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LABOR, COMMERCE, RESEARCH AND ECONOMIC DEVELOPMENT

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**STATE OF MAINE
HOUSE OF REPRESENTATIVES
125TH LEGISLATURE
SECOND REGULAR SESSION**

COMMITTEE AMENDMENT “ ” to H.P. 960, L.D. 1314, Bill, “An Act To Standardize the Definition of "Independent Contractor"”

Amend the bill by striking out everything after the enacting clause and before the summary and inserting the following:

Sec. 1. 1 MRSA §1012, sub-§9, as amended by PL 1991, c. 885, Pt. E, §1 and affected by §47, is further amended to read:

9. Self-employed. "Self-employed" means that the person qualifies as an independent contractor under Title 39-A, section 102, subsection ~~43~~ 13-A.

Sec. 2. 5 MRSA §19, sub-§1, ¶J, as amended by PL 1991, c. 885, Pt. E, §6 and affected by §47, is further amended to read:

J. "Self-employed" means that the person qualifies as an independent contractor under Title 39-A, section 102, subsection ~~43~~ 13-A.

Sec. 3. 26 MRSA §591, sub-§2, as amended by PL 1985, c. 112, §1, is further amended to read:

2. Employer. "Employer" means an individual, partnership, association, corporation, legal representative, trustee, receiver, trustee in bankruptcy and any common carrier by rail, motor, water, air or express company doing business in or operating within the State; ~~and~~

Sec. 4. 26 MRSA §591, sub-§3 is enacted to read:

3. Independent contractor. "Independent contractor" means an individual who qualifies as an independent contractor under section 1043, subsection 11, paragraph E.

Sec. 5. 26 MRSA §591-A is enacted to read:

COMMITTEE AMENDMENT

1 **§591-A. Employee misclassification**

2 An employer that intentionally or knowingly misclassifies an employee as an
3 independent contractor commits a civil violation for which a fine of not less than \$2,000
4 and not more than \$10,000 per violation may be adjudged.

5 A determination of misclassification of a worker as an independent contractor may
6 result in the assessment of penalties under section 1051, 1082 or 1225 or Title 39-A,
7 section 105-A or 324.

8 **Sec. 6. 26 MRSA §1043, sub-§11, ¶E,** as amended by PL 2011, c. 292, §1, is
9 repealed and the following enacted in its place:

10 E. Services performed by an individual for remuneration are considered to be
11 employment subject to this chapter unless it is shown to the satisfaction of the bureau
12 that the individual is free from the essential direction and control of the employing
13 unit, both under the individual's contract of service and in fact, and the employing
14 unit proves that the individual meets all of the criteria in subparagraph (1) and criteria
15 of at least 3 divisions of subparagraph (2). In order for an individual to be considered
16 an independent contractor:

17 (1) The following criteria must be met:

18 (a) The individual has the essential right to control the means and progress
19 of the work except as to final results;

20 (b) The individual is customarily engaged in an independently established
21 trade, occupation, profession or business;

22 (c) The individual has the opportunity for profit and loss as a result of the
23 services being performed for the other individual or entity;

24 (d) The individual hires and pays the individual's assistants, if any, and, to
25 the extent such assistants are employees, supervises the details of the
26 assistants' work; and

27 (e) The individual makes the individual's services available to some client or
28 customer community even if the individual's right to do so is voluntarily not
29 exercised or is temporarily restricted; and

30 (2) At least 3 of the following criteria must be met:

31 (a) The individual has a substantive investment in the facilities, tools,
32 instruments, materials and knowledge used by the individual to complete the
33 work;

34 (b) The individual is not required to work exclusively for the other
35 individual or entity;

36 (c) The individual is responsible for satisfactory completion of the work and
37 may be held contractually responsible for failure to complete the work;

1 (d) The parties have a contract that defines the relationship and gives
2 contractual rights in the event the contract is terminated by the other
3 individual or entity prior to completion of the work;

4 (e) Payment to the individual is based on factors directly related to the work
5 performed and not solely on the amount of time expended by the individual;

6 (f) The work is outside the usual course of business for which the service is
7 performed; or

8 (g) The individual has been determined to be an independent contractor by
9 the federal Internal Revenue Service.

10 **Sec. 7. 39-A MRSA §102, sub-§13**, as amended by PL 2009, c. 452, §4, is
11 repealed.

12 **Sec. 8. 39-A MRSA §102, sub-§13-A** is enacted to read:

13 **13-A. Independent contractor.** A person who performs services for remuneration
14 is presumed to be an employee unless the employing unit proves that the person is free
15 from the essential direction and control of the employing unit, both under the person's
16 contract of service and in fact and the person meets specific criteria. In order for a person
17 to be an independent contractor:

18 A. The following criteria must be met:

19 (1) The person has the essential right to control the means and progress of the
20 work except as to final results;

21 (2) The person is customarily engaged in an independently established trade,
22 occupation, profession or business;

23 (3) The person has the opportunity for profit and loss as a result of the services
24 being performed for the other individual or entity;

25 (4) The person hires and pays the person's assistants, if any, and, to the extent
26 such assistants are employees, supervises the details of the assistants' work; and

27 (5) The person makes the person's services available to some client or customer
28 community even if the person's right to do so is voluntarily not exercised or is
29 temporarily restricted; and

30 B. At least 3 of the following criteria must be met:

31 (1) The person has a substantive investment in the facilities, tools, instruments,
32 materials and knowledge used by the person to complete the work;

33 (2) The person is not required to work exclusively for the other individual or
34 entity;

35 (3) The person is responsible for satisfactory completion of the work and may be
36 held contractually responsible for failure to complete the work;

1 (4) The parties have a contract that defines the relationship and gives contractual
2 rights in the event the contract is terminated by the other individual or entity prior
3 to completion of the work;

4 (5) Payment to the person is based on factors directly related to the work
5 performed and not solely on the amount of time expended by the person;

6 (6) The work is outside the usual course of business for which the service is
7 performed; or

8 (7) The person has been determined to be an independent contractor by the
9 federal Internal Revenue Service.

