

# Bill as Introduced

HB 1368 - AS INTRODUCED

2010 SESSION

10-2413  
01/10

HOUSE BILL            **1368**

AN ACT                relative to the definition of "employee" for workers' compensation purposes.

SPONSORS:            Rep. Goley, Hills 8; Rep. Craig, Hills 9; Rep. R. Holden, Hills 7; Rep. Barody,  
                         Hills 13; Sen. DeVries, Dist 18; Sen. Cilley, Dist 6

COMMITTEE:          Labor, Industrial and Rehabilitative Services

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ANALYSIS

This bill clarifies the evidence required to establish the relationship between the employer and the person providing services under the workers' compensation law.

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Explanation:        Matter added to current law appears in ***bold italics***.  
                         Matter removed from current law appears [~~in brackets and struckthrough.~~]  
                         Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

*In the Year of Our Lord Two Thousand Ten*

AN ACT                   relative to the definition of "employee" for workers' compensation purposes.

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

1           1 Workers' Compensation; Definition of "Employee." Amend RSA 281-A:2, VI(c) to read as  
2 follows:

3                   (c) Prima facie evidence that the criteria prescribed in subparagraphs (b)(1)(A)-(L) have  
4 been met may be established by a written agreement signed by the employer and the person  
5 providing services, on or about the date such person was engaged, which describes the services to be  
6 performed and affirms that such services are to be performed in accordance with each of the criteria.  
7 Nothing in this subparagraph shall require such an agreement to establish that the criteria have  
8 been met. If the commissioner finds that ~~[the employer's use of such written agreement was~~  
9 ~~intended to misrepresent]~~ ***an employer has misrepresented*** the relationship between the employer  
10 and the person providing services, the commissioner may assess a civil penalty of up to \$2,500; in  
11 addition, such employer shall be assessed a civil penalty of \$100 per employee for each day of  
12 noncompliance. The fines shall be assessed from the first day of the infraction but not to exceed one  
13 year. Notwithstanding any provision of law to the contrary, any person with control or responsibility  
14 over decisions to disburse funds and salaries and who knowingly violates the provisions of this  
15 subparagraph shall be held personally liable for payments of fines. All funds collected under this  
16 subparagraph shall be continually appropriated and deposited into a nonlapsing workers'  
17 compensation fraud fund dedicated to the investigation and compliance activities required by this  
18 section and related sections pertaining to labor and insurance law. The commissioner of labor shall  
19 appoint as many individuals as necessary to carry out the department's responsibilities under this  
20 section.

21           2 Effective Date. This act shall take effect January 1, 2011.

HB 1368 - AS AMENDED BY THE HOUSE

17Feb2010... 0374h

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HOUSE BILL **1368**

AN ACT relative to the definition of "employee" for workers' compensation purposes.

SPONSORS: Rep. Goley, Hills 8; Rep. Craig, Hills 9; Rep. R. Holden, Hills 7; Rep. Barody, Hills 13; Sen. DeVries, Dist 18; Sen. Cilley, Dist 6

COMMITTEE: Labor, Industrial and Rehabilitative Services

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1 1 Workers' Compensation; Definition of "Employee." Amend RSA 281-A:2, VI(c) to read as  
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3 (c) *A written agreement signed by the employer and the person providing*  
4 *services, on or about the date such person was engaged, which describes the services to be*  
5 *performed and affirms that such services are to be performed in accordance with each of*  
6 *the criteria in subparagraphs (b)(1)(A)-(L) is prima facie evidence that the criteria have*  
7 *been met.* [~~Prima facie evidence that the criteria prescribed in subparagraphs (b)(1)(A)-(L) have~~  
8 ~~been met may be established by a written agreement signed by the employer and the person~~  
9 ~~providing services, on or about the date such person was engaged, which describes the services to be~~  
10 ~~performed and affirms that such services are to be performed in accordance with each of the criteria.]  
11 Nothing in this subparagraph shall require such an agreement to establish that the criteria have  
12 been met.~~

13 (d) If the commissioner finds that [~~the employer's use of such written agreement was~~  
14 ~~intended to misrepresent]~~ *an employer has misrepresented* the relationship between the employer  
15 and the person providing services, the commissioner may assess a civil penalty of up to \$2,500; in  
16 addition, such employer [~~shall~~] *may* be assessed a civil penalty of \$100 per employee for each day of  
17 noncompliance. The fines [~~shall~~] *may* be assessed from the first day of the infraction but not to  
18 exceed one year. Notwithstanding any provision of law to the contrary, any person with control or  
19 responsibility over decisions to disburse funds and salaries and who knowingly violates the  
20 provisions of this subparagraph shall be held personally liable for payments of fines. All funds  
21 collected under this subparagraph shall be continually appropriated and deposited into a nonlapsing  
22 workers' compensation fraud fund dedicated to the investigation and compliance activities required  
23 by this section and related sections pertaining to labor and insurance law. The commissioner of  
24 labor shall appoint as many individuals as necessary to carry out the department's responsibilities  
25 under this section.

26 2 Effective Date. This act shall take effect January 1, 2011.

CHAPTER 145  
HB 1368 - FINAL VERSION

17Feb2010... 0374h  
05/12/10 1967s  
05/12/10 2024s

2010 SESSION

10-2413  
01/10

HOUSE BILL **1368**

AN ACT relative to the definition of "employee" for workers' compensation purposes and relative to the New Hampshire return to work program.

SPONSORS: Rep. Goley, Hills 8; Rep. Craig, Hills 9; Rep. R. Holden, Hills 7; Rep. Baroody, Hills 13; Sen. DeVries, Dist 18; Sen. Cilley, Dist 6

COMMITTEE: Labor, Industrial and Rehabilitative Services

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AMENDED ANALYSIS

This bill clarifies the evidence required to establish the relationship between the employer and the person providing services under the workers' compensation law. The bill also provides that participants in the department of employment security's return to work program shall be entitled to certain unemployment compensation benefits.

-----

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STATE OF NEW HAMPSHIRE

*In the Year of Our Lord Two Thousand Ten*

AN ACT                   relative to the definition of “employee” for workers’ compensation purposes and  
relative to the New Hampshire return to work program.

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

1           145:1 Workers’ Compensation; Definition of “Employee.” Amend RSA 281-A:2, VI(c) to read as  
2 follows:

3                   (c) *A written agreement signed by the employer and the person providing*  
4 *services, on or about the date such person was engaged, which describes the services to be*  
5 *performed and affirms that such services are to be performed in accordance with each of*  
6 *the criteria in subparagraphs (b)(1)(A)-(L) is prima facie evidence that the criteria have*  
7 *been met.* [~~Prima facie evidence that the criteria prescribed in subparagraphs (b)(1)(A)-(L) have~~  
8 ~~been met may be established by a written agreement signed by the employer and the person~~  
9 ~~providing services, on or about the date such person was engaged, which describes the services to be~~  
10 ~~performed and affirms that such services are to be performed in accordance with each of the criteria.]  
11 Nothing in this subparagraph shall require such an agreement to establish that the criteria have  
12 been met.~~

13                   (d) If the commissioner finds that [~~the employer’s use of such written agreement was~~  
14 ~~intended to misrepresent]~~ *an employer has misrepresented* the relationship between the employer  
15 and the person providing services, the commissioner may assess a civil penalty of up to \$2,500; in  
16 addition, such employer [~~shall~~] *may* be assessed a civil penalty of \$100 per employee for each day of  
17 noncompliance. The fines [~~shall~~] *may* be assessed from the first day of the infraction but not to  
18 exceed one year. Notwithstanding any provision of law to the contrary, any person with control or  
19 responsibility over decisions to disburse funds and salaries and who knowingly violates the  
20 provisions of this subparagraph shall be held personally liable for payments of fines. All funds  
21 collected under this subparagraph shall be continually appropriated and deposited into a nonlapsing  
22 workers’ compensation fraud fund dedicated to the investigation and compliance activities required  
23 by this section and related sections pertaining to labor and insurance law. The commissioner of  
24 labor shall appoint as many individuals as necessary to carry out the department’s responsibilities  
25 under this section.

26           145:2 New Subparagraph; Employment; New Hampshire Return to Work Program. Amend  
27 RSA 282-A:9, IV by inserting after subparagraph (w) the following new subparagraph:

**CHAPTER 145**  
**HB 1368 - FINAL VERSION**  
**- Page 2 -**

1           (x) Participation in the New Hampshire return to work program in the department of  
2 employment security which provides a structured, supervised training opportunity to claimants  
3 through a designated employer/training partner. Claimants participate on a voluntary basis and  
4 continue to receive unemployment compensation during the training period as long as they remain  
5 otherwise eligible. The training program duration is a maximum of 6 weeks and a maximum of 24  
6 hours per week.

7           145:3 New Section; Return to Work Program Participants; Workers' Compensation Eligibility.  
8 Amend RSA 282-A by inserting after section 26 the following new section:

9           282-A:26-a Return to Work Program Participants; Workers' Compensation Eligibility.

10           I. A participant in the department of employment security's return to work program shall be  
11 entitled to certain benefits under RSA 281-A. In the event that it is determined that a return to  
12 work program participant has been subject to an injury or occupational disease producing a  
13 disability arising out of and in the course of participation in the return to work program, the  
14 department of employment security shall not provide compensation pursuant to RSA 281-A:28, 281-  
15 A:28-a, 281-A:31, and 281-A:31-a, but the participant shall receive unemployment compensation  
16 benefits while otherwise eligible under RSA 282-A, or compensation equivalent to 90 percent of those  
17 benefits if the disability causes the participant to become ineligible for benefits under RSA 282-A.  
18 When determining the amount of compensation provided pursuant to RSA 281-A:32 for a scheduled  
19 permanent impairment award, the amount of compensation shall be calculated by using the  
20 minimum wage at the time of injury multiplied by the average number of hours in training per week.

21           II. For a participant in the return to work program, RSA 281-A:8, I and II shall not apply  
22 and the following provisions shall apply:

23           (a) A participant in the return to work program shall be conclusively presumed to have  
24 accepted the provisions of this chapter and, on behalf of the participant or the participant's personal  
25 or legal representatives, to have waived all rights of action whether at common law or by statute or  
26 provided under the laws of any other state or otherwise:

27           (1) Against the employer/training partner, or the employer/training partner's  
28 insurance carrier, or an association or group providing self-insurance to a number of employers, or  
29 the department and the return to work program; and

30           (2) Except for intentional torts, against any officer, director, agent, servant, or  
31 employee acting on behalf of the entities named in subparagraph (a)(1).

32           (b) The spouse of a return to work program participant entitled to benefits under this  
33 chapter, or any other person who might otherwise be entitled to recover damages on account of the  
34 participant's personal injury or death, shall have no direct action, either at common law or by statute  
35 or otherwise, to recover for such damages against any person identified in this paragraph.

36           III. The department of employment security may provide this benefit by appropriate means



**CHAPTER 145**  
**HB 1368 – FINAL VERSION**  
**- Page 3 -**

1 including purchasing and serving as the master policyholder for any insurance, by self-insurance, or  
2 by administrative services contract.

3 IV. Except as otherwise provided in this section, all other provisions of RSA 281-A shall  
4 apply.

5 145:4 Effective Date. This act shall take effect upon its passage.

