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State of Minnesota

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HOUSE OF REPRESENTATIVES

Unofficial Engrossment

House Engrossment of a Senate File

EIGHTY-SEVENTH SESSION

S. F. No. 1653

Senate Author(s): Pederson, Kelash and Tomassoni

House Action

04/19/2012 Companion to House File No. 2093. (Authors: Sanders, Gunther, Scalze, McFarlane and Nelson)

Read First Time and Referred to the Committee on Ways and Means

04/26/2012 Adoption of Report: Pass as Amended and Read Second Time

1.1 A bill for an act
1.2 relating to labor and industry; clarifying employee classification of independent
1.3 contractors; providing pilot project for contractor registration; providing for
1.4 penalties; amending Minnesota Statutes 2010, sections 181.723, subdivisions
1.5 1, 3, 4, 7, 15, 16, by adding subdivisions; 326B.081, subdivision 3; Minnesota
1.6 Statutes 2011 Supplement, section 181.723, subdivision 5; repealing Minnesota
1.7 Statutes 2010, section 181.723, subdivisions 6, 8, 9, 10, 11, 12, 14, 17; Minnesota
1.8 Rules, parts 5202.0100; 5202.0110; 5202.0120; 5202.0130; 5202.0140;
1.9 5202.0150; 5202.0160.

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

1.11 Section 1. Minnesota Statutes 2010, section 181.723, subdivision 1, is amended to read:

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

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

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

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

1.21 (d) "Individual" means a human being.

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

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

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

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

2.3 (h) "Business entity" means a person other than an individual or a sole proprietor.

2.4 Sec. 2. Minnesota Statutes 2010, section 181.723, subdivision 3, is amended to read:

2.5 Subd. 3. **Employee-employer relationship.** Except as provided in subdivision 4,
2.6 for purposes of chapters 176, 177, 181A, 182, and 268, as of January 1, ~~2009~~ 2013, an
2.7 individual who performs services for a person that are in the course of the person's trade,
2.8 business, profession, or occupation is an employee of that person and that person is an
2.9 employer of the individual.

2.10 Sec. 3. Minnesota Statutes 2010, section 181.723, subdivision 4, is amended to read:

2.11 Subd. 4. **Independent contractor.** (a) An individual is an independent contractor
2.12 and not an employee of the person for whom the individual is performing services in the
2.13 course of the person's trade, business, profession, or occupation only if ~~(1) the individual~~
2.14 ~~holds a current independent contractor exemption certificate issued by the commissioner;~~
2.15 ~~and (2) the individual is performing services for the person under the independent~~
2.16 ~~contractor exemption certificate as provided in subdivision 6. The requirements in clauses~~
2.17 ~~(1) and (2) must be met in order to qualify as an independent contractor and not as an~~
2.18 ~~employee of the person for whom the individual is performing services in the course of~~
2.19 ~~the person's trade, business, profession, or occupation. the individual is registered with the~~
2.20 Department of Labor and Industry, if required under subdivision 4a, and the individual:

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

2.23 (2)(i) holds or has applied for a federal employer identification number or (ii) has
2.24 filed business or self-employment income tax returns with the federal Internal Revenue
2.25 Service if the worker has performed services in the previous year;

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

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

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

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

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

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

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

3.6 (b) If a worker is an owner or partial owner of a business entity, the worker is an
3.7 employee of the person for whom the worker is performing services in the course of the
3.8 person's trade, business, profession, or occupation, and is not an employee of the business
3.9 entity in which the worker has an ownership interest, unless:

3.10 (1) the business entity meets the nine factors in paragraph (a);

3.11 (2) invoices are submitted in the name of the business entity;

3.12 (3) the business entity is registered with the secretary of state, if required; and

3.13 (4) the business entity is registered with the Department of Labor and Industry,
3.14 if required under subdivision 4a.

