

**State of Minnesota  
Department of Labor and Industry  
Construction Codes and Licensing Division**

**STATEMENT OF NEED AND REASONABLENESS**

**Proposed Rules Governing Independent Contractor Exemption Certificates;  
Minnesota Rules, Chapter 5202**

**INTRODUCTION**

During the 2007 Legislative Session, a new statute regulating independent contractors who operate in the construction industry, Minn. Stat. § 181.723, was passed by the legislature and signed into law by the governor. This new independent contractor statute provides in pertinent part as follows:

For purposes of Minnesota's workers compensation statutes Minn. Stat. Ch.176, minimum wage and overtime statute, Minn. Stat. Ch.177, child labor statute, Minn. Stat. Ch. 181A, occupation safety and health statute, Minn. Stat. Ch. 182, and unemployment insurance statute, Minn. Stat. Ch. 268:

An individual who performs public or private sector commercial or residential building construction or improvement services for a person that are in the course of the person's trade, business, profession, or occupation is an employee of that person unless the individual holds a current independent contractor exemption certificate issued by the commissioner of the Department of Labor and Industry and is performing services for the person under the exemption certificate then the individual is an independent contractor.

The scope of the new independent contractor statute is limited to public or private sector commercial or residential building construction or improvement services performed by an individual for a person that are in the course of the person's trade, business, profession or occupation. It does not apply to homeowners who contract with individuals to perform residential building contractor services on their homes.

Under the new statute, an individual must have both a current independent contractor exemption certificate issued by the Department of Labor and Industry and be performing services under the exemption certificate in order to operate as an independent contractor. If either requirement is not met the individual is an employee of the person for whom the individual is performing services.

An individual is performing services under the independent contractor exemption certificate, if the individual and the specific work situation meet the following requirements:

- (a) the individual is performing services listed on the individual's independent contractor exemption certificate; and
- (b) at the time the individual is performing services listed on the individual's

independent contractor exemption certificate, the individual meets all of the following [nine] conditions:

- (1) maintains a separate business with the individual's own office, equipment, materials, and other facilities;
- (2) holds or has applied for a federal employer identification number or has filed business or self-employment income tax returns with the federal Internal Revenue Service if the individual performed services in the previous year for which the individual has the independent contractor exemption certificate;
- (3) is operating under contract to perform the specific services for the person for specific amounts of money and under which the individual controls the means of performing the services;
- (4) is incurring the main expenses related to the services that the individual is performing for the person under the contract;
- (5) is responsible for the satisfactory completion of the services that the individual has contracted to perform for the person and is liable for a failure to complete the services;
- (6) receives compensation from the person for the services performed under the contract on a commission or per-job or competitive bid basis and not on any other basis;
- (7) may realize a profit or suffers a loss under the contract to perform services for the person;
- (8) has continuing or recurring business liabilities or obligations; and
- (9) the success or failure of the individual's business depends on the relationship of business receipts to expenditures.

To obtain an independent contractor exemption certificate, an individual must submit a complete application and application fee to the Department of Labor and Industry. The statute requires that a complete application include the following information:

- (1) the individual's full name;
- (2) the individual's residence address and telephone number;
- (3) the individual's business name, address, and telephone number;
- (4) the services for which the individual is seeking an independent contractor exemption certificate;
- (5) the individual's Social Security number;
- (6) the individual's or the individual's business federal employer identification number, if a number has been issued to the individual or the individual's business;
- (7) any information or documentation that the commissioner requires by rule that will assist the Department in determining whether to grant or deny the individual's application; and
- (8) the individual's sworn statement that the individual meets all of the [nine conditions set out above].

The issue of whether an individual is an employee or independent contractor arises in innumerable contexts and often at the point it must be discerned whether particular laws such as workers' compensation, unemployment insurance, tax, occupation safety and health, and wage and hour, apply to or have been violated by the individual and/or the person who hired him or her. Under current law, whether an individual is operating as an independent contractor is determined based on an assessment of whether the individual and the specific work situation in question meet certain conditions, which are typically an iteration set out in statute, rule or case law of the nine conditions set out above.

The new statute's requirement that the individual be working under the exemption certificate, Minn. Stat. § 181.723, subd. 6, incorporates the current law's requirement that to operate as an independent contractor the individual and the specific work situation must meet certain conditions. For example, Minn. Stat. §§ 176.042 and 268.035, subd. 9 already require that an individual providing services for a person whose trade, business or occupation is the residential or commercial construction industry is considered an employee unless the individual satisfies the same nine factor test set forth in the new Minn. Stat. § 181.723, subd. 6. The new statute, however, adds the requirement that to operate as an independent contractor an individual must also have a current independent contractor exemption certificate. Obtaining an independent contractor exemption certificate permits the individual to hold him or herself out as an independent contractor, and be treated as such for purposes of workers' compensation, unemployment compensation, labor standards, child labor, and occupational and safety laws. Therefore to grant an individual's application for an independent contractor exemption certificate, the Department must determine whether an individual could in fact meet the above nine conditions. Consequently, a primary purpose of the proposed rules is to identify and require the submission of the "best" information and documentation that will assist the Department in making that determination.

The proposed rules also establish requirements and administrative processes necessary to grant, deny, correct, renew, amend, cancel and revoke exemption certificates. In addition, they set out the contents of issued certificates, require the Department to maintain a list of exemption certificate holders, and require the identification of certificate holders by the persons who hire them.

To obtain input on the rulemaking and on drafts of the proposed rules, the Department published a Request for Comments on August 13, 2007. In addition, during the fall and winter of 2007 and 2008 the Department met with and submitted drafts of the proposed rules to staff of the Minnesota Department of Employment and Economic Development and the Minnesota Department of Revenue and an investigator with the federal Internal Revenue Service. The Department also met with and submitted drafts of the proposed rules to persons identified by the Department and who identified themselves to the Department as being interested in the rulemaking and the draft proposed rules. The Department has also posted drafts of the proposed rules on its Rulemaking Docket Web site. The Department received and considered both written and oral comments on the rulemaking and the draft proposed rules as a result of the above efforts.

### **ALTERNATIVE FORMAT**

Upon request, this Statement of Need and Reasonableness can be made available in an alternative format, such as large print, Braille, or cassette tape. To make a request, contact Carrie Rohling at Department of Labor and Industry, 443 Lafayette Road North, Third Floor, Saint Paul, Minnesota 55155, or FAX (651) 284-5725. TTY users may call the Department at (651) 297-4198.

### **STATUTORY AUTHORITY**

The statutory authority for these rules is in Minn. Stat. § 181.723 (Supp. 2007). Subdivision 13 of that section provides that the commissioner may, in consultation with the commissioner of revenue and the commissioner of employment and economic development, adopt, amend, suspend, and repeal rules under the rulemaking provisions of chapter 14 that relate to the commissioner's responsibilities under Minn. Stat. § 181.723. The effective date of the authorization to adopt rules in subdivision 13 was May 26, 2007.

