

## **EMPLOYEE OR INDEPENDENT CONTRACTOR REGULATIONS IMPACTED BY LEGISLATIVE ACTION**

In the 2007 summer issue of the Construction RESOURCE, legislation impacting workers compensation regulations in New Hampshire were highlighted. During the 2008 session additional changes were enacted, some affecting legislation that passed in 2007. It is important for all contractors to understand the regulations now in effect. For further clarification contractors should contact their insurance agent or contact the ABC Chapter office.

Senate Bill 92 (2007) creates a new definition of employee that provides a revised outline of criteria that must be met for an individual to be exempted and qualify as an independent contractor (RSA 275:4 II). The new criteria will be included in the state statutes regulating employment, payment of wages, whistleblower protection, minimum wage, and workers compensation. House Bill 471 (2007), House Bill 692 (2008) and Senate Bill 501 (2008) changes the corporate exclusion for workers compensation coverage on projects administered by the state (RSA 228:4-b). House Bill 471 also creates a certification requirement of current workers compensation coverage for all contractors on state projects (RSA 228:4-b). House Bill 337 (2007) was passed to dramatically increase the liability of employers failing to comply with workers compensation regulations, including a provision for who is personally liable for payment of penalties (RSA 281-A:2VI(c)). House Bill 336 (2007) creates a requirement that employers post information about the criteria for classifying an employee as an employee or an independent contractor (RSA 275:49V). Senate Bill 500 (2008) increases penalties for insurance fraud and for employers who purposely fail to secure workers compensation coverage (RSA 281-A:7), changes information that insurance companies are required to verify on insurance applications (RSA 402:82), creates requirements for information that will be required to appear on certificates of insurance (RSA 412:37-a) and creates a task force to study employee misclassification.

### HIGHLIGHTED REGULATIONS

#### RSA 275:49 V.

Every employer shall keep posted in a place accessible to his or her employees.....information about the criteria for classifying an employee as an employee or as an independent contractor...

#### RSA 281-A:7 I.(a)(1)

An employer who fails to comply with the provisions of RSA 281-A:5 (Workers Compensation Coverage requirements) by not securing payment of compensation may be assessed a civil penalty of up to \$2500; in addition, such an employer may be assessed a civil penalty of up to \$100 per employee for each day of noncompliance. The penalties shall be assessed from the first day of the infraction not to exceed one year. Notwithstanding any provision of law to the contrary, any person with control or responsibility over decisions to disburse funds and salaries and who knowingly failed to secure payment of workers compensation under this chapter shall be held personally liable for the payment of penalties under this chapter.

#### RSA 228:4-b I

Prior to any work being done by an individual contractor on any state transportation/Administrative Services project....such contractor, including all subcontractors and independent contractors, working on a construction, reconstruction, alteration, or maintenance project, excluding routine maintenance operations conducted utilizing the contract rental agreement process and excluding deliveries to and removals from a project administered by the departments shall provide to the commissioner:

- (a) A certification of insurance of his or her current workers compensation coverage in New Hampshire for the classification of work to be completed on the project;
- (b) A sworn statement that coverage shall remain in effect for the duration of his or her anticipated work on the project;
- (c) A completed work certificate.....that shall include the total number of employees anticipated to be employed by such contractor, subcontractor, or independent contractor on the project during the contract period, delineated by the National Council on Compensation Insurance classification code applicable to the scope of work to be performed;
- (d) A copy of the contractors compliance with a current written safety program, if applicable, as filed with the commissioner of labor under RSA 281-A:64 II and proof of an existing joint loss management committee as required under RSA 281-A:64, III, if applicable.
- (e) The department may develop procedures to obtain the requirements in this section on an annual basis or by a prequalification procedure rather than on a project by project basis.

II. If any .... Contractor, subcontractor, or independent contractor who might otherwise claim an exclusion under RSA 281-A:18-a is directly performing the work on a project covered under this section, such contractor, subcontractor, or independent contractor shall comply with the provisions of this section.