6 Approved: June 14, 2010

7 Effective Date: June 14, 2010

# Amendments



Amendment to HB 1368

1 Amend the title of the bill by replacing it with the following:

2

3 AN ACT relative to the definition of "employee" for workers' compensation purposes and  
4 relative to the New Hampshire return to work program.  
5

6 Amend the bill by replacing all after section 1 with the following:

7

8 2 New Subparagraph; Employment; New Hampshire Return to Work Program. Amend  
9 RSA 282-A:9, IV by inserting after subparagraph (w) the following new subparagraph:

10 (x) Participation in the New Hampshire return to work program in the department of  
11 employment security which provides a structured, supervised training opportunity to claimants  
12 through a designated employer/training partner. Claimants participate on a voluntary basis and  
13 continue to receive unemployment compensation during the training period as long as they remain  
14 otherwise eligible. The training program duration is a maximum of 6 weeks and a maximum of 24  
15 hours per week.

16 3 New Section; Return to Work Program Participants; Workers' Compensation Eligibility.  
17 Amend RSA 282-A by inserting after section 26 the following new section:

18 282-A:26-a Return to Work Program Participants; Workers' Compensation Eligibility.

19 I. A participant in the department of employment security's return to work program shall be  
20 entitled to certain benefits under RSA 281-A. In the event that it is determined that a return to  
21 work program participant has been subject to an injury or occupational disease producing a  
22 disability arising out of and in the course of participation in the return to work program, the  
23 department of employment security shall not provide compensation pursuant to RSA 281-A:28, 281-  
24 A:28-a, 281-A:31, and 281-A:31-a, but the participant shall receive unemployment compensation  
25 benefits while otherwise eligible under RSA 282-A, or compensation equivalent to 90 percent of those  
26 benefits if the disability causes the participant to become ineligible for benefits under RSA 282-A.  
27 When determining the amount of compensation provided pursuant to RSA 281-A:32 for a scheduled  
28 permanent impairment award, the amount of compensation shall be calculated by using the  
29 minimum wage at the time of injury multiplied by the average number of hours in training per week.

30 II. For a participant in the return to work program, RSA 281-A:8, I and II shall not apply  
31 and the following provisions shall apply:

32 (a) A participant in the return to work program shall be conclusively presumed to have



1 accepted the provisions of this chapter and, on behalf of the participant or the participant's personal  
2 or legal representatives, to have waived all rights of action whether at common law or by statute or  
3 provided under the laws of any other state or otherwise:

4 (1) Against the employer/training partner, or the employer/training partner's  
5 insurance carrier, or an association or group providing self-insurance to a number of employers, or  
6 the department and the return to work program; and

7 (2) Except for intentional torts, against any officer, director, agent, servant, or  
8 employee acting on behalf of the entities named in subparagraph (a)(1).

9 (b) The spouse of a return to work program participant entitled to benefits under this  
10 chapter, or any other person who might otherwise be entitled to recover damages on account of the  
11 participant's personal injury or death, shall have no direct action, either at common law or by statute  
12 or otherwise, to recover for such damages against any person identified in this paragraph.

13 III. The department of employment security may provide this benefit by appropriate means  
14 including purchasing and serving as the master policyholder for any insurance, by self-insurance, or  
15 by administrative services contract.

16 IV. Except as otherwise provided in this section, all other provisions of RSA 281-A shall  
17 apply.

18 4 Effective Date. This act shall take effect January 1, 2011.



2010-1967s

AMENDED ANALYSIS

This bill clarifies the evidence required to establish the relationship between the employer and the person providing services under the workers' compensation law. The bill also provides that participants in the department of employment security's return to work program shall be entitled to certain unemployment compensation benefits.

# Committee Minutes

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**SENATE CALENDAR NOTICE  
COMMERCE, LABOR AND CONSUMER PROTECTION**

- ✓ Senator Margaret Hassan Chairman
- ✓ Senator Betsi DeVries V Chairman
- ✓ Senator Deborah Reynolds
- ✓ Senator Jacalyn Cilley
- ✓ Senator Peter Bragdon
- ✓ Senator Sheila Roberge

For Use by Senate Clerk's Office ONLY	
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<input type="checkbox"/> Calendar	
Proof: <input type="checkbox"/> Calendar	<input type="checkbox"/> Bill Status

**Date: April 5, 2010**

**HEARINGS**

**Tuesday**

**4/27/2010**

COMMERCE, LABOR AND CONSUMER PROTECTION

LOB 102

8:30 AM

(Name of Committee)

(Place)

(Time)

**EXECUTIVE SESSION MAY FOLLOW**

- 8:30 AM HB1187
- ✓ 8:45 AM HB1368
- 9:00 AM HCR30
- 9:15 AM HB1364

relative to residential elevators and accessibility lifts.  
 relative to the definition of "employee" for workers' compensation purposes.  
 (New Title) urging the attorney general to fully investigate the proposed transaction between Catholic Medical Center Healthcare System and Dartmouth-Hitchcock Health.  
 relative to Medicare unfair trade practices.

**Sponsors:**

**HB1187**

Rep. Nancy Elliott  
 Rep. Edith Hogan

Rep. Carol McGuire

Rep. Warren Groen

Rep. Laurie Boyce

**HB1368**

Rep. Jeffrey Goley  
 Sen. Betsi DeVries

Rep. James Craig  
 Sen. Jacalyn Cilley

Rep. Rip Holden

Rep. Benjamin Baroody

**HCR30**

Rep. Joel Winters

Rep. Connie Soucy

Rep. William Infantine

**HB1364**

Rep. James Headd

Rep. Donald Flanders

*START: 8:53am*

*END: 9:17am - RECESSED*

**Commerce, Labor & Consumer Protection Committee  
Hearing Report**

**To:** Members of the Senate  
**From:** Greg Silverman, *Legislative Aide*  
**Re:** Hearing report on **HB1368** - relative to the definition of "employee" for workers' compensation purposes.  
**Hearing date:** April 27<sup>th</sup>, 2010

**Members of the Committee Present:** Senator Hassan, District 23; Senator DeVries, District 18; Senator Reynolds, District 2; Senator Roberge, District 9; Senator Cilley, District 6; Senator Bragdon, District 11.

**Members of the Committee Absent:** None.

**Sponsors:** Rep. Goley, Hills 8; Rep. Craig, Hills 9; Rep. R. Holden, Hills 7; Rep. Baroody, Hills 13; Sen. DeVries, Dist 18; Sen. Cilley, Dist 6.

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**What the bill does:** This bill clarifies the evidence required to establish the relationship between the employer and the person providing services under the workers' compensation law.

**Who supports this bill:** Rep. Jeff Goley, Hills 8; Senator DeVries, District 18; Commissioner Tara Reardon, NH Employment Security; Marty Jenkins, Dept. of Labor; Bob Nash, Independent Insurance Agents of NH; Joe Donahue, Carpenters Union; Mark McKenzie, President of NH AFL-CIO; Gary Abbott, VP Association General Contractors of NH.

**Who opposes this bill:** None.

**Summary of testimony received:**

Rep. Jeff Goley, Hills 8.

- Prime Sponsor.
- This legislation originated through a task force on employee misclassification.
- Previously, the only way the Dept. of Labor could enforce these provisions was if a deceiving written agreement was produced beforehand.
  - Violations were very difficult to prosecute in this way.
  - Amended so misrepresentation by an employer is a violation.
- Gave the Commissioner of Labor greater discretion of levying a fine to an employer by changing 'shall' to 'may.'

Senator DeVries, District 18.

- Proposed an amendment regarding stop work orders.
  - On the books in Maine and awaiting the Governor's signature in Vermont.
  - Represents NCOIL model language.
- A stop work order is when the Labor Dept. declares a stop and decess order on a continuous violator.

Commissioner Tara Reardon, NH Employment Security

- Proposed amendment defining 'return to work.'
- 2<sup>nd</sup> two paragraphs outline insurance details for welfare to work participants
  - Either self insured or through purchasing a policy.
- This will strengthen legislation to support the NH Working commission.

Marty Jenkins, Dept. of Labor.

- Supports HB1368 as written.
- Encourages a written agreement if an employer wants to hire someone as an independent contractor.
  - Preexisting law hampered enforcement efforts. The Department can only press for a violation if employer intentionally misrepresents a written agreement.
- Reversing 'shall' to 'may' reflects consistent policy at the DOL.
- Neutral to Sen. DeVries' amendment.
- Strongly support NH working amendment by Employment Security.
- Many times an employer intentionally calls employers independent contractors to save on workers compensation insurance and taxes. However, it is clear they do not meet the NH test for an independent contractor and are in fact employees.

Bob Nash, Independent Insurance Agents of NH.

- Supports HB1368 as amended by the House and Commissioner Reardon.
- As per the DeVries amendment supports "knowingly" violated the law.
  - Making a company personally liable is very punitive.

Joe Donahue, Carpenters Union.

- Strongly support Sen. DeVries' amendment for repeat offenders.
- Workers comp rates have fallen 52% in FL because of tight regulations related to the language in DeVries' amendment.
- A stop work order was one of the most effective tools FL has to enforce laws.

Mark McKenzie, President of NH AFL-CIO.

- Supports HB1368 and amendment from DeVries.

Gary Abbott, VP Association General Contractors of NH.

- Supports HB1368 as amended by the House.
- Has concerns about stop work orders.
  - There may be a problem with one subcontractor, but the DeVries amendment would require stoppage of the whole site.

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**Hearing date:** May 6<sup>th</sup>, 2010

**Members of the Committee Present:** Senator Hassan, District 23; Senator DeVries, District 18; Senator Reynolds, District 2; Senator Roberge, District 9; Senator Cilley, District 6; Senator Bragdon, District 11.



**Members of the Committee Absent:** None.

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Gary Abbott, Exec. Vice President of Associated General Contractors of NH.

- Supports original bill.
- Concerned about Amendment 1585s.
  - The language is vague.
    - It does not fully explain the stop work process and the specificities regarding independent contractors and subcontractors.
- The provision that allows the stop-work order could be applied to successor firms.
- The amendment may affect other industries as well as construction.

Maria Dalterrio, General Counsel NH Employment Security.

- Supports the Department's Amendment.
- RSA 167-91b concerns workers compensation eligibility.
  - Defines what the benefits would be to the trainees enrolled in NH working.
- This will strengthen overall legislation to support the NH Working commission.

Paul Morin, Home Builders and Remodelers Association.

- Supports sending Amendment 1585s to the employee misclassification taskforce.

Peter McCardle, NH Association of Domestic Insurance Companies.

- Supports sending Amendment 1585s to the employee misclassification taskforce.

Mark Holden, President of Associated Builders and Contractors.

- Supports sending Amendment 1585s to the employee misclassification taskforce.
- Too premature to enact at this time because there are still many questions about definitions and consequences.

Joe Donahue, Carpenters Union.

- Supports the bill and Amendment 1585s.
- This amendment deals with repeat offenders, unlike other New England states which issue a stop-work order on the first offense.
  - They also forbid them from doing state work for 3 years.
- Officials from other states say this is the most efficient tool to stop employee misclassification.
- The stop-work order would only affect the violating contractor where the violation occurred.
  - The committee noted they were concerned the amendment would apply to other industries besides construction sites.

**Action:** Senator DeVries moved the bill Ought to Pass. Senator Hassan seconded the motion. Senator Hassan moved the NH Employment Security amendment Ought to Pass. Senator DeVries seconded the motion. The committee voted 4-0. Senator Hassan Moved the bill as amended Ought to Pass. Senator DeVries seconded the motion. The committee voted 3-1 in favor. Senator DeVries will take the bill out.

RP

Date: April 27, 2010  
Time: 8:53 A.M.  
Room: LOB 102

The Senate Committee on Commerce, Labor and Consumer Protection held a hearing on the following:

HB1368 (New Title) relative to the definition of "employee" for workers' compensation purposes and relative to the New Hampshire return to work program.

