

A bill for an act
relating to employment; requiring independent contractor exemption certificates;
providing penalties; authorizing notice to the commissioners of revenue and
employment and economic development; requiring the commissioner of revenue
to review certifications of independent contractor status; proposing coding for
new law in Minnesota Statutes, chapter 181; repealing Minnesota Statutes 2006,
sections 176.042; 268.035, subdivision 9.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. **[181.723] INDEPENDENT CONTRACTORS.**

Subdivision 1. Definitions. The definitions in this subdivision apply to this section.

(a) "Person" means any individual, limited liability corporation, corporation, partnership, incorporated or unincorporated association, sole proprietorship, joint stock company, or any other legal or commercial entity.

(b) "Department" means the Department of Labor and Industry.

(c) "Commissioner" means the commissioner of labor and industry or a duly designated representative of the commissioner who is either an employee of the Department of Labor and Industry or person working under contract with the Department of Labor and Industry.

(d) "Individual" means a human being.

(e) "Day" means calendar day unless otherwise provided.

(f) "Knowingly" means knew or could have known with the exercise of reasonable diligence.

(g) "Document" or "documents" includes papers; books; records; memoranda; data; contracts; drawings; graphs; charts; photographs; digital, video, and audio recordings;

records; accounts; files; statements; letters; e-mails; invoices; bills; notes; and calendars maintained in any form or manner.

Subd. 2. **Limited application.** This section only applies to individuals performing public or private sector commercial or residential building construction or improvement services as described in section 326.83.

Subd. 3. **Employee-employer relationship.** Except as provided in subdivision 4, for purposes of chapters 176, 177, 181A, 182, and 268, as of January 1, 2009, an individual who performs services for a person that are in the course of the person's trade, business, profession, or occupation is an employee of that person and that person is an employer of the individual.

Subd. 4. **Independent contractor.** An individual is an independent contractor and not an employee of the person for whom the individual is performing services in the course of the person's trade, business, profession, or occupation only if (1) the individual holds a current independent contractor exemption certificate issued by the commissioner; and (2) the individual is performing services for the person under the independent contractor exemption certificate as provided in subdivision 6. The requirements in clauses (1) and (2) must be met in order to qualify as an independent contractor and not as an employee of the person for whom the individual is performing services in the course of the person's trade, business, profession, or occupation.

Subd. 5. **Application.** To obtain an independent contractor exemption certificate, the individual must submit, in the manner prescribed by the commissioner, a complete application and the certificate fee required under subdivision 14.

(a) A complete application must include all of the following information:

(1) the individual's full name;

(2) the individual's residence address and telephone number;

(3) the individual's business name, address, and telephone number;

(4) the services for which the individual is seeking an independent contractor exemption certificate;

(5) the individual's Social Security number;

(6) the individual's or the individual's business federal employer identification number, if a number has been issued to the individual or the individual's business;

(7) any information or documentation that the commissioner requires by rule that will assist the department in determining whether to grant or deny the individual's application; and

(8) the individual's sworn statement that the individual meets all of the following conditions:

3.1 (i) maintains a separate business with the individual's own office, equipment,
3.2 materials, and other facilities;

3.3 (ii) holds or has applied for a federal employer identification number or has filed
3.4 business or self-employment income tax returns with the federal Internal Revenue Service
3.5 if the person has performed services in the previous year for which the individual is
3.6 seeking the independent contractor exemption certificate;

3.7 (iii) operates under contracts to perform specific services for specific amounts of
3.8 money and under which the individual controls the means of performing the services;

3.9 (iv) incurs the main expenses related to the service that the individual performs
3.10 under contract;

3.11 (v) is responsible for the satisfactory completion of services that the individual
3.12 contracts to perform and is liable for a failure to complete the service;

3.13 (vi) receives compensation for service performed under a contract on a commission
3.14 or per-job or competitive bid basis and not on any other basis;

3.15 (vii) may realize a profit or suffer a loss under contracts to perform service;

3.16 (viii) has continuing or recurring business liabilities or obligations; and

3.17 (ix) the success or failure of the individual's business depends on the relationship of
3.18 business receipts to expenditures.