3.15 Sec. 4. Minnesota Statutes 2010, section 181.723, is amended by adding a subdivision
3.16 to read:

3.17 Subd. 4a. **Registration pilot project.** (a) The commissioner shall implement a pilot
3.18 project, effective July 1, 2012, for the registration of persons who perform public or
3.19 private sector commercial or residential building construction or improvement services
3.20 as described in subdivision 2. The purpose of the pilot project is to evaluate whether the
3.21 information obtained through registration assists the Department of Labor and Industry,
3.22 the Department of Employment and Economic Development, and the Department of
3.23 Revenue to enforce laws related to misclassification of employees. The commissioner
3.24 shall issue a report to the legislature no later than January 1, 2014, on recommendations
3.25 for amendments to the registration program, including reasonable registration fees to be
3.26 used to aid in enforcing misclassification laws. The commissioner must not charge a fee
3.27 for registration under the pilot project, but may take the enforcement action specified in
3.28 subdivision 8a. The pilot project shall expire on June 30, 2014, unless extended by the
3.29 legislature.

3.30 (b) Except as provided in paragraph (c), any person who performs construction
3.31 services in the state on or after September 15, 2012, must register with the commissioner
3.32 as provided in subdivision 5 before performing construction services for another person.
3.33 The requirements for registration under this subdivision are not a substitute for, and do
3.34 not relieve a person from complying with, any other law requiring that the person be
3.35 licensed, registered, or certified.

4.1 (c) The registration requirements in this subdivision do not apply to:

4.2 (1) a person who, at the time the person is performing the construction services,
4.3 holds a current license, certificate, or registration under chapter 299M or 326B;

4.4 (2) a person who holds a current independent contractor exemption certificate
4.5 issued under this section that is in effect on September 15, 2012, except that the person
4.6 must register under this section no later than the date the exemption certificate expires, is
4.7 revoked, or is canceled;

4.8 (3) a person who has given a bond to the state under section 326B.197 or 326B.46;

4.9 (4) an employee of the person performing the construction services, if the person
4.10 was in compliance with laws related to employment of the individual at the time the
4.11 construction services were performed;

4.12 (5) an architect or professional engineer engaging in professional practice as defined
4.13 in section 326.02, subdivisions 2 and 3;

4.14 (6) a school district or technical college governed under chapter 136F; or

4.15 (7) a person providing construction services on a volunteer basis, including but not
4.16 limited to Habitat for Humanity and Builders Outreach Foundation, and their individual
4.17 volunteers when engaged in activities on their behalf.

4.18 Sec. 5. Minnesota Statutes 2011 Supplement, section 181.723, subdivision 5, is
4.19 amended to read:

4.20 Subd. 5. **Registration application.** ~~To obtain an independent contractor exemption~~
4.21 ~~certificate, the individual must submit~~ (a) Persons required to register under subdivision 4a
4.22 must submit electronically, in the manner prescribed by the commissioner, a complete
4.23 application and the certificate fee required under subdivision 14 according to paragraphs
4.24 (b) to (d).

4.25 ~~(a)~~ (b) A complete application must include all of the following information about
4.26 any individual who is registering as an individual or a sole proprietor, or who owns 25
4.27 percent or more of a business entity being registered:

4.28 (1) the individual's full legal name and title at applicant's business;

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

4.30 (3) the individual's business name, address, and telephone number, percentage of the
4.31 applicant's business owned by the individual; and

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

4.34 ~~(5)~~ (4) the individual's Social Security number;

