



NEW ZEALAND COUNCIL OF TRADE UNIONS  
*Te Kauae Kaimahi*

Submission of the  
New Zealand Council of Trade Unions  
Te Kauae Kaimahi

to MBI E

on

Discussion Paper: Protecting businesses and  
consumers from unfair practices

P O Box 6645  
Wellington

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## 1. Summary of Recommendations

1. Adopt components of the options identified in the Discussion Paper as follows:
  - a. The CTU supports a retrospective *and* forward facing general statutory prohibition against unfair conduct and unfair contracts with a penalty regime, such a regime to be able to take into account standards of social norms and fairness in determining unconscionability, enforcement to be carried out by a government body as well as a worker claims process. This to be a low costs jurisdiction.
2. Employment Regulation
  - a. Include two additional factors of “economic dependence” (to capture dependent contractors) and “imbalance of bargaining power” in the “real nature of the relationship” test under s6 of the Employment Relations Act 2000.
  - b. Have the capacity to deem workers in particular industries, and children, to be employees.
  - c. Labour inspectors should be empowered to make employment status determinations (with a clear right of appeal).
  - d. Pick up the work undertaken with the failed member’s bill, The Minimum Wage (Contractor Remuneration) Amendment Bill.
  - e. Consider advancements in overseas jurisdictions such as inserting into the employment statute particular provisions to protect employees from sham contracting, as per the Australian model.

### 3. Commercial Regulation

- a. Pick up the statutory model in Australia of the *Independent Contractors Act 2006* (Cth.), which allows a Court to determine that a contract is 'harsh' or 'unfair' by taking into account the respective bargaining powers of the parties, whether unfair tactics were used in negotiating the contract and whether the contractor will receive remuneration for services which are comparable to that of an employee performing similar work (s15).
- b. Consider an exemption process to allow genuine independent contractors to bargain collectively.

## 2. Introduction

- 2.1. This submission is made on behalf of the 27 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With 320,000 members, the CTU is one of the largest democratic organisations in New Zealand.
- 2.2. The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga), the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers.
- 2.3. The CTU welcomes the opportunity to comment on *Discussion Paper: Protecting businesses and consumers from unfair commercial practices* (the Discussion Paper) prepared by the Ministry of Business, Innovation and Employment.
- 2.4. In this submission, the CTU addresses the discreet issue arising within the Discussion Paper, namely the treatment of self-employed contractors, most particularly, dependent contractors.
- 2.5. The phrase 'dependent contractors' (also known as 'sham contracting' or 'disguised employment') refers to situations where a person works for reward and is defined as self-employed but, in reality, has very little or none of the autonomy that would be expected of an independent contractor and does not in reality run a business on their own account. These types of workers are often inaccurately termed 'independent contractors' but are subject to various means of control by the engaging company.

Such workers might theoretically meet some of the criteria for an independent contractor but they sit in a grey area.

- 2.6. The International Labour Organisation defines dependent contractors as workers who have contractual arrangements of a commercial nature (but not a contract of employment) to provide goods or services for or through another economic unit. They are not employees of that economic unit, but are dependent on that unit for organization and execution of the work, income, or for access to the market. They are workers employed for profit, who are dependent on another entity that exercises control over their productive activities and directly benefits from the work performed by them.<sup>1</sup>
- 2.7. A dependent contractor could be subject to a sham contract where an employer deliberately disguises an employment relationship as an independent contracting arrangement, instead of engaging the worker as an employee. The motive for this is risk shifting to evade paying employee entitlements such as superannuation contributions, ACC levy, and certain taxes, and respecting employment rights such as minimum standards (including Holidays Act entitlements and the minimum wage), rights to collectively bargain, and personal grievances. In other cases, employees are pressured to become independent contractors where they are threatened with being dismissed or are misled about the effect of changing their working arrangements.
- 2.8. This type of arrangement may become more common through the rise of the 'gig' economy, using "on-demand" app-based service providers such as Deliveroo, Uber, TaskRabbit, AirTasker and Lyft.
- 2.9. While this kind of arrangement may be beneficial to some workers with in-demand skills and high bargaining power, evidence suggests that, on average, these workers are low paid and insecure. It is important that dependent contractors have access to the same protections as other workers, including minimum employment standards and rights to collective bargaining. The theory of a naturally correcting commercial market does not ring true here. There is no constraining power of competitive forces.
- 2.10. While dependent contractors cannot be easily identified in official statistics and distinguished from the true self-employed, research conducted by the CTU showed