Members of Committee present: Senator Hassan  
Senator DeVries  
Senator Reynolds  
Senator Cilley  
Senator Bragdon  
Senator Roberge

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The Chair, Senator Margaret Wood Hassan, opened the hearing on HB1368 and invited the prime sponsor, Representative Jeffrey Goley, to introduce the legislation.

Representative Jeffrey Goley: Good morning, Madam Chairman, and members of the Committee. I will try to keep brief to two minutes. For the record, I'm Representative Jeff Goley, representing Hillsborough District 8, Manchester's Ward 1.

House Bill 1368 was brought forward as I am a member of the Task Force on Employee Misclassification, as well as Senator DeVries. This legislation, this wording came about through the task force and with some work with the Department of Labor. What we did in the first part of it, the written agreement and the prima facie evidence, we changed that and one of the members of my committee felt that this cleared it up a little better, the wording, the language versus what was currently in the bill.

The second part, (d), it was brought forward through the Department of Labor that just the only way they could go after someone was if they had a written agreement, and a lot of people out there were just doing verbals through independent contractors when they were hiring them; that you can

work for me for such and such a wage, and so many hours, and I will pay you afterwards. So there was that trouble of finding that written document to go after that employer. What this does is change that to saying if the employer has misrepresented the relationship between the employer and the person providing services to make it a little easier to define if something has gone wrong and not having to have that written document to prove that.

And then, the third change was giving the Commissioner a little bit of leeway in the changing "shall" to "may." As we know, we have the 12-point criteria and it can get a little confusing from time to time that if that employer didn't intentionally misrepresent that doing, that the Commissioner has a little bit of discretion in levying the fine against the employer. So, that is why we changed the "shall" to "may" so that the Commissioner will still have the discretion on that.

Other than that, those were the three main changes in 1368.

Senator Margaret Wood Hassan, D. 23: Thank you. Have you seen Senator DeVries' amendment?

Representative Goley: Yes I have.

Senator Margaret Wood Hassan, D. 23: Okay, and do you support it?

Representative Goley: I know there's two amendments.

Senator Betsi DeVries, D. 18: The stop work.

Representative Goley: The stop work. In concept I do. I'm just a little concerned on some of the penalties. I'm not sure if that will fly, the \$5,000 they pay is a stiff penalty, but I mean stop work orders I think are a good thing. We have seen them happen in other states and be very effective for employee misclassification.

Senator Margaret Wood Hassan, D. 23: Thank you. Are there questions for Representative Goley? Seeing none, thank you very much for your testimony.

Representative Goley: Thank you.

Senator Margaret Wood Hassan, D. 23: Senator DeVries, do you want to present your amendment?

Senator Betsi DeVries, D. 18: Sure.

Senator Margaret Wood Hassan, D. 23: And then, we might as well have people hear it and think about it before they...

Senator Betsi DeVries, D. 18: Thank you, Madam Chair, and members of the Committee. For the record, I'm Senator Betsi DeVries, representing District 18.

The amendment that has been distributed to you is an amendment that is similar in language to what has already passed in the state of Maine, has recently just passed in the state of Vermont through their Senate awaiting the signature of their Governor, has been adopted in most New England states, and also is model language for NCOIL, the National Committee, I think it is, National Conference of Insurance Legislators.

**Please see Attachment #1 – proposed amendment #1585s submitted by Senator Betsi DeVries.**

Though the language may not be 100% consistent, and I will admit to you that I have just received a copy of the NCOIL model language, so there may be some need to further look at what has been drafted for you. But, the theory in practice here is to allow that flexibility for the first offender that may be able to make a strong case that they did not have knowledge of the rules or regulations to follow when they were caught up. And, that is the enabling language that you've just heard about, changing "shall" to "may" for first offenders. But, to have a more serious penalty phase for those that are knowingly repeat offenders.

The stop work order is when the Department has decided that there is a knowing violation here and has decided to tell the company to cease and desist until they've put insurance in place. And, if the company continues to work without the benefit of workmen's comp insurance, that is when you will see the penalty phase of \$5,000 a day kick in.

So, that is an egregious circumstance, the penalty of \$5,000 a day, where an employer is knowingly disregarding a stop work order that is put in place by the Department, by the Commissioner of Labor. I think that is acceptable, but as always I'm sure we will bat around the amount of that penalty and decide whether or not that is the right amount for New Hampshire.

Senator Margaret Wood Hassan, D. 23: Thank you. Any questions for Senator DeVries? Senator Reynolds.

Senator Deborah R. Reynolds, D. 2: Thank you, Madam Chair. Thank you, Senator DeVries. The \$5,000 per day, to your knowledge, is it in place in Vermont and Maine?

Senator Betsi DeVries, D. 18: I don't have that knowledge. But I think there may be somebody behind me that will be speaking to that and that would have that knowledge.

Senator Deborah R. Reynolds, D. 2: Thank you, Senator.

Senator Betsi DeVries, D. 18: Thank you.

Senator Margaret Wood Hassan, D. 23: Any other questions for Senator DeVries? Thank you very much for your testimony. Commissioner Reardon is here.

Commissioner Tara Reardon: Madam Chair, we have an amendment that does not affect this bill per se, but it is a workers' comp amendment.

Senator Margaret Wood Hassan, D. 23: Why don't you on come up and introduce yourself with Ms. Dalterio.

Commissioner Reardon: Good morning, Madam Chair. The amendment that we have that we'll pass out to you enables our return to work portion, the middle initiative of the New Hampshire Working Initiative, for us to provide workers' comp coverage. Right now, we are doing it with a memorandum of understanding through Administrative Services for the state.

**Please see Attachment #2 – amendment proposed by Commissioner Reardon, New Hampshire Employment Security.**

This bill does just a couple of simple things. First, it defines "return to work" in our statute. The second two paragraphs are really we've copied RSA 167 where the welfare to work participants are covered under the state's policy there. And then, paragraph three, you will see it gives us the ability to provide our workers' comp either through a memorandum of understanding, as we are doing through Administrative Services right now, by self-insuring, or buying a policy. It is the wisdom of the Department that buying a policy is the less risky way to do that.

Senator Margaret Wood Hassan, D. 23: Thank you. Are there questions?

I just want to clarify that, for the record, these are amendments that the Department is recommending to reflect in legislation what you are already doing to support the New Hampshire Working Initiative. Is that correct?

Commissioner Reardon: And give us another option on how to provide that coverage, yes.

Senator Deborah R. Reynolds, D. 2: Madam Chair, I don't think we all got this.

Senator Margaret Wood Hassan, D. 23: Did we all get copies?

Senator Jacalyn L. Cilley, D. 6: No.

Senator Deborah R. Reynolds, D. 2: No.

Senator Margaret Wood Hassan, D. 23: Oh, okay. They are coming. Senator Bragdon did you have a question?

Senator Peter E. Bragdon, D. 11: Yes, just a question for you, Madam Chair. We have now had two amendments that are significant. I assume the intent is not to exec on this bill today.

Senator Margaret Wood Hassan, D. 23: The intent is not to exec on this bill today, and given what I know is going to be a lengthy hearing coming up on the next bill, what I would like to do is try to get through the list of speakers that we have on this bill briefly, but my intention, we don't have a session of Commerce scheduled right now for Thursday, May 6<sup>th</sup>. I think I should recess this hearing to May 6<sup>th</sup>, understanding we will need to exec this bill on May 6<sup>th</sup>. But that will allow people to consider these amendments and make sure that whatever questions they have can be answered fully.

But, I would welcome comments about the amendments from anybody else testifying who has had a chance to look at them. Okay?

Senator Peter E. Bragdon, D. 11: Thank you.

Senator Margaret Wood Hassan, D. 23: Anybody else? Okay, thank you both very much for coming over here and for the language. Mr. Jenkins, please.

Attorney Martin Jenkins: Thank you. Good morning. My name is Martin Jenkins, I am counsel for the New Hampshire Department of Labor.

Taking things in order, the Department of Labor strongly supports the original House Bill 1368 as it has been presented to you in the two parts. The first one encourages a written agreement when an employer wants to hire someone as an independent contractor, that they thoughtfully go through an agreement with the worker to be sure that everyone understands that's exactly what they are doing. That's a very good idea.

Part (d) would change the preexisting law which hampered our enforcement efforts. Under the preexisting law as it is written now, we can only press for a violation if the employer has used a written agreement to intentionally misrepresent the classification of an employee as an independent contractor. We find that that rarely happens; that people put down in writing their intention to violate the law. So, what we would like to do is take that out and simply say, if we can prove there has been misrepresentation, then we can proceed to the penalty.

We do prefer the "may" language rather than the "shall" language because that pretty much reflects what is consistent policy at the Department of Labor. There are many other statutes reflecting the Commissioner of Labor's power to assess a civil penalty. And, in 273, his general power, in 275-F, the new WARN Act, in 281-A, the workers' compensation law which has several different civil penalty provisions. It is almost universally "may". We find that this allows us a lot of discretion to get good conduct without using a hammer, but with using perhaps a fly swatter. So, we really would like that discretion if we could.

Secondly, Senator DeVries' amendment is fairly new, we only saw it recently. Of course, we will enforce whatever you tell us to do as the law of the state. We formally neither support nor oppose it. There is some question about the wording. It is a bit unclear to us exactly what we're supposed to do in certain circumstances; unclear whether the determination for the stop work order means simply an investigation that looks like there might be a violation or if we have to go all the way through to a finding of a violation after a hearing. And there is some question whether this stop work order for the site of the violation would really stop work on a huge site if it's just like the painter subcontractor who has done something wrong. We are not clear exactly what that means there. But, as I say, we neither support nor oppose it.

And then, finally what Commissioner Reardon has presented for the New Hampshire Working, we strongly favor that, we are strongly in support of that. We want to get New Hampshire working; worked hard with Maria to come up with that language. We think it would work, and be appropriate, and we would love to see that in the law.

Thank you. Questions?

Senator Margaret Wood Hassan, D. 23: Thank you.

Senator Betsi DeVries, D. 18: Madam Chair.

Senator Margaret Wood Hassan, D. 23: Yes.

Senator Betsi DeVries, D. 18: In reference to the amendment, would, the amendment that I presented, would the Department of Labor be at the next meeting on May 6<sup>th</sup> in order to address our questions at that time?

Attorney Jenkins: Absolutely.

Senator Margaret Wood Hassan, D. 23: I'm sure they will be. Any further questions? Quickly, please.

Senator Jacalyn L. Cilley, D. 6: Thank you, Madam Chair, and thank you, Mr. Jenkins, for your testimony. I just want to make sure, this language in (d) on the original bill, "if the Commissioner finds that an employer has misrepresented." This has shown up, I think at least four times over the last four years in various iterations. Will it be in rules how you determine what that misrepresentation is? Or, is this just a flat, if they shouldn't have been working at that site because they were misclassified....

Attorney Jenkins: No. Misrepresentation implies some, what we lawyers call scienter, some intentionality to do something wrong. It is not simply accident or I looked at it and I was mistaken. This is where we can show that the employer intentionally called these workers independent contractors so that he could save on workers' compensation, so he could save on taxes. When in fact it is clear, both objectively and should have been obvious to the employer, that these people do not meet the New Hampshire test for employment, I'm sorry for an independent contractor, so they are in fact employees and everybody should have known that.

Senator Margaret Wood Hassan, D. 23: Senator Reynolds.

Senator Deborah R. Reynolds, D. 2: Very quickly. But, you would agree that misrepresentation could be intentional or negligent. So I guess, to go to Senator Cilley's question, I just will think about this before May 6<sup>th</sup>, there may be some need to have more of a mens rea in terms of misrepresentation.

