

# MAINE STATE LEGISLATURE

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# 125th MAINE LEGISLATURE

## FIRST REGULAR SESSION-2011

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Legislative Document

No. 1450

H.P. 1064

House of Representatives, April 11, 2011

### An Act To Enforce Wage Laws

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Reference to the Committee on Labor, Commerce, Research and Economic Development suggested and ordered printed.

A handwritten signature in cursive script that reads "Heather J.R. Priest".

HEATHER J.R. PRIEST  
Clerk

Presented by Representative RUSSELL of Portland.  
Cosponsored by Representatives: BERRY of Bowdoinham, GILBERT of Jay, GOODE of Bangor, INNES of Yarmouth.

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

2 **Sec. 1. 26 MRSA §620** is enacted to read:

3 **§620. Definitions**

4 As used in this subchapter, unless the context otherwise indicates, the following  
5 terms have the following meanings.

6 **1. Employee.** "Employee" means an individual who is employed in this State by an  
7 employer, including an individual who is in receipt of or is entitled to any compensation  
8 for labor performed for an employer. "Employee" also includes a commission salesperson  
9 who takes orders from or performs services on behalf of a principal and who is paid on  
10 the basis of commissions, but does not include individuals who purchase for their own  
11 account for resale. "Employee" does not include an independent contractor.

12 **2. Employer.** "Employer" means an individual, firm or corporation, agent, manager,  
13 representative, contractor, subcontractor or principal or a person acting directly or  
14 indirectly in the interest of an employer to suffer or permit an employee to work.

15 **3. Independent contractor.** "Independent contractor" means an individual who:

16 A. Provides services free from direction and control over the means and manner of  
17 providing the services, subject only to the right of the person or entity for whom  
18 services are provided to specify the desired result, and furnishes the tools and  
19 equipment necessary to provide the services;

20 B. Operates a business that is considered inseparable from the individual for  
21 purposes of taxes, profits and liabilities:

22 (1) In which the individual:

23 (a) Owns all of the assets and profits of the business; and

24 (b) Has sole, unlimited personal liability for all of the debts and liabilities of  
25 the business, unless the business is organized as a corporate entity to which  
26 sole, unlimited personal liability does not apply; and

27 (2) For which:

28 (a) The individual does not pay taxes separately but reports business income  
29 and losses on the individual's personal tax return; and

30 (b) If the business is organized as a corporate entity and the individual  
31 otherwise qualifies as an independent contractor under this subsection, the  
32 individual files a separate federal informational tax return as required by law;  
33 and

34 C. Exercises complete control over the management and operations of the business  
35 under paragraph B and exercises the right and opportunity on a continuing basis to  
36 perform the services of the business for multiple entities at the individual's sole  
37 choice and discretion.

1           **Sec. 2. 26 MRSA §621-A, sub-§1**, as amended by PL 2005, c. 103, §1, is further  
2 amended to read:

3           **1. Minimum frequency and full payment.** At regular intervals not to exceed 16  
4 days, every employer ~~must~~ shall pay in full all wages earned by each employee. Each  
5 payment must include all wages earned to within 8 days of the payment date. An  
6 employee who is absent from work at a time fixed for payment must be paid on demand  
7 after that time.

8           **Sec. 3. 26 MRSA §621-A, sub-§5**, as amended by PL 2005, c. 103, §1, is further  
9 amended to read:

10           **5. Change in rate of pay.** Notwithstanding the provision of section 623 exempting  
11 salaried employees as defined in section 663, subsection 3, paragraph K, payment of  
12 wages or salary must be made at the rate previously established by the employer, except  
13 that the employer may decrease the rate of pay, effective the next ~~working day~~ pay  
14 period, if the employer gives notice to all affected employees one pay period prior to the  
15 change. When an employer has temporarily increased an employee's wage rate to comply  
16 with the prevailing wage requirements of chapter 15; the federal Davis-Bacon Act, 40  
17 United States Code, Section 276a et seq.; or other applicable federal or state law, an  
18 employer need not provide advance notice prior to returning the employee to the  
19 employee's regular wage rate, as long as the employer is in compliance with all posting  
20 and notice provisions of the applicable law. Changes of rates of pay made under a  
21 collective bargaining agreement are exempt from this requirement. All notices must  
22 either be in writing or posted at a place where employee notices are routinely posted.