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<sup>1</sup> International Labour Office Resolution concerning statistics on work relationships, 20th International Conference of Labour Statisticians Geneva, 10-19 October 2018, p8, Available at: [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/meetingdocument/wcms\\_648693.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/meetingdocument/wcms_648693.pdf)

that a large proportion of the self-employed were earning at very low hourly rates. It found that “In 2015, an estimated 41 percent of self-employed were earning less than the minimum wage and 51 percent were earning under the Living Wage.” The bottom 30 percent had falling earning rates in real terms over the period 1998-2015.<sup>2</sup>

- 2.11. There is increasing public concern at the impact not only on the terms of employment of these workers, but also the dangers to their own and the public’s health and safety. Examples in the trucking industry were documented in a recent series on The Spinoff website.<sup>3</sup>
- 2.12. In New Zealand, dependent contractors (and sham contracts) are seen in the transport and delivery, care and support, beauty, health & fitness, telecommunications installation, residential building, commercial cleaning industries, live performance industry, public and community services and in current and emergent gig platforms. We can provide further examples and details on request.
- 2.13. New Zealand’s approach to the issue of employee versus self-employed contractor is a binary model; there are employees with minimum entitlements and termination restrictions, or independent contractor model with fetters on the degree to which the worker can be controlled or integrated. However, often there is not a clear line between a genuinely independent contractor, an independent contractor (a hybrid between an employee and an independent contractor) and sham contracting or disguised employment where an employee is unlawfully treated as a purported ‘independent’ contractor.
- 2.14. In the situation of sham or disguised employment, workers have recourse to s 6 of the ER Act under which the Authority or the Court must determine the “real nature of the relationship” taking into account all relevant matters that indicate the intention of the parties and that any statement of intention is not to be treated as determinative.

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<sup>2</sup> Rosenberg, B. (2017). Shrinking portions to low and middle-income earners: Inequality in Wages & Self-Employment 1998-2015. Wellington, New Zealand: New Zealand Council of Trade Unions Te Kauae Kaimahi. Available at <http://www.union.org.nz/wage-and-salary-earners-below-the-average-wage-lost-out-on-income-growth/inequality-wages-self-employment-1998-2015/>

<sup>3</sup> Slade, M. (2019, January 16). Transport’s dirty little secret: The truckers breaking the law just to survive. Available at <https://thespinoff.co.nz/business/16-01-2019/transport-sectors-dirty-little-secret-truckers-breaking-the-law-to-survive/>; Slade, M. (2019, February 27). NZ truckies queue up to take cases against food giant Goodman Fielder. Available at <https://thespinoff.co.nz/business/27-02-2019/nz-truckies-queue-up-to-take-cases-against-food-giant-goodman-fielder/>

- 2.15. The recent case of *Prasad v LSG Sky Chefs New Zealand Ltd*<sup>4</sup> is an example of using employment regulation avenues to address sham arrangements. In this case the Employment Court found that independent contractors of labour hire company Solutions Personnel Ltd were, in fact, employees of the end-user client, LSG Sky Chefs, even in the circumstances where the individuals had signed documents confirming an independent contractor relationship.
- 2.16. Often, however, this avenue is not realistically available to dependent contractors due to uncertainty in the nature of their true classification (they may have indicia of employees and contractors) and in sham contracting arrangements where work is often offered on a take it or leave it basis to vulnerable workers who do not have the means to access representation and legal remedies.
- 2.17. New Zealand law has a deep gulf between the protections afforded to contractors compared to those given to employees. This becomes all the more problematic in relation to dependent contractors in the grey area. CTU commented in the ‘Under Pressure’ report at 56:

