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An Act To Improve the Process by Which Logging Contractors Hire Legal Foreign Workers

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

Sec. 1. 26 MRSA §872, as amended by PL 2009, c. 637, §§3 to 9, is further amended to read:

§ 872. Notification regarding foreign laborers in logging occupations

1. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Bond worker" means a person who has been described under 8 United States Code, Section 1101(a)(15)(H)(ii) and granted permission to work temporarily in the United States.

B. "Logging equipment" means ~~equipment used directly in the cutting and transporting of logs to the roadside, the production of wood chips in the field, the construction of logging roads and the transporting of logs or other wood products off-site or on roadways.~~

2. Proof of ownership required. ~~An employer in this State who applies for a bond worker in a logging occupation shall provide proof of the employer's ownership of any logging equipment used by that worker in the course of employment, including proof of ownership of at least one piece of logging equipment for every 2 bond workers employed by the employer in a logging occupation. The employer shall provide proof of ownership as required by this subsection on a form provided by the Commissioner of Labor. The proof required by this subsection must include, but not be limited to, a receipt for payment for the equipment purchased in a bona fide transaction and documentation of payment of any tax assessed on the equipment pursuant to Title 36, chapter 105 for the year in which the bond worker is employed by the employer. Proof of ownership must be carried in the equipment and, upon request by the department, the operator of equipment subject to this section shall provide proof of ownership. Notwithstanding section 3, information regarding proof of ownership is not confidential and may be disclosed to the public. If the equipment is leased by the employer, the employer shall provide the name, address and telephone number of the leasing company and its affiliates and subsidiaries; the names, addresses and telephone numbers of the leasing company's owner or owners, its agent and members of its board of directors; and a copy of the lease document. A lease is sufficient to meet the ownership requirement of this section only if it is a bona fide lease and:~~

A. ~~The lease consists of an arm's length transaction between unrelated entities or is a transfer of equipment between affiliated companies;~~

B. ~~The lease document contains a specific duration and lease amount;~~

~~C. The lessor is not an entity owned or controlled by a bond worker or a bond worker's spouse, parent, child, sibling, aunt, uncle or cousin or person related to a bond worker in the same manner by marriage, or by any combination of a bond worker and the bond worker's family members described in this paragraph; and~~

~~D. The lessor is a bona fide leasing business as evidenced by a lease of logging equipment to at least 3 different, unrelated entities within each of the past 3 years.~~

~~**2-A. Notification.** An employer filing for certification from the United States Department of Labor to hire a bond worker to operate logging equipment shall at the time of filing of a bond worker in a logging occupation shall notify the Maine Department of Labor and provide, for the year in which the bond worker is employed, the number of bond workers requested; a list of each piece of logging equipment, including serial number, a bond worker will operate; receipts for payment for the logging equipment purchased in bona fide transactions; and documentation of payment of any tax assessed on the logging equipment pursuant to Title 36, chapter 105. An employer shall notify the Maine Department of Labor within 330 days of the date on which a bond worker begins work in the State and shall specify the name of the bond worker and the anticipated locations where the bond worker will be conducting work.~~

~~**2-B. Violation.** Upon conviction of a violation of subsection 2, an employer may not employ bond workers in this State for 2 years.~~

~~**3. Equipment covered by federal prevailing wage exempt.** This section does not apply to equipment for which the United States Department of Labor, Division of Foreign Labor Certification has established a prevailing wage under the federal Service Contract Act of 1965 for persons using that equipment.~~

~~**4. Enforcement; rules.** The Commissioner of Labor shall adopt rules to implement and enforce the provisions of this section, including rules regarding the receipt of documentation and the investigation and prosecution of employer proof of ownership of logging equipment. Rules adopted pursuant to this subsection are major substantive rules as defined in Title 5, chapter 375, subchapter 2-A.~~

~~**5. Penalty; enforcement.** An employer who violates subsection 2, 2-A or 2-B or the rules adopted pursuant to this section commits a civil violation for which a fine of not less than \$10,000 and not more than \$25,000 per violation may be adjudged.~~

~~In the event of a violation of the provisions of this section, the Attorney General may institute injunction proceedings in the Superior Court to enjoin further violation of this section.~~

~~**6. Assistance.** The Department of Conservation and the Department of Administrative and Financial Services, Bureau of Revenue Services shall provide interagency support and field information to assist the Department of Labor in enforcing this section.~~

Sec. 2. 26 MRSA §873, as corrected by RR 2009, c. 2, §§73 and 74, is amended to read:

§ 873. Recruitment for logging occupations

1. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Bond worker" has the same meaning as in section 872.