## **REGULATORY ANALYSIS**

Minnesota Statutes, section 14.131, sets out seven factors for a regulatory analysis that must be included in the SONAR. Paragraphs (1) through (7) below quote these factors and then give the agency's response.

**(1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule:**

Because the proposed rules focus on the implementation of the independent contractor exemption certificate required by statute, the classes of persons who will be affected by the proposed rules are the individuals in the construction industry who choose to apply for an independent contractor exemption certificate and the persons for whom those individuals perform services under the independent contractor exemption certificate. The minimal cost of the proposed rule will be borne primarily by the individuals who choose to apply for an independent contractor exemption certificate. There will be some minimal cost incurred by individuals to complete the application and prepare, copy, and submit the required information and documentation. However, as more fully discussed under question (3), much of the information and documentation required by the application is information and documentation that individuals are required to prepare and maintain for other purposes such as the required tax information and documentation. To an even lesser degree the cost of the proposed rule will be borne by the persons for whom those individuals perform services as independent contractors. The cost incurred by persons for whom individuals are performing services will be the minimal cost of checking and retaining a copy of an individuals' identification and printing a copy of the individual's independent contractor exemption certificate from the Department's website.

Individuals applying for an exemption certificate and persons they perform services for will be the primary beneficiaries of the proposed rule. The information and documentation required by the application process will result in greater assurance for both individuals and persons for whom they are providing services that an individual who is granted an exemption certificate by the Department can meet the nine conditions necessary to operate as an independent contractor for purposes of workers' compensation, unemployment compensation, occupational safety and health, child labor, and labor standards laws.

In addition to specifying the required information and documentation to apply for an exemption certificate, the proposed rules also set forth administrative requirements and processes for granting, denying, correcting, renewing, amending, cancelling and revoking exemption certificates. These administrative requirements and processes will affect individuals who choose to apply for an exemption certificate and to a significantly lesser degree the persons for whom they perform services. The costs will be only the cost of mailing a request to cancel an

exemption certificate to the Department and to persons for which the individual is performing services under the exemption certificate. Having clear administrative requirements and processes will also benefit the individuals who choose to apply for an exemption certificate and the person for whom they perform services. Of course the rules will also benefit the Department in its administration and enforcement of the new statute.

**(2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues:**

An individual who submits an application for an independent contractor exemption certificate is required under the new statute to pay an application fee of \$150, Minn. Stat. § 181.723, subd. 14. This application fee was intended to cover the cost of the application process and enforcement of the new law. Item (7) of Minn. Stat. § 181.723, subd. 5, anticipates and expressly permits the Department to require additional information and documentation to assist it in determining whether to grant or deny an application. To the extent that the proposed rules require an applicant to submit additional information and documentation and as a result additional resources are required to review that information and documentation, the cost was anticipated in setting the \$150 application fee. Therefore the statute has provided for the probable costs of reviewing the additional information and documentation and has determined its effects on state revenues. The Department does not anticipate costs or effects on state revenue associated with the other provisions of the proposed rule since they simply implement requirements set out in the statute. The Department does not anticipate that there will be implementation and enforcement costs for any other agency from the proposed rules.

**(3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule:**

Because obtaining an independent contractor exemption certificate permits an individual to hold him or herself out as an independent contractor, before granting an application the Department must determine whether the individual can in fact operate as an independent contractor; i.e., meet the nine conditions. Consequently as stated in the Introduction, the primary purpose of the proposed rule is to identify and require the submission of the “best” information and documentation that will assist the Department in making that determination.

Initially the Department worked with staff from the Department of Revenue, the Department of Employment and Economic Development, and an investigator with the Internal Revenue Service and with interested persons to identify all possible information and documentation that could be relevant to determining whether an individual meets or could meet each of the nine conditions. The Department worked to identify information and documentation that would assist it in making a determination for individuals who had previously operated as independent contractors and those individuals who had not. The Department then worked to winnow down the identified information and documentation to the information and documentation that was the “best evidence” that an individual meets or could meet the nine conditions and therefore operate as an independent contractor.

As part of its evaluation of what would constitute the “best evidence,” the Department

considered whether an applicant would have already prepared or maintained the required information and documentation for another purpose, thus reducing the time and cost of completing the application. Further, as the Department worked to winnow down the required information and documentation, it considered various ways of organizing the rule, such as organizing the requested information and documentation under the nine conditions as set out in the statute. The rules as proposed reflect that the information and documentation submitted may support more than one condition. In addition, the Department considered under what circumstances it was necessary to require individuals to explain why the information and documentation submitted supported their application or why their failure to submit certain information or documentation should not result in the denial of their application. The Department also considered what specific documentation should be required and what would simply be identified as the type or an example of documentation that could meet a required condition. A final culling of the “best evidence” resulted in the minimum information and documentation necessary to make the required determination. As a result of the above process, the proposed rule is the least costly and least intrusive method of achieving the primary purpose of the proposed rule.

The administrative requirements and processes set out in the proposed rule related to granting, denying, correcting, renewing, amending, cancelling and revoking exemption certificates are relatively straight forward and as stated above, result in minimal or no cost that was not anticipated by the application fee provided for in the new law. Further, the proposed administrative requirements and processes are not intrusive. Provision of photo identification to establish one’s identity is common place whether to verify the identity of a credit card user, purchase alcohol at a liquor store or check in for a flight at an airport.

**(4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule:**

With respect to alternative methods for achieving the purpose of the proposed rules related to the application and documentation requirements, please see the response to (3).

The Department also considered alternative methods for achieving how persons would confirm the identity of individuals with whom they were contracting to perform services under exemption certificates and that the individuals held current independent contractor exemption certificates. The Department first considered the form of the exemption certificate and the manner in which it would be issued to individuals and accessed by the persons who hired them. The Department considered issuing exemption certificate cards. The Department also considered taking or by some other method including individuals’ photos with their exemption certificates.

The Department rejected issuing exemption certificate cards because cards are frequently lost or stolen and can be easily forged unless produced using expensive processes. The cost of issuing cards that couldn’t be forged was not anticipated when the application fee of \$150 was set by the new law. The Department also rejected taking individuals’ photographs because that would require applicants to travel to a state office and for state offices to have the required equipment and personnel to take and process the photographs. That cost was also not anticipated by the \$150 application fee.

Instead of the above options, the Department determined that it could best verify the identity of the certificate holder by requiring individuals who perform services under an exemption certificate to present current photo identification issued to them by the United States or a state or territory of the United State to persons with whom they contracted to perform services. In addition, before permitting certificate holders to work, the proposed rules require persons who contract with certificate holders to obtain from the Department (not the certificate holder), a copy of the exemption certificate for that certificate holder and retain it for five years. The proposed rule also requires the person to retain a copy of the identification presented by the certificate holder to verify his or her identity.

