Advisory Task Force on Employee Misclassification Report to the 2011-2012 Biennium, Eighty-Seventh Legislature

May 13, 2011

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This is the Report to the Minnesota Legislature of the Advisory Task Force on Employee Misclassification.

This report includes:

- A description of the Advisory Task Force on Employee Misclassification ("the Task Force"). A list of the membership is in Appendix A;
- Background information about the Legislative Auditor's 2007 Evaluation Report on Misclassification of Employees as Independent Contractors;
- Background information about the Independent Contractor Exemption Certificate (ICEC) program;
- A discussion of the problems encountered related to the ICEC program
- The Advisory Task Force's proposed amendments to Minn. Stat. § 181.723 and an explanation of the amendments (Appendix B).
- Comments of individual Task Force members and organizations (Appendix C).

Executive Summary

The Advisory Task Force on Employee Misclassification was established by the Legislature in 2009[1] and is made up of individuals representing commercial and residential general contractors, subcontractors, independent contractors and construction employees as well as representatives from Labor and Industry, Revenue, DEED, and the Attorney General's Office. The group met for over a year to discuss the difficult issue of employee misclassification in the construction industry. The proposed amendment of Minn. Stat. § 181.723 is one of the recommendations from that group. The other recommendations include increased coordination among enforcement agencies and continued education of the construction industry. The Task Force proposal is attached to this Report as Appendix A.

As an overview, the Task Force recommended amendments to Minn. Stat. § 181.723 to:

- Repeal the Independent Contractor Exemption Certificate (ICEC) program that went into effect in 2009 and replace it with a simplified contractor registration.[2]
- Establish a framework within which individual construction workers may be determined to be either construction contractors or employees of construction contractors for purposes of workers' compensation, unemployment insurance, and other specified laws.
- Level the playing field for legitimate businesses.

[1] Minn. Stat. § 181.723, subd. 17

[2] Minn. Stat. § 181.723 was enacted in 2007, and exemption certificates were required as of January 1, 2009.

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The Task Force found that the Independent Contractor Exemption Certificate program has not been effective in addressing the issues of misclassification of workers in construction. There are several reasons for this:

- Many independent contractors believe that the ICEC application process is too extensive and complicated because the applicant must provide written documentation showing that the individual can meet each of the nine-factors in the law.
- There are existing exemptions from coverage under the workers' compensation and unemployment compensation laws for certain businesses that have registered with the Secretary of State. However, some individuals who form a business entity would not meet the nine-factor test and may not comply with all legal obligations that legitimate business entities comply with. This creates a competitive disadvantage for legitimate business entities that do comply with the law.
- Holding an independent contractor exemption certificate (ICEC) does not provide a safe harbor for construction contractors who hire an individual subcontractor. An individual holding an ICEC must also meet the nine-factor test in Minn. Stat. § 181.723 at the time the services are provided.
- Misclassification of workers continues to occur. However, under current law, the Department of Labor and Industry's enforcement authority is limited to violations related to independent contractor exemption certificates.

Under the Task Force recommendations:

- Anyone who is not already licensed, registered, or bonded with DLI and is performing construction services in the state would register as a construction contractor using a simple on-line form. (Proposed section 181.723, subd. 4a.)
- Construction contractors would pay an $80 bi-annual registration fee as compared to a $150 fee every four years for an exemption certificate. (Proposed section 181.723, subd 5a (b).)
- Registration will be done online, without the need for extensive documentation of the nine-factor test. Public data will be easy for contractors and owners to look-up on-line once a year. (Subd. 6a.) This is in contrast to the current law, which requires general contractors to print off and retain for five years an exemption certificate from the DLI web site each time they contract with an independent contractor.
- Construction contractors will provide their business name, the names and information about owners and officers of limited liability companies and corporations as well as proof of workers' compensation and unemployment insurance where required.[3] This information is critical to enforcement activities of DLI, DEED, and Revenue and is similar to the information currently required for licensed residential building contractors, electrical contractors, and bonded plumbers. (Proposed section 181.723, subd. 5a)

[3] *See*, Minn. Stat. §§ 176.182 and 270C.72 (2010).

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- The nine-factor test that helps identify an employee-employer relationship is retained for individuals performing construction work on a job site. (Subd. 4). However, an independent contractor is no longer required to obtain an exemption certificate before performing construction services. Disputes about whether an injured or unemployed individual satisfied the nine-factor test would be handled on a case-by-case basis or in litigation, the same as it was before 2009.

- Where a business entity providing construction services is registered with the Secretary of State, individual owners and officers are required to:
  - Maintain an active filing with Secretary of State as required by law
  - Operate under invoices and written contracts (as residential construction contractors are required to do under Minn. Stat. § 326B.809)
  - Make payments to the business entity with whom they have contracted (not individual owners) (Subd. 7)

- There are clear penalties for failure to register, hiring unregistered contractors, and coercing others to form a business entity. There is a discretionary penalty of a maximum of $500 for the first failure to register, and only a notice of violation (without a monetary penalty) the first time a contractor pays a subcontractor who is not registered. (Subd. 8)

- Rules related to independent contractor exemption certificates are repealed.

The Advisory Task Force

The Advisory Task Force on Employee Misclassification (TASK FORCE) was created in 2009.[4] Minnesota Statutes § 181.723 required the Commissioner of DLI to "appoint an advisory task force on employee misclassification and 'off the books' payment of workers in the construction industry." The Task Force was charged with: advising the commissioner on the development, implementation and coordination of enforcement activities, including information sharing and joint investigation and prosecution of persons who violate laws under the jurisdiction of the Department of Labor and Industry (DLI), the Department of Employment and Economic Development (DEED) and the Department of Revenue (DOR). It was also charged with advising the commissioner on the development and adoption of necessary legislation, regulations, policies and procedures.
Its enabling legislation specified the makeup of the task force. It was to consist of the following members:

- The Commissioner of Labor and Industry or his designee;
- The Commissioner of the Department of Employment and Economic Development or his designee;
- The Commissioner of the Department of Revenue or his designee;
- The Attorney General or her designee;

[4] 2009 Minn. Laws, ch. 78, art. 6, sec. 17

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- A representative appointed by the Minnesota County Attorney's Association;
- Two members who are members of a labor organization that represents members who perform public or private sector commercial or building construction or improvement services;
- One member who is a general contractor or a representative of general contractors that performs public or private sector commercial building construction or government services;
- One member who is a general contractor or a representative of general contractors that performs public or private sector residential building construction or improvement services;
- One member who is a subcontractor or a representative of subcontractors that performs public or private sector commercial building construction or improvement services;
- One member who is a subcontractor or a representative of subcontractors that performs public or private sector residential building construction or improvement services; and
- Up to three additional members who perform public or private sector commercial or residential building and construction or improvement services including one member who is an independent contractor with a current independent contractor exemption certificate; one member who is a limited liability corporation; and one member who is an employee.

The current membership of the Task Force is included as Appendix A. Over its lifetime, the Task Force membership remained the same, with one exception. The representative of the Association of County Attorneys was Susan Gaertner until January 2010. At that point, John Choi was appointed.

DLI sent letters and emails to the agencies and offices specifically listed in the statute to request participation. DLI also invited persons on existing Construction Codes and Licensing Division mailing lists to submit applications. Appointments to the Task Force were determined from responses to these solicitations by then Commissioner Steve Sviggum. He designated then Acting Deputy Commissioner Cindy Valentine as the Task Force Chair.

The Task Force met for the first time in the fall of 2009. It has met formally eleven times, with working groups comprised of a subset of members meeting another three times.

A group as deliberately diverse as the members of the Task Force struggled at first to find common ground and most meetings included give and take among members. Although they may have come to these conclusions for differing reasons, the members ultimately agreed on the following concepts:

- Employee misclassification in the construction industry is prevalent and causes problems. Individuals working in the construction industry who meet the legal definition of "employee" and who are not treated as employees miss out on legal protections including the Fair Labor Standards Act, Workers Compensation, and Unemployment Insurance.

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- Undocumented workers are relatively common in certain disciplines within the construction industry. Misclassification sometimes results in their being exploited.

- Misclassified employees may be paid in cash and avoid having income counted for tax purposes.

- Contractors who follow state laws and attempt to work within statutory parameters may face an "uneven" playing field if forced to bid for work against competitors who are not following the law. Task Force members expressed frustration about trying to be "good guys" and losing business to those who weren't.

- Minnesota's current Independent Contractor Exemption Certificate program did not succeed. The application was difficult and required extensive documentation.

- The 2% withholding requirement for independent contractors, enacted at approximately the same time as the ICEC, made it even less attractive.

- Many construction contractors formed limited liability companies as an alternative to the ICEC program.

- Many states are struggling with the misclassification issue. Some like, New York, take an aggressive approach; others like Montana, a more targeted approach.

The Task Force spent many hours in detailed discussions about the challenges employee misclassification created and the obstacles that lead construction entities to hire people in a status other than "employee."

The Task force came forward with the recommendations that:

- The Department of Labor and Industry (DLI), Department of Employee and Economic Development (DEED), and the Department of Revenue (DOR) continue to cooperate in the enforcement of employee misclassification issues. DLI is currently forwarding its investigation results to DOR and DEED.

- DLI, DEED and DOR continue to educate the construction industry about the misclassification of workers issue through general outreach efforts.

- The Legislature amend Minn. Stat. §181.723. The Task Force proposal is an attempt to define a common ground solution. It is certainly not without flaw, but does represent the best efforts of a diverse and engaged group of citizens.

The Legislative Auditor's Report

In 2007, the Office of the Legislative Auditor issued an Evaluation Report on Misclassification of Employees as Independent Contractors in Minnesota.[5] This audit covered all professions,

[5] http://www.auditor.leg.state.mn.us/ped/2007/missclasssum.htm

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but arrived at findings and made recommendations that are relevant to misclassification in the construction industry. Among its major findings:

- "Using independent contractors instead of employees can significantly reduce an organization's labor costs. However, when employers misclassify employees as independent contractors, the workers are denied benefits and protections that should be available to them."
- "An estimated 14% of Minnesota employers subject to unemployment insurance taxes - or 1 in 7 - misclassified at least one worker in 2005. "
- "Because of limits in state law, employers are normally not penalized specifically for misclassifying workers; rather, they may be penalized for related failures to obtain workers compensation insurance or withhold taxes from employees' wages."

The Auditor's Report made the following recommendations:

- Minnesota laws and rules used to determine workers' status should be standardized.
- DEED, DLI and DOR should better coordinate their audit and investigation activities related to worker classification. These agencies should establish procedures to routinely share information about identified instances of misclassification and work with the Legislature to resolve any statutory barriers to doing so.
- The Legislature should modify state law to authorize a penalty for repeated misclassification by an employer.

In March, 2009, the Report was updated to reflect improvements that had been implemented. These included:

- To improve consistency for worker classification in the construction industry, state unemployment statutes now refer to DLI's definition of an independent contractor.
- DEED and DOR have started routinely sharing audit information on worker classification determinations and conferring on audit strategies to avoid duplication. DLI is now using DEED payroll records to verify worker status in its investigations and plans to do more information sharing with DEED and DOR in the near future.

Currently, DLI Enforcement staff forward data and findings from their misclassification investigations to DOR and DEED to assist them with their compliance activities.

The Independent Contractor Exemption Certificate (ICEC) Program

In an attempt to address employee misclassification in the construction industry, in 2007 the legislature enacted an independent contractor certification program for construction workers, codified as Minn. Stat. § 181.723.[6] Effective January 1, 2009, DLI began issuing independent contractor exemption certificates to individuals who submitted documentation that they could meet the nine-factor test used to determine whether an individual performing building construction or improvement services is an independent contractor or an employee of the

[6] 2007 Minn. Laws, ch. 135, art. 3, sec 15

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contractor for whom the services are performed. This nine-factor test had been in the workers' compensation law since 1996 and the unemployment law since 1998, with minor modifications.

Under the ICEC law, an individual performing construction services for a construction contractor is presumed to be an employee of the contractor for purposes of workers' compensation, unemployment, OSHA and labor standards laws, unless the individual 1) holds an ICEC issued by the DLI that shows the individual could meet the nine-factor independent contractor test; and 2) meets the nine-factor test at the time the individual performs the construction services.

In 2008 and 2009, the department received 1,960 applications and issued 1,625 exemption certificates. In 2010 the department received 77 applications and issued 57 exemption certificates. The number of exemption certificates issued has been lower than anticipated for several reasons:

- There has been a perception that the ICEC application process is too extensive and complicated because the applicant must provide written documentation that the individual can meet each of the nine factors in the law.
- There are existing exemptions from coverage under the workers' compensation and unemployment compensation laws for business entities registered with the Secretary of State, such as certain limited liability companies and closely held corporations. The application to be registered with the Secretary of State as a Limited Liability Company (LLC) requires much less information. Moreover, some individuals who form a business entity may not meet the nine-factor test or comply with all legal obligations that legitimate business entities comply with. This creates a competitive disadvantage for legitimate business entities that do comply with the law.
- In Minn. Stat. § 290.92, subd. 31, "A contractor who makes payments to an individual carrying on a trade or business described in paragraph (a) as a sole proprietorship must deduct and withhold two percent of the payment as Minnesota withholding tax when the amount the contractor paid to that individual during the calendar year exceeds $600." Under this law, a construction contractor is required to withhold 2% of payments made to an individual subcontractor who holds an independent contractor exemption certificate. The 2% tax is not required to be withheld if the subcontractor is registered with the Secretary of State as a business entity, such as a limited liability company;
- Holding an ICEC does not provide a safe harbor for construction contractors that hire an individual contractor - an individual holding an ICEC must also meet the nine-factor test in Minn. Stat. § 181.723 at the time the services are provided. This leads to uncertainty about the effect of the ICEC.

Because of the above factors, thousands of construction workers have formed limited liability companies instead of obtaining independent contractor exemption certificates under Minn. Stat. § 181.723.

Misclassification of workers continues to occur, but under current law, the Department of Labor and Industry has limited authority to investigate whether limited liability companies or other business entities are legitimate businesses, in part because Minn. Stat. § 181.723 applies to individual contractors, not business entities registered with the Secretary of State. In *Nelson v. Levy and DEED* AI0-996 (February, 2011), the Minnesota Court of Appeals stated, "A limited liability corporation (LLC) in the construction industry is not considered another entity's

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employee under Minn. Stat. § 181.723 (2008).