B. "Recruitment clearinghouse" or "clearinghouse" means a system operated by members of the forest products industry and described in subsection 3 and supported by the Maine Department of Labor.

~~**2. Employer requirements; clearinghouse and reporting.** An employer filing for certification with the United States Department of Labor to hire a bond worker in a logging occupation shall:~~

~~A. File a copy of all federal forms and reports relating to H2 visas with the Maine Department of Labor at the same time as the employer files the form or report with the United States Department of Labor; and~~

~~B. Be a member and active participant of a recruitment clearinghouse that complies with subsection 3. The Maine Department of Labor may consider failure to participate in the clearinghouse as failure to participate in good faith recruitment of workers who are citizens of the United States and a failure to meet the requirement that the employer accept qualified workers referred through the department under subsection 5.~~

3. Clearinghouse requirements. The Maine Department of Labor shall assist members of the forest products industry in establishing ~~the~~ and maintaining a recruitment clearinghouse, which ~~must~~ may be ~~financed and operated and directed~~ by members of the forest products industry. The goal of the clearinghouse ~~must~~ is to provide a centralized, streamlined process for applicants in the forest products industry.

~~A. The clearinghouse must provide a staffed, toll-free telephone number to receive telephone inquiries for logging employment.~~

~~B. For each applicant who contacts the clearinghouse directly or who is referred to the clearinghouse by the Maine Department of Labor pursuant to subsection 4, the clearinghouse shall~~ may gather any information necessary to assess the job applicant's qualifications for the job classification applied for, including but not limited to conducting a reference check. Following the assessment, the clearinghouse shall:

(1) Notify the Maine Department of Labor and the applicant that the applicant lacks sufficient qualifications or satisfactory references for the position sought and state the reasons for that determination; or

(2) Refer the applicant to a logging employer seeking workers in that job classification. To the extent practicable, the clearinghouse shall refer the applicant to the applicant's preferred geographic area of employment. Referral may be made to any employer with relevant job openings, regardless of whether the employer is seeking bond workers, ~~if the applicant prefers such a referral.~~

4. Department role. The Maine Department of Labor shall:

A. Refer to the recruitment clearinghouse all applicants who meet minimum qualifications for employment with a logging employer. The referral must include information required of applicants who use the department's career center services;

B. Keep a record of the name, date of referral, preferred working location and job classification of each applicant referred to the recruitment clearinghouse;

C. Engage actively with the recruitment clearinghouse and with employers to assist them in understanding how to comply with their obligations under state and federal law regarding recruitment and hiring of logging workers; and

~~D. Regularly review clearinghouse referrals and assessments and employer response to referrals in order to make determinations of compliance by employers with the requirements of 20 Code of Federal Regulations, Part 655, Subpart B. Failure of the clearinghouse to appropriately refer and assess applicants may be considered failure of each of the member employers to adequately recruit workers who are citizens of the United States.~~

E. Promote the clearinghouse as a means to match applicants with logging employers; and

F. Provide such other assistance to logging employers as may be appropriate.

5. Job offer; skills test. Upon referral of an applicant under subsection 3, a logging employer shall offer employment to that applicant.

A. An employment offer may be conditioned on a skills test, but only if the employer requires the skills test of all new applicants in that job classification who have similar levels of experience with respect to the models of equipment to be operated.

B. If a skills test under paragraph A is required, it must be conducted at the area of intended employment, at a central location designated by the recruitment clearinghouse in conjunction with the logging employer or at another location within reasonable distance from the applicant's residence or the employer's place of employment.

~~C. A contractor that requires a skills test under paragraph A in the preemployment hiring process shall submit a copy of the testing policy and procedure to the Maine Department of Labor at the time the contractor files the position on the state Job Bank.~~

D. An applicant who is rejected from employment due to failing a skills test under paragraph A must be given a written statement of the reason for failure of the skills test. The employer shall provide a copy of the written statement to the recruitment clearinghouse and the Maine Department of Labor.