The above method has many advantages. These advantages include eliminating the necessity to replace lost or stolen exemption certificate cards. If an exemption certificate is amended, corrected, cancelled or revoked, the exemption certificate information can be updated and made immediately available to the public simply by changing the information on the Department's website. In addition, use of photo identification issued by the United States or a state or territory of the United States for purposes of confirming an individual's identity, eliminates the Department's need to repeat the verification of the applicant's identity and the taking of another photo. Finally, it is of primary importance to persons who contract with individuals to perform construction services to be certain that the individuals are who they say they are and that they have current exemption certificates. Therefore, it is appropriate to have those persons verify individuals' identities at the time they enter into contracts for their services.

**(5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals:**

It is difficult to determine the probable costs for submitting the information and documentation necessary to establish that the applicant could operate as an independent contractor, because they will be different for each individual depending on the documentation currently collected and maintained. As noted in the discussion under question (1), there will be some minimal cost incurred by individuals to complete the application and prepare, copy, and submit the required information and documentation. However, because the nine factor test already exists in Minn. Stat. §§ 176.042, and 268.035, subd. 9, much of the information and documentation required by the application is information and documentation that individuals are already required to prepare and maintain for other purposes. For example, workers compensation insurers may audit a business and require documentation that business's independent contractors meet the nine factor test. The Minnesota Department of Revenue has expressly stated in its *Employment Taxes and Employer Issues and Responsibilities Guide* that actual documentation that the criteria in the current nine factor test set out in Minn. Stat. § 176.042 must be maintained.<sup>1</sup> Therefore, independent contractors who currently meet the statutory factors will have the least cost, probably less than \$10.00 in copying and mailing costs. Those who enter into contracts with certificate holders for services will have even less cost, probably less than \$2.00, for printing off

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1. See page 10 of the guide on the Minnesota Department of Revenue's web site at: [http://www.taxes.state.mn.us/business\\_taxpayers/other\\_supporting\\_content/employment\\_tax%20.pdf](http://www.taxes.state.mn.us/business_taxpayers/other_supporting_content/employment_tax%20.pdf)

the certificate from the Department's web site and copying the identification presented. There may be a greater cost for individuals and businesses who do not currently maintain documentation that they meet the nine factor test, and those who are just starting out as independent contractors. However, the costs to these people are imposed by the statute, not the proposed rules.

In addition to specifying the required documentation to obtain an exemption certificate, the proposed rules also set forth administrative requirements and processes for granting, denying, correcting, renewing, amending, cancelling and revoking exemption certificates. These administrative requirements and processes will affect individuals who choose to apply for an exemption certificate and to a significantly lesser degree the persons for whom they perform services. The costs are limited to the expense of mailing a request to cancel an exemption certificate to the Department and to persons for which the individual is performing services under the exemption certificate. Having clear administrative requirements and processes will also benefit the individuals who choose to apply and the persons for whom individuals perform services. Of course the rules will also benefit the Department in its administration and enforcement of the new statute.

Lastly, the requirement that an applicant submit documentation required by any federal electronic program, such as the Systemic Alien Verification for Entitlements (SAVE) Program, which enables the Department to verify a non-citizen applicant's immigration status and authorization to work in the United States is that same documentation that the applicant is required to provide employers and person with which they contract. Therefore the Department does not anticipate any cost associated with this requirement.

**(6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals:**

Not adopting the proposed rule will make it more difficult and more costly for the Department to determine whether an applicant could in fact operate as an independent contractor. It could also delay processing of the applications.

**(7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.**

There are no existing federal regulations governing independent contractor exemption certificates.

**PERFORMANCE-BASED RULE**

Minnesota Statutes, §§ 14.002 and 14.131 require that the Statement of Need and Reasonableness describe how the Department, in developing the rules, considered and implemented performance-based standards that emphasize superior achievement in meeting the Department's regulatory objectives and maximum flexibility for the regulated party and the Department in meeting those goals.

The proposed rules establish the application process for obtaining and maintaining an



independent contractor exemption certificate under Minn. Stat. § 181.723. Part 5202.0130 describes the information and documentation that must be submitted as part of the application to support the statutory factors found in Minn. Stat. § 181.723, subd. 5 (a) (8). Subpart 2, items D through I, require that the applicant submit specific types of information and documentation, and require the applicant to explain how the information and documentation relates to the statutory factors. Item J requires the submission of up to five past contracts of the applicant's choosing (if any). Item J also requires that a template contract or contracts be submitted, but the applicant has the flexibility to design the template contract or contracts. Item K requires additional documentation to support the statutory factors, but provides only examples of acceptable documentation; the applicant is free to submit whatever documentation the applicant chooses, again with an explanation of how the chosen documentation supports the statutory factors. Therefore, while the rules require that the applicant submit documentation that he or she meets the statutory criteria for an independent contractor exemption certificate, they also provide the applicant a great deal of flexibility to demonstrate and explain how that goal is met.

### **ADDITIONAL NOTICE**

This Additional Notice Plan was reviewed by the Office of Administrative Hearings and approved in a March 20, 2008 letter by Administrative Law Judge Bruce Johnson.

1. The Department of Labor and Industry's notice plan includes giving notice as required by statute. We will mail the Dual Notice of Intent to Adopt Rules (the Notice) to everyone who has registered with the Department of Labor and Industry pursuant to Minn. Stat. § 14.14, subd. 1a to receive rule mailings pertaining to:
  - a. All agency rules;
  - b. All rules related to the Construction codes and licensing division, and independent contractor exemption certificates;
  - c. Workers' compensation
  - d. Occupational safety and health
  - e. Labor standards and child labor
  - f. Apprenticeship
  - f. Residential contractor licensing
  - g. International Building Code
  - h. International Residential Code
  - i. Accessibility Code
  - j. Electrical Code
  - k. Plumbing Code
  - n. Mechanical Code
  - o. Prefabricated structures, modular homes and industrialized/modular buildings
  - p. High pressure piping
2. The Department will also mail or e-mail the Notice to the following persons that it licenses:
  - a. Master plumbers
  - b. Master electricians and power limited technicians
  - c. Residential building contractors, remodelers and roofers
  - d. Contracting high pressure pipefitters
3. In addition, the Department will mail or email the Notice to the following interested persons

and associations:

- a. Associated General Contractors (AGC)
- b. Associated Building Contractors (ABC)
- c. The National Electrical Contractors Association
- d. The Minnesota Mechanical Contractors Association
- e. Plumbing, Heating and Cooling Contractors Association (PHCC)
- f. The Builders Association of Minnesota
- g. Builder's Association of the Twin Cities
- h. The Minnesota Building and Construction Trades Council
- i. Lakes and Plains Regional Council of Carpenters and Joiners
- j. Laborers District Council of Minnesota and North Dakota
- k. North Central State Regional Council of Carpenters
- l. The subscribers of *Compact*, the Department's quarterly workers' compensation newsletter
- m. Subscribers of the Department's internet list serve for workers' compensation insurers;
- n. Subscribers of the Department's *CCLD Review* newsletter for the Construction Codes and Licensing Division
- o. Subscribers of the Department's *Safety Lines* OSHA newsletter
- p. Persons who are registered on the Department of Employment and Economic Development's rule mailing list under Minn. Stat. 13.14, subd. 1a pertaining to unemployment compensation.
- q. Persons who have submitted comments during the rule development process.

