

# HOUSE BILL REPORT

## ESHB 3122

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### As Passed House:

February 14, 2008

**Title:** An act relating to consolidating, aligning, and clarifying exception tests for determination of independent contractor status under unemployment compensation and workers' compensation laws.

**Brief Description:** Consolidating, aligning, and clarifying exception tests for determination of independent contractor status under unemployment compensation and workers' compensation laws.

**Sponsors:** By House Committee on Commerce & Labor (originally sponsored by Representatives Conway, Green, Hunt, Kenney, Roberts, Haler, Morrell, Ericks, Hankins, Eddy, Wood, Sells, Chase, Ormsby, Hasegawa, Appleton, Williams, Moeller, Simpson, Sullivan and McIntire).

### Brief History:

#### Committee Activity:

Commerce & Labor: 1/29/08, 2/5/08 [DPS].

#### Floor Activity:

Passed House: 2/14/08, 92-2.

### Brief Summary of Engrossed Substitute Bill

- Creates test for determining whether a construction worker is a covered worker or uncovered independent contractor for purposes of unemployment and industrial insurance laws.

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## HOUSE COMMITTEE ON COMMERCE & LABOR

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 5 members: Representatives Conway, Chair; Wood, Vice Chair; Green, Moeller and Williams.

**Minority Report:** Do not pass. Signed by 3 members: Representatives Condotta, Ranking Minority Member; Chandler, Assistant Ranking Minority Member; Crouse.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

**Staff:** Joan Elgee (786-7106).

**Background:**

In 2007 the Legislature enacted SB 5926, which created a Joint Legislative Task Force on the Underground Economy in the Construction Industry (Task Force). The Task Force was directed to formulate a state policy to establish cohesion and transparency between state agencies to increase oversight and regulation of the underground construction economy. Over the 2007 interim, the Task Force met six times and adopted recommendations at its final meeting.

One of the issues the Task Force discussed was independent contractor laws. The term "independent contractor" is not defined in law; rather, this concept is embodied in several exception tests to the definition of "worker" in industrial insurance statutes and "employment" in unemployment compensation statutes. If a worker fulfills the tests, the worker is not covered for purposes of workers' compensation and unemployment insurance, and no industrial insurance premiums or unemployment taxes are due. Otherwise, the worker is a covered worker, and premiums and taxes are due.

Industrial insurance and unemployment insurance laws both share a four-part exception test that applies only to construction. These laws also share a six-part test that applies to all industries, including construction. Persons working under independent contract, the essence of which is personal labor, are covered under industrial insurance. Both sets of laws also contain exceptions for specific industries, and sole proprietors and other business owners are exempt. The analysis also otherwise differs somewhat for unemployment insurance and industrial insurance.

The Task Force recommended that the different definitions of covered worker and employment exceptions be blended into one consistent definition.

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**Summary of Engrossed Substitute Bill:**

A new test is established to determine when work is done by independent contract in the construction industry for purposes of unemployment insurance and industrial insurance. The existing construction specific tests are eliminated. All parts of the following test must be met:

- (1) The person has been and will continue to be free from control or direction over the performance of the service, both under contract and in fact.
- (2) The service is either outside the usual course of business for which the service is performed, or outside of all the places of the enterprise for which the service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the place of business.
- (3) The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature, or the individual has a principal place of

business that is eligible for a business deduction for federal income tax purposes, other than that furnished by the employer.

- (4) On the effective date of the contract, the individual is responsible for filing, under the contract and in fact, a schedule of expenses with the internal revenue service.
- (5) On the effective date of the contract or within a reasonable period after the effective date, the individual has an active and valid certificate of registration with the Department of Revenue and an active and valid account with any other state agencies, and has a Unified Business Identifier number.
- (6) On the effective date of the contract, the individual is maintaining a separate set of books or records.
- (7) On the effective date of the contract, the individual has a valid contractor registration or electrical contractor license if the work requires the registration or license.

The new test is similar to the six part test for all industries. The test differs in that the individual must have a valid contractor registration or electrical contractor license on the effective date of the contract and the individual must have an active and valid certificate of registration with the Department of Revenue and an active and valid account with any other state agencies. In addition, the principal place of business that is eligible for a business deduction must be other than that furnished by the employer.

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**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill takes effect 90 days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony:**

(In support) The agencies identified the lack of a single definition and the lack of a definition of independent contractor as barriers to getting at the underground economy. Consistent misclassification of workers is a problem in the underground economy. Workers are misclassified as independent contractors and do not get protected.

Care was taken so other industries were not impacted and that there were no unintended consequences.

An issue with control and direction in the taxicab industry could be taken care of with an amendment.

(Concerns) This bill seems to create new substantive tests and in this complex area, the effort should be undertaken with a broader business/labor group.

There is new language in subsection 2 (c) relating to a principle place of business and what impact this might have is not clear. When courts see new language, they interpret it as a change. The new active and valid language in subsection (e) is also a concern. The

appropriate remedy is for a person to be fined, not to change the independent contractor laws. Does this mean a data base needs to be checked?

The bill would be okay if the new language were removed.

Subsection (a) imports new language from the common law test that applies only to construction. This should be removed.

Consolidation is okay but maybe a better approach is just to define employment (and therefore what is not employment) and not broach the issue of independent contractor. Parts (e) and (g) also seem to create a different time frame as to when the clock begins to tick because (g) does not include a reasonable period after the effective date of the contract while (e) does.

(Neutral) A subcommittee of the Underground Economy Task Force looked at whether the similar tests could be simplified and if mirroring language for the two agencies was possible, as well as whether two separate tests could be reduced to one. This bill provides clarity in a single test that will be easier to follow. In 99 percent of the cases, there will be no change. There are two places where there could be a difference because there were some loopholes. First, the test that applies to all industries does not require a person to be an independent contractor. An audit case was lost because a person was found to be an independent contractor even though the contractor was not registered. Second, the Department of Labor and Industries has lost cases because the registration was 10 years old or even revoked so "active and valid" was added.

(Opposed) None.

**Persons Testifying:** (In support) Dave Johnson, Washington State Building and Construction Trades Council; Bob Abbott, Washington and Northern Idaho District Council of Laborers; John Littel, Pacific Northwest Regional Council of Carpenters; and Chris Van Dyk, BYG Taxicab Cooperative.

(Concerns) Dan Fazio, Washington Farm Bureau; Kris Tefft, Association of Washington Business; Dave Ducharme, Utility Contractors Association of Washington; and Rick Slunaker, Associated General Contractors.

(Neutral) Carl Hammersburg, Department of Labor and Industries; Lisa Marsh, Washington Employment Security Department; and Drew Shirk, Department of Revenue.

**Persons Signed In To Testify But Not Testifying:** None.