*Workers outside of the protections of the employment relationship are most vulnerable of all. They are not entitled to receive the so-called ‘minimum code’ statutory protections such as holidays and other types of paid leave, minimum wages or equal pay. Certain terms implied into every employment agreement by statute or common law are not present in ordinary contracts. For example, the obligation of good faith under section 4 of the Employment Relations Act 2000 requires the parties to be open and communicative and not to do anything likely to mislead or deceive one another.*

*Contractors retain some rights (though they are excluded from others), including the right to a healthy workplace, some parental leave rights, and rights under the Fair Trading Act 1986 against misleading and deceptive conduct. They also retain rights and protections under general contract law. These rights are the poor cousins of the detailed law built up to protect employees from what the Employment Relations Act 2000 calls “the inherent inequality of bargaining power in employment relationships”.*

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<sup>4</sup> [2017] NZEmpC 150

- 2.18. Contractors will not have access to the low-level, low- or no-cost dispute resolution services provided under the employment framework such as the Mediation Service and Employment Relations Authority.
- 2.19. Therefore the CTU considers the issue of self-employed contractors should be addressed as part of this review. This is consistent with the stated high level objective of this work outlined in Chapter 1 of the Discussion Paper to ensure that New Zealand's regulatory systems contribute to a business environment where businesses and consumers are confident participants in fair and thriving markets. The continued existence, and increased occurrence, of unfair grey area self-employed contractor arrangements needs to be addressed by further government regulation. As stated in paragraph 70 of the Discussion Paper, there are currently no legislative protections that specifically address unfair contract terms in contractual dealings between businesses. New Zealand law currently only recognises the binary concepts of employee "contract of services" or contractor "contract for services". There are sound economic reasons for prohibiting unfair business-to-business conduct, of which the treatment of contractors is one type, as well as broader 'fairness' justifications, including issues related to migration and trafficking for labour exploitation.

### **3. Defining the Concerns**

- 3.1. The issue of unfair treatment of self-employed contractors is acknowledged in the Discussion Paper at page 24 in *Box 2: unfair treatment of contractors* which states:

*The focus of this section is on businesses' conduct towards other businesses, as opposed to their conduct towards natural persons. However, we are also aware of concerns about the treatment of contractors by firms in some industries (such as the trucking and delivery industry). Contractors nominally function as businesses, but in practice they can bear a number of similarities to employees. The Employment Relations Act 2000 already provides guidance around when a person is an employee. However, there are situations where contractors may genuinely be in business on their own account (and therefore unlikely to qualify as employees), while in practice having very little bargaining power, and being economically dependent on a single principal firm.*

*Some of the concerns we are aware of in this context include:*

- *contracts which allow a principal firm to unilaterally adjust payment rates or the contractor's territory*



- *one-sided termination rights in favour of the principal firm; and*
- *clauses which require the contractor to work exclusively for the principal firm.*

*While these examples are not dissimilar to the examples of unfairness in more clear-cut business-to business relationships, they may be of added concern because such contractors are not afforded the protections given to employees. The options discussed in Chapter 5 are not specific to any particular form of business model. As such, they have the potential to address some of contractors' concerns.*

3.2. With respect, the CTU does not consider the issue of the treatment of contractors has been fully captured in the text above. In addition to the 'concerns' listed above in the box 2 text, further areas of concern include the respective bargaining powers of the parties, whether unfair tactics were used in negotiating the contract, whether the contractor will receive remuneration for services which are comparable to that of an employee performing similar work and the existence of unfair termination provisions which don't provide for the obligation to have justification for the termination.

3.3. The Discussion Paper adopts a classification system of 'unfair conduct' and 'unfair contracts'. The CTU and its affiliates have observed the following conduct under the classifications:

3.4. Unfair conduct:

- Deliberate exploitation of grey areas or regulatory gaps between employment and commercial law.
- Blatantly unlawfully treating employees as contractors, such as contractor contracts indicating integration in the company as per an employee – the contractor is subject to supervision, compulsory uniforms, performance management, inability to turn down work and they are not liable for GST. The contractors do not do their own advertising, employ others, or run a business on their own account.
- Exploitation of weak bargaining power.
- Presenting standard form contracts on a take it or leave it basis, with no capacity to meaningfully negotiate the contract terms.

