quasi-public corporations of a similar character, every
6 duly elected or appointed executive officer of a private corporation other than a
7 charitable, religious, educational or other nonprofit corporation, and every person in
8 the service of another under any contract of hire, express or implied, oral or written,
9 except:

10 (1) Persons engaged in maritime employment or in interstate or foreign
11 commerce who are within the exclusive jurisdiction of admiralty law or the laws
12 of the United States, except that this section may not be construed to exempt
13 from the definition of "employee" a person who is employed by the State and is
14 thereby barred by the State's sovereign immunity from bringing a claim against
15 that person's employer under admiralty law or other laws of the United States for
16 claims that are otherwise cognizable under this Act;

17 (2) Firefighters, including volunteer firefighters who are active members of a
18 volunteer fire association as defined in Title 30-A, section 3151; volunteer
19 emergency medical services persons as defined in Title 32, section 83, subsection
20 12; and police officers are employees within the meaning of this Act. In
21 computing the average weekly wage of an injured volunteer firefighter or
22 volunteer emergency services person, the average weekly wage must be taken to
23 be the earning capacity of the injured employee in the occupation in which the
24 employee is regularly engaged. Employers who hire workers within this State to
25 work outside the State may agree with these workers that the remedies under this
26 Act are exclusive as regards injuries received outside this State arising out of and
27 in the course of that employment; and all contracts of hiring in this State, unless
28 otherwise specified, are presumed to include such an agreement. Any reference to
29 an employee who has been injured must, when the employee is dead, include the
30 employee's legal representatives, dependents and other persons to whom
31 compensation may be payable;

32 (3) Notwithstanding any other provisions of this Act, any charitable, religious,
33 educational or other nonprofit corporation that may be or may become an
34 assenting employer under this Act may cause any duly elected or appointed
35 executive officer to be an employee of the corporation by specifically including
36 the executive officer among those to whom the corporation secures payment of
37 compensation in conformity with chapter 5; and the executive officer must
38 remain an employee of the corporation under this Act while such payment is so
39 secured. With respect to any corporation that secures compensation by making a
40 contract of workers' compensation insurance, specific inclusion of the executive
41 officer in the contract causes the officer to be an employee of the corporation
42 under this Act;

43 (4) Except for persons engaged in harvesting of forest products, any person
44 who, in a written statement to the board, waives all the benefits and privileges

1 provided by the workers' compensation laws, provided that the board has found
2 that person to be a bona fide owner of at least 20% of the outstanding voting
3 stock of the corporation by which that person is employed or a shareholder of the
4 professional corporation by which that person is employed and that this waiver
5 was not a prerequisite condition to employment. For the purposes of this
6 subparagraph, the term "professional corporation" means a domestic or foreign
7 professional corporation as defined in Title 13, section 723.

8 Any person may revoke or rescind that person's waiver upon 30 days' written
9 notice to the board and that person's employer. The parent, spouse or child of a
10 person who has made a waiver under the previous sentence may state, in writing,
11 that the parent, spouse or child waives all the benefits and privileges provided by
12 the workers' compensation laws if the board finds that the waiver is not a
13 prerequisite condition to employment and if the parent, spouse or child is
14 employed by the same corporation that employs the person who has made the
15 first waiver;

16 (5) Except for persons engaged in harvesting of forest products, the parent,
17 spouse or child of a sole proprietor who is employed by that sole proprietor or the
18 parent, spouse or child of a partner who is employed by the partnership of that
19 partner or the parent, spouse or child of a member of a limited liability company
20 who is employed by that limited liability company may state, in writing, that the
21 parent, spouse or child waives all the benefits and privileges provided by the
22 workers' compensation laws if the board finds that the waiver is not a prerequisite
23 condition to employment;

24 (6) Employees of an agricultural employer when harvesting 150 cords of wood
25 or less each year from farm wood lots, provided that the employer is covered
26 under an employer's liability insurance policy as required in subsection 17;

27 (7) An independent contractor;

28 (8) Except as otherwise provided in section 401 and section 105-A, if a person
29 employs an independent contractor, any employee of the independent contractor
30 is not considered an employee of that person for the purposes of this Act. The
31 person who employs an independent contractor is not responsible for providing
32 workers' compensation insurance covering the payment of compensation and
33 benefits to the employees of the independent contractor. An insurance company
34 may not charge a premium to any person for any employee excluded by this
35 subparagraph; or

36 (9) A state or municipal employee while the employee is on assignment as a
37 certified disaster service volunteer for the American Red Cross pursuant to Title
38 5, section 19-B or Title 30-A, section 2705. Duties performed while on a
39 volunteer disaster relief assignment for the American Red Cross may not be
40 considered a work assignment by a state agency or municipality.

