

**Maine Department of Labor  
Bureau of Unemployment Compensation**

**An Act To Modify the Laws Regarding Status  
as an Independent Contractor**

**Report to the Joint Standing Committee on  
Labor, Commerce, Research & Economic Development**

**February 2012**

**Authorized by the 125th Maine Legislature  
Public Law Chapter 292, LD 1420**

## Executive Summary:

In the first session of the 125<sup>th</sup> Maine State Legislature, Public Law, Chapter 292 was enacted that directed the Commissioner of the Maine Department of Labor or his designee to convene a “stakeholder workgroup” made up of key business and labor representatives and members of state agencies engaged in making employment determinations; with the goal of developing a recommendation for a single employment standard test for use in administering Department of Labor and Maine Workers Compensation Laws. This group worked over the course of the fall 2011 and early winter 2012 to explore all of the current tests used in Maine State Government, as well as the IRS and Economic Realities tests, to make employment and independent contractor determinations. Ultimately, the group developed a draft employment test recommendation for use in Workers Compensation, Unemployment Insurance and Labor Standards programs for determining whether an individual is an independent contractor or employee for purposes of coverage and premium or tax liability. The draft incorporates mandatory components as well as allowing some degree of flexible options in defining an independent contractor business relationship.

Although full consensus was not achieved on every point, there was more agreement than disagreement about the final wording of the draft contained in this report. It should be noted that the Labor community still feels strongly that a fully conjunctive test be adopted to ensure strong worker protection against abuse and the risk of misclassification, which harms both employers and workers alike. However, neither the Business community nor the Governor support a fully conjunctive test as it restricts entrepreneurial development. Both the Maine Workers Compensation Agency and the Department of Labor are satisfied and comfortable with the recommended draft, believing that the critical components of *all* independent contractor relationships are represented by the mandatory section of the recommended language and that the flexibility of the non-conjunctive section will make the test more readily applicable to all industries and occupations.

## Background:

LD 1420, "An Act to Modify the Laws Regarding Status as an Independent Contractor," and LD 1314, "An Act to Standardize the Definition of 'Independent Contractor,'" were both introduced in the 1st session of the 125th Maine State Legislature. LD 1420 sought to revise the employment standard for determining independent contractor status for Unemployment Insurance liability and benefit coverage. LD 1314 proposed the adoption of a new employment standard to determine independent contractor status for both the unemployment insurance and workers compensation programs. These efforts were the most recent of an extensive history of legislative attempts to address long-standing frustration with, and confusion around, the multiple definitions of employment status across these two programs.

The conjunctive nature of the 'ABC' test used to determine employment coverage for unemployment protection was viewed by the business community as overly restrictive and severely limited the ability of individuals who wish to be in business for themselves to be "independent." The labor community appreciated and supported the 'presumption of employment' and conjunctive nature of the test as it protected workers from possible misclassification. Although containing only three elements, the 'ABC' test was broadly written and difficult for employers and workers to use effectively as guidance without the assistance of 'experts' in the application of the test.

The laws governing the Maine Workers Compensation program employed multiple employment tests depending on the industry. A twelve-part conjunctive test recently enacted for use with construction

occupations also incorporated the presumption of employment and contained two of the three elements of the 'ABC' test. It also contained more specificity than the 'ABC' test and was better understood by the general public in practical application. Although considered by many to be an improvement over the 8-factor test used to determine workers compensation coverage for non-construction occupations, the 12-factor test still lacked universal support. The 8-factor test for most other occupations was not conjunctive, and therefore was open to subjective application that could lead to inconsistencies in determinations or perceptions of 'unfair' application. Workers Compensation law also contains a third test pertaining to woodlot owners, and a fourth test pertaining to operators of motor vehicles engaged in freight transportation or courier and messaging services, which was enacted in 2011.

To further complicate matters, the Maine Revenue Services, which is intricately linked with the federal Internal Revenue Services (IRS), uses the IRS regulatory definition for determining employment coverage. The Maine laws governing the Bureau of Labor Standards' programs within the Department of Labor do not contain a specific test, and the program relies primarily on the employment determinations made under the Unemployment Insurance Program.

The resulting confusion from the many employment tests used by State agencies has generated long-standing frustration for employers, workers and independent contractors alike, with what often appears to be contradictory determinations across multiple state agencies and an unnecessarily heavy regulatory burden on businesses who must comply with all of the different tests. It also contributed to worker misclassification which is harmful to all involved. Misclassified workers lose critical workplace protections such as health insurance and prescribed treatment of overtime. Misclassification creates inequitable market conditions among employers, making it difficult for those complying with states laws to compete against those that do not comply. State Government loses tax revenue, unemployment contributions and workers compensation premiums, resulting in higher taxes and premium costs passed on to those who classify their workers appropriately.

After much public testimony in response to both bills, it was clearly apparent that the current multiple employment test situation in Maine State Government was not working and that changes were needed. It was also clear that there was no agreement around which test to use. Moreover, there seemed to be a common desire for having 'one' standard - at a minimum for Workers Compensation and Unemployment Insurance coverage determinations - and if possible, one test for use by all state agencies.