5.1 ~~(6) the individual's or the individual's business federal employer identification~~
5.2 ~~number, if a number has been issued to the individual or the individual's business;~~
5.3 ~~(7) any information or documentation that the commissioner requires by rule that~~
5.4 ~~will assist the department in determining whether to grant or deny the individual's~~
5.5 ~~application; and~~
5.6 ~~(8) the individual's sworn statement that the individual meets all of the following~~
5.7 ~~conditions:~~
5.8 ~~(i) maintains a separate business with the individual's own office, equipment,~~
5.9 ~~materials, and other facilities;~~
5.10 ~~(ii) holds or has applied for a federal employer identification number or has filed~~
5.11 ~~business or self-employment income tax returns with the federal Internal Revenue Service~~
5.12 ~~if the person has performed services in the previous year for which the individual is~~
5.13 ~~seeking the independent contractor exemption certificate;~~
5.14 ~~(iii) operates under contracts to perform specific services for specific amounts of~~
5.15 ~~money and under which the individual controls the means of performing the services;~~
5.16 ~~(iv) incurs the main expenses related to the service that the individual performs~~
5.17 ~~under contract;~~
5.18 ~~(v) is responsible for the satisfactory completion of services that the individual~~
5.19 ~~contracts to perform and is liable for a failure to complete the service;~~
5.20 ~~(vi) receives compensation for service performed under a contract on a commission~~
5.21 ~~or per-job or competitive bid basis and not on any other basis;~~
5.22 ~~(vii) may realize a profit or suffer a loss under contracts to perform service;~~
5.23 ~~(viii) has continuing or recurring business liabilities or obligations; and~~
5.24 ~~(ix) the success or failure of the individual's business depends on the relationship of~~
5.25 ~~business receipts to expenditures.~~
5.26 ~~(b) Individuals who are applying for or renewing a residential building contractor or~~
5.27 ~~residential remodeler license under sections 326B.197, 326B.802, 326B.805, 326B.81,~~
5.28 ~~326B.815, 326B.821 to 326B.86, 326B.87 to 326B.885, and 327B.041, and any rules~~
5.29 ~~promulgated pursuant thereto, may simultaneously apply for or renew an independent~~
5.30 ~~contractor exemption certificate. The commissioner shall create an application form~~
5.31 ~~that allows for the simultaneous application for both a residential building contractor~~
5.32 ~~or residential remodeler license and an independent contractor exemption certificate.~~
5.33 ~~If individuals simultaneously apply for or renew a residential building contractor or~~
5.34 ~~residential remodeler license and an independent contractor exemption certificate using~~
5.35 ~~the form created by the commissioner, individuals shall only be required to provide, in~~
5.36 ~~addition to the information required by section 326B.83 and rules promulgated pursuant~~

6.1 ~~thereto, the sworn statement required by paragraph (a), clause (8), and any additional~~
6.2 ~~information required by this subdivision that is not also required by section 326B.83 and~~
6.3 ~~any rules promulgated thereto. An independent contractor exemption certificate that is in~~
6.4 ~~effect before March 1, 2009, shall remain in effect until March 1, 2013, unless revoked by~~
6.5 ~~the commissioner or canceled by the individual.~~

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

6.17 ~~(1) revoked by the commissioner; or~~

6.18 ~~(2) canceled by the individual.~~

6.19 ~~(d) If the department denies an individual's original or renewal application for~~
6.20 ~~an independent contractor exemption certificate or revokes an independent contractor~~
6.21 ~~exemption certificate, the commissioner shall issue to the individual an order denying or~~
6.22 ~~revoking the certificate. The commissioner may issue an administrative penalty order to~~
6.23 ~~an individual or person who commits any of the actions set out in subdivision 7. The~~
6.24 ~~commissioner may file and enforce the unpaid portion of a penalty as a judgment in~~
6.25 ~~district court without further notice or additional proceedings.~~

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

- 7.1 (c) A complete application must also include the following information:
7.2 (1) the applicant's legal name; assumed name filed with the secretary of state, if any;
7.3 designated business address; physical address; telephone number; and e-mail address;
7.4 (2) the applicant's Minnesota tax identification number, if one is required or has
7.5 been issued;
7.6 (3) the applicant's federal employer identification number, if one is required or
7.7 has been issued;
7.8 (4) evidence of the active status of the applicant's business filings with the secretary
7.9 of state, if one is required or has been issued;
7.10 (5) whether the applicant has any employees at the time the application is filed;
7.11 (6) the names of all other persons with an ownership interest in the business entity
7.12 who are not identified in paragraph (b), and the percentage of the interest owned by each
7.13 person, except that the names of shareholders with less than ten percent ownership in a
7.14 publicly traded corporation need not be provided;
7.15 (7) information documenting compliance with workers' compensation and
7.16 unemployment insurance laws;
7.17 (8) a certification that the person signing the application has: reviewed it; determined
7.18 that the information provided is true and accurate; and determined that the person signing
7.19 is authorized to sign and file the application as an agent of the applicant. The name of the
7.20 person signing, entered on an electronic application, shall constitute a valid signature of
7.21 the agent on behalf of the applicant; and
7.22 (9) a signed authorization for the Department of Labor and Industry to verify the
7.23 information provided on or with the application.
7.24 (d) A registered person must notify the commissioner within 15 days after there is a
7.25 change in any of the information on the application as approved. This notification must
7.26 be provided electronically in the manner prescribed by the commissioner. However, if
7.27 the business entity structure, legal form of the business entity, or business ownership has
7.28 changed, the person must submit a new registration application and registration fee, if
7.29 any, for the new business entity.
7.30 (e) The registered person must remain registered while providing construction
7.31 services for another person. The provisions of sections 326B.091 and 326B.094 to
7.32 326B.097 apply to this section.