3.19 (b) Individuals who are applying for or renewing a residential building contractor
3.20 or residential remodeler license under sections 326.83 to 326.992 and any rules
3.21 promulgated pursuant thereto may simultaneously apply for or renew an independent
3.22 contractor exemption certificate. The commissioner shall create an application form
3.23 that allows for the simultaneous application for both a residential building contractor
3.24 or residential remodeler license and an independent contractor exemption certificate.
3.25 If individuals simultaneously apply for or renew a residential building contractor or
3.26 residential remodeler license and an independent contractor exemption certificate using
3.27 the form created by the commissioner, individuals shall only be required to provide, in
3.28 addition to the information required by section 326.89 and rules promulgated pursuant
3.29 thereto, the sworn statement required by paragraph (a), clause (8), and any additional
3.30 information required by this subdivision that is not also required by section 326.89 and
3.31 any rules promulgated thereto. When individuals submit a simultaneous application
3.32 on the form created by the commissioner for both a residential building contractor or
3.33 residential remodeler license and an independent contractor exemption certificate the
3.34 application fee shall be \$150. An independent contractor exemption certificate that is in
3.35 effect before March 1, 2009, shall remain in effect until March 1, 2011, unless revoked by
3.36 the commissioner or cancelled by the individual.

(c) Within 30 days of receiving a complete application and the certificate fee, the commissioner must either grant or deny the application. The commissioner may deny an application for an independent contractor exemption certificate if the individual has not submitted a complete application and certificate fee or if the individual does not meet all of the conditions for holding the independent contractor exemption certificate. The commissioner may revoke an independent contractor exemption certificate if the commissioner determines that the individual no longer meets all of the conditions for holding the independent contractor exemption certificate, commits any of the actions set out in subdivision 7, or fails to cooperate with a department investigation into the continued validity of the individual's certificate. Once issued, an independent contractor exemption certificate remains in effect for two years unless:

(1) revoked by the commissioner; or

(2) canceled by the individual.

(d) If the department denies an individual's original or renewal application for an independent contractor exemption certificate or revokes an independent contractor exemption certificate, the commissioner shall issue to the individual an order denying or revoking the certificate. The commissioner may issue an administrative penalty order to an individual or person who commits any of the actions set out in subdivision 7.

(e) An individual or person to whom the commissioner issues an order under paragraph (d) shall have 30 days after service of the order to request a hearing. The request for hearing must be in writing and must be served on or faxed to the commissioner at the address or facsimile number specified in the order by the 30th day after service of the order. If the individual does not request a hearing or if the individual's request for a hearing is not served on or faxed to the commissioner by the 30th day after service of the order, the order shall become a final order of the commissioner and will not be subject to review by any court or agency. The date on which a request for hearing is served by mail shall be the postmark date on the envelope in which the request for hearing is mailed. If the individual serves or faxes a timely request for hearing, the hearing shall be a contested case hearing and shall be held in accordance with chapter 14.

Subd. 6. Performing services under exemption certificate. An individual is performing services for a person under an independent contractor exemption certificate if:

(a) the individual is performing services listed on the individual's independent contractor exemption certificate;

(b) at the time the individual is performing services listed on the individual's independent contractor exemption certificate, the individual meets all of the following conditions:

(1) maintains a separate business with the individual's own office, equipment, materials, and other facilities;

(2) holds or has applied for a federal employer identification number or has filed business or self-employment income tax returns with the federal Internal Revenue Service if the individual performed services in the previous year for which the individual has the independent contractor exemption certificate;

(3) is operating under contract to perform the specific services for the person for specific amounts of money and under which the individual controls the means of performing the services;

(4) is incurring the main expenses related to the services that the individual is performing for the person under the contract;

(5) is responsible for the satisfactory completion of the services that the individual has contracted to perform for the person and is liable for a failure to complete the services;

(6) receives compensation from the person for the services performed under the contract on a commission or per-job or competitive bid basis and not on any other basis;

(7) may realize a profit or suffers a loss under the contract to perform services for the person;

(8) has continuing or recurring business liabilities or obligations; and

(9) the success or failure of the individual's business depends on the relationship of business receipts to expenditures.

Subd. 7. Prohibited activities. (a) An individual shall not:

(1) perform work as an independent contractor who meets the qualifications under subdivision 6, without first obtaining from the department an independent contractor exemption certificate;

(2) perform work as an independent contractor when the department has denied or revoked the individual's independent contractor exemption certificate;

(3) transfer to another individual or allow another individual to use the individual's independent contractor exemption certificate;

(4) alter or falsify an independent contractor exemption certificate;

(5) misrepresent the individual's status as an independent contractor; or

(6) make a false material statement, representation, or certification; omit material information; or alter, conceal, or fail to file a document required by this section or any rule promulgated by the commissioner under rulemaking authority set out in this section.