- Unfair, dishonest recruitment practices and/or transfers from one employer to another.
  - Using threats of force, coercion, fraud, deception and abuse of power or vulnerability.
- 3.5. Unfair contracts
- Terms that restrict and control contractors.
  - Terms prohibiting secondary employment.
  - Payment of dependent contractors at or below the minimum wage.
  - Terms that provide for termination with no justification.
  - Terms that provide for an imbalance of power.
- 3.6. The Discussion Paper at page 18 identifies the issues with respect to the treatment of self-employed contractors where it explains that problems associated with unfair contract terms are likely to be concentrated in contracts which are standard form; and where one of the parties is small in either absolute terms, or relative to the other party, and are more pronounced for small businesses
- 3.7. The Discussion Paper describes remedial avenues open in these circumstances, including declining the contract, seeking legal advice, and seeking to renegotiate the terms of the contract. It goes on to say that despite those theoretical remediation avenues and the presence of one or more one or more unfair contract terms, in a number of situations, businesses may nevertheless enter into a contract because they have no other viable alternative. The CTU understands there are large numbers of self-employed contractors in the situation of not being able to realistically access a just remedy and are working under unfair or sham contracts.
- 3.8. While it is correct in some respects that the nature of contracts can be dealt with via employment law avenues, these avenues are effectively barred except in unionised industries.
- 3.9. The CTU argues government intervention is necessary to address these circumstances.

#### **4. Comment on High-Level Objectives and Criteria in Discussion Paper**

- 4.1. The Discussion Paper requests submitters to comment on the suitability of the high-level objectives and criteria set out in the Discussion Paper.
- 4.2. The CTU considers that the high-level objective and criteria set out in section 4 (page 27) does not capture adequately the issue of unfair treatment of self-employed contractors. As a result, we have not adopted the criteria in our submission.

#### **5. Comment on Options in Discussion Paper**

- 5.1. As is mentioned in the Discussion Paper's *Box 2 unfair treatment of contractors*, the options to address gaps in regulating commercial conduct between business to business resulting in unfair contracts and/or conduct does not address specifically the issue of self-employed contractors (either independent or dependent). However, as equally noted some of the options could be applied to contractor issues. These should be supplemented with specific, targeted measures.
- 5.2. We do not find the method of setting out options in the Discussion Paper is particularly appropriate for dealing with the issue of self-employed contractors. However, in attempting to remain within the parameters of this method, the CTU generally supports an approach of a hybrid of option 1A and B (in order to capture the detail of unconscionable conduct) and to extend this option by adding on option 2.
- 5.3. The CTU considers it more useful to outline components of a regulatory system to deal with the issue of self-employed contractors and therefore supports the following components of the options outlined in the discussion paper:
- 5.4. The CTU considers any regime adopted should be able to capture both unfair conduct and unfair contracts.
- 5.5. The CTU supports a general statutory prohibition against unfair conduct and unfair contracts.
- 5.6. There needs to be an application process to declare contracts unfair (due to either terms or conduct, or both).
- 5.7. Contractors should be protected from unfair contract terms even in respect of main subject matter (price) in the contract.

- 5.8. There should be a penalty or offence regime underpinning the regulation. It should be an offence to contravene the prohibition against unfair conduct
- 5.9. Legislative guidance on examples of unfair conduct or contracts terms is desirable.
- 5.10. The statutory regime should codify and expand upon the common law doctrine of unconscionability. CTU agrees with picking up, and expanding upon, the regime of unconscionable conduct under the *Australian Competition and Consumer Act 2010* (Commonwealth). The statutory prohibition should explicitly state that it may apply to: a. a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and b. the manner in which and the extent to which the contract is carried out. The Australian prohibition also states that the terms of a contract may be unconscionable. As per decisions of the Australian Courts, the threshold as to what may be considered unconscionable should be lowered by clarifying that Courts can take into account standards of social norms and fairness in assessing unconscionability. This could be achieved via introducing a flexible definition of unconscionable conduct in the legislation.
- 5.11. The application of the law needs to be retrospective, in that current unfair situations can be remedied and forward facing to prevent future conduct.
- 5.12. Enforcement should be via a government body, in addition to the right of workers to seek remedies. Consideration needs to be given to the costs of the enforcement regime in terms of access to justice as many dependent/sham contractors are precarious and vulnerable.
- 5.13. There should be a low threshold to access remedies.
- 5.14. Consideration could be given to targeting the protections to particular types of sectors/industries with the vulnerability, perhaps targeting industries/occupations with high number of sole trader contractors for instance. This could possibly address deliberate predatory behaviour.

