Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS
No. SJC-13485

DHANANJAY PATEL; SAFDAR HUSSAIN; VATSAL CHOKSHI;
DHAVAL PATEL; NIRAL PATEL,
Plaintiffs-Appellants,

v.

7-ELEVEN, INC.,
Defendant/Third Party Plaintiff-Appellee,

MARY CADIGAN; ANDREW BROTHERS,
Defendants,

DPNEWTO1; DP TREMONT STREET INC.; DP MILK STREET INC.;
DP JERSEY INC.,
Third Party Defendants.

On A Certified Question From The United States Court Of Appeals
For The First Circuit

BRIEF FOR THE DEFENDANT/THIRD PARTY PLAINTIFF-APPELLEE, 7-ELEVEN, INC.

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CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee 7-Eleven, Inc., a Texas corporation, is wholly-owned by SEJ Asset Management & Investment Company, Inc. ("SAM"), a Delaware corporation. SAM is owned in part by Seven-Eleven Japan Co., Ltd. ("SEJ"), a Japanese corporation. SEJ is wholly owned by Seven & i Holdings, Co., Ltd., a Japanese corporation, whose stock is publicly traded on the Tokyo Stock Exchange. SAM is also owned in part by Seven & i Holdings, Co., Ltd.

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STATEMENT OF THE CASE

This is the second time this Court has been asked whether G.L. c. 149, § 148B (the "ICL") should be interpreted to transform individuals and entities that own and operate multi-million-dollar franchised businesses into employees. This case was brought by five Plaintiffs: two who own 7-Eleven franchises, and three who own companies that own 7-Eleven franchises. These franchises constitute just a portion of Plaintiffs' business interests, which include real estate holdings, other franchised and non-franchised businesses and competitive convenience stores—generate millions of dollars in annual sales, yield hundreds of thousands of dollars in annual income in most cases, and employ numerous individuals.[1] Not satisfied with this, and seeking to create a windfall, Plaintiffs seek to use this suit to mutate the ICL into something it was never intended to be: a tool for business owners to recover, as "damages," three times the value of their business's operating expenses, including their franchise fees and the payroll they pay to their own employees.

The travel of this case, which the First Circuit Court of Appeals recounted in its certification decision, see Patel v. 7-Eleven, Inc., 81 F.4th 73, 74 (1st Cir. 2023), has been long. The District Court has twice entered summary judgment for 7-Eleven: once in 2020, see Patel v. 7-Eleven, Inc., 485 F. Supp. 3d 299 (D. Mass.

[1] To be clear, this case **does not** involve the individuals (like the counter clerks) that work at these franchises for wages. These are Plaintiffs' employees, and they are covered by the Commonwealth's labor laws.

2020) (the "2020 Decision"), and again in 2022, see Patel v. 7-Eleven, Inc., 618 F. Supp. 3d 42 (D. Mass. 2022) (the "2022 Decision").[2] Between those Decisions, this Court answered a certified question regarding the interplay between the ICL and the Federal Trade Commission's Franchising Rule. See Patel v. 7-Eleven, Inc., 489 Mass. 356 (2022) ("Patel"). As part of its answer, Patel provided guidance about the ICL's "Threshold Inquiry," which courts must resolve before deciding whether the ICL's three-part "ABC test" applies to a particular relationship:

> [D]istinguishing between legitimate arrangements and misclassification requires examination of the facts of each case, which begins with a threshold determination whether the putative employee "perform[s] any service" for the alleged employer. G. L. c. 149, § 148B. This threshold is not satisfied merely because a relationship between the parties benefits their mutual economic interests. See Jinks v. Credico (USA) LLC, 488 Mass. 691, 696, 177 N.E.3d 509 (2021). Nor is required compliance with Federal or State regulatory obligations enough, in isolation, to satisfy this threshold inquiry. See Sebago [v. Boston Cab Dispatch, Inc., 471 Mass. 329-331 (2015)] 1139 (compliance with regulatory leasehold mandated by regulations was not dispositive in determining whether individual "performs any service" for putative employer).

Patel, 489 Mass. at 370.

Relying on this guidance, the District Court resolved the parties' cross-motions for summary judgment and held Plaintiffs had failed, as a matter of law, to show they satisfied the Threshold Inquiry. The District Court ruled that Plaintiffs' performance of their contract obligations (such as those governing store

[2] The 2022 Decision is at the start of the Addendum. Citations appear as "Add. at __."

operating hours, inventory recording procedures and uniform use) were not "services" under the ICL because Plaintiffs were not paid to perform them. Add. at 66-69. The District Court also rejected Plaintiffs' argument that they satisfy the Threshold Inquiry by paying franchise fees out of their stores' profits to compensate 7-Eleven for the lease and license rights it provides. As the District Court explained, "in Patel, the SJC reiterated that the services threshold is not met 'merely because a relationship between the parties benefits their mutual economic interests.'" Add. at 69, quoting Patel, 489 Mass. at 370.

After argument on appeal, the First Circuit Court of Appeals certified the following question to this Court:

> Do Plaintiffs "perform[] any service" for 7-Eleven, within the meaning of Mass. Gen. Laws ch. 149, § 148B, where, as here, they perform various contractual obligations under the Franchise Agreement and 7-Eleven receives a percentage of the franchise's gross profits?

As discussed below, this question has enormous breadth—it could, if answered yes, transform any contractual relationship in which payment hinges on the level of sales or revenue (like commercial leases, licensing agreements, publishing agreements, distribution arrangements, and of course franchise relationships) into presumptive employment. Seeking to obscure these implications, Plaintiffs treat the certified question as if it only applies to franchisees, whom they contend are just "managers" working for their franchisors. See, e.g., P. Brief at 8. As the following facts demonstrate, that contention is, frankly, comical.

STATEMENT OF FACTS

To fully understand why Plaintiffs' approach to the certified question would turn virtually every franchisor into a presumptive employer, it is essential to understand what franchising is, how it works, and how 7-Eleven does business with Plaintiffs. 7-Eleven provides that context here.

I. How Franchising Actually Works.[3]

Franchising has "existed in this country in one form or another for over 150 years." Patterson v. Domino's Pizza, LLC, 60 Cal. 4th 474, 488-89 (2014). More recently, it has "become a ubiquitous, lucrative, and thriving business model." Id. at 477. There are two main forms of franchising: product franchising (*e.g.*, car dealers and gasoline retailers) and business-format franchising (*e.g.*, convenience stores like those at issue here, restaurants, hotels, and gyms). JA476. In product franchising, the primary commodity exchanged is a tangible product that the

[3] The facts in this section are drawn from an affidavit submitted by Dean Francine Lafontaine, the Senior Associate Dean for Faculty and Research, and a Professor of Business Economics and Public Policy at the University of Michigan's Ross School of Business. JA462-561. Dean Lafontaine's academic research is in Industrial Organization, with a focus on franchising. JA463. 7-Eleven submitted Dean Lafontaine's affidavit at summary judgment to provide the District Court with relevant information about franchising and the context in which 7-Eleven's business operates. Plaintiffs did not present any evidence to the District Court to dispute Dean Lafontaine's conclusions. Instead, they objected to Dean Lafontaine's evidence on a variety of grounds. See JA3226-50. The District Court overruled Plaintiffs' objections in its 2020 Decision, 485 F. Supp. at 305–06, and Plaintiffs did not appeal this determination. Dean Lafontaine's affidavit is a part of the record and the facts it establishes are undisputed.

franchisee resells to consumers; in business-format franchising, it is a license for the franchisee to distribute products or services using the franchisor's operating system. JA476-77.

The essence of business-format franchising is the replication of the franchisor's business concept by independent business owners who purchase the right to use the franchisor's brand, systems, and know-how. JA481. Franchisees derive value from this franchise arrangement in at least three ways: (1) brand equity, which is the ability of the brand to draw in customers to the franchisee's business, (2) access to economies of scale, and (3) system access, which is the franchisee's ability to benefit from the franchisor's intellectual property and know-how. JA482. Unlike employees, franchisees can develop equity in their franchised business by increasing its profitability and income and then monetize that equity when they sell their business for a profit. JA482-83.

Franchisors receive compensation for the licenses, services, and know-how they provide their franchisees by charging franchise fees. JA497-99, JA513. See also 16 C.F.R. § 436.1(h)(3) (defining a franchise relationship as one where "[a]s a condition of obtaining or commencing operation of the franchise" the franchisee pays a fee). This compensation typically consists of both upfront fees and periodic royalties. JA515.

II. 7-Eleven.

7-Eleven is the world's largest franchisor of retail convenience stores.[4] JA591. It has been selling franchises in the United States for more than fifty years. Id. There are currently more than 7,800 7-Eleven® stores operating in the United States, approximately 159 of which are franchised to independent business owners in Massachusetts. Id.; JA3177.[5]

It is undisputed that 7-Eleven's relationship with its franchisees conforms to the standard business format franchise model discussed in the previous section. JA497. 7-Eleven provides its franchisees with a variety of services, including

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[4] Plaintiffs criticize 7-Eleven for operating company-owned as well as franchised stores. See P. Brief at 9-10. But almost all franchisors operate a small percentage of company-owned locations to support their franchise operations. JA503-04. These stores are laboratories for testing new products, training facilities for new franchisees and, on occasion, provide a transition between the time a franchisee leaves the system and a new franchisee acquires the location. JA504-07.

[5] Plaintiffs state that "in Japan … 7-Eleven franchisees have been held by the courts to be employees." Plaintiffs' Br. at 13. Even if the record supported this claim (it does not), 7-Eleven franchisees in Japan are franchisees of Seven & i Holdings—a publicly traded company on the Nikkei stock exchange—not 7-Eleven. JA3179. More importantly, courts in *this* country have routinely concluded that 7-Eleven's franchisees are independent contractors. See, e.g., Haitayan v. 7-Eleven, Inc., No. 21-56144, 2022 WL 17547805, at *1 (9th Cir. Dec. 9, 2022) (upholding trial verdict that 7-Eleven franchisors were independent contractors); 7-Eleven, Inc. v. Sodhi, Civ. Action No. 13-3715 (MAS) (JS), 2016 WL 3085897, at *7 (D.N.J. May 31, 2016) (finding franchisees' counterclaim that he should be classified as an employee under the FLSA failed as a matter of law), aff'd, 706 F. App'x 777 (3d Cir. 2017). Likewise, although Plaintiffs assert that 7-Eleven's counsel "acknowledged in an email … that 7-Eleven cannot justify claiming independent contractor status for its franchisees…" the record citation Plaintiffs provide for this assertion (JA2284) does not support it.

training, a license to operate a store using 7-Eleven's trademarks and operating system, leasehold rights, maintenance and repair support, and advertising. Add. at 68; JA476-77; JA528; JA601-04; JA618-19; JA3260. 7-Eleven employs over 3,700 corporate personnel, including over 1,000 field consultants, to provide these services to its franchisees. JA497-98.

Like other franchisors, 7-Eleven does not do this work for free. In return for the services 7-Eleven provides, 7-Eleven's franchisees pay 7-Eleven an upfront franchise fee and a periodic royalty (called the "7-Eleven Charge") based on a percentage of the franchise's gross profits. Add. at 68-69 ("the franchisees pay franchise fees to 7-Eleven in exchange for a variety of services"); JA498; JA606-07; JA3260-61. And like most business format franchisors, 7-Eleven divides the fees it charges this way to: (1) spread the cost of those services over the length of the contract (rather than in one initial lump sum), (2) reassure its franchisees that 7-Eleven has an incentive to help them succeed, and (3) share its franchisees' risk of failure by absorbing a portion of the franchisees' losses in the event of a business downturn. JA515-16.

What 7-Eleven does *not* do is "pay [its franchisees] for anything." Add. at 68. Instead, 7-Eleven franchisees pay *themselves* by "withdraw[ing] weekly or monthly 'draws' from the store's gross profit minus the 7-Eleven Charge and store expenses." Id., quoting 2020 Decision, 485 F. Supp. 3d at 303-04. Like all business owners,

franchisees can choose to withdraw those profits or reinvest them in their business. Provided they maintain a minimum net worth (which is required to cover 7-Eleven's security interest in the store's inventory), franchisees are entitled to all the profit that remains after paying the 7-Eleven Charge and other store expenses. JA3261.

III. Plaintiffs And Their Businesses.

Throughout this proceeding, Plaintiffs have spun a Dickensian tale which paints them not as independent, savvy business owners, but as downtrodden store managers forced to work long hours for a pittance. The reality is far different.

Four of the five Plaintiffs set up corporations to own and/or manage their 7-Eleven franchises. Plaintiffs Niral Patel, Dhaval Patel, and Vatsal Chokshi each set up a corporate entity to enter a franchise relationship with 7-Eleven, and each is an employee and officer of that entity. JA2807; JA2813; JA2975; JA3027; JA3143-61. Another Plaintiff, Dhananjay Patel, formed a management company ("Shree Corporation") to operate his 7-Eleven franchise. JA2930. Shree Corporation receives all the revenue the 7-Eleven franchise generates and, in turn, pays Mr. Patel a management fee. Id.

Plaintiffs have enjoyed the advantages of being business owners in various ways: they have had multiple investors in their franchises, adjusted corporate ownership structures, and taken loans from their businesses. For example, the entities Niral Patel and Dhaval Patel formed were originally owned in part by another

7-Eleven franchisee named Dharmesh Patel. JA2980-81; JA3027-28. Dharmesh Patel had no role in operating either franchise, and both Dhaval and Niral Patel ultimately acquired Dharmesh Patel's ownership interests to become their companies' sole owners. JA3038; JA2984-85.

Vatsal Chokshi is an owner and officer of two corporations he created for his 7-Eleven franchises (DP Jersey and DPNEWT01), and he receives a salary from each. JA2807; JA2814; JA2817. Mr. Chokshi has varied these corporations' ownership structure over the years. For example, in 2015, Mr. Chokshi sold 20% of DP Jersey's stock to his brother and another 40% to Dharmesh Patel. JA2803-06. He repurchased that stock in 2018. Id. In 2015, Mr. Chokshi sold 50% of DP NEWT01 to Dharmesh Patel. JA2811. He repurchased that stock in 2017. Id. Mr. Chokshi also made loans to and took loans from the corporations in amounts ranging from approximately $160,000 to $275,000. JA2804; JA2806.

