

CHAPTER 135  
HB 336 – FINAL VERSION

2007 SESSION

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07-0949

06/05

HOUSE BILL **336**

AN ACT requiring notice of the classifications of employee and independent contractor.

SPONSORS: Rep. Infantine, Hills 13; Sen. Hassan, Dist 23

COMMITTEE: Labor, Industrial and Rehabilitative Services

ANALYSIS

This bill requires that information about the classification of workers as employees or independent contractors be posted as part of the "Know Your Rights" notice in every place of employment.

Explanation: Matter added to current law appears in *bold italics*.

Matter removed from current law appears [~~in brackets and struck through.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

07-0949

06/05

STATE OF NEW HAMPSHIRE

*In the Year of Our Lord Two Thousand Seven*

AN ACT requiring notice of the classifications of employee and independent contractor.

*Be it Enacted by the Senate and House of Representatives in General Court convened:*

135:1 Notification, Posting, and Records; Independent Contractor Classification Information Added. Amend RSA 275:49 to read as follows:

275:49 Notification, Posting, and Records. Every employer shall:

- I. Notify the employees, at the time of hiring of the rate of pay, and of the day and place of payment;
- II. Notify his *or her* employees of any changes in the arrangements specified above prior to the time of such changes;
- III. Make available to his *or her* employees in writing or through a posted notice maintained in a place accessible to his *or her* employees employment practices and policies with regard to vacation pay, sick leave, and other fringe benefits;

IV. Furnish each employee with a statement of deductions made from his *or her* wages under RSA 275:48 for each pay period such deductions are made;

V. Keep posted in a place accessible to his *or her* employees an abstract of this subdivision furnished by the commissioner *which shall include information about the criteria for classifying an employee as an employee or as an independent contractor*; and

VI. Make such records of the persons employed by him *or her*, including wage and hour records, preserve such records for such periods of time, and make such reports therefrom to the commissioner, as the commissioner shall prescribe by regulation as necessary or appropriate for the enforcement of the provisions of this subdivision.

135:2 Effective Date. This act shall take effect 60 days after its passage.

Approved: June 18, 2007

Effective: August 17, 2007

## SB 92 – VERSION ADOPTED BY BOTH BODIES

04/12/07 1150s

04/12/07 1247s

06Jun2007... 1806h

06Jun2007... 2074h

## 2007 SESSION

07-1150

06/05

SENATE BILL **92**

AN ACT relative to the definition of employee and clarifying the criteria for exempting workers from employee status.

SPONSORS: Sen. Hassan, Dist 23; Sen. Janeway, Dist 7; Rep. Infantine, Hills 13; Rep. M. Knowles, Hills 27; Rep. DeChane, Strafford 3; Rep. Goley, Hills 8

COMMITTEE: Commerce, Labor and Consumer Protection

## ANALYSIS

This bill creates a uniform definition of employee and clarifies the criteria for exempting a worker from employee status.

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Explanation: Matter added to current law appears in *bold italics*.

Matter removed from current law appears [~~in brackets and struckthrough~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

04/12/07 1150s

04/12/07 1247s

06Jun2007... 1806h

06Jun2007... 2074h

07-1150

06/05

## STATE OF NEW HAMPSHIRE

*In the Year of Our Lord Two Thousand Seven*

AN ACT relative to the definition of employee and clarifying the criteria for exempting workers from employee status.

*Be it Enacted by the Senate and House of Representatives in General Court convened:*

1 Definition of Employee. Purpose Statement. The general court recognizes the need to protect employees from being improperly classified as independent contractors and thereby being denied workers' compensation coverage and certain other benefits. Therefore, it is the intent of the general court to define "employee" in a manner that clarifies the criteria for the classification.

2 Procuring Employment; Imposition of Conditions; Definition of Employee Changed. RSA 275:4, II is repealed and reenacted to read as follows:

II. In this subdivision, "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 exempted from the definition of employee as stated in RSA 281-A:2, VI(b)(2), (3), or (4), or RSA 281-A:2, VII(b), or a person providing services as part of a residential placement for individuals with developmental, acquired, or emotional disabilities, or any person who meets all of 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, and in the case of entertainment, the time such entertainment is to be presented.

(d) The person hires and pays the person's 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 person's 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 employer's special requirements or are located on the employer's premises.

(l) The person is not required to work exclusively for the employer.

3 Payment of Wages; Definition of Employee Changed. RSA 275:42, II is repealed and reenacted to read as follows:

II. "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 exempted from the definition of employee as stated in RSA 281-A:2, VI(b)(2), (3), or (4), or RSA 281-A:2, VII(b), or a person providing services as part of a residential placement for individuals with developmental, acquired, or emotional disabilities, or any

person who meets all of 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, and in the case of entertainment, the time such entertainment is to be presented.
- (d) The person hires and pays the person's 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 person's 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 employer's special requirements or are located on the employer's premises.
- (l) The person is not required to work exclusively for the employer.