4. The Department will also publish the Notice, the proposed rules, and the statement of need and reasonableness on the Department's website at:

[http://www.doli.state.mn.us/pdf/rulemaking\\_ic\\_exemption\\_cert\\_docket.pdf](http://www.doli.state.mn.us/pdf/rulemaking_ic_exemption_cert_docket.pdf)

5. The Department will also provide notice to the Legislature as required by Minnesota Statutes, section 14.116

## **CONSULT WITH FINANCE ON LOCAL GOVERNMENT IMPACT**

As required by Minnesota Statutes, section 14.131, the Department has consulted with the Commissioner of Finance. The Department of Finance sent a letter dated March 5, 2008 with its comments.

## **COST OF COMPLYING FOR SMALL BUSINESS OR CITY**

### **Agency Determination of Cost**

As required by Minnesota Statutes, § 14.127, the Department has considered whether the cost of complying with the proposed rules in the first year after the rules take effect will exceed \$25,000 for any small business or small city. The Department has determined that the cost of complying with the proposed rules in the first year after the rules take effect will not exceed \$25,000 for any small business. If an independent contractor is acting as a small business in accordance with existing law the burden of gathering information to comply with this rule would be minimal as discussed in the regulatory analysis section.

Small businesses that are in the trade or business of contracting with independent contractors to perform services will be required to verify the certificate and identity of the certificate holder under the rule. The requirement to retain a copy of the certificate for five years is already in

Minn. Stat. § 181.723, subd. 6 (c), so this is not a new cost. The requirement in part 5202.0150, subpart 4 (that the business must verify the identity of the certificate holder by reviewing and copying a photo identification card), will not cost the business anything, and in fact may save small businesses money if it assists the business in avoiding liability as an employer if someone falsely holds himself or herself out as a certificate holder.

The Department also determined that the rule will have no impact on small cities. Cities are not individuals such that they would be applying for an exemption certificate. If a small city is subject to Minn. Stat. § 181.723 as a hiring entity there will be no cost of compliance for the reasons discussed above.

## **EFFECT ON CHICANO/LATINO PERSONS AND FARMING OPERATIONS**

The Department has considered whether the rules have their primary effect on Chicano/Latino people under Minn. Stat. § 3.9223 and whether the rules affect farming operations under Minn. Stat. § 14.111. The Department has determined that the rules do not have their primary effect on Chicano/Latino people and do not affect farming operations.

## **LIST OF WITNESSES**

If these rules go to a public hearing, the Department anticipates having Stephen Hernick, Assistant Director of CCLD Administrative Services, testify in support of the need for and reasonableness of the rules. In addition, the agency may present testimony from representatives of the Minnesota Department of Revenue and Department of Employment and Economic Security.

## **RULE-BY-RULE ANALYSIS**

### **Part 5202.0100. Scope.**

This part establishes the scope of the rules. It is reasonable and necessary to include a scope clause to distinguish these rules from those in Minn. Rules chapter 5224, which set forth factors to be used to determine whether a person is an independent contractor in the workers' compensation system. The factors in chapter 5224 only apply to the extent that persons are not governed by Minn. Stat. § 181.723 and these rules.

### **Part 5202.0110. Definitions.**

This part is necessary to define the terms used throughout the rules. "Applicant," "Exemption certificate," and "Certificate holder" are defined to permit less cumbersome wording and ease of reading. The remainder of the definitions merely cross-reference definitions in the authorizing statute.

### **Part 5202.0120. Who shall be issued an independent contractor exemption certificate.**

**Subpart 1. Individuals.** This subpart is necessary primarily to make clear to whom the Department shall issue independent contractor exemption certificates and to whom it shall not. The “independent contractor” classification is frequently misused and misunderstood. Minnesota Statutes, § 181.723 is clear that the commissioner may grant independent contractor exemption certificates only to “individuals.” “Individual” is defined in Minn. Stat. § 181.723, subd. 1 (f) as a “human being.” Making clear that the statute only allows for exemption certificates to be issued to individuals, and not to business entities such as corporations and partnerships that are created by Minnesota statutes, will reduce the likelihood of such entities submitting applications only to have them denied by the Department.

**Subpart 2. Manufacture, supply and sale of products, materials or merchandise excluded.** During the rule development process, the Department received an inquiry about whether individual delivering supplies to a construction site would be required to hold an exemption certificate. This subpart is necessary to clarify application of Minn. Stat. § 181.723, subd. 2, which provides that the law only applies to individuals performing public or private sector commercial or residential “building construction or improvement *services*, as defined in section 326.83.” The rule distinguishes between individuals who manufacture, supply or sell products, materials and merchandise from those who provide a construction or improvement “service” - that is, those who install, connect, attach or adjust for use products, materials and merchandise. The alternative, to require exemption certificates for those who manufacturer, supply or sell goods, would be to greatly expand the number of individuals who could be considered employees of the person constructing a building. For example, the manufacturer, supplier or seller of roofing shingles who does not hold an exemption certificate could be considered an employee of a person constructing a building. Therefore, a distinction between a supplier or manufacturer of building materials and those who use the supplies and materials in the construction or improvement of a building is reasonable and necessary. This rule is consistent with a distinction made in Minn. Stat. §§ 326.83 and 326.84 with respect to licensure requirements for residential remodelers and residential building contractors.<sup>2</sup> The rule will also minimize confusion about who can apply for an exemption certificate and minimize disputes about whether an individual manufacturer, supplier or seller without one is an employee or an independent contractor.

**Subpart 3. Landscaping services excluded.** This subpart provides that individuals who are performing landscaping services are not performing public or private sector commercial or residential building construction or improvement services. This rule provides that landscaping services means “to adorn or improve the land around a building by contouring the land and placing and setting plants, shrubs and trees.” By expressly excluding landscaping services, the rule places reasonable boundaries around the meaning of the phrase “building construction or improvement” used in Minn. Stat. § 181.723, subd. 2. Services that contour land and place and set plants, shrubs and trees around a building are not the same as building construction or improvement services. This rule provides a clear standard to ensure that the law is not greatly

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2. Subdivisions 15 and 16 of section 326.83 define residential building contractors and residential remodelers, and limit application of the terms to those who provide two or more of the “special skills” listed in subdivision 19. Minnesota Statutes § 326.84 provides licensing criteria for residential building contractors and residential remodelers, but expressly provides in subdivision 3, paragraph (2) that the license requirement does not apply to “a material person, manufacturer, or retailer furnishing finished products, materials, or articles of merchandise who does not install or attach the items. . .”

expanded beyond what was anticipated by the legislature. As with subpart 2, this rule will minimize confusion about who can apply for an exemption certificate and will minimize disputes about whether an individual performing landscaping services without an exemption certificate is an employee or an independent contractor.