III. The commissioner of labor may assess any contractor.....who falsifies information or fails to comply with this section a civil penalty of up to \$2500 and in addition such employer shall be assessed a civil penalty of up to \$100 per employee per day of noncompliance. Notwithstanding any other provision of law to the contrary, any person with control or responsibility over the decisions to disburse funds and salaries and who knowingly falsifies information or knowingly failed to comply with this section shall be held personally liable for the payment of penalties under this section and such contractor.....shall not be allowed to bid or work on state projects for up to 5 years. The state shall be entitled to recover from the violator all costs and fees directly associated with uncovering falsified information supplied under this section.

281-A:4-b – The commissioner of labor shall provide a work certificate form to meet the requirements of.....(this act)

#### RSA 275:4 II

(for the regulation of employment, payment of wages, whistle blower protection, minimum wage and workers compensation) “employee” means and includes every person who may be permitted, required, or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment, but shall not include any person.....who meets all the following criteria:

- (a) The person possesses or has applied for a federal employer identification number or social security number, or in the alternative, has agreed in writing to carry out the responsibilities imposed on employers under this chapter.
- (b) The person has control and discretion over the means and manner of performance of the work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the employer.

- c) The person has control over the time when the work is performed, and the time of performance is not dictated by the employer. However, this shall not prohibit the employer from reaching an agreement with the person as to completion schedule, range of work hours, and maximum number of work hours to be provided by the person.....
- (d) The person hires and pays the persons assistants, if any, and to the extent such assistants are employees, supervises the details of the assistants work.
- (e) The person holds himself or herself out to be in business for himself or herself.
- (f) The person has continuing or recurring business liabilities or obligations.
- (g) The success or failure of the persons business depends on the relationship of business receipts to expenditures.
- (h) The person receives compensation for work or services performed and remuneration is not determined unilaterally by the hiring party.
- (i) The person is responsible in the first instance for the main expenses related to the service or work performed. However, this shall not prohibit the employer or person offering work from providing the supplies or materials necessary to perform the work.
- (j) The person is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work.
- (k) The person supplies the principal tools and instrumentalities used in the work, except that the employer may furnish tools or instrumentalities that are unique to the employers special requirements or are located on the employers premises.
- (l) The person is not required to work exclusively for the employer.

RSA 281-A:2 VI (c)

Prima facie evidence that the criteria prescribed ....have been met may be established by a written agreement signed by the employer and the person providing services, on or about the date such person was engaged.....If the commissioner finds that the employers use of such written agreement was intended to misrepresent the relationship between the employer and the person providing services, the commissioner may assess a civil penalty of up to \$2500; in addition, such employer shall be assessed a civil penalty of \$100 per employee for each day of noncompliance. The fines shall be assessed from the first day of the infraction but not to exceed one year. Notwithstanding any provision of law to the contrary, any person with control or responsibility over decisions to disburse funds and salaries and who knowingly violates the provisions of this subparagraph shall be held personally liable for payments of fines.

RSA 281-A:7, VI

Any employer, individual, or corporate officer required to secure payment of compensation under this chapter who purposely, as defined in RSA 626:2, II(a), fails to secure such payment shall be guilty of a class B felony.

RSA 402:82

Claims Forms and Applications

I. All insurance claim forms shall contain a statement that clearly states in substance the following: "Any person who, with a purpose to injure, defraud, or deceive an insurance company, files a statement of claim containing any false, incomplete, or misleading information is subject to prosecution and punishment for insurance fraud, as provided in RSA:20"

II. No insurance company or producer shall accept an application for workers compensation or property or casualty insurance, unless the application includes:

- (a) A written or electronic signature of the producer, unless the transaction does not involve a producer; and

(b) A written or electronic signature of the applicant.

III. The lack of the information required by paragraphs I and II shall not constitute a defense against prosecution under RSA:20 or any other criminal statute.

IV. "Electronic signature" shall have the same definition as under RSA 294-E:2

V. "Written signature" means an original signature or a duplicate copy made by photocopying, facsimile, or other means similar and does not include stamped signatures.

#### RSA 412:37-a

##### Certificates of Insurance

Every certificate of insurance issued or presented in this state pursuant to a workers compensation insurance policy shall contain the following information:

I. All states for which such statutory coverage is provided;

II. Names of all executive officers or members who are excluded, if any, pursuant to RSA 281-A:18-a, or a notation that no executive officers or members are excluded; and

III. Names of all sole proprietors or partners who have elected to be covered under the policy or a notation that no sole proprietors or partners are covered.