41 **Sec. 2. 39-A MRSA §102, sub-§13**, as enacted by PL 1991, c. 885, Pt. A, §8 and
42 as affected by §§9 to 11, is amended to read:

1 **13. Independent contractor.** "Independent contractor" means a person working
2 under a construction contractor certificate under section 105-A; or a person who performs
3 services for another under contract, but who is not under the essential control or
4 superintendence of the other person while performing those services. In determining
5 whether such a relationship exists, the board shall consider the following factors:

6 A. Whether or not a contract exists for the person to perform a certain piece or kind
7 of work at a fixed price;

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

10 C. Whether or not the person has an obligation to furnish any necessary tools,
11 supplies and materials;

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

14 E. Whether or not the work is part of the regular business of the employer;

15 F. Whether or not the person's business or occupation is typically of an independent
16 nature;

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

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

19 In applying these factors, the board may not give any particular factor a greater weight
20 than any other factor, nor may the existence or absence of any one factor be decisive.
21 The board shall consider the totality of the relationship in determining whether an
22 employer exercises essential control or superintendence of the person.

23 **Sec. 3. 39-A MRSA §105-A** is enacted to read:

24 **§105-A. Construction contractor certificates**

25 **1. Definitions.** As used in this section, unless the context otherwise indicates, the
26 following terms have the following meanings.

27 A. "Construction contractor certificate" or "certificate" means a certificate issued
28 pursuant to subsection 5.

29 B. "Construction site" means a location where a structure that is attached or will be
30 attached to real property is constructed, altered or remodeled.

31 C. "Construction work" includes all or any part of the construction, alteration or
32 remodeling of a structure.

33 D. "Hiring agent" means a person or entity that employs or contracts with a person to
34 perform construction work, but excludes a homeowner who contracts for residential
35 construction work.

36 E. "Person" means a sole proprietor, a working member of a partnership or a
37 working member of a limited liability company who has not elected to be personally
38 covered by this Act in accordance with section 102, subsection 11, paragraph B.

1 **2. Persons deemed employees.** Beginning January 1, 2008, a person is deemed an
2 employee in accordance with this subsection.

3 A. A person performing construction work on a construction site for a hiring agent is
4 deemed to be the employee of the hiring agent for purposes of this Act, unless that
5 person is working under a valid contractor certificate.

6 B. If a person who is deemed an employee under paragraph A has not secured the
7 payment of compensation under sections 401 to 407, that person's employees, if any,
8 are deemed employees of the person's hiring agent.

9 **3. Construction contractor certificate; presumption.** A person engaged in
10 construction work on a construction site may apply to the board for a construction
11 contractor certificate. A person working under a valid certificate is conclusively
12 presumed to be an independent contractor and the person is considered to have waived all
13 rights and benefits under this Act unless and until the person secures workers'
14 compensation coverage.

15 **4. Application.** An applicant for a certificate shall submit to the board an
16 application under oath on a form prescribed by the board and containing the following:

17 A. The applicant's name and address;

18 B. The applicant's social security number;

19 C. Each occupation for which the applicant is seeking construction contractor
20 certification; and

21 D. Documentation as provided by board rule to assist in determining if the applicant
22 works as an employee or independent contractor, including, but not limited to,
23 whether the applicant has an independently established business and is free of control
24 of hiring agents for whom the applicant expects to perform work.

25 The application form must contain language in bold print confirming that, if allowed, the
26 applicant has waived all rights under this Act and the consequences of such waiver.

27 **5. Issuance of certificate.** The board shall issue a construction contractor certificate
28 to an applicant if:

29 A. The board determines that an applicant meets the definition of independent
30 contractor set forth in section 102, subsection 13; or

31 B. The applicant demonstrates that the applicant has secured the payment of
32 compensation under sections 401 to 407.

33 Once issued, a certificate remains in effect for 2 years unless suspended or revoked
34 pursuant to subsection 10 or cancelled by the holder. The certificate must inform the
35 holder that the holder has waived all rights under this Act for work performed under the
36 certificate and that the holder may suspend or revoke the certificate at any time upon
37 written notice to the board and current hiring agent, if any.

38 **6. Appeal.** If the board denies an application for a certificate, the applicant may
39 appeal the denial in accordance with section 105, subsection 4.