In response, the Joint Standing Committee on Labor, Commerce, Research and Economic Development (**Committee**) took two actions. First, the Committee amended LD 1420 to direct the Commissioner of the Department of Labor (or his designee) to convene a "stakeholders' workgroup" consisting of representatives from key business and labor associations and members of state agencies that make employment determinations for tax or insurance coverage purposes. The Employment Standards Stakeholder workgroup (**workgroup**) would meet with the goal of developing a single employment test for administration of the Maine Workers Compensation, Unemployment Insurance and the Bureau of Labor Standards programs in determining whether an individual is an employee or independent contractor. A report of this workgroup recommending language for a single test would be reported back to the Committee during the 2nd session of the 125th legislature for potential legislative action. Although the Resolve authorizes the Committee to report out a bill based on the workgroup's recommendations, LD 1314 was also carried over as the potential legislative vehicle to take legislative action.

Second, the Committee adopted the revision of the 'ABC' test proposed under LD 1420, which removed the conjunctive nature of the test. Instead of having to pass all three elements of the test, an independent contractor status can be determined by passing 'A plus B' or 'A plus C'. This change was made to alleviate tension around this test pending the outcome of the workgroup and included a sunset provision of 12/31/2012.

Stakeholder Group:

The Study amendment directed the inclusion of specific stakeholders in the workgroup. Representatives of all identified groups were invited and kept informed of the progress and output of the workgroup and the majority directly participated whenever possible. The names of the representatives to the workgroup are as follows:

***Business Community Representatives:***

Peter Gore, Maine Chamber of Commerce  
David Clough, National Association of Independent Business  
James Cote, Associated Builders & Contractors, Inc.  
Brian Parke, Maine Motor Transport Association  
John O'Dea, Associated General Contractors of Maine  
Frank Porter, Porter Drywall  
John Spritz, Technology Association of Maine (invited but did not participate)  
Curtis Picard & Debra Hart, Maine Merchants Association  
Richard Holden, Maine Staffing Association

***Labor Community Representatives:***

Matt Schlobohm, American Federation of Labor-Congress of Industrial Organizations  
Anne Carney, Pine Tree Legal  
Laura Harper, Maine Women's Lobby  
John Leavitt, New England Regional Council of Carpenters  
Chris Hastedt & Robyn Merrill, Maine Equal Justice  
Ben Chin, Maine Immigrants Rights Coalition  
John Napolitano, Maine State Building & Construction Trades Council

***Additional Stakeholder Representatives:***

Michael Bourque, Maine Employees' Mutual Insurance Company  
Mary Lou Dyer, Maine Association for Community Service Providers

***State Government Members:***

Office of the Governor:

John Butera, Senior Policy Advisor  
Kathleen Newman, Deputy Chief of Staff

Department of Labor

Robert J. Winglass, Commissioner  
Jeanne Paquette, Deputy Commissioner  
Laura Boyett, Bureau of Unemployment Compensation  
Richard Snow, Bureau of Labor Standards  
Susan Wasserott, Legislative Liaison

Workers Compensation Board

Paul Sighinolfi, Executive Director  
John Rohde, Chief Counsel

Department of Administrative & Financial Services

Sawin Millett, Commissioner  
Gerome Gerard, Maine Revenue Services  
John Sagasser, Maine Revenue Services

Attorney General's Office

Liz Wyman, Assistant Attorney General for Department of Labor

Secretary of State

Jay Martin, Small Business Advocacy

Department of Health & Human Services

Ricker Hamilton, Office of Elder Services  
Guy Cousins, Offices of Substance Abuse

***Maine State Legislature:***

Senator Christopher Rector, Chair, Joint Standing Committee on LCRED  
Carolyn Russo, Legislative Analyst for LCRED

The workgroup met three times in person over the fall and winter and communicated by e-mail between meetings. Additionally, smaller groups met independently to develop responses to a draft work product, which was then shared as a framework for full workgroup discussion and draft refinement.

The first meeting was devoted to reviewing and understanding the employment tests currently in effect in Maine State Government. Additionally, any barriers or statutory challenges that could limit the use of a common test were identified. The two concrete limitations identified included the federal statutory prohibition against an individual voluntarily giving up his or her rights to unemployment insurance protection (which negates the use of a 'binding' pre-determination of independent contractor status for the Unemployment Insurance Program); and the integral policy and procedural relationship between the Maine Revenue Services and the Internal Revenue Services (which would prohibit MRS from using any employment test other than that used by the IRS).

