

MARYLAND REGISTER

**Proposed Action on Regulations**

<b>Transmittal Sheet</b>  <b>PROPOSED OR REPROPOSED</b>  <b>Actions on Regulations</b>	<b>Date Filed with AELR Committee</b>	<b>TO BE COMPLETED BY DSD</b>
	12/12/2016	Date Filed with Division of State Documents
		Document Number
		Date of Publication in MD Register

**1. Desired date of publication in Maryland Register: 1/20/2017**

**2. COMAR Codification**

**Title Subtitle Chapter Regulation**

09 32 01 18

**3. Name of Promulgating Authority**

Department of Labor, Licensing, and Regulation

**4. Name of Regulations Coordinator Telephone Number**  
Jessica V Carter 410-230-6112

**Mailing Address**

500 N. Calvert Street, Suite 406

**City State Zip Code**  
Baltimore MD 21202

**Email**  
jessica.carter1@maryland.gov

**5. Name of Person to Call About this Document Telephone No.**  
Jared Murphy 410-767-2409

**Email Address**  
jared.murphy@maryland.gov

**6. Check applicable items:**  
 New Regulations  
 Amendments to Existing Regulations

Date when existing text was downloaded from COMAR online: December 9, 2016.

- Repeal of Existing Regulations
- Recodification
- Incorporation by Reference of Documents Requiring DSD Approval
- Reproposal of Substantively Different Text:

: Md. R  
 (vol.) (issue) (page nos) (date)

Under Maryland Register docket no.: --P.

**7. Is there emergency text which is identical to this proposal:**

Yes  No

**8. Incorporation by Reference**

Check if applicable: Incorporation by Reference (IBR) approval form(s) attached and 18 copies of documents proposed for incorporation submitted to DSD. (Submit 18 paper copies of IBR document to DSD and one copy to AELR.)

**9. Public Body - Open Meeting**

OPTIONAL - If promulgating authority is a public body, check to include a sentence in the Notice of Proposed Action that proposed action was considered at an open meeting held pursuant to General Provisions Article, §3-302(c), Annotated Code of Maryland.

OPTIONAL - If promulgating authority is a public body, check to include a paragraph that final action will be considered at an open meeting.

**10. Children's Environmental Health and Protection**

Check if the system should send a copy of the proposal to the Children's Environmental Health and Protection Advisory Council.

**11. Certificate of Authorized Officer**

I certify that the attached document is in compliance with the Administrative Procedure Act. I also certify that the attached text has been approved for legality by Cynthia Dietz Spirt, Assistant Attorney General, (telephone #410-230-6120) on December 12, 2016. A written copy of the approval is on file at this agency.

**Name of Authorized Officer**

Kelly M. Schulz

**Title**

Secretary

**Telephone No.**

410-230-6020

**Date**

December 12, 2016

**Title 09**  
**DEPARTMENT OF LABOR, LICENSING, AND**  
**REGULATION**

**Subtitle 32 UNEMPLOYMENT INSURANCE**

**09.32.01 Obligations of Employers**

Authority: Labor and Employment Article, §§ 8-201 and 8-205, Annotated Code of  
Maryland

**Notice of Proposed Action**

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The Secretary of the Department of Labor, Licensing, and Regulation proposes to amend Regulation .18 under COMAR 09.32.01 Obligations of Employers.

**Statement of Purpose**

The purpose of this action is to clarify the factors to be considered by the Secretary when determining whether a worker is classified as an independent contractor or is working in covered employment for the purpose of unemployment insurance coverage. The proper classification of workers impacts a business's tax obligations and a worker's eligibility for unemployment insurance benefits. The proposal removes certain out of date considerations, such as the specific reference to an independent contractor maintaining a listing in a telephone directory. The proposed regulation reflects the statutory requirement that the Secretary must determine that each of the three conditions found in Labor and Employment Article, § 2-205(a), Annotated Code of Maryland, must be satisfied by the employer before an independent contractor relationship will be found to exist. The proposed regulation revises and expands upon the current factors that may be considered by the Secretary in making the three required determinations and clarifies that each determination is based on the totality of the circumstances. The proposed regulation amends the order of the paragraphs in COMAR 09.32.01.18 so that the regulation addresses the three required determinations in the same order in which they appear in the statute.

**Comparison to Federal Standards**

There is no corresponding federal standard to this proposed action.

**Estimate of Economic Impact**

The proposed action has no economic impact.

**Economic Impact on Small Businesses**

The proposed action has minimal or no economic impact on small businesses.

## **Impact on Individuals with Disabilities**

The proposed action has no impact on individuals with disabilities.

## **Opportunity for Public Comment**

Comments may be sent to Jared Murphy, Director, Unemployment Insurance Legal Services, 1100 N. Eutaw Street, Baltimore, MD 21201, or call 410-767-2409, or email to [jared.murphy@maryland.gov](mailto:jared.murphy@maryland.gov), or fax to 410-333-7099. Comments will be accepted through February 21, 2017. A public hearing has not been scheduled.

## **Economic Impact Statement Part C**

A. Fiscal Year in which regulations will become effective: FY 17

B. Does the budget for the fiscal year in which regulations become effective contain funds to implement the regulations?

Yes

C. If 'yes', state whether general, special (exact name), or federal funds will be used:  
No additional funds are necessary to implement.