Attorney Jenkins: All the more reason why we want "may" rather than "shall."



Senator Deborah R. Reynolds, D. 2: Okay. Thank you.

Senator Margaret Wood Hassan, D. 23: Thank you. Are there further questions? Seeing none, thank you very much for your testimony. Mr. Nash, please. And, I have learned how to work my stopwatch now on this just so everybody knows. I'm getting good.

Bob Nash: Thank you, Madam Chairman. Bob Nash, I'm the President of the Independent Insurance Agents of New Hampshire.

We are here in support of House Bill 1368. We also have reviewed Commissioner Reardon's amendment. We have absolutely no problem with that, and would support that also.

Concerning Senator DeVries' amendment, I would ask two things as you work through that amendment. We commend the Senator for making sure that the stop work order centers around knowingly violating the law rather than inadvertently violated. And we point out line 18 in the current bill that states "who knowingly violates the provisions of this subparagraph" also becomes personally liable for any fines. That's pretty punitive damages. So we would hope, as you review Senator DeVries' amendment, it would not conflict with line 19, and that we could have a stop work order amendment that would make sense here in the entirety.

And with that, Madam Chairman, we support the bill.

Senator Margaret Wood Hassan, D. 23: Thank you very much. Any questions? Seeing none, thank you very much. And, folks that was just a minute and four seconds, and it was exemplary testimony. Joe Donahue, please.

Joe Donahue: Thank you, Madam Chair. I brought written testimony for the Committee. And, I will do my best to keep it under two minutes.

**Please see Attachment # 3- prepared testimony submitted by Joe Donahue, Carpenters Labor Management Program.**

Senator Margaret Wood Hassan, D. 23: Thank you.

Mr. Donahue: My name is Joseph Donahue, I'm with the Carpenters Labor Management Program. I live in Derry, New Hampshire. I'm also a member of the New Hampshire Workers' Comp Fraud Task Force.

I have supplied written testimony with a lot of information in it. I will go very quickly through it. We strongly support the first change in the legislation dealing with the written contracts.

The second change in the legislation that gives the Commissioner discretion and changes "shall" to "may", we agree with in theory, but our experience has shown us that some people may take advantage of that. And that's why we strongly support the amendment for repeat offenders. People who have had a chance the first time and choose to break the law again, we believe the penalty should be more severe.

In my written testimony, I have listed a number of states that have stop work orders in place. Most of those states I've listed are from the Northeast. As Senator DeVries mentioned, two weeks ago, Governor Baldacci signed Maine's stop work order legislation into law. Yesterday, the Vermont Senate passed theirs out and it is on its way to the Governor.

In the testimony, as you look at the states in the boxes, I've also put websites at the bottom where you can go to and gather all this information yourself; speaks about stop work orders.

The one exception to the Northeast part of this is I put Florida in there. The reason why I put Florida in there is Florida was one of the first states to aggressively go after misclassification. And as you can see, since 2004, they have issued 14,000 stop work orders.

At the bottom of Florida's box, you will see there's two websites. One website is to find out about the stop work orders. The second website is a report released by the Florida Insurance Department, and in that report it shows that, since all their new laws went into place regarding this whole issue in 2003, that their workers' comp rates and contracts have fallen 52% in the State of Florida because of their aggressive actions.

One other point I want to make about most of these states, with the exception of New Jersey, all of them issue stop work orders and the other penalties on first offenses, not on second offenses. Here, we are asking on the second offense. And, I'm just flying through this because I know the time is going.

One other thing, two other points quickly I want to make. Several months ago members of our task force went to a task force summit where members from task forces across the Northeast got together and one of the main points that were made at that taskforce of states who have stop work order authority is that that was either one of or the most effective tool they had to combat this problem.

The second thing I want to mention is the NCOIL. I also brought a copy of that report which I will leave for the Committee.

**Transcriber's note: The NCOIL report was not submitted for the record.**

The one thing to keep in mind on the model legislation is again that is for first offenses, where we're asking in this for second offenses.

And, that was as quick as I could do it.

Senator Margaret Wood Hassan, D. 23: That was great. Thank you very much. I see Senator Cilley's hand raised, or didn't I? Are you just putting on your glasses?

Senator Jacalyn L. Cilley, D. 6: No. I wouldn't want to be at an auction.

Senator Margaret Wood Hassan, D. 23: No you wouldn't want to be at an auction. Any other questions for Mr. Donahue here? Thank you very much for the testimony. And, I hope that you will be able to be here next Thursday as questions may come up as people consider it. Mr. MacKenzie, please.

Mark MacKenzie: Madam Chair, thank you. I won't even sit down. I'm Mark MacKenzie, President of New Hampshire AFL-CIO.

We are here in support of 1368, the original bill. We are in support of the amendment that has been put by Senator DeVries. And finally, we have not seen the workers' comp piece that has come up so we need to review that. Would be happy to come back and work with the Committee and be willing to answer any questions.

Senator Margaret Wood Hassan, D. 23: Thank you very much. Any questions for Mr. MacKenzie at this time? Seeing none, thank you very much. Mr. Abbott.

Gary Abbott: Thank you, Madam Chairman. For the record, my name is Gary Abbott. I'm the Executive Vice President of the Associated General Contractors of New Hampshire.

For the record, today, I did not plan to testify until I saw the second amendment. So, I would like to just first put up House Bill 1368 as it came over from the House. We are in support of that. I know there is not multiple spots to pick out on the sign-up sheet.

When it comes to the stop work orders, we have a number of concerns so that is why I checked off we are in opposition, at the moment, because stop work orders on a large construction site you may be involving one subcontractor. And this statute really is about the misrepresentation of those that are called independent contractors and so there really is a lack of process in here that Marty Jenkins talked about.

In a quick read of this thing, there needs to be more language as far as the procedure and whether this is the appropriate place for that because this is really about the criteria and independent, and I think stop work orders. I heard some testimony relating to other issues with classification and other areas other than just whether you are an independent.

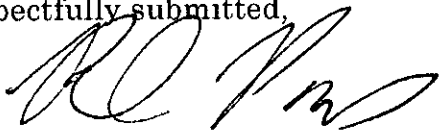
So, I'm not so sure, even though this is taken from some other states, whether this is the appropriate place and fully worked out. So, with that, I am going to end my testimony.

Senator Margaret Wood Hassan, D. 23: Thank you very much, and I am going to ask the group to defer any questions since we are going to recess the hearing.

So, with that, was there anybody else who wanted to speak on House Bill 1368 understanding that we are recessing this hearing to next week so that is there really anyone that can't be here next Thursday which will be around a 12:30 or 1:00 hearing? Okay. With that, we are going to recess the hearing on House Bill 1368.

Hearing recessed at 9:17 A.M.

Respectfully submitted,



Richard Parsons  
Senate Committee Secretary

9/14/10

3 Attachments

Sen. DeVries, Dist. 18  
April 26, 2010  
2010-1585s  
01/09

Amendment to HB 1368

1 Amend RSA 281-A:2, VI(d) as inserted by section 1 of the bill by replacing it with the following:

2  
3 (d) If the commissioner finds that ~~[the employer's use of such written agreement was~~  
4 ~~intended to misrepresent]~~ ***an employer has misrepresented*** the relationship between the employer  
5 and the person providing services, the commissioner may assess a civil penalty of up to \$2,500; in  
6 addition, such employer ~~[shall]~~ ***may*** be assessed a civil penalty of \$100 per employee for each day of  
7 noncompliance. ~~[The]~~ ***Such*** fines ~~[shall]~~ ***may*** be assessed from the first day of the infraction but not  
8 to exceed one year. ***For a second or any subsequent violation, the commissioner shall issue a***  
9 ***stop-work order requiring the cessation of all business operations at every site at which the***  
10 ***violation occurred within 72 hours of that determination. The order shall take effect when***  
11 ***served upon the employer, or, for a particular employer worksite, when served at that***  
12 ***worksite. The order shall remain in effect until the commissioner issues an order releasing***  
13 ***the stop-work order upon finding that the employer has properly classified the individual***  
14 ***or individuals as an employee or employees and has paid any penalty assessed under this***  
15 ***subparagraph. Stop-work orders issued pursuant to this subparagraph against an***  
16 ***employer shall be in effect against any successor corporation or business entity that has***  
17 ***one or more of the same principals or officers as the employer against whom the stop-work***  
18 ***order was issued and which is engaged in the same or equivalent trade or activity. The***  
19 ***commissioner shall assess a penalty of \$5,000 per day against an employer for each day***  
20 ***that it conducts business operations that are in violation of a stop-work order issued***  
21 ***pursuant to this subparagraph. For a second or any subsequent violation, which is within***  
22 ***5 years of an earlier violation, the commissioner shall add the employer or entity's name to***  
23 ***a list to be posted on the department's official website. Upon such notice, the commissioner***  
24 ***shall notify the violating employer or entity. No state contract shall be awarded to an***  
25 ***employer or entities appearing on the list until 4 years have elapsed from the date of the***  
26 ***last violation.*** Notwithstanding any provision of law to the contrary, any person with control or  
27 responsibility over decisions to disburse funds and salaries and who knowingly violates the  
28 provisions of this subparagraph shall be held personally liable for payments of fines. All funds  
29 collected under this subparagraph shall be continually appropriated and deposited into a nonlapsing  
30 workers' compensation fraud fund dedicated to the investigation and compliance activities required  
31 by this section and related sections pertaining to labor and insurance law. The commissioner of  
32 labor shall appoint as many individuals as necessary to carry out the department's responsibilities  
33 under this section.

**Amendment to HB 1368**  
**- Page 2 -**

2010-1585s

**AMENDED ANALYSIS**

This bill clarifies the evidence required to establish the relationship between the employer and the person providing services under the workers' compensation law. This bill also adds penalties for second and subsequent violations of an employer misrepresenting the relationship between such employer and the person providing services.

**Amend RSA 282-A:9, IV.\* by adding the following paragraph:**

(x) Participation in the New Hampshire Return to Work initiative which is a program of New Hampshire Employment Security which provides a structured, supervised training opportunity to claimants through a designated employer/ training partner. Claimants participate on a voluntary basis and continue to receive unemployment compensation during the training period as long as they remain otherwise eligible. The training program duration is a maximum of six (6) weeks, and a maximum of twenty-four (24) hours per week.

**Amend RSA 282-A by adding the following:****RSA 282-A:26-a Return to Work Program Participants; Workers' Compensation Eligibility.**

I. A participant in New Hampshire Employment Security's Return to Work program is entitled to benefits under RSA chapter 281-A as follows. In the event that it is determined that a Return to Work program participant has been subject to an injury or occupational disease producing a disability arising out of and in the course of participation in the Return to Work program, New Hampshire Employment Security shall not provide compensation pursuant to RSA 281-A:28, 281-A:28-a, 281-A:31, and 281-A:31-a, but the participant shall receive unemployment compensation benefits while otherwise eligible under New Hampshire RSA 282-A, or compensation equivalent to 90% of those benefits if the disability causes the participant to become ineligible for benefits under RSA 282-A. When determining the amount of compensation provided pursuant to RSA 281-A:32 for a scheduled permanent impairment award, the amount of compensation shall be calculated by using the minimum wage at the time of injury multiplied by the average number of hours in training per week.