Workgroup members then followed up this meeting with input as to whether one of the existing tests should be chosen, and if not, what each felt would be important components or characteristics of any

test potentially developed or adopted. None of the current tests used within state government garnered support across the stakeholders, or even within the business or labor groups. However, certain characteristic commonalities emerged, including that any test chosen or developed should be easily understood by both employers and workers, minimize subjectivity, and increase certainty with respect to employment status determinations for both employers and workers. Additionally, the business stakeholders urged that any test chosen must allow for and encourage true entrepreneurial growth, while the labor stakeholders advocated for a test that provided strong worker protection against potential abuse (misclassification). To achieve the latter, the labor community felt that retaining a presumption of employment and a fully conjunctive test would provide the best level of protection as well as certainty in employment determinations. The business community also supported a test that adequately protected against misclassification abuse to ensure equality in competitive conditions but believed this could be achieved without requiring a fully conjunctive test.

#### First & Second Test Draft Efforts:

The discussion, participation and input from the stakeholders was excellent and provided all members with a clear understanding of each group's perspectives and objectives. It became evident that none of the existing tests in Maine law, or the IRS standards and the Economic Realities test used by the US Bureau of Labor Standards, would satisfy the requirements of all of the stakeholders. The more likely avenue to pursue would be to develop a test using the input from the stakeholders as to characteristics and components of what would be a 'good' test for Maine. However, it was difficult to develop the 'test' with a group of this size, so given the time constraint Paul Sighinolfi and John Rohde from Workers Compensation, Laura Boyett from the Department of Labor and Liz Wyman from the Attorney General's office met and developed an initial test draft attempting to incorporate the feedback from the larger group. The result was a conjunctive test that started with the individual being free from all direction and control of the contracting entity and then meeting thirteen criteria. This draft was distributed to the full workgroup as a basic framework to react to and develop from.

After the Governor reviewed the draft, both he and business stakeholders raised concerns about the fully conjunctive nature of the test. Much of the concern was that it forced all independent contractors to meet a 'cookie cutter' mold which wasn't practical, especially across all industries. A smaller subset of business representatives met to develop an alternative proposal based on this initial draft. The group invited Paul Sighinolfi of Workers Compensation and Laura Boyett of the Unemployment Insurance Program to provide input and feedback to their proposal before rolling it out to the full workgroup for discussion. The draft was also reviewed by the Governor and staff for input.

The result was a partial hybrid of the original draft that incorporates a conjunctive base that must be present in all independent contractor relationships but then allows some flexibility among additional components that complete the description of an independent contractor relationship. This draft was sent out to the full workgroup and became the basis of the work conducted in the final in-person meeting. The full workgroup worked diligently throughout this extended meeting to find common ground and wording that could be agreed upon by all stakeholders. Although full consensus was not achieved on every point, there was more agreement than disagreement about the final wording of the draft contained in this report. It should be noted that the Labor community still feels strongly that a fully conjunctive test be adopted to ensure strong worker protection against abuse and the risk of misclassification which harms both employers and workers alike. However, neither the Business community nor the Governor support a fully conjunctive test as it restricts entrepreneurial development. Both Workers Compensation and the Department of Labor are comfortable with the

hybrid draft believing that the critical components of *all* independent contractor relationships are covered by the mandatory section of the recommended language and that the flexibility of the non-conjunctive section will make the test more readily applicable to all industries and occupations.

Although there are still some areas that will need discussion and work by the Committee in order to finalize the test for legislative action, the framework for a single test to replace the current ones used in the Department of Labor and Workers Compensation is there. Due to the inextricable operational linkages between the Maine Revenue Services (MRS) and the Internal Revenue Services, the workgroup is not recommending that the proposed test pertain to MRS. To do so would add considerable complexity to their procedures and result in significant loss of operational efficiencies.

Recommended Draft and Stakeholder Comments:

As the workgroup was not able to come to full consensus on the complete wording in the recommended draft language, each was afforded the opportunity to provide specific comments that they wished to be included in the final report for the Committee's consideration. The test draft which follows identifies the areas where there was **not** agreement. The business and labor stakeholders grouped their report comments and these follow the employment test draft. To facilitate the Committee's review, the draft is not in the final legislative format that would reference specific statutes where the test would be inserted. Once the language is finalized, this can easily be accomplished.

Draft Employment Standards Test

**An Act To Establish a Uniform Definition of Independent Contractor**

Services performed by an individual for remuneration are considered to be employment subject to this chapter unless it is shown to the satisfaction of the agency that the individual is free from the essential direction or control of the employing unit, both under the individual's contract of service and in fact, the employing unit proves that the individual meets all of the criteria in Section A and (a) of the criteria in Section B.

Section A:

1. The individual has the ( b ) right to control the means, ( c ) and progress of the work except as to final results; and
2. The individual is customarily engaged in an independently established trade, occupation, profession or business; ( or d ), and
3. The individual has the opportunity for profit and loss as a result of the services being performed for the other individual/entity; and
4. The individual ( e ) hires and pays the individual's assistants, if any, and, to the extent such assistants are employees, supervises the details of the assistant's work;
- ( 5.  f  )

Section B:

1. The individual has ( g ) invested in the facilities, tools, instruments and materials used by the individual to complete the work;

2. The individual is not required to work exclusively for the other individual/entity;
3. The individual is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work;
4. The parties have a contract that defines the relationship and gives contractual rights in the event the contract is terminated by the other individual /entity prior to completion of the work;
5. Payment to the individual is based on factors directly related to the work performed and not solely on the amount of time expended by the individual;
6. The individual makes that individual's services available to some community; (  h  )
7. IRS determination of independent contractor status (SS-8 determination).