1 **7. Validity of status under certificate.** A person is working under a certificate only
2 if performing work in the trade, business, occupation or profession listed on the person's
3 certificate and the person and the hiring agent do not have a written or oral agreement that
4 the person's status with respect to the work at issue is that of an employee.

5 **8. Records retention.** A hiring agent shall maintain copies of all certificates that
6 relate to the independent contractors it uses in the event of safety inspections and
7 premium audits performed by its workers' compensation insurer, if any.

8 **9. Penalty for coercion, intimidation, deceit.** A hiring agent that willfully acts to
9 circumvent the provisions of this section by using coercion, intimidation or deceit to
10 encourage a person who would otherwise be considered an employee within the meaning
11 of this Act to apply for a certificate for the purpose of evading an obligation to provide
12 workers' compensation coverage is subject to applicable penalty provisions, including but
13 not limited to those under section 360, subsection 2.

14 **10. Suspension or revocation of certificate.** A certificate may be suspended or
15 revoked in accordance with this subsection.

16 A. The board may suspend a certificate for a specific business relationship if the
17 board determines that the hiring agent exerts or retains a greater right of control or
18 actual control than represented in the application.

19 B. The board may revoke a certificate for good cause including a determination that
20 the certificate holder provided misrepresentations in the application or renewal form,
21 altered or amended the application or renewal form or supporting documentation or
22 failed to cooperate with the board in providing information relevant to the continued
23 validity of the certificate.

24 C. A decision by the board to suspend or revoke a certificate takes effect upon
25 issuance of the decision.

26 D. Suspension or revocation of the certificate does not invalidate the certificate
27 holder's waiver of rights and benefits under this Act for the period prior to notice to
28 the hiring agent by the board of the board's decision to suspend or revoke the
29 certificate.

30 E. A decision by the board to suspend or revoke a certificate may be appealed in the
31 same manner as provided in subsection 6 for denial of an application for a certificate.

32 **11. Rules.** The board shall adopt rules and create application forms in order to
33 implement this section. Rules adopted pursuant to this subsection are major substantive
34 rules as defined in Title 5, chapter 375, subchapter 2-A.

35 **Sec. 4. 39-A MRSA §106,** as amended by PL 1995, c. 694, Pt. D, §63 and as
36 affected by Pt. E, §2, is further amended to read:

37 **§106. Invalidity of waiver of rights; claims not assignable**

38 No agreement by an employee, unless approved by the board or by the Commissioner
39 of Labor, to waive the employee's rights to compensation under this Act is valid. No
40 claims for compensation under this Act are assignable or subject to attachment or liable in

1 any way for debt, except for the enforcement of a current support obligation or support
2 arrears pursuant to Title 19-A, chapter 65, subchapter H 2, article 3 or Title 19-A, chapter
3 65, subchapter H 3, or for reimbursement of general assistance pursuant to Title 22,
4 section 4318. A person who possesses and is working under a construction contractor
5 certificate issued pursuant to section 105-A waives all rights and benefits under this Act.

6 **Sec. 5. Fee for application for construction contractor certificate.** The
7 Workers' Compensation Board shall endeavor to process applications for construction
8 contractor certificates under the Maine Revised Statutes, Title 39-A, section 105-A within
9 its existing resources. If the board determines that it must establish, through rulemaking
10 authorized pursuant to Title 39-A, section 105-A, subsection 11, a fee for processing such
11 applications, the fee may not exceed \$50 per application.

12 SUMMARY

13 This bill requires the Workers' Compensation Board to issue a construction contractor
14 certificate to a person working in the construction industry upon proof that the person
15 functions in a particular trade or occupation as an independent contractor rather than an
16 employee or upon proof that the person has secured the payment of compensation by
17 obtaining insurance coverage. The certificate creates a binding presumption that the
18 person is an independent contractor so long as the person works in the trade, business,
19 occupation or profession identified in the certificate. The application for and issuance of
20 a construction contractor certificate constitutes a waiver of rights under the Maine
21 Workers' Compensation Act of 1992. Construction contractor certificates are effective
22 for 2-year periods and may be renewed. A person who engages in construction work
23 without a certificate is deemed an employee of the person's hiring agent. An independent
24 contractor may revoke the certificate or the board may suspend or revoke it upon a
25 finding that the person misrepresented material facts in the application. The board is
26 required to implement these provisions through major substantive rules. A hiring agent
27 that uses coercion or intimidation or deceit to encourage persons who would otherwise be
28 deemed employees to apply for certificates are subject to penalties, including penalties
29 for a willful violation of the Act, fraud or intentional misrepresentation.