

March 19, 2013 Issue

GOVERNMENT AFFAIRS NEWS

STATE LEGISLATION

States are in the midst of their 2013 legislative sessions and some have even already adjourned such as Virginia. Please review the legislation, its current status and look to the following states for newly introduced or acted upon legislation: Nevada, Oregon, Kentucky, Maine and Maryland.

Connecticut Senate Bill 344

Sponsored by Senator Anthony Musto (D – Majority)

Senate Bill 344 amends to change the definition of independent contractor to exclude any individual that is paid hourly, whose tools are provided by the person paying the worker, or who otherwise acts at the specific direction of the payor. *Status: Introduced and referred to Joint Committee on Labor and Public Employees on January 23, 2013.*

Kentucky Senate Bill 89

Sponsored by Senator John Schickel (R – Majority)

The measure defines independent contractor if (a) the person is not limited by the contractor, prime contractor, or subcontractor from making his or her services available to the general public or the business community on a continuing basis; (b) the person has the capacity to perform similar services for others on the basis and schedule he or she agrees to provide such services; (c) the person may realize a profit or suffer a loss under contracts to perform the service; (d) if necessary, the person hires his or her own employees or subcontracts the services and is directly responsible for his or her employee or subcontractor compensation; (e) the person demonstrates compliance with federal employment eligibility verification as required by the United States Department of Homeland Security; and the (f) the person is performing the service without the contractor's direct supervision, subject only to the right of the person for whom the service is provided to specify the desired result, both under the person's contract of service and in fact. It further establishes that if any person who is determined to have misclassified employees must pay a penalty of one hundred dollars (\$100) per determination.

Status: Introduced and referred to Senate Committee on Economic Development, Tourism and Labor February 7th, 2013. Passed Senate Committee on Economic Development, Tourism and Labor on February 20th. Passed Senate chamber, introduced in the House and referred to the House Committee on Labor and Industry on February 25th.

Maine House Bill 290

Sponsored by Representative Diane Russell (D – Majority)

Defines independent contractor, for the purposes of prevent misclassification as a person who:

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

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

(1) In which the individual:

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

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

(2) For which:

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

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

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

Status: Introduced on February 12th, 2013. The House and Senate concurred bill "Ought Not to Pass" and measure died on March 12th.

Maryland House Bill 735

Sponsored by Delegate John Olszewski (D – Majority)

The measure requires employers to provide employees with specified earned sick and safe leave and how said leave is accrued and treated by the employer. The measure provides no exemptions for any industry or business regardless of number of employees or if you have a collective bargaining agreement.

*Status: Introduced and referred to the House Committee on Economic Matters February 6th, 2013. This measure has a companion bill as Maryland Senate Bill 698. **If you would like to participate contact Henry Seaton at heseaton@aol.com.***

Massachusetts House Draft 3198

Sponsored by Representative Joseph Wagner (D – Majority)

This is only a bill draft and the language is not available to the public yet. However, through cooperation from the Massachusetts Delivery Association and the Massachusetts Trucking Association, the draft text provides a beneficial 7-point independent contractor test. More information will become available when the draft is officially introduced as a bill.

Michigan Senate Bill 1

Sponsored by Senator Randy Richardville (R – Majority)

Provides for protections regarding employee misclassifications through the new Employee Classification Act. Stipulates that employees are to be classified by the federal Internal Revenue Service's 20 factor test. *Status: Introduced and referred to the Senate Committee on Government Operations and Reform on January 16, 2013.*

Nevada Senate Bill 95

Sponsored by the Senate Committee on Commerce, Labor and Energy

Establishes a Task Force on Employee Misclassification. The Task Force will be comprised of individuals including one IC, a person from a company that employees more than 500 people, a person from a company that employees less than 500 people and other representatives from the state Department of Labor and the Attorney General's office. The Task Force is charged with:

1. Evaluate the policies and practices of the Labor Commissioner, Division of Industrial Relations of the Department of Business and Industry, Employment Security Division of the Department of Employment, Training and Rehabilitation, Department of Taxation and Attorney General relating to employee misclassification.
2. Evaluate any existing fines, penalties or other disciplinary action relating to employee misclassifications that are authorized to be imposed by a state agency.
3. Develop recommendations for policies, practices or proposed legislation to reduce the occurrence of employee misclassification.
4. On or before July 1, 2014, and on or before July 1 of each subsequent year, submit a written report to the Director of the Legislative Counsel Bureau for submission to the Legislative Commission. The report must include, without limitation, a summary of the work of the Task Force and recommendations for legislation concerning employee misclassification.

Status: Introduced on February 7th, 2013.

Nevada Senate Bill 96

Sponsored by Senate Committee on Commerce, Labor and Energy

The bill authorizes the Nevada Labor Commissioner to impose an administrative penalty against an employer who misclassifies an employee as an independent contractor. Establishes that the administrative penalty must be collected in the following amounts as determined by the Labor Commissioner:

- (a) For a first offense:

(1) At least \$250 but less than \$1,000 for each employee or person who is misclassified unintentionally or is otherwise not properly classified unintentionally.