Notes regarding the gaps in agreement labeled (a) through (f) of the draft (see individual comments for further detail):

- (a) *the original draft included a recommendation that '3 or more' of the elements in Section B be met in addition to meeting all of the elements in Section A – MEMIC & the State Small Business Advocate supports '3 or more', business would like this section to require '2 or more' elements and labor would like the test to require more than three. Business believes satisfying the freedom from direction and control and all of Section A is already strong and defines the bulk of all true independent contractor relationships, Section B merely 'fleshes' out the full picture. Labor feels that many of the elements of Section B could be easily met and that requiring only three would enable someone to 'cherry pick' the three easiest elements on the list and that requiring four or more would effectively eliminate this risk.*
- (b) *the original draft, A-1 included the word 'sole' when describing the individual's right to control their work – some business representatives were comfortable with this, others would like it removed. Labor endorses keeping it.*
- (c) *During the meeting discussion, the suggestion was made to include the means and "manner" in the description of the individual's area of control under A-1. Agreement was reached around the addition of 'means' but not with including 'manner'.*
- (d) *The business community recommends that A-2 be amended to include an 'or' phrase - "or such work is outside the usual course of the business for which the service is performed." Although there was a little discussion about this possibility at the end of the last meeting - neither side had reached agreement about its inclusion prior to the end of the meeting.*
- (e) *In the last meeting, there appeared to be agreement to add the phrase "makes the determination to" before hire in A-4. Upon further review, the business community would like this removed.*
- (f) *Some members of the labor community felt that a fifth element should be added to Section A stating "Such work is outside the usual course of the business for which the service is performed" in order to strengthen the test. Members of the business community pointed out that this would*

*reinstate the conjunctive elements of the “ABC” test which was eliminated in the 1<sup>st</sup> session of the 125<sup>th</sup> legislature and make this test even more restrictive.*

*(g) Members of the Labor community & MEMIC felt that there should be language added that would make it clear that the investment in one’s business be more than de minimus in B-1. The business community did not necessarily disagree with this conceptually but no agreement could be reached as to what the language should be that would be measurable versus subjective.*

*(h) Labor suggested that this criterion (B-6) is so broad and vague that it becomes an ineffective test. As such, they recommend dropping it from the criterion available under B. State agencies have some concerns about this recommendation as 'holding oneself' out as a business to some community would appear to be a solid indicator that an individual's intent is to be in business for him or herself. No agreement was reached among the members. Business supports the retention of this element.*

Additional recommendations made where there was group agreement:

- Requirement that the Department of Labor and Workers Compensation report back to the legislature after implementation with an update on how the new definition is working. The report should include misclassification data.
- Education and Enforcement is a key piece in the rollout of any new test – there needs to be a stated plan for this as a next step post legislation and involvement by business & labor stakeholders.
- Test starts with the presumption of employment which increases the strength of it as a valid employment test.

Additional suggestions where group agreement was **not** achieved:

- Labor recommended the addition of a three-year Sunset to evaluate the impact on employment decisions compared with the current tests used, with report back to the Committee for action. Although business and MEMIC support the idea of a status report including misclassification data, neither supports a sunset provision.
- Business recommends adding a requirement for developing minor technical rulemaking for a binding predetermination process that could be phased in on a voluntary basis, using existing (and re-authorized) staff resources at the Department of Labor and Workers Compensation and would include a fee structure (if required). MEMIC supports having a sanctioned 'pre-determination' process. *The Department of Labor has to restate that a binding pre-determination process **cannot** apply to Unemployment Insurance coverage as it is prohibited under federal law for a person to voluntarily give up his or her rights to unemployment coverage for the position held or the work performed. Any binding pre-determination process, if approved, could only apply to Workers Compensation. In the current recommendation, the Workers Compensation Agency is recommending the elimination of the existing 'rebuttable' pre-determination process and cautions against the inclusion of a binding pre-determination due to cost to administer and the required*

*additional documentation and time requirements that would need to be placed upon employers and the agency to make these determinations accurately.*

- Labor also recommends that one year beyond implementation and rollout of the new test, stronger penalties associated with misclassification be adopted as a deterrent. If there is no consensus for the one-year wait period, then labor requests this possibility be revisited as part of the recommended three-year sunset provision review.
- MEMIC would like to see inclusion of a reference to a 'written' contractual relationship. State agencies have concerns about mandating written contracts due to the administrative burden on small employers. In addition, the use of 'written' contracts has been regularly misused in misclassification situations, creating the perception of the parties that any written language in the contract holds weight over the law, even when that perception is inaccurate