Plaintiffs agreed they were business owners when they signed their franchise agreements, see, e.g., JA746, and conducted themselves as such. Each incorporated franchisee filed corporate tax returns (JA2805; JA2989; JA3029), and each individual franchisee filed tax returns stating they were sole proprietors, not employees (JA2865; JA2930). These returns deducted the franchises' operating expenses. JA2930; JA2864-65.

Further, Plaintiffs control their business operations. While the obligations imposed by 7-Eleven have no bearing on the legal principles at issue in this appeal, 7-Eleven notes that Plaintiffs largely disclaimed their allegations of control during discovery. For example, Plaintiffs admitted they work when they want (JA2820; JA2887; JA2925; JA2984; JA3049), take vacations when they want (JA2823; JA2887-88; JA2948; JA2984; JA3049), and exercise total control over all their employment practices—including the hiring, firing, wages, discipline, scheduling, and staffing of their many employees. See, e.g., JA2814; JA2819-20; JA2860-62; JA2921-22; JA2933; JA2976-77; JA3029; JA3046-48; JA3052. In addition, Plaintiffs determine how they want to merchandise their stores (JA2872; JA2944-46), how to price the products they choose to sell (JA2823-24; JA2869; JA2942; JA2998-99; JA3043; JA3049), and which vendors they use (JA2940). They own their own business licenses, carry non-recommended inventory, and participate in promotions only when they conclude they make sense for their businesses. JA2824-25; JA2870-72; JA2939-40; JA2943-46; JA2999-3001; JA3043.

These decisions and the rights they received from 7-Eleven have made Plaintiffs' franchised businesses extremely profitable. Dhananjay Patel testified that, due to his hard work and good business decisions, he grew his franchise's sales to more than $2.1 million. JA2935. As a result of his efforts, Vatsal Chokshi acquired property worth more than $2 million (JA2812) and, in 2018, paid himself

(directly or through disbursements made to his wholly owned corporations) $203,151 – *excluding* W-2 wages he took as an employee of his corporations and *excluding* tens of thousands of dollars of ordinary business income he chose not to disburse to himself. JA2816-17.

Finally, even setting their 7-Eleven franchises aside, the record still shows that Plaintiffs are successful businessmen. For example:

- In 2011, Safdar Hussain acquired (through ASH, LLC, his wholly owned entity) a Sunoco gas station and a mini-mart franchise called APlus. JA2855-57. Mr. Hussain is also the President and owner of a perfume distribution company (Orchid Collections, LLC). JA2884.

- Dhananjay Patel owns: (i) a non-7-Eleven convenience store (West Elm Variety), which he has owned and operated since 2014; (ii) income property (through his entity, Bhadravir Realty LLC) valued at $2.5 million; and (iii) commercial real estate through yet another entity (Shree Ji Real Estate, LLC). JA2924; JA2929-31.

- Vatsal Chokshi owned a Blimpie's® franchise and a drug testing company as well as a gas station and unbranded convenience store. JA2796-97.

- Dhaval Patel owns another business (DPMP LLC) that previously owned rental property. JA3030.

In 2017—years after they became franchisees, see JA1825; JA1831; JA1837; JA1843—Plaintiffs filed their Complaint, alleging for the first time that they were employees, not business owners, and the operating expenses they pay out of their franchises' gross revenue constitute improper deductions from their "pay." JA45.

SUMMARY OF ARGUMENT

Part I (pp. 23-28) of this brief explains why the answer to the certified question is "No." This is so for three reasons:

First, contractual obligations alone cannot constitute Threshold Inquiry "services." If they were, all contracts would be presumptive employment contracts because, by definition, all contracts impose obligations. Answering "Yes" would conflict with not only common sense, but this Court's reasoning in Sebago. 471 Mass. at 325, 329-30 (holding taxi drivers did not provide services to taxi medallion owners even though drivers had contractual obligations to medallion owners).

Second, an obligation to pay a percentage of one's gross profits to another party likewise cannot be a Threshold Inquiry "service" because a payment obligation (whether percentage-based or not) is simply an economic benefit. And Patel makes clear that the Threshold Inquiry "is not satisfied merely because a relationship between the parties benefits their mutual economic interests." 489 Mass. at 370.

Third, contractual obligations and percentage payments cannot be Threshold Inquiry "services" in combination because that combination is not an indicium of employment. The combination occurs in a host of contexts—like commercial leasing, licensing, publishing, product distribution, etc.—that have nothing to do with employment.

Part II (pp. 28-38) explains why the District Court's Threshold Inquiry interpretation—which used pay as a litmus test for Threshold Inquiry "services"—was the correct one. The District Court's approach aligns with this Court's holdings in Sebago and the approaches of eleven other states (including California), all of which recognize the common-sense notion that "services" are provided for remuneration. It also solves the problem of charitable volunteers, whose work would be criminalized under Plaintiffs' Threshold Inquiry interpretation. What the District Court's interpretation will *not* do is "upend application of [the ICL] to employees throughout the Commonwealth," as Plaintiffs theatrically suggest. P. Brief at 2. Plaintiffs never explain how employers could end-run the ICL if the District Court were upheld, or why employers have not already done so in the eleven other states that use the District Court's approach.

Part III (pp. 39-48) explains why Plaintiffs' alternative formulation cannot be correct. Plaintiffs contend the Threshold Inquiry is satisfied whenever a putative employer's revenue depend on a worker's labor. See, e.g., P. Brief at 20. But this contention, among other things:

- Rests on a mischaracterization of Sebago. The fact this Court found dispositive in that case was *not* that the putative employer derived revenue from the workers, but rather that the putative employer used those workers to perform services for its own clients. Id. 471 Mass. at 331.
- Contradicts both Jinks v. Credico (USA) LLC, 488 Mass. 691 (2021) and Patel. As the District Court noted, both cases reject Plaintiffs'

theory that "because the revenue flowing to 7-Eleven is directly dependent on [Plaintiffs'] stores' revenue, they provide services to 7-Eleven." Add. at 69.

- Is unworkable in practice. As the New Jersey Appellate Division explained when rejecting a similar argument, Plaintiffs' approach would extend the ABC test's reach to virtually every economic relationship. See AC&C Dogs, LLC v. New Jersey Dep't of Lab., 332 N.J. Super. 330, 335 (App. Div. 2000).

Finally, Part IV (pp. 48-53) corrects three false arguments in Plaintiffs' Brief. It explains that the Threshold Inquiry is not toothless, why the District Court's finding that 7-Eleven does not pay Plaintiffs was correct, and why 7-Eleven's franchise fee structure is normal in the industry.

ARGUMENT

I. The Answer To The Certified Question Is "No."

The answer to the certified question is "No," for three reasons:

First, the notion that contractual obligations are "services" under the Threshold Inquiry proves far too much. A contractual obligation is a duty arising from a contract. See OBLIGATION, Black's Law Dictionary (11th ed. 2019). Because all contracts by definition impose obligations on the contracting parties,[6] a rule equating contractual obligations with "services" would convert every contract into a presumptive employment relationship. And because employment

[6] See, e.g., CONTRACT, Black's Law Dictionary (11th ed. 2019) ("An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.").

relationships create criminal liability under G.L. c. 149, § 148 (the "Wage Act"), such a rule would force every contracting party to either treat its counter-party as an "employee" or pass the ABC test to avoid criminal liability. See Lynch v. Crawford, 483 Mass. 631, 643 (2019) ("a Wage Act violation … is a crime").

Given the ABC test's breadth, this is no easy task. Prong B of the ICL establishes an employment relationship unless "the service is performed outside the usual course of the business of the employer," G.L. c. 149, § 148B(2). If performing obligations under a contract satisfies the Threshold Inquiry, then *every* contract between entities or individuals in the same line of work (such as manufacturers and distributors) would be an employment contract under the ICL.

It is impossible to square this approach with either common sense or precedent. For starters, extending the ICL's reach to every contract would make the Threshold Inquiry useless for "distinguishing between legitimate arrangements and misclassification," which, as Patel notes, is the Inquiry's purpose. Patel, 489 Mass. at 370.

Further, this interpretation is irreconcilable with Sebago. Sebago involved misclassification claims brought by taxi drivers ("Drivers") against three groups of defendants: (1) "Medallion Owners," who owned the taxicabs the Drivers used; (2) the "Radio Associations" who dispatched the Drivers, and (3) a taxicab garage that serviced taxicabs. Sebago, 471 Mass. at 325. The Drivers obtained the right to drive

the taxicabs by signing lease agreements with the Medallion Owners that "set forth the rights and obligations of the lessor and lessee, the duration of the lease, and the applicable flat lease rate." Id. If contractual obligations are "services," these lease obligations would have satisfied the Threshold Inquiry with respect to the Medallion Owners. But that is not what this Court held. See id. at 329-30.[7]

Second, it cannot be true that an obligation to pay a percentage of gross profits or sales to another party counts as a Threshold Inquiry "service." Although percentage-based payment obligations—like all payment obligations—confer benefits on the payee, that benefit is economic, and this Court held in Patel that the Threshold Inquiry "is not satisfied merely because a relationship between the parties benefits their mutual economic interests." 489 Mass. at 370, quoting Jinks, 488 Mass. at 696. Accord AC&C Dogs, 332 N.J. Super. at 335 (stating if application of ABC test were "contingent upon receipt of an economic benefit, … it would be difficult to envision an economic relationship that could be exempted").

[7] In Sebago, this Court did state in *dicta* that "the extent to which medallion owners sold advertising space on their taxicabs and, further, the extent to which the plaintiffs drove taxicabs depicting those advertisements … arguably could constitute a service to the owners insofar as it increased the value and facilitated the sale of advertising space." 471 Mass. at 331. Section III(A) of this Brief addresses why this text has no bearing on this analysis.

The fact that a contract obligates a party to pay money on a percentage basis (rather than a flat fee) changes nothing.[8] As the benefits conferred by percentage-based fees and flat fees are both purely economic, logic dictates that Patel's holding that economic benefits do not satisfy the Threshold Inquiry applies to both.[9] Cf. Kirby v. Indiana Emp. Sec. Bd., 158 Ind. App. 643, 644, 648 (1973) (under Indiana independent contract law, "no services were rendered" where putative workers paid putative employer "a straight percentage of their gross receipts").

[8] Percentage-based franchise fees are common because they help insulate franchisees from down-side risk (by passing to the franchisor a share of the economic consequences of poor sales) and incentivize franchisors to help franchisees succeed (by linking franchisor profit to franchisee success). See JA515-16.

[9] Plaintiffs argue that language from Sebago suggests that percentage-based fees should receive different treatment in the Threshold Inquiry analysis. See Plaintiffs' Brief at 3, citing Sebago, 471 Mass. at 334. But the language Plaintiffs cite is not from Sebago's discussion of the Threshold Inquiry. It is from the portion of Sebago discussing Prong B. See id. at 333-34. Although one could debate the utility of using percentage payments as a metric for determining whether contracting parties are in the same usual course of business, Prong B is not at issue here, and nothing in Sebago's discussion of Prong B suggests that percentage payments are not the "economic benefits" that Patel excludes from Threshold Inquiry consideration. It is notable, however, that if the payment of a percentage of revenue under a contract was enough to satisfy the Threshold Inquiry, and if percentage payments also run afoul of Prong B, then Plaintiffs' interpretation of the Threshold Inquiry would necessarily create an employment relationship and render an analysis of any of the Prongs unnecessary. Cf. id. at 334-35 ("the second prong 'should not be construed to include all aspects of a business such that [the first and third] prongs … become unnecessary'"), quoting Attorney General's Advisory 2008/1.

Third, coupling contractual obligations with percentage-based gross profit payments cannot create a "service" where none otherwise exists. In Patel, this Court observed that "nothing in the independent contractor statute prohibits legitimate franchise relationships among independent entities that are not created to evade employment obligations under the wage statutes." 489 Mass. at 370. But "a periodic royalty in the form of a percentage of the franchisee's sales, revenues, or gross profits" is "a standard practice in franchising," JA515, including franchise relationships that are unquestionably "legitimate." See, e.g., Moghaddam v. Dunkin' Donuts, Inc., 295 F. Supp. 2d 136, 137 (D. Mass. 2003) (noting that franchisees pay Dunkin' a "percentage of gross sales"). And this is hardly unique to franchising. As the Indiana Court of Appeals has observed, contract obligations and percentage-based payments frequently occur together in contexts having nothing to do with employment. See Kirby, 158 Ind. App. at 648 (stating percentage-based revenue payments were "more indicative of a lease … that provides for payments to be determined by the lessees' usage …, than of an employer-employee relationship"). For example, both routinely occur together in commercial lease, licensing, and rental agreements. See, e.g., F. Parks Brown, Solar Lease Negotiations from the Landowner's Perspective, 49 Tex. J. Bus. L. 1, 6 (2020) ("many … energy industry leases allow the … landowner to receive a percentage of the revenue obtained by the lessee"); Todd Brabec, Jeff Brabec, The Broadway

Musical: Composer, Lyricist and Songwriter Royalties and Deals, Ent. & Sports Law., Winter 2017, at 17, 18 ("The most common type of formula being used on Broadway today is the 'royalty pool' arrangement, whereby [the] music and lyric writers, book writer, director, choreographer, underlying rights owner, producer, etc. [share a] percentage of the weekly operating profits of the musical…."); John C. Murphy, Percentage Rent Provisions in Shopping Center Leases: A Changing World?, 35 Real Prop. Prob. & Tr. J. 731, 732–34 (2001) ("Percentage rent provisions in retail commercial leases usually provide that the percentage rent … is based on a percentage of sales"). Nothing suggests the Legislature intended the ICL to transform these commercial relationships into presumptive employment relationships. Accordingly, the answer to the First Circuit's certified question must be "No."

II. The District Court Applied the Threshold Inquiry Correctly.

The foregoing analysis resolves the certified question (which Plaintiffs ignore). However, as the First Circuit asked for additional guidance, it is worth examining how the District Court applied the Threshold Inquiry to preserve the ICL's purpose and avoid the consequences of Plaintiffs' unreasonable interpretations.