The Task Force Recommendation to Amend §181.723

The proposed amendments to Minn. Stat. § 181.723 are recommendations of the Advisory Task Force on Employee Misclassification in the Construction Industry. The amendments repeal the Independent Contractor Exemption Certificate (ICEC) program and replace it with a simplified contractor registration. The amendments also establish a framework within which individual construction workers may be determined to be either construction contractors or employees of construction contractors for purposes of workers' compensation, unemployment insurance, and other specified laws.

The bill is designed to address the problems with the ICEC program, which was not as successful in reducing misclassification as anticipated. The bill replaces the ICEC program and its extensive application process for individuals with a simplified registration application for construction contractors. In turn, registration will provide the agency with enough information about all construction contractors to give the Departments of DEED, DLI, and Revenue the tools to identify legitimately operating business entities and take enforcement action against business entities that are not legitimately operating and misclassifying workers. In that way it levels the playing field for businesses that are complying with the law. The proposed amendments and an explanation of the proposal are attached as Appendix B.

Conclusion

The decision of the Legislature to turn to the construction industry to explore the subject of employee misclassification exemplifies the complexity of the issue. Legislators and state agency officials have been unable to resolve how to deal with the "cash economy" and the affect employee misclassification has on the state's economy. Getting stakeholder representatives of varying points of view into the same room and giving them a mandate to provide advice to the Commissioner of Labor and Industry and to recommend legislative, rule or procedural changes means that any product must represent compromise and be the result of a discussion of divergent points of view. No one who participated on the Advisory Task Force on Employee Misclassification went unheard. The report and proposed amendments demonstrate what committed citizens can accomplish when charged by their elected officials to look at a difficult problem and come up with workable solutions.

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Appendix A: Task Force Membership List

The Advisory Task Force on Employee Misclassification Membership

Member	Business	Representing
Cindy Valentine	DLI	1. Commissioner of DLI
Lee Nelson	DEED	2. Commissioner of DEED
Dan Lee	DOR	3. Commissioner of DOR
Steve Gunn	AG	4. Attorney General or designee
John Choi	Ramsey County Attorney	5. Representative appointed by the Minnesota County Attorney Association
Kyle Makarios	North Central States Regional Council of Carpenters	6. Two members who are members of a labor organization that represents members who perform public or private sector commercial or residential building construction or improvement services
Francisco Altamirano	District Council 82	6. " "
Michael Lapicola	AGC of Minnesota	7. One member who is a general contractor or a representative of general contractors that performs public or private sector commercial building construction or improvement services
Kathe Ostrom	C. N. Ostrom & Son, Inc.	8. One member who is a general contractor or a representative of general contractors that performs public or private sector residential building construction or improvement services
Dale Zoerb	Building Restoration Corporation	9. One member who is a subcontractor or a representative of subcontractors that performs public or private sector commercial building construction or improvement services
Bill Becker	Becker Brothers, Inc.	10. One member who is a subcontractor or a representative of subcontractors that performs public or private sector residential building construction or improvement
Mike Allen LLC	Mike Allen Home Builders	11. Up to three additional members who perform public or private sector commercial or residential building and construction or improvement services including one member who is an independent contractor with a current independent contractor certificate, one member is a limited liability corporation and one member who is an employee
Jade West	Twin City Acoustics	11. Up to three additional members who perform public or private sector commercial or residential building and construction or improvement services including one member who is an independent contractor with a current independent contractor certificate, one member is a limited liability corporation and one member who is an employee.
Jean-Pierre Jacquet	Hand Carved Stone	11. Up to three additional members who perform public or private sector commercial or residential building and construction or improvement services including one member who is an independent contractor with a current independent contractor certificate, one member is a limited liability corporation and one member who is an employee

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Appendix B: Proposed Legislation and detailed discussion of the provisions

A bill for an act

1.2 relating to employment; modifying worker classification regulation, penalties,
1.3 and fees; authorizing rulemaking;amending Minnesota Statutes 2010, sections
1.4 181.723; 326B.081, subdivision 3; repealing Minnesota Statutes 2010, section
1.5 181.723, subdivision 17; Minnesota Rules, parts 5202.0100; 5202.0110;
1.6 5202.0120; 5202.0130; 5202.0140; 5202.0150; 5202.0160.
1.7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

1.8 Section 1. Minnesota Statutes 2010, section 181.723, is amended to read:
1.9 **181.723 ~~INDEPENDENT~~ CONSTRUCTION CONTRACTORS.**
1.10 Subdivision 1. **~~Definitions~~ Scope.** This section governs registration and other
1.11 responsibilities of persons performing construction services in Minnesota.
1.12 Subd. 1a. **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.~~
2.1 ~~(g)~~ (f) "Document" or "documents" includes papers; books; records; memoranda;
2.2 data; contracts; drawings; graphs; charts; photographs; digital, video, and audio
2.3 recordings; records; accounts; files; statements; letters; e-mails; invoices; bills; notes; and
2.4 calendars maintained in any form or manner.
2.5 (g) "Construction services" means field installation of building construction
2.6 materials into new or existing public or private sector commercial or residential buildings.
2.7 Construction services include demolition or deconstruction of building components.
2.8 Construction services include landscaping services and construction cleaning services
2.9 when they are performed as part of a contract for other building construction or
2.10 improvement services. Construction services do not include:
2.11 (1) the manufacture, supply, or sale of products, materials, merchandise, or
2.12 construction equipment;

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2.13(2) installation or delivery of a product by the manufacturer of the product;
2.14(3) rubbish or debris hauling; or
2.15(4) cleaning or maintenance of a building.
2.16(h) "Construction contractor" means a person that meets the requirements of
2.17subdivision 4.
2.18(i) "Business entity" means a person other than an individual or a sole proprietor.
2.19(j) "In the course of a person's construction business" means in the course of a
2.20person's construction trade, business, profession, or occupation.
2.21 ~~Subd. 2. **Limited application.** This section only applies to individuals performing~~
2.22~~public or private sector commercial or residential building construction or improvement~~
2.23~~services. Building construction and improvement services do not include (1) the~~
2.24~~manufacture, supply, or sale of products, materials, or merchandise; (2) landscaping~~
2.25~~services for the maintenance or removal of existing plants, shrubs, trees, and other~~
2.26~~vegetation, whether or not the services are provided as part of a contract for the building~~
2.27~~construction or improvement services; and (3) all other landscaping services, unless the~~
2.28~~other landscaping services are provided as part of a contract for the building construction~~
2.29~~or improvement services.~~
2.30 Subd. 3. **Employee-employer relationship.** ~~Except as provided in subdivision 4,~~
2.31For purposes of chapters 176, 177, 181A, 182, and 268, as of January 1, ~~2009~~ 2012, an
2.32individual who performs construction services for ~~a~~ another person that are in the course
2.33of the other person's ~~trade,~~ construction business~~, profession, or occupation~~ is an employee
2.34of that person and that person is an employer of the individual, except that if the individual
2.35satisfies all of the conditions in subdivision 4, clause (2), the individual is an independent
2.36contractor and not an employee for purposes of those chapters only.
3.1 Subd. 4. ~~**Independent**~~ **Construction contractor.** ~~An individual is an independent~~
3.2~~contractor and not an employee of the person for whom the individual is performing~~
3.3~~services in the course of the person's trade, business, profession, or occupation only if (1)~~
3.4~~the individual holds a current independent contractor exemption certificate issued by~~
3.5~~the commissioner; and (2) the individual is performing services for the person under~~
3.6~~the independent contractor exemption certificate as provided in subdivision 6. The~~
3.7~~requirements in clauses (1) and (2) must be met in order to qualify as an independent~~
3.8~~contractor and not as an employee of the person for whom the individual is performing~~
3.9~~services in the course of the person's trade, business, profession, or occupation.~~ A person
3.10is a construction contractor only if:
3.11(1) the person has satisfied the registration requirements of subdivision 4a; and
3.12(2) the person meets all of the following conditions:
3.13(i) the person maintains a separate business with the person's own office, equipment,
3.14and materials;
3.15(ii) the person holds a federal employer identification number or has filed business

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3.16 or self-employment income tax returns with the federal Internal Revenue Service if the
3.17 person has performed services in the previous year;
3.18 (iii) the person operates under written contracts to perform specific construction
3.19 services for specific amounts of money and under which the person controls the means of
3.20 performing the services;
3.21 (iv) the person incurs the main expenses related to the construction services that the
3.22 person performs under contract;
3.23 (v) the person is responsible for the satisfactory completion of construction services
3.24 that the person contracts to perform and is liable for a failure to complete the service;
3.25 (vi) the person receives compensation for construction services performed under a
3.26 contract on a commission or per-job or competitive bid basis and not on any other basis;
3.27 (vii) the person may realize a profit or suffer a loss under contracts to perform
3.28 construction services;
3.29 (viii) the person has continuing or recurring business liabilities or obligations; and
3.30 (ix) the success or failure of the person's business depends on the relationship of
3.31 business receipts to expenditures.
3.32 Subd. 4a. **Registration.** (a) Except as provided in paragraph (b), any person who
3.33 performs construction services in the state on or after January 1, 2012, must register with
3.34 the commissioner as provided in subdivision 5a before performing construction services
3.35 for another person.
3.36 (b) The registration requirements in this section do not apply to:
4.1 (1) a person who, at the time the person is performing the construction services,
4.2 holds a current license, certificate, or registration under chapter 299M or 326B;
4.3 (2) a person who holds a current independent contractor exemption certificate issued
4.4 under this section that expires on or after January 1, 2012;
4.5 (3) a person who has given a bond to the state under section 326B.197 or 326B.46;
4.6 (4) an employee of the person performing the construction services, if the person
4.7 was in compliance with laws related to employment of the individual at the time the
4.8 construction services were performed;
4.9 (5) an architect or professional engineer engaging in professional practice as defined
4.10 in section 326.02, subdivisions 2 and 3;
4.11 (6) a school district or technical college governed under chapter 136F;
4.12 (7) a person providing construction services on a volunteer basis, such as Habitat
4.13 for Humanity and Builders Outreach Foundation, and their individual volunteers when
4.14 engaged in activities on their behalf; and
4.15 (8) a person who provides construction services with gross annual receipts of less
4.16 than $..... during a calendar year.
4.17 (c) The requirements for registration under this section are not a substitute for, and
4.18 do not relieve a person from complying with, any other law requiring that the person be

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4.19 licensed, registered, or certified.

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

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

4.24 ~~(1) the individual's full name;~~

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

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

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

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

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

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

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

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

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

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

5.9 ~~(iv) incurs the main expenses related to the service that the individual performs~~
5.10 ~~under contract;~~

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

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

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

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

5.17 ~~(ix) the success or failure of the individual's business depends on the relationship of~~
5.18 ~~business receipts to expenditures.~~

5.19 ~~(b) Individuals who are applying for or renewing a residential building contractor or~~
5.20 ~~residential remodeler license under sections 326B.197, 326B.802, 326B.805, 326B.81,~~
5.21 ~~326B.815, 326B.821 to 326B.86, 326B.87 to 326B.885, and 327B.041, and any rules~~

Archived Copy as of 04/09/2012

5.22 ~~promulgated pursuant thereto, may simultaneously apply for or renew an independent~~
5.23 ~~contractor exemption certificate. The commissioner shall create an application form~~
5.24 ~~that allows for the simultaneous application for both a residential building contractor~~
5.25 ~~or residential remodeler license and an independent contractor exemption certificate.~~
5.26 ~~If individuals simultaneously apply for or renew a residential building contractor or~~
5.27 ~~residential remodeler license and an independent contractor exemption certificate using~~
5.28 ~~the form created by the commissioner, individuals shall only be required to provide, in~~
5.29 ~~addition to the information required by section 326B.83 and rules promulgated pursuant~~
5.30 ~~thereto, the sworn statement required by paragraph (a), clause (8), and any additional~~
5.31 ~~information required by this subdivision that is not also required by section 326B.83~~
5.32 ~~and any rules promulgated thereto. When individuals submit a simultaneous application~~
5.33 ~~on the form created by the commissioner for both a residential building contractor or~~
5.34 ~~residential remodeler license and an independent contractor exemption certificate, the~~
5.35 ~~application fee shall be $150. An independent contractor exemption certificate that is in~~
6.1 ~~effect before March 1, 2009, shall remain in effect until March 1, 2013, unless revoked by~~
6.2 ~~the commissioner or canceled by the individual.~~
6.3 ~~(c) Within 30 days of receiving a complete application and the certificate fee, the~~
6.4 ~~commissioner must either grant or deny the application. The commissioner may deny~~
6.5 ~~an application for an independent contractor exemption certificate if the individual has~~
6.6 ~~not submitted a complete application and certificate fee or if the individual does not~~
6.7 ~~meet all of the conditions for holding the independent contractor exemption certificate.~~
6.8 ~~The commissioner may revoke an independent contractor exemption certificate if the~~
6.9 ~~commissioner determines that the individual no longer meets all of the conditions for~~
6.10 ~~holding the independent contractor exemption certificate, commits any of the actions~~
6.11 ~~set out in subdivision 7, or fails to cooperate with a department investigation into the~~
6.12 ~~continued validity of the individual's certificate. Once issued, an independent contractor~~
6.13 ~~exemption certificate remains in effect for four years unless:~~
6.14 ~~(1) revoked by the commissioner; or~~
6.15 ~~(2) canceled by the individual.~~
6.16 ~~(d) If the department denies an individual's original or renewal application for~~
6.17 ~~an independent contractor exemption certificate or revokes an independent contractor~~
6.18 ~~exemption certificate, the commissioner shall issue to the individual an order denying or~~
6.19 ~~revoking the certificate. The commissioner may issue an administrative penalty order to~~
6.20 ~~an individual or person who commits any of the actions set out in subdivision 7.~~
6.21 ~~(e) An individual or person to whom the commissioner issues an order under~~
6.22 ~~paragraph (d) shall have 30 days after service of the order to request a hearing. The~~
6.23 ~~request for hearing must be in writing and must be served on or faxed to the commissioner~~
6.24 ~~at the address or facsimile number specified in the order by the 30th day after service of~~
6.25 ~~the order. If the individual does not request a hearing or if the individual's request for a~~