## Attachments

- Stakeholders Comments for Consideration by the LCRED Committee
  - Comments by Matt Schlobohm, AFL-CIO for the Labor Stakeholder Community
  - Comments Business Stakeholder Community
  - Comments by Michael Bourque, MEMIC
  - Comments by Jay Martin, Advocate for Small Business
  - Comments by John Sagasser, General Counsel for Maine Revenue Services
  
- LD 1420 Amendment Language authorizing the Stakeholder Group work

## Matt Schlobohm – Labor Community Comments & Additional Recommendations

*Email of January 31, 2012*

**From:** Matt Schlobohm [mailto:matt@maineaficio.org]

**Sent:** Tuesday, January 31, 2012 3:56 PM

**To:** Boyett, Laura L.

**Cc:** 'Chris Hastedt'; lharper@mainewomen.org; Ben@mainepeoplesalliance.org; 'Robyn Merrill'

**Subject:** Comments on draft test RE: Marked up version of draft test

Hi Laura,

I've submitted a couple comments and edits to the latest draft test on behalf of the Maine AFL-CIO, Maine Equal Justice Partners, Maine Women's Lobby and Maine People's Alliance. We made an effort to reach Ann Carney and couldn't do so, but we believe she would sign onto these suggestions as well. Some of the suggestions are pasted just below and others are attached as track changes. I apologize for not putting these in one uniform document, but I wanted to get this in before COB today and I'm running out of time. Please let us know if you have any questions. Best, Matt

Here are the comments. Note additional comments are attached as track changes.

- We think it is important to make it clear in the very beginning that there was not agreement from the task force on this draft proposal. There is reference to that in the "Discussion around test characteristics or criteria where there was no consensus" section, but with opening language referring to "changes with consensus," it does not come across as clearly as it could that there was not agreement on this framework.

We would suggest either a cover letter that indicated very clearly that the task force could not reach consensus on a draft proposal or alternately, there could be a section at the top of the report, "Summary of the Task Force's work." In that cover letter or additional section, we would hope it could include something to indicate the following:

The task force could not reach consensus on a draft proposal. Labor stakeholders felt the original draft version which depicted a fully conjunctive test better met their goals for ensuring strong worker protection and protecting against misclassification. They also felt there were two additional reasons to adopt a conjunctive test that is rigorous, easily understood, not easily manipulated and that minimizes uncertainty and subjectivity for all parties:

- 1) Employee misclassification is on the rise in Maine and across the country. This harms employees, employers and our state as a whole.
- 2) In this difficult and extremely competitive economy, there is more incentive than ever to misclassify and gain a competitive advantage over other employers. The test we adopt should take that into account.

Business stakeholders felt that the original draft did not recognize differences in true independent contractor relationships and would make it difficult for valid independent contractors to be identified if everyone is forced into the same mold. This contingency felt the second draft combined a strong foundation in the mandatory section that must be met in all independent contractor relationships but allowed for some flexibility by recognizing differences individual situations, industry requirements, etc.

It was made clear to task force members that the Administration would only support this disjunctive proposal and thus parties worked within that framework to make changes, even though there was not consensus on that overall approach.

- Edit to “Additional components where there was group consensus”

In the first bullet – on the Sunset- could we add language at the end of that sentence – see proposed addition in bold. So it would read:

“Add to legislative proposal a 3 year Sunset to evaluate the impact on employment decisions compared with the current tests used with report back to LCRED for action. **This will include yearly data on the level of misclassification in Maine, so that impact can be fully assessed.**

(Note: This was brought up at the last meeting and I think there was consensus on this point.

- We would recommend that after one year, we implement stronger penalties in order to deter misclassification. If there is not consensus to include that now, then an assessment of whether stronger penalties are needed to deter misclassification should be conducted as part of the three year sunset evaluation.

Thanks, Laura. Please let us know if you have any questions.

Best,

Matt Schlobohm  
Maine AFL-CIO

Additional specific wording change suggestions by Labor to draft:

Section A –

5. The individual has the opportunity for profit and loss as a result of an investment of capital in the business through which the services are being performed for the other individual/entity; and [NOTE: we are concerned that as written, a commission or bonus for an employee might be considered a “profit” or the failure to receive it as a “loss.” To truly be an independent contractor there should be some investment in capital. Even an individual practicing law on

their own or a computer technician must invest in some tangible property to engage in that business independently.]

Add #5 Such work is outside the usual course of the business for which the service is performed.

Section B:

1. The individual has made more than a de minimus ~~invested investment~~ in the facilities, tools, instruments and materials used by the individual to complete the work; [NOTE: we think that “de minimus” is ok, but if others are not comfortable with this language we would suggest “The individual has made a *substantial* investment in the facilities....”.]

6. The individual makes that individual’s services available to some community; [NOTE: Based on our discussion we believe that this criteria is so broad as to capture so many circumstances that it becomes an ineffective test. We strongly recommend eliminating number 6 from the criterion in Section B.]