6. Contracts with landowners. A contract for harvesting wood between a logging employer and a landowner ~~must~~may contain a provision that allows the landowner to terminate the contract if the logging employer violates this section or the applicable federal regulations regarding employment of bond workers.

7. Penalties. ~~The Maine Department of Labor shall make good faith efforts to resolve alleged violations of this section or of the recruitment process. If such efforts are not successful, the following penalties apply:~~

~~A. Violation of this section is considered a violation of section 872 and is subject to the penalties as set forth in section 872, subsection 5.~~

~~B. An employer is subject to discontinuation of services pursuant to 20 Code of Federal Regulations, Section 658.500 et seq. if the employer fails to comply with this section or the clearinghouse fails to appropriately refer or assess applicants in the job classification in which the employer is seeking bond workers.~~

8. Landowner contracts with employers. ~~This subsection governs contracts between logging employers and landowners:~~

~~A. The Maine Department of Labor shall maintain an approved list of employers consisting of those employers filing for certification with the United States Department of Labor to hire a bond worker in a logging occupation that are members of and active participants in a recruitment clearinghouse that complies with subsections 2 and 3. The list must also contain any employer under investigation by the Maine Department of Labor for a violation of section 872, this section or federal regulations applicable to foreign labor. The department shall publish the list on the department's publicly accessible website and forward a copy of the list and subsequent updates to the recruitment clearinghouse. Each landowner or other person that wishes to be notified of a change in status of a contractor must file with the department a request to be notified and contact information for the notification.~~

~~B. The Maine Department of Labor, after notice and hearing, shall remove from the list of approved employers under paragraph A any employer filing for certification with the United States Department of Labor to hire a bond worker in a logging occupation that is found to have committed a material violation of section 872, this section or the applicable federal regulations.~~

~~C. A person may appeal the placement or removal of an employer on the approved list under paragraph A to the State Board of Arbitration and Conciliation. If the appeal relates to removal of the employer from the list, it must be made within 15 days of notice of removal to the employer. The board shall conduct an arbitration session pursuant to chapter 9, subchapter 2-A. Board proceedings~~

~~under this section must be conducted in Augusta, unless the board determines that this location is impracticable in the specific circumstances. Notwithstanding section 931, the costs of arbitration under this section must be paid by a nonlapsing fund to be established by the department.~~

~~D. The Maine Department of Labor shall notify persons who have filed a request for notification of the removal of any employer from the list.~~

~~E. A landowner who enters into or maintains a contract with an employer not on the approved list under paragraph A is subject to a fine of not more than \$50,000.~~

Sec. 3. 26 MRSA §874, as enacted by PL 2009, c. 637, §11, is repealed.

Sec. 4. 26 MRSA §1043, sub-§11, ¶F, as amended by PL 2009, c. 637, §12, is further amended to read:

F. The term "employment" does not include:

(1) Service performed in the employ of this State, or of any political subdivision thereof, or of any instrumentality of this State or its political subdivisions, except as provided by this subsection;

(2) Service performed in the employ of the United States Government or an instrumentality of the United States immune under the Constitution of the United States from the contributions imposed by this chapter, except that on and after January 1, 1940 to the extent that the Congress of the United States has permitted states to require any instrumentalities of the United States to make payments into an unemployment compensation fund under a state unemployment compensation or employment security law, all of the provisions of this chapter are applicable to such instrumentalities and to services performed for such instrumentalities in the same manner, to the same extent and on the same terms as to all other employers, employing units, individuals and services. If this State is not certified for any year by the Secretary of Labor under section 3304 of the Federal Internal Revenue Code, the payments required of such instrumentalities with respect to that year must be refunded by the commissioner from the fund in the same manner and within the same period as is provided in section 1225, subsection 5, with respect to contributions erroneously collected;

(3) Service with respect to which unemployment compensation is payable under an unemployment compensation system or employment security system established by an Act of Congress. The commissioner is authorized and directed to enter into agreements with the proper agencies under such an Act of Congress, which agreements become effective 10 days after publication thereof in the manner provided in section 1082, subsection 2, for regulations, to provide reciprocal treatment to individuals who have, after acquiring potential rights to benefits under this chapter, acquired rights to unemployment compensation under such an Act of Congress, or who have, after acquiring potential rights to unemployment compensation under such an Act of Congress, acquired rights to benefits under this chapter;

(4) Agricultural labor as defined in subsection 1, except as provided in paragraph A-2;

