

# Vermont

# News

Labor Market

November 2009

Working Together  
for Vermont

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## Commissioner's Message

*Patricia Moulton Powden*

### **Update: the Unemployment Insurance Trust Fund still a crisis.**

As we have previously reported, our unemployment insurance trust fund is in serious financial trouble. Current projections have the fund running out of money by mid December or early January 2010. Once the fund is empty, we begin borrowing from the federal government to pay unemployment benefits, just as 22 other states are presently doing.

Last January, Governor Douglas and the Department of Labor presented a comprehensive plan to the Legislature which would return the fund to solvency. That plan included phased in increases to the taxable wage base used as the basis of employer taxes, and reductions in benefits bringing our unemployment benefits closer to national averages. Currently, Vermont exceeds the national average in several benefit areas. This balanced approach will minimize borrowing necessary to pay claims and enable the fund to move toward solvency before a threat of another recession. The Legislature took limited action last session. They increased the taxable wage base from the current \$8,000 of every employee's pay, to \$10,000, effective January 1, 2010. They also froze the maximum weekly benefit at the current \$425. These measures have not been comprehensive enough to avoid significant borrowing to pay unemployment claims in 2010. We project we will need to borrow \$110 million by the end of 2010 to meet current benefit obligations. This is approximately \$30 million more than we would have needed if the Legislature had accepted a comprehensive solution last session.

Admittedly, this is a very difficult time to be implementing tax increases on employers and benefit reductions for claimants. This Administration does not propose this lightly. However, failure to

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# Commissioner's Message - continued

implement a balanced, comprehensive solution to the UI fund problem now will result in even greater tax increases and likely even deeper cuts in benefits in order to get the fund back to solvency before another recession.

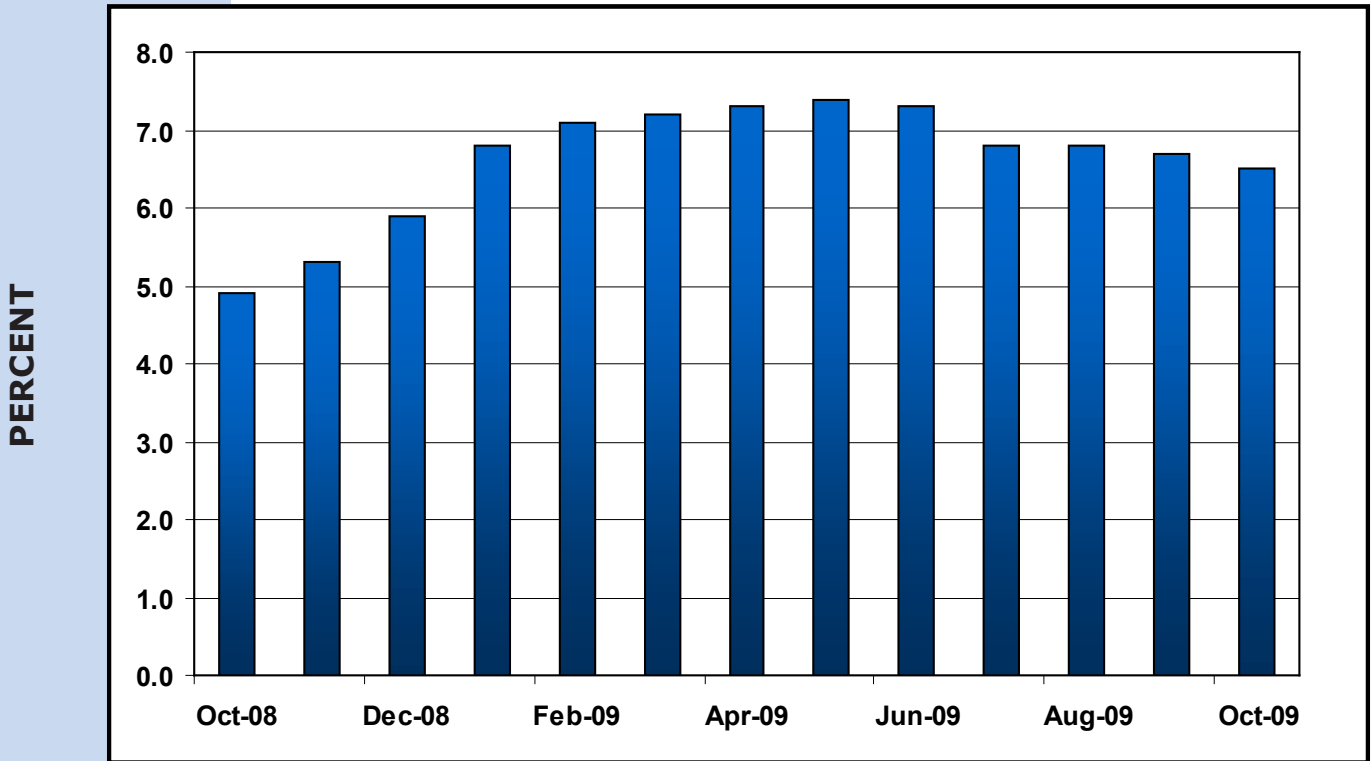
The Legislature created a study committee to examine the situation and prepare recommendations for consideration in January 2010. That committee is meeting now to consider various ideas for fixing the fund. Thus far, the discussion centers on raising taxes and borrowing. There are no benefit reductions being discussed other than freezing the maximum weekly benefit amount. You may find a schedule of the committee's meetings at <http://www.leg.state.vt.us>. Look for "committee meetings and events" and you will find the Trust Fund Reform committee listed.