II. For a participant in New Hampshire Employment Security's Return to Work program, the following shall replace RSA 281-A:8, sections I. and II.: I. A participant in the New Hampshire Return to Work program shall be conclusively presumed to have accepted the provisions of this chapter and, on behalf of the participant or the participant's personal or legal representatives, to have waived all rights of action whether at common law or by statute or provided under the laws of any other state or otherwise: (a) Against the employer/training partner or the employer/training partner's insurance carrier or an association or group providing self-insurance to a number of employers or the New Hampshire Employment Security and the New Hampshire Return to Work program; and (b) Except for intentional torts, against any officer, director, agent, servant or employee acting on behalf of the entities named in subparagraph (a). II. The spouse of a New Hampshire Return to Work program participant entitled to benefits under this chapter, or any other person who might otherwise be entitled to recover damages on account of the participant's personal injury or death, shall have no direct action, either at common law or by statute or otherwise, to recover for such damages against any person identified in subparagraph I(a) or (b).

III. New Hampshire Employment Security may provide this benefit by appropriate means including purchasing and serving as the master policyholder for any insurance, by self-insurance or by administrative services contract.

IV. Except as otherwise provided in this section, all other provisions of RSA 281-A apply.

Testimony of Joseph Donahue  
In support of  
House Bill 1368

This bill clarifies the evidence required to establish the relationship between the employer and the person providing services under the workers' compensation law.

April 27, 2010

HB 1368 basically does two things. First, it clarifies the evidence required to establish the relationship between the employer and the person providing services under the workers' compensation law. This language fixes a major problem with existing law. Under current law, unless there is a written document that shows intent to misclassify workers, the Department of Labor has no authority to assess penalties. We strongly support this change because we know that contractors who are intent on breaking the law usually do not put it in writing.

The second thing this legislation does is change the words "Shall" to "May." Today, if the commissioner finds an employer in violation, the law reads the commissioner "shall" assess the penalties. Changing this language would allow the Commissioner to use discretion in determining whether an employer has made an honest mistake and refrain from assessing penalties.

While we agree with this change in theory, in reality, experience has taught us that those intent on breaking the law will use this change to their advantage. For that reason, we strongly support the amendment making the penalties more severe for repeat offenders including issuing stop work orders. We believe if an employer is caught repeatedly violating the law the penalties should become more severe, especially if the penalty for the first violation was waived by the Commissioner.

Many states across the country and most of the states in the northeast have adopted Stop Work Order language. Below I have provided several examples of states mostly from the northeast that already have stop work order requirements. The main difference between those states (with the exception of New Jersey) and what's being proposed here today is in every one of those states stop work orders are issued on the first offense.

On April 10, 2010 Governor Baldacci of Maine signed LD 1565 which authorizes the Executive Director of the Workers' Compensation Board to issue a stop-work order for failure to provide workers' compensation coverage.

In Vermont H. 647 requires the Commissioner of Labor to issue an emergency order to any employer to stop work for failure to provide workers' compensation coverage until the employer has secured workers' compensation insurance. H. 647 passed the House earlier this session and was passed out of the Senate yesterday.



State	Reasons for issuing stop work order against an employer	When does the stop work order take effect? How is service accomplished?	Scope of stop work order	Other information
<p>Florida</p> <p><b>Over 14,000 stop work orders issued since 2004.</b></p>	<p>Failure to secure workers' compensation by understating payroll, misstating employee duties to avoid proper classification for premium calculations, or materially concealing information relating to the computation and application of an experience rating modification factor.</p>	<p><b>Immediately upon service. Service can be accomplished by posting a copy of the stop work order in a conspicuous location at the worksite, and it must be made on the employer.</b></p>	<p>After service is made on the employer, the order is effective upon all employer worksites in the state for which the employer is not in compliance. The order remains in effect until the employer comes into compliance.</p>	<p>The employer may receive an order of conditional release from the stop work order if he or she has complied with the coverage requirements and agreed to pay penalties through a payment schedule. If the terms of the schedule are not met, the stop work order will be reinstated and the unpaid balance of the penalty will become due. The employer may be required to file reports demonstrating compliance during a two year probationary period. Stop work orders issued against a business are effective against any successor entity that has one or more of the same principals or officers as the business and are engaged in the same or equivalent trade or activity.</p>
<p><a href="http://www.myfloridacfo.com/wcapps/swo/swoquery.asp">http://www.myfloridacfo.com/wcapps/swo/swoquery.asp</a></p>				
<p>Workers Comp Report</p>				
<p><a href="http://www.carpenters.org/misclassification/ALL%20DOCUMENTS/Office%20of%20Insur%20Reg%20repor%20on%20WComp-01-08.pdf">http://www.carpenters.org/misclassification/ALL%20DOCUMENTS/Office%20of%20Insur%20Reg%20repor%20on%20WComp-01-08.pdf</a></p>				
<p>Connecticut</p> <p><b>Approximately 500 stop work orders issued in 2009.</b></p>	<p>Misrepresenting his or her employees as independent contractors or providing false information regarding the amount of employees to obtain a lower premium rate.</p>	<p>Immediately upon service. Service can be accomplished by posting a copy of the stop work order in a conspicuous location at the place of business or employment.</p>	<p>All business operations of the employer must cease. The order applies only against the employer found to be in violation and only to the specific place of business or employment for which the violation exists. It remains in effect until the employer comes into compliance.</p>	<p>Stop work orders issued against a business are effective against any successor entity that has one or more of the same principals or officers as the business and are engaged in the same or equivalent trade or activity.</p>
<p><a href="http://www.ctdol.state.ct.us/wgwkstnd/StopWork/StopWork.htm">http://www.ctdol.state.ct.us/wgwkstnd/StopWork/StopWork.htm</a></p>				

State	Reasons for issuing stop work order against an employer	When does the stop work order take effect? How is service accomplished?	Scope of stop work order	Other information
<p>Massachusetts</p> <p>Over 6,500 stop work orders issued since 2007.</p>	<p>Failure to provide workers' compensation payments to his or her employees.</p>	<p>Immediately upon service on the employer unless the employer provides evidence of securing insurance.</p>	<p>All business operations at the place of employment or job site must cease.</p>	<p>The stop work order is not in effect during an appeal and will be rescinded if the employer is found to be in compliance. If the employer is not found to be in compliance, the stop work order is reinstated until he or she proves compliance and pays a penalty of \$250 a day for each day of noncompliance. An employee affected by the stop work order must be paid for the first ten days lost due to the order.</p>
<p><a href="http://www.mass.gov/?pageID=elwdmodulechunk&amp;L=4&amp;L0=Home&amp;L1=Government&amp;L2=Departments+and+Divisions+(EOLWD)&amp;L3=Joint+Task+Force+on+the+Underground+Economy+and+Employee+Misclassification&amp;sid=Elwd&amp;b=terminalcontent&amp;f=dia+investigation+debarment+list&amp;csid=Elwd">http://www.mass.gov/?pageID=elwdmodulechunk&amp;L=4&amp;L0=Home&amp;L1=Government&amp;L2=Departments+and+Divisions+(EOLWD)&amp;L3=Joint+Task+Force+on+the+Underground+Economy+and+Employee+Misclassification&amp;sid=Elwd&amp;b=terminalcontent&amp;f=dia investigation debarment list&amp;csid=Elwd</a></p>				
<p>New Jersey</p> <p>New Law passed in 2009</p>	<p>A second or subsequent violation of failing to properly classify an employee.</p>	<p>Immediately upon service on the employer or worksite.</p>	<p>The first stop work order (second violation) requires the cessation of all business operations at every site at which the violation occurred. The second and subsequent stop work orders (third or subsequent violations) require the cessation of all business operations of the employer. The order remains in effect until the employer properly classifies his or her employees and pays any penalties.</p>	<p>The employer may be required to file reports demonstrating compliance during a two year probationary period. Stop work orders issued against a business are effective against any successor entity that has one or more of the same principals or officers as the business and are engaged in the same or equivalent trade or activity.</p>

State	Reasons for issuing stop work order against an employer	When does the stop work order take effect? How is service accomplished?	Scope of stop work order	Other information
New York	Failure to secure workers' compensation for his or her employees.	Immediately upon service. Service can be made at a worksite or to the employer. Service at the worksite is accomplished by posting the order in a conspicuous location at the worksite.	When served on a worksite, the order is effective to that worksite. When served on the employer, the order is effective to all employer worksites for which the employer is not in compliance. The order remains in effect until the employer comes into compliance and pays any penalties.	The employer may receive an order of conditional release from the stop work order if he or she has complied with the coverage requirements and agreed to pay penalties through a payment schedule. If the terms of the schedule are not met, the stop work order will be reinstated and the unpaid balance of the penalty will become due. The employer may be required to file reports demonstrating compliance during a two year probationary period. A stop work order is in effect against any noncompliant substantially-owned affiliated entity.
<a href="http://www.wcb.state.ny.us/content/main/Employers/stopWorkOrders_np.jsp">http://www.wcb.state.ny.us/content/main/Employers/stopWorkOrders_np.jsp</a>				

Several months ago along with several other members of the New Hampshire Workers Compensation Fraud Task Force I attended a summit that had representatives from task forces from all the states in the northeast. It was made clear at the summit that states that have stop work authority find it to be the most effective tool they have to combat the illegal misclassification of workers as 1099 independent contractors. That is why, the National Conference of Insurance Legislators just this past November, unanimously adopted a model workers compensation enforcement bill for the construction industry with stop work orders in it. If we want better compliance with the law, stop work orders will get us there.

SENATE CALENDAR NOTICE

COMMERCE, LABOR AND CONSUMER PROTECTION

- ✓ Senator Margaret Hassan Chairman
- ✓ Senator Betsi DeVries V Chairman
- ✓ Senator Deborah Reynolds
- ✓ Senator Jacalyn Cilley
- ✓ Senator Peter Bragdon
- ✓ Senator Sheila Roberge

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Bill Status

Docket

Calendar

Proof:  Calendar  Bill Status

Date: May 4, 2010

HEARINGS

Thursday

5/6/2010

COMMERCE, LABOR AND CONSUMER PROTECTION

SH 103

12:30 PM

(Name of Committee)

(Place)

(Time)

EXECUTIVE SESSION MAY FOLLOW

**Comments:** Please note these hearings are scheduled outside of their normal day, time and room. HB 1368 was previously recessed on 4/27/10. HB 1459 was previously recessed on 4/29/10. HB 1393 was previously recessed on 5/4/10.

- ✓ 12:30 PM HB1368 relative to the definition of "employee" for workers' compensation purposes.
- 12:45 PM HB1459 relative to the board of trust company incorporation.
- 1:15 PM HB1393 (New Title) relative to the treatment of New Hampshire investment trusts.

Sponsors:

**HB1368**

Rep. Jeffrey Goley  
Sen. Betsi DeVries

Rep. James Craig  
Sen. Jacalyn Cilley

Rep. Rip Holden

Rep. Benjamin Baroody

**HB1459**

Rep. Edward Butler

**HB1393**

Rep. John DeJoie

START: 12:36 P.M.

END: 1:00 PM

RP

Date: May 6, 2010  
Time: 12:36 P.M.  
Room: SH 103

The Senate Committee on Commerce, Labor and Consumer Protection held a hearing on the following:

HB1368 (New Title) relative to the definition of "employee" for workers' compensation purposes and relative to the New Hampshire return to work program.

Members of Committee present: Senator Hassan  
Senator DeVries  
Senator Reynolds  
Senator Cilley  
Senator Bragdon  
Senator Roberge

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The Chair, Senator Margaret Wood Hassan, reopened the hearing on HB1368.

Senator Margaret Wood Hassan, D. 23: Good afternoon, folks. This is a continuation of a recessed hearing on House Bill 1368. And, just a couple of points of housekeeping, please turn off or silence cell phones, and also I'm going to have to leave here a little before 1:00. So please, nobody take it personally. I'll be back, but I have to be upstairs for a little while.