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6.26 ~~hearing is not served on or faxed to the commissioner by the 30th day after service of the~~
6.27 ~~order, the order shall become a final order of the commissioner and will not be subject to~~
6.28 ~~review by any court or agency. The date on which a request for hearing is served by mail~~
6.29 ~~shall be the postmark date on the envelope in which the request for hearing is mailed. If~~
6.30 ~~the individual serves or faxes a timely request for hearing, the hearing shall be a contested~~
6.31 ~~case hearing and shall be held in accordance with chapter 14.~~
6.32 Subd. 5a. **Registration and renewal application.** (a) A person required to
6.33 register with the commissioner under subdivision 4a must file a registration application
6.34 electronically in the manner prescribed by the commissioner. The application for initial or
6.35 renewal registration must include the following information:
7.1 (1) the applicant's legal name; assumed name filed with the secretary of state, if any;
7.2 designated business address; physical address; phone number; and e-mail address;
7.3 (2) the applicant's Minnesota tax identification number, if one is required or has
7.4 been issued;
7.5 (3) the applicant's federal employee identification number, if one is required or
7.6 has been issued;
7.7 (4) evidence of the active status of the applicant's business filings with the secretary
7.8 of state, if one is required or has been issued;
7.9 (5) for each of the applicant's directors; officers; governors; owners; partners;
7.10 members, managers, and partners of a limited liability company or limited liability
7.11 partnership; and shareholders, except for shareholders with less than a ten percent interest
7.12 in a publicly traded corporation; the following information:
7.13 (i) the individual's full name, business telephone number, Social Security number,
7.14 and title at applicant's business;
7.15 (ii) the percentage of the applicant's business owned by each individual; and
7.16 (iii) whether the individual personally performs construction services on behalf of
7.17 the applicant;
7.18 (6) whether the applicant has any employees at the time the application is filed;
7.19 (7) the name of the applicant's workers' compensation insurer, the policy number,
7.20 and the effective dates of coverage, or a description of the basis for exemption from
7.21 workers' compensation coverage laws;
7.22 (8) the unemployment insurance account number, if any;
7.23 (9) a certification that the person signing the application has reviewed it; that the
7.24 information provided is true and accurate; and that the person signing is authorized to sign
7.25 and file the application as an agent of the applicant. The name of the person signing,
7.26 entered on an electronic application, shall constitute a valid signature of the agent on
7.27 behalf of the applicant; and
7.28 (10) a signed authorization for the Department of Labor and Industry to verify the
7.29 information provided on or with the application.

Archived Copy as of 04/09/2012

7.30(b) A person's registration shall expire at the end of the calendar year following
7.31the year of initial registration and every two years thereafter. The registered person
7.32must remain registered while providing construction services for another person. The
7.33provisions of sections 326B.091 to 326B.097 apply to this section, except that the initial
7.34registration and renewal fees under this section shall be $80 for each initial or renewal
7.35application for registration.
8.1(c) A registered person must notify the commissioner within 15 days after there is a
8.2change in any of the information on the application as approved. This notification must
8.3be provided electronically in the manner prescribed by the commissioner. However, if
8.4the business entity structure, legal form of the business entity, or business ownership has
8.5changed, the person must submit a new registration application and registration fee for
8.6the new business entity.
8.7(d) An application for registration is private data on individuals as defined in section
8.8 13.02, subdivision 12, and nonpublic data as defined under section 13.02, subdivision 9,
8.9except for the information on the registration certificate described in subdivision 6a,
8.10paragraph (b), which shall be public data as defined under section 13.02, subdivisions
8.11 14 and 15. However, the commissioner is authorized to share application data with the
8.12Departments of Revenue and Employment and Economic Development for purposes
8.13of enforcement of laws administered by those agencies. Information shared with the
8.14Departments of Revenue and Employment and Economic Development shall remain
8.15private and nonpublic data in the possession of the receiving agency unless otherwise
8.16provided by law.
8.17 ~~Subd. 6. **Performing services under exemption certificate.** An individual is~~
8.18~~performing services for a person under an independent contractor exemption certificate if:~~
8.19 ~~(a) the individual is performing services listed on the individual's independent~~
8.20~~contractor exemption certificate; and~~
8.21 ~~(b) at the time the individual is performing services listed on the individual's~~
8.22~~independent contractor exemption certificate, the individual meets all of the following~~
8.23~~conditions:~~
8.24 ~~(1) maintains a separate business with the individual's own office, equipment,~~
8.25~~materials, and other facilities;~~
8.26 ~~(2) holds or has applied for a federal employer identification number or has filed~~
8.27~~business or self-employment income tax returns with the federal Internal Revenue Service~~
8.28~~if the individual performed services in the previous year for which the individual has the~~
8.29~~independent contractor exemption certificate;~~
8.30 ~~(3) is operating under contract to perform the specific services for the person~~
8.31~~for specific amounts of money and under which the individual controls the means of~~
8.32~~performing the services;~~
8.33 ~~(4) is incurring the main expenses related to the services that the individual is~~

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8.34 ~~performing for the person under the contract;~~

8.35 ~~(5) is responsible for the satisfactory completion of the services that the individual~~

8.36 ~~has contracted to perform for the person and is liable for a failure to complete the services;~~

9.1 ~~(6) receives compensation from the person for the services performed under the~~

9.2 ~~contract on a commission or per job or competitive bid basis and not on any other basis;~~

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

9.4 ~~the person;~~

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

9.6 ~~(9) the success or failure of the individual's business depends on the relationship of~~

9.7 ~~business receipts to expenditures.~~

9.8 Subd. 6a. **Web site.** (a) The commissioner shall develop and maintain a Web site on

9.9 which applicants for registration can submit a registration application and payment. The

9.10 Web site shall be designed to receive and process registration applications and payments

9.11 and promptly issue registration certificates electronically to successful applicants.

9.12 (b) The commissioner shall maintain the certificates of registration on the

9.13 department's official public Web site, which shall include the following information:

9.14 (1) the registered person's legal business name, including any assumed name, as

9.15 filed with the secretary of state;

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

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

9.18 Subd. 7. **Prohibited activities.** (a) The prohibited activities in this section are in

9.19 addition to those in sections 326B.081 to 326B.085.

9.20 (b) An individual shall not perform or offer to perform construction services on

9.21 behalf of a business entity of which the individual is a director; officer; governor; owner;

9.22 partner; member, manager, or partner of a limited liability company or limited liability

9.23 partnership; or shareholder, except for a shareholder holding less than ten percent interest

9.24 in a publicly traded company; unless:

9.25 (1) ~~perform work as an independent contractor who meets the qualifications under~~

9.26 ~~subdivision 6 without first obtaining from the department an independent contractor~~

9.27 ~~exemption certificate~~ the business entity is a construction contractor under subdivision 4;

9.28 (2) ~~perform work as an independent contractor when the department has denied or~~

9.29 ~~revoked the individual's independent contractor exemption certificate~~ the business entity is

9.30 listed as active with the secretary of state, if required for the business entity;

9.31 (3) ~~transfer to another individual or allow another individual to use the individual's~~

9.32 ~~independent contractor exemption certificate~~ there is a signed and dated written contract

9.33 between the business entity and the person for whom the construction services are

9.34 performed that describes the services to be performed and the payment for the services;

10.1 (4) ~~alter or falsify an independent contractor exemption certificate~~ invoices or

10.2 bills for the construction services performed are submitted in the name of the business

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10.3 entity; and

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

10.5 made to the business entity.

10.6 ~~(6) make a false material statement, representation, or certification; omit material~~

10.7 ~~information; or alter, conceal, or fail to file a document required by this section or any rule~~

10.8 ~~promulgated by the commissioner under rulemaking authority set out in this section.~~

10.9 ~~(b)~~ (c) A person shall not:

10.10 (1) require an individual through coercion, misrepresentation, or fraudulent means to

10.11 ~~adopt independent contractor status~~ form a business entity;

10.12 (2) ~~knowingly misrepresent that an individual who has not been issued an~~

10.13 ~~independent contractor exemption certificate or is not performing services for the person~~

10.14 ~~under an independent contractor exemption certificate is an independent contractor~~

10.15 represent that the person is a construction contractor unless the person is a construction

10.16 contractor under subdivision 4; ~~or~~

10.17 (3) ~~make a false material statement, representation, or certification; omit material~~

10.18 ~~information; or alter, conceal, or fail to file a document required by this section or any~~

10.19 ~~rule promulgated by the commissioner under rulemaking authority set out in this section.~~

10.20 perform or provide construction services for another person if the person performing the

10.21 construction services is not registered as required by subdivision 4a; or

10.22 (4) perform or provide construction services for another person in the course of the

10.23 other person's business if the person performing or providing the construction services is

10.24 not a construction contractor under subdivision 4.

10.25 ~~(c)~~ (d) A person ~~for whom an individual is performing services must obtain a~~

10.26 ~~copy of the individual's independent contractor exemption certificate before services~~

10.27 ~~may commence. A copy of the independent contractor exemption certificate must be~~

10.28 ~~retained for five years from the date of receipt by the person for whom an individual is~~

10.29 ~~performing services.~~ who provides construction services in the course of that person's

10.30 business shall not:

10.31 (1) pay a person that is not named in a contract for construction services, or pay a

10.32 person without receiving an invoice from the person; or

10.33 (2) contract with or pay another person to perform construction services if the other

10.34 person is not registered under subdivision 4a.

11.1 (e) This subdivision does not apply to an employee of a person performing the

11.2 construction services, if the person was in compliance with laws related to employment of

11.3 the individual at the time the construction services were performed.

11.4 Subd. 8. **Enforcement; remedies and penalties.** ~~An individual or person who~~

11.5 ~~violates any provision of subdivision 7 is subject to a penalty to be assessed by the~~

11.6 ~~department of up to $5,000 for each violation. The department shall deposit penalties in~~

11.7 ~~the assigned risk safety account.~~ (a) The commissioner is authorized to use sections

Archived Copy as of 04/09/2012

11.8 326B.081 to 326B.085 to enforce this section. Notwithstanding the maximum penalty
11.9 amount in section 326B.082, subdivisions 7 and 12, the monetary penalties for violation
11.10 of this section shall be as provided in paragraphs (b), (c), and (d).
11.11 (b) The commissioner may assess a monetary penalty against an unregistered person
11.12 who is required to be registered, in violation of subdivision 4a, as follows:
11.13 (1) for the first violation, the commissioner may assess a monetary penalty of
11.14 $2,000. If the person registers within 30 days of the date of the order, $1,500 of the
11.15 penalty shall be forgiven; and
11.16 (2) for the second and each subsequent violation, the commissioner may assess a
11.17 penalty of up to $2,000.
11.18 (c) The commissioner may assess a monetary penalty against a person who, in the
11.19 course of that person's business, directly pays an unregistered person for construction
11.20 services performed by the unregistered person, in violation of subdivision 7, paragraph
11.21 (d), clause (2), as follows:
11.22 (1) for the first violation, the commissioner shall issue a notice of violation under
11.23 section 326B.082, subdivision 6; and
11.24 (2) for the second and each subsequent violation, the commissioner may assess a
11.25 penalty of up to $2,000.
11.26 For purposes of this paragraph, all payments to an unregistered person for
11.27 construction services on a single project site shall be considered a single violation. It shall
11.28 not be a violation for a person to pay an unregistered person if the unregistered person was
11.29 registered at the time the contract for construction services was entered into.
11.30 (d) For all other violations of this section, the monetary penalties shall be as provided
11.31 in section 326B.082, subdivisions 7 and 12.
11.32 (e) Monetary penalties under this section shall be payable to the commissioner for
11.33 deposit in the assigned risk safety account under chapter 79.
11.34 ~~Subd. 9. **Commissioner's powers.** (a) In order to carry out the purposes of this~~
11.35 ~~section, the commissioner may:~~
12.1 ~~(1) administer oaths and affirmations, certify official acts, interview, question, take~~
12.2 ~~oral or written statements, and take depositions;~~
12.3 ~~(2) request, examine, take possession of, photograph, record, and copy any~~
12.4 ~~documents, equipment, or materials;~~
12.5 ~~(3) at a time and place indicated by the commissioner, request persons to appear~~
12.6 ~~before the commissioner to give testimony and produce documents, equipment, or~~
12.7 ~~materials;~~
12.8 ~~(4) issue subpoenas to compel persons to appear before the commissioner to give~~
12.9 ~~testimony and produce documents, equipment, or materials; and~~
12.10 ~~(5) subject to paragraph (c), with or without notice, enter without delay upon~~
12.11 ~~any property, public or private, for the purpose of taking any action authorized under~~