A. The District Court's Approach.

After Patel instructed the District Court to resolve the "threshold determination whether the putative employee 'perform[s] any service' for the alleged employer" through an "examination of the facts," 489 Mass. at 370 (quoting G.L. c. 149, § 148B), the parties filed cross-motions for summary judgment. Relying solely "upon the obligations outlined in the Franchise Agreement," Add. at 67, Plaintiffs argued that their contractual promises to work full time, operate the store 24 hours a day, record inventory sales, wear uniforms, use the 7-Eleven payroll system, and submit cash reports satisfied the Threshold Inquiry. Id. at 67. The District Court rejected this argument, holding that "merely fulfilling … contractual obligations" is not a "service" under the ICL. Id. at 69-70.

The District Court then took its analysis a step further and looked at how the parties' relationship functioned. Reviewing the Franchise Agreement in its entirety, the District Court noted that the Agreement obligated *7-Eleven* to confer a host of benefits on Plaintiffs, including:

> …access to the 7-Eleven Operations Manual (Section 4), the grant of a license to operate the 7-Eleven store at the specified location (Section 7), bookkeeping records and payroll software (Section 12), store audits (Section 14), maintenance of 7-Eleven equipment and performance of store repairs (Section 20) and advertising services (Section 22). Per Section 15, 7-Eleven also ["]procure[s] the initial inventory [for the franchisees,] help[s] [them] clean and stock the store [and] provide[s] other services to prepare the store to open for business.["]

Add. at 68. But the District Court did not weigh these obligations against those of Plaintiffs. Instead, it used a simple expedient to determine where the "services" flowed under the Franchise Agreement—it followed the money. After all, while obligations necessarily run in both directions under a contract, payment typically runs one way only—from the service beneficiary (the employer) to the service provider (the employee).

In this case, the undisputed facts showed that *all* the money flowed in one direction: *from* Plaintiffs *to* 7-Eleven. As the District Court noted, under the Franchise Agreement, "[P]laintiffs pay 7-Eleven a franchise fee and down payment (Section 3) and pursuant to Section 10 of the Franchise Agreement, they agree to pay 7-Eleven the 7-Eleven Charge for the License, the Lease and 7-Eleven's continuing services." Add. at 68 (cleaned up). 7-Eleven, in contrast, "does not pay the plaintiffs for anything." Id. Because Plaintiffs are the ones paying for services under their Franchise Agreements, then it stands to reason, the District Court concluded, that 7-Eleven was the party providing them. Id. at 69.

B. The District Court's Approach Accords with This Court's Precedent, The Approaches of Other States, And Common Sense.

1. The District Court's Approach Aligns With Sebago.

The District Court did not pluck the idea of using pay as a litmus test for the Threshold Inquiry out of thin air. Sebago took the same approach in analyzing whether the Threshold Inquiry was satisfied with respect to the Radio Associations.

That analysis did not address contractual obligations. Instead, this Court focused on the Drivers' participation in the Radio Associations' corporate voucher programs, which was not a contractual obligation. See Sebago, 471 Mass. at 331 (finding voucher program participation satisfied Threshold Inquiry even though Drivers "were not required to" participate).

In holding that the Drivers provided a service to the Radio Associations by participating in these programs, this Court, like the District Court, followed the money. Cf. Koza v. New Jersey Dep't of Lab., 307 N.J. Super. 439, 444 (App. Div. 1998) ("the key to the ABC test is 'to follow the money'"). Sebago noted that, under the voucher programs, the Radio Associations sold vouchers to their own corporate clients. When those clients used a taxi, they submitted the vouchers to the Driver as payment. The Driver would then return the voucher to the Radio Association, which would pay the Driver "an amount equal to the fare and tip, minus a 'processing' fee…." Sebago, 471 Mass. at 331. In other words, the Radio Associations made money by selling vouchers for a service (a taxi ride) that they paid the Drivers to perform.[10] Cf. Alaska Contracting & Consulting, Inc. v. Alaska Dep't of Lab., 8 P.3d 340, 349 (Alaska 2000) (stating drivers provided "service" under Alaska's ICL "when those drivers operated trucks necessary for [employer] to satisfy its own

[10] Plaintiffs cite language from Sebago's discussion of the Radio Associations to support their own Threshold Inquiry interpretation, P. Brief at 35. But Plaintiffs misread the passage they cite. See infra at 39-41.

obligations" and employer "paid each driver"). That is the inverse of the fact pattern here, where Plaintiffs *pay 7-Eleven* for a license and lease Plaintiffs use to sell goods to their own customers. Add. at 68. JA496-97.

2. The District Court's Approach Tracks with Both the Common-Sense Understanding of the Term "Service" and the Approach of Other States.

The District Court's approach conforms not only with the approach taken in Sebago, but with (i) the ordinary understanding of the term "service," (ii) the approach taken by other states, and (iii) common sense. The District Court did not examine dictionary definitions in its Decision—neither party asked it to. But its analysis aligns with the traditional "service" definition: "[l]abor performed in the interest or under the direction of others; specif[ally], the performance of some useful act or series of acts for the benefit of another, usu[ally] *for a fee*…." SERVICE, Black's Law Dictionary (11th ed. 2019) (emphasis added).

Numerous states use this traditional definition of "service" to restrict their ABC tests to situations in which services are performed for wages or remuneration. For example, California's independent contractor law states that the ABC test only applies to "person(s) providing labor or services **for remuneration**…." Cal. Lab. Code § 2775 (b)(1) (emphasis added).[11] Ten other states have independent

[11] Plaintiffs argue that California courts "have declined to impose a 'threshold' burden before reaching the prongs of the ABC test." P. Brief at 18. Not so. California courts have rejected the notion of "a threshold hiring entity test," under

contractor laws that say essentially the same thing. See Ind. Code Ann. § 22-4-8-1 (limiting ABC test to "[s]ervices performed … for remuneration"); N.J. Stat. Ann. § 43:21-19 (same); Wash. Rev. Code Ann. § 50.04.140(1) (same); Del. Code Ann. tit. 19, § 3302(10)(K) (limiting ABC test to "services performed by an individual for wages"); Haw. Rev. Stat. Ann. § 383-6 (same); La. Stat. Ann. § 23:1472(12)(E) (same); Neb. Rev. Stat. Ann. § 48-604(5) (same); N.H. Rev. Stat. Ann. § 282-A:9(III) (same); Nev. Rev. Stat. Ann. § 612.085 (same); Vt. Stat. Ann. tit. 21, § 1301(6)(B) (same); N.M. Stat. Ann. § 51-1-42(F)(5) ("wages or other remuneration").

Because they cannot show any payment from 7-Eleven, Plaintiffs try to muddy the waters by arguing they receive "remuneration" from their own business revenue. See P. Brief at 3 (suggesting "remuneration" can "come[] directly from customers"). That, however, is not what "remuneration" means. "[R]emuneration is generally defined as payment for services performed." In re Network Assocs.,

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which a prospective employer could not "be held liable for misclassifying a worker it neither hired nor directed another entity to hire." Mejia v. Roussos Constr., Inc., 76 Cal. App. 5th 811, 817, 818 (2022) (collecting cases); People v. Uber Techs., Inc., 56 Cal. App. 5th 266, 287 (2020) (same). But that is different than a service requirement. California does not have a service-based Threshold Inquiry because its independent contractor law, Cal. Lab. Code § 2775, expressly excludes relationships (like these) where the putative employer does not pay the putative employee. This question did not arise in Haitayan v. 7-Eleven, Inc., 2022 WL 17547805 (9th Cir. Dec. 9, 2022)—which held 7-Eleven had satisfied the ABC test—because that case concerned events prior to the effective date of Cal. Lab. Code § 2775. See id.

Inc., Sec. Litig., 76 F. Supp. 2d 1017, 1043 (N.D. Cal. 1999) (collecting cases, internal quotes omitted). See also REMUNERATION, Black's Law Dictionary (11th ed. 2019) ("Payment; compensation, esp. for a service that someone has performed."); Worcester Telegram Pub. Co. v. Dir. of Div. of Emp. Sec., 347 Mass. 505, 513-14 (1964) ("remuneration" is money "paid for services rendered"). Where, as in these statutes, "the preface to subsections (A), (B) and (C) requires that the 'employee' provides services 'for remuneration,' [t]he implication of this section is that **the remuneration flow from the putative employer to the alleged employee**." Koza, 307 N.J. Super. at 443–44, (emphasis added). When that does not occur, the ABC test does not apply, as the District Court correctly held. See Add. at 68; accord AC&C Dogs, 332 N.J. Super. at 335 (finding ABC test did not apply where putative employee did not receive remuneration from putative employer).

AC&C Dogs, which rejected the equivalent of Plaintiff's argument, is instructive. There, the plaintiff ("AC&C") was engaged in the business of renting hot dog carts to vendors. While AC&C was not a franchisor, it performed an equivalent function—it licensed (in return for a fee) a commodity used by other business owners (the vendors) to operate their own businesses. See id.; cf. JA477-78.[12] Adopting Plaintiffs' view here, an ALJ concluded that, even though the

[12] As 7-Eleven's expert explained in unrebutted testimony, a franchisor performs essentially the same service for its franchisees as the putative employer in AC&C Dogs, albeit on a more comprehensive scale. Whereas the putative employer

vendors' revenue "[wa]s generated by the vendors' retail sales to the public, a portion of which is returned to ACC," id. at 336, the ABC test nevertheless applied to AC&C (rendering it the vendors' employer) because "the vendors were rendering services to ACC in return for remuneration," id. at 336.

The appellate court disagreed. In rejecting the ALJ's conclusion (and Plaintiffs' view), the Appellate Division held:

> We consider [the ALJ's] analysis flawed…. The statute does not make responsibility for unemployment contributions contingent upon receipt of an economic benefit; if it did, it would be difficult to envision an economic relationship that could be exempted. Rather, it refers to remuneration for services. The implication of this section is that the remuneration flow from the putative employer to the alleged employee. … Here, of course, just the reverse obtains.

Id. at 335 (internal quotes omitted).

So too here:

> The record demonstrates [Plaintiffs] are not paid for any services performed for 7-Eleven. In contrast, the franchisees pay franchise fees to 7-Eleven in exchange for a variety of services to support the franchisee.

Add. at 69.

Finally, applying the District Court's approach avoids absurd (and unnecessary) consequences. Many charitable and non-profit institutions in

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in AC&C Dogs provided the hot dog cart and supplies the hot dog vendors needed to operate their own businesses, see 332 N.J. Super. at 335, 7-Eleven provides its franchisees with the trademark license, store, and initial inventory they need to run their own businesses, JA477. Both provide, in exchange for a fee, a commodity used by another business to make money. JA477-78.

Massachusetts depend on volunteer labor. Habitat for Humanity Greater Boston ("Habitat"), for example, has been building homes in Massachusetts for individuals with low-to-moderate incomes since 1987. See https://habitatboston.org/about/mission-and-history/, last accessed November 26, 2023. To do this, Habitat uses "groups of dedicated volunteers … to build affordable and environmentally sustainable homes…." Id. Although Habitat earns revenue from the homes these volunteers build,[13] it does not pay the volunteers. Quite the opposite—Habitat charges volunteers for the chance to work for it. See https://habitatboston.org/about/mission-and-history/, last accessed November 26, 2023. If unpaid labor that produces revenue for an entity is a Threshold Inquiry service, then Habitat has been a presumptive employer—and possibly breaking the law—for decades.[14]

3. The District Court's Interpretation Will Not End the World.

Plaintiffs argue that the District Court's interpretation of the Threshold Inquiry—interpreting a "service" as work performed for pay—will "upend application of [the ICL] to employees throughout the Commonwealth" and "create

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[13] See https://habitatboston.org/wp-content/uploads/2023/05/HFHGB_FY2022 AuditedFinancialStatement.pdf), last accessed November 26, 2023, at 9 ("When the home is complete, Habitat sells it to the family for an affordable price….").

[14] Although G.L. c. 231, § 85W, extends charitable immunity to officers of charitable organizations, see Lynch, 483 Mass. at 643, 7-Eleven is not aware of a statutory provision conferring comparable immunity on charitable organizations.

and 'end-run' around the Wage Act…." P. Brief at 2. This is, frankly, nonsense. As discussed above, eleven states, including California, incorporate the same interpretation into their independent contractor statutes. As far as 7-Eleven is aware, their labor forces have not been upended.

Unfounded apocalyptic visions aside, 7-Eleven recognizes there may be circumstances where the District Court's payment-based approach might need adjustment to address unique facts. One example may be the unreported "exotic dancing" cases Plaintiffs cite for the proposition that customer tips can constitute payment satisfying the Threshold Inquiry. See P. Brief at 26, citing Monteiro v. PJD Ent. of Worcester, Inc., No. 101930, 2011 WL 7090703, at *1 (Mass. Super. Nov. 23, 2011), Jenks v. D. & B. Corp., No. CIV.A. 09-01978, 2011 WL 3930190, at *3 (Mass. Super. Aug. 24, 2011), and Chaves v. King Arthur's Lounge, No. 07-2505, 2009 WL 3188948, at *1 (Mass. Super. July 30, 2009). Yet even if these cases addressed the Threshold Inquiry (none did), nothing about them undercuts the propriety of the District Court's approach.[15]

As this Court noted in Patel, "distinguishing between legitimate arrangements and misclassification requires examination of the facts of each case." 489 Mass. at 370. The exotic dancing cases prove this point, as what sets them apart is that all

[15] At least one of the strip club defendants did pay its dancers. See Chaves, 2009 WL 3188948, at *1 ("King Arthur's receives … $30 per session, paid to King Arthur's, with $20 of that being paid to the dancer.").

three involved the "sale of alcohol and the exotic dancing, together and intertwined, both clearly comprise[d] the adult entertainment portfolio of [the defendant]." Jenks, 2011 WL 3930190, at *3, quoting Chaves, 2009 WL 3188948, at *1. In other words, the work the plaintiffs performed in the exotic dancer cases (dancing) was a *commodity* the strip club defendants sold to make money. Where an establishment makes money by having a worker provide a service or product to its own customers, that is the hallmark of an employment relationship. See pp. 40-42, supra. It also explains why a court would consider the fact that "the dancers [were] remunerated for their services via customer gratuities," Monteiro, 2011 WL 7090703, at *2, instead of paid directly, to be a distinction without a difference.