With that, we had taken some testimony on the underlying bill on House Bill 1368. There was, also, and it is the reason we recessed the hearing, was that Senator DeVries proposed amendment 1585s to 1368. And so, people who signed in today can feel free to address both the underlying bill and the amendment and that would be helpful.

As always, we are pressed for time. So, I would appreciate as concise testimony as is possible, and as always, if someone else has said what you would like to say, feel free to reference their testimony.

So, with that, could I have Mr. Abbott up here, please?

Gary Abbott: Thank you, Senator and Senators. For the record, my name is Gary Abbott. I'm the Executive Vice President of the Associated General Contractors of New Hampshire.

I want to thank the Chairman for delaying the hearing on this amendment that was proposed last week in order for us to have an opportunity to look at it. I'm handing out a quick position paper on 1368.

**Please see Attachment #1 – position paper submitted by Gary Abbott, Associated Contractors of New Hampshire.**

For the record, I want to reiterate that we are in support of the original bill as it came over from the House. The concerns are all raised with the amendment that was proposed that day by Senator DeVries, #1585. Have had an opportunity to look at the language closer, also looked at language that was passed in Vermont and Maine, and each of those is different than what was proposed here. So that went into some of my comments.

Also, this is a pretty; I guess we will explain it this way, the two times of misclassification and you can't work for the state is a pretty high threshold that has us concerned. You could be a contractor working on any project, have hired an independent that you thought met the criteria. They might be working on multiple projects of yours. You could have two very quickly of the same individual citations, and under this rule, you could be debarred really from state work for four years.

So, I think there is a big difference between willful intent of trying to not beat the law and if something happened within five years that you ended up with a disagreement over whether there was a classification and a determination.

The other thing is in other state laws, like Maine, there was a time period, a number of days, that a person had to respond before the job shut down. That's not really in this. There are also in, I know in Maine's law when I passed it to my counterpart to take a look at what we had proposed in this state, clearly the \$5,000 he was kind of shocked at how high that was for a fine for New Hampshire.

I went into some other points in the position paper, but I don't want to take all your time up on this. But, I think there is enough issues with the language that is presented that I really think it should be referred to the task force that studies employee misclassification; that really is the right opportunity. I know they are looking at things like independent contractor registry, those kinds of things, to help solve this issue. Because, what this bill and probably the largest point is, is that you can have a really good

contractor trying to do the right thing and this legislation, how it is drafted, could have some unintended consequences for those. We are not opposed to going after those that are bad actors that have an intent in trying to beat the law and misuse it. But I think how this bill is drafted I think it needs a lot of work to fit our statute.

So, that's really what the position paper says. It points out some other issues. But I would hope that you pass the original bill from the House. And, I know there is another amendment. I have not really been involved with the other amendment from unemployment. I will leave that up to the Senators for their discussion, but on this one that has the stop operations.

The other one point that I want to make too is, looking at it, it doesn't only affect construction. The sites it doesn't necessarily, in our view, specify construction sites. You could have a regular manufacturing plant that probably does work for the state, and I don't know what happens if they have two misclassifications of an independent that they hired whether they would no longer be able to. That could have bigger ramifications than even construction.

Senator Margaret Wood Hassan, D. 23: I see a question from Senator DeVries.

Senator Betsi DeVries, D. 18: And, thank you, Madam Chair. Thank you, Mr. Abbott, for your comments. I guess what I heard you say is that you represent that you would very much like to go after the bad actors, and bring them into some sort of line, and I'm just wondering why you weren't able to take the issues and problems with the language and come back to us with some amended language as opposed to a task force recommendation.

Mr. Abbott: Well, I do think it needs a lot of...I'll use the original bill as an example. The original bill went through a number of gyrations in the House that took weeks to get it to the version that you have in front of you because we had some concerns with the original version. For one week, to do this whole, which is a stop work order on jobs, is a brand new issue for us. In one week, it would be a pretty tall order to figure out how that would work with all the pieces with the Department, with both the Insurance Department and the Labor Department, how it would work. Because there's issues with if a sub on the site hires an independent and they are cited, does the job stop or do they just stop? Can I replace them? There's a lot of issues when it comes to construction that just I don't think you could do in a week.

Senator Betsi DeVries, D. 18: Thank you.

Senator Margaret Wood Hassan, D. 23: Any other questions for Mr. Abbott. Seeing none, thank you very much. It occurs to me that we also, as Mr. Abbot referenced, had an amendment from the Department of Employment Security. And, I apologize, Ms. Dalterio, for not putting that into my initial comments. You are signed up to speak, so would you like to come up and address that please? And, am I right that what we have for language is what you handed in last time?

Attorney Maria Dalterio: Yes, Senator.

Senator Margaret Wood Hassan, D. 23: Okay.

Attorney Dalterio: That's correct. Good afternoon. My name is Maria Dalterio. I'm general counsel for the New Hampshire Department of Employment Security.

The amendment that we're proposing relates to the "New Hampshire Return to Work Initiative" which is one of the three New Hampshire working initiatives that the Governor introduced in his state of the state speech in January. This amendment specifically addresses workers' compensation coverage for trainees who are participating in the Return to Work Program, who are not employees of the employer with whom they are training, but they are in the workplace and exposed to possible dangers resulting from being in the workplace.

We drew up this amendment. We modeled it after RSA 167:91-b, which talks about workers' compensation eligibility for participants in the work experience and community service program for the Department of Health and Human Services and that is where a lot of this language comes from. These people are in training, what they call AWETS, are just working as part of their TANF eligibility. But, both of them are not really employees, you know; they are covered actually by...we want them to be covered by the state and by...the Department of Employment Security actually plans to purchase an insurance policy to cover these trainees and this statute would allow us to do that and it defines what the benefit would be to the trainees.

Senator Margaret Wood Hassan, D. 23: Thank you. Are there any questions for Ms. Dalterio? Seeing none, thank you very much.

Attorney Dalterio: Thank you.

Senator Margaret Wood Hassan, D. 23: Just in order to try to keep us focused on kind of one issue at a time, I have one, two, three, four more people signed up on this bill. Was there anybody who specifically wanted to



address the Department of Employment Security's amendment that Ms. Dalterio just spoke about? Okay, so that's our testimony on that particular amendment.

So, now let me continue with the list of those signed up. How about Mr. Morin, please?

Paul Morin: Thank you, Madam Chair. Paul Morin for the Home Builders and Remodelers Association and a member of the Employee Misclassification Task Force.

Senator DeVries posed an excellent question, why not just amend what is before us? I saw this amendment I think when it first came out about a week ago. I have read it. I could come up with some suggestions for you. The reason I will not is because, as a member of the task force, I am also on the land use commission. These are groups that I would defer to the majority opinion on that. This is the subject matter that is very much what the task force is dealing with, and I was a little disappointed that it hadn't gone through that process, and I think that it still could if you were to refer it there.

But, if you did want a suggestion on an amendment, there is one. If you look at the original bill, which I and the task force did support, line 16 and 17, the words "shall" in both places have been struck out and replaced with "may" regarding the amount of penalty assessed by the Commissioner. And that is because the Commissioner has exercised discretion for a number of years and he has done so unlawfully if you look at this language and that correction needed to be made.

So, if nothing else, I would look to the offered amendment. It is not numbered lines, but about two thirds of the way down, "the Commissioner shall assess a penalty of \$5,000 per day." If you want to be in concert with part of the intent of the original bill, you will change "shall" to "may" and trust the Commissioner to exercise proper discretion when it comes to evoking penalties.

And, I would be happy to take questions, but I am reluctant to offer further amendments. I really think that there is enough substance here that it should be vetted through the task force.

Senator Margaret Wood Hassan, D. 23: Thank you. Are there questions for Mr. Morin? Seeing none, thank you very much for your testimony. Mr. McArdle, please.

Peter McArdle: Good afternoon, Madam Chairman, members of the Committee. For the record, my name is Peter McArdle, and I represent the New Hampshire Association of Domestic Insurance Companies.

And, I don't want to repeat everything that Gary Abbott and Paul Morin said, but I do support the positions. And, I also sit on the task force and I think that this is the place that this amendment should go back to because there are a number of issues that need to be addressed, and to shut down a whole job site because one contractor isn't in compliance or so forth is a major issue.

So, I would support the positions and I would like to see this go to interim study and to task force for further actions and then come back with recommendations for next year.

Senator Margaret Wood Hassan, D. 23: Thank you. Are there questions for Mr. McArdle? Seeing none, thank you very much. Mr. Holden, please.

Mark Holden: Thank you. My name is Mark Holden, I'm President of Associated Builders and Contractors.

We oppose the amendment; it is what we are addressing today. We are in support of the original bill as was presented. I'm not going to repeat what was just said, but a couple of things. I am going looking at the amendment here and I don't have the same copy with the lined numbers and what have you, but some of the questions we had that I think need to be addressed because we have questions about them. It refers to a second or subsequent violation and we are not sure of what. This is in legislation that is addressing the misrepresentation of misclassification. It is not in the legislation relative to misclassification, which I believe is RSA 281-A:7. So, we are not sure if this is a subsequent violation of the misrepresentation or subsequent violation of the misclassification. So that's a clarification.

Then, it continues on. Shall issue a stop work order requiring cessation of all business operations. But, at what point is this? Because typically there is a finding of a violation, there is a hearing process, there's appeals and what have you. At what point would this stop work order kick in? Would it be upon the initial proposed finding that there is a violation or would it wait until the proposed finding takes its course through its hearing and its appeals? So, it leads to a lot of questions that we have, and I will apologize before the question may be asked for not coming in with any kind of suggested language. But, we just had a week to look at this and we do have a lot of questions ourselves. So, we would be more than happy to work with the task group or any other group that might be looking at this remedy, the fraud

issue that is out there that we are in support of trying to stop. But, we think this is a little bit too premature to enact at this time.

Senator Margaret Wood Hassan, D. 23: Thank you. Are there any questions? Seeing none, thank you very much for your testimony. Mr. Donahue, please.

Joseph Donahue: Good afternoon. My name is Joseph Donahue, I'm with the Carpenters Labor Management Program. I also sit on the task force, and I am in favor of the amendment. And, I have already testified so I will just touch on some points that were made today.

First, I would like to focus on the Department part. If you remember, the task force itself and many other items were formed out of Senate Bill 500 a couple of years ago. Senate Bill 500 was put together by a large group of people. Many of the Departments had representation on the group, the Attorney General, Mr. Holden, Mr. Abbott, several labor people, and with the task force, there were other recommendations. And one of those recommendations appear in our criminal code today, and if you give me one second, I will pull it out.

On RSA 638, under insurance fraud, dealing directly with workers' comp, it is right in there (and I have a copy of this for the Committee) that on the first offense, people are debarred for three years, or forbidden from doing work for the state for up to three years. And on the third offense, they could be forbidden permanently from doing work. So, that is already in the criminal code dealing with workers' comp.

Also, on certain publicly funded projects, Department of Transportation projects, and RSA 228:4-b, dealing with workers' comp coverage, any contract that is in violation of that can be debarred from doing work with the state for up to five years and I have copies of both of those for the Committee.

**Please see Attachment #2- documents submitted by Joe Donahue, Carpenter's Labor Management Program.**

So, what the language that is in this amendment is consistent with what is already in the law and has been reviewed. Especially in RSA 638, because we had a very long-term study committee that looked at that and developed that language.