The Department has updated the proposal for the fund responding to concerns raised by employers. We also have reviewed the benefit reductions to address concerns raised by the Legislature, employers, employees, and others to find a better balanced approach. You can find more information about the unemployment system and our proposed solution at [www.labor.vermont.gov](http://www.labor.vermont.gov). Click on "UI Trust Fund" in the "news" section on the right hand side of the front page.

I encourage you to become informed about this issue and discuss it with your legislators. Solving the fund problem requires action now to avoid even bigger problems down the road. If Vermont experiences another recession in the next 7-10 years, we could be borrowing to pay benefits for 10-20 years! And no one can afford that.



# Vermont Seasonally Adjusted Unemployment Rate



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**Equal Opportunity is the Law** - The State of Vermont is an Equal Opportunity/Affirmative Action Employer. Applications from women, individuals with disabilities, and people from diverse cultural backgrounds are encouraged. Auxiliary aids and services are available upon request to individuals with disabilities. 711 (TTY/Relay Service) or 802-828-4203 TDD (Vermont Department of Labor). Interpretative services are available for limited English proficiency customers. For more information please visit: <http://www.dol.gov/oasam/programs/crc/ISpeakCards.pdf>.

# Vermont Unemployment Estimates Statewide

(Seasonally Adjusted)

	Oct. '09	Sep. '09	Oct. '08	Changes from:	
				Sep. '09	Oct. '08
<b>TOTAL LABOR FORCE<sup>1</sup></b>	356,700	357,100	356,800	-400	-100
<b>EMPLOYED</b>	333,400	333,200	339,200	200	-5,800
<b>UNEMPLOYED</b>	23,300	23,900	17,600	-600	5,700
<b>RATE (%)</b>	6.5	6.7	4.9	-0.2	1.6

<sup>1</sup>Includes proprietors, professionals, and unpaid family workers.  
VCM Regression Methodology

## Labor Market Areas By Residence (Not Seasonally Adjusted)

AREA	Total Labor Force	Number Employed	Number Unemployed	Oct-09 Rate (%)	Sept-09 Rate (%)	Oct-08 Rate (%)
Barre-Montpelier	29,300	27,600	1,700	5.8	6.2	4.5
Bennington	13,450	12,550	900	6.6	7.2	4.8
Bradford	4,950	4,650	300	6.1	6.8	4.5
Brattleboro	24,100	22,700	1,400	5.8	6.5	4.5
Burlington-South Burlington	113,750	107,800	5,950	5.2	5.7	4.1
Hartford	20,150	19,400	750	3.7	4.1	2.7
Manchester	12,200	11,450	750	6.2	6.8	4.6
Middlebury	18,300	17,300	1,000	5.6	6.2	4.2
Morristown-Stowe	21,000	19,800	1,200	5.7	6.1	4.3
Newport	14,250	13,200	1,100	7.6	8.4	5.9
Randolph	8,900	8,300	650	7.0	7.2	5.1
Rutland	24,850	22,850	2,000	8.0	8.7	5.5
Springfield	12,250	11,450	850	6.8	7.6	4.9
St. Johnsbury	15,450	14,450	1,050	6.7	7.2	4.7
Swanton-Enosburg	14,250	13,250	950	6.8	6.9	5.3
Warren-Waitsfield	3,900	3,700	200	4.9	5.5	3.3
Woodstock	3,800	3,650	150	4.2	4.6	3.0
<b>Vermont Total</b>	<b>357,200</b>	<b>336,200</b>	<b>21,000</b>	<b>5.9</b>	<b>6.4</b>	<b>4.4</b>