23           **Sec. 4. 26 MRSA §621-A, sub-§7** is enacted to read:

24           **7. Notification.** An employer shall notify its employees in writing at the time of  
25 hiring of the wages and regular paydays that are designated by the employer.

26           **Sec. 5. 26 MRSA §622**, as repealed and replaced by PL 1999, c. 465, §3, is  
27 repealed and the following enacted in its place:

28           **§622. Notification; records**

29           **1. Notification.** An employer shall make available to its employees, upon written  
30 request, a written statement enumerating employment agreements and policies with  
31 regard to vacation pay, sick leave, reimbursement for expenses, retirement benefits,  
32 severance pay or other matters with respect to wages. Notice of the availability of the  
33 agreements and policies must be given to each employee in writing or by a notice posted  
34 at a place where employee notices are routinely posted.

35           **2. Records.** An employer shall:

36           A. Within 10 working days of a request by an employee, furnish to the employee a  
37 written, itemized statement or access to a written, itemized statement listing the  
38 earnings and deductions made from the employee's wages for each pay period in

1 which the deductions were made together with an explanation of how the wages and  
2 deductions were computed;

3 B. On each regular payday, send to each employee by mail or provide at the  
4 employee's normal place of employment during normal employment hours a  
5 statement showing the hours the employee worked, the wages earned by the  
6 employee and deductions made for the employee;

7 C. Establish, maintain and preserve for 3 calendar years the payroll records showing  
8 the hours worked, wages earned and deductions made for each employee and any  
9 employment agreement entered into between the employer and employee. Failure to  
10 maintain these records raises a rebuttable presumption that the employer did not pay  
11 the required minimum wage rate; and

12 D. Make available records required to be kept by this section to any representative of  
13 the Department of Labor at any reasonable hour. This section and sections 621-A  
14 and 623 do not excuse any employer subject to section 702 from keeping the records  
15 required by that section. A representative of the department may, consistent with due  
16 process of law, enter any place of employment to inspect records concerning wages  
17 and payrolls, question the employer and employees and investigate such facts,  
18 conditions or matters as are considered appropriate in determining whether any  
19 person has violated the provisions of this subchapter. The name of any employee  
20 identified in a complaint to the department must be kept confidential as long as  
21 possible. When the department determines that an employee's name must be  
22 disclosed in order to investigate the complaint further, it may do so only with the  
23 employee's consent. The Commissioner of Labor shall adopt any rules necessary to  
24 carry out the provisions of this subchapter. Rules adopted pursuant to this paragraph  
25 are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

26 **Sec. 6. 26 MRSA §623**, as amended by PL 2005, c. 18, §2, is further amended to  
27 read:

28 **§623. Exemptions**

29 This section and ~~sections section~~ section 621-A and ~~622~~ do not apply to family members and  
30 salaried employees as defined in section 663, subsection 3, paragraphs J and K. ~~Sections~~  
31 Section 621-A and 622 do does not apply to an employee of a cooperative corporation or  
32 association if the employee is a stockholder of the corporation or association, unless the  
33 employee requests the association or corporation to pay that employee in accordance with  
34 section 621-A. Except as provided in section 621-A, subsections 3, 4 and 5, a  
35 corporation, contractor, person or partnership may not by a special contract with an  
36 employee or by any other means exempt itself from this section and sections 621-A and  
37 622.

38 **Sec. 7. 26 MRSA §626, 2nd ¶**, as enacted by PL 1991, c. 162, is repealed.

39 **Sec. 8. 26 MRSA §626-A**, as amended by PL 1999, c. 465, §5, is further amended  
40 to read:

1           **§626-A. Penalties**

2           Whoever violates any of the provisions of sections 621-A to 623 or section 626,  
3 626-C, 628, 629 or 629-B is subject to a ~~forfeiture~~ fine of not less than \$100 nor more  
4 than \$500 for each violation.

5           Any employer is liable to the employee or employees for the amount of unpaid wages  
6 and health benefits. Upon a judgment being rendered in favor of any employee or  
7 employees, in any action brought to recover unpaid wages or health benefits under this  
8 subchapter, such judgment includes, in addition to the unpaid wages or health benefits  
9 adjudged to be due, a reasonable rate of interest, costs of suit including a reasonable  
10 attorney's fee, and an additional amount equal to twice the amount of unpaid wages as  
11 liquidated damages.