Archived Copy as of 04/09/2012

12.12 ~~this subdivision or the applicable law, including obtaining information or conducting~~
12.13 ~~inspections or investigations.~~
12.14 ~~(b) Persons requested by the commissioner to give testimony or produce documents,~~
12.15 ~~equipment, or materials shall respond within the time and in the manner specified by the~~
12.16 ~~commissioner. If no time to respond is specified in the request, then a response shall be~~
12.17 ~~submitted within 30 days of the commissioner's service of the request.~~
12.18 ~~(c) Upon the refusal or anticipated refusal of a property owner, lessee, property~~
12.19 ~~owner's representative, or lessee's representative to permit the commissioner's entry onto~~
12.20 ~~property as provided in paragraph (a), the commissioner may apply for an administrative~~
12.21 ~~inspection order in the Ramsey County District Court or, at the commissioner's discretion,~~
12.22 ~~in the district court in the county in which the property is located. The commissioner may~~
12.23 ~~anticipate that a property owner or lessee will refuse entry if the property owner, lessee,~~
12.24 ~~property owner's representative, or lessee's representative has refused to permit entry on a~~
12.25 ~~prior occasion or has informed the commissioner that entry will be refused. Upon showing~~
12.26 ~~of administrative probable cause by the commissioner, the district court shall issue an~~
12.27 ~~administrative inspection order that compels the property owner or lessee to permit the~~
12.28 ~~commissioner to enter the property for the purposes specified in paragraph (a).~~
12.29 ~~(d) Upon the application of the commissioner, a district court shall treat the failure of~~
12.30 ~~any person to obey a subpoena lawfully issued by the commissioner under this subdivision~~
12.31 ~~as a contempt of court.~~
12.32 ~~Subd. 10. **Notice requirements.** Unless otherwise specified, service of a document~~
12.33 ~~on a person under this section may be by mail, by personal service, or in accordance with~~
12.34 ~~any consent to service filed with the commissioner. Service by mail shall be accomplished~~
12.35 ~~in the manner provided in Minnesota Rules, part 1400.5550, subpart 2. Personal service~~
13.1 ~~shall be accomplished in the manner provided in Minnesota Rules, part 1400.5550,~~
13.2 ~~subpart 3.~~
13.3 ~~Subd. 11. **Facsimile; timely service.** When this section permits a request for~~
13.4 ~~hearing to be served by facsimile on the commissioner, the facsimile shall not exceed 15~~
13.5 ~~pages in length. The request shall be considered timely served if the facsimile is received~~
13.6 ~~by the commissioner, at the facsimile number identified by the commissioner in the order,~~
13.7 ~~no later than 4:30 p.m. central time on the last day permitted for faxing the request.~~
13.8 ~~Where the quality or authenticity of the faxed request is at issue, the commissioner~~
13.9 ~~may require the original request to be filed. Where the commissioner has not identified~~
13.10 ~~quality or authenticity of the faxed request as an issue and the request has been faxed in~~
13.11 ~~accordance with this subdivision, the person faxing the request does not need to file the~~
13.12 ~~original request with the commissioner.~~
13.13 ~~Subd. 12. **Time period computation.** In computing any period of time prescribed~~
13.14 ~~or allowed by this section, the day of the act, event, or default from which the designated~~
13.15 ~~period of time begins to run shall not be included. The last day of the period so computed~~

Archived Copy as of 04/09/2012

13.16 ~~shall be included, unless it is a Saturday, Sunday, or legal holiday, in which event the~~
13.17 ~~period runs until the next day which is not a Saturday, Sunday, or legal holiday.~~
13.18 Subd. 13. **Rulemaking.** The commissioner may, in consultation with the
13.19 commissioner of revenue and the commissioner of employment and economic
13.20 development, adopt, amend, suspend, and repeal rules under the rulemaking provisions of
13.21 chapter 14 that relate to the commissioner's responsibilities under this section as amended
13.22 by this act. ~~This subdivision is effective May 26, 2007.~~
13.23 ~~Subd. 14. **Fee.** The certificate fee for the original application and for the renewal of~~
13.24 ~~an independent contractor exemption certificate shall be $150.~~
13.25 ~~Subd. 15. **Notice to commissioner; review by commissioner of revenue.** When~~
13.26 ~~the commissioner has reason to believe that an individual who holds a certificate has failed~~
13.27 ~~to maintain all the conditions required by subdivision 6 or is not performing services for a~~
13.28 ~~person under the independent contractor exemption certificate, the commissioner must~~
13.29 ~~notify the commissioner of revenue and the commissioner of employment and economic~~
13.30 ~~development. Upon receipt of notification from the commissioner that an individual who~~
13.31 ~~holds a certificate has failed to maintain all the conditions required by subdivision 6~~
13.32 ~~or is not performing services for a person under the independent contractor exemption~~
13.33 ~~certificate, the commissioner of revenue must review the information returns required~~
13.34 ~~under section 6041A of the Internal Revenue Code. The commissioner of revenue shall~~
13.35 ~~also review the submitted certification that is applicable to returns audited or investigated~~
13.36 ~~under section 289A.35.~~
14.1 Subd. 16. **Data classified.** Data in applications for an independent contractor
14.2 exemption certificate and any required documentation submitted to the commissioner are
14.3 private data on individuals as defined in section 13.02. Data in exemption certificates
14.4 issued by the commissioner are public data. Data that document a revocation or
14.5 cancellation of an exemption certificate are public data. Upon request of the Department
14.6 of Revenue or Department of Employment and Economic Development, the commissioner
14.7 may release to the requesting department data classified as private under this subdivision
14.8 or investigative data that are not public under section 13.39 that relate to the issuance or
14.9 denial of applications or revocations of certificates.
14.10 Subd. 17. **Advisory task force on employee misclassification.** (a) The
14.11 commissioner of the Department of Labor and Industry shall appoint an advisory task
14.12 force on employee misclassification and "off-the-books" payment of workers in the
14.13 construction industry. The advisory task force shall consist of the following members:
14.14 (1) the commissioner of the Department of Labor and Industry or designee;
14.15 (2) the commissioner of the Department of Employment and Economic Development
14.16 or designee;
14.17 (3) the commissioner of the Department of Revenue or designee;
14.18 (4) the attorney general or designee;

Archived Copy as of 04/09/2012

14.19(5) a representative appointed by the Minnesota County Attorneys Association;
14.20(6) two members who are members of a labor organization that represents members
14.21who perform public or private sector commercial or residential building construction
14.22or improvement services;
14.23(7) one member who is a general contractor or a representative of general contractors
14.24that performs public or private sector commercial building construction or improvement
14.25services;
14.26(8) one member who is a general contractor or a representative of general contractors
14.27that performs public or private sector residential building construction or improvement
14.28services;
14.29(9) one member who is a subcontractor or a representative of subcontractors that
14.30performs public or private sector commercial building construction or improvement
14.31services;
14.32(10) one member who is a subcontractor or a representative of subcontractors
14.33that performs public or private sector residential building construction or improvement
14.34services; and
14.35(11) up to three additional members who perform public or private sector commercial
14.36or residential building and construction or improvement services including one member
15.1who is an independent contractor with a current independent contractor certificate; one
15.2member who is a limited liability corporation; and one member who is an employee.
15.3The commissioner of the Department of Labor and Industry or designee shall serve
15.4as the advisory task force chair. The advisory task force shall meet on a regular basis.
15.5(b) The advisory task force shall have the following duties:
15.6(1) advise the commissioner on the development, implementation, and coordination
15.7of enforcement activities, including information sharing and joint investigation and
15.8prosecution of persons who violate laws under the jurisdiction of the Department of
15.9Labor and Industry, Department of Employment and Economic Development, and the
15.10Department of Revenue; and
15.11(2) advise the commissioner on the development and adoption of necessary
15.12legislation, regulations, policies, and procedures.
15.13(c) The advisory task force shall expire and the terms, compensation, and removal of
15.14members shall be as provided in section 15.059, subdivision 6.
15.15(d) The advisory task force shall, prior to its expiration, report to the legislature a
15.16summary of the advice it provided to the commissioner.
15.17**EFFECTIVE DATE.**This section is effective January 1, 2012, except (1) the new
15.18rulemaking authority in subdivision 13 is effective March 1, 2012, and (2) the amendments
15.19in this section do not apply to the regulation of an independent contractor exemption
15.20certificate issued before January 1, 2012, under Minnesota Statutes 2010, section 181.723,
15.21subdivision 5, and shall not be effective for a person holding that exemption certificate

Archived Copy as of 04/09/2012

15.22 until the exemption certificate expires, is revoked, or is canceled.

15.23 Sec. 2. Minnesota Statutes 2010, section 326B.081, subdivision 3, is amended to read:
15.24 Subd. 3. **Applicable law.** "Applicable law" means the provisions of sections
15.25 181.723, 327.31 to 327.36, and this chapter, and all rules, orders, stipulation agreements,
15.26 settlements, compliance agreements, licenses, registrations, certificates, and permits
15.27 adopted, issued, or enforced by the department under sections 181.723, 327.31 to 327.36,
15.28 or this chapter.
15.29 **EFFECTIVE DATE.** This section is effective January 1, 2012, except the
15.30 amendments in this section do not apply to the regulation of an independent contractor
15.31 exemption certificate issued before January 1, 2012, under Minnesota Statutes 2010,
15.32 section 181.723, subdivision 5, and shall not be effective for a person holding that
15.33 exemption certificate until the exemption certificate expires, is revoked, or is canceled.

16.1 Sec. 3. **REPEALER.**
16.2 (a) Minnesota Statutes 2010, section 181.723, subdivision 17, is repealed on May
16.3 15, 2011.
16.4 (b) Minnesota Rules, parts 5202.0100; 5202.0110; 5202.0120; 5202.0130;
16.5 5202.0140; 5202.0150; and 5202.0160, are repealed on January 1, 2012, except that
16.6 they shall remain in effect for the regulation of an independent contractor exemption
16.7 certificate issued before January 1, 2012, under Minnesota Statutes 2010, section 181.723,
16.8 subdivision 5, and shall remain in effect for a person holding that exemption certificate
16.9 until the exemption certificate expires, is revoked, or is canceled.

Archived Copy as of 04/09/2012

Discussion of the Proposed Amendments to Minn. Stat. §181.723 Recommended by the Advisory Task Force on Employee Misclassification

Sec. 1, Amendments to Minn. Stat. §181.723

Subdivision 1. Scope. The amendment governs registration and other responsibilities of persons performing construction services in Minnesota. This includes individual independent contractors who perform building construction and improvement services as well as business entities that are construction contractors. The scope clause was recommended by an Advisory Task Force member who thought it was important to identify the broader scope of the proposal compared to current law, which only requires individual independent contractors to obtain an ICEC.

Subd. Ia. Definitions. The definitions in the amendment remain the same as under the current law, except as follows:

- Paragraph (a) uses the correct statutory terms for a limited liability company under chapter 322B, and limited liability partnership under chapter 323A.
- Paragraph (f) deletes a definition of "knowingly" which does not appear in the amendment. Paragraph (f) now contains the definition of "document," which was formerly paragraph (g).
- Paragraph (g) defines "construction services." The expanded definition was recommended by the Task Force to ensure consistent and comprehensive application of the term "construction services."
    - Construction services means field installation of building construction materials into new or existing public or private sector commercial or residential buildings. The term "field installation" is added to clarify that the proposed amendments apply only to building construction that occurs on the site where the building will be located.
    - The definition also adds that "demolition or deconstruction of building components" into new or existing buildings is also considered a part of building construction. This concept is currently in subdivision (2), which refers to building construction "or remodeling," which often includes demolition or deconstruction.
    - Under the amended definition, all landscaping services are excluded if they are not performed as part of a contract for other building construction or improvement services.
    - The amended definition also excludes construction cleaning services if they are part not performed as part of a construction contract.

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- The current subdivision 2 excludes "the manufacture, supply, or sale of products, materials, or merchandise." The amendment excludes the manufacture, supply, or sale of "construction equipment."
- The amendment definition also excludes from the definition of "construction services" installation or delivery of a product by the manufacturer of the product; rubbish or debris hauling; and cleaning or maintenance of a building.

- Paragraph (h) adds a definition of "construction contractor" to mean a person (either an individual human being or a business entity) that meets the requirements of subdivision 4. This term is distinct from "independent contractor" as defined in subdivision 3, which refers only to an individual independent contractor, not a business entity, for the purposes of the presumption of employment under the statutes cited in subdivision 3.

- Paragraph (i) adds a definition of "business entity" to mean a person other than an individual or sole proprietor. This distinction is necessary because a business entity is any of the entities listed in paragraph (a) except for a human being or sole proprietorship.

- Paragraph (j) defines "in the course of a person's construction business" to shorten and simplify the language of the current subdivision 3 which refers to services performed "for a person that are in the course of the person's trade, business, profession, or occupation."

Subd. 2. Limited application. This subdivision is proposed to be deleted. Section 181.723 as proposed to be amended no longer applies only to individuals, but also includes registration of business entities. The definition of building construction services and exclusions are now in the amended definitions in subdivision 1a.

Subd. 3. Employee-employer relationship. This subdivision is amended to:

- Revise the effective date of the proposed amendments.
- Incorporate the new definition of construction services.
- Clarify that subdivision 3 only applies when the individual is performing services for another person who is in the business of providing construction services. These amendments make the subdivision easier to read.
- Continue the current exclusion from the presumption of employment under the workers' compensation, unemployment, OSHA, and labor standards laws if the individual performing the construction services meets the nine-factor test. (The nine-factors are currently in subdivision 5, paragraph (a), clause (8); they are proposed to be moved to subdivision 4, clause (2).) The difference from current law is that the Department of Labor and Industry will no longer issue exemption certificates. Enforcement of the nine-factor test will be the same as it was before 2009: by agency investigation and enforcement or by the courts in the event of litigation related to employment status under workers' compensation, unemployment compensation, OSHA and labor standards laws.
- Require an independent contractor to register as a construction contractor under

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subdivision 4 in order to perform construction services.

Subd. 4. Construction contractor. This subdivision deletes the current language of subdivision 4 because it refers to the independent contractor exemption certificate, which is being eliminated and replaced with a simpler registration requirement in subdivision 4a. The exception to the presumption of employment for an individual who meets the nine-factor test is now in the last sentence of subdivision 3 as amended.

Subdivision 4, as amended, describes the requirements and conditions that must be met for a person to be a "construction contractor." This subdivision provides that to be a construction contractor, a person (which could be either an individual or a business entity such as a corporation or limited liability company) must be registered under subdivision 4a, and must also meet the nine-factor test.

Clause (2) spells out the nine-factor test. This is the same nine-factor test in the current law (subdivision 5, paragraph (a), clause (8)) with minor modifications. The changes do not fundamentally change the nine-factor test, but are reasonable to provide clarification and effectively implement the proposed amendments:

- Factor (i) is amended to eliminate the requirement that the person have "other facilities." The Task Force recommended that "other facilities" be deleted because it was unclear what that means, and it is not necessary for an independent contractor to have more than one facility.
- Factor (ii) is amended to delete the option that the person "has applied for a federal employer identification number." The application for an FEIN is made over the internet and the FEIN is returned electronically with little or no delay. Therefore, the amended Factor (ii) requires that the individual hold an FEIN (or meet the alternative requirements of this factor).
- Factor (iii) as amended requires the person to operate under written contracts to perform specific construction services for specific amounts of money and under which the person controls the means of performing the services. The word "written" is added, because oral contracts are difficult to prove, especially in the course of an agency investigation. A contract need not be complicated, but it must be in writing. This is consistent with construction code licensees, who must use written contracts under Minn. Stat. §326B.809.
- Under current law, the nine factors only apply to "individuals." The factors as amended refer to "persons." As defined, the term "persons' includes both individual human beings and business entities, such as corporations and limited liability companies. It is necessary to refer to "the person" in each factor because individuals must meet the nine-factor test to be an independent contractor for purposes of the laws specified in subdivision 3, and business entities must also meet the nine-factor test to be a construction contractor under subdivision 4.