### AREAS FROM ADJOINING STATES INCLUDING VERMONT TOWNS (Not Seasonally Adjusted)

Colebrook, NH-VT	4,000	3,650	350	8.8	8.9	4.2
Lebanon, NH-VT	47,800	45,950	1,900	3.9	4.4	2.6
Littleton, NH-VT	13,300	12,350	950	7.0	7.4	4.1
North Adams, MA-VT	17,500	15,950	1,550	8.8	9.5	5.8

# Vermont Seasonally Adjusted Nonfarm Employment in Thousands

BY NAICS	Prelim.	Revised	Revised	Changes From:		Otm	Oty
	Oct. '09	Sept. '09	Oct. '08	Sept. '09	Oct. '08	Change %	Change %
<b>Total - All Industries</b>	<b>294.6</b>	<b>294.4</b>	<b>305.3</b>	<b>0.2</b>	<b>-10.7</b>	<b>0.1</b>	<b>-3.5</b>
<b>Private Industries</b>	<b>240.7</b>	<b>240.6</b>	<b>251.3</b>	<b>0.1</b>	<b>-10.6</b>	<b>0.0</b>	<b>-4.2</b>
Construction	13.2	13.1	15.2	0.1	-2.0	0.8	-13.2
Manufacturing	29.9	30.2	34.3	-0.3	-4.4	-1.0	-12.8
Durable Goods	21.1	21.2	25.0	-0.1	-3.9	-0.5	-15.6
Non-Durable Goods	8.8	9.0	9.3	-0.2	-0.5	-2.2	-5.4
Trade, Transportation & Utilities	56.2	56.5	58.0	-0.3	-1.8	-0.5	-3.1
Retail Trade	37.4	37.7	39.3	-0.3	-1.9	-0.8	-4.8
Trans., Warehousing & Utilities	8.7	8.8	8.6	-0.1	0.1	-1.1	1.2
Financial Activities	12.7	12.6	12.8	0.1	-0.1	0.8	-0.8
Professional & Business Services	20.6	20.7	22.6	-0.1	-2.0	-0.5	-8.8
Professional, Scientific & Technical	12.8	12.8	13.4	0.0	-0.8	0.0	-4.5
Administrative Support & Waste	7.7	7.7	8.9	0.0	-1.2	0.0	-13.5
Education & Health Services	61.8	60.4	60.0	1.4	1.8	2.3	3.0
Private Ed. Services	13.7	13.2	13.5	0.5	0.2	3.8	1.5
Health Care & Social Assistance	48.1	47.2	46.5	0.9	1.6	1.9	3.4
Leisure & Hospitality	30.2	30.7	32.0	-0.5	-1.8	-1.6	-5.6
Arts, Entertainment & Recreation	3.9	3.8	3.9	0.1	0.0	2.6	0.0
Accommodation & Food Services	26.3	26.9	28.1	-0.6	-1.8	-2.2	-6.4
Other Services	9.7	9.6	9.8	0.1	-0.1	1.0	-1.0
<b>Total Government</b>	<b>53.9</b>	<b>53.8</b>	<b>54.0</b>	<b>0.1</b>	<b>-0.1</b>	<b>0.2</b>	<b>-0.2</b>
State Government	17.1	17.3	17.6	-0.2	-0.5	-1.2	-2.8
Local Government	30.6	30.4	30.3	0.2	0.3	0.7	1.0
<b>Burlington - S. Burlington MSA</b>							
<b>Total - All Industries</b>	<b>108.7</b>	<b>109.5</b>	<b>113.3</b>	<b>-0.8</b>	<b>-4.6</b>	<b>-0.7</b>	<b>-4.1</b>

Statewide Total - All Industries estimate is seasonally adjusted independently.