10 **Sec. 9. 39-A MRSA §105-A, sub-§1, ¶B,** as enacted by PL 2009, c. 452, §5, is
11 repealed and the following enacted in its place:

12 B. "Construction subcontractor" means an independent contractor.

13 **Sec. 10. 39-A MRSA §114,** as enacted by PL 2011, c. 176, §1, is repealed.

14 **Sec. 11. 39-A MRSA §401, sub-§4,** as amended by PL 1999, c. 364, §6, is
15 further amended to read:

16 **4. Liability of landowner.** A landowner subject to this Act who contracts to have
17 wood harvested from the landowner's property by a contractor who, as an employer, is
18 subject to this Act and who has not complied with the provisions of this section and who
19 does not comply with the provisions of this section prior to the date of an injury or death
20 for which a claim is made is liable to pay to any person employed by the contractor in the
21 execution of the work any compensation under this Act that the landowner would have
22 been liable to pay if that person had been immediately employed by the landowner.

23 A landowner is not liable for compensation if at the time the landowner enters into the
24 contract with the contractor, the landowner applies for and receives a predetermination of
25 the independent status of the contractor as set forth in section 105, the landowner requests
26 and receives a certificate of independent status, issued by the board on an annual basis to
27 a contractor, certifying that the contractor harvests forest products in a manner that would
28 not make the contractor an employee of the landowner or the landowner requests and
29 receives a certificate of insurance, issued by the contractor's insurance carrier, certifying
30 that the contractor has obtained the required coverage and indicating the effective dates of
31 the policy, and if the landowner requests and receives at least annually similar certificates
32 indicating continuing coverage during the performance of the work. A landowner who
33 receives a predetermination of the contractor's status as independent contractor or a
34 certificate of independent status is only relieved of liability under this paragraph if the
35 contract for wood harvesting expressly states that the independent contractor will not hire
36 any employees to assist in the wood harvesting without first providing the required
37 certificate of insurance to the landowner.

38 Notwithstanding section 105, subsection 1, paragraph A, a predetermination under
39 section 105 related only to a person engaged in harvesting forest products is a conclusive
40 presumption that the determination is correct and section 105, subsection 2 does not apply
41 to that determination. Each party involved in or affected by the predetermination must be
42 provided information on the workers' compensation laws and the effect of independent

1 contractor status in relation to those laws. A predetermination under section 105 related
2 to a person engaged in harvesting forest products is effective for one calendar year or the
3 duration of the contract, whichever is shorter.

4 A landowner required to pay compensation under this section is entitled to be
5 indemnified by the contractor and may recover the amount paid in an action against that
6 contractor. A landowner may demand that the contractor enter into a written agreement
7 to reimburse the landowner for any loss incurred under this section due to a claim filed
8 for compensation and other benefits. The employee is not entitled to recover at common
9 law against the landowner for any damages arising from such injury if the employee takes
10 compensation from that landowner.

11 Landowners willfully acting to circumvent the provisions of this section by using
12 coercion, intimidation, deceit or other means to encourage persons who would otherwise
13 be considered employees within the meaning of this Act to pose as contractors for the
14 purpose of evading this section are liable subject to the provisions of section 324,
15 subsection 3. Nothing in this section may be construed to prohibit an employee from
16 becoming a contractor subject to the provisions of section 102, subsection 43 13-A.

17 **Sec. 12. Reports.** The Commissioner of Labor or the commissioner's designee in
18 cooperation with the Executive Director of the Workers' Compensation Board or the
19 executive director's designee shall submit 2 interim reports and one comprehensive final
20 report to the joint standing committee of the Legislature having jurisdiction over labor
21 matters. The first interim report is due February 1, 2013 and must include a review of the
22 implementation of the independent contractor criteria under this Act. This report must
23 include a break down of information by industry and include agency audit finding data
24 for 2011 and 2012; the number of workers misclassified as independent contractors; and,
25 specifically for unemployment insurance, the overreporting and underreporting of wages
26 and unemployment contributions credited or due. The 2nd report is due June 2, 2014 and
27 must include agency audit finding data for 2013, the effects of the criteria on
28 misclassification and an update of the information required in the initial report.

29 The comprehensive final report must break information down by industry and is due
30 to the joint standing committee of the Legislature having jurisdiction over labor matters
31 by February 1, 2015. This report must include the following:

32 1. An analysis of the new criteria in comparison with previous criteria for both
33 workers' compensation and unemployment insurance;

34 2. The identification of any issues with the interpretation or the understanding of the
35 new criteria language by agency staff, businesses and workers;

36 3. The identification of any issues in the application of the criteria across different
37 industries and occupations;

38 4. Data, to the extent possible, on the potential effect of identified misclassification
39 on the affected workers with regard to loss of fringe benefits or other workplace benefits;
40 and

41 5. Data on the effects of the use of the new misclassification penalty.

42 **Sec. 13. Effective date.** This Act takes effect December 31, 2012.'

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SUMMARY

This amendment, which is the majority report, standardizes the definition of "independent contractor" for employment security law and workers' compensation law. It clearly states the penalties for the misclassification of a worker as an independent contractor. The amendment also requires 2 interim reports and a final comprehensive report to the joint standing committee of the Legislature having jurisdiction over labor matters from the Workers' Compensation Board and the Department of Labor on the implementation of the new independent contractor definition.

FISCAL NOTE REQUIRED

(See attached)