(4-1) Services Agricultural labor, if performed by an individual who is an alien, other than a citizen of a contiguous country with which the United States has an agreement with respect to unemployment compensation, admitted to the United States to perform agricultural labor pursuant to the United States Immigration and Nationality Act, Sections 214(c) and 101(a) (15) (H);

(5) Domestic service in a private home, except as provided in paragraph A-3;

(6) Service performed by an individual in the employ of that individual's son, daughter or spouse and service performed by a child under the age of 18 in the employ of that child's father or mother, except for periods of such service for which unemployment insurance contributions are paid;

(6-1) Services performed by a student attending an elementary, secondary or postsecondary school while participating in a cooperative program of education and occupational training or on-the-job training that is part of the school curriculum;

(9) Service performed with respect to which unemployment compensation is payable under the Railroad Unemployment Insurance Act (52 Stat. 1094);

(10) Services performed in the employ of any other state, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing that is wholly owned by one or more states or political subdivisions and any services performed in the employ of any instrumentality of one or more other states or their political subdivisions to the extent that the instrumentality is, with respect to such a service, immune under the Constitution of the United States from the tax imposed by section 3301 of the Federal Internal Revenue Code, except as provided in paragraph A-1, subparagraph (1);

(11) Service performed in any calendar quarter in the employ of any organization exempt from income tax under section 501(a) of the Federal Internal Revenue Code other than an organization described in section 401(a) or under section 521 of the Code, if the remuneration for such service is less than \$150;

(16) Service performed in the employ of a foreign government, including service as a consular or other officer or employee or a nondiplomatic representative;

(17) Service performed in the employ of an instrumentality wholly owned by a foreign government:

(a) If the service is of a character similar to that performed in foreign countries by employees of the United States Government or an instrumentality thereof; and

(b) If the commissioner finds that the United States Secretary of State has certified to the United States Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States Government and of instrumentalities thereof;

(18) Service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to state law and service performed as an intern in the employ of a hospital by an individual who has completed a 4 years' course in a medical school chartered or approved pursuant to state law;

(19) Service performed by an individual for a person as a real estate broker, a real estate sales representative, an insurance agent or an insurance solicitor, if all such service performed by that individual for that person is performed for remuneration solely by way of commission;

(20) Service performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news except delivery or distribution to any point for subsequent delivery or distribution;

(21) Service performed in the employ of any organization that is excluded from the term "employment" as defined in the Federal Unemployment Tax Act solely by reason of section 3306(c)(7) or (8) if:

(a) Service is performed in the employ of a church or convention or association of churches or an organization that is operated primarily for religious purposes and that is operated, supervised, controlled or principally supported by a church or convention or association of churches;

(b) Service is performed by a duly ordained, commissioned or licensed minister of a church in the exercise of that minister's ministry or by a member of a religious order in the exercise of duties required by that order;

(c) Prior to January 1, 1978, service is performed in the employ of a school primarily operated as an elementary, secondary or preparatory school for higher education that is not an institution of higher education;

(d) Service is performed in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or providing remunerative work for individuals who, because of their impaired physical or mental capacity, cannot be readily absorbed in the competitive labor market by an individual receiving such rehabilitation or remunerative work;

(e) Service is performed as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof by an individual receiving that work-relief or work-training;

(f) Service is performed in the employ of a hospital as defined in subsection 26 by a patient of that hospital;

(g) Services are performed prior to January 1, 1978 for a hospital in a state prison or other state correctional institution by an inmate of that prison or correctional institution and after December 31, 1977 by an inmate of a custodial or penal institution;

(h) Service is performed in the employ of a school, college or university if that service is performed by a student who is enrolled and is regularly attending classes at such a school, college or university; or

(i) Prior to January 1, 1978, service is performed in the employ of a school that is not an institution of higher education and after December 31, 1977, service is performed in the employ of a governmental entity referred to in paragraph A-1, subparagraph (1) if that service is performed by an individual in the exercise of duties:

(i) As an elected official;

(ii) As a member of a legislative body or a member of the judiciary of a state or political subdivision of a state;

(iii) As a member of the State National Guard or Air National Guard;

(iv) As an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood or similar emergency;

(v) In a position that, under or pursuant to the laws of this State, is designated as a major nontenured policymaking or advisory position or a policymaking or advisory position the performance of the duties of which ordinarily does not require more than 8 hours per week; or