7.33 Sec. 6. Minnesota Statutes 2010, section 181.723, is amended by adding a subdivision
7.34 to read:

8.1 Subd. 5a. **Web site.** (a) The commissioner shall develop and maintain a Web site
8.2 on which applicants for registration can submit a registration application. The Web site
8.3 shall be designed to receive and process registration applications and promptly issue
8.4 registration certificates electronically to successful applicants.

8.5 (b) The commissioner shall maintain the certificates of registration on the
8.6 department's official public Web site, which shall include the following information:

8.7 (1) the registered person's legal business name, including any assumed name, as
8.8 filed with the secretary of state;

8.9 (2) the person's business address designated on the application; and

8.10 (3) the effective date of the registration and the expiration date.

8.11 Sec. 7. Minnesota Statutes 2010, section 181.723, subdivision 7, is amended to read:

8.12 Subd. 7. **Prohibited activities.** (a) The prohibited activities in this subdivision are
8.13 in addition to those prohibited in sections 326B.081 to 326B.085.

8.14 ~~(a) (b)~~ An individual shall not:

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

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

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

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

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

8.24 ~~(6) make a false material statement, representation, or certification; omit material~~
8.25 ~~information; or alter, conceal, or fail to file a document required by this section or any~~
8.26 ~~rule promulgated by the commissioner under rulemaking authority set out in this section.~~
8.27 hold himself or herself out as an independent contractor unless the individual meets the
8.28 requirements of subdivision 4.

8.29 ~~(b) (c)~~ A person who provides construction services in the course of the person's
8.30 trade, business, occupation, or profession shall not:

8.31 (1) require an individual through coercion, misrepresentation, or fraudulent means to
8.32 adopt independent contractor status or form a business entity;

8.33 (2) knowingly misrepresent ~~that an individual who has not been issued~~ or misclassify
8.34 a worker as an independent contractor exemption certificate or is not performing services

9.1 ~~for the person under an independent contractor exemption certificate is an independent~~
 9.2 ~~contractor; or~~

9.3 (3) contract with or perform construction services for another person without first
 9.4 being registered if required by subdivision 4a;

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

9.8 contract with or pay another person to perform construction services if the other person
 9.9 is not registered if required by subdivision 4a. All payments to an unregistered person
 9.10 for construction services on a single project site shall be considered a single violation. It
 9.11 is not a violation of this clause:

9.12 (i) for a person to contract with or pay an unregistered person if the unregistered
 9.13 person was registered at the time the contract for construction services was entered into; or

9.14 (ii) for a homeowner or business to contract with or pay an unregistered person if
 9.15 the homeowner or business is not in the trade, business, profession, or occupation of
 9.16 performing building construction or improvement services; or

9.17 (5) be penalized for violations of this subdivision that are committed by another
 9.18 person. This clause applies only to violations of this paragraph.

9.19 ~~(c) A person for whom an individual is performing services must obtain a copy of the~~
 9.20 ~~individual's independent contractor exemption certificate before services may commence.~~
 9.21 ~~A copy of the independent contractor exemption certificate must be retained for five years~~
 9.22 ~~from the date of receipt by the person for whom an individual is performing services.~~

9.23 Sec. 8. Minnesota Statutes 2010, section 181.723, is amended by adding a subdivision
 9.24 to read:

9.25 Subd. 8a. **Enforcement; remedies; and penalties.** Notwithstanding the maximum
 9.26 penalty amount in section 326B.082, subdivisions 7 and 12, the maximum penalty for
 9.27 failure to register is \$2,000, but the commissioner shall forgive the penalty if the person
 9.28 registers within 30 days of the date of the penalty order.