### **Part 5202.0130. Application; Required information and documentation; Approval or denial.**

This part sets out the application process, including when an application is complete, the information and documentation that must be submitted, and the standards for approval or denial of an application by the commissioner.

**Subpart 1. Complete Application; submission of documents.** Under Minn. Stat. § 181.723, subd. 5 (c), the commissioner is required to grant or deny an application within 30 days of receipt of a “complete application” and the certificate fee. To provide clear guidance to the applicant and the commissioner about when the 30 days begins, it is necessary to define what a “complete application” consists of. Item A, subitems 1, 2 and 3 describe the elements that must be satisfied before an application is considered complete: Under subitems 1 and 2, the application must be signed and dated on a form approved by the commissioner, and must include the required information and documentation described in subpart 2. These requirements are reasonable and necessary to ensure that the application requirements are consistently applied to all applicants, while allowing an applicant to submit individually specific information. Subitem 3 reflects that the application is not complete unless it includes the fee required by statute.

Item B requires the applicant to submit complete and legible copies, rather than originals, of the required information and documentation. This item also permits the commissioner to destroy the copies after 60 days following a final order approving or denying the application, provided they have been electronically stored. Retaining application documents in an imaging system or other electronic storage method is necessary because the volume of paper filed by applicants could result in the submission of thousands of documents every year, leading to significant storage problems. Imaging systems, such as that used by the workers’ compensation division of the Department of Labor and Industry for more than 15 years, have proven to be reliable and accurate. Because documents are destroyed after imaging, the rule also requires the applicant to retain original documents for two years after submitting the information and documentation. Two years is reasonable because the exemption certificate is valid for two years.

Item C provides that where the legibility, completeness, authenticity or accuracy of the copies of documents submitted is at issue, the commissioner may require that the applicant submit the original information or documentation. This is necessary to maintain the integrity of the process. Because the applicant might need the original documents for another purpose, and because the Department would no longer need the original after electronically storing them, the rule also provides that the originals must be returned to the applicant within 30 days after electronic storage.

**Subpart 2. Required information and documentation.** Minn. Stat. § 181.723, subd. 5 (7) requires an applicant to submit “any information or documentation that the commissioner requires by rule that will assist the Department in determining whether to grant or deny the

individual's application." This subpart specifies the information and documentation that will assist the Department in determining whether the applicant could satisfy the nine factors in Minn. Stat. § 181.723, subd. 5 (a) (8) and therefore should be issued an exemption certificate.

Item A requires the information required already by statute. This is included in the rule as a cross-reference for completeness.

Item B requires the applicant to designate the address and telephone number to be used for purposes of contacting the applicant. Contact information is necessary in case there are questions about the application or the exemption certificate, for complaint purposes and for personal service under Minn. Stat. § 181.723, subd. 10. It is reasonable to allow the applicant to designate where they wish to be contacted.

Item C requires the applicant to identify the business name under which the applicant intends to operate as an independent contractor. If the applicant does not intend to use his or her full legal name, the applicant must document that he or she has complied with the statutory requirements for filing an assumed name with the Secretary of State under Minn. Stat. chapter 333. This is necessary to ensure that the exemption certificate is issued in the proper legal or assumed name of the applicant, and to ensure compliance with Minnesota law for the protection of persons doing business with independent contractors who are granted an exemption certificate.

Item D requires the applicant to submit a copy of any document issued by a state or federal court or agency that is related to the applicant's business or status as an independent contractor or employee. A number of other government agencies may have issued decisions on the independent contractor status of an applicant, including the Internal Revenue Service, the Department of Revenue, the Office of Administrative Hearings, the Workers' Compensation Court of Appeals, the Minnesota Supreme Court, the Department of Labor and Industry Claims Services and Investigations unit, and the Department of Employment and Economic Development. There may be opinions or rulings from other states as well. This rule is necessary to promote consistency with other government agencies and minimize duplicative analysis where another agency has already ruled on whether the applicant is an independent contractor or an employee. Since a ruling from another government agency may no longer be relevant to the applicant's current status as an independent contractor or employee, the rule requires the applicant to explain how the opinion supports the application or why the opinion or ruling is no longer relevant.

Item E requires the applicant to provide information about any license, degree, certificate, training or other credential that is related to or required for the performance of the applicant's services under the exemption certificate. Licensure information is necessary to ensure that an individual holding himself or herself out as an independent contractor has complied with licensing laws. For example, residential remodeling contractors are required to be licensed. For other trades, information about training or credentials, even if not legally required, indicates that the applicant has the skills necessary to perform the services as an independent contractor. For example an individual may not perform most electrical work without a license unless under the direct supervision of a licensed electrician. Therefore if an individual is applying for an exemption certificate to perform electrical services, having an electrical license would make it more likely that the individual could meet the nine conditions. It is reasonable and necessary to

ask the applicant to explain how the credential supports one or more of the nine factors because the applicant, not the Department, has the most information about why the credential provided relates to and supports any of the nine factors for the applicant's business.

Item F requires the applicant to provide information about whether the applicant employs or intends to employ others when operating under the exemption certificate. If so, the applicant must provide documentation of compliance with workers' compensation and unemployment insurance laws. This is necessary to comply with Minn. Stat. § 176.182, which requires that the state may not issue a license or permit to operate a business unless acceptable evidence of compliance with workers' compensation insurance coverage is provided. Moreover, the fact that an applicant has employees and complies with the workers' compensation and unemployment insurance coverage laws is evidence that supports that the applicant has his or her own business and has continuing or recurring business liabilities or obligations under factors (i) and (viii) of the Minn. Stat. § 181.723, subd. 5 (a) (8).

Item G requires the applicant to provide information about whether, at any time during the two years before the application, the applicant has been employed. It also asks whether the applicant has been paid wages, has had wages garnished or withheld, or has received workers' compensation or unemployment insurance benefits. This information is necessary because the statute requires the Department to determine whether or not an applicant could operate as an independent contractor. If the applicant states that he or she has been employed or provides the other information required by this item that are indications of employment, then the applicant will need to explain why despite his or her previous and/or current status as an employee, he or she could operate as a independent contractor. Further, if an applicant has been working but not as an employee, then the applicant should be able to provide documentation required by other items in this subpart such as 1099 tax forms. Also, in applications for renewal of an exemption certificate, the Department will look carefully at applications where the individual continues to work for the same person as an independent contractor that he or she had previously worked for as an employee, and where the applicant has had only one source of income during the previous two years.