(2) At least \$5,000 but less than \$15,000 for each employee or person who is misclassified willfully or is otherwise not properly classified willfully.

(b) For a second offense, at least \$15,000 but less than \$25,000 for each employee or person misclassified or otherwise not properly classified.

The bill allows a person to be open to liability in a civil action brought by the Attorney General if the person advises an employer or an employee, officer or agent of an employer to misrepresent the classification of an employee of the employer; an amount that is equal to three times the total amount of any reasonable expenses incurred by the State. *Introduced and referred to Senate Committee on Commerce, Labor and Energy on February 7, 2013.*

New Jersey Assembly Bill 1578

Sponsored by Assemblyman John Wisniewski (D – Majority)

The “Truck Operator Independent Contractor Act” creates a presumption that a worker arrangement in the parcel delivery industry is an employer-employee relationship. A worker is only found to be an independent contractor if: (1) the individual is free from direction and control; (2) the service is outside the usual course of business; and (3) the individual is customarily engaged in an independently established trade. The failure to properly classify an individual can result in both fines and imprisonment. If the Commissioner of Labor and Workforce Development finds that the employer has violated provisions of this act, the commissioner may refer the matter to the New Jersey Attorney General. The bill was amended on March 14th, 2013 to excluded newspaper delivery from the definition of “parcel delivery.” The measure has a companion in Senate Bill 1450. *Status: On January 10, 2012 the measure was introduced and referred to the Assembly Committee on Labor. Passed Assembly Labor Committee on October 15, 2012. Referred to Assembly Committee on Transportation, Public Works and Independent Authorities. Passed Committee on Transportation, Public Works and Independent Authorities as amended on March 14, 2013.*

New Jersey Assembly Bill 3310

Sponsored by Assemblyman Timothy Eustace (D – Majority)

Provides that an independent contractor must be paid the compensation earned according to work terms agreed to by the independent contractor and its client, and requires the Department of Labor and Workforce Development to act as a regulatory agency. Stipulates that any client who does not pay the compensation of all of its independent contractors will be guilty of a disorderly persons offense. *Status: Introduced and referred to Assembly Committee on Labor September 27, 2012. Amended and passed from Assembly Labor Committee October 15, 2012.*

New York Assembly Bill 224

Sponsored by Assemblyman Brian Kavanagh (D – Majority)

Provides that bicycle operators and the businesses working as an independent contractor with such operators shall be liable for such operator's violation of the law; provides that any business using a bicycle for commercial purposes shall be vicariously liable for any civil penalty imposed on any bicycle operator employed by or otherwise working as an independent contractor with such business. *Status: Introduced and referred to the Assembly Committee on Cities January 9, 2013.*

New York Assembly Bill 5237

Sponsored by Assemblyman Keith Wright (D – Majority)

This is the re-introduction of the “Commercial Goods Transportation Industry Fair Play Act” from the 2012 session; Assemblyman Wright was the bill sponsor from last year as well. The bill defines presumption of employment in the commercial goods transportation industry. Provides that any person performing commercial goods transportation services for a commercial goods transportation contractor shall be classified as an employee unless the person is a separate business entity under portions of the bill or all of the following criteria are met, in which case the person shall be an independent contractor: (a) the individual is free from control and direction in performing the job, both under his or her contract and in fact; (b) the service must be performed outside the usual course of business for which the service is performed; and (c) the individual is customarily engaged in an independently established trade,

occupation, profession, or business that is similar to the service at issue. This also requires a commercial goods transportation contractors' to correctly classify employees and to inform subcontractors, of their obligations regarding employee classification. Also outlines penalties for contractors and sub-contractors who violate and willfully violate the provisions of the law. *Introduced and referred to Assembly Committee on Labor February 21, 2013.*

New York Senate Bill 231

Sponsored by Senator Daniel Squadron (D – Minority)

An independent contractor must be paid the compensation earned in accordance with the agreed work terms. If an independent contractor and client did not agree on a date for payment of compensation earned, the independent contractor shall be paid the compensation earned not later than the last day of the month following the month in which the compensation is earned. The agreed work terms shall be reduced in writing, signed by both the client and the independent contractor, kept on file by the client for a period of not less than six years and made available to the commissioner upon request. Such writing must include a description of how compensation earned and payable shall be calculated. The failure of a client to produce such written work terms, upon request of the commissioner of the Department of Labor, shall give rise to a presumption that the terms that the independent contractor has presented are the agreed terms. The measure authorizes the Department of Labor to investigate complaints, make claims for compensation, assess liquid damages, civil penalties and criminal penalties and authorize the award of attorney fees and liquidated damages as they relate to the payment of independent contractors. *Status: Introduced and referred to the Senate Committee on Labor January 9, 2013.*