It was mentioned that there needs to be a time period for a stop work order to be issued like what happens in Maine and Vermont and other states. The one major difference between this amendment and the other states, the other

states issue stop work orders on the first offense. The first time you are caught breaking the law, you stop work. So, they do allow time for hearings. Here we are talking about repeat offenders. We are talking about people who have already dealt with the DOL on this issue, who know the law, and who are caught for a second or third or fourth time breaking the law. So, you will have to consider that when you are looking at your time periods.

Dealing with the \$5,000 a day fine. We really need to understand what this fine is. This fine means that they had a first offense and whatever happened happened. On the second offense, they receive a stop work order. In order for this \$5,000 a day fine to kick in, they must refuse to obey the stop work order and continue working so now they are on the third strike. They are a three time offender before this \$5,000 fine kicks in. It isn't like it's the first time it's happened; they have already had three warnings.

As far as the Task Force and sending this through to task force. The Task Force is now, and it's well into its second year of being in place. And the first year of the Task Force, we received significant information from other states. We've had officials from other states come to New Hampshire. Some of us attended a summit with all of the states in the Northeast. And the main point that they made was stop work orders is one of the most effective tools they have. If we wait for this to go through the Task Force for another year, and then not be implemented for possibly two years, the workers and businesses in New Hampshire are losing.

One of the things that we're concerned about, as someone who has worked on this issue for a long time, several years ago when we passed Senate Bill 92, which was the original criteria that the first part of this bill is trying to fix, we thought we were going to be able to make a major step in solving this problem. But we haven't been able to do that because the DOL cannot enforce the misclassification law.

During that same period of time, other states have really taken aggressive steps to deal with this, including stop work orders. If we are going to now fix the law that we were hoping to be in place three years ago and have to wait another year or two years to get this into effect, we are just kind of falling behind. And, I feel that, with all the information dealing with stop work orders from every state in the Northeast, all the information that we have on stop work orders, there is no one, no public officials, no one has come out and said this is a bad idea and it's not working. In fact, it has been the exact opposite. They find it very effective and that's why states like Maine and Vermont, who didn't have it, passed laws just this past month or so getting it.

New Hampshire, right now, is one of the few states in this region that does not have stop work order or enforcement abilities. And that's about it, unless I missed anything.

Senator Betsi DeVries, D. 18: If I might.

Senator Margaret Wood Hassan, D. 23: Question from Senator DeVries. Thank you, Mr. Donahue.

Senator Betsi DeVries, D. 18: And, thank you, Mr. Donahue for your testimony. There was some discussion about the differences between this legislation and what has been enacted in Maine and other states. And, I just didn't know if you could address how or why this might be different. I think you did at the beginning, but the additional work sites for the stop work, I think is part of the question as well; the shutting down every work site.

Mr. Donahue: Okay. First of, again, I did work very closely with Maine and Vermont. I work with Mr. Abbott's counterpart and he was happy with the results. Again, the Maine main difference is that is on first offenses up there, here it's repeat offenses. You know, it is hard to argue to say on a first offense there is no time, no hearings. But, this is second or third offenses.

As far as shutting down the jobs sites. This stop work order would only affect the violating contractor, and I will speak just for construction. If you have a major construction project going on and one subcontractor, which would most likely be the dry wall subcontractor, was found to be misclassifying their workers, that individual subcontractor would receive the stop work order just on the site where the violation occurred. So, if he is doing 20 different jobs in the state, only where the violation occurs would the stop work order go into effect.

Now, will it cause people to lose money? Would it possibly cause the project to slow down? Yes, it would. Absolutely, and I can't argue that it wouldn't. But, at some point, the general contractors who feel that they are going to be held responsible for this have to take some responsibility. If they continue to hire people who repeatedly, again this isn't for first offenses, who repeatedly violate the law, there is a risk in that. If you want to continue to take the low bid knowing that these contractors have a record of not providing workers' comp for their workers, there is a risk to that.

So, yes it may slow down a job in extreme cases. But again, when we talk about not having workers' comp, part of this is already in effect, well not the stop work orders, but on publicly funded projects, people can be debarred if they are not providing workers' comp. That is already in the law.

Senator Margaret Wood Hassan, D. 23: Are there other questions? I had one, Mr. Donahue, which is that and I'm not sure if I'm reading this correctly, but I'm concerned that this may apply to businesses that aren't construction sites. So you'd have a stop work order in a hospital because a consultant has come in and misclassified some of its employees while doing computer work.

I'm just trying to understand whether this needs a little bit more work to narrow it because there are situations in which, I think, we might give it the balance of possible harms to a stop work order could be unique. Do you read this to apply to any job site, not just construction?

Mr. Donahue: Because that's the way the laws apply in New Hampshire, it would apply to any job site. I would agree with you, though, there are certain cases where maybe a sentence needs to be included, and those cases I stress are only when someone's life could be in danger, and in not only hospitals but in nursing homes as well.

If you look at the Vermont legislation, and I'm sorry I don't have it right in front of me, but there is a sentence in that legislation that deals with this particular issue dealing with hospitals and nursing homes that gives the Commissioner of Labor the authority to, even though there is a violation and even though workers are at risk because other people could get injured worse, he could make an exception and allow the work to continue. So, I don't have that one sentence in front of me, but it is in the Vermont legislation that got passed.

Senator Margaret Wood Hassan, D. 23: Thank you. Are there other questions? Seeing none, thank you very much for your testimony. Was there anybody else who wanted to testify on House Bill 1368? Okay, I'm going to close the hearing on House bill 1368.

Hearing closed at 1:00 P.M.

Respectfully submitted,



Richard Parsons  
Senate Committee Secretary

9/14/10

2 Attachments



# The Associated General Contractors of New Hampshire, Inc.

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## Position Paper on House Bill 1368

*Presented before the Senate Commerce, Labor, and Consumer Protection Committee  
May 6, 2010*

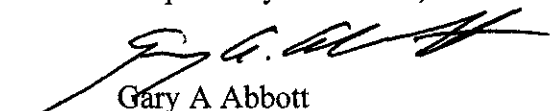
House Bill 1368 seeks to clarify the evidence required to establish the relationship between the employer and the person providing services under the workers' compensation law. The Associated General Contractors of New Hampshire (AGC of NH) is not opposed to the original language as proposed in the House version. However, the Association strongly opposes amendment 1585s that introduces stop work orders into the legislation. This amendment was added late in the legislative process, not allowing adequate time to fully review the amendment, and develop appropriate language for New Hampshire.

In addition to its late arrival, the amendment is vaguely written, and does not fully explain the stop work order process. In particular, the amendment does not explain what will happen on a jobsite if an independent contractor is hired by a subcontractor and not the general contractor. Will the entire job be shut down, or will just the subcontractor be removed from the project? Similarly, the amendment does not outline a process to be followed after a jobsite has been cited. Is there an appeals process? How long can a jobsite be shutdown by the department, and who carries the burden for financial delays in the project?

Also of concern is the penalties that may be imposed once a contractor is cited. The \$5,000 per day fine is extremely high compared to other fines. Additionally, the provision that allows the stop work order to be carried over to a successor firm or other principles of the company we believe needs further discussion. Furthermore, the inclusion of debarment from state projects for a second offense if it was without willful intent should be examined.

Lastly, the Association would like to point out that this amendment does not expressly refer to the construction industry. There may be many more industries, such as manufacturing, that could be affected by this legislation. The Association asks that the Senate Commerce, Labor, and Consumer Protection Committee recognize the need to look into these issues in the amendment further before passage. **Therefore, the AGC of NH respectfully asks that the committee vote against amendment 1585s and refer this to the Task Force to Study Employee Misclassification.**

Respectfully Submitted,



Gary A Abbott  
Executive Vice President

# TITLE XX TRANSPORTATION

## CHAPTER 228 ADMINISTRATION OF TRANSPORTATION LAWS

### Section 228:4-b

#### **228:4-b Certification of Current Workers' Compensation Coverage Required. –**

I. Prior to any work being done by an individual contractor on any state transportation project carried out under this subdivision, such contractor, including all subcontractors and independent contractors, working on a highway, bridge, or other construction, reconstruction, alteration, or maintenance project, excluding routine maintenance operations conducted utilizing the contract rental agreement process, and excluding deliveries to and removals from a project administered by the department shall provide to the commissioner of transportation:

(a) A certificate of insurance of his or her current workers' compensation coverage in New Hampshire for the classification of work to be completed on the project;

(b) A sworn statement that this coverage shall remain in effect for the duration of his or her anticipated work on the project;

(c) A completed work certificate, provided pursuant to RSA 281-A:4-b, that shall include the total number of employees anticipated to be employed by such contractor, subcontractor, or independent contractor on the project during the contract period, delineated by the National Council on Compensation Insurance (NCCI) classification code applicable to the scope of work to be performed;

(d) A copy of the contractor's compliance with a current written safety program, if applicable, as filed with the commissioner of labor under RSA 281-A:64, II and proof of an existing joint loss management committee as required under RSA 281-A:64, III, if applicable; and

(e) The department may develop procedures to obtain the requirements in this section on an annual basis or by a prequalification procedure rather than on a project-by-project basis.

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

III. The commissioner of labor may assess any contractor, subcontractor, or independent contractor who falsifies information or fails to comply with this section a civil penalty of up to \$2,500 and in addition, such an employer shall be assessed a civil penalty of up to \$100 per employee per day of noncompliance. Notwithstanding any other provision of law to the contrary, any person with control or responsibility over the decisions to disburse funds and salaries and who knowingly falsified information or knowingly failed to comply with this section shall be held personally liable for the payment of penalties under this section and such contractor, subcontractor, or independent contractor shall not be allowed to bid or work on state projects for up to 5 years. The state shall be entitled to recover from the violator all costs and fees directly associated with uncovering falsified information supplied under this section.

[Paragraph IV effective until July 1, 2011; see also paragraph IV set out below.]

IV. There is hereby established a nonlapsing workers' compensation fraud fund in the office of the



state treasurer. All funds collected under this section shall be deposited in such fund and continually appropriated to the commissioner of labor to be used for investigations and compliance activities required under this section and related sections pertaining to labor and insurance law. Any amounts over \$400,000 in the fund shall lapse to the general fund on June 30 of each year.

[Paragraph IV effective July 1, 2011; see also paragraph IV set out above.]

IV. All funds collected under this section shall be deposited into the general fund.

V. The commissioner of labor shall appoint as many individuals as necessary to carry out the department's responsibilities under this section.

VI. On a quarterly basis, the commissioners of transportation and labor shall post electronically for public access and shall also circulate to all other public works construction or renovation awarding authorities of state government, including the college and university systems and the department of education office of building aid, a list of any highway, bridge, or other construction contractors, subcontractors, or independent contractors found to be in violation of this section, including the amount fined and the period of time such persons or entities shall not be allowed to bid or work on state projects.

**Source.** 2007, 323:2, 7. 2008, 1:2, eff. Jan. 4, 2008; 270:1, eff. June 26, 2008.

# TITLE LXII CRIMINAL CODE

## CHAPTER 638 FRAUD

### Insurance Fraud

#### Section 638:20

##### **638:20 Insurance Fraud. –**

##### **I. In this section:**

- (a) ""Bidding" includes a bid made as any contractor, general contractor, or subcontractor.
- (b) ""Financial interest" means any direct or indirect interest in the entity, whether as an owner, partner, officer, manager, employee, agent, consultant, advisor, or representative, but does not include an employee who does not participate in management of the entity and ownership in a mutual or common investment fund that holds securities unless the person participates in the management of the fund.
- (c) ""Insurance policy" includes an actual or purported insurance policy.
- (d) ""Insurer" includes any insurance company, health maintenance organization, or reinsurance company, or broker or agent thereof, or insurance claims adjuster.
- (e) ""Participating in public works projects" means bidding or working on any public works project or holding any financial interest in any entity bidding or working on any public works project.
- (f) ""Public works project" means any construction project financed by public funds.
- (g) ""Statement" includes, but is not limited to, any notice, statement, proof of loss, bill of lading, receipt of payment, invoice, account, estimate of property damages, bill for service, diagnosis, prescription, hospital or doctor records, x-rays, test results, or other evidence of loss, injury, or expense.