Item H, requires the applicant to provide copies of tax returns, schedules and attachments, if any, that are related to services the applicant will provide as an independent contractor under the exemption certificate, if filed within the previous two years. If no related business tax returns or documents have been filed, the rule requires the applicant to explain why not. Under item H, if an applicant has not operated as an independent contractor and therefore has not filed any business tax forms in the past two years, the application will not necessarily be denied. However, the applicant will have to establish that the statutory factors in Minn. Stat. § 181.723, subd. 5 (a) (8) will be met going forward. Tax filings reflecting the applicant's business operations will presumably be filed upon application for renewal of the exemption certificate in two years.

Item H was developed in consultation with the Minnesota Department of Revenue. It limits the filings to services that the applicant will provide under the exemption certificate because tax returns contain highly personal information that the Department does not need unless the information is related to the application for an exemption certificate. Nor does the Department

need tax information about businesses unrelated to the requested exemption certificate because they will not likely establish any of the statutory factors.

However, documentation of tax filings related to the services the applicant intends to provide under the exemption certificate is reasonable and necessary to support the statutory factors. The rule provides examples of tax forms and schedules identified by the Department of Revenue as commonly filed by independent contractors. These are provided to help applicants understand the types of tax documents that are required to be provided as part of the application. The listed examples are not exclusive or exhaustive because information related to the applicant's business may appear in other tax forms as well and because the names and nature of forms may change over time as tax law and procedures change. If the applicant has been self-employed as an independent contractor in the past two years, tax documents such as the examples listed are likely to show business or self-employment taxes paid, business receipts, depreciation, expenses, obligations, profits and losses under factors (i), (ii), (iv), (vii), (viii), and (ix) of Minn. Stat. § 181.723, subd. 5(a) (8). Specifically:

1. Independent contractors typically report business income and taxes on either Internal Revenue Service (IRS) forms 1040 or 1040 SS (the self-employment tax return, including profit and loss information), and Minnesota Department of Revenue (MDR) form M1.
2. Itemized business deductions are sometimes reported on IRS Schedule A, which is attached to IRS form 1040;
3. Income, profit or loss from a business are shown on IRS Schedule C or C-EZ, which are attached to IRS form 1040;
4. Self-employment tax paid or owed is shown on IRS Schedule SE, which is attached to IRS form 1040;
5. Federal Unemployment Tax paid or owed is reported on IRS form 940;
6. If the applicant has employees, withholdings from wages for federal taxes are reported on Internal Revenue Service Employer's Annual or Quarterly Tax Returns forms 941 and 944. Withholdings from wages for Minnesota taxes are reported using the Minnesota Department of Revenue Annual Withholding Return/Reconciliation and Information Return;
7. Deductions for depreciation and amortization are shown on IRS form 4562;
8. The sale of business property is shown on IRS form 4797;
9. Cash payments received in a trade or business are shown on IRS form 8300;
10. Expenses for business use of a home are shown on IRS form 8829;
11. Independent contractors complete Certificates of Exemption of Payment of Sales tax on Minnesota Department of Revenue form ST3; and
12. Wages paid or received by the applicant are reflected on W-2 and W-3 forms. Payments made to other independent contractors and payments received by the applicant as an independent contractor are reflected on IRS 1099 and 1096 forms.

Subitem 12 requires the applicant to submit all IRS 1099 and W-2 forms issued or received by the applicant in the previous two years, and a description of services performed for each 1099 and W-2 form submitted. IRS 1099 forms are issued to independent contractors by businesses to reflect payments made to the independent contractor. An applicant is required to submit these forms because they verify that the applicant has received payment as an independent contractor and show whether the applicant has provided services for one or more contractors. It is possible for an independent contractor to work on a long term project for one contractor. However, if the



applicant has been issued 1099 forms by multiple contractors it more readily establishes that the applicant is holding himself or herself out to the public as a separate business under statutory factor (i). An applicant who has not received any IRS 1099 forms is not necessarily precluded from receiving an exemption certificate, but will need to submit more documentation under item K or other items in subpart 2 to establish the statutory factors. Subitem 12 also requires the applicant to submit copies of 1099 forms that the applicant has issued to other independent contractors (sometimes referred to as subcontractors) which, in combination with other documentation, may support that the applicant has ongoing business liabilities and operates under contracts according to one or more of the statutory factors

Subitem 12 also requires the applicant to describe the services for which W-2 forms were issued by or to the applicant. Again, whether the applicant received or paid wages in the previous two years is relevant to the applicant's status as an independent contractor. Ongoing business liabilities are established by an applicant who is an employer, as discussed under item G. An applicant who has received W-2 forms is not precluded from being an independent contractor, but will have to submit additional documentation under this subpart to establish the statutory factors.

Item I requires the applicant to submit the Minnesota tax identification number, if there is one, or an explanation of why one is not needed. This number is needed to report to the Minnesota Department of Revenue a variety of things, such as withholding Minnesota income taxes from employees' wages, making estimated business tax payments, filing certain business tax returns, and to report use taxes. Not every independent contractor will need a Minnesota tax identification number, but if one is required it is another indication that the applicant has satisfied one or more of the statutory factors.

Item J requires the applicant to submit copies of up to five executed contracts for services the applicant contracted to provide before the date of the application, if any, and template contracts that the applicant intends to use to provide services under an exemption certificate. This is necessary because statutory factors (iii) to (vii) relate to contracts entered into by the independent contractor. It is reasonable for the Department to review past contracts to determine whether the applicant has been providing services as an independent contractor consistent with these factors. Contracts that satisfy these factors will support the application. The Department acknowledges that sometimes the factors are not clearly addressed in a contract, or a contract conflicts with one or more factor. While this may indicate that the person has not satisfied the independent contractor factors in Minn. Stat. § 176.042, it will not necessarily result in denial of the application. Rather, the applicant will still have to submit a template contract, consistent with the statutory factors, that would be used for services provided under the exemption certificate. The applicant will presumably file examples of executed template contracts when applying for renewal of the exemption certificate in two years.

Item K requires the applicant to submit additional information and documentation that support the factors in Minn. Stat. §181.723, subd. 5 (a) (8) for services the applicant will provide as an independent contractor under the exemption certificate. The applicant is also required to explain how each document submitted supports one or more of the factors. This is necessary to prevent an applicant from filing a "box of documents" without any analysis or description of why they

support the factors. The applicant, not the Department, is in the best position to know how each document submitted supports one or more factors.

Item K also provides examples of documents that could be used to support one or more of the statutory factors. As with the tax documents, this list is not exhaustive or exclusive. The applicant is free to submit any additional documentation that the applicant chooses to support one or more of the statutory factors. In some cases, the factors may all be satisfied by submission of self-employment tax returns, past contracts and template future contracts. In other cases, such as when an applicant is just starting a business, more documentation may be required. This could include documentation of ownership or lease of facility space or equipment, tools, materials, and vehicles that have been or will be used in the business in support of factors (i), (iv) and (viii). Insurance policies for the business could support factor (viii). Business permits issued in the name of the applicant could support one or more of the factors. Documentation of business expenses and liabilities under factors (iv), (viii) and (ix) could be supported by submission of bills, invoices and contracts with vendors, suppliers, subcontractors or other persons. Bank and accounting statements could be used to demonstrate business receipts, expenditures, and profit or loss for the business under factors (vii) or (ix). Trade or professional memberships and marketing or advertising materials might support factor (i) of even factor (vii).