In the end, the exotic dancing "cases are not applicable here" because franchising "is not a case of defendants concocting an artificial leasing scheme to circumvent the wage laws." Sebago, 471 Mass. at 330. Franchising is a method of doing business that has "existed in this country in one form or another for over 150 years." Patterson, 60 Cal. 4th at 488-89. Accordingly, the exotic dancing cases do not undermine the District Court's common-sense conclusion that franchisors who sell trademark licensing rights do not automatically become the presumptive employers of the parties with whom they contract.

III. Plaintiffs' Alternative Formulation Does Not Work.

Having explained why the District Court's Threshold Inquiry interpretation makes sense, this section explains why Plaintiffs' interpretation does not. Plaintiffs argue the Court should hold that the Threshold Inquiry is satisfied whenever "the putative employer's revenue is directly dependent on the putative employee's labor." P. Brief at 3. But this approach mischaracterizes the authority on which it purports to be based (Sebago), contradicts this Court's holdings in Jinks and Patel and, as the New Jersey Appellate Division has noted, transforms every business into the putative employer of all the entities from whom it receives any revenue.

A. Plaintiffs Mischaracterize Sebago.

Plaintiffs argue that:

> …in Sebago … this Court affirmed that all that is required for a putative employee to meet § 148B's requirement of "providing any service" is a finding that the putative employer's revenue is "directly dependent on the [putative employees'] work…" 471 Mass. at 329.

P. Brief at 20. But this redacted "quote"—which appears in Sebago's discussion of the Radio Associations on page 331 (not 329)—is misleading. The full passage, which gives context to the phrase Plaintiffs cleaved out, explains why:

> With respect to **the radio associations**, it is noteworthy that they **maintain voucher accounts with corporate clients**. **Vouchers from such clients are submitted to the taxicab drivers as payment** for fares and tips. **The voucher may then be redeemed through the radio association, which advances an amount equal to the fare and tip, minus a "processing" fee**, which Rule 403 caps at eight per cent of the fare. Rule 403, § 7(I)(*l*). **The revenue flowing to the radio association through the voucher program is**

> **directly dependent on the drivers' work of transporting passengers.** Although the plaintiffs were not required to perform services for the radio associations, that is precisely what they did. Consequently, the independent contractor test must be applied to determine whether the plaintiffs are employees of the radio associations.

Id. at 331 (emphasis added).

As the complete text demonstrates, Sebago did *not* hold that the Drivers provided a service to the Radio Associations because the Radio Associations' revenue depended on the Drivers. If that were Sebago's point, this Court would have concluded that *both* the Medallion Owners *and* the Radio Associations were presumptive employers, as the Medallion Owners' revenue was equally dependent on the Drivers. See id. at 325 (noting Drivers "leased taxicabs and medallions from the medallion owners at flat rates"); see also id. at 329 ("without the [D]rivers' work, the [O]wners' medallions and taxicabs would be worthless."). But Sebago rejected that result as "prov[ing] too much." Id.[16] Instead, as Sebago's unredacted text

[16] Plaintiffs also argue Da Costa v. Vanguard Cleaning Sys., Inc., No. CV 15-04743, 2017 WL 4817349 (Mass. Super. Sept. 29, 2017) and Ruggiero v. Am. United Life Ins. Co., 137 F. Supp. 3d 104 (D. Mass. 2015) support their revenue-based Threshold Inquiry interpretation. See P. Brief at 39, n. 21. Neither does, because in both cases the putative employer paid the putative employee. In Da Costa, a janitorial franchisor ("Vanguard") solicited cleaning customers and forwarded the cleaning accounts to an intermediate company ("Ztico"). 2017 WL 4817349, at *1. The Da Costa plaintiffs ("Cleaners") then contracted "with Ztico to receive cleaning work." Id. at *3. Ztico would "assign[] a cleaning schedule to the [Cleaners]," who would clean the customer's businesses under Vanguard's close supervision. Id. at **6-7. Ztico would then pay the Cleaners for this work. Id. at *6. Likewise, in Ruggiero, the putative employer paid the putative worker commissions and fees. See 137 F. Supp. 3d at 109.

makes clear, the fact this Court found dispositive when applying the Threshold Inquiry to the Radio Associations was that "revenue flow[ed] to the radio association **through the voucher program**…" Id. at 331 (emphasis added). The Radio Associations' other revenue sources (like the payments they received for dispatching Drivers, id. at 324) did not matter, even though that revenue also depended on the Drivers' work. What set the voucher revenue apart was the fact that the Radio Associations earned it by selling vouchers to their own "**corporate clients**." Id. at 331 (emphasis added). Those corporate clients, in turn, traded the vouchers for rides, and the Radio Associations "*paid* the taxi drivers when they redeemed their passengers' vouchers." Add. at 67, citing Sebago, 471 Mass. at 331 (emphasis added). This distinction was dispositive because, unlike both the Medallion Owners (who earned revenue by selling leasehold rights to the Drivers) and 7-Eleven (who earns revenue by selling leasehold and franchise rights to Plaintiffs, JA3260), the Radio Associations sold a service *to their own customers* and then *paid the Drivers to perform it*. In doing so, they created a typical employment relationship: a customer pays a company for a service and the company pays a worker to perform that service for the customer.

Sebago's focus on workers performing services for customers also appears in its discussion of the Medallion Owners. After first rejecting essentially the same argument Plaintiffs are running here—namely, "that the drivers provided a service

because, without the drivers' work, the owners' medallions and taxicabs would be worthless," id. at 329 (rejecting argument)—this Court examined the Medallion Owner's use of Drivers to provide advertising services. It wrote:

> It may be argued that there is a genuine issue of material fact as to whether the plaintiffs provided services to the medallion owners beyond the mere operation of their lessor-lessee relationship. **The summary judgment record is opaque, for example, regarding the extent to which medallion owners sold advertising space on their taxicabs and, further, the extent to which the plaintiffs drove taxicabs depicting those advertisements.** Although **the plaintiffs** were free to use leased taxicabs for purposes entirely unrelated to the transportation of passengers, their **use of the taxicabs arguably could constitute a service to the owners insofar as it increased the value and facilitated the sale of advertising space.**

471 Mass. at 331 (emphasis added). As the emphasized text makes clear, what troubled this Court about the Medallion Owners' relationship with the Drivers was not that the Drivers provided fee revenue to the Medallion Owners. Rather, it was that the Medallion Owners (like the Radio Associations) might have been using the Drivers to perform a service (advertising) for the Medallion Owners' own clients.

That is not this case. Plaintiffs "operate their own stores," Add. at 70, and the people who shop in those stores are Plaintiffs' customers, not 7-Eleven's customers. They purchase Plaintiffs' goods, see JA332 (franchisees own their store's inventory), and Plaintiffs collect the resulting profits, see JA3261 (franchisees own their store's gross profits). Simply put, to the extent Plaintiffs provide a service to anyone, they provide it to themselves, not 7-Eleven.

B. Plaintiffs' Argument Contradicts Jinks And Patel.

As discussed above, one cannot square Plaintiffs' position that their franchise fee payments are "services" with Sebago's holding that the Drivers' lease payments were not. And as the District Court correctly noted, it is equally impossible to reconcile Plaintiffs' position with Jinks and Patel. See Add. at 69 ("Plaintiffs suggest that because the revenue flowing to 7-Eleven is directly dependent on their stores' revenue, they provide services to 7-Eleven. That theory was, however, rejected by the SJC twice in the past year, both in Patel and Jinks.").

Jinks involved a direct marketing broker ("Credico") that contracted with a staffing company ("DFW") to provide door-to-door sales services for Credico's clients. 488 Mass. at 693. DFW, in turn, hired the plaintiffs ("Sellers") as independent contractors and paid them to do the sales work. Id. at 693-94. Although the Sellers initially alleged Credico employed them directly, on appeal they argued the joint employment finding needed to create this relationship was unnecessary for ICL liability because, under the Threshold Inquiry, "an entity is an individual's employer so long as the individual is 'performing any service' from which the entity derives an economic benefit." Id. at 696. This Court disagreed. It held that even though Credico "derived an economic benefit from the third-party workers," it was not liable for misclassifying the Sellers because DFW, not Credico, was the Sellers' "direct employer." Id. at 696-97.

Jinks addressed a different question than the one here. In Jinks, there was no dispute that the Sellers provided services to someone, but the beneficiary of those services was unclear. The beneficiary could have been Credico, because the Sellers performed sales work for Credico's clients, or it could have been DFW, because the Sellers performed sales work for DFW. This Court chose the latter option because DFW, not Credico, contracted with and paid the Sellers.

The question in this case is whether Plaintiffs provided a service to *anyone*, or, alternatively, worked for themselves. But, as the District Court recognized, while the question in Jinks was different, Patel's citation of Jinks for the general proposition that the Threshold Inquiry "is not satisfied merely because a relationship between the parties benefits their mutual economic interests," 489 Mass. at 370, answers the question posed here. Although 7-Eleven may "profit from the franchise stores' revenue," under Jinks and Patel that "interest is not … sufficient to establish that plaintiffs perform services for 7-Eleven." Add. at 69-70.

Plaintiffs argue that Jinks "has no applicability to this case" because it "had nothing to do with independent contractor misclassification." P. Brief at 40. But it did. The Sellers in Jinks, "[r]elying on the independent contractor statute," argued Credico was liable under the Wage Act because "an entity is an individual's employer so long as the individual is 'performing any service' from which the entity derives an economic benefit." 488 Mass. at 696. In the Sellers' view, this was so

because, even though the Sellers did not contract with Credico, they worked "as salespersons … on various marketing campaigns in Massachusetts **for Credico's clients**." Jinks, 488 Mass. at 693 (emphasis added). This meant, to use Plaintiffs' terminology, that Credico's "revenue [wa]s directly dependent on the [Seller's] labor," P. Brief at 3, as without that labor Credico would not have been paid.

If Plaintiffs' Threshold Inquiry interpretation is correct, and the Threshold Inquiry is satisfied whenever "the putative employer's revenue is directly dependent on the putative employee's labor," P. Brief at 3, then Jinks was wrongly decided because the fact that Credico's revenue depended on the Sellers' work would have established that Credico was the Seller's presumptive employer. That the Sellers had no contract with Credico would not alter this result. See Depianti v. Jan-Pro Franchising Int'l, Inc., 465 Mass. 607, 619 (2013) ("the lack of a contract between the parties does not itself, without more, preclude liability under the independent contractor statute"). Put another way, Jinks was not an independent contractor misclassification case *because* Plaintiffs' Threshold Inquiry interpretation is wrong. If Plaintiffs were right, then this Court would have held that the Sellers provided a Threshold Inquiry service to Credico and remanded the case for the trial court to apply the ABC test. But this did not happen. Instead, as Patel explains, Jinks held economic benefits do not satisfy the Threshold Inquiry. 489 Mass. at 370. And that forecloses Plaintiffs' revenue-based Threshold Inquiry interpretation.

C. Plaintiffs' Argument Is Unworkable.

In the end, Plaintiffs' Threshold Inquiry position collapses to this—people presumptively employ everyone "whose labor directly impacts the[ir] … revenue."[17] P. Brief at 43. That cannot be the rule, for if it is, then it is hard to find any economic relationship the ABC test does not govern. AC&C Dogs, 332 N.J. Super. at 335. To illustrate the problem, assume your child operates a lemonade stand. Assume further that, instead of making her own lemonade, your child purchases lemonade made by a local shop and sells it for a markup. Under Plaintiffs' Threshold Inquiry interpretation, your child is the shop owner's presumptive employer, because the shop owner's labor making the lemonade "directly impacts" the revenue your child makes selling that lemonade. See, e.g., Jinks, 488 Mass. at 702 ("Section 148B(a) provides that 'an individual performing any service … shall be considered to be an employee … unless three factors are established to rebut this presumption of employment"). Accordingly, unless your child pays the shop owner a minimum wage for his "service," your child risks criminal liability. See, e.g., Monell v. Boston Pads, LLC, 471 Mass. 566, 577 (2015) (misclassification "subjects [the] employer to criminal penalties").

It gets worse. You may think that, even if your child *presumptively* employs the shop owner, she will not face criminal liability because she can satisfy the ABC

[17] Plaintiffs never explain what "directly" means in this context.

test. You are likely wrong about that. Prong B of the ABC test asks whether "the service is performed outside the usual course of the business of the employer…." G.L. c. 149, § 148B(a)(2). Are both your child and the shop owner in the same usual course of business? Probably—they both sell lemonade. And if the answer to that question is yes, then your child is criminally liable. See, e.g., Patel, 489 Mass. at 360-61 ("If any one of the [ABC test's] criteria is not shown, the statute directs that the individual is an employee for purposes of our wage statutes….").

If this were not absurd enough, consider that the outcome is identical if you run the inquiry in reverse. Just as the shop owner's labor impacts your child's revenue because he makes the product your child sells, your child's labor also impacts the shop owner's revenues because she purchases and resells the shop's lemonade. Indeed, the shop owner is in the same position in this hypothetical as 7-Eleven is here—just as the shop owner earns revenue by selling the lemonade your child needs to run his or her business, 7-Eleven earns revenue by selling the franchise rights Plaintiffs need to run their businesses. This outcome is inescapable because, as Dean Lafontaine explained in her unrebutted expert affidavit, "in *any* distribution system, a distributor's work is 'necessary' to a manufacturer's business (and vice versa) just as a franchisee's work is 'necessary' to a franchisor, and for the same reason: ultimately, the manufacturer's income depends on the distributor's ability to sell the manufacturer's product to consumers." JA514 (emphasis in original).

It goes without saying that a construction of the ICL that transforms both parties in a simple commodities transaction into the putative employers *of each other* cannot be correct. See, e.g., Bellalta v. Zoning Bd. of Appeals of Brookline, 481 Mass. 372, 378 (2019) (courts avoid absurd statutory constructions). As the District Court's construction of the ICL (which accords with the law of eleven other states) avoids this absurdity, this Court should adopt it.

IV. Correcting Plaintiffs' Legal Misstatements.

Plaintiffs' Brief makes various false assertions. This section corrects them.