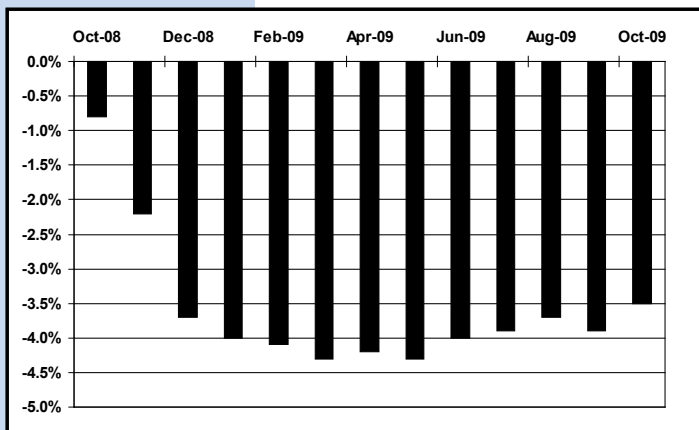
Note: Beginning January 2009 Vermont will publish a seasonally adjusted Total-All Industries estimate for the Burlington - S. Burlington MSA. Seasonal factors available from VDOL/LMI on request.

Produced by the Vermont Department of Labor in cooperation with the U.S Bureau of Labor Statistics.

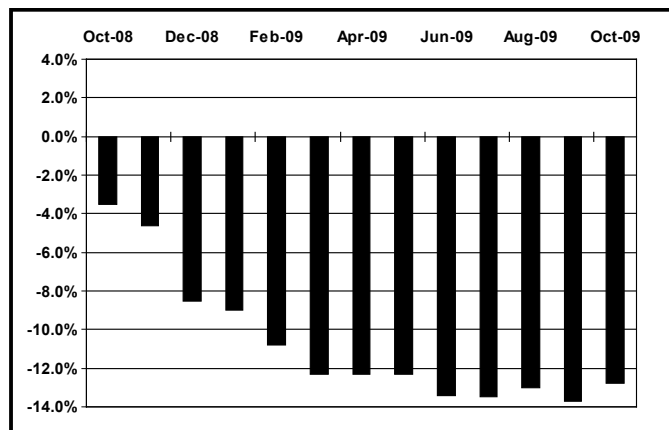
## Vermont Annual Job Growth

### Not Seasonally Adjusted Data

#### All Industries



#### Manufacturing



# Nonfarm Employment in Vermont (Not Seasonally Adjusted)

Compiled by the Vermont Department of Labor in cooperation with the Bureau of Labor Statistics, U.S. Department of Labor