## Business Community Comments & Additional Recommendations

January 31, 2012

To: Ms. Laura Boyett, Director, Bureau of Unemployment Compensation

From: David Clough, National Federation of Independent Business – Maine Chapter  
James Cote, Associated Builders and Contractors of Maine  
John O’Dea, Associated General Contractors of Maine  
Peter Gore, Maine State Chamber of Commerce  
Brian Parke, Maine Motor Transport Association  
Curtis Picard, Maine Merchants Association

Cc: Paul Sighinolfi, Executive Director, Workers Compensation Board

Re: An Act To Establish a Uniform Definition of Independent Contractor

On behalf our associations, which represent much of Maine’s business community, we would like to extend our gratitude to you for helping lead the effort to reform and update Maine’s independent contractor definition. We believe product of this exercise that business can support will help to provide Maine’s business community with clarity and consistency, and thus assist businesses and workers in the 21<sup>st</sup> economy as well as invite entrepreneurship and innovation. We hope the updated definition will give increased confidence to those who hire independent contractors.

We recognize that intentional misclassification is a harmful practice that disadvantages workers and businesses. A clearer definition of who is an independent contractor will improve public education efforts and sharpen the focus on misclassification, whether unwitting or willful.

Below are our comments on the marked-up version of the draft proposal that resulted from the January 20 meeting of the stakeholder group. We have also attached a clean copy of the proposal that we support.

Please let us know if we can answer any questions or provide more information.

### **Comments**

***Opening Paragraph*** – We support changing the ‘3 or more’ standard referring to the number of elements an individual must meet in Section B to ‘2 or more’. We believe that meeting two or more of the elements in section B, when viewed in conjunction with having satisfied all the elements in Section A (which is extremely strong based upon case law and existing statutes), should provide ample evidence that a person is a legitimate independent contractor. As you know, Section A goes beyond what is currently spelled out in the unemployment law test for independent contractor status and, with its presumption of employment, Section A goes beyond that 8-factor test currently contained in the workers compensation law. Once a worker answers “yes” to each of the elements in Section A, the worker is 96% of the way toward establishing credentials as an independent contractor.

**Section A** – We support the following changes:

1. Delete the words “sole” and “manner” in A-1, which are implicit and according to legal counsel has little to no legal precedent.
2. Amend A-2 to read: “*The individual is customarily engaged in an independently established trade, occupation, profession or business, or, such work is outside the usual course of business for which the service is being performed.*” We believe that this is consistent with the current A+B or A+C test in Maine’s unemployment law.
3. Delete A-5. The addition of this element to the conjunctive portion of the proposed test would make the new definition substantially more difficult to satisfy than the current A+B or A+C test in the unemployment law. In fact, the addition of A-5 together with the other conjunctive elements in Section A would make the new independent contractor test statutorily more restrictive than the old ABC test (unchanged since 1935 until last year) that had become increasingly impractical in the modern economy. We are trying to move forward, not backward.
4. Delete the term “makes the determination to” in A-4.

**Section B** – We support the following changes:

1. Delete the term “has made more than a de minimus” in B-1.
2. Do **not** move A-6 to section A.

**Additional components where there was group consensus** – We support the following changes:

1. First Bullet – We do **not** support the inclusion of a sunset in this legislation.
  - a. Legislation should direct MEDOL and WCB to report back with an update on misclassification problems and how the new definition is working.
2. Second Bullet – We suggest the following under the second bullet for Education and Enforcement:
  - a. Legislation should direct a working group to develop recommendations for minor technical rulemaking for a binding predetermination process that could be phased in on a voluntary basis, using existing (an re-prioritized) staff resources at MEDOL and WC, and a fee structure (if required).

We have attached a non-redlined draft of our proposed recommendations, which we understand will ultimately be edited by the Revisor’s Office.

Thank you for incorporating our views into your report. We look forward to future partnership and success.

### **An Act To Establish a Uniform Definition of Independent Contractor**

Services performed by an individual for remuneration are considered to be employment subject to this chapter unless it is shown to the satisfaction of the agency that the individual is free from the essential direction or control of the employing unit, both under the individual's contract of service and in fact, the

employing unit proves that the individual meets all of the criteria in Section A and **two** or more of the criteria in Section B:

Section A:

1. The individual has the right to control the means, and progress of the work except as to final results; and
2. The individual is customarily engaged in an independently established trade, occupation, profession or business, **or**, such work is outside the usual course of the business for which the service is performed; and
3. The individual has the opportunity for profit and loss as a result of the services being performed for the other individual/entity; and
4. The individual pays the individual's assistants, if any, and, to the extent such assistants are employees, supervises the details of the assistant's work;

Section B:

1. The individual has invested in the facilities, tools, instruments and materials used by the individual to complete the work;
2. The individual is not required to work exclusively for the other individual/entity;
3. The individual is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work;
4. The parties have a contract that defines the relationship and gives contractual rights in the event the contract is terminated by the other individual /entity prior to completion of the work;
5. Payment to the individual is based on factors directly related to the work performed and not solely on the amount of time expended by the individual;
6. The individual makes that individual's services available to some community;
7. IRS determination of independent contractor status (SS-8 determination).