12           The 10 largest shareholders, as determined by the fair value of their beneficial  
13 interest as of the beginning of the period during which the unpaid services referred to in  
14 this subchapter are performed, of a corporation that does not have shares listed on a  
15 national securities exchange or regularly quoted on an over-the-counter market by one or  
16 more members of a national or an affiliated securities association are jointly and severally  
17 personally liable for all debts, wages or salaries due and owing to any of the corporation's  
18 employees for services performed by them for that corporation. Civil action may be  
19 brought against a shareholder liable for wages due under this subchapter instead of and in  
20 addition to the employer. For the purposes of this paragraph, "corporation" does not  
21 include an investment company registered as such under the federal Investment Company  
22 Act of 1940, 15 United States Code, Sections 80a-1 to 80a-64.

23           Remedies for unpaid wages do not become available to the employee except as  
24 follows. If the wages are clearly due without a bona fide dispute, remedies are available  
25 to the employee 8 days after the due date for payment. If there is a bona fide dispute at  
26 the time payment is due, remedies become available to the employee 8 days after demand  
27 when the wages are, in fact, due and remain unpaid.

28           The action for unpaid wages or health benefits may be brought by either the affected  
29 employee or employees or by the Department of Labor. The Department of Labor is  
30 further authorized to supervise the payment of the judgment, collect the judgment on  
31 behalf of the employee or employees and collect fines incurred through violation of this  
32 subchapter. The Department of Labor shall retain any penalties, except those penalties  
33 due employees, in a nonlapsing account to be used for enforcement of this subchapter.  
34 When the Department of Labor brings an action for unpaid wages or health benefits, this  
35 action and an action to collect a civil ~~forfeiture~~ fine may both be joined in the same  
36 proceeding.

37           For purposes of calculating penalties pursuant to this section, each violation of this  
38 subchapter that occurs during a separate week, including discriminatory or retaliatory  
39 practices, is considered a separate violation.

40           **Sec. 9. 26 MRSA §626-C** is enacted to read:

1 **§626-C. Preventing retaliation against employees**

2 **1. Prohibition.** An individual or employer may not discharge or in any other  
3 manner discriminate or retaliate against an employee or other individual for exercising a  
4 right under this subchapter or any rule implementing its provisions, or against an  
5 individual for providing assistance to an employee or information regarding the exercise  
6 of that right, or for testifying or planning to testify in any investigation or proceeding  
7 regarding the exercise of that right.

8 **2. Presumption of retaliation.** An employer or individual that takes an adverse  
9 action against an individual within 90 days of that individual's engaging in the activities  
10 specified in subsection 1 raises a presumption that the action was retaliation. This  
11 presumption may be rebutted by clear and convincing evidence that the action was taken  
12 for other permissible reasons.

13 **3. Complaint.** An employee or other individual may file a complaint with the  
14 Department of Labor against an employer or individual alleging retaliatory discharge or  
15 discrimination as described in subsection 2 within 30 days after the alleged retaliatory  
16 discharge or discrimination occurs. Upon receipt of the complaint, the department shall  
17 cause an investigation to be made to the extent considered appropriate. If the department  
18 determines from the investigation that the provisions of this section have been violated,  
19 the department shall bring an action in the appropriate District Court against that  
20 employer or individual. The District Court may, for cause shown, restrain violations of  
21 this section and order all appropriate relief, including rehiring or reinstatement of the  
22 employee to the former position with back pay. A civil action to enforce this section may  
23 also be maintained in any court of competent jurisdiction by the State or by any party  
24 injured by a violation of this section. The court shall require an employer or individual  
25 that retaliates against an employee or other individual in violation of this subchapter to  
26 pay the employee or other individual an amount set by the department or a court  
27 sufficient to compensate the employee or other individual and deter future violations but  
28 not less than \$150 for each day that the violation continued or until legal judgment is  
29 final.

30 **SUMMARY**

31 This bill defines "employee," "employer" and "independent contractor" for the  
32 purposes of the wages and medium of payment provisions of the labor laws in order to  
33 prevent misclassification of employees and their exclusion from wage law protection. It  
34 strengthens notification and reporting requirements. The bill includes shareholders'  
35 liability to protect employees who are hired by corporations that use bankruptcy law to  
36 evade payment. It makes each violation of the wage and medium of payment provisions  
37 that occurs during a separate week, including discriminatory or retaliatory practices, a  
38 separate violation. The bill also prohibits employer retaliation against employees or  
39 others who bring complaints under the law.