INDUSTRY BY NAICS	Prelim.	Revised	Revised	Changes From:	
	Oct. '09	Sept. '09	Oct. '08	Sept. '09	Oct. '08
<b>TOTAL NONFARM</b>	<b>298,850</b>	<b>297,050</b>	<b>309,700</b>	<b>1,800</b>	<b>-10,850</b>
<b>TOTAL PRIVATE</b>	<b>242,200</b>	<b>242,350</b>	<b>252,900</b>	<b>-150</b>	<b>-10,700</b>
<b>GOODS PRODUCING</b>	<b>45,200</b>	<b>45,400</b>	<b>51,700</b>	<b>-200</b>	<b>-6,500</b>
MANUFACTURING	30,100	30,250	34,500	-150	-4,400
Durable Goods	21,100	21,200	25,050	-100	-3,950
Computer & Electrical Equipment Mfg.	8,400	8,450	9,050	-50	-650
Fabricated Metal Products Mfg.	2,500	2,500	2,550	0	-50
Non-Durable Goods	9,000	9,050	9,450	-50	-450
Food Mfg.	4,000	3,950	3,950	50	50
CONSTRUCTION	14,250	14,300	16,300	-50	-2,050
MINING & LOGGING	850	850	900	0	-50
<b>SERVICE-PROVIDING</b>	<b>253,650</b>	<b>251,650</b>	<b>258,000</b>	<b>2,000</b>	<b>-4,350</b>
TRADE, TRANSPORTATION AND UTILITIES	56,850	56,500	58,700	350	-1,850
Wholesale Trade	10,200	10,050	10,250	150	-50
Retail Trade	37,700	37,500	39,600	200	-1,900
Food & Beverage Stores	10,150	10,050	10,150	100	0
General Merchandise Store	2,850	2,800	2,900	50	-50
Transportation, Warehousing and Utilities	8,950	8,950	8,850	0	100
Utilities	1,800	1,800	1,750	0	50
Transportation & Warehousing	7,150	7,150	7,100	0	50
INFORMATION	5,450	5,450	5,650	0	-200
FINANCIAL ACTIVITIES	12,500	12,600	12,750	-100	-250
Finance & Insurance	9,250	9,300	9,500	-50	-250
Real Estate, Rental & Leasing	3,250	3,300	3,250	-50	0
PROFESSIONAL AND BUSINESS SERVICES	21,050	21,100	22,950	-50	-1,900
Professional, Scientific and Technical	12,800	12,750	13,350	50	-550
Administrative, Support and Waste	7,950	8,100	9,200	-150	-1,250
EDUCATIONAL AND HEALTH SERVICES	62,300	61,150	60,400	1,150	1,900
Educational Services	14,100	13,750	13,950	350	150
College, Universities and Professional	7,300	7,050	7,300	250	0
Health Care and Social Assistance	48,200	47,400	46,450	800	1,750
Ambulatory Health Care Services	16,150	16,200	16,000	-50	150
Hospitals	12,850	12,900	12,200	-50	650
Nursing and Residential Care Facilities	6,950	6,950	6,900	0	50
LEISURE AND HOSPITALITY	29,200	30,500	30,950	-1,300	-1,750
Arts, Entertainment and Recreation	3,900	4,300	3,900	-400	0
Accommodation and Food Services	25,300	26,200	27,050	-900	-1,750
Accommodations	8,450	8,900	9,000	-450	-550
Hotel & Motels	7,400	7,750	7,950	-350	-550
Food Services and Drinking Places	16,850	17,300	18,050	-450	-1,200
OTHER SERVICES	9,650	9,650	9,800	0	-150
<b>GOVERNMENT</b>	<b>56,650</b>	<b>54,700</b>	<b>56,800</b>	<b>1,950</b>	<b>-150</b>
Federal Government	6,250	6,250	6,200	0	50
State Government Education	8,850	8,500	8,900	350	-50
Local Government Education	24,950	23,450	24,750	1,500	200
Other State Government	9,250	9,250	9,650	0	-400
Other Local Government	7,350	7,250	7,300	100	50

**NOTE: Data compiled in cooperation with the U.S. Bureau of Labor Statistics. Estimates are preliminary and subject to revision. See Annual Summary for Details. Beginning with the January '09 estimates CES has implemented a change to the Super Sector previously titled "Natural Resources & Mining" to "Mining & Logging". It's merely a change of title to better reflect the true makeup of the Super Sector in CES.**

# The Advisor

## **Employer Alert:**

*Improperly Classifying Workers as Independent Contractors Can Result In Severe Monetary Penalties, Interest, and Contracting Debarment*

The Vermont Legislature has found that improperly classifying workers as independent contractors adversely impacts the Vermont economy. Employers who misclassify workers are given an improper financial competitive advantage over law-abiding businesses. They deprive the state of substantial revenue and impose indirect costs from decreased legitimate business activity and increased demand for social services. (See Act 208 of the 2008 Legislative Session.) Data collected by the Vermont Department of Labor (VDOL) suggests that 15% to 20% of Vermont employers improperly classify their workers and this improper classification may cost the unemployment insurance fund a million dollars or more in annual contributions. In 2008 the Legislature estimated that misclassification might add as much as 24% to the cost of all workers compensation insurance policies issued. To ensure that it is in compliance with all applicable laws a business should review the specific legal definitions under the W.C. statute, the U.I. statute, the Wage and Hour statutes, and the tax statutes. The Department of Labor has proposed to the Legislature that a single, easier to apply definition be developed, but until that occurs a business must consider each statute separately.

*Investigation and Enforcement is a High Priority; Penalties for Non-Compliance are Severe*

Because of the apparent seriousness of this problem, investigation and prosecution of alleged employer misclassification is a high priority for VDOL and the Vermont Department of Banking, Insurance, Securities and Health Care Administration (BISHCA). Last legislative session, VDOL was directed to hire additional investigators, whose primary duty is to investigate employers who may not be properly classifying their workers as employees for the purposes of worker's compensation coverage and unemployment insurance coverage. The Department's investigative powers were also increased, and an employer may be required to submit a written compliance statement demonstrating that appropriate worker's compensation coverage is in place, the proper insurance classification codes are used, and identifying all persons paid by the employer, both those classified as employees and those with 1099s. Failure to complete a compliance statement or providing false information on a compliance statement is punishable by a penalty of \$5000.00 per week. In addition, an employer who is found to have misclassified workers may be penalized up to \$20,000.00. Finally, an employer found to have misclassified, may be debarred from bidding on state contracts for a period of time.