As with the other items, item K provides guidance and examples of documentation that the applicant for an exemption certificate might submit in support of the statutory factors. The rules provide the applicant with a framework, but it is up to the applicant to submit documentation and information that will establish how the applicant will be able to operate under the statutory factors as an independent contractor for the services listed in the exemption certificate.

Item L requires the applicant to authorize or complete authorization forms that allow the Department to verify that the application and all information and documents submitted with the application are true and correct. To protect the integrity of the process, this rule will allow the Department to confirm the authenticity of the documents with private and public entities since most of the required documents could be readily fabricated. For example, the Department may obtain an authorization to verify the authenticity of tax returns, forms and schedules with the Internal Revenue Service and the Minnesota Department of Revenue. The applicant's unemployment insurance account number could be verified with the Minnesota Department of Employment and Economic Development. Accounting and bank statements could be verified with the issuing business.

Item M requires the applicant to submit a color copy of current, valid photo identification issued by the United States or a state or territory of the United States. This is necessary to verify the identity of the applicant in whose legal name the certificate would be issued (along with any assumed name). This rule coordinates with part 5202.0150, which requires certificate holders to provide government issued identification to a person for whom the certificate holder will be providing services. This will minimize the likelihood that one certificate will be used by more than one person, thus undermining the integrity of the process.

Item M also requires the applicant to submit documentation required by any federal electronic verification program, such as the Systemic Alien Verification for Entitlements (SAVE) Program,

to assist the Department verify a non-citizen applicant's authorization to work in the United States. Verification of authorization to work is necessary to ensure that an independent contractor exemption certificate is not issued to a person who is ineligible to work in the United States. For example, the federal SAVE program is designed to enable federal, state, and local government agencies and licensing bureaus to obtain immigration status information needed to determine a non-citizen applicant's eligibility for a public benefit, professional or commercial license.

Item N requires the applicant to submit a sworn statement that the application and all documents submitted are true and correct. This is necessary to help ensure the validity of all documents submitted and the integrity of the exemption certificate law. Item N also requires the applicant to submit a sworn statement that the applicant is either a US citizen, or is authorized to work in the United States under federal immigration law; and that the applicant has complied with and will continue to comply with federal immigration law in verifying that any employees hired by the applicant are authorized to work in the United States. This is necessary to ensure that an independent contractor exemption certificate is not issued by a person who is in violation of federal immigration law with respect to working in the United States or with respect to hiring employees. Because of the nature of the certificate, it is important that certificate holders understand that the exemption certificate does not grant eligibility to work in the United States under federal immigration law.

**Subpart 3. Approval or denial.** This subpart sets out the process by which the commissioner must issue or deny an exemption certificate. Item A requires the commissioner to issue an exemption certificate if the application is complete and if the commissioner determines that all of the information and documentation submitted establishes that the applicant meets or could meet the factors in Minn. Stat. § 181.723, subd. 5 (a) (8) for the services for which the applicant has requested an exemption certificate. Item B requires the commissioner to deny a certificate if the application is not complete and if the applicant has not established that the applicant meets or could meet the statutory factors for services that will be provided under the exemption certificate. These requirements are consistent with Minn. Stat. § 181.723, subd. 5 (c), which states that the commissioner may deny an exemption certificate if the individual has not submitted a complete application and certificate fee, or if the individual does not meet all of the conditions for holding the exemption certificate. This rule is reasonable and necessary because the subpart defines a complete application in the context of the additional documentation required by the rules as a condition of obtaining an exemption certificate.

## **Part 5202.0140. Application for a corrected, renewal, or amended certificate; Time frames for submission of initial and renewal applications.**

**Subpart 1. Obligation to update identifying information.** This subpart requires the applicant to notify the commissioner in writing within 15 days of any changes in the certificate holder's legal and business names, addresses, and telephone numbers. This is necessary to ensure that the certificate is current and accurately reflects the identity and location of the certificate holder so the Department can contact the certificate holder if necessary. The certificate holder must also notify the commissioner of any change in the nature of the business organization. For example, if the independent contractor becomes incorporated the exemption certificate may no longer be effective, because under the statute only individuals are eligible for an exemption certificate. The information in this subpart will allow the commissioner to issue updated

exemption certificates as necessary to ensure the exemption certificates function as anticipated by Minn. Stat. § 181.723.

**Subpart 2. No additional fee or documentation.** This subpart provides that if the change is to the certificate holder's business or residential address or telephone number, the commissioner must issue an updated exemption certificate within 10 business days without requiring an additional fee or documentation. This is reasonable and necessary to encourage certificate holders to report this information and to expedite updates to the exemption certificate with changes that do not affect the underlying eligibility of the certificate holder to provide services as an independent contractor.

**Subpart 3. New application and fee required.** This subpart provides that the certificate holder must file a new application and pay a new fee if there is a change to the legal name, business name, or business organization. A change to the legal name or business name is significant because all the documents submitted in the application will have been under another legal or business name and a new application is therefore needed to evaluate whether the statutory factors are still satisfied. The commissioner also needs to reevaluate the effect of a change in business organization. For instance, an exemption certificate will not be issued to a business entity such as a corporation under Minn. Stat. § 181.723, subd. 2. The commissioner will be required to review the nature of the name change and business organization and the significance of the changes with respect to the documents supporting the statutory factors filed with the initial application. Therefore, it is reasonable and necessary to require the applicant to file a new application and fee.

**Subpart 4. Application to add a new category of service.** This rule requires a certificate holder to file a new application and fee in order to add a new category of service. This is necessary because under Minn. Stat. § 181.723, subdivisions 4, 5 and 6, the application and exemption certificate are specific to the services to be provided by the independent contractor. Where a new category of service is proposed to be added to the exemption certificate the applicant must demonstrate that he or she is able to provide the new services as an independent contractor under the statutory factors.

