

MAINE STATE LEGISLATURE

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124th MAINE LEGISLATURE

FIRST REGULAR SESSION-2009

Legislative Document

No. 1456

H.P. 1008

House of Representatives, April 9, 2009

**An Act To Ensure That Construction Workers Are Protected by
Workers' Compensation Insurance**

Reference to the Committee on Labor suggested and ordered printed.

Millicent M. MacFarland
MILLICENT M. MacFARLAND
Clerk

Presented by Representative MARTIN of Eagle Lake.
Cosponsored by Representative CUSHING of Hampden, Senator JACKSON of Aroostook and
Representative: Speaker PINGREE of North Haven, Senators: MILLS of Somerset, SIMPSON
of Androscoggin.

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

Sec. 1. 39-A MRSA §102, sub-§11, ¶A, as amended by PL 2007, c. 350, §1, is further amended to read:

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

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

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

(3) Notwithstanding any other provisions of this Act, any charitable, religious, educational or other nonprofit corporation that may be or may become an assenting employer under this Act may cause any duly elected or appointed executive officer to be an employee of the corporation by specifically including the executive officer among those to whom the corporation secures payment of compensation in conformity with chapter 5; and the executive officer must 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 causes the officer to be an employee of the corporation under this Act;

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

1 by the workers' compensation laws, provided that the board has found that person
2 to be a bona fide owner of at least 20% of the outstanding voting stock of the
3 corporation by which that person is employed or a shareholder of the professional
4 corporation by which that person is employed and that this waiver was not a
5 prerequisite condition to employment. For the purposes of this subparagraph, the
6 term "professional corporation" means a domestic or foreign professional
7 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, domestic
10 partner as defined in Title 24, section 2319-A, subsection 1 or child of a person
11 who has made a waiver under the previous sentence may state, in writing, that the
12 parent, spouse, domestic partner as defined in Title 24, section 2319-A,
13 subsection 1 or child waives all the benefits and privileges provided by the
14 workers' compensation laws if the board finds that the waiver is not a prerequisite
15 condition to employment and if the parent, spouse, domestic partner as defined in
16 Title 24, section 2319-A, subsection 1 or child is employed by the same
17 corporation that employs the person who has made the first waiver;

18 (5) Except for persons engaged in harvesting of forest products, the parent,
19 spouse, domestic partner as defined in Title 24, section 2319-A, subsection 1 or
20 child of a sole proprietor who is employed by that sole proprietor or the parent,
21 spouse, domestic partner as defined in Title 24, section 2319-A, subsection 1 or
22 child of a partner who is employed by the partnership of that partner or the
23 parent, spouse, domestic partner as defined in Title 24, section 2319-A,
24 subsection 1 or child of a member of a limited liability company who is
25 employed by that limited liability company may state, in writing, that the parent,
26 spouse, domestic partner as defined in Title 24, section 2319-A, subsection 1 or
27 child waives all the benefits and privileges provided by the workers'
28 compensation laws if the board finds that the waiver is not a prerequisite
29 condition to employment;

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

33 (7) An independent contractor;

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

42 (9) A state or municipal employee while the employee is on assignment as a
43 certified disaster service volunteer for the American Red Cross pursuant to Title
44 5, section 19-B or Title 30-A, section 2705. Duties performed while on a

1 volunteer disaster relief assignment for the American Red Cross may not be
2 considered a work assignment by a state agency or municipality.

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

5 **13. Independent contractor.** "Independent Except as otherwise provided by section
6 105-A, "independent contractor" means a person who performs services for another under
7 contract, but who is not under the essential control or superintendence of the other person
8 while performing those services. In determining whether such a relationship exists, the
9 board shall consider the following factors:

- 10 A. Whether or not a contract exists for the person to perform a certain piece or kind
11 of work at a fixed price;
- 12 B. Whether or not the person employs assistants with the right to supervise their
13 activities;
- 14 C. Whether or not the person has an obligation to furnish any necessary tools,
15 supplies and materials;
- 16 D. Whether or not the person has the right to control the progress of the work, except
17 as to final results;
- 18 E. Whether or not the work is part of the regular business of the employer;
- 19 F. Whether or not the person's business or occupation is typically of an independent
20 nature;
- 21 G. The amount of time for which the person is employed; and
- 22 H. The method of payment, whether by time or by job.