Subd. 4a Registration. Paragraph (a) of this subdivision establishes a registration requirement, which applies to any person (an individual human being and any type of business entity) who performs construction services in Minnesota on or after January 1, 2012. Under

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this subdivision, a person who performs construction services for anyone, including a property owner, must register unless one of the exceptions applies. The Task Force felt that by identifying all construction contractors in Minnesota the state would also be able to identify the extent to which misclassification in the construction industry is occurring and conduct effective enforcement.

Paragraph (b) provides exceptions to the registration requirement:

- Because they have already provided information about their business, exceptions are made for persons who are already licensed, registered, or certified by the DLI; persons whose ICEC has not yet expired; and persons who have given a bond to the state.
- An exception is also made for an employee of a person performing construction services, if the person was in compliance with employment laws at the time the services were provided, because in this case there was no misclassification.
- The following persons are exempt from registration because they are exempt from licensure as a residential building contractor, residential remodeler, residential roofer, or manufactured home installer under Minn. Stat. § 326B.805, subd. 6:
  - Architects and professional engineers;
  - School districts and technical colleges; and
  - Volunteers who perform construction services for volunteer organizations such as Habitat for Humanity and Builders Outreach Foundation. (Moreover, a volunteer is not a misclassified employee.)
- A person who provides construction services with gross annual receipts of less than a certain dollar amount is not required to register. These are people whose main occupation is not that of a construction contractor; they typically provide services on small projects for relatives or friends. The Task Force deferred the precise dollar amount of receipts to the Legislature.

Paragraph (c) makes it clear that registration is not a substitute for other laws requiring a person to be licensed, registered or certified. For example, a person who is required to be licensed as a residential building contractor is not permitted to register under this section instead of obtaining the required license.

Subd. 5. Application. This subdivision is deleted because it governs the application for an independent contractor exemption certificate, which is proposed to be replaced by the registration process in subdivision 4a.

Subd. 5a. Registration and renewal application. This subdivision describes the requirements for the registration and renewal application.

Paragraph (a) requires the application to be filed electronically because it is the fastest and most efficient way to process the application. Applicants who do not have home internet access can apply on a computer at the local library. The Department of Labor and Industry will assist any person who needs an accommodation for a disability yp file a paper application. This paragraph also describes the information that must be provided on the application:

Archived Copy as of 04/09/2012

- Clauses (1) to (3) require applicant identifying information.

- Clause (4) requires the applicant to submit evidence of the active status of the applicant's business filings with the Secretary of State, if filing is required or a filing number has been issued. For example, if the applicant holds itself out as a limited liability company, the application would have to include the Secretary of State's certificate number so the active status of the company can be verified.

- Clause (5) requires identification and contact information for the applicant's directors, officers, governors, owners, partners, members, managers, and partners of a limited liability company or limited liability partnership. Shareholder identification must be provided if the shareholder has at least a ten percent interest in a publicly traded corporation.

  - The full name, business telephone number, and title of certain individuals who have an ownership interest or high managerial responsibilities (such as a director) in a business entity registering with the Department as a construction contractor is necessary to identify legal identity as an owner, officer or manager at the applicant's business and the role of decision-makers within the business. This provides the Department with a way to contact owners, officers, directors and managers as part of a mandatory coverage or misclassification investigation.

  - Social security numbers are required of individuals with an ownership interest or high managerial responsibilities in the business to coordinate compliance activities between the Departments of Labor and Industry, Revenue and Employment and Economic Development, all of which use social security numbers to enforce compliance with laws potentially violated by employee misclassification.[7]

  - Minnesota Statutes, section 176.081, subd. 8, paragraph (a) authorizes this coordination for purposes of verifying employment or employer status. That paragraph states in part, "The Departments of Labor and Industry, Employment and Economic Development, Human Services, Agriculture, Transportation, and Revenue are authorized to share information regarding the employment status of individuals, including but not limited to Social Security numbers and payroll and withholding and income tax information, and may use that information for purposes consistent with this section and regarding the employment or employer status . . . ."

  - The percentage of the applicant's business owned by each individual is necessary to verify compliance with other laws related to misclassification. For example, the workers' compensation law (Minn. Stat. § 176.041) exempts certain owners, officers, partners, shareholders, and managers of limited liability companies from workers' compensation coverage. Obtaining this information will enable the Department to

[7] *See also,* Minnesota Statutes § 270C.72, which requires applicants for a license, including registration, issued by the state as a condition of doing business to provide Social Security numbers and Minnesota business identification numbers on license applications.

Archived Copy as of 04/09/2012

confirm compliance with coverage laws such as Minn. Stat. § 176.041, under which a manager of a limited liability company that holds a 25% membership is excluded only if the company has ten or fewer members.

- Pursuant to paragraph (d) of the proposed section 181.723, subdivision 5a, the above data would be private data on individuals and nonpublic data under the Minnesota Data Practices Act, except for the registered person's legal business name filed with the secretary of state; the person's business address designated on the application; the effective date of registration; and the expiration date of registration. This information will be published on the Department's Web site under subdivision 6a of the proposed amendments.

- Clauses (6) and (7) require the applicant to state whether the person has any employees at the time the application is filed and, if so, to verify workers' compensation insurance. Minnesota Statutes § 176.182 requires every state and local licensing agency to withhold issuance or renewal of a license or permit to operate a business in Minnesota unless the applicant presents acceptable evidence of compliance with the workers' compensation insurance coverage requirements.

- Clause (8) requires the applicant to provide its unemployment insurance account number, if any. This allows for consistent enforcement by DLI and DEED.

- Clause (9) requires the person signing the application to certify that the information is true and accurate and that the person signing it is authorized to do so. As with most electronic applications, this clause provides that the name of the person entered on the electronic application constitutes a valid signature on behalf of the applicant.

- Clause (10) authorizes the Department of Labor and Industry to verify the information submitted in the registration application.

Paragraph (b) provides that:

- The registration expires at the end of the calendar year following the year of initial registration, and every two years thereafter, and requires a registered person to remain registered while providing construction services for another person. The Task Force recommended a standard expiration period because it allows contractors to confirm the registration of all subcontractors only once a year.

- The provisions of Minn. Stat. §§ 326B.091 to 326B.097 apply to this section. Those provisions are incorporated to ensure DLI has consistent procedures governing renewal, incomplete applications, and a prohibition against the transfer of registrations. Consistent procedures in DLI's Construction Codes and Licensing Division facilitate efficiency and cost savings for DLI and constituents.

- The initial application and renewal fees are $80 for a biennial year. Because the registration is for two years, it works out to only $40 per calendar year. The bill repeals a current fee of $150 for a four year Independent Contractor Exemption Certificate.

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Assuming approximately 10,000 contractors register, the revenue is estimated to be approximately $800,000 over the biennium. Costs for the administration of the registration and enforcement programs are estimated to be approximately equal to the projected revenues.

Paragraph (c) requires a registered person to notify the commissioner electronically within 15 days after there is a change in any of the information in the approved application. A new application is not necessary unless there is a change in the business entity structure, legal form of the business entity, or the business ownership. For example, if the business changes from a limited liability company to a sole proprietorship, a new application and fee is necessary because much of the information in the initial application will have changed.

Paragraph (d) specifies that the application data is private data on individuals and nonpublic data as defined in the data practices act. This was recommended by the Task Force because of the personal nature of data collected, such as the social security number and percent of the business owned. However, the registration data on the certificate, including the legal name, assumed name, business address, and effective date and expiration date of the registration is public because that information is necessary for contractors to confirm the registration of subcontractors. Finally, this paragraph allows the DLI Commissioner to share data with the Departments of Revenue and Employment and Economic Development for purposes of enforcement of laws administered by those agencies. The information shared with these agencies remains private and nonpublic with the other agencies unless otherwise provided by law.

Subd. 6. Performing services under exemption certificate. This subdivision is repealed effective January 1, 2012, because independent contractor exemption certificates are being replaced by registration. The nine-factor test spelled out in this subdivision is now in the amended subdivision 3.

Subd. 6a. Web Site. This subdivision requires the commissioner to develop and maintain a Web site for the purpose of submission of registration applications and payment. This web site will minimize inefficiencies associated with filling out and mailing paper applications, and will be programmed to quickly identify applications for which registration can be approved electronically, and which applications are incomplete. This subdivision also requires the Commissioner to publish the certificates of registration on its official Web site, so the public can easily verify whether and for how long a contractor is registered. The Department has also maintained a Web site for verification of independent contractor exemption certificate holders, which has worked well.

Subd. 7 Prohibited activities. Prohibited practices specific to independent contractor exemption certificates are deleted throughout this subdivision, and are replaced with provisions specific to registration and other requirements for contractors providing construction services.

Paragraph (a) provides that this subdivision is in addition to prohibited activities in Minnesota Statutes §§ 326B.081 to 326B.085, which governs enforcement of applicable law against a person required to have a license, registration, certificate, or permit issued by the Construction Codes and Licensing Division of DLI.

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- Section 326B.081 is the definition section.

- Section 326B.082 governs investigatory authority and subpoenas, which are needed to investigate possible misclassification; service of documents; fax transmission; time computation, notices of violation; orders and hearings on orders; assessment of monetary penalties; injunctive relief, stop orders; and summary suspension. Incorporating these provisions provides for consistency and efficiency in Department of Labor and Industry enforcement actions. Minnesota Statutes, § 181.723, subdivisions 9, 10, 11 and 12 (proposed to be repealed) were essentially taken from section 326B.082.

- Section 326B.083 governs penalty amounts and the contents of administrative and licensing orders. These are incorporated for consistency and efficiency in Department enforcement actions.

- Section 326B.084 prohibits a person who is subject to the requirements of applicable law from making a false statement, omitting material information, or altering an application or other document required under applicable law. It would also prohibit an unregistered person who is required to be registered from offering to provide construction services.

- Section 326B.085 allows the Commissioner to petition a court for reimbursement of litigation expenses incurred by the state if the state prevails in an action for enforcement of an order for injunctive relief or to compel performance under applicable law.

Paragraph (b) deletes language related to independent contractor exemption certificates and prohibited practices that are already incorporated in paragraph (a) described above. New language is added to prohibit an individual from performing or offering to perform construction services on behalf of a business entity in which the individual has an ownership interest or is in a management position unless the business entity is legitimate. One of the concerns about the current ICEC law is that it was not written to address non-compliant business entities. To address that concern, the proposal holds owners and managers responsible for operating a legitimate construction business according to the following criteria:

- First, the business entity in which the individual has an ownership or management interest must be a construction contractor, which means that the business entity must be registered and must meet the nine-factor test described in subdivision 4. Business owners and managers would be held accountable for compliance with this law.

- Second, the business entity must be listed as active with the Secretary of State, if required for the business entity. For example, it would be a prohibited practice for an individual owner or manager of a business entity to perform construction services as a limited liability company unless the business files all documents with the Secretary of State that are required for LLCs. This again relates to the validity of the business entity, and provides the commissioner with enforcement authority over an individual who misleads others about the nature of the business entity providing the construction services.

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- Third, there must be a signed and dated written contract between the business entity and the person for whom the construction services are performed. The contract must describe the services to be performed and the payment for the services. Again, if a corporation is doing business as a corporation, the contract must be with the corporation and not a specific individual.

- Finally, invoices of bills for the construction services must be submitted in the name of the business entity, and payment must be to the business entity, not an individual.

Paragraph (c) prohibits a person (defined as individuals and business entities) from any of the following conduct, to prevent misclassification of workers:

- First, a person may not require another person through coercion, misrepresentation, or fraudulent means to form a business entity. The Department has received reports that some construction contractors completed and filed with the Secretary of State paperwork to form limited liability companies for their workers so that the workers would not be considered employees, even if they did not meet the nine-factor test. The concern is that these workers might not even understand the nature of the paperwork the contactor asked them to sign. This provision would allow the Commissioner to investigate and take enforcement action in cases where this type of misclassification occurs, and educate the individuals performing construction services about their rights and obligations as a limited liability company.

- Second, a person may not represent that the person is a construction contractor unless the person is registered with the Department and meets the nine-factor test under subdivision 4. Under paragraph (d), a construction contractor is prohibited from hiring another contractor, such as a subcontractor, to provide services unless the subcontractor is registered. In addition, property owners may want to hire only registered contractors to provide construction services. Therefore, for the protection of property owners and hiring construction contractors, it is necessary to be able to take enforcement action against a person who falsely represents that they are a registered construction contractor.

- Third, a person may not perform or provide construction services for anyone if the person performing the construction services is not registered (if registration is required). For example, the Department could take enforcement action against an unregistered person who provides construction services for a property owner, unless one of the registration exemptions applies.

- Fourth, a person must be a construction contractor under subdivision 4 to perform or provide construction services for another person in the course of the other person's business. This means that a person who provides construction services for another construction contractor must be registered *and* meet the nine-factor test under subdivision 4.

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- The third and fourth clauses described above provide the Commissioner with authority to investigate possible misclassification where a person performing construction services is not registered or does not meet the nine-factor test.

Paragraph (d) prohibits a person who provides construction services in the course of the person's business from paying another person, such as a subcontractor, for construction services if the subcontractor is not named in the construction contract. It also prohibits the person from paying a subcontractor who does not submit an invoice. A written contract and invoices are evidence of a legitimate transaction between two businesses. The absence of a written contract or invoice could indicate misclassification of the worker.

Paragraph (d) also prohibits a person who provides construction services in the course of the person's business from contracting with or paying an unregistered person for construction services. This clause requires a construction contractor to verify that another person providing construction services for it, such as a subcontractor, is also registered. This is easily accomplished by confirming registration on the Department's Web site dedicated to registration. This is necessary to ensure all contractors and subcontractors comply with the registration requirement.

Paragraph (e) clarifies that the prohibitions in this subdivision do not apply to an employee of a person performing the construction services, if the employee was treated as such at the time the services were provided. Misclassification is a problem when an individual worker is misclassified as an independent contractor, subcontractor, or business entity. Misclassification is not an issue when the individual is treated as an employee in compliance with employment laws.