A. The Threshold Inquiry Is Not Toothless.

Plaintiffs argue, without citation to authority, that the Threshold Inquiry's threshold is so "exceedingly low," P. Brief at 17, that courts can "simply bypass[] it," id. at 3. 7-Eleven is not aware of any decision saying this. Cf. Doherty v. Civil Service Commission, 486 Mass. 487, 491-92 (2020) (stating courts must "avoid a construction which would make statutory language meaningless"). In the few misclassification decisions Plaintiffs cite for this proposition, the Threshold Inquiry was not addressed because it was not in dispute. See, e.g., Hogan v. InStore Grp., LLC, 512 F. Supp. 3d 157, 164 (D. Mass. 2021) ("InStore contracts with retailers and manufacturers to provide labor for certain retail services"); Beck v. Massachusetts Bay Techs., Inc., No. CV 16-10759-MBB, 2017 WL 4898322, at *3 (D. Mass. Sept. 6, 2017) (Plaintiff "worked as a consultant" and "was paid a weekly,

flat rate") (internal quotes omitted); Weiss v. Loomis, Sayles & Co., Inc., 97 Mass. App. Ct. 1, 7 (2020) ("Weiss provided his personal services to Loomis … working forty to sixty hours per week."). Regardless, if any case did support the notion that the Threshold Inquiry is meaningless, Patel's holding that "distinguishing between legitimate arrangements and misclassification … begins with a threshold determination whether the putative employee 'perform[s] any service' for the alleged employer" overrules it. 489 Mass. at 370.[18]

It is true that the Decision represents the first time a Massachusetts court found a franchisee did not provide services to a franchisor. But that is because in every other franchise misclassification case, the franchisor paid its franchisees like employees—*i.e.*, for providing services *to the franchisor's customers*.[19] See Awuah v. Coverall N. Am., Inc., 460 Mass. 484, 490 (2011) (stating the "accounts-receivable financing system incorporated into Graffeo's contract … classifies what are in reality wages for work performed as compensation 'advances'"); Coverall N. Am., Inc. v. Com'r of Div. of Unemployment Assistance, 447 Mass. 852, 854 (2006) ("Each month, Coverall directly bills all customers. In turn, the franchisee receives

[18] In any event, this Court put teeth in the Threshold Inquiry in Sebago. See 471 Mass. at 331 ("plaintiffs clearly do not provide services to taxicab garages").

[19] The franchise misclassification cases Plaintiffs cite all involved janitorial franchises. There are "significant factual differences" between janitorial franchises and 7-Eleven franchises at issue here. Haitayan v. 7-Eleven, Inc., No. CV 17-7454 DSF (ASX), 2021 WL 4078727, at *17 (C.D. Cal. Sept. 8, 2021), aff'd, No. 21-56144, 2022 WL 17547805 (9th Cir. Dec. 9, 2022).

payment from Coverall for the services rendered to the customers…."); Da Costa v. Vanguard Cleaning Sys., Inc., No. CV 15-04743, 2017 WL 4817349, at *6 (Mass. Super. Sept. 29, 2017) (recognizing franchisor's agent "paid the plaintiffs"); cf. Sebago, 471 Mass. at 331 (finding Threshold Inquiry satisfied as to radio associations, which paid drivers for providing services to their customers).[20] Here, it is undisputed that Plaintiffs services their own customers (not 7-Eleven's), and that 7-Eleven pays Plaintiffs nothing.

B. The District Court Did Not Get the Facts Wrong.

Plaintiffs argue on page 38 of their Brief that the District Court erred in finding that "7-Eleven does not pay the plaintiffs for anything." Add. at 68. That claim is both incorrect and beyond the scope of this certification proceeding. When a question is certified, this Court "assume[s] the evidentiary record supports the judge's pertinent factual findings," Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp., 418 Mass. 737, 738, n. 1 (1994), and "cannot base [its] decision on facts not contained in the record." Love v. Massachusetts Parole Bd., 413 Mass. 766, 768 (1992).

[20] Plaintiffs also cite Depianti v. Jan-Pro Franchising Int'l, Inc., 465 Mass. 607 (2013), as an example of a Massachusetts case that applied the ICL to a franchisor. P. Brief at 30. But Depianti (which also involved janitorial franchises) "neither analyze[d] the elements necessary to maintain a claim under [the ICL], nor consider[ed] the application of the statute to franchise arrangements such as the one here." 465 Mass. at 619, n. 14.

This is not the case to depart from that precedent, for at least two reasons. First, Plaintiffs waived this argument. The District Court initially concluded that 7-Eleven does not pay its franchisees in the 2020 Decision. See Add. at 68, quoting 485 F. Supp. 3d at 303-04. Because Plaintiffs did not challenge that finding in their first appeal, see Opening Brief of Plaintiffs, No. 20-1999, 2021 WL 807805 (1st Cir., Feb. 16, 2021), they waived their right to challenge it now, see Labor Relations Div. v. Teamsters Local 379, 156 F.3d 13, 17-18 (1st Cir. 1998) (failure to raise argument in initial appeal waives argument on remand or subsequent appeal).

Second, and more importantly, the assertion that 7-Eleven pays Plaintiffs is wrong. The Franchise Agreement language Plaintiffs cite as evidence of "pay" concerns *draws* 7-Eleven franchisees take from their franchises' accounts, see JA109, which are funded entirely from the revenue franchisees earn by selling merchandise to their own customers. This system—which exists to ensure that sufficient funds exist in the franchises' account to safeguard 7-Eleven's security interest in financing it provides, see JA1301-02—has nothing to do with wages. See Patel v. 7-Eleven, Inc., No. 18 C 07010, 2019 WL 3554438, at *3 (N.D. Ill. Aug. 5, 2019) (dismissing misclassification claim and holding 7-Eleven's franchise draw system "is not a wage-payment arrangement"). In fact, it is undisputed on this record that, as long as they satisfy their minimum net worth requirements: (i) "Plaintiffs [not 7-Eleven] determine whether to take draws from their 7-Eleven accounts, and

determine the amounts of those draws," JA3268; (ii) Plaintiffs own and are "entitled to all of the gross profits of the business that remain[s] after paying the 7-Eleven Charge and the store expenses," and (iii) Plaintiffs can "pay themselves" whatever they wanted from those profits, JA3261. In short, there is no evidence in the record that 7-Eleven paid any Plaintiff anything, at any time, for any reason. And, as a matter of fact, it did not.

C. 7-Eleven's Franchise Fee Is Not Unusual.

Lastly, Plaintiffs criticize the 7-Eleven Charge—under which 7-Eleven receives approximately 50% of its franchisees' gross profits as consideration for the license to use 7-Eleven's marks, the lease rights to 7-Eleven's equipment and property, and 7-Eleven's continuing services, JA108, JA592, JA3260-01—as unreasonably generous to 7-Eleven. See, e.g., P. Brief at 12. Assuming *arguendo* this is a proper consideration in this proceeding, Plaintiffs' criticism rests on both a misunderstanding of what the 7-Eleven Charge is and an oversimplification of what it encompasses.[21]

Franchisors typically divide their compensation between "an initial lump sum fee (which helps offset the franchisor's initial outlays in establishing the franchise) and a periodic royalty in the form of a percentage of the franchisee's sales, revenues,

[21] Plaintiffs confuse gross profits with revenues when describing the 7-Eleven Charge. See, e.g., P. Brief at 12. The 7-Eleven Charge is equal to approximately 50% of a franchisees' *gross profits*. See JA3260-61.

or gross profits." JA515. Periodic royalty rates vary widely based on the nature of the industry, the value of the franchise brand (more valuable brands typically charge higher royalties), and the size of the initial franchise fee (the lower the initial fee, the higher the periodic royalty). 7-Eleven is one of the most valuable brands in the country, see JA484, it sometimes does not charge any initial franchisee fee at all, JA3178, and it supplies its franchisees with not only a trademark license, but with lease rights to a store, the land on which the store sits, and the equipment it contains, JA1293. In short, the 7-Eleven Charge is high because the rights it buys are extensive and valuable. Nevertheless, the 7-Eleven Charge stills falls within the normal franchise fee range. See https://www.forbes.com/sites/fionasimpson1/2018/10/08/franchise-royalty-fees-percentage-versus-fixed/?sh=429929231a93, last accessed December 19, 2023 ("periodic franchise royalties can range from a small fraction of 1 to 50 percent or more of revenue, depending on the franchise and industry").

CONCLUSION

The District Court, after an "examination of the facts of [this] case," Patel, 489 Mass. at 370, properly interpreted and applied the Threshold Inquiry. Plaintiff's alternative approach makes no sense and is unworkable. Accordingly, the answer to the certified question is "No."

DATED: January 12, 2024 By its attorneys,

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ADDENDUM

ADDENDUM
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United States District Court
District of Massachusetts

Dhananjay Patel, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.**
	)	**17-11414-NMG**
7-Eleven, Inc., et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM & ORDER

GORTON, J.

This case arises from a putative class action brought by five 7-Eleven, Inc. ("7-Eleven" or "defendant") franchise store owners and operators, Dhananjay Patel, Safdar Hussain, Vatsal Chokshi, Dhaval Patel and Niral Patel (collectively "plaintiffs"). Plaintiffs brought this putative class action on behalf of themselves and a putative class of similarly situated individuals in the Commonwealth of Massachusetts.

Plaintiffs allege that 7-Eleven (1) misclassified the franchisees as independent contractors instead of employees in violation of the Massachusetts Independent Contractor Law, Mass. Gen. L. c. 149, § 148B (Count I) and (2) has violated the Massachusetts Wage Act, Mass. Gen. L. c. 149, § 148 (Count II). Plaintiffs also initially alleged that 7-Eleven violated the

Massachusetts Minimum Wage Law, Mass. Gen. L. c. 151, §§ 1, 7 (Count III) but voluntarily withdrew that claim in July, 2020.

Pending before the Court on remand from the First Circuit Court of Appeals are the parties' cross motions for summary judgment and plaintiffs' motion for class certification. Because this dispute stretches back over five years and has been the subject of opinions of this Court, the First Circuit Court of Appeals and the Massachusetts Supreme Judicial Court, only the relevant background is included below.

I. Background

A. The Parties

7-Eleven is a Texas corporation with its principal place of business in Texas. It both sells convenience store franchises and operates its own corporate stores. There are approximately 160 franchisee-operated 7-Elevens in Massachusetts.

The named plaintiffs own and operate 7-Eleven franchises in the Commonwealth, where they reside. Two of the named plaintiffs, Dhananjay Patel and Sadar Hussain, entered into franchise agreements directly with 7-Eleven.

The remaining three named plaintiffs entered into franchise agreements with 7-Eleven on behalf of separate corporate entities: Niral Patel on behalf of DP Milk Street, Inc., Dhaval Patel on behalf of DP Tremont Street, Inc., and Vatsal Chokski

on behalf of both DP Jersey, Inc. and DPNEWTO1, Inc. These plaintiffs receive their salaries from the respective corporate franchisees.

B. The Franchise Agreements

To establish each franchise location, the plaintiffs entered into franchise agreements ("the Franchise Agreement") with 7-Eleven. Dhananjay Patel and Sadar Hussain signed these agreements as individuals while Niral Patel, Dhaval Patel and Vatsal Chokski executed the agreements on behalf of their respective corporations.

The Franchise Agreement, which is substantively identical in all cases, grants franchisees the license and right to operate a 7-Eleven store. It outlines in detail the obligations and covenants that both 7-Eleven and the franchisees agree to fulfill when an individual purchases a 7-Eleven franchise store. Section 2 of the Franchise Agreement, for example, provides that the franchisee agrees "to hold [itself] out to the public as an independent contractor."

The franchisee promises to pay several fees to 7-Eleven both upon execution of the Franchise Agreement and throughout the franchisor-franchisee relationship. In Section 3, the franchisee agrees to pay 7-Eleven a franchise fee, initial gasoline fee and down payment. Section 10(a) outlines the "7-

Eleven Charge", a fee 7-Eleven collects in exchange for providing the 7-Eleven License.

> 7-Eleven Charge. You agree to pay us the 7-Eleven Charge for the License, the Lease and our continuing services. The 7-Eleven Charge is due and payable each Collection Period with respect to the Receipts from the Collection Period at the time the deposit of those Receipts is due. . . . You may not withhold Receipts or prevent payment of the 7-Eleven Charge to us on the grounds of the alleged non-performance or breach of any of our obligations to provide services to you or any other obligations to you under this Agreement or any related agreement.

C. Procedural Background

In June, 2017, plaintiffs filed this class action in Massachusetts Superior Court for Middlesex County and in August, 2017, defendant removed the case to this Court on diversity grounds.

After this Court denied defendant's motion to dismiss, 7-Eleven counterclaimed for: (1) declaratory judgment that the plaintiffs' franchise agreements are void (Counterclaim I); (2) breach of contract (Counterclaim II); and (3) contractual indemnity (Counterclaim III). Additionally, 7-Eleven filed third-party complaints against DPNEWTO1, Inc., DP Tremont Street, Inc., DP Milk Street, Inc. and DP Jersey, Inc., the four corporations on behalf of which a named individual plaintiff signed a Franchise Agreement with 7-Eleven. This Court denied

plaintiffs' motion to dismiss the counterclaims and the third-party complaints in September, 2019.

In March, 2020, both parties filed cross motions for summary judgment and plaintiffs filed their motion for class certification. This Court allowed summary judgment in favor of defendant, 7-Eleven.

Plaintiffs appealed the summary judgment decision to the First Circuit Court of Appeals, which certified a question of law to the Massachusetts Supreme Judicial Court ("the SJC") in August, 2021. See Patel v. 7-Eleven, Inc., 8 F.4th 26 (1st Cir. 2021) ("[W]e consider the most prudent approach to be to give the SJC the first opportunity to weigh in on this issue."). The certified question was:

> Whether the three-prong test for independent contractor status set forth in Mass. Gen. Laws ch. 149 § 148B applies to the relationship between a franchisor and its franchisee, where the franchisor must also comply with the FTC Franchise Rule?

Id. In March, 2022, the SJC answered the certified question, explaining that the Massachusetts ICL both applies to the franchisor-franchisee relationship and does not conflict with the federal franchisor disclosure requirements in the FTC Franchise Rule. Patel v. 7-Eleven, Inc., 183 N.E.3d 398 (Mass. 2022). The First Circuit Court of Appeals then vacated the

decision of this Court and remanded the case for further proceedings.