##### **I-a. [Repealed.]**

II. A person is guilty of insurance fraud, if, such person knowingly and with intent to injure, defraud or deceive any insurer, conceals or causes to be concealed from any insurer a material statement, or presents or causes to be presented to any insurer, or prepares with knowledge or belief that it will be so presented, any written or oral statement including computer-generated documents, knowing that such statement contains any false, incomplete or misleading information which is material to:

- (a) An application for the issuance of any insurance policy.
- (b) The rating of any insurance policy.
- (c) A claim for payment or benefit pursuant to any insurance policy.
- (d) Premiums on any insurance policy.
- (e) Payments made in accordance with the terms of any insurance policy.

III. A person is guilty as an accomplice to insurance fraud, if, with a purpose to injure, defraud or deceive any insurer, the person assists, abets, solicits or conspires with another to commit insurance fraud, as defined in paragraph II of this section.

##### **IV. (a) Insurance fraud is:**

- (1) A class A felony if the value of the fraudulent portion of the claim for payment or other benefit pursuant to an insurance policy is more than \$1,000.
- (2) A class B felony if the value of the fraudulent portion of the claim for payment or other benefit pursuant to an insurance policy is more than \$500, but not more than \$1,000.
- (3) A misdemeanor in all other cases.

(b) The value shall be determined according to the provisions of RSA 637:2, V.

V. [Repealed.]

VI. In addition to any other penalty authorized by law, any person convicted of violating subparagraphs II(a), (b), or (d) relative to a workers' compensation insurance policy shall, as a condition of his or her sentence, be prohibited from participating in any public works projects for a period of no less than one year and no more than 3 years and shall be ordered to pay restitution to its workers' compensation carrier, as determined by the sentencing court. Any person convicted of a third or subsequent violation may, as a condition of his or her sentence, be permanently banned from participating in any public works projects. For the purposes of this paragraph, "restitution" means the difference between the premium actually charged and the premium amount that would have been charged if accurate information had been provided to the carrier, provided that the carrier is not compensated by the offender more than once.

VII. The commissioner of the department of administrative services shall maintain a list of persons who have been banned from participating in public works projects under this section. Such list shall be a public record under 91-A.

**Source.** 1991, 248:1. 1993, 239:4, 5. 1996, 285:257. 2001, 224:12, II, eff. Sept. 9, 2001. 2008, 378:5, 6, eff. Jan. 1, 2009.

# Speakers











# Voting Sheets

# Senate Commerce, Labor & Consumer Protection Committee EXECUTIVE SESSION

Bill # HB 1368

Hearing date: 5/6/10

Executive session date: 5/6/10

Motion of: DTP

VOTE: \_\_\_\_\_

<u>Made by</u>	Hassan	<input type="checkbox"/>	<u>Seconded</u>	Hassan	<input checked="" type="checkbox"/>	<u>Reported</u>	Hassan	<input type="checkbox"/>
<u>Senator:</u>	DeVries	<input checked="" type="checkbox"/>	<u>by Senator:</u>	DeVries	<input type="checkbox"/>	<u>by Senator:</u>	DeVries	<input type="checkbox"/>
	Reynolds	<input type="checkbox"/>		Reynolds	<input type="checkbox"/>		Reynolds	<input type="checkbox"/>
	Cilley	<input type="checkbox"/>		Cilley	<input type="checkbox"/>		Cilley	<input type="checkbox"/>
	Bragdon	<input type="checkbox"/>		Bragdon	<input type="checkbox"/>		Bragdon	<input type="checkbox"/>
	Roberge	<input type="checkbox"/>		Roberge	<input type="checkbox"/>		Roberge	<input type="checkbox"/>

Motion of: DTP/A

VOTE: 3-1

<u>Made by</u>	Hassan	<input checked="" type="checkbox"/>	<u>Seconded</u>	Hassan	<input type="checkbox"/>	<u>Reported</u>	Hassan	<input checked="" type="checkbox"/>
<u>Senator:</u>	DeVries	<input type="checkbox"/>	<u>by Senator:</u>	DeVries	<input checked="" type="checkbox"/>	<u>by Senator:</u>	DeVries	<input type="checkbox"/>
	Reynolds	<input type="checkbox"/>		Reynolds	<input type="checkbox"/>		Reynolds	<input type="checkbox"/>
	Cilley	<input type="checkbox"/>		Cilley	<input type="checkbox"/>		Cilley	<input type="checkbox"/>
	Bragdon	<input type="checkbox"/>		Bragdon	<input type="checkbox"/>		Bragdon	<input type="checkbox"/>
	Roberge	<input type="checkbox"/>		Roberge	<input type="checkbox"/>		Roberge	<input type="checkbox"/>

<u>Committee Member</u>	<u>Present</u>	<u>Yes</u>	<u>No</u>	<u>Reported out by</u>
Senator Hassan, Chairman	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Senator DeVries, Vice-Chair	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Reynolds	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Cilley	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Bragdon	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Roberge	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

\*Amendments: 19675

Notes: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

# Committee Report

STATE OF NEW HAMPSHIRE  
SENATE  
REPORT OF THE COMMITTEE

Date: May 6, 2010

THE COMMITTEE ON Commerce, Labor and Consumer Protection  
to which was referred House Bill 1368

AN ACT                      relative to the definition of "employee" for workers'  
   compensation purposes.

Having considered the same, the committee recommends that the Bill:

**OUGHT TO PASS WITH AMENDMENT**

BY A VOTE OF:    3-1

AMENDMENT # 1967s

Senator Margaret Wood Hassan  
For the Committee

L. Gail Brown 271-3076

## New Hampshire General Court - Bill Status System

**Docket of HB1368**

Docket Abbreviations

**Bill Title:** (New Title) relative to the definition of "employee" for workers' compensation purposes and relative to the New Hampshire return to work program.

*Official Docket of HB1368:*

<b>Date</b>	<b>Body</b>	<b>Description</b>
12/10/2009	H	Introduced 1/6/2010 and Referred to Labor, Industrial and Rehabilitative Services; <b>HJ 6</b> , PG.237
12/22/2009	H	Public Hearing: 1/7/2010 2:00 PM LOB 307
01/13/2010	H	Subcommittee Work Session: 1/20/2010 1:30 PM LOB 307
02/02/2010	H	Subcommittee Work Session: 2/9/2010 9:01 AM LOB 307
02/02/2010	H	Executive Session: 2/9/2010 9:30 AM LOB 307
02/10/2010	H	Committee Report: Ought to Pass with AM #0374h for Feb 17 CC (Vote 17-0); <b>HC 14</b> , PG.592-593
02/10/2010	H	Prposed Committee Amendment #0374h; <b>HC 14</b> , PG.636
02/17/2010	H	Amendment #0374h Adopted, VV; <b>HJ 18</b> , PG.964-965
02/17/2010	H	Ought to Pass with Amendment #0374h: MA VV; <b>HJ 18</b> , PG.964-965
03/03/2010	S	Introduced and Referred to Commerce, Labor and Consumer Protection
04/06/2010	S	Hearing: April 27, 2010, Room 102, LOB, 8:45 a.m.; <b>SC15</b>
04/27/2010	S	Hearing: === RECESSED === April 27, 2010, Room 102, LOB, 8:45 a.m.; <b>SC18</b>
04/30/2010	S	Hearing: === RECONVENE === May 6, 2010, Room 103, LOB, 12:30 p.m.; <b>SC18</b>
04/30/2010	S	Hearing: === ROOM CHANGE === May 6, 2010, Room 103, SH, 12:30 p.m.; <b>SC18A</b>
05/06/2010	S	Committee Report: Ought to Pass with Amendment 1967s, NT, 5/12/10; <b>SC19</b>
05/12/2010	S	Committee Amendment 1967s, NT, AA, VV; <b>SJ 18</b> , Pg.418
05/12/2010	S	Sen. Hassan Floor Amendment 2024s, AA, VV; <b>SJ 18</b> , Pg.419
05/12/2010	S	Ought to Pass with Amendments 1967s, NT, 2024s, MA, VV; OT3rdg; <b>SJ 18</b> , Pg.419
05/12/2010	S	Passed by Third Reading Resolution; <b>SJ 18</b> , Pg.497
05/19/2010	H	House Concurs with Senate #AM 1967s(NT) and #2024s (Rep Goley): MA DIV 193-82; <b>HJ 46</b> , PG.2227
06/02/2010	H	Enrolled; <b>HJ 51</b> , PG.2321
06/02/2010	S	Enrolled; <b>SJ 21</b> , Pg.777
06/16/2010	H	Signed by the Governor 06/14/2010; Effective 06/14/2010; Chapter 0145

NH House

NH Senate

Contact Us

New Hampshire General Court Information Systems  
107 North Main Street - State House Room 31, Concord NH 03301

# Other Referrals

# COMMITTEE REPORT FILE INVENTORY

HB1368 ORIGINAL REFERRAL

RE-REFERRAL

1. THIS INVENTORY IS TO BE SIGNED AND DATED BY THE COMMITTEE SECRETARY AND PLACED INSIDE THE FOLDER AS THE FIRST ITEM IN THE COMMITTEE FILE.
2. PLACE ALL DOCUMENTS IN THE FOLDER FOLLOWING THE INVENTORY IN THE ORDER LISTED.
3. THE DOCUMENTS WHICH HAVE AN "X" BESIDE THEM ARE CONFIRMED AS BEING IN THE FOLDER.
4. THE COMPLETED FILE IS THEN DELIVERED TO THE CALENDAR CLERK.

DOCKET (Submit only the latest docket found in Bill Status)

COMMITTEE REPORT

CALENDAR NOTICE on which you have taken attendance

HEARING REPORT (written summary of hearing testimony)

HEARING TRANSCRIPT (verbatim transcript of hearing)

List attachments (testimony and submissions which are part of the transcript) by number [1 thru 4 or 1, 2, 3, 4] here: 1 thru 3, 1 thru 2

SIGN-UP SHEET

ALL AMENDMENTS (passed or not) CONSIDERED BY COMMITTEE:

- AMENDMENT # 19675                      \_\_\_\_\_ - AMENDMENT # \_\_\_\_\_  
\_\_\_\_\_ - AMENDMENT # \_\_\_\_\_                      \_\_\_\_\_ - AMENDMENT # \_\_\_\_\_

ALL AVAILABLE VERSIONS OF THE BILL:

AS INTRODUCED                       AS AMENDED BY THE HOUSE  
 FINAL VERSION                      \_\_\_\_\_ AS AMENDED BY THE SENATE

\_\_\_\_\_ PREPARED TESTIMONY AND OTHER SUBMISSIONS (Which are not part of the transcript)

List by letter [ a thru g or a, b, c, d] here: \_\_\_\_\_

EXECUTIVE SESSION REPORT

\_\_\_\_\_ OTHER (Anything else deemed important but not listed above, such as amended fiscal notes):

IF YOU HAVE A RE-REFERRED BILL, YOU ARE GOING TO MAKE UP A DUPLICATE FILE FOLDER

DATE DELIVERED TO SENATE CLERK 10/4/10

  
\_\_\_\_\_  
COMMITTEE SECRETARY