

New Hampshire Draws Bright Line Between “Employees” and “Independent Contractors”



Mark Broth, Esquire

For many years, employers have had difficulty determining whether an individual in their service was properly classified as an

“employee” or as an “independent contractor.” This distinction can be of some importance in that state laws extend certain rights to employees (such as workers’ compensation benefits and the ability to file wage claims and whistleblower actions) that are not available to independent contractors. Several state employment laws have attempted to define who was an “employee,” but these definitions were both unclear and inconsistent. The problems with these definitions created opportunities for inadvertent misclassification and for abuse.

In order to address this issue, the New Hampshire Legislature has enacted Senate Bill 92, “An Act relative to the definition of employee and clarifying the criteria for exempting workers from employee status.” The new law, which was signed by Governor Lynch on July 17, 2007, and which takes effect on January 1, 2008, is intended “to protect employees from being improperly classified as independent contractors and thereby being denied workers’ compensation coverage and certain other benefits.” The new law repeals the definitions of “employee” which appear in RSA 275:4, II (general definition), RSA 275:42, II (Payment of Wages), RSA 275-E:1, I (Whistleblower Protection Act), RSA 279:1, X (Minimum Wage Law), and RSA 281:2, VI(b)(1) (Workers’ Compensation) and replaces them with new definitions that are largely, but not entirely, consistent. The new law excludes from the definition of “employee” those individuals excluded from the definition of

“employee” under the Workers’ Compensation law (more on that below) as well as certain disabled individuals who are working as part of a residential placement. In addition, each of the new definitions require that an individual must be classified as an employee, rather than an independent contractor, **unless they meet all of the following criteria:**

1. That the individual possess a federal Employer Identification Number, Social Security Number, or has agreed in writing to carry out the responsibilities imposed on employers; and
2. That the individual has control and discretion over the means and manner of performance of the work, “in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the employer”; and
3. That the individual has control over the time when the work is performed (although agreements on completion schedule, range of work hours, and maximum number of work hours can be established); and
4. That the individual hires, pays, and supervises his or her own assistants; and
5. That the individual is self-identified as being in business for himself or herself; and
6. That the individual “has continuing or recurring business liabilities or obligations”; and

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7. That the success or failure of the individual's business depends on the relationship between business receipts and expenses; and

8. That compensation for services performed is not unilaterally determined by the hiring party; and

9. That the individual is responsible for the main expenses related to the service or work provided (although and employer can agree to provide necessary supplies and materials); and

10. The individual is responsible for and contractually responsible for satisfactory completion of the work; and

11. That the individual supplies the principal tools and equipment necessary to perform the work (although an employer may provide tools and instruments unique to the employer's special requirements or equipment located on the employer's premise); and

12. The individual is not required to work exclusively for the employer.

The definition of "employee" under the Workers' Compensation law, which is incorporated by reference in the other definitions, includes additional exemptions for "a direct seller or qualified real estate broker or real estate appraiser"; correctional facility inmates; individuals engaged in court-ordered community service or diversion programs; persons volunteering services to public sector employers; and individuals participating in municipal welfare work programs.

By enacting this law, New Hampshire has followed the lead of Massachusetts, which, in 2001, enacted an Independent Contractor Law, M.G.L. c. 149, § 27(C), which

similarly sought to create uniform definitions so as to avoid misclassification of employees.

This new law will have a significant impact on certain industries, like construction, where some employers have liberally classified individuals as independent contractors. However, all employers are strongly encouraged to review all of their independent contractor relationships prior to January 1, 2008, to ensure that they satisfy the new definitions and that those relationships are properly documented.

(Mark Broth is with the law firm of Devine Millimet, a Silver Association Partner. You may call 695-8582 to access Devine Millimet's free Employment Law Hotline.) ▲

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