Additional Recommendations:

- **Education and Enforcement**

- b. Legislation should direct MEDOL and WCB to report back with an update on misclassification, enforcement programs, and how the new definition is working.
- c. Legislation should direct a working group to develop recommendations for routine technical rulemaking for a binding predetermination process that could be phased in on a voluntary basis.
- d. Legislation should direct a subcommittee of stakeholder group members to work with MEDOL and WCB on guidance documents, similar to the format used in Montana and other states.

## Comments by Michael Bourque, MEMIC

January 31, 2012

To: Laura Boyett, Maine Department of Labor

CC: Paul Sighinolfi, Maine Workers' Compensation Board

From: Michael Bourque, MEMIC

Re: MEMIC commentary on most recent proposal to unify definition of independent contractor in Maine

Summary: In total, we believe that this proposal has the potential to meet its stated goals of clarifying the definition while providing appropriate protections within employer-employee relationships. That said, the discussion surrounding this plan called for "guidance" to be issued by the state agencies. We believe this guidance will be very important and note that no mention is included within these revisions. Given the importance of this part of the overall proposal, it seems worthy of being addressed in some fashion.

Further, the current proposal is not yet in statutory form and, therefore, does not address the issue of predetermination of independent contractor status which is current law under the Workers' Compensation Act. We continue to believe that any system must provide for a sanctioned pre-determination. This would serve all stakeholders in these systems by making clear what relationships are employer-employee and which are that of an independent contractor. We believe that those who would apply for such a certification would be willing to pay a fee for this service. While we understand the political implications of a fiscal note, this is a small price to pay to make the system work as intended. As this statute presumes the relationship to be that of an employer-employee, workers' compensation insurers will necessarily charge premiums until such time as a relationship can be proved to be outside of an insurer's liability.

Specific comments:

- We agree that three or more should be required in Section B.
- In Section B (1), we agree that inclusion that an investment be of "significant" or "more than de minimus" or "bona fide" nature clarifies the intent of this requirement.
- In Section B, we believe 3 and 4 could be made clearer if there was reference to a "written" contractual relationship. This may be implied but seems worthy of mention as it may benefit the ultimate interpretation by those attempting to abide by it.
- We do not favor a sunset provision but agree that the bill should call for a report from the Department of Labor, the Maine Workers' Compensation Board with consultation from the Maine Bureau of Insurance (which regulates workers' compensation insurance).

## Comments by Jay Martin, State Advocate for Small Business

Laura Boyett, Director  
Bureau of Unemployment Compensation  
Maine Department of Labor  
54 State House Station  
Augusta, Maine 04333-0054

Wednesday, February 1, 2012

Dear Ms. Boyett:

I wish to thank you for the opportunity to participate in the Employment Standards Stakeholders Group (ESSG). As Maine's Small Business Advocate, established in PL Ch. 304, this office is asked to comment on pending rules and legislation that affects small businesses. All ESSG members seem to agree that the statute must more clearly establish how employers are expected to properly classify their employees and independent contractors to reasonably compel compliance and ensure fairness.

For the past few weeks, I have engaged in many discussions with business owners, trade association representatives, and our fellow stakeholders to better inform my perspective in this matter. I request that the following recommendations be considered in any proposed legislation addressing this definition.

Section A, Item 1: In our ESSG meeting on January 20, Mr. Paul Sighinolfi, Executive Director of the Maine Workers' Compensation Board, acknowledged that inclusion of the word "manner" in this clause would likely prevent an employing unit from exerting any control in the *manner* by which a subcontractor completes the work, even should the subcontractor violate safety rules that expose the employing unit to regulatory enforcement action. In our discussion that day, Mr. Sighinolfi confirmed my assertion that the only appropriate recourse available to the employing unit would be to immediately terminate the contract with the subcontractor at the very moment the violation of the safety regulation(s) occurs. As I expressed in response, this seems entirely unreasonable. The employing unit must be allowed some ability to control the manner by which the work is completed to meet health and safety regulations.

**Recommendation 1:** Please consider excluding the word "manner" from this clause.

Section A, Item 5: This clause is very likely to become a significant hindrance to small general contractors. To illustrate, please consider the following example:

*A small general contractor usually completes any painting work required as the scope of painting work is so limited; it can be often difficult to find subcontractors interested in performing such small jobs. This small general contractor signs on to a large project that includes interior and exterior painting. The size and timeline of this project demands that this contractor subcontract some of the painting work to meet the contract requirements.*

Item 5 in Section A would very likely prohibit this contractor from subcontracting any work involving painting, as this general contractor regularly completes painting work when the scope of the work is limited. The inclusion of this line item under Section A would very likely create great hardship for small general contractors when appropriately bidding for large contracts.