(b) A person shall not:

(1) require an individual through coercion, misrepresentation, or fraudulent means to adopt independent contractor status;

(2) knowingly misrepresent that an individual who has not been issued an independent contractor exemption certificate or is not performing services for the person under an independent contractor exemption certificate is an independent contractor; or

(3) make a false material statement, representation, or certification; omit material information; or alter, conceal, or fail to file a document required by this section or any rule promulgated by the commissioner under rulemaking authority set out in this section.

(c) A person for whom an individual is performing services must obtain a copy of the individual's independent contractor exemption certificate before services may commence.

A copy of the independent contractor exemption certificate must be retained for five years from the date of receipt by the person for whom an individual is performing services.

Subd. 8. **Remedies.** An individual or person who violates any provision of subdivision 7 is subject to a penalty to be assessed by the department of up to \$5,000 for each violation. The department shall deposit penalties in the assigned risk safety account.

Subd. 9. **Commissioner's powers.** (a) In order to carry out the purposes of this section, the commissioner may:

(1) administer oaths and affirmations, certify official acts, interview, question, take oral or written statements, and take depositions;

(2) request, examine, take possession of, photograph, record, and copy any documents, equipment, or materials;

(3) at a time and place indicated by the commissioner, request persons to appear before the commissioner to give testimony and produce documents, equipment, or materials;

(4) issue subpoenas to compel persons to appear before the commissioner to give testimony and produce documents, equipment, or materials; and

(5) subject to paragraph (c), with or without notice, enter without delay upon any property, public or private, for the purpose of taking any action authorized under this subdivision or the applicable law, including obtaining information or conducting inspections or investigations.

(b) Persons requested by the commissioner to give testimony or produce documents, equipment, or materials shall respond within the time and in the manner specified by the commissioner. If no time to respond is specified in the request, then a response shall be submitted within 30 days of the commissioner's service of the request.

(c) Upon the refusal or anticipated refusal of a property owner, lessee, property owner's representative, or lessee's representative to permit the commissioner's entry onto property as provided in paragraph (a), the commissioner may apply for an administrative inspection order in the Ramsey County District Court or, at the commissioner's discretion,

in the district court in the county in which the property is located. The commissioner may anticipate that a property owner or lessee will refuse entry if the property owner, lessee, property owner's representative, or lessee's representative has refused to permit entry on a prior occasion or has informed the commissioner that entry will be refused. Upon showing of administrative probable cause by the commissioner, the district court shall issue an administrative inspection order that compels the property owner or lessee to permit the commissioner to enter the property for the purposes specified in paragraph (a).

(d) Upon the application of the commissioner, a district court shall treat the failure of any person to obey a subpoena lawfully issued by the commissioner under this subdivision as a contempt of court.

Subd. 10. **Notice requirements.** Unless otherwise specified, service of a document on a person under this section may be by mail, by personal service, or in accordance with any consent to service filed with the commissioner. Service by mail shall be accomplished in the manner provided in Minnesota Rules, part 1400.5550, subpart 2. Personal service shall be accomplished in the manner provided in Minnesota Rules, part 1400.5550, subpart 3.

Subd. 11. **Facsimile; timely service.** When this section permits a request for hearing to be served by facsimile on the commissioner, the facsimile shall not exceed 15 pages in length. The request shall be considered timely served if the facsimile is received by the commissioner, at the facsimile number identified by the commissioner in the order, no later than 4:30 p.m. central time on the last day permitted for faxing the request. Where the quality or authenticity of the faxed request is at issue, the commissioner may require the original request to be filed. Where the commissioner has not identified quality or authenticity of the faxed request as an issue and the request has been faxed in accordance with this subdivision, the person faxing the request does not need to file the original request with the commissioner.

Subd. 12. **Time period computation.** In computing any period of time prescribed or allowed by this section, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the next day which is not a Saturday, Sunday, or legal holiday.

Subd. 13. **Rulemaking.** The commissioner may, in consultation with the commissioner of revenue and the commissioner of employment and economic development, adopt, amend, suspend, and repeal rules under the rulemaking provisions of chapter 14 that relate to the commissioner's responsibilities under this section. This subdivision is effective the day following final enactment.