Because of the severity of these consequences, a business should carefully evaluate whether a legal employment situation exists under workers' compensation and unemployment insurance law. It is important for the business to recognize that the legal definitions of "employer" and "employee" are different for income tax, workers' compensation and unemployment insurance purposes. This means that even if a person or entity with whom the business contracts might be considered an independent contractor under income tax law, there is still a good chance that the person or entity would be considered an employee for worker's compensation or unemployment purposes. The purpose of this article is to provide businesses with some assistance in evaluating whether a person or entity may be considered an employee for worker's compensation purposes.

*Two Legal Tests and Both Must Be Met*

A business must apply two legal tests, the "nature of the business" test and the "right to control" test, when determining whether a worker must be classified as an employee for worker's compensation purposes or may be legitimately considered an independent contractor. When applying these tests, the business must remember that the law starts with the presumption that an employer-employee relationship exists, and it will be incumbent on the business to affirmatively demonstrate that some other relationship is present. It also must remember to apply both tests – if under either test it appears that the worker is an employee, worker's compensation insurance must be provided.

Since most businesses are already familiar with the "right to control" test, this article will start with the "nature of the business" test and address the other test later.

*"Nature of the Business" Test:*

This test was developed based on the specific definition of employer created in the worker's compensation statute (21 V.S.A. §601(3)).

1. Are the activities being performed by the worker an integral part of the employer's regular business?
2. Is the work being performed of the type that normally could be carried out by an employee in the usual course of business?

If the response to either these questions is yes, then a statutory employer-employee relationship exists, and the employer must provide worker's compensation coverage for the worker. As an example:

# The Advisor - continued

If painting business A contracts with person B to assist the painting business in painting a large building, person B will be considered to be an employee of painting business A, even if person B has his or her own painting business and has painting jobs separate from the building under contract. Why? Because the work performed is "painting" and that is an integral part of painting business A's operations. Further, it is work that could otherwise be performed by an employee. If painting business A contracts with person C, a licensed electrician, to move electrical outlets in the building, then person C may be an independent contractor for whom worker's compensation coverage is not required (assuming that A does not "control" C's work). Why? Because electrical work would be outside of the regular business of painting company A, assuming A did not employ other electricians or regularly perform such work in the course of its painting business.

The broad sweep of the "nature of the business" test is further illustrated by the Vermont Supreme Court case *In re Chatham Woods Holdings, LLC*, 2008 VT 70 (May 16, 2008). In that case, Chatham Woods, a real estate development company which originally did not involve itself in the actual building of real estate projects, decided to get directly involved in a construction project when it could not find a purchaser willing to take on one of its developments. Chatham Woods hired several subcontractors to perform the construction; some of those subcontractors were sole proprietor business owners. After reviewing the situation, the worker's compensation insurer for Chatham Woods determined that it was effectively the general contractor for the project and thus responsible for providing worker's compensation insurance for any uninsured sub-contractor. Chatham Woods challenged that determination, but on appeal the Vermont Supreme Court determined that applying the "nature of the business" test (and the "right to control" test), Chatham Woods had become a statutory employer of the sub-contractors. The Court stated that the test "is whether the work that the owner contracted for is a part of, or process in, the trade, business, or occupation of the owner." In this case, Chatham Woods operated as a developer *and* a builder at the project, and this new approach to its development business was sufficient to make it an employer of the uninsured workers on the project.

Several other court cases have reached a similar conclusion. Applying the "nature of the business" test, the Vermont Supreme Court has found a statutory employer-employee relationship between: (1) a lumber trimming/staining business and a truck driver of a business contracted to haul products to and from the plant, *Frazier*, 2004 VT 95, ¶ 10; (2) a state agency engaged in selling and distributing liquor and a person injured while working for the business contracted by the state to transport the liquor, *Edson*, 2003 VT 32, ¶ 9; and (3) a manufacturer of sounding boards and an employee of the independent contractor hired by the manufacturer to haul lumber to the manufacturer's factory, *O'Boyle v. Parker-Young Co.*, 95 Vt. 58, 61, 112 A. 385, 386 (1921). The Court interprets the Legislature's intent behind the Worker's Compensation Act to favor an "all embracing" definition of employee and employer where such a construction is reasonable. *Fotinopoulos v. Dep't of Corr.*, 174 Vt. 510, 512, 811 A.2d 1227, 1229 (2002) (mem.)

