Employment Law: Agents of Change

Vermont Department of Labor
Reference Material

Applicable State Statutes

Misclassification

Unemployment statutes
http://www.leg.state.vt.us/statutes/sections.cfm?Title=21&Chapter=017
http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=21&Chapter=017&Section=01314
http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=21&Chapter=017&Section=01314a

Workers Compensation statutes
http://www.leg.state.vt.us/statutes/sections.cfm?Title=21&Chapter=009
http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=21&Chapter=009&Section=00692

Vermont Wage and Hour Law
http://www.leg.state.vt.us/statutes/sections.cfm?Title=21&Chapter=005

Federal Fair Labor Standards Act

Case Law

Misclassification

Unemployment case law
Fleece on Earth v. Dept. of Employment and Training (2005-367)

Workers Compensation case law
In re Chatham Woods Holdings, LLC, 2008 Vt 70 (2007-046):
Marcum v. State of Vermont Agency of Human Services (2010-472)
http://info.libraries.vermont.gov/supct/current/eo2010-472.html
OUTLINE of remarks

Misclassification
  Unemployment Insurance
  Workers Compensation Insurance

Wage and Hour Laws
  Vermont Minimum Wage
  Vermont Overtime Exemptions

Misclassification – Employer versus independent contractor

Vermont as well as a number of other states, and the federal government are concerned that a significant number of businesses are evading workers’ compensation, unemployment, state and federal wage and hour laws, and state and federal employment taxes by improperly classifying workers as independent contractors rather than employees. The Legislature in Vermont and elsewhere, have specifically directed the department of labor to step up the investigation and enforcement of existing UI and W.C. laws, and authorized heavy penalties for noncompliance. (See e.g. 21 VSA §692, http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=21&Chapter=009&Section=00692; and 21 VSA §1314a(f)(1)(B) http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=21&Chapter=009&Section=00692)

The goal of this stepped up compliance enforcement effort is to protect workers, as well as level the playing field for the businesses already complying with the law, so that they are not out bid by companies violating it.

Unfortunately, Vermont law has several separate definitions defining who is an employer, and who is an employee, so it is not enough to assume for example, that if some one is an independent contractor for federal tax purposes, they would be an independent contractor for purposes of unemployment insurance or workers compensation insurance.

21 V.S.A. §601 (3) defines an “Employer” to encompass:
any body of persons, corporate or unincorporated . . . and includes the owner or lessee of premises or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workers there employed.

This provision has been interpreted to mean:
“Section 601(3) creates a statutory employer/employee relationship where no such relationship existed at common law. King v. Snide (1984). The legislative intent was to impose liability ‘on the owner or proprietor of a
regular trade or business . . . where an uninsured independent contractor is
carrying out some phase of the owner’s or operator’s business.’”

*In Re Chatham Woods Holdings, LLC,* (2008)


This is known as the “nature of the business” test – if the work to be performed is within
the nature of the employer’s business, than the employer must cover the worker with
Workers compensation insurance coverage. In *Chatham* the general contractor was
required to pay W.C. premium covering a sole proprietor who had not covered himself,
and the owner of a corporation who had excluded himself from W.C. coverage, but was
working on the site, because all of the work fell within the nature of the general
contractor’s business.

Of course, regardless of whether the work falls within the nature of the business, if the
employer exercises direction and control over the work, the worker will be considered an
employee and must be covered by workers compensation.

For unemployment purposes, the appropriate test to determine whether a worker is an
employee or independent contractor is often referred to as the “ABC” test. The person is
an employee if:

- (A) the individual has been and will continue to be free from control or
direction over the performance of such services, both under the contract of
service and in fact; and
- (B) the service is either outside all the usual course of business for which
such service is performed, or outside all the places of business of the
enterprise for which such service is performed; and
- (C) the individual is customarily engaged in an independently established
trade, occupation, profession or business.

The hiring entity has the burden of demonstrating that all of these factors are met in order
to consider the person an independent contractor for unemployment purposes.

For a recent discussion of the “ABC” test see *Fleece on Earth v. Dept. of
Employment and Training* (2005-367),


**Wage and Hour Minimum Wage and Overtime Issues**

Vermont also has different definitions covering who is an employer and who is an
employee for purposes of the state minimum wage and overtime laws. Vermont’s
minimum wage statute provides:

- 2) “Employee,” any individual employed or permitted to work by an
employer except:
  - (A) any individual employed in agriculture;
  - (B) any individual employed in domestic service in or about a private
home;
  - (C) any individual employed by the United States;
(D) any individual employed in the activities of a public supported nonprofit organization, except laundry employees, nurses' aides or practical nurses;
(E) any individual employed in a bona fide executive, administrative or professional capacity;
(F) any individual making home deliveries of newspapers or advertising;
(G) taxi-cab drivers;
(H) outside salespersons; and
(I) students working during all or any part of the school year or regular vacation periods.