D. If 'no', identify the source(s) of funds necessary for implementation of these regulations:

E. If these regulations have no economic impact under Part A, indicate reason briefly:  
The proposed action under COMAR 09.32.01.18 clarifies language but does not substantively change the applicable test for worker classification.

F. If these regulations have minimal or no economic impact on small businesses under Part B, indicate the reason and attach small business worksheet.  
See response to E, above.

G. Small Business Worksheet:

Attached Document:

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# **TITLE 9 DEPARTMENT OF LABOR, LICENSING, AND REGULATION**

## ***SUBTITLE 32 UNEMPLOYMENT INSURANCE***

### **01 Obligations of Employers**

Authority: Labor & Employment Article, §§ 8-201 and 8-205, Annotated Code of Maryland

#### **.18 Presumption of Employee Status and Determinations of Worker Classification.**

A. (text unchanged)

B. Independent Contractor.

(1) To overcome the [employee] presumption of *employee status*, an employing unit shall *bear the burden of proof* to establish, *by a preponderance of the evidence*, that the person performing services is an independent contractor.

(2) The Secretary shall determine [that] if an employing unit has established that a [the] person performing services is an independent contractor [when the conditions] *by considering, for each paragraph of Labor and Employment Article, § 8-205(a), Annotated Code of Maryland, the factors in §B(3)(a)–(c) of this regulation* [are clearly shown]. *The Secretary shall consider the totality of the circumstances for each of the three paragraphs found in § 8-205(a). Each determination is considered based on the specific facts of the relationship between the employing unit and the worker. The Secretary may consider a relevant prior determination by a taxing authority regarding the proper classification of the worker.*

(3) *When assessing the totality of the circumstances to determine the proper worker classification under each paragraph of § 8-205(a), the Secretary shall consider the following factors.* [Circumstances evidencing the conditions mentioned in §B(2) of this regulation include, but are not limited to, the items listed after each condition:]

(a) *To determine whether there is a right to control or direct how the worker performed the task for which the worker is hired and the absence of control in practice, relevant facts include but are not limited to* [The person has been and will continue to be free from the employing unit's control or direction]:

(i) *The extent of instruction provided to the worker by the employing unit;* [The employing unit does not require the person to comply with detailed instructions about when, where, and how the person is to work],

(ii) *The extent and type of training provided to the worker by the employing unit;* [The employing unit does not train the person to perform the service in a particular manner or using a particular method determined by the employing unit.]

(iii) *Whether the worker or the employing unit determines how work results are achieved;* [The employing unit does not establish set hours of work for the person performing the services,]

(iv) *Whether the worker or the employing unit determines the order or sequence to follow in performing the work;* [The employing unit does not establish a schedule or routine for the person performing the service,]

(v) *Whether the worker is hired and discharged under specific terms of an agreement or at-will;* [The employing unit may not discharge the person for failure to obey the employing unit's specific instructions on how the service is to be performed;]

(vi) *Who determines and provides the supplies, tools, and equipment used to perform the task;*

(vii) *Whether the work must be performed personally by the worker;*

(viii) *The extent to which the worker is subjected to pre-employment testing, credentialing, resume verification, background checks, and/or pre-employment physicals;*

(ix) *Whether the worker is required to devote substantially full time to the employing unit; and*

(x) *Whether the worker is required to submit regular or written reports to the employing unit.*

(b) [The service is outside the usual course of business of the employing unit:

(i) The person performs the work off the employing unit's premises,

(ii) The person performs work that is not integrated into the employing unit's operation,

(iii) The service performed is unrelated to the employing unit's business;

(c) *To determine whether the worker* [The person performing the service] *is customarily engaged in an independently established business, relevant facts include but are not limited to:*

(i) *The extent to which the worker makes services available to the relevant market;* [Maintains a business listing in the telephone directory,]

(ii) *Whether the worker* [Has] *has his or her own place of business* [,];

(iii) *The extent of the worker's investment beyond the worker's own time;* [Has a financial investment in a related business and can incur a loss in the performance of the service,]

(iv) *The extent to which the worker has unreimbursed business expenses;* [Has his or her own equipment needed to perform the service,]

(v) *The extent to which the worker realizes a profit or loss;* [Determines the price of the service to be performed,]

(vi) *Whether the worker hires other workers to assist with the work;* [Employs others to perform the service,]

(vii) *Whether the worker is provided with coverage under the employing unit's liability or workers' compensation insurance or is provided with employee-type benefits, such as health insurance, a pension, retirement plan, or vacation pay;* [Carries his or her own liability or workers' compensation insurance, or both,]

(viii) *Whether the worker* [Performs] *performs the service for* [more than one] *an unrelated employer at the same time* [,];

(ix) *Whether the worker* [Sets] *sets his or her own hours* [,]; *and*

(x) *Whether the worker* [Is] *is paid by the job.*

(c) *To determine whether the work is outside the usual course of business of the employing unit for which the work is performed, relevant facts include but are not limited to:*

(i) *The person performs the work off the employing unit's premises;*

(ii) *The person performs work that is not integrated into the employing unit's operation;*

(iii) *The extent to which the services performed by the worker are similar to the duties of other employees;*

- (iv) The type of relationship intended to be established by the parties' contractual agreement; and*  
*(v) Whether the relationship is of a definite term.*

KELLY M. SCHULZ  
Secretary  
Department of Labor, Licensing, and Regulation