Subd. 8. Enforcement; remedies and penalties. The penalty for violating prohibited practices related to independent contractor exemption certificates is deleted and is replaced with penalties recommended by the Task Force for violation of the new provisions related to registration and other requirements under this section.

Paragraph (a) authorizes the commissioner to use Minn. Stat. §§ 326B.081 to 326B.085 to enforce this section. Those sections are described under subdivision 7, paragraph (a). An exception to the penalties in section 326B.082, subdivisions 7 and 12 is provided in paragraphs (b), (c), and (d).

Paragraph (b) authorizes the commissioner to assess a monetary penalty against a person who fails to register in violation of subdivision 4a as follows:

- For the first violation, the commissioner may assess a penalty of $2000; however, the goal is to obtain registration compliance, so if the person registers within 30 days of the date of the order, all but $500 of the penalty will be forgiven.

- For the second and each subsequent violation, the commissioner may assess a penalty of up to $2000.

Paragraph (c) authorizes the commissioner to assess a monetary penalty against a person who, in the course of that person's business, directly pays an unregistered person for construction services, as follows:

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- For the first violation, the commissioner shall issue a notice of violation, which cannot carry a monetary penalty;

- For the second and subsequent violations, the commissioner may assess a penalty up to $2000.

Paragraph (c) also provides that all payments to an unregistered person for construction services on a single project site shall be considered a single violation. It shall not be a violation for a person to pay an unregistered person if the unregistered person was registered at the time the construction contract was entered into. This provides clarification about how to determine when a violation has occurred for purposes of assessing the penalties.

Paragraph (d) provides that for all violations of section 181.723, other than those described in paragraphs (b) and (c) described above, the monetary penalties shall be as provided in section 326B.082, subdivisions 7 and 12, under which the maximum penalty amount is $10,000.

Subd. 9. Commissioner's powers.
Subd. 10. Notice requirements.
Subd. 11. Facsimile; timely service.
Subd. 12. Time period computation.

The above subdivisions are deleted because identical or very similar provisions are also in Minn. Stat. § 326B.082, subdivisions 2, 3, 4, 5, and 6. Section 326B.082 is incorporated by reference in subdivisions 7 and 8 of this section.

Subd. 13. Rulemaking. This subdivision is amended to authorize rulemaking to implement the new amendments to this section. However, the effective date of the rulemaking authority is not until March 12, 2012, to give the Commissioner time to process registration applications before deciding whether rulemaking is needed.

Subd. 16. Data classified. This section is not amended, and is retained because, even after the independent contractor exemption certificate program is repealed, the data will still be retained according the Department's retention schedule and data privacy classification for the data.

Effective date: This section is effective January 1, 2012, which coordinates with other recent amendments to Minnesota Statutes chapter 326B. However, as noted above, the rulemaking authority is delayed three months to allow the commissioner to assess the need for rulemaking; and the amendments do not apply to regulation of independent contractor exemptions certificates issued before January 12, 2012, or to persons holding exemption certificates until the certificates expire, are revoked, or are cancelled.

Section 2; Amendment to Minn. Stat. § 326B.081, subd. 3

Subd. 3. Applicable law. A cross reference to Minn. Stat. § 181.723 is added to the definition of "applicable law" in Minn. Stat. § 326B.081. This is necessary because subdivisions 7 and 8

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incorporate the provisions of sections 326B.081 to 326B.085, and section 181.723 therefore becomes part of the "applicable law" for those sections.

Effective Date: As with the other provisions, this section is effective January 1, 2012, except that it does not apply to regulation of independent contractor exemption certificate holders until the certificates expire, are revoked or are cancelled.

Section 3. Repealer

Paragraph (a) repeals Minn. Stat. § 181.723, subd. 17, governing the Advisory Task Force on Employee Misclassification, as of May 15, 2011. That is the day the task force expires by operation of Minn. Stat. § 15.059, subd. 6, as referenced in section 181.723, subd. 17, paragraph (c).

Paragraph (b) repeals Minnesota Rules in chapter 5202, governing independent contractor exemption certificate applications, as of January 1, 2012, except that the rules shall remain in effect for the regulation of independent contractor exemption certificates issued before January 1, 2012, until the certificates, expire, are revoked, or are cancelled.

Archived Copy as of 04/09/2012

Appendix C: Task Force Member Comments

1. Comment from Dale Zoerb, Building Restoration Corporation
2. Comment from AGC of Minnesota
3. Comment from Kyle Makarios, North Central States Regional Council of Carpenters

Archived Copy as of 04/09/2012

Appendix C: Task Force Member Comments

1. Comment from Dale Zoerb, Building Restoration Corporation
2. Comment from AGC of Minnesota
3. Comment from Kyle Makarios, North Central States Regional Council of Carpenters

Archived Copy as of 04/09/2012

Building Restoration Corporation
1920 Oakcrest Ave. Roseville, MN 55113
Phone 612-789-2800 Fax 612-789-2875

May 12th 2011

Cynthia Valentine
Chief Information Officer
MN Department of Labor & Industry
443 Lafayette Road N
St. Paul, MN 55155

Re: MN Advisory Task Force on Employee Misclassification

Dear Cynthia,

As a member serving on the MN Advisory Task Force on Employee Misclassification I want to object to the proposed legislation as written and make sure the legislature is aware that the group as a whole has not reached unanimous consensus on proposed changes to the current law. I believe the proposal is unreasnable and will lead to litigation.

While the proposed legislation does well to provide definitions of the words and terms used it has become needless wordy, using the word "person" to create different and distinguishable meanings throughout and such over-usage of this term creates misinterpretation.

I have concerns that the legislation recommendation goes too far in its efforts to classify almost all construction workers as employees. I am also concerned that the proposed legislation does not protect legitimate contracting businesses and will therefore misclassify them, particularly partnerships and mulit member LLC's.

This proposed legislation may even misclassify W-2 employees of a subcontractor as employees working for the General Contractor. The proposed language under Subd.4 states that " a person is a construction contractor only if: " ...they meet all of the following conditions.....and by the definition provided a "person" is defined as any type of entity.

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With such language a company of any type, even a corporation hiring W-2 employees, who do not meet all of the nine-factor tests would be deemed to NOT be a "Construction contractor". Clearly, this presents a big problem for the industry. If such a contractor was not deemed to be an independent contractor, who would their employees be working for? What would this entity then become?

Since this proposed legislation was drafted to address the shortcomings and problems that the 2009 Independent Contractor law created, when we move forward with additional legislation we need to move forward cautiously so that this legislation does not create even more problems than the last law it seeks to correct.

Furthermore, the proposed legislation derives most of its determination of whether or not a worker or a contractor is an employee based on a "nine-factor test" that was part of a Minnesota unemployment law, but that law has since been repealed. The nine-factor test in question may be interpreted to disallow time and material work, a common business practice for many contractors or those in the repair industry. The nine-factor test as proposed may be interpreted to disallow oral contracts, a common practice for small jobs.

I have attached revisions to the language that made it into a recent senate bill which could be used to amend the language of the proposed legislation that would help to protect legitimate businesses from falling victim to becoming misclassified by the current proposal and its enforcement. I have also highlighted a section of the proposed languages that extablishes penalites in other sections of law, which provide for penalties for all other violations of up to $ 10,000 so the legislature is able to judge if such limits are extreme.

Please add these comments to your report along with the attached revisions. If you have any questions, please do not hesitate to call me at 612-789-2800 or you can e-mail me at dale@BRCUSA.com

Sincerely,
BUILDING RESTORATION CORPORATION

Dale Zoerb

Archived Copy as of 04/09/2012

Amendments: On the bill there is colored text of amendments as follows:

Red is to be deleted

Green is to be added

Just a note of information

A bill for an act

relating to employment; modifying worker classification regulation, penalties, and fees; authorizing rulemaking; amending Minnesota Statutes 2010, sections 181.723; 326B.081, subdivision 3; repealing Minnesota Statutes 2010, section 181.723, subdivision 17; Minnesota Rules, parts 5202.0100; 5202.0110; 5202.0120; 5202.0130; 5202.0140; 5202.0150; 5202.0160.

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

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

181.723 ~~INDEPENDENT~~ CONSTRUCTION CONTRACTORS.

Subdivision 1. **~~Definitions~~ Scope.** This section governs registration and other responsibilities of persons performing construction services in Minnesota.

Subd. 1a. **Definitions.** The definitions in this subdivision apply to this section.

(a) "Person" means any individual, limited liability ~~corporation~~ company, limited liability partnership, corporation, partnership, incorporated or unincorporated association, sole proprietorship, doing business as (DBA), 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)~~ (f) "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.

(g) "Construction services" means field installation of building construction materials into new or existing public or private sector commercial or residential buildings. Construction services include demolition or deconstruction of building components.

Archived Copy as of 04/09/2012

2.8 Construction services include landscaping services and construction cleaning services
2.9 when they are performed as part of a contract for other building construction or
2.10 improvement services. Construction services do not include:
2.11 (1) the manufacture, supply, or sale of products, materials, merchandise, or
2.12 construction equipment;
2.13 (2) installation or delivery of a product by the manufacturer of the product;
2.14 (3) rubbish or debris hauling; or
2.15 (4) cleaning or maintenance of a building.
2.16 (h) "Construction contractor" means a person that meets the requirements of
2.17 subdivision 4. who performes Construction services.
2.18 (i) "Business entity" means a person other than an individual or a sole proprietor
2.19 (j) "In the course of a person's construction business" means in the course of a
2.20 person's construction trade, business, profession, or occupation.
2.21 Subd. 2. **Limited application.** This section only applies to individuals performing
2.22 public or private sector commercial or residential building construction or improvement
2.23 services. Building construction and improvement services do not include (1) the
2.24 manufacture, supply, or sale of products, materials, or merchandise; (2) landscaping
2.25 services for the maintenance or removal of existing plants, shrubs, trees, and other
2.26 vegetation, whether or not the services are provided as part of a contract for the building
2.27 construction or improvement services; and (3) all other landscaping services, unless the
2.28 other landscaping services are provided as part of a contract for the building construction
2.29 or improvement services.
2.30 Subd. 3. **Employee-employer relationship.** Except as provided in subdivision 4,
2.31 For purposes of chapters 176, 177, 181A, 182, and 268, as of January 1, 2009 2012, an
2.32 individual who performs construction services for a Consturction contractor, of which they have no ownership interest, a another person that are in the course
2.33 of the other persons trade, construction business, profession, or occupation is an employee
2.34 of that person Construction contractor and that person Construction contractor is an employer of the individual, except that if the individual
2.35 satisfies all eight of the nine of the conditions in subdivision 4, clause (2), the individual is an independent
2.36 contractor and not an employee for purposes of those chapters only.
3.1 Subd. 4. **independent Construction contractor.** An individual is an independent
3.2 contractor and not an employee of the person for whom the individual is performing
3.3 services in the course of the person's trade, business, profession, or occupation only if (1)
3.4 the individual holds a current independent contractor exemption certificate issued by
3.5 the commissioner; and (2) the individual is performing services for the person under
3.6 the independent contractor exemption certificate as provided in subdivision 6. The
3.7 requirements in clauses (1) and (2) must be met in order to qualify as an independent
3.8 contractor and not as an employee of the person for whom the individual is performing
3.9 services in the course of the person's trade, business, profession, or occupation. A person

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3.10 is a operating as a construction contractor only if shall insure that:
3.11 (1) the person has satisfied the registration requirements of subdivision 4a; and
3.12 (2) the person meets all eight of the nine of the following conditions:
3.13 (i) the person maintains a separate business with the person's own office, equipment,
3.14 and materials;
3.15 (ii) the person holds a federal employer identification number or has filed business
3.16 or self-employment income tax returns with the federal Internal Revenue Service if the
3.17 person has performed services in the previous year;
3.18 (iii) the person operates under written contracts to perform specific construction
3.19 services for specific amounts of money and under which the person controls the means of
3.20 performing the services;
3.21 (iv) the person incurs the main expenses related to the construction services that the
3.22 person performs under contract;
3.23 (v) the person is responsible for the satisfactory completion of construction services
3.24 that the person contracts to perform and is liable for a failure to complete the service;
3.25 (vi) the person receives compensation for construction services performed under a
3.26 contract on a commission or per-job or competitive bid or time and material basis and not on
any other basis;
3.27 (vii) the person may realize a profit or suffer a loss under contracts to perform
3.28 construction services;
3.29 (viii) the person has continuing or recurring business liabilities or obligations; and
3.30 (ix) the success or failure of the person's business depends on the relationship of
3.31 business receipts to expenditures.
3.32 Subd. 4a. **Registration.** (a) Except as provided in paragraph (b), any person who
3.33 performs construction services in the state on or after January 1, 2012, must register with
3.34 the commissioner as provided in subdivision 5a before performing construction services
3.35 for another person.
3.36 (b) The registration requirements in this section do not apply to:
4.1 (1) a person who, at the time the person is performing the construction services,
4.2 holds a current license, certificate, or registration under chapter 299M or 326B;
4.3 (2) a person who holds a current independent contractor exemption certificate issued
4.4 under this section that expires on or after January 1, 2012;
4.5 (3) a person who has given a bond to the state under section 326B.197 or 326B.46;
4.6 (4) an employee of the person Consturction contractor while performing the construction
services, if the person
4.7 was in compliance with laws related to employment of the individual at the time the
4.8 construction services were performed;
4.9 (5) an architect or professional engineer engaging in professional practice as defined
4.10 in section 326.02, subdivisions 2 and 3;
4.11 (6) a school district or technical college governed under chapter 136F;
4.12 (7) a person providing construction services on a volunteer basis, such as Habitat