## "Right to Control" Test

Under the "right to control" test, courts examine numerous factors to ascertain whether a business has exercised enough control over an individual to classify the relationship as employer-employee within the meaning of the worker's compensation statute. This test does not require an employer to actually exercise control; it merely requires that an employer *could*, if it chose to do so, exercise control over the employee. This classification is entirely factually specific. The factors to be considered are:

1. Who controls the means and methods of the work performance?
2. Does the worker hold his services out to the general public?
3. Does the worker perform the task without supervision?
4. Does the worker possess the required permits, licenses and certificates?
5. Is the worker doing business as a corporation or under an assumed business name?
6. Does the work require extensive skill, education or experience?
7. Who establishes the routine or schedule?
8. What is the duration of the relationship?
9. What is the method of payment, whether by time or by job?
10. Are taxes deducted or withheld from the worker's check?
11. Who determines the hours of work?
12. Does the worker receive fringe benefits or bonuses?
13. Who provides the equipment necessary for completion of the work task?

If the totality of responses to these questions leads to the conclusion that an employer "controls" its worker, then the analysis concludes and the employer must be insured for worker's compensation purposes.

The following examples may prove helpful when determining whether a worker is properly classified as an employee or an independent contractor for worker's compensation purposes.

# The Advisor - continued

Under the “right to control” test, a truck driver is an employee when the company/employer exerts the requisite amount of control over their drivers. Specifically, if the employer instructs the driver on maintaining, parking and loading the truck; provides specific travel routes to the driver; instructs him not to drive during inclement weather; pays all maintenance and fuel costs for the truck and handles all contracting with third parties; then the employer controls the truck-driving activities. Therefore, an employer-employee relationship exists between the parties and worker’s compensation coverage is required. *Falconer v Richard and Janet Cameron, d/b/a R&J Cameron Leasing Company*, 151 Vt. 530 (1989).

A manufacturer is a “statutory employer” for worker’s compensation purposes, of a worker hired through a temporary agency, where the manufacturer owned the premises and carried on the business where the worker worked, supervised the work, and had the power to replace the worker if the work was unsatisfactory. *Candido v. Polymers Inc.*, 166 Vt. 15 (1996) (Court rejected worker’s attempt to sue manufacturer in tort concluding that exclusive remedy was worker’s compensation).

A manufacturer that owned lumber to be shipped to its factory was in the business of hauling lumber, and thus was the “statutory employer” of a worker hired under contract to haul the lumber and load it on railcars at a specified price per thousand. If the work being performed pertains to the business, trade, or occupation carried on by the claimed employer for pecuniary gain, then the person performing the work is an employee, even if hired as an independent contractor. *Boyle v. Parker-Young Co.*, 95 Vt. 58 (1921)

A landowner, who is not in the lumber or logging business, but hires a logger to cut and remove trees from the land is *not* the “statutory employer” of a worker hired by the logger to assist in cutting and removing the timber. *King v. Snide*, 144 Vt. 395 (1984). The logging work was not part of the landowner’s regular trade or business and the landowner did not direct the means or method of the work that was to be performed.

Keep in mind that if either the “nature of the business” test or the “right to control” test indicates an employment relationship, the worker should be treated as an employee for the purposes of workers’ compensation coverage.

## Conclusion:

All businesses, employees and workers in the state should be careful to consider seriously the ramifications and consequences of classifying a worker as an independent contractor rather than an employee. VDOL, and the Vermont courts, narrowly interpret exceptions to the Worker’s Compensation Act’s coverage requirements. Accordingly, if a business has any doubt as to the proper classification of a worker, the Department recommends that the worker be classified as an employee. This approach protects the business from the severe consequences of improperly classifying the worker, especially since, although the legal definitions in the Unemployment Insurance Act differ from the Worker’s Compensation Act definitions, a determination that a worker is an employee under one Act more often than not will also lead to a determination that the worker is an employee under the other Act.

Additional information on this issue is available on the VDOL website: <http://labor.vermont.gov/>.

Questions also may be submitted via e-mail to [stephen.monahan@state.vt.us](mailto:stephen.monahan@state.vt.us).