In July, 2022, the parties submitted supplemental briefing in support of their pending cross motions for summary judgment and plaintiffs' motion for class certification. The deadline for all remaining discovery is December 30, 2022, and trial is scheduled to commence in late January, 2023.

II. Motion for Summary Judgment

A. Legal Standard

The role of summary judgment is "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Mesnick v. Gen. Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991) (quoting Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990)). The burden is on the moving party to show, through the pleadings, discovery and affidavits, "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

A fact is material if it "might affect the outcome of the suit under the governing law . . . ." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A genuine issue of material fact exists where the evidence with respect to the material fact

in dispute "is such that a reasonable jury could return a verdict for the nonmoving party." Id.

Once the moving party has satisfied its burden, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine, triable issue. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The Court must view the entire record in the light most hospitable to the non-moving party and make all reasonable inferences in that party's favor. O'Connor v. Steeves, 994 F.2d 905, 907 (1st Cir. 1993). If, after viewing the record in the non-moving party's favor, the Court determines that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law, then summary judgment is warranted. Celotex Corp., 477 U.S. at 322-23.

B. The Massachusetts Independent Contractor Law ("the Massachusetts ICL")

Massachusetts considers "an individual performing any service" for another to be an employee, unless the purported employer can rebut that presumption. Mass. Gen. L. c. 149, § 148B(a). To do so, the employer must prove the three conjunctive elements of an independent contractor relationship:

> (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and

> (2) the service is performed outside the usual course of the business of the employer; and,
>
> (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

Id. at § 148B(a)(1)-(3) ("the ABC Test"). If an employer is unable to satisfy any prong, then the individual is classified as an employee. Sebago v. Bos. Cab Dispatch, Inc., 28 N.E.3d 1139, 1146 (Mass. 2015).

C. Arguments of the Parties

7-Eleven argues that the Massachusetts ICL does not apply because (1) plaintiffs cannot meet the threshold inquiry that franchisees perform services for 7-Eleven because 7-Eleven in fact provides services to the franchisees in exchange for payment and (2) 7-Eleven is not the direct employer of Dhaval Patel, Niral Patel or Vatsal Chokshi because their separate corporate entities signed Franchise Agreements with 7-Eleven and thus 7-Eleven is, at a minimum, not liable for any alleged misclassification as to those plaintiffs. Furthermore, 7-Eleven contends that plaintiffs have not incurred any Wage Act damages because the SJC deemed franchise fees legal in Patel v. 7-Eleven, Inc., 183 N.E.3d 398 (Mass. 2022).

Plaintiffs respond that (1) the Massachusetts ICL applies because plaintiffs do perform services for 7-Eleven, (2) the

existence of plaintiffs' corporations does not render the Massachusetts ICL inapplicable and (3) the SJC opinion in Patel does not invalidate plaintiffs' Wage Act claim.

D. Application

1. Resolving the Services Inquiry on Summary Judgment

As an initial matter, 7-Eleven again reiterates in its supplemental briefing that plaintiffs do not provide services to it, and thus cannot meet the threshold inquiry for the Massachusetts ICL to apply, while plaintiffs, not surprisingly, dispute that contention.

The threshold inquiry to determine if an individual is deemed an employee under the Massachusetts ICL is whether the "individual perform[s] any service" for the alleged employer. Mass. Gen. L. c. 149, § 148B(a). "Service" is construed liberally to effectuate the remedial purpose of the statute in "protect[ing] employees from being deprived of the benefits enjoyed by employees through their misclassification." Somers v. Converged Access, Inc., 911 N.E.2d 739, 749 (Mass. 2009).

This Court initially declined to enter summary judgment for defendant on this ground after considering (1) plaintiffs' argument that the services inquiry is a low threshold issue, (2) the competing allegations and various contractual obligations of both parties and (3) the language of the Franchise Agreement.

The SJC has, however, provided additional guidance on the threshold inquiry when it resolved the First Circuit's certified question in this matter. See Patel, 183 N.E.3d at 411. The SJC explained:

> This threshold is not satisfied merely because a relationship between the parties benefits their mutual economic interests. Nor is required compliance with Federal or State regulatory obligations enough, in isolation, to satisfy this threshold inquiry.

Id. (citing Jinks v. Credico (USA) LLC, 177 N.E.3d 509, 515-16 (Mass. 2021); Sebago, 28 N.E.3d at 1147-48). This additional guidance is instructive in analyzing whether plaintiffs have satisfied their burden of demonstrating that they do in fact perform services for 7-Eleven. See Patel, 183 N.E.3d at 404 ("Once the individual has shown the performance of services for the putative employer, the alleged employer may rebut the presumption by establishing [the ABC test] by a preponderance of the evidence."). With this guidance in mind, this Court will proceed to analyze the record to determine if plaintiffs can satisfy the threshold inquiry.

2. Whether Plaintiffs Perform "Services" for 7-Eleven

7-Eleven continues to assert that the plaintiff franchisees pay it, the franchisor, for the provision of services. It denies the suggestion that 7-Eleven pays the plaintiffs for any services.

Both parties rely upon the obligations outlined in the Franchise Agreement to bolster their services inquiry arguments. Plaintiffs contend that the covenants in the Franchise Agreement constitute services that they perform for 7-Eleven. For example, plaintiffs discuss Section 19 of the Franchise Agreement, in which they promise to work full time in the store, operate the store 24 hours a day, record inventory sales, wear approved uniforms and use the 7-Eleven payroll system. Plaintiffs also refer to certain financial obligations outlined in Section 12, such as preparing and submitting a cash report and depositing receipts, as services performed for 7-Eleven. In response, defendant stresses that these contractual obligations are not, on their own, services performed for an employer within the meaning of the Massachusetts ICL.

Rather, defendant cites Sebago for the proposition that services are obligations performed by employees in exchange for payment. In Sebago, the SJC held that the plaintiff taxi drivers did perform a service for the defendant radio associations, because the radio associations paid the taxi drivers when they redeemed their passengers' vouchers that were purchased from the radio association. 28 N.E.3d at 1149. In the case at bar, however, 7-Eleven does not pay the franchisees for the performance of any alleged obligations. In fact, the

opposite is true, because 7-Eleven actually provides the franchisees with services in exchange for franchise fees.

Defendant renders the following services: both initial and ongoing training programs, including access to the 7-Eleven Operations Manual (Section 4), the grant of a license to operate the 7-Eleven store at the specified location (Section 7), bookkeeping records and payroll software (Section 12), store audits (Section 14), maintenance of 7-Eleven equipment and performance of store repairs (Section 20) and advertising services (Section 22). Per Section 15, 7-Eleven also

> procure[s] the initial inventory [for the franchisees,] help[s] [them] clean and stock the store [and] provide[s] other services to prepare the store to open for business.

In return for such services, plaintiffs pay 7-Eleven a franchise fee and down payment (Section 3) and pursuant to Section 10 of the Franchise Agreement, they "agree to pay [7-Eleven] the 7-Eleven Charge for the License, the Lease and [7-Eleven's] continuing services." As this Court previously found, 7-Eleven does not pay the plaintiffs for anything.

> 7-Eleven does not pay franchisees a salary. Instead, franchisees may withdraw weekly or monthly "draws" from the store's gross profit minus the 7-Eleven Charge and store expenses.

Patel v. 7-Eleven, Inc., 485 F. Supp. 3d 299, 303-04 (D. Mass. 2020).

The Court remains unconvinced that the plaintiffs' contractual obligations outlined in the Franchise Agreement alone are enough to constitute services under the Massachusetts ICL. The record demonstrates that they are not paid for any services performed for 7-Eleven. In contrast, the franchisees pay franchise fees to 7-Eleven in exchange for a variety of services to support the franchisee.

3. Plaintiffs' Revenue Argument

Plaintiffs suggest that because the revenue flowing to 7-Eleven is directly dependent on their stores' revenue, they provide services to 7-Eleven. That theory was, however, rejected by the SJC twice in the past year, both in Patel and Jinks. In Jinks,

> the plaintiffs urge[d] that an entity is an individual's employer so long as the individual is "performing any service" from which the entity derives an economic benefit [and the SJC remarked that it already] rejected such an approach in Depianti v. Jan-Pro Franchising.

177 N.E.3d at 515-16 (citing 990 N.E.2d 1054 (Mass. 2013)). Further, in Patel, the SJC reiterated that the services threshold is not met "merely because a relationship between the parties benefits their mutual economic interests." 183 N.E.3d at 411. Plaintiffs and 7-Eleven do have mutual economic interests, as both profit from the franchise stores' revenue. That mutual

interest is not, however, sufficient to establish that plaintiffs perform services for 7-Eleven.

The SJC insisted in Patel that

> nothing in the independent contractor statute prohibits legitimate franchise relationships among independent entities that are not created to evade employment obligations under the wage statutes.

183 N.E.3d at 411 (citing An Advisory from the Attorney General's Fair Labor Division on M.G.L. c. 149 § 148B 2008/1, https://www.mass.gov/ doc/an-advisory-from-the-attorney-generals-fair-labor-division-on-mgl-c-149-s-148b-20081/download). Here, 7-Eleven's mutual economic interests with the plaintiff franchisees in the stores' sales and revenue are inherent in legitimate franchise relationships. The Franchise Agreement sets forth a legitimate franchise relationship between 7-Eleven and the individual plaintiffs who operate their own stores. The Massachusetts ICL does not prohibit those relationships, and thus, the mere fact that the parties share economic interest does not imply that plaintiffs perform services for 7-Eleven.

The Court, thus, rejects the notion that plaintiffs perform services for 7-Eleven. The franchisees, who pay franchisor 7-Eleven for a plethora of services, are merely fulfilling their

contractual obligations. The Court will, therefore, allow summary judgment in defendant's favor on both remaining counts.

Having so concluded, plaintiffs' motions for summary judgment on 7-Eleven's liability for misclassification and class certification will be denied. 7-Eleven's counterclaims and third-party claims for (1) declaratory judgment that the various franchise agreements are void; (2) breach of contract; and (3) contractual indemnity are not the subject of any summary judgment motion and, therefore, remain pending.

ORDER

For the foregoing reasons, defendant 7-Eleven, Inc.'s motion for summary judgment (Docket No. 112) is **ALLOWED**. Plaintiffs' motions for summary judgment and class certification (Docket Nos. 117, 118) are **DENIED**.

The parties are directed to submit a joint status report on defendant's pending counterclaims against plaintiffs and third-party defendants on or before Wednesday, October 19, 2022.

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated September 28, 2022

2016 WL 3085897
Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States District Court, D. New Jersey.

7-ELEVEN, INC., Plaintiff,

v.

Karamjeet SODHI, et al., Defendants.

Civil Action No. 13-3715 (MAS) (JS)
|
Signed 05/31/2016

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OPINION

SHIPP, District Judge

***1** This matter arises from Plaintiff 7-Eleven, Inc.'s ("Plaintiff" or "7-Eleven") claim that Defendants Karamjeet Sodhi ("Mr. Sodhi"), Manjinder Singh, and Karamjit Singh (collectively, "Defendants") committed incurable breaches of Mr. Sodhi's franchise agreements with Plaintiff. (*See generally* First Am. Compl.,[1] ECF No. 7.) In response to these allegations, Defendants asserted the following four counterclaims: (1) violation of the New Jersey Franchise Practices Act, N.J.S.A. 56:10-1 ("NJFPA"); (2) breach of the implied covenant of good faith and fair dealing; (3) violation of the Fair Labor Standards Act, 29 U.S.C. § 201 ("FLSA"); and (4) violation of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 ("NJLAD"). (ECF No. 11.) This matter comes before the Court on 7-Eleven's motion for summary judgment on Defendants' counterclaims and on its request for a declaratory judgment that Mr. Sodhi's franchise agreement has been properly terminated. (ECF No. 500.) Defendants filed opposition (ECF No. 507), and Plaintiff replied (ECF No. 517). The Court, having considered the parties' submissions, decides the matter without oral argument pursuant to Local Civil Rule 78.1. For the reasons stated below, Plaintiffs motion for summary judgment is granted.

I. Background[2]

A. 7-Eleven Franchise

7-Eleven operates, franchises, and licenses the 7-ELEVEN chain of convenience stores. (Pl.'s Statement of Undisputed Material Facts ("Pl.'s SOF")[3] ¶ 5, ECF No. 500-2.) Pursuant to its franchise agreements, 7-Eleven allows its franchisees to use the 7-ELEVEN trademarks and trade names in connection with their operation, advertising, and identification of convenience stores. (*Id.* ¶ 6.) In return, 7-Eleven receives a percentage of the "gross profits" (net sales less cost of goods sold) obtained from the operation of the convenience stores. (*Id.* ¶ 8.)

B. Mr. Sodhi's 7-Eleven Stores

Since 2001, Mr. Sodhi has been a 7-Eleven franchise operator. (Am. Countercl. ¶ 10, ECF No. 11.) Mr. Sodhi currently owns the following six 7-Eleven convenience stores ("Stores"):

Store No.	Address
2412-21958C	1200 South Avenue W. and Crossway Place, Westfield, New Jersey 07090 (the "Crossway Place" store)
2412-32260A	463-467 Avenue C, Bayonne, New Jersey 07002 (the "Avenue C" store)
2413-32771A	1189 Route 9 North, Old Bridge, New Jersey 08857 (the "Route 9" store)
2413-32896A	527 Florida Grove Road, Perth Amboy, New Jersey 08861 (the "Florida Grove Road" store)
2412-34296A	100 Lindbergh Road, Newark, New Jersey 07114 (the "Lindbergh Road" store)
2413-34531A	1299 Roosevelt Avenue, Carteret, New Jersey 07008 (the "Roosevelt Avenue" store).