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

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

28 **§105-A. Construction contractors**

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

31 A. "Construction site" means a location where a structure that is attached or will be
32 attached to real property is constructed, altered or remodeled.

33 B. "Construction subcontractor" means a person who performs construction work on
34 a construction site for a hiring agent if the person satisfies all of the following
35 criteria:

36 (1) The person possesses or has applied for a federal employer identification
37 number or social security number or has agreed in writing to carry out the
38 responsibilities imposed on employers under this chapter;

- 1 (2) The person has control and discretion over the means and manner of
2 performance of the construction work, in that the result of the work, rather than
3 the means or manner by which the work is performed, is the primary element
4 bargained for by the hiring agent;
- 5 (3) The person has control over the time when the work is performed and the
6 time of performance is not dictated by the hiring agent. Nothing in this
7 paragraph prohibits the hiring agent from reaching an agreement with the person
8 as to a completion schedule, range of work hours and maximum number of work
9 hours to be provided by the person;
- 10 (4) The person hires and pays the person's assistants, if any, and, to the extent
11 such assistants are employees, supervises the details of the assistants' work;
- 12 (5) The person purports to be in business for that person's self;
- 13 (6) The person has continuing or recurring construction business liabilities or
14 obligations;
- 15 (7) The success or failure of the person's construction business depends on the
16 relationship of business receipts to expenditures;
- 17 (8) The person receives compensation for construction work or services
18 performed and remuneration is not determined unilaterally by the hiring agent;
- 19 (9) The person is responsible in the first instance for the main expenses related to
20 the service or construction work performed; however, nothing in this paragraph
21 prohibits the hiring agent from providing the supplies or materials necessary to
22 perform the work;
- 23 (10) The person is responsible for satisfactory completion of the work and may
24 be held contractually responsible for failure to complete the work;
- 25 (11) The person supplies the principal tools and instruments used in the work,
26 except that the hiring agent may furnish tools or instruments that are unique to
27 the hiring agent's special requirements or are located on the hiring agent's
28 premises; and
- 29 (12) The person is not required to work exclusively for the hiring agent.
- 30 C. "Construction work" means any part of the construction, alteration or remodeling
31 of a structure, including related landscaping and other site work performed in
32 connection with the performance of such work, but not including surveying,
33 engineering, examination or inspection of a construction site or the delivery of
34 materials to a construction site.
- 35 D. "Hiring agent" means a person that hires or contracts with a person to perform
36 construction work, but excludes an owner or occupant of real property who hires a
37 person or persons to perform construction work on that real property.
- 38 E. "Person" means:
- 39 (1) An individual;
- 40 (2) A sole proprietor;

1 (3) A working member of a partnership;

2 (4) A working member of a limited liability company;

3 (5) A parent, spouse or child of a sole proprietor, partner or working member of
4 a limited liability company under section 102, subsection 11, paragraph A;

5 (6) A working owner or part owner of a corporation; and

6 (7) A working shareholder of a professional corporation.

7 **2. Status of persons performing construction work.** Beginning January 1, 2010, a
8 person performing construction work on a construction site for a hiring agent is presumed
9 to be the employee of the hiring agent for purposes of this Act, unless:

10 A. The person is a construction subcontractor; or

11 B. The person has secured the payment of compensation under sections 401 to 407.
12 For purposes of this paragraph, a person who has waived coverage on the person as a
13 bona fide owner of at least 20% of the outstanding voting stock of the corporation
14 that employs the person in accordance with section 102, subsection 11, paragraph A
15 has secured the payment of compensation under sections 401 to 407 if the corporation
16 that employs the person has secured the payment of compensation with respect to any
17 other employees it has.

18 **3. Penalties.** A person who is required to but fails to secure the payment of
19 compensation with respect to persons deemed to be that person's employees under this
20 section is subject to the penalties under section 324, subsection 3.

21 **4. Insurer referral obligation.** An insurer that believes in good faith that an insured
22 employer withheld from it or from the State Tax Assessor records of payments to a
23 person deemed to be the person's employee under this section shall refer the insurer and
24 person to the State Tax Assessor in order that the assessor may take appropriate action,
25 and the insurer enjoys immunity for such actions.

26 **SUMMARY**

27 This bill provides that, beginning January 1, 2010, a person performing construction
28 work on a construction site for a hiring agent presumed to be an employee of the hiring
29 agent for purposes of workers' compensation, unless the person either meets the definition
30 of "construction subcontractor" or carries workers' compensation insurance.