## **6. Other Regulatory Options**

- 6.1. The CTU considers a mix of further regulatory measures should be considered to address the treatment of self-employed contractors. Some of the regulatory measures come under employment law and others under commercial law. Although not the

subject of this Discussion Paper, the employment law measures are set out for context.

### Employment Regulation

- 6.2. In New Zealand, the “real nature of the relationship” test should set out the common law fundamental nature, control and integration tests<sup>5</sup> as this would add two additional factors of “economic dependence” (to capture dependent contractors) and “imbalance of bargaining power;”
- 6.3. New Zealand deems all homeworkers to be employees under Section 6(1)(b)(i) of the Employment Relations Act 2000. Several overseas jurisdictions have deemed all workers in particular industries to be employees. The law should allow a further regulation making power permitting the Government to do this where appropriate.
- 6.4. Children should also be deemed to be employees in any work they undertake before they turn 16.
- 6.5. The next challenge is enforcement. An issue with the “real nature of the relationship test” is that it involves balancing a range of factors and is therefore inherently uncertain. It also requires a status application to the Employment Relations Authority (which can be done by workers, unions or labour inspectors). The uncertainty and court filing combine to make such applications uncommon (2-5 per year). Labour inspectors should be empowered to make employment status determinations (with a clear right of appeal). This would allow workers a quicker, less formal avenue than applying to the Authority.
- 6.6. The CTU recommends continuing the work undertaken with the member’s bill, The Minimum Wage (Contractor Remuneration) Amendment Bill, which proposed to introduce a contractor minimum wage. This Bill was narrowly voted down just prior to the 2017 election.
- 6.7. Other countries are also grappling with these issues with a variety of policy responses. We mention two by way of example to emphasise the importance of New Zealand

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<sup>5</sup> The best explanation of these tests we have found is set out in 2016 IRD guidance interpretation guideline: IG 16/01 Determining employment status for tax purposes (employee or independent contractor?). Available at: <http://www.ird.govt.nz/resources/8/6/86750f2f-18b3-44de-9f15-4fb110b18f1d/ig1601.pdf>

also addressing the issue, not to advocate for the particular responses unless specifically stated.

- 6.8. In the United Kingdom the workforce is split into three broad categories: employee, worker and independent contractor. The “worker” category provides a reduced set of minimum protections, including the minimum wage, paid holidays, statutory sick leave, rest breaks and protection from unlawful discrimination. However, workers do not receive unfair dismissal rights or statutory redundancy pay.
- 6.9. Australia has bespoke provisions in employment law to deal with the issue of the unfair treatment of contractors. Although possibly outside of the scope of this review, New Zealand should investigate incorporating a similar regime into its employment statute.
- 6.10. The Australian *Fair Work Act 2009* (Commonwealth) protects genuine employees from 'sham' independent contracting arrangements and outlines employers' obligations when establishing an employment relationship. It also protects independent contractors from adverse action (equivalent to unjustifiable disadvantage in New Zealand), coercion and abuses of freedom of association.
- 6.11. Sections 357 – 359 of the *Fair Work Act 2009* (Cth.) (outlined in Appendix 1) provide a penalty regime for the offences of misrepresenting employment as an independent contracting arrangement, dismissing an employee to engage them as an independent contractor and misrepresentation in order to engage as an independent contractor.