***2** (Pl.'s SOF ¶ 3.) Mr. Sodhi testified that: his work at the Stores is "very minimal"; for the last five to six years he has spent about twenty to twenty-five hours a week in the Stores and he does not work on 7-Eleven business outside the Stores; his management of the Stores was "totally hands off"; he did not have a regular schedule and rather "just drop[s] by when it is convenient"; he and his managers have control over the prices charged for merchandise sold in the Stores; he receives a percentage of the gross profit from the sale of merchandise at the Stores; and his time was "monopolized" by his other business ventures. (Decl. of Susan V. Metcalfe, Ex. 1 ("Sodhi Tr.") 43:20-44:6, 46:8-10, 46:15-18, 63:24-64:4, 452:13-19, ECF No. 501-1.)[4] Based on the net income reported by Mr. Sodhi to 7-Eleven, Mr. Sodhi earned in excess of a million dollars from the operation of the Stores in 2011 and 2012, and he earned close to one million dollars from the operation of the Stores in 2013. (Pl.'s SOF ¶ 53.)[5]

C. 7-Eleven's Franchise Agreements with Mr. Sodhi

Each of the Stores is subject to a franchise agreement ("Franchise Agreement") between Mr. Sodhi and 7-Eleven. (*Id.* ¶ 4.) With one exception, the Franchise Agreements for the Stores are identical in all material respects. (*Id.*) The one material distinction between the Franchise Agreements is the minimum net worth requirement for the Stores. (*Id.*) The minimum net worth requirement for the Lindbergh Road and Roosevelt Avenue stores is $15,000, whereas, the minimum net worth requirement for the other stores is $10,000. (*Id.*) All of the Franchise Agreements, however, require the franchisee to, inter alia:

- Cause all sales of [i]nventory to be properly recorded at the time of sale ***at the retail prices set by you*** and generally offered by you to customers of the Stores;
- Use electronic equipment provided by 7-Eleven to scan the sale of all products capable of being scanned;
- Prepare and furnish to 7-Eleven actual sales data;
- Prepare and furnish to 7-Eleven daily reports of Receipts;
- Deposit the Receipts for each Collection Period within twenty-four hours after the end of the Collection Period in the Bank or night depository designated by 7-Eleven, except for cash expended by you from the day's Receipts for Purchases or

Operating Expenses paid on that day, which Purchases and/or Operating Expenses were required to be properly reported and accompanied by invoices reflecting payment;

***3** • Prepare and furnish to 7-Eleven weekly time and wage authorizations for the Stores' employees;

• Keep 7-Eleven currently advised in writing of all discounts, allowances and/or premiums received in connection with the operation in the Stores;

• Provide 7-Eleven with truthful, accurate and complete information in compliance with all applicable laws and such policies that 7-EIeven may implement from time to time;

• Pay all sales, payroll and income taxes with regard to the operation of the Stores.

(Decl. of Susan v. Metcalfe, Ex. 2A ("Franchise Agreements"), ECF No. 501-6.) In addition, all of the Franchise Agreements describe the franchisee as an "Independent Contractor." (Franchise Agreements ¶ 2; Pl.'s SOF ¶ 10.) In particular, the Franchise Agreements include the following provision describing the franchisee's relationship with 7-Eleven:

> **Independent Contractor**. You and we agree that this Agreement creates an arm's-length business relationship and does not create any fiduciary, special or other similar relationship. You agree: (a) to hold yourself out to the public as an independent contractor; (b) to control the manner and means of the operation of the Store; and (c) to exercise complete control over and responsibility for all labor relations and the conduct of your agents and employees, including the day-to-day operations of the Store and all Store employees. You and your agents and employees may not: (i)be considered or held out to be our agents or employees or (ii) negotiate or enter any agreement or incur any liability in our name, on our behalf, or purporting to bind us or any of our or your successors-in-interest. Without in any way limiting the preceding statements, we do not exercise any discretion or control over your employment policies or employment decisions. All employees of the Store are solely your employees and you will control the manner and means of the operation of the Store. No actions you, your agents or employees take will be attributable to us or be considered to be actions obligating us.

(Franchise Agreements ¶ 2.)

D. 7-Eleven's Audits of Mr. Sodhi's 7-Eleven Stores

On November 17, 2011, 7-Eleven conducted an audit of the Stores. (Metcalfe Suppl. Decl., Ex. A ("Pasarella Decl.") ¶¶ 17-32, ECF No. 517-2; Sodhi Tr. 441:6-20.) 7-Eleven identified what it believed to be accounting discrepancies during this audit. (Pasarella Decl. ¶¶ 20, 23, 25-27.) In particular, 7-Eleven identified an issue with money orders at the Stores. (*Id.* 23.) Following this audit, 7-Eleven conducted further investigation of the Stores and specifically investigated Mr. Sodhi's employment practices at the Stores. (*Id.* ¶ 42.)

E. 7-Eleven's Termination of Mr. Sodhi's Franchise Agreement

Based on the results of its audits, on June 25, 2013, 7-Eleven sent Mr. Sodhi a Non-Curable Notice of Material Breach and Termination, which pertained to all of the Stores. (Pasarella Decl., Ex. C ("June 25, 2013 Notice") ¶ 3.) The June 25, 2013 Notice asserted that Mr. Sodhi:

> [I]ntentionally failed to report multiple hundreds of thousands of dollars of merchandise sales, including taxable sales, at the Stores by manipulation of the cash registers.... [M]asked a portion of the inventory shortages that would otherwise have resulted from the unrecorded sale of merchandise by various illicit schemes and devices, including making purchases of inventory which were not reported to 7-Eleven and movement of inventory from store-to-store on the day inventory audits were being conducted at all six Stores.... [U]sed the cash illicitly, and secretly, siphoned from the Stores to pay the Stores' workers, some of whom were undocumented, in cash (in violation of Federal and State law).... [and] paid workers for overtime work at rates less than the minimum wage mandated by State and Federal law, and paid different rates to workers based, not on skill or tenure, but rather, on whether workers were documented or undocumented.

***4** (*Id.*) Thereafter, 7-Eleven served Mr. Sodhi with a Supplemental Notice of Material Breach dated October 21, 2014 ("October 21, 2014 Supplemental Notice"), for all of his Stores. (Pl.'s SOF ¶ 85.) The October 21, 2014 Supplemental Notice gave Mr. Sodhi "sixty days' notice" and an opportunity to cure his breaches. (*Id.*) On December 31, 2014, 7-Eleven sent Mr. Sodhi additional notices of material breach regarding the minimum net worth requirement in the Franchise Agreements. (*Id.* ¶ 87)

II. Legal Standard

Federal Rule of Civil Procedure 56(a) provides that the "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The substantive law identifies which facts are material. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A material fact raises a "genuine" dispute "if the evidence is such that a reasonable jury could return a verdict" for the non-moving party. *Williams v. Borough of W. Chester*, 891 F.2d 458,459 (3d Cir. 1989).

The Court must consider all facts and their logical inferences in the light most favorable to the non-moving party. *Pollock v. Am. Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3d Cir. 1986). The Court will not "weigh the evidence and determine the truth of the matter" but will determine whether a genuine dispute necessitates a trial. *Anderson*, 477 U.S. at 249. While the moving party bears the initial burden of showing the absence of a genuine dispute of material fact, meeting this obligation shifts the burden to the non-moving party to "set forth specific facts showing that there is a genuine [dispute] for trial." *Id.* at 250. If the non-moving party has failed "to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial ... there can be no genuine [dispute] of material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Katz v. Aetna Cas. & Sur. Co., 972* F.2d 53, 55 n.5 (3d Cir. 1992) (internal quotation marks omitted). If the non-moving party fails to demonstrate proof beyond a "mere scintilla" of evidence that a genuine dispute of material fact exists, then the court must grant summary judgment. *Big Apple BMW Inc. v. BMW ofN. Am. Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992). Furthermore, "a party does not raise a genuine [dispute] of material fact by speculation and conclusory allegations." *Dunkin' Donuts Inc. v. Patel*, 174 F. Supp. 2d 202, 209 (D.N.J. 2001).

III. Discussion

A. Violation of the NJFPA

In their Counterclaim, Defendants assert that 7-Eleven violated the NJFPA by: (1) imposing unreasonable standards on Mr. Sodhi's Stores; and (2) attempting to terminate the Franchise Agreements without good cause. (Am. Countercl. ¶¶ 32-42.) In opposition to Plaintiff's motion for summary judgment, Defendants have not, however, adduced any evidence of 7-Eleven's "unreasonable standards." Indeed, Defendants' opposition is entirely silent as to this claim. In light of Defendants' failure of proof concerning this claim, the Court grants judgment on the unreasonable standards violation of the NJFPA claim to 7-Eleven. *See Katz*, 972 F.2d at 55 n.5 ("[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.").

***5** Next, with respect to Defendants' assertion that 7-Eleven is attempting to terminate the Franchise Agreements without "good cause" (Am. Countercl, ¶ 38), Defendants' opposition does not rebut the evidence showing that Mr. Sodhi violated the Franchise Agreements. Here, Mr. Sodhi has admitted that he failed to pay payroll taxes, provide workers' compensation insurance, or withhold and pay Social Security taxes for employees of his Stores. (Sodhi Tr. 293:4-14, 435:15-16, 435:22-25.) The failure to pay and/or withhold these taxes violated the provision in the Franchise Agreements requiring franchisees to "[p]ay [ ] all ... payroll ... and income taxes" with regard to the operation of the Stores. (Franchise Agreements ¶ 21.) In their opposition, Defendants do not dispute that Mr. Sodhi's failure to pay and/or withhold the applicable taxes constitutes breach of the Franchise Agreements or that this is a material breach sufficient to justify termination. On the contrary, Defendants dispute

only whether Mr. Sodhi was given sufficient notice and opportunity to cure such breaches, and argue that the termination was improper because it was based on "racial and other animus." (Defs.' Opp'n Br. 21, ECF No. 507.)

Under the NJFPA, a franchisor must give a franchisee "at least 60 days [notice] in advance of ... termination, cancellation, or failure to renew [a franchise agreement]." N.J.S.A. 56:10-5. Here, Plaintiff asserts that the Franchise Agreements were validly terminated pursuant to the October 21, 2014 Supplemental Notice, which gave Mr. Sodhi the requisite sixty-day-notice of the breaches and opportunity to cure. (Pl.'s Reply Br. 5, ECF No. 517.) Notwithstanding this notice and opportunity to cure, Mr. Sodhi admits that he never paid and/or withheld the applicable taxes identified in the October 21, 2014 Supplemental Notice. (Sodhi Tr. 293:4-14, 435:15-16, 435:22-25.) Thus, Mr. Sodhi does not dispute that he did not cure the breaches identified in the October 21, 2014 Supplemental Notice of the Franchise Agreements.

The Court finds that Mr. Sodhi's failure to pay and/or withhold applicable payroll and income taxes is, in addition to being against the law,[6] a material breach of the Franchise Agreements. Thus, any purported ulterior motive of 7-Eleven, even if shown, is irrelevant to finding that 7-Eleven had good cause to terminate the Franchise Agreements.[7] *See Dunkin' Donuts Inc. v. Patel*, 174 F. Supp. 2d 202, 212 (D.N.J. 2001) ("Dunkin's motives in conducting its inspections have no bearing on whether Defendants breached their Franchise Agreement with Plaintiff by failing to properly maintain the three shops."); *McDonald's Corp. v. Robertson*, 147 D. 3d 1301, 1309 (11th Cir. 1998) ("[W]e find that [franchisee's] failure to comply with McDonald's [quality, safety, and cleanliness] and food safety standards constituted a material breach of the franchise agreement sufficient to justify termination, and thus, it does not matter whether McDonald's also possessed an ulterior, improper motive for terminating the [franchisee's] franchise agreement."). Thus, construing the facts in the light most favorable to Defendants, no reasonable juror could find that 7-Eleven did not have good cause to terminate the Franchise Agreements. *See Dunkin' Donuts of Am., Inc. v. Middletown Donut Corp.*, 100 N.J. 166, 178 (1985). ("The [NJFPA] ... is not designed to protect those franchisees who willfully violate the terms of their franchise agreements.").

Accordingly, based on the October 21, 2014 Supplemental Notice and the Court's finding of good cause, the Court finds that the Franchise Agreements have been properly terminated.

B. Breach of the Implied Duty of Good Faith and Fair Dealing

In their opposition, Defendants assert that disputes of material fact remain as to whether 7-Eleven engaged in inequitable and bad faith conduct with respect to its obligations under the Franchise Agreements. (Def.'s Opp'n Br. 9.) In support of this argument, Defendants cite to only inadmissible hearsay statements about a particular 7-Eleven manager making disparaging remarks about people of Indian descent; a statement in a 7-Eleven powerpoint presentation stating that the company should "[g]et out and look for candidates who fit the store's predominant demographic base-Latino, African American, Veteran, Caucasian; and documents referring to a "Project P" and listing Mr. Sodhi, as well as, other franchise owners, some of whom appear to be of Indian descent, as "Second Wave Target[s]." (Decl. of Gerald A. Marks, Ex. 9, ECF No. 507-1.) As an initial matter, inadmissible hearsay statements are not sufficient to overcome a motion for summary statement. *See Dunkin' Donuts Inc.*, 174 F. Supp. 2d at 212. Next, with respect to the documents cited in Defendants' opposition brief, this evidence is insufficient to defeat a motion for summary judgment. At most, the evidence listing Mr. Sodhi as a "Second Wave Target" and references to "Project P" suggest that 7-Eleven *may* have had an ulterior motive in terminating the Franchise Agreements. As discussed above, however, such an ulterior motive does not preclude termination for "good cause." Thus, as the implied duty of good faith and fair dealing does not "preclude a party from exercising its express rights under such an agreement." *Fleming Cos., Inc., v. Thriftway Medford Lakes, Inc.*, 913 F. Supp. 837, 846 (D.N.J. 1995); (*see also DiCarlo v. St. Mary Hosp.*, 530 F.3d 255, 267 (3d Cir. 2008) (same)), given the Court's finding of "good cause" for termination, 7-Eleven is entitled to judgment as a matter of law on the counterclaim for breach of the implied covenant of good faith and fair dealing.

C. Violation of the FLSA

***6** To state a claim for a violation of the FLSA, a plaintiff must as an initial matter show that he is an "employee" as defined by the FLSA. *Michaelgreaves v. Gap, Inc.*, No. 11-6283, 2013 WL 257127, at *4 (D.N.J. Jan. 23, 2013). While there is "no single test to determine whether a person is an employee or an independent contractor for the purposes of the FLSA," in this Circuit courts look to the following six factors to determine whether an individual is an "employee":

> 1) the degree of the alleged employer's right to control the manner in which the work is to be performed; 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; 6) whether the service rendered is an integral part of the alleged employer's business.