See 21 VSA §383

Once again it is essential to consider both the state’s minimum wage law, and the federal fair labor standards act, because the coverages are not identical and the provision providing greater protection for the worker will control. An example: state law exempts domestic workers from the state minimum wage but the FLSA requires that Domestic service workers such as day workers, housekeepers, chauffeurs, cooks, or full-time babysitters are covered if:
1. their cash wages from one employer in calendar year 2010 are at least $1,700 (this calendar year threshold is adjusted by the Social Security Administration each year); or
2. they work a total of more than 8 hours a week for one or more employers.

Similarly, Vermont’s overtime laws exempt certain employers, but the FLSA requires that overtime be paid. Vermont for example exempts restaurants, and hotels from the state overtime provisions, but federal law would require payment of overtime if an employee is involved in interstate commerce (handling credit cards is such an activity) or if the restaurant or establishment meets the “federal enterprise definition.

Some examples of FLSA exemptions are:

**Exemptions from Both Minimum Wage and Overtime Pay**
1. Executive, administrative, and professional employees (including teachers and academic administrative personnel in elementary and secondary schools), outside sales employees, and employees in certain computer-related occupations (as defined in DOL regulations);
2. Employees of certain seasonal amusement or recreational establishments, employees of certain small newspapers, seamen employed on foreign vessels, employees engaged in fishing operations, and employees engaged in newspaper delivery;
3. Farmworkers employed by anyone who used no more than 500 “man-days” of farm labor in any calendar quarter of the preceding calendar year;
4. Casual babysitters and persons employed as companions to the elderly or infirm.

**Exemptions from Overtime Pay Only**
1. Certain commissioned employees of retail or service establishments; auto, truck, trailer, farm implement, boat, or aircraft sales-workers; or parts-clerks and mechanics servicing autos, trucks, or farm implements, who are employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers;
2. Employees of railroads and air carriers, taxi drivers, certain employees of motor
 carriers, seamen on American vessels, and local delivery employees paid on approved
trip rate plans;
3. Announcers, news editors, and chief engineers of certain non-metropolitan
broadcasting stations;
4. Domestic service workers living in the employer’s residence;
5. Employees of motion picture theaters; and
6. Farmworkers.

Partial Exemptions from Overtime Pay
1. Partial overtime pay exemptions apply to employees engaged in certain operations on
agricultural commodities and to employees of certain bulk petroleum distributors.
2. Hospitals and residential care establishments may adopt, by agreement with their
employees, a 14-day work period instead of the usual 7-day workweek if the employees
are paid at least time and one-half their regular rates for hours worked over 8 in a day or
80 in a 14-day work period, whichever is the greater number of overtime hours.
3. Employees who lack a high school diploma, or who have not attained the educational
level of the 8th grade, can be required to spend up to 10 hours in a workweek engaged in
remedial reading or training in other basic skills without receiving time and one-half
overtime pay for these hours. However, the employees must receive their normal wages
for hours spent in such training and the training must not be job specific.
4. Public agency fire departments and police departments may establish a work period
ranging from 7 to 28 days in which overtime need only be paid after a specified number
of hours in each work period.

State overtime exemptions are:
   (b) Notwithstanding subsection (a) of this section, an employer shall not
   pay an employee less than one and one-half times the regular wage rate for
   any work done by the employee in excess of 40 hours during a workweek.
   However, this subsection shall not apply to:
   (1) Employees of any retail or service establishment. A "retail or service
       establishment" means an establishment 75 percent of whose annual
       volume of sales of goods or services, or of both, is not for resale and is
       recognized as retail sales or services in the particular industry.
   (2) Employees of an establishment which is an amusement or recreational
       establishment, if:
       (A) it does not operate for more than seven months in any calendar year;
           or
       (B) during the preceding calendar year its average receipts for any six
           months of that year were not more than one-third of its average receipts
           for the other six months of the year.
   (3) Employees of an establishment which is a hotel, motel, or restaurant.
(4) Employees of hospitals, public health centers, nursing homes, maternity homes, therapeutic community residences, and residential care homes as those terms are defined in Title 18, provided:
(A) the employer pays the employee on a biweekly basis; and
(B) the employer files an election to be governed by this section with the commissioner; and
(C) the employee receives not less than one and one-half times the regular wage rate for any work done by the employee:
   (i) in excess of eight hours for any workday; or
   (ii) in excess of 80 hours for any biweekly period.
(5) Those employees of a business engaged in the transportation of persons or property to whom the overtime provisions of the Federal Fair Labor Standards Act do not apply, but shall apply to all other employees of such businesses.
(6) Those employees of a political subdivision of this state.
(7) State employees who are covered by the U.S. Federal Fair Labor Standards Act.

Exemptions under both the FLSA and state law are narrowly construed. It is essential that the terms and conditions of each exemption be carefully checked.