8.1 Subd. 14. **Fee.** The certificate fee for the original application and for the renewal
8.2 of an independent contractor exemption certificate shall be \$150. Fees collected under
8.3 this subdivision are deposited in the construction code fund and are appropriated to the
8.4 commissioner of labor and industry in fiscal years 2008 and 2009 to administer and
8.5 enforce the provisions of this act.

8.6 Subd. 15. **Notice to commissioner; review by commissioner of revenue.** When
8.7 the commissioner has reason to believe that an individual who holds a certificate has failed
8.8 to maintain all the conditions required by subdivision 6 or is not performing services for a
8.9 person under the independent contractor exemption certificate, the commissioner must
8.10 notify the commissioner of revenue and the commissioner of employment and economic
8.11 development. Upon receipt of notification from the commissioner that an individual who
8.12 holds a certificate has failed to maintain all the conditions required by subdivision 6
8.13 or is not performing services for a person under the independent contractor exemption
8.14 certificate, the commissioner of revenue must review the information returns required
8.15 under section 6041A of the Internal Revenue Code. The commissioner of revenue shall
8.16 also review the submitted certification that is applicable to returns audited or investigated
8.17 under section 289A.35.

8.18 Subd. 16. **Data classified.** Data in applications for an independent contractor
8.19 exemption certificate and any required documentation submitted to the commissioner are
8.20 private data on individuals as defined in section 13.02. Data in exemption certificates
8.21 issued by the commissioner are public data. Data that document a revocation or
8.22 cancellation of an exemption certificate are public data. Upon request of the Department
8.23 of Revenue or Department of Employment and Economic Development, the commissioner
8.24 may release to the requesting department data classified as private under this subdivision
8.25 or investigative data that are not public under section 13.39 that relate to the issuance or
8.26 denial of applications or revocations of certificates.

8.27 **EFFECTIVE DATE.** This section is effective July 1, 2008.

8.28 **Sec. 2. REPEALER.**

8.29 Minnesota Statutes 2006, sections 176.042; and 268.035, subdivision 9, are repealed.

8.30 **EFFECTIVE DATE.** This section is effective January 1, 2009.

176.042 INDEPENDENT CONTRACTORS.

Subdivision 1. **General rule; independent contractors are employees.** Except as provided in subdivision 2, every independent contractor doing commercial or residential building construction or improvements in the public or private sector is, for the purpose of this chapter, an employee of any employer under this chapter for whom the independent contractor is performing service in the course of the trade, business, profession, or occupation of that employer at the time of the injury.

Subd. 2. **Exception.** An independent contractor, as described in subdivision 1, is not an employee of an employer for whom the independent contractor performs work or services if the independent contractor meets all of the following conditions:

(1) maintains a separate business with the independent contractor's own office, equipment, materials, and other facilities;

(2) holds or has applied for a federal employer identification number or has filed business or self-employment income tax returns with the federal Internal Revenue Service based on that work or service in the previous year;

(3) operates under contracts to perform specific services or work for specific amounts of money and under which the independent contractor controls the means of performing the services or work;

(4) incurs the main expenses related to the service or work that the independent contractor performs under contract;

(5) is responsible for the satisfactory completion of work or services that the independent contractor contracts to perform and is liable for a failure to complete the work or service;

(6) receives compensation for work or service performed under a contract on a commission or per-job or competitive bid basis and not on any other basis;

(7) may realize a profit or suffer a loss under contracts to perform work or service;

(8) has continuing or recurring business liabilities or obligations; and

(9) the success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

268.035 DEFINITIONS.

Subd. 9. **Construction/independent contractor.** A worker doing commercial or residential building construction or improvement, in the public or private sector, performing services in the course of the trade, business, profession, or occupation of the employer, shall be considered an employee and not an "independent contractor" unless the worker meets all the following conditions:

(1) maintains a separate business with the independent contractor's own office, equipment, materials, and other facilities;

(2) holds or has applied for a federal employer identification number or has filed business or self-employment income tax returns with the federal Internal Revenue Service based on that work or service in the previous year;

(3) operates under contracts to perform specific services or work for specific amounts of money under which the independent contractor controls the means of performing the services or work;

(4) incurs the main expenses related to the service or work that the independent contractor performs under contract;

(5) is responsible for the satisfactory completion of work or services that the independent contractor contracts to perform and is liable for a failure to complete the work or service;

(6) receives compensation for work or service performed under a contract on a commission or per job or competitive bid basis and not on any other basis;

(7) may realize a profit or suffer a loss under contracts to perform work or service;

(8) has continuing or recurring business liabilities or obligations; and

(9) the success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.