#### Commercial Regulation

- 6.12. As is noted in the Discussion Paper, in New Zealand there are currently insufficient commercial law regulatory protections to deal with the issue of unfair treatment of self-employed contractors. The CTU has set out the components of options outlined in the Discussion Paper it supports. In addition to those measures, the CTU considers further measures should be considered.
- 6.13. The CTU recommends adopting the Australian model of a statutory avenue to deal with unfair treatment of self-employed contractors. The Australian *Independent Contractors Act 2006* (Cth.), provides a statutory regime for affected persons to seek relief where a person performs work on terms that are 'unfair' or 'harsh'.
- 6.14. Under the *Independent Contractors Act 2006* (Cth.), a Court can determine that a contract is 'harsh' or 'unfair' by taking into account the respective bargaining powers of the parties, whether unfair tactics were used in negotiating the contract and whether

the contractor will receive remuneration for services which are comparable to that of an employee performing similar work (s15).

6.15. If a court determines that contract is 'unfair' or 'harsh' it may order that:

- the terms of the contract be changed (for example, terms may be added or removed);
- parts of the contract will have no effect;
- the contract will be 'set aside' (which means the entire contract will no longer have any effect).

6.16. Costs are limited in these cases.

6.17. The following is a practical example of how the *Independent Contractors Act 2006* (Cth.) works:

Mary is an elderly cleaner with limited English skills who contracts with XYZ Ltd to clean office buildings. She has never previously been a party to a services contract. In these circumstances, a court may take account of Mary's limited understanding of her contractual obligations when compared with XYZ Ltd's when considering whether the contract is unfair.

## **7. Bargaining for Genuine Contractors**

7.1. In addition to the measures outlined by the CTU in this submission, the CTU recognises there is a further issue in relation to contractors that must be addressed. Although possibly outside the scope of this Discussion Paper, it is set out here for comprehensiveness. There needs to be further consideration given to question of how to provide a better deal for 'genuine' contractors. This is becoming all the more relevant as the Fair Pay Agreement tripartite Working group and the Film Industry tripartite Working Group grapple with the question of how to facilitate collective bargaining for genuine contractors.

7.2. The passing of the Commerce (Cartels and Other Matters) Amendment Act goes some way to address this issue. It allows the Commerce Commission to declare certain types of activity excluded from price-fixing restrictions. However, it is likely further solutions are required such as creating an exemption process in the

Commerce Act 1986 for unions to negotiate standard contracts (including price) on behalf of self-employed workers.

## **8. Conclusion**

- 8.1. The CTU acknowledges that that this Discussion Paper raises the issue of the treatment of self-employed contractors as part of its identification of further regulatory solutions needed for prohibiting unfair business to business conduct. The CTU considers there are sound economic reasons for prohibiting unfair business-to-business conduct, as well as broader 'fairness' justifications.
- 8.2. The CTU supports sub-components of the options outlined in the Discussion Paper but considers more targeted regulatory responses are needed to address the specific issue of the treatment of self-employed contractors. Some of the measures recommended by the CTU are potentially outside the scope of this review but are included for context and comprehensiveness. We submit that it would be good public policy that they be considered.
- 8.3. The CTU considers further policy development work as part of this review needs to be undertaken in order to address the issue of unfair treatment of self-employed contractors.



**Appendix 1**  
**Select Provisions of *Fair Work Act 2009* (Cth.)**

**s357 Misrepresenting employment as independent contracting arrangement**

(1) A person (the employer) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer:

(a) did not know; and

(b) was not reckless as to whether the contract was a contract of employment rather than a contract for services.

**s358 Dismissing to engage as independent contractor**

An employer must not dismiss, or threaten to dismiss, an individual who:

(c) is an employee of the employer; and

(d) performs particular work for the employer;

in order to engage the individual as an independent contractor to perform the same, or substantially the same, work under a contract for services.

Note: This section is a civil remedy provision (see Part 4-1).

**s139 Misrepresentation to engage as independent contractor**

A person (the employer ) that employs, or has at any time employed, an individual to perform particular work must not make a statement that the employer knows is false in order to persuade or influence the individual to enter into a contract for services under which the individual will perform, as an independent contractor, the same, or substantially the same, work for the employer.

Note: This section is a civil remedy provision (see Part 4-1).