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4.13 for Humanity and Builders Outreach Foundation, and their individual volunteers when
4.14 engaged in activities on their behalf; and
4.15 (8) a person who provides construction services with gross annual receipts of less
4.16 than $..... during a calendar year.
4.17 (c) The requirements for registration under this section are not a substitute for, and
4.18 do not relieve a person from complying with, any other law requiring that the person be
4.19 licensed, registered, or certified.
4.20 ~~Subd. 5. **Application.** To obtain an independent contractor exemption certificate,~~
4.21 ~~the individual must submit, in the manner prescribed by the commissioner, a complete~~
4.22 ~~application and the certificate fee required under subdivision 14.~~
4.23 ~~(a) A complete application must include all of the following information:~~
4.24 ~~(1) the individual's full name;~~
4.25 ~~(2) the individual's residence address and telephone number;~~
4.26 ~~(3) the individual's business name, address, and telephone number;~~
4.27 ~~(4) the services for which the individual is seeking an independent contractor~~
4.28 ~~exemption certificate;~~
4.29 ~~(5) the individual's Social Security number;~~
4.30 ~~(6) the individual's or the individual's business federal employer identification~~
4.31 ~~number, if a number has been issued to the individual or the individual's business;~~
4.32 ~~(7) any information or documentation that the commissioner requires by rule that~~
4.33 ~~will assist the department in determining whether to grant or deny the individual's~~
4.34 ~~application; and~~
4.35 ~~(8) the individual's sworn statement that the individual meets all of the following~~
4.36 ~~conditions:~~
5.1 ~~(i) maintains a separate business with the individual's own office, equipment,~~
5.2 ~~materials, and other facilities;~~
5.3 ~~(ii) holds or has applied for a federal employer identification number or has filed~~
5.4 ~~business or self-employment income tax returns with the federal Internal Revenue Service~~
5.5 ~~if the person has performed services in the previous year for which the individual is~~
5.6 ~~seeking the independent contractor exemption certificate;~~
5.7 ~~(iii) operates under contracts to perform specific services for specific amounts of~~
5.8 ~~money and under which the individual controls the means of performing the services;~~
5.9 ~~(iv) incurs the main expenses related to the service that the individual performs~~
5.10 ~~under contract;~~
5.11 ~~(v) is responsible for the satisfactory completion of services that the individual~~
5.12 ~~contracts to perform and is liable for a failure to complete the service;~~
5.13 ~~(vi) receives compensation for service performed under a contract on a commission~~
5.14 ~~or per-job or competitive bid basis and not on any other basis;~~
5.15 ~~(vii) may realize a profit or suffer a loss under contracts to perform service;~~
5.16 ~~(viii) has continuing or recurring business liabilities or obligations; and~~
5.17 ~~(ix) the success or failure of the individual's business depends on the relationship of~~

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5.18 ~~business receipts to expenditures.~~

5.19 ~~(b) Individuals who are applying for or renewing a residential building contractor or~~
5.20 ~~residential remodeler license under sections 326B.197, 326B.802, 326B.805, 326B.81,~~
5.21 ~~326B.815, 326B.821 to 326B.86, 326B.87 to 326B.885, and 327B.041, and any rules~~
5.22 ~~promulgated pursuant thereto, may simultaneously apply for or renew an independent~~
5.23 ~~contractor exemption certificate. The commissioner shall create an application form~~
5.24 ~~that allows for the simultaneous application for both a residential building contractor~~
5.25 ~~or residential remodeler license and an independent contractor exemption certificate.~~
5.26 ~~If individuals simultaneously apply for or renew a residential building contractor or~~
5.27 ~~residential remodeler license and an independent contractor exemption certificate using~~
5.28 ~~the form created by the commissioner, individuals shall only be required to provide, in~~
5.29 ~~addition to the information required by section 326B.83 and rules promulgated pursuant~~
5.30 ~~thereto, the sworn statement required by paragraph (a), clause (8), and any additional~~
5.31 ~~information required by this subdivision that is not also required by section 326B.83~~
5.32 ~~and any rules promulgated thereto. When individuals submit a simultaneous application~~
5.33 ~~on the form created by the commissioner for both a residential building contractor or~~
5.34 ~~residential remodeler license and an independent contractor exemption certificate, the~~
5.35 ~~application fee shall be $150. An independent contractor exemption certificate that is in~~
6.1 ~~effect before March 1, 2009, shall remain in effect until March 1, 2013, unless revoked by~~
6.2 ~~the commissioner or canceled by the individual.~~

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

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

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

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

6.21 ~~(e) An individual or person to whom the commissioner issues an order under~~
6.22 ~~paragraph (d) shall have 30 days after service of the order to request a hearing. The~~
6.23 ~~request for hearing must be in writing and must be served on or faxed to the commissioner~~

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6.24 ~~at the address or facsimile number specified in the order by the 30th day after service of~~
6.25 ~~the order. If the individual does not request a hearing or if the individual's request for a~~
6.26 ~~hearing is not served on or faxed to the commissioner by the 30th day after service of the~~
6.27 ~~order, the order shall become a final order of the commissioner and will not be subject to~~
6.28 ~~review by any court or agency. The date on which a request for hearing is served by mail~~
6.29 ~~shall be the postmark date on the envelope in which the request for hearing is mailed. If~~
6.30 ~~the individual serves or faxes a timely request for hearing, the hearing shall be a contested~~
6.31 ~~case hearing and shall be held in accordance with chapter 14.~~
6.32 Subd. 5a. **Registration and renewal application.** (a) A person required to
6.33 register with the commissioner under subdivision 4a must file a registration application
6.34 electronically in the manner prescribed by the commissioner. The application for initial or
6.35 renewal registration must include the following information:
7.1 (1) the applicant's legal name; assumed name filed with the secretary of state, if any;
7.2 designated business address; physical address; phone number; and e-mail address;
7.3 (2) the applicant's Minnesota tax identification number, if one is required or has
7.4 been issued;
7.5 (3) the applicant's federal employee identification number, if one is required or
7.6 has been issued;
7.7 (4) evidence of the active status of the applicant's business filings with the secretary
7.8 of state, if one is required or has been issued;
7.9 (5) for each of the applicant's directors; officers; governors; owners; partners;
7.10 members, managers, and partners of a limited liability company or limited liability
7.11 partnership; and shareholders, except for shareholders with less than a ten percent interest
7.12 ~~in a publicly traded corporation~~; the following information:
7.13 (i) the individual's full name, business telephone number, Social Security number,
7.14 and title at applicant's business;
7.15 (ii) the percentage of the applicant's business owned by each individual; and
7.16 (iii) whether the individual personally performs construction services on behalf of
7.17 the applicant;
7.18 (6) whether the applicant has any employees at the time the application is filed;
7.19 (7) the name of the applicant's workers' compensation insurer, the policy number,
7.20 and the effective dates of coverage, or a description of the basis for exemption from
7.21 workers' compensation coverage laws;
7.22 (8) the unemployment insurance account number, if any;
7.23 (9) a certification that the person signing the application has reviewed it; that the
7.24 information provided is true and accurate; and that the person signing is authorized to sign
7.25 and file the application as an agent of the applicant. The name of the person signing,
7.26 entered on an electronic application, shall constitute a valid signature of the agent on
7.27 behalf of the applicant; and
7.28 (10) a signed authorization for the Department of Labor and Industry to verify the
7.29 information provided on or with the application.

Archived Copy as of 04/09/2012

7.30(b) A person's registration shall expire at the end of the calendar year following
7.31the year of initial registration and every two years thereafter. The registered person
7.32must remain registered while providing construction services for another person. The
7.33provisions of sections 326B.091 to 326B.097 apply to this section, except that the initial
7.34registration and renewal fees under this section shall be $80 for each initial or renewal
7.35application for registration. The Commissioner shall provide a notice to each applicant by email, to the email address provided by the applicant, at least 15 days before the expiration date of their registration notifying the person that their registration will expire. The Commissioner shall provide a web link in such email where a renewal may be filed electronically in the manner prescribed by the commissioner. For Construction contractors whose registration has expired the Commissioner shall mail to the business address provided by the applicant a notice of their expiration.
8.1(c) A registered person must notify the commissioner within 15 days after there is a
8.2change in any of the information on the application as approved. This notification must
8.3be provided electronically in the manner prescribed by the commissioner. However, if
8.4the business entity structure, legal form of the business entity, or business ownership has
8.5changed, the person must submit a new registration application and registration fee for
8.6the new business entity.
8.7(d) An application for registration is private data on individuals as defined in section
8.813.02, subdivision 12, and nonpublic data as defined under section 13.02, subdivision 9,
8.9except for the information on the registration certificate described in subdivision 6a,
8.10paragraph (b), which shall be public data as defined under section 13.02, subdivisions
8.1114 and 15. However, the commissioner is authorized to share application data with the
8.12Departments of Revenue and Employment and Economic Development for purposes
8.13of enforcement of laws administered by those agencies. Information shared with the
8.14Departments of Revenue and Employment and Economic Development shall remain
8.15private and nonpublic data in the possession of the receiving agency unless otherwise
8.16provided by law.
8.17 ~~Subd. 6. **Performing services under exemption certificate.** An individual is~~
8.18~~performing services for a person under an independent contractor exemption certificate if:~~
8.19 ~~(a) the individual is performing services listed on the individual's independent~~
8.20~~contractor exemption certificate; and~~
8.21 ~~(b) at the time the individual is performing services listed on the individual's~~
8.22~~independent contractor exemption certificate, the individual meets all of the following~~
8.23~~conditions:~~
8.24 ~~(1) maintains a separate business with the individual's own office, equipment,~~
8.25~~materials, and other facilities;~~
8.26 ~~(2) holds or has applied for a federal employer identification number or has filed~~
8.27~~business or self-employment income tax returns with the federal Internal Revenue Service~~
8.28~~if the individual performed services in the previous year for which the individual has the~~
8.29~~independent contractor exemption certificate;~~

Archived Copy as of 04/09/2012

8.30 ~~(3) is operating under contract to perform the specific services for the person~~
8.31 ~~for specific amounts of money and under which the individual controls the means of~~
8.32 ~~performing the services;~~
8.33 ~~(4) is incurring the main expenses related to the services that the individual is~~
8.34 ~~performing for the person under the contract;~~
8.35 ~~(5) is responsible for the satisfactory completion of the services that the individual~~
8.36 ~~has contracted to perform for the person and is liable for a failure to complete the services;~~
9.1 ~~(6) receives compensation from the person for the services performed under the~~
9.2 ~~contract on a commission or per-job or competitive bid basis and not on any other basis;~~
9.3 ~~(7) may realize a profit or suffers a loss under the contract to perform services for~~
9.4 ~~the person;~~
9.5 ~~(8) has continuing or recurring business liabilities or obligations; and~~
9.6 ~~(9) the success or failure of the individual's business depends on the relationship of~~
9.7 ~~business receipts to expenditures.~~
9.8 Subd. 6a. **Web site.** (a) The commissioner shall develop and maintain a Web site on
9.9 which applicants for registration can submit a registration application and payment. The
9.10 Web site shall be designed to receive and process registration applications and payments
9.11 and promptly issue registration certificates electronically to successful applicants.
9.12 (b) The commissioner shall maintain the certificates of registration on the
9.13 department's official public Web site, which shall include the following information:
9.14 (1) the registered person's legal business name, including any assumed name, as
9.15 filed with the secretary of state;
9.16 (2) the person's business address designated on the application; and
9.17 (3) the effective date of the registration and the expiration date.
9.18 Subd. 7. **Prohibited activities.** (a) The prohibited activities in this section are in
9.19 addition to those in sections 326B.081 to 326B.085.
9.20 (b) An individual shall not perform or offer to perform construction services on
9.21 behalf of a business entity of which the individual is a director; officer; governor; owner;
9.22 partner; member, manager, or partner of a limited liability company or limited liability
9.23 partnership; or shareholder, except for a shareholder holding less than ten percent interest
9.24 in a publicly traded company; unless:
9.25 (1) ~~perform work as an independent contractor who meets the qualifications under~~
9.26 ~~subdivision 6 without first obtaining from the department an independent contractor~~
9.27 ~~exemption certificate~~ the business entity is a construction contractor under subdivision 4;
9.28 (2) ~~perform work as an independent contractor when the department has denied or~~
9.29 ~~revoked the individual's independent contractor exemption certificate~~ the business entity is
9.30 listed as active with the secretary of state, if required for the business entity;
9.31 (3) ~~transfer to another individual or allow another individual to use the individual's~~
9.32 ~~independent contractor exemption certificate~~ there is a signed and dated written contract
9.33 between the business entity and the person for whom the construction services are
9.34 performed that describes the services to be performed and the payment for the services;

Archived Copy as of 04/09/2012

10.1 (4) ~~alter or falsify an independent contractor exemption certificate~~ invoices or
10.2 bills for the construction services performed are submitted in the name of the business
10.3 entity; and
10.4 (5) ~~misrepresent the individual's status as an independent contractor; or~~ payment is
10.5 made to the business entity.
10.6 ~~(6) make a false material statement, representation, or certification; omit material~~
10.7 ~~information; or alter, conceal, or fail to file a document required by this section or any rule~~
10.8 ~~promulgated by the commissioner under rulemaking authority set out in this section.~~
10.9 ~~(b)~~ (c) A ~~person~~ Construction contractor shall not:
10.10 (1) require an individual through coercion, misrepresentation, or fraudulent means to
10.11 ~~adopt independent contractor status~~ form a business entity;
10.12 (2) ~~knowingly misrepresent that an individual who has not been issued an~~
10.13 ~~independent contractor exemption certificate or is not performing services for the person~~
10.14 ~~under an independent contractor exemption certificate is an independent contractor~~
10.15 represent that the person is a construction contractor unless the person is a construction
10.16 contractor under subdivision 4; ~~or~~
10.17 (3) ~~make a false material statement, representation, or certification; omit material~~
10.18 ~~information; or alter, conceal, or fail to file a document required by this section or any~~
10.19 ~~rule promulgated by the commissioner under rulemaking authority set out in this section.~~
10.20 perform or provide construction services for another person if the person performing the
10.21 construction services is not registered as required by subdivision 4a; or
10.22 ~~(4) perform or provide construction services for another person in the course of the~~
10.23 ~~other person's business if the person performing or providing the construction services is~~
10.24 ~~not a construction contractor under subdivision 4.~~
10.25 ~~(c)~~ (d) A ~~person~~ Construction contractor ~~for whom an individual is performing services~~
~~must obtain a~~
10.26 ~~copy of the individual's independent contractor exemption certificate before services~~
10.27 ~~may commence. A copy of the independent contractor exemption certificate must be~~
10.28 ~~retained for five years from the date of receipt by the person for whom an individual is~~
10.29 ~~performing services.~~ ~~who provides construction services in the course of that person's~~
10.30 ~~business~~ shall not:
10.31 (1) pay a person that is not named in a contract for construction services, or pay a
10.32 person without receiving an invoice or pay request from the person; or
10.33 (2) contract with ~~or~~ and pay another person to perform construction services if the other
10.34 person is not registered under subdivision 4a.
11.1 (e) This subdivision does not apply to an employee of a ~~person~~ Construction contractor
performing the
11.2 construction services, if the ~~person~~ Construction contractor was in compliance with laws
related to employment of
11.3 the individual at the time the construction services were performed.
11.4 Subd. 8. **Enforcement; remedies and penalties.** ~~An individual or person who~~