**Recommendation 2:** Please consider striking this clause from Section A.

Section B, Item 5: This clause infers that subcontractors must enter into “lump sum” contract agreements only, rather than any contract based upon an hourly rate. I understand that it would often occur that such a clause would inhibit a contract agreement between a legitimate general contractor and a legitimate subcontractor. To illustrate, please consider the following example:

*A small general contractor has signed on to replace the top of a building. Under the contract agreement with the client, this small general contractor must replace any rotten boards under the existing roofing. The general contractor hires a subcontractor to replace rotten boards, without any practical way of knowing the full extent of the work involved. The only appropriate approach to establishing an agreement with a subcontractor would be to hire the subcontractor on a “time and material” basis.*

Item 5 in Section B necessarily would prohibit the general contractor from engaging the services of a subcontractor in such circumstances.

**Recommendation 3:** Please consider striking this clause from Section B.

Section B: Regarding the number of items under Section B an employing unit must meet when hiring an independent contractor, a minimum of three could be viewed as reasonable. A number greater than three must be considered unreasonable.

**Recommendation 4:** Please require that employing units meet all requirements under Section A, and a minimum of three requirements under Section B.

I very much appreciate the opportunity to comment on this important definition. Please contact me if I can be of further assistance to you in this matter.

Sincerely,  
Jay Martin  
Small Business Advocate

cc: Secretary of State Charles E. Summers, Jr.

**Comment by John Sagasser, General Counsel, on behalf of Maine Revenue Services**

**From:** Sagaser, John W.

**Sent:** Wednesday, January 25, 2012 10:18 AM

**To:** Boyett, Laura L.

**Cc:** Gerard, Jerome D.

**Subject:** DOL Report -- Stakeholder Group and PL 2011 c.292

Laura,

Here is the Maine Revenue Services (MRS) follow-up to last Friday's meeting of the stakeholder group and your request that participants send you any requested text for the DOL report.

MRS requests that you include the following text in your report:

At the first meeting convened by DOL, the stakeholder group addressed the scope of its efforts to recommend a uniform test for determining whether an individual is working as an employee or as an independent contractor. Maine Revenue Services explained that Maine's income tax law is linked to the Internal Revenue Code and its adoption, with exceptions, of the federal common law test. MRS stated that it could not de-link from the federal tax law tests without adding very considerable complexity and loss of efficiencies. Accordingly, the stakeholder group limited its efforts to fashioning a uniform definition for use under Maine's unemployment compensation and workers' compensation laws.

Thanks.

John

*John W. Sagaser*

General Counsel

Maine Revenue Services

## **An Act To Modify the Laws Regarding Status as an Independent Contractor**

**Emergency preamble.** Whereas, acts and resolves of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

**Whereas,** the meaning of "independent contractor" in unemployment law is confusing to employers and employees, who seek clarity and uniformity; and

**Whereas,** the issue of classification of workers transcends many decades of legislative discussion and needs to be addressed to encourage the spirit of entrepreneurship in the State; and

**Whereas,** it is in the best interests of the State, employees and employers to eliminate this confusion as soon as possible and, to that end, the stakeholder group authorized by this legislation needs to meet as soon as possible to formulate a test to determine independent contractor status; and

**Whereas,** in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

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

**Sec. 1. 26 MRSA §1043, sub-§11, ¶E,** as amended by PL 1979, c. 651, §45, is further amended to read:

E. Services performed by an individual for remuneration ~~shall be deemed~~ are considered to be employment subject to this chapter unless ~~and until~~ it is shown to the satisfaction of the bureau that the individual has been and will continue to be free from control or direction over the performance of such services, both under the individual's contract of service and in fact, and:

~~(1) Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact;~~

(2) Such service is either outside the usual course of the business for which such service is performed; or ~~that~~ such service is performed outside of all the places of business of the enterprise for which such service is performed; ~~and/or~~

(3) ~~Such~~That individual is customarily engaged in an independently established trade, occupation, profession or business.

This paragraph is repealed December 31, 2012.

**Sec. 2. Report.** The Commissioner of Labor or the commissioner's designee shall convene a stakeholder group with representatives from the Workers' Compensation Board and the Department of Administrative and Financial Services, Maine Revenue Services and shall invite the participation of representatives from the Maine Merchants Association, Maine State

Chamber of Commerce, National Federation of Independent Business, Maine Employers' Mutual Insurance Company, American Federation of Labor - Congress of Industrial Organizations, Maine Women's Lobby, Maine Equal Justice Partners, Associated Builders and Contractors, Inc., Associated General Contractors of Maine, Technology Association of Maine and Maine Immigrant Rights Coalition. The stakeholder group shall develop an employment test to be used in the administration of, without limitation, unemployment compensation law, workers' compensation law and programs of the Department of Labor, Bureau of Labor Standards to determine whether a person is an employee or independent contractor. The commissioner or the commissioner's designee shall submit a report with recommendations to the Joint Standing Committee on Labor, Commerce, Research and Economic Development by January 15, 2012. The joint standing committee is authorized to introduce a bill related to the report to the Second Regular Session of the 125th Legislature.

**Emergency clause.** In view of the emergency cited in the preamble, this legislation takes effect when approved.

Effective June 10, 2011.