9.29 Sec. 9. Minnesota Statutes 2010, section 181.723, subdivision 15, is amended to read:

9.30 Subd. 15. **Notice to commissioner; review by commissioner of revenue.** When
 9.31 the commissioner has reason to believe that ~~an individual who holds a certificate has~~
 9.32 ~~failed to maintain all the conditions required by subdivision 6 or is not performing~~
 9.33 ~~services for a person under the independent contractor exemption certificate a person has~~
 9.34 violated subdivision 7, paragraph (b); or (c), clause (1) or (2), the commissioner must

10.1 notify the commissioner of revenue and the commissioner of employment and economic
10.2 development. Upon receipt of notification from the commissioner ~~that an individual who~~
10.3 ~~holds a certificate has failed to maintain all the conditions required by subdivision 6~~
10.4 ~~or is not performing services for a person under the independent contractor exemption~~
10.5 ~~certificate~~, the commissioner of revenue must review the information returns required
10.6 under section 6041A of the Internal Revenue Code. The commissioner of revenue shall
10.7 also review the submitted certification that is applicable to returns audited or investigated
10.8 under section 289A.35.

10.9 Sec. 10. Minnesota Statutes 2010, section 181.723, subdivision 16, is amended to read:

10.10 Subd. 16. **Data classified.** Data in applications ~~for an independent contractor~~
10.11 ~~exemption certificate~~ and any required documentation submitted to the commissioner
10.12 under this section are private data on individuals or nonpublic data as defined in section
10.13 13.02. Data in ~~exemption~~ registration certificates issued by the commissioner are public
10.14 data; except that registration information published on the department's Web site may be
10.15 accessed for registration verification purposes only. Data that document a revocation
10.16 or cancellation of ~~an exemption~~ a certificate are public data. Upon request of the
10.17 Department of Revenue or the Department of Employment and Economic Development,
10.18 the commissioner may release to the requesting department data classified as private or
10.19 nonpublic under this subdivision or investigative data that are not public under section
10.20 13.39 that relate to the issuance or denial of applications or revocations of certificates.

10.21 Sec. 11. Minnesota Statutes 2010, section 326B.081, subdivision 3, is amended to read:

10.22 Subd. 3. **Applicable law.** "Applicable law" means the provisions of sections
10.23 181.723, 327.31 to 327.36, and this chapter, and all rules, orders, stipulation agreements,
10.24 settlements, compliance agreements, licenses, registrations, certificates, and permits
10.25 adopted, issued, or enforced by the department under sections 181.723, 327.31 to 327.36,
10.26 or this chapter.

10.27 Sec. 12. **REPEALER.**

10.28 (a) Minnesota Statutes 2010, section 181.723, subdivision 17, is repealed effective
10.29 May 15, 2011.

10.30 (b) Minnesota Statutes 2010, section 181.723, subdivisions 6, 8, 9, 10, 11, 12, and
10.31 14, and Minnesota Rules, parts 5202.0100; 5202.0110; 5202.0120; 5202.0130; 5202.0140;
10.32 5202.0150; and 5202.0160, are repealed July 1, 2012, except they shall remain in effect
10.33 for the regulation of an individual holding an independent contractor exemption certificate

11.1 issued before July 1, 2012, under Minnesota Statutes 2010, section 181.723, subdivision
11.2 5, until the exemption certificate expires, is revoked, or is canceled.

11.3 Sec. 13. **EFFECTIVE DATE.**

11.4 Sections 1 to 11 are effective July 1, 2012, except that those sections do not apply to
11.5 the regulation of an individual who holds an independent contractor exemption certificate
11.6 issued before July 1, 2012, under Minnesota Statutes 2010, section 181.723, subdivision
11.7 5, until the exemption certificate expires, or is revoked or canceled.