

SENATE BILL REPORT

ESB 6321

As Passed Senate, February 16, 2016

Title: An act relating to certain exclusions from the definition of worker under industrial insurance statutes.

Brief Description: Addressing certain exclusions from the definition of worker under industrial insurance statutes.

Sponsors: Senators Baumgartner and Pedersen.

Brief History:

Committee Activity: Commerce & Labor: 1/25/16, 1/27/16 [DP, DNP].
Passed Senate: 2/16/16, 29-20.

SENATE COMMITTEE ON COMMERCE & LABOR

Majority Report: Do pass.

Signed by Senators Baumgartner, Chair; Braun, Vice Chair; King and Warnick.

Minority Report: Do not pass.

Signed by Senators Hasegawa, Ranking Minority Member; Conway and Keiser.

Staff: Susan Jones (786-7404)

Background: Joint Legislative Task Force on the Underground Economy in the Construction Industry. In 2007, the Joint Legislative Task Force on the Underground Economy in the Construction Industry (Task Force) was created. The Task Force was directed to formulate a state policy to establish cohesion and transparency between state agencies to increase oversight and regulation of the underground construction economy. One of the issues the Task Force discussed was the determination of independent contractor status. The Task Force made recommendations. In 2008, a new test was established in law to determine when work is done by an independent contractor in the construction industry for purposes of unemployment insurance and industrial insurance.

Contractors and Electricians - Seven-Part Test. For the purposes of the industrial insurance, any individual performing services that require registration as a contractor or licensing as an electrician for remuneration under an independent contract is not a worker when:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

1. the individual has been, and will continue to be, free from control or direction over the performance of the service, both under the contract of service and in fact;
2. the service is either outside the usual course of business for which the service is performed, or the service is performed outside all of the places of business of the enterprise for which the service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the service is performed;
3. the individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service, or the individual has a principal place of business for the individual's business that is eligible for a business deduction for federal income tax purposes other than that furnished by the employer for which the business has contracted to furnish services;
4. on the contract date, the individual is responsible for filing at the next applicable filing period a schedule of expenses with the IRS for the type of business the individual is conducting;
5. on the contract date, or within a reasonable period after contract date, the individual has an active and valid certificate of registration with the department of revenue, and an active and valid account with any other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a state UBI;
6. on the contract date, the individual is maintaining a separate set of books or records for the business; and
7. on the contract date, the individual has a valid contractor registration or an electrician license.

Summary of Engrossed Bill: With respect to the first part of the test -control or direction-requirements regarding sequencing, deadlines, or date and time of entry to a worksite do not constitute control or direction, nor do reasonable expectations of professional dress, conduct, demeanor, safety, or any other conditions specified in the agreement with the owner of the property or a higher tier contractor.

The following provisions and requirements are eliminated:

- that the individual has a principal place of business for the business that is eligible for a federal income tax business deduction;
- on the contract date, the individual is responsible for filing at the next applicable filing period a schedule of expenses with the IRS for the type of business the individual is conducting; and
- on the contract date, the individual is maintaining a separate set of books or records for the business.

With respect to the requirement that the individual have an active and valid account with any other state agencies, the requirement is only with respect to accounts with L&I. With respect to (1) the active and valid account with L&I, and (2) the valid contractor registration or an electrician license, if they are checked quarterly or within a reasonable period before, during, or after the agreement, reliance on the Department of Revenue and L&I published information constitutes compliance with the requirements.

Appropriation: None.

Fiscal Note: Not requested.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: This bill was brought by people trying to grow the economy. There have been constituent complaints about the seven-part test. Some aspects are quite arbitrary and require contractors to prove items that are very difficult to prove among their subcontractors. This may inhibit business growth. Making some straightforward tweaks may help the overall integrity of the system. The BIAW agrees that they do not want illegal contractors. The bill will streamline the process and eliminate ambiguity. Determining whether a subcontractor qualifies for tax deductions is challenging. The seven-part test goes beyond what a contractor should be expected to determine with respect to a subcontractor. This will avoid legitimate contractors from having to avoid expensive litigation and appeals defending themselves. L&I sometimes issues large fines that the contractors have to protest and litigate. There are many tests for independent contractors. This will streamline the test. The current test requires the contractor to be the enforcer for the subcontractors. A lot of the fight comes with respect to control. If a contractor says that this is the day the electrical needs to go in, then that is considered control.

CON: We have a huge worker misclassification in this state already. Streamlining and clarifying the seven-part test is fine but avoiding worker misclassification is important so workers do not end up without unemployment insurance and workers compensation benefits. Those benefits are a significant part of the social safety network. This legislation allows for the check or verification before, during, or after the contract is executed. Therefore, a general contractor could make the determination after an injury had already occurred. The worker may not even know that the worker is not covered for the injury.

OTHER: L&I agrees with the stated intent of the bill and providing clarity to employers around independent contractor status. L&I has informational materials and ways for employers to determine the issue and obtain assistance. There is a special unit to help gain certainty. This bill would increase the number of workers who would be exempt from the workers compensation system. The bill may lead to unintended consequences.

Persons Testifying: PRO: Senator Michael Baumgartner, prime sponsor; Tom Kwieciak, Building Industry Association of WA; Dave Main, Building Industry Association of WA - President; Bob Battles, AWB.

CON: Joe Kendo, Washington State Labor Council.

OTHER: Elizabeth Smith, Labor & Industries; Larry Stevens, Mechanical and Electrical Contractors.

Persons Signed In To Testify But Not Testifying: No one.