Archived Copy as of 04/09/2012

11.5 ~~violates any provision of subdivision 7 is subject to a penalty to be assessed by the~~
11.6 ~~department of up to $5,000 for each violation. The department shall deposit penalties in~~
11.7 ~~the assigned risk safety account.~~ (a) The commissioner is authorized to use sections
11.8 326B.081 to 326B.085 to enforce this section. Notwithstanding the maximum penalty
11.9 amount in section 326B.082, subdivisions 7 and 12, the monetary penalties for violation
11.10 of this section shall be as provided in paragraphs (b), (c), and (d).
11.11 (b) The commissioner may assess a monetary penalty against an unregistered person
11.12 who is required to be registered, in violation of subdivision 4a, as follows:
11.13 (1) for the first violation, the commissioner may assess a monetary penalty of
11.14 $2,000. If the person registers within 30 days of the date of the order, $1,500 of the
11.15 penalty shall be forgiven; and
11.16 (2) for the second and each subsequent violation, the commissioner may assess a
11.17 penalty of up to $2,000.
11.18 (c) The commissioner may assess a monetary penalty against a person Construction contractor who, in the
11.19 course of that person Construction contractor's business, directly pays an unregistered person for construction
11.20 services performed by the unregistered person, in violation of subdivision 7, paragraph
11.21 (d), clause (2), as follows:
11.22 (1) for the first violation, the commissioner shall issue a notice of violation under
11.23 section 326B.082, subdivision 6; and
11.24 (2) for the second and each subsequent violation, the commissioner may assess a
11.25 penalty of up to $2,000.
11.26 For purposes of this paragraph, all payments to an unregistered person for
11.27 construction services on a single project site shall be considered a single violation. It shall
11.28 not be a violation for a person to pay an unregistered person if the unregistered person was
11.29 registered at the time the contract for construction services was entered into.
11.30 (d) For all other violations of this section, the monetary penalties shall be as provided
11.31 in section 326B.082, subdivisions 7 and 12.

Note that this is a penalty of up to $ 10,000 under 326B.082, subdivisions 7 and revocation of registration under subdivision 12

11.32 (e) Monetary penalties under this section shall be payable to the commissioner for
11.33 deposit in the assigned risk safety account under chapter 79.
11.34 ~~Subd. 9. **Commissioner's powers.** (a) In order to carry out the purposes of this~~
11.35 ~~section, the commissioner may:~~
12.1 ~~(1) administer oaths and affirmations, certify official acts, interview, question, take~~
12.2 ~~oral or written statements, and take depositions;~~
12.3 ~~(2) request, examine, take possession of, photograph, record, and copy any~~
12.4 ~~documents, equipment, or materials;~~
12.5 ~~(3) at a time and place indicated by the commissioner, request persons to appear~~

Archived Copy as of 04/09/2012

12.6 ~~before the commissioner to give testimony and produce documents, equipment, or~~
12.7 ~~materials;~~
12.8 ~~(4) issue subpoenas to compel persons to appear before the commissioner to give~~
12.9 ~~testimony and produce documents, equipment, or materials; and~~
12.10 ~~(5) subject to paragraph (c), with or without notice, enter without delay upon~~
12.11 ~~any property, public or private, for the purpose of taking any action authorized under~~
12.12 ~~this subdivision or the applicable law, including obtaining information or conducting~~
12.13 ~~inspections or investigations.~~
12.14 ~~(b) Persons requested by the commissioner to give testimony or produce documents,~~
12.15 ~~equipment, or materials shall respond within the time and in the manner specified by the~~
12.16 ~~commissioner. If no time to respond is specified in the request, then a response shall be~~
12.17 ~~submitted within 30 days of the commissioner's service of the request.~~
12.18 ~~(c) Upon the refusal or anticipated refusal of a property owner, lessee, property~~
12.19 ~~owner's representative, or lessee's representative to permit the commissioner's entry onto~~
12.20 ~~property as provided in paragraph (a), the commissioner may apply for an administrative~~
12.21 ~~inspection order in the Ramsey County District Court or, at the commissioner's discretion,~~
12.22 ~~in the district court in the county in which the property is located. The commissioner may~~
12.23 ~~anticipate that a property owner or lessee will refuse entry if the property owner, lessee,~~
12.24 ~~property owner's representative, or lessee's representative has refused to permit entry on a~~
12.25 ~~prior occasion or has informed the commissioner that entry will be refused. Upon showing~~
12.26 ~~of administrative probable cause by the commissioner, the district court shall issue an~~
12.27 ~~administrative inspection order that compels the property owner or lessee to permit the~~
12.28 ~~commissioner to enter the property for the purposes specified in paragraph (a).~~
12.29 ~~(d) Upon the application of the commissioner, a district court shall treat the failure of~~
12.30 ~~any person to obey a subpoena lawfully issued by the commissioner under this subdivision~~
12.31 ~~as a contempt of court.~~
12.32 ~~Subd. 10.~~ ~~**Notice requirements.**~~ ~~Unless otherwise specified, service of a document~~
12.33 ~~on a person under this section may be by mail, by personal service, or in accordance with~~
12.34 ~~any consent to service filed with the commissioner. Service by mail shall be accomplished~~
12.35 ~~in the manner provided in Minnesota Rules, part 1400.5550, subpart 2. Personal service~~
13.1 ~~shall be accomplished in the manner provided in Minnesota Rules, part 1400.5550,~~
13.2 ~~subpart 3.~~
13.3 ~~Subd. 11.~~ ~~**Facsimile; timely service.**~~ ~~When this section permits a request for~~
13.4 ~~hearing to be served by facsimile on the commissioner, the facsimile shall not exceed 15~~
13.5 ~~pages in length. The request shall be considered timely served if the facsimile is received~~
13.6 ~~by the commissioner, at the facsimile number identified by the commissioner in the order,~~
13.7 ~~no later than 4:30 p.m. central time on the last day permitted for faxing the request.~~
13.8 ~~Where the quality or authenticity of the faxed request is at issue, the commissioner~~
13.9 ~~may require the original request to be filed. Where the commissioner has not identified~~
13.10 ~~quality or authenticity of the faxed request as an issue and the request has been faxed in~~
13.11 ~~accordance with this subdivision, the person faxing the request does not need to file the~~

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~~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 as amended by this act. ~~This subdivision is effective May 26, 2007.~~

~~Subd. 14. **Fee.** The certificate fee for the original application and for the renewal of an independent contractor exemption certificate shall be $150.~~

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

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

Subd. 17. **Advisory task force on employee misclassification.** (a) The commissioner of the Department of Labor and Industry shall appoint an advisory task force on employee misclassification and "off-the-books" payment of workers in the construction industry. The advisory task force shall consist of the following members:

(1) the commissioner of the Department of Labor and Industry or designee;

(2) the commissioner of the Department of Employment and Economic Development or designee;

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14.17(3) the commissioner of the Department of Revenue or designee;
14.18(4) the attorney general or designee;
14.19(5) a representative appointed by the Minnesota County Attorneys Association;
14.20(6) two members who are members of a labor organization that represents members
14.21who perform public or private sector commercial or residential building construction
14.22or improvement services;
14.23(7) one member who is a general contractor or a representative of general contractors
14.24that performs public or private sector commercial building construction or improvement
14.25services;
14.26(8) one member who is a general contractor or a representative of general contractors
14.27that performs public or private sector residential building construction or improvement
14.28services;
14.29(9) one member who is a subcontractor or a representative of subcontractors that
14.30performs public or private sector commercial building construction or improvement
14.31services;
14.32(10) one member who is a subcontractor or a representative of subcontractors
14.33that performs public or private sector residential building construction or improvement
14.34services; and
14.35(11) up to three additional members who perform public or private sector commercial
14.36or residential building and construction or improvement services including one member
15.1who is an independent contractor with a current independent contractor certificate; one
15.2member who is a limited liability corporation; and one member who is an employee.
15.3The commissioner of the Department of Labor and Industry or designee shall serve
15.4as the advisory task force chair. The advisory task force shall meet on a regular basis.
15.5(b) The advisory task force shall have the following duties:
15.6(1) advise the commissioner on the development, implementation, and coordination
15.7of enforcement activities, including information sharing and joint investigation and
15.8prosecution of persons who violate laws under the jurisdiction of the Department of
15.9Labor and Industry, Department of Employment and Economic Development, and the
15.10Department of Revenue; and
15.11(2) advise the commissioner on the development and adoption of necessary
15.12legislation, regulations, policies, and procedures.
15.13(c) The advisory task force shall expire and the terms, compensation, and removal of
15.14members shall be as provided in section 15.059, subdivision 6.
15.15(d) The advisory task force shall, prior to its expiration, report to the legislature a
15.16summary of the advice it provided to the commissioner.
15.17**EFFECTIVE DATE.**This section is effective January 1, 2012, except (1) the new
15.18rulemaking authority in subdivision 13 is effective March 1, 2012, and (2) the amendments
15.19in this section do not apply to the regulation of an independent contractor exemption
15.20certificate issued before January 1, 2012, under Minnesota Statutes 2010, section 181.723,
15.21subdivision 5, and shall not be effective for a person holding that exemption certificate

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15.22 until the exemption certificate expires, is revoked, or is canceled.

15.23 Sec. 2. Minnesota Statutes 2010, section 326B.081, subdivision 3, is amended to read:
15.24 Subd. 3. **Applicable law.** "Applicable law" means the provisions of sections
15.25 181.723, 327.31 to 327.36, and this chapter, and all rules, orders, stipulation agreements,
15.26 settlements, compliance agreements, licenses, registrations, certificates, and permits
15.27 adopted, issued, or enforced by the department under sections 181.723, 327.31 to 327.36,
15.28 or this chapter.
15.29 **EFFECTIVE DATE.** This section is effective January 1, 2012, except the
15.30 amendments in this section do not apply to the regulation of an independent contractor
15.31 exemption certificate issued before January 1, 2012, under Minnesota Statutes 2010,
15.32 section 181.723, subdivision 5, and shall not be effective for a person holding that
15.33 exemption certificate until the exemption certificate expires, is revoked, or is canceled.

16.1 Sec. 3. **REPEALER.**
16.2 (a) Minnesota Statutes 2010, section 181.723, subdivision 17, is repealed on May
16.3 15, 2011.
16.4 (b) Minnesota Rules, parts 5202.0100; 5202.0110; 5202.0120; 5202.0130;
16.5 5202.0140; 5202.0150; and 5202.0160, are repealed on January 1, 2012, except that
16.6 they shall remain in effect for the regulation of an independent contractor exemption
16.7 certificate issued before January 1, 2012, under Minnesota Statutes 2010, section 181.723,
16.8 subdivision 5, and shall remain in effect for a person holding that exemption certificate
16.9 until the exemption certificate expires, is revoked, or is canceled.

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NCSRCC
North Central States
Regional Council of Carpenters

May 12, 2011

Ms. Cynthia Valentine
Chair, Advisory Task Force on Employee Misclassification
Minnesota Department of Labor and Industry
443 Lafayette Road N.
St. Paul, Minnesota 55155

Dear Ms. Valentine,

Thank you for the opportunity to serve on the Advisory Task Force on Employee Misclassification, and for your work chairing this important group. For almost two years, this Task Force has studied, discussed, and debated the significant problems related to employee misclassification, cash payment, and fraudulent payment schemes in the construction industry. We have weighed proposals to counter these unlawful and/or unfair practices with the burdens such proposals place on businesses in the industry that play by the rules.

In the end, through a lengthy process of give and take, the Task Force has made recommendations that take into account these thoughtful and deliberate discussions. I believe that these proposals accurately reflects the sentiment of the members of the Task Force as well as many specific policy suggestions by individual members of the Task Force. These proposals incorporate concerns made by state agencies, general contractors, subcontractors, small residential home builders, construction employees, and independent contractors.

I strongly support each of the three recommendations in this report: (1) that the Department of Labor and Industry continue to educate the construction industry about misclassification and its consequences for businesses and workers; (2) that state agencies increase their coordination in enforcing existing laws related to misclassification; and (3) that legislation be enacted that would help to ensure a fair playing field in the construction industry.

Again, thank you for leading this important work.

Sincerely,

Kyle Makarios

James E. Moore
Executive Secretary-Treasurer
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May 13, 2011

Cynthia Valentine
Chief Information Officer
Minnesota Department of Labor and Industry
443 Lafayette Road N.
St. Paul, Minnesota 55155

Re: AGC of Minnesota Comments to the Advisory Task Force on Employee Misclassification Report to the 2011-2012 Biennium, Eighty-Seventh Legislature

Dear Ms. Valentine:

Although the AGC of Minnesota generally supports the descriptions and recommendations included in the Advisory Task Force on Employee Misclassification Report to the 2011-2012 Biennium, Eighty-Seventh Legislature (the "Report"), we do have two significant concerns about the proposed legislation included in Appendix B to the Report.

First, Subdivision 7(b) of the proposed revisions to Minn. Stat. §181.723 would make individual directors, officers, owners, and managers of construction companies personally liable for penalties and fines if, for example, their companies inadvertently failed to renew a registration or a secretary of state filing or failed to obtain a signed and dated written contract. Among other problems, such a clause would undermine one of the primary benefits of incorporation – the protection of individuals and individual assets from the business liabilities of the company.

In addition, Subdivision 7(d) of §181.723 would make it a violation of the statute for a construction company to pay a subcontractor or supplier without a written contract and a written invoice. The realities of the construction industry are such that it simply is not always possible to comply with this proposed requirement, especially for smaller contractors, subcontractors, and suppliers.

AGC of Minnesota

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