

HOUSE BILL REPORT

HB 2147

As Reported by House Committee On:
Labor & Workforce Development

Title: An act relating to a voluntary independent contractor certification.

Brief Description: Concerning voluntary independent contractor certification.

Sponsors: Representatives Condotta and Buys.

Brief History:

Committee Activity:

Labor & Workforce Development: 1/21/14, 2/5/14 [DPS].

Brief Summary of Substitute Bill

- Allows persons who meet certain requirements to obtain an independent contractor exemption certificate from the Department of Labor and Industries.
- Provides that persons working under a certificate are exempt from industrial insurance, minimum wage and overtime, prevailing wage, and unemployment insurance.

HOUSE COMMITTEE ON LABOR & WORKFORCE DEVELOPMENT

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Sells, Chair; Reykdal, Vice Chair; Manweller, Ranking Minority Member; Condotta, Assistant Ranking Minority Member; Christian, Green, G. Hunt and Moeller.

Minority Report: Do not pass. Signed by 1 member: Representative Ormsby.

Staff: Joan Elgee (786-7106).

Background:

Employment standards and benefits generally apply only if an employer-employee relationship exists rather than an independent contractor relationship. Various multi-part tests are used to determine whether an individual is an independent contractor. For purposes of

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prevailing wage, industrial insurance, and unemployment insurance, a six-part statutory independent contractor test is applied. This test requires that:

- the individual has been and will be free from direction and control, both under the contract and in fact;
- the individual's services are outside the usual course of business for which the service is performed, or outside all the places of business, or the individual must pay the costs of the principal place of business where the services are performed;
- the individual has an independently established business, or a principal place of business that qualifies for an Internal Revenue Service (IRS) deduction;
- the individual is responsible for filing a schedule of expenses with the IRS;
- the individual has a separate set of books and records that reflect all items of income and expenses; and
- the individual has an active and valid registration with the Department of Revenue, has a unified business identifier number, and has any other required state accounts for the payment of taxes.

In the construction industry, a seventh required element is that the individual be registered as a contractor or licensed as an electrical contractor. For industrial insurance, a threshold question is whether a person under contract brings more than their personal labor to the job and for unemployment insurance, persons may also be independent contractors under an alternative three part test. For purposes of minimum wage and overtime, a common law test, known as the economic dependence test, applies. The inquiry under this test is whether the worker is economically dependent on the alleged employer or is instead in business for himself or herself.

The Department of Labor and Industries (Department) and the Employment Security Department apply the tests to determine if a worker is eligible for the benefits of the particular employment law and whether the employer is responsible for the payment of wages or taxes, as appropriate, for the particular law.

Summary of Substitute Bill:

Independent Contractor Exemption Certificate.

A person who regularly and customarily performs services at a location other than a fixed business location may apply to the Department for an independent contractor exemption certificate (ICEC). A person working under an ICEC is conclusively presumed to be an exempt independent contractor for purposes of industrial insurance. In addition, a person working under an ICEC certificate is exempt from minimum wage and overtime, prevailing wage, and unemployment insurance. "Working under" an ICEC means the person is performing work on the type listed on the ICEC and there is no written agreement that the person is covered by industrial insurance. To be covered, the agreement must be filed with the Department at the time and in the form prescribed by the Department.

Obtaining an ICEC.

An ICEC application must be under oath and contain specified items, including:

- identification of each trade, occupation, business, or profession for which the applicant seeks certification;
- a statement that the applicant meets a test:
 - the applicant has been and will continue to be free from direction or control over the performance of the applicant's own services, both under contract and in fact; and
 - the applicant is engaged in an independently established trade, occupation, business, or profession;
- a statement that the applicant understands he or she is not eligible for benefits, unless coverage is elected;
- documentation that the applicant has an active and valid account with the Department of Revenue, any active and valid credentials required by the state for the trade, occupation, business, or profession, and any required registration with the Secretary of State.

Suspension/Revocation of an ICEC.

The Department may suspend an ICEC for a specific business relationship if the Department determines the holder is not free from direction or control. The Department may revoke an ICEC if the holder:

- made misrepresentations in the application or renewal form;
- altered or amended the application or renewal form, supporting documentation, or the ICEC;
- failed to cooperate with the Department in providing information relevant to the validity of the ICEC; or
- does not have a independently established business.

Suspension or revocation of an ICEC takes effect upon the Department's decision, subject to appeal, and does not invalidate the holder's ineligibility for benefits for the period before suspension or revocation.

Penalties.

It is a violation for a person to transfer an ICEC to another person, alter an ICEC, misrepresent the person's status as an ICEC holder, or commit other acts. For an employer, it is a violation to require a person through coercion, misrepresentation, or fraudulent means to apply for an ICEC to avoid industrial insurance obligations or to exert direction and control such that the person no longer meets requirements to obtain an ICEC. Violators are subject to a fine of up to \$1,000 for each violation.

Appeals of denials of ICEC applications, suspensions, revocations, and penalties are heard by the Board of Industrial Insurance Appeals.

Fee/Revenue.

The application and renewal fee must be not more than \$125. Fees and fines are deposited into a newly created ICEC account, which is subject to appropriation. Expenditures may be used only for purposes of the ICEC program.

Other.

A person working under an ICEC is an independent contractor for business and occupation tax purposes. The Department has rule-making authority. Persons may begin applying for an

ICEC on September 1, 2014. The Department must maintain on its website a searchable database of ICEC holders and the trade, occupation, business, or profession listed on each certificate.

Substitute Bill Compared to Original Bill:

The substitute bill requires agreements that an ICEC holder be covered by workers' compensation to be in writing and filed with the Department. It also adds the requirement that the Department maintain a database of certificate holders on its website. Clarifying and consistency changes are also made.

Appropriation: None.

Fiscal Note: Preliminary fiscal note available.

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

Staff Summary of Public Testimony:

(In support) We have been working on misclassification for about 10 years, but everything we do punishes the good guys. Making things simpler for the good guys will help prevent driving more people underground. It is becoming too difficult to do business in the state. This bill is a different approach based on success in Montana. It creates a clear line of who is an independent contractor. The seven part test has become muddled and there are too many interpretations. Under this bill, the Department can educate contractors so they can't say "I didn't know." There are protections so abusers will be punished.

The bill is supported in concept. Having a way to state your intent and being reviewed is a worthwhile idea. This bill will foster entrepreneurship. The bill is a starting point and there is willingness to work on it.

(Opposed) This bill does not address the root cause of misclassification. The bill fails to address low-wage workers being forced to sign boilerplate independent contractor documents and get their own UBI and registration numbers. The bill would permit dishonest employers who engage in payroll fraud to continue to operate. It ignores the balance of power between an employer and employee. The critical questions are whether the person has their own business and is free from direction and control. Look at the ABC test.

Persons Testifying: (In support) Representative Condotta, prime sponsor; Van Collins, Associated General Contractors; and Tim O'Connell, Association of Washington Business.

(Opposed) Diego Rondón Ichikawa, National Employment Law Project; and Teresa Mosqueda, Washington State Labor Council.

Persons Signed In To Testify But Not Testifying: Vickie Kennedy, Department of Labor and Industries.