**Subpart 5. Application for a renewed certificate; Time frames for submission of initial and renewal applications.** This subpart provides the time frames within which an applicant must apply for an initial and renewed exemption certificate. The rule provides that applications must not be submitted before September 2, 2008, or the effective date of the rules, whichever is later. The rule reasonably balances the Department's need for current information and documentation with the need to provide adequate time for the preparation, submission and review of applications. September 2, 2008 is a reasonable date to begin accepting initial applications because it allows applicants three months to prepare and submit applications according to the rules in order to receive the commissioner's determination by January 1, 2009.<sup>3</sup> A longer application period would increase the likelihood that the information and documentation

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3. January 1, 2009 is the date exemption certificates are required for individuals who want to operate as independent contractors under Minn. Stat. § 181.723, subd. 3. The commissioner must approve or deny a complete application within 30 days under Minn. Stat. § 181.723, subd. 5 (c).

submitted will be outdated and may no longer reflect the applicant's status as of January 1, 2009.<sup>4</sup>

Minnesota Statutes § 181.723, subd. 5 (c) also provides that an exemption certificate is effective for two years. Subdivision 14 establishes a renewal application fee of \$150. Therefore, in order for the exemption certificate to remain in effect without lapse after two years, the certificate holder must submit a new application at least 30 days before the expiration date. The rule further provides that the renewal application must not be submitted more than 60 days before the expiration date. This is to ensure that applications for a renewed certificate provide reasonably current information. Without the 60 day time limit an application for renewal could conceivably be filed immediately after the certificate is issued, based on the original application. Finally, subpart 5 provides that a certificate expires at 11:59:59 P.M., Central Standard Time. This is necessary to clearly establish the exact time and day that a certificate expires; the next day begins at 12:00 A.M.

## **Part 5202.0150. Contents of approved certificate; Notice of certificate; effective date.**

**Subpart 1. Contents of certificate.** This rule describes the contents of an exemption certificate issued by the commissioner. The name of the independent contractor, the assumed name of the business, and the address and telephone number of the certificate holder are required identifying information needed by any person for whom the certificate holder is providing services. The date the certificate was issued, the expiration date and services that the certificate holder may perform under the certificate is also necessary information for a person to have before contracting with the certificate holder in order to verify that it is current and consistent with the services that will be provided under the contract.

A description of the effect of the certificate is necessary to ensure that both contracting parties understand the scope of the certificate: For purposes of workers' compensation, labor standards, child labor; occupational safety and health, and unemployment insurance, an individual performing public or private sector commercial or residential building construction or improvement services for a person in the course of the person's trade, business, profession, or occupation is an employee of the person unless: 1) the individual holds a current independent contractor exemption certificate; 2) the individual is performing services listed in the exemption certificate; and 3) at the time the individual is performing the services, all of the statutory factors establishing independent contractor status continue to be met. It is important that the exemption certificate include this information to minimize confusion and promote the proper and intended use of the exemption certificate in practice by the parties to the contract.

Finally, this subpart requires the certificate to describe how a person may contact the Department with questions or to verify that a specific certificate remains current. This is important to coordinate with subpart 4, which requires the contracting person to verify the validity of the

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4. It is anticipated that the rules will become effective before September 2, 2009. However, because rules cannot be applied retroactively, it is necessary to provide an alternative date if delays in the rule adoption process result in a delay in the effective date.

certificate with the Department before allowing the certificate holder to perform services as an independent contractor.

Subpart 2. Department list of certificate holders. This provision requires the Department to maintain a list of current certificate holders on its official Web site, which must include the information in subpart 1 and, if applicable, whether the Department has received a request to cancel a certificate or has revoked the certificate and the date it was cancelled or revoked. As discussed under subpart 4, maintaining the information in subpart 1 for each certificate holder on the Department's Web site minimizes the opportunity for someone to falsify or alter a certificate in paper or card form for use by a person who is not the actual certificate holder. It also eliminates the necessity of replacing lost or stolen exemption certificate cards. Posting information about whether there has been a request to cancel the certificate or whether it has been revoked is necessary to ensure that the most current information is available to persons who are required to verify the information under subpart 4. If an exemption certificate is amended, corrected, cancelled or revoked, the exemption certificate information can be updated and made immediately available to the public simply by changing the information on the Department's website.

**Subpart 3. Effective date.** This provides the effective date of certificates according to Minn. Stat. § 181.723, subdivision 5 (b) and (c). They are included in the rule for ease in understanding how the statutory effective dates are coordinated. This subpart also provides that a new application and fee must be submitted if the previous certificate has expired, or is cancelled or revoked. This is necessary to set forth the procedure for reapplying for an exemption certificate once it is no longer effective.

**Subpart 4. Verification of exemption certificate and identity of certificate holder.** This subpart requires a person for whom the certificate holder is performing services to verify the certificate and the identity of the certificate holder to ensure the validity of an exemption certificate and the identity of the individual holding the certificate. A certificate holder must present, and the person for whom a certificate holder is performing services must review, valid photo identification issued by the United States or a state or territory of the United States. This will make it difficult for someone to present an exemption certificate posing as another person. Limiting acceptable identification to that issued by the United States and a state or territory minimizes the ability of an individual to falsify identification.

Finally, subpart 4 provides that before the permitting the certificate holder to provide services as an independent contractor, the person for whom the certificate holder is providing services must obtain from the Department a copy of the Department's current exemption certificate. It is anticipated that the current certificate will be available for printing from the Department's web site 24 hours a day. Requiring the hiring person to print the exemption certificate directly off the Department's web site will minimize the use of false or altered certificates.

Requiring the hiring contractor to obtain certificates directly from the Department and to verify the identity of the certificate holder under this subpart will promote the integrity of the exemption certificate program.

**Part 5202.0160. Expiration, revocation, or cancellation of certificate; notice to public and contractors.**

**Subpart 1. Notice.** This subpart requires the Department to maintain current information regarding the status of exemption certificates on its website and to maintain information about an exemption certificate that has expired, been cancelled or revoked on its website for minimum period of time. It also makes clear at what time of a day the expiration, cancellation or revocation of an exemption certificate is effective. This subpart is needed particularly by persons who hire individuals to perform services within the scope of the statute to determine whether or not the individual may operate as an independent contractor and if the individual may operate as an independent contractor, to obtain a copy of the exemption certificate from the Department's website, as required by Minn. Stat. § 181.723, subd. 7 (c).

**Subpart 2. Cancellation.** This subpart sets out the process by which a certificate holder may cancel his or her certificate. This subpart is necessary because individuals who cancel their certificates are no longer independent contractors and persons for whom they are currently working or intending to work for need to be notified of the cancellation. The process provides for notice to the Department and to persons with which the individual is performing services or intends on performing services prior to the cancellation of the certificate and provides time for persons affected by the cancellation to take action that may be necessary in response to the cancellation.

**Subpart 3. Revocation notice.** This subpart provides for the process by which an exemption certificate will be cancelled and for notice to person for whom the certificate holder is providing services or intends on providing services. As discussed under subpart 2, this subpart is necessary because individuals whose exemption certificates are revoked may no longer operate as an independent contractor and the persons they are working for or intend on working for need to be notified of the revocation. This process provides for notification of those persons by the Department and provides time for persons affected by the revocation to take action that may be necessary in response to the revocation.

**CONCLUSION:** Based on the foregoing, the proposed rules are both needed and reasonable.

This Statement of Need and Reasonableness was made available for public review on March 20, 2008.