(vi) As an election official or election worker if the amount of remuneration received by the individual during the calendar year for services as an election official or election worker is less than \$1,000;

(29) Services performed by a hairdresser who holds a booth license and operates within another hairdressing establishment if operated under a booth rental agreement or other rental agreement;

(30) Services performed by a barber who holds a booth license and operates within another barbering establishment if operated under a booth rental agreement or other rental agreement;

(31) Services performed by a contract interviewer engaged in marketing research or public opinion interviewing when such interviewing is conducted in the field or over the telephone on premises not used or controlled by the person for whom such contract services are being provided;

(32) After December 31, 1981, services performed by an individual on a boat engaged in catching fish or other forms of aquatic animal life, unless those services would be included in the definition of "employment" for federal unemployment tax purposes under the Federal Unemployment Act, United States Code, Title 26, Section 3306(c), as it may be amended. Also included in this exemption are services performed in harvesting shellfish for depuration from designated areas as authorized by Title 12, section 6856;

(33) Services performed by a member or leader of a musical group, band or orchestra or an entertainer when the services are performed under terms of a contract entered into by the leader or an agent of the musical group, band, orchestra or entertainer with an employing unit for whom the services are being performed, provided the leader or agent is not an employer by reason of subsection 9 or of section 1222, subsection 3;

(34) Services performed in the delivery or distribution of newspapers or magazines to the ultimate consumer by an individual who is compensated by receiving or retaining a commission or profit on the sale of the newspaper or magazine;

(35) Services performed by a homemaker in the knitted outerwear industry as those terms are defined, on the effective date of this subparagraph, in 29 Code of Federal Regulations, Part 530, Section 530.1;

(36) Service performed by a full-time student, as defined in subsection 30, in the employ of a youth camp licensed under Title 22, section 2495 if the full-time student performed services in the employ of the camp for less than 13 calendar weeks in the calendar year and the camp:

(a) Did not operate for more than 7 months in the calendar year and did not operate for more than 7 months in the preceding calendar year; or

(b) Had average gross receipts for any 6 months in the preceding calendar year that were not more than 33 1/3% of its average gross receipts for the other 6 months in the preceding calendar year;

(37) Services performed by an individual as a home stitcher as long as that employment is not subject to federal unemployment tax;

(38) Services performed by a person licensed as a guide as required by Title 12, section 12853, as long as that employment is not subject to federal unemployment tax;

(39) Services performed by a direct seller as defined in 26 United States Code, Section 3508, Subsection (b), Paragraph (2). This subparagraph does not include a person selling major improvements or renovations to the structure of a home, business or property;

(40) Services performed by lessees of taxicabs, as long as that employment is not subject to federal unemployment tax. This subparagraph may not be construed to affect a determination regarding a lessee's status as an independent contractor for workers' compensation purposes;

(41) Services provided by a dance instructor to students of a dance studio when there is a contract between the instructor and the studio under which the instructor's services are not offered exclusively to the studio, the studio does not control the scheduling of the days and times of classes other than beginning and end dates, the instructor is paid by the class and not on an hourly or salary basis, the compensation rate is the result of negotiation between the instructor and the studio and the instructor is given the freedom to develop the curriculum;

(42) Services performed by participants enrolled in programs or projects under the national service laws including the federal National and Community Service Act of 1990, as amended, 42 United States Code, Section 12501 et seq., and the federal Domestic Volunteer Service Act, as amended, 42 United States Code, Section 4950 et seq.;

(43) Services of an author in furnishing text or other material to a publisher who:

- (a) Does not control the author's work except to propose topics or to edit material submitted;
- (b) Does not restrict the author from publishing elsewhere;
- (c) Furnishes neither a place of employment nor equipment for the author's use;
- (d) Does not direct or control the time devoted to the work; and
- (e) Pays only for material that is accepted for publication.

This exception does not apply if the employment is subject to federal unemployment tax; and

(44) Services provided by an owner-operator of a truck or truck tractor while it is leased to a motor carrier, as defined in 49 Code of Federal Regulations, 390.5 (2000), as long as that employment is not subject to federal unemployment tax.

SUMMARY

This bill simplifies the process for employers in the logging industry who hire employees from another country who have been given permission to work in this country.