New York Senate Bill 232

Sponsored by Senator Daniel Squadron (D – Minority)

An independent contractor must be paid the compensation earned in accordance with the agreed work terms. If an independent contractor and client did not agree on a date for payment of compensation earned, the independent contractor shall be paid the compensation earned not later than the last day of the month following the month in which the compensation is earned. The agreed work terms shall be reduced in writing, signed by both the client and the independent contractor, kept on file by the client for a period of not less than six years and made available to the commissioner upon request. Such writing must include a description of how compensation earned and payable shall be calculated. The failure of a client to produce such written work terms, upon request of the commissioner of the Department of Labor, shall give rise to a presumption that the terms that the independent contractor has presented are the agreed terms. The measure authorizes the Department of Labor to investigate complaints, make claims for compensation, assess liquid damages, civil penalties and criminal penalties and authorize the award of attorney fees and liquidated damages as they relate to the payment of independent contractors. *Status: Introduced and referred to the Senate Committee on Labor January 9, 2013.*

New York Senate Bill 2556

Sponsored by Senator Marty Golden (R – Majority)

An independent contractor must be paid the compensation earned in accordance with the agreed work terms. If an independent contractor and client did not agree on a date for payment of compensation earned, the independent contractor shall be paid the compensation earned not later than the last day of the month following the month in which the compensation is earned. The agreed work terms shall be reduced in writing, signed by both the client and the independent contractor, kept on file by the client for a period of not less than six years and made available to the commissioner upon request. Such writing must include a description of how compensation earned and payable shall be calculated. The failure of a client to produce such written work terms, upon request of the commissioner of the Department of Labor, shall give rise to a presumption that the terms that the independent contractor has presented are the agreed terms. The measure authorizes the Department of Labor to investigate complaints, make claims for compensation, assess liquid damages, civil penalties and criminal penalties and authorize the award of attorney fees and liquidated damages as they relate to the payment of independent contractors. Includes exemption for the construction industry. *Status: Introduced and referred to the Senate Committee on Labor on January 22nd, 2013.*

Oregon House Bill 2907

Sponsored by the House Committee on Business and Labor

The measure would require the Department of Labor and Industries to establish a full-time position of investigator to investigate misclassification of employees as independent contractors. Permits the Department of Labor to assess civil penalties for misclassification.

Status: Introduced on February 13th, 2013 and referred to House Committee on Business and Labor.

Texas House Bill 372

Sponsored by Representative Joe Deshotel (D – Minority)

Establishes a Workplace Fraud Prevention Act by creating penalties for misclassification of employees in the construction industry. *Status: Introduced on January 8, 2013. Left in House Committee on Business and Industry March 12th.*

Virginia Senate Bill 879

Sponsored by Senator Puckett (D – Split Chamber)

Establishes the Employee Misclassification Task Force to, among other things, develop and recommend legislation to provide a clear and consistent definition of employee, to ensure conformance with relevant federal tax laws; provides that the provisions of the bill shall expire on July 1, 2018. *Status: Introduced and referred to Senate General Laws and Technology Committee on January 9, 2013. Passed Senate General Laws and Technology Committee on January 14. Passed by the Senate January 17. Introduced in the House of Representatives on January 18. **This measure did not pass prior to the Virginia Legislature's adjournment and is considered failed.***

Washington House Bill 1440

Sponsored by Representative John McCoy (D – Split)

This measure applies to employees and ICs in all industries. The bill stipulates that an individual who performs services for remuneration is presumed to be an employee and a person asserting that an individual is not an employee must prove independent contractor status by a preponderance of the evidence. An individual is an independent contractor if:

- he or she is and will continue to be free from control or direction over the performance of the service;
- the service is outside the usual course of business for which the service is performed, or the service is performed outside all the places of business of the enterprise for which the service is performed; and
- the individual is customarily engaged in an independently established trade.

The Department of Labor and Industries may investigate retaliation and order an employer to: pay a civil penalty of \$1000 to \$10,000 per employee; pay an aggrieved employee the greater of \$10,000 or treble damages; or reinstate the employee. An interested party or aggrieved individual may file suit, including a class action. The court:

- must order the greater of either treble damages or statutory damages of \$10,000 per aggrieved employee, or \$10,000 to \$25,000 where there is a pattern or practice of violations;
- may award injunctive or other equitable relief, including reinstatement or front pay in lieu of reinstatement; and
- must award attorneys' fees and costs.

*Status: Introduced and referred to House Labor & Workforce Development Committee on January 28, 2013. The committee held a public hearing on January 31. Written testimony was submitted to the committee in opposition of the measure. Several members based in WA State have written their elected officials due to concern and negative impacts of this bill. This measure was amended (reflected in text above) and passed out of the House Labor Committee on February 8th and referred to the House Committee on Finance. **This measure and its Senate companion bill failed to pass the before a legislative deadline and is considered failed/non-active.***

Source: Messenger Courier Association of America