4 Whistleblowers' Protection Act; Definition of Employee Changed. RSA 275-E:1, I is repealed and reenacted to read as follows:

I. "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 exempted from the definition of employee as stated in RSA 281-A:2, VI(b)(2), (3), or (4), or RSA 281-A:2, VII(b), or a person providing services as part of a residential placement for individuals with developmental, acquired, or emotional disabilities, or any person who meets all of 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, and in the case of entertainment, the time such entertainment is to be presented.

- (d) The person hires and pays the person's 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 person's 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 employer's special requirements or are located on the employer's premises.
- (l) The person is not required to work exclusively for the employer.

5 Minimum Wage Law; Definition of Employee Changed. RSA 279:1, X is repealed and reenacted to read as follows:

X. "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 exempted from the definition of employee as stated in RSA 281-A:2, VI(b)(2), (3), or (4), or RSA 281-A:2, VII(b), or a person providing services as part of a residential placement for individuals with developmental, acquired, or emotional disabilities, or any person who meets all of 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, and in the case of entertainment, the time such entertainment is to be presented.
- (d) The person hires and pays the person's 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 person's 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 employer's special requirements or are located on the employer's premises.

(l) The person is not required to work exclusively for the employer.

6 Workers' Compensation; Definition of Employee Changed. RSA 281-A:2, VI(b)(1) is repealed and reenacted to read as follows:

(b)(1) Subject to the preceding subparagraph, any person, other than a direct seller or qualified real estate broker or agent or real estate appraiser, or person providing services as part of a residential placement for individuals with developmental, acquired, or emotional disabilities, who performs services for pay for an employer, is presumed to be an employee. This presumption may be rebutted by proof that an individual meets all of 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, and in the case of entertainment, the time such entertainment is to be presented.

(D) The person hires and pays the person's 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 person's 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 employer's special requirements or are located on the employer's premises.

(L) The person is not required to work exclusively for the employer.

7 Workers' Compensation; Definition of Direct Seller. Amend RSA 281-A:2, VI(b)(3)(B) to read as follows:

(B) Who receives substantially all remuneration as such in a direct relationship to sales or other output including the performance of services, rather than the number of hours worked and whose services are performed pursuant to a written contract with the person for whom the services are performed, which provides that the individual will not be treated as an employee for federal tax purposes. *For purposes of this subparagraph a mortgage originator as defined by RSA 397-A:1, XVII who meets the conditions of this subparagraph shall be deemed a direct seller.*

8 Definition. Amend RSA 281-A:2, VII(b) to read as follows:

(b) "Employee," with respect to public employment shall not include any inmate of a county or state correctional facility who is, under RSA 651, required or allowed to work or perform services for which no significant remuneration is provided, any volunteer not covered under RSA 281-A:2, VII(a)(2) through (5), who performs services for which no significant remuneration is provided, or any participant performing community service work under a court order or the provisions of a court diversion program, *or any person providing services as part of a residential placement for individuals with developmental, acquired, or emotional disabilities.* "Employee," with respect to public employment, shall include any person participating in a local welfare work program established under RSA 165:31; however, the local governing body may vote to make the provisions of this chapter not applicable to local welfare work program participants through guidelines adopted under RSA 165:1, II.

9 Workers' Compensation; Definition of Employee; Reference Changed. RSA 281-A:2, VI(c) is repealed and reenacted to read as follows:

(c) Prima facie evidence that the criteria prescribed in subparagraphs (b)(1)(A)-~~(E)~~**(L)** 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, which describes the services to be performed and affirms that such services are to be performed in accordance with each of the criteria. Nothing in this subparagraph shall require such an agreement to establish that the criteria have been met. If the commissioner finds that the employer's 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 \$2,500; 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. All funds collected under this subparagraph shall be continually appropriated and deposited into a nonlapsing workers' compensation fraud fund dedicated to the investigation and compliance activities required by this section and related sections pertaining to labor and insurance law. The commissioner of labor shall appoint as many individuals as necessary to carry out the department's responsibilities under this section.

10 New Subparagraph; Application of Receipts. Amend RSA 6:12, I(b) by inserting after subparagraph 252 the following new subparagraph:

(253) Moneys deposited in the workers' compensation fraud fund established by RSA 281-A:2, VI(c).

11 Effective Date. This act shall take effect January 1, 2008.

LBAO

07-1150

Amended 06/12/07

### SB 92 FISCAL NOTE

AN ACT relative to the definition of employee and clarifying the criteria for exempting workers from employee status.

#### FISCAL IMPACT:

The Department of Labor has determined this bill, as amended by the House, (Amendment #2007-1806h), will have no fiscal impact on state, county, and local revenues or expenditures.

#### METHODOLOGY:

The Department of Labor states this bill does not have any fiscal impact.