Martin v. Selker Bros., Inc., 949 F.2d 1286, 1293 (3d Cir. 1991). "The determination of whether an individual should be classified as an employee for the purposes of the FLSA is a question of law." *Atkins v. Capri Training Ctr., Inc.*, No. 13-6820, 2014 WL 4930906, at *7 (D.N.J. Oct. 1, 2014). As discussed below, the Court finds that the factors weigh against finding that Mr. Sodhi is an employee of 7-Eleven.

Construing the evidence in the light most favorable to Defendants, the Court finds that the first factor weighs against finding that Mr. Sodhi was an "employee" of 7-Eleven. In particular, the Court finds that the following testimony from Mr. Sodhi shows that 7-Eleven did not control the manner in which Mr. Sodhi performed his 7-Eleven business: (1) he did not have a regular schedule but rather "just drop[s] by when it is convenient" (Sodhi Tr. 46:8-18); (2) wore a 7-Eleven uniform only once or twice to show his employees that he had a shirt too (*id.* at 213:1-5); (3) visits India regularly for up to three weeks at a time (*id.* at 26:19-27:8); (4) regularly travels around the country on business not related to 7-Eleven (*id.* at 49:24-50:8); (5) is "totally hands off" in his management of the Store (*id.* 452:13-14); (6) has "other business ventures unrelated to 7-Eleven that monopolize [his] time," (Decl. of Mr. Sodhi ¶ 3, ECF No. 44-8); and (7) along with his managers, has the ability to set the prices charged for merchandise sold in the Stores (Sodhi Tr. 211:4-212:1). *See Carney v. Dexter Shoe Co.*, 701 F. Supp. 1093, 1100 (D.N.J. 1998) (finding that plaintiff's "free[dom] to set his daily schedule as he saw fit," weighed against finding that he was an employee).

With respect to the second factor, the opportunity for profit or loss depending upon managerial skill, it is undisputed that Mr. Sodhi shares in the gross profits of the store (Pl.'s SOF ¶ 35); in addition, Mr. Sodhi testified that gross profits may be increased by product selection and that he has delegated the responsibility for product selection to his managers (Sodhi Tr. 66:18-67:1). Based on Mr. Sodhi's testimony and the undisputed evidence, the Court finds that this factor also weighs against finding that Mr. Sodhi is an employee. *Cf. Donnovan v. Dial America Mktg., Inc.*, 757 F.2d 1376, 1383-84 (3d Cir. 1985) (recognizing that a small opportunity for profit and loss weighs in favor of finding that an individual is an employee). With respect to the third factor, investment in equipment or materials, Mr. Sodhi alleged in his Counterclaim that he "has spent millions of dollars on franchise fees, licenses, approvals, and related goods and services in operating his [Stores]."[8] (Am. Countercl. ¶ 35.) Accordingly, the Court finds that this factor also weighs against finding that Mr. Sodhi is an employee. *See Donnovan*, 757 F.2d at 1387 (finding that a significant investment in transportation expenses weighed against finding that individual was an employee). With respect to the fourth factor, whether the services rendered required special skills, it is undisputed that "[Mr.] Sodhi demonstrated business-like initiative by using the profits he made from the Store he initially franchised to invest in one after another additional 7-Eleven store[s], until he operated a total of six stores at once." (Pl.'s SOF ¶ 46.) The Court finds that this demonstration of entrepreneurial skills weighs against finding that Mr. Sodhi is an employee. *Cf. Patel v. Cigna Corp.*, No. 12-6141, 2005 WL 1656930, at *4 (D.N.J. July 12, 2005) ("Individuals who are unskilled are usually regarded as employees rather than independent contractors."). With respect to the fifth factor, the permanence of the working relationship, it is undisputed that Mr. Sodhi could terminate the Franchise Agreements at any time. (Pl.'s SOF ¶¶ 41-42.) Likewise, as discussed above, pursuant to the NJFPA, 7-Eleven could terminate the Franchise Agreements for good cause. Accordingly, the Court finds that this factor also weighs against finding that Mr. Sodhi was an employee. Finally, with respect to the sixth factor, whether the services rendered were an integral part of 7-Eleven's business, 7-Eleven argues that "this factor is neither informative nor helpful" in the franchise context because "[o]n one hand, the services collectively performed by all 7-Eleven franchisees are indisputably integral to 7-Eleven's business," but on the other hand a franchisee could individually be terminated

without apparent negative effect to the franchisor. (Pl.'s Moving Br. 46, ECF No. 500-1.) The Court agrees and finds that this factor is neutral as to whether Mr. Sodhi is an employee under the FLSA.

***7** Thus, the Court finds that Mr. Sodhi should not be classified as an employee for the purposes of the FLSA. Accordingly, Defendants' FLSA claim fails as a matter of law.

D. Violation of the NJLAD

In the Counterclaim, Defendants assert that 7-Eleven violated the NJLAD by either discriminating against Mr. Sodhi, in the context of his employment, or if the Court finds that he was not an employee, Defendants allege that 7-Eleven violated the NJLAD by refusing to do business or terminating Mr. Sodhi as an independent contractor. (Am. Countercl. ¶¶ 48-55). Given the Court's finding that Mr. Sodhi was not an employee of 7-Eleven, the Court finds that Defendants' NJLAD claim for discrimination in the employment context fails. Likewise, Defendants' claims based on 7-Eleven's refusal to do business with or termination of Mr. Sodhi as an independent contractor also fail. Defendants have not alleged that 7-Eleven "refuse[d] to ... contract with ... or otherwise do business" with Mr. Sodhi on the basis of his race, which is prohibited by N.J.S.A. 10:5-12(1). On the contrary, Defendants allege that 7-Eleven discriminated against Mr. Sodhi in the ongoing execution of his Franchise Agreements by "tak[ing] aggressive steps to subject [him] ... and other franchisee (employee) store owners to unreasonable standards and has lodged untrue accusations at [Mr.] Sodhi and other franchisees similarly situated in direct response and retaliation for ... efforts to combat racial prejudice within the 7-Eleven franchise system." (Am. Countercl. ¶ 55.) Because the NJLAD does not cover "discrimination during the ongoing execution of a contract," Mr. Sodhi's NJLAD claim fails as a matter of law. *Naik v. 7-Eleven, Inc.*, No. 13-4578, 2014 WL 3844792, at * 11 (D.N.J. Aug. 5, 2014) ("Plaintiffs conflate a refusal to continue to contract with alleged discrimination during the ongoing execution of a contract, discrimination which the very case cited by Plaintiffs makes clear is outside of the protections of N.J.S.A. 10:5-12(1).") (citing *Rowan v. Hartforf Plaza Ltd., L.P.*, No. L-3106-09, 2013 WL 1350095, at *10 (N.J. App. Div. Apr. 5, 2013) ("N.J.S.A. 10:5-12(1) does not apply to discrimination during the ongoing execution of a contract.")).

IV. Conclusion

For the reasons set forth above, Plaintiff's motion for summary judgment on Defendants' counterclaims and 7-Eleven's claim for a declaratory judgment that the Franchise Agreements are terminated is granted. The Court shall issue an order consistent with this Opinion.

All Citations

Not Reported in Fed. Supp., 2016 WL 3085897

Footnotes

1 With leave from the Undersigned (ECF No. 524), Plaintiff filed a Second Amended Complaint (ECF No. 525) on February 16, 2016. Although the amendments are not relevant to the motion sub judice, the Court notes that the Second Amended Complaint is the operative pleading.

2 The Court assumes familiarity with the facts set forth in its decision on Plaintiffs Motion for a Preliminary Injunction (ECF No. 523), and includes only those facts relevant to the motion sub judice.

3 Unless otherwise indicated, Defendants do not dispute the facts cited in Plaintiffs Statement of Undisputed Material Facts. (*See* Defs.' Resp. to Pl.'s Statement of Undisputed Material Facts. ("Defs.' RSOF"), ECF No. 508.)

4 To the extent that there are inconsistencies between Mr. Sodhi's declaration and his deposition testimony, the Court affords greater reliability to Mr. Sodhi's deposition testimony. *See Cho v. Park*, No. 06-4533, 2008 WL 2967623, *3 (D.N.J. July 25, 2008) ("[A] deposition is accorded more reliability than an affidavit.") (citing *In re CitX Corp., Inc.*, 448 F.3d 672, 680 (3d Cir. 2006)).

5 Local Civil Rule 56.1 ("Rule 56.1") provides that "[t]he opponent of summary judgment shall furnish ... a responsive statement of material facts, addressing each paragraph of the movant's [Rule 56.1] statement, indicating agreement or disagreement and, if not agreed, ***stating each material fact in dispute and citing to affidavits and other documents submitted in connection with the motion*****[.]"** L. Civ. R. 56.1 (emphasis added). In their response to several paragraphs of Plaintiffs Rule 56.1 Statement, Defendants state only "Disagreed." (*See, e.g.*, Defs.' RSOF ¶¶ 21, 36, 40, 50, 53, 79.) Accordingly, pursuant to Rule 56.1, the Court shall deem these facts undisputed. In addition, in response to several other paragraphs, Defendants provide boilerplate, conclusory assertions regarding 7-Eleven's alleged control over Mr. Sodhi's business. (*See id.* ¶¶ 11, 12, 15-18, 20, 22, 26, 27, 33, 39.) These responses, which do not identify the specific facts that are disputed, are not helpful to the Court and do not comply with Rule 56.1. Nonetheless, the Court has endeavored to parse through these submissions to identify genuine disputes of material facts.

6 26 U.S.C. § 7202 (stating that failure to collect and pay applicable taxes constitutes a felony).

7 Having found that Mr. Sodhi violated the Franchise Agreements by failing to pay and/or withhold the applicable payroll and income taxes, the Court does not address the arguments regarding Mr. Sodhi's alleged violation of the Franchise Agreement's minimum net worth requirement.

8 In their response to 7-Eleven's assertion in its Rule 56.1 Statement that "Mr. Sodhi made a substantial investment in his franchised business," Defendants state only "Disagreed." (Defs.' RSOF ¶ 40.) Significantly, Defendants did not cite any evidence in their response. Accordingly, pursuant to Rule 56.1, the Court shall deem this fact undisputed. L. Civ. R. 56.1

End of Document

California Statutes Annotated - 2023

West's Annotated California Codes
Labor Code (Refs & Annos)
Division 3. Employment Relations (Refs & Annos)
Chapter 2. Employer and Employee
Article 1.5. Worker Status: Employees (Refs & Annos)

West's Ann.Cal.Labor Code § 2775

§ 2775. Determination of status as employee or independent contractor; conditions; court decisions

Effective: September 4, 2020
Currentness

(a) As used in this article:

(1) "Dynamex" means Dynamex Operations W. Inc. v. Superior Court (2018) 4 Cal.5th 903.

(2) "Borello" means the California Supreme Court's decision in S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341.

(b)(1) For purposes of this code and the Unemployment Insurance Code, and for the purposes of wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:

(A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(B) The person performs work that is outside the usual course of the hiring entity's business.

(C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

(2) Notwithstanding paragraph (1), any exceptions to the terms "employee," "employer," "employ," or "independent contractor," and any extensions of employer status or liability, that are expressly made by a provision of this code, the Unemployment Insurance Code, or in an applicable order of the Industrial Welfare Commission, including, but not limited to, the definition of "employee" in subdivision 2(E) of Wage Order No. 2, shall remain in effect for the purposes set forth therein.

(3) If a court of law rules that the three-part test in paragraph (1) cannot be applied to a particular context based on grounds other than an express exception to employment status as provided under paragraph (2), then the determination of employee

or independent contractor status in that context shall instead be governed by the California Supreme Court's decision in S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341 (Borello).

Credits
(Added by Stats.2020, c. 38 (A.B.2257), § 2, eff. Sept. 4, 2020.)

HISTORICAL AND STATUTORY NOTES
2024 Electronic Pocket Part Update
2020 Legislation
Section 8 of Stats.2020, c. 38 (A.B.2257), provides:

"SEC. 8. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the California Constitution and shall go into immediate effect. The facts constituting the necessity are:

"In order to ensure businesses and workers have immediate clarity on the specific standards used to determine an individual's employment classification working in the professions impacted by this legislation, including musicians, various professionals in the music recording industry, writers, photographers, videographers, photo editors, and illustrators, and others, it is necessary for this act to take effect immediately."

The Assembly Daily Journal for the 2019-2020 Regular Session, pages 5518-5519, contained the following letter dated August 31, 2020, from Assembly Member Lorena Gonzalez, regarding the intent of Stats.2020, c. 38 (A.B.2257):

"Sue Parker

"Chief Clerk of the Assembly

"State Capitol, Room 3196

"Sacramento, California

"Dear Ms. Parker: I am writing to clarify the intent of AB 2257. The fundamental purpose of AB 2257 is to clarify the application of the California Supreme Court's unanimous decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles (2018)* 4 Cal.5th 903 (Dynamex) and AB 5 (Chapter 296, Statutes of 2019) in state law. AB 2257 recasts the provisions of AB 5 and provides that, for specified occupations and relationships, the applicable test for determining if an individual is an employee or an independent contractor is the test set forth in the California Supreme Court decision in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (Borello) or relevant statute.

"In AB 2257, Section 2775 of Article 1.5 of Chapter 2 of Division 3 outlines the 'ABC' test in paragraph (1) of subdivision (b) which provides a presumption of employment for a person providing labor or services for renumeration for purposes of the Labor Code, Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission. Under Section 2775, an individual is presumed to be an employee as opposed to an independent contractor unless an individual's hiring entity demonstrates that the conditions outlined in paragraph (1) of subdivision (b) of Section 2775 are satisfied. Nothing in AB 2257 suggests that when a hiring entity demonstrates that the conditions in paragraph (1) of subdivision (b) of Section 2775 are satisfied for the purposes of classifying an individual as an independent contractor, that the hiring entity must satisfy additional conditions outlined in Sections 2776 to Section 2784. It is still the intent of the author to preserve preexisting statutory extensions or exceptions to employment status which exist in the Labor Code, Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission.

"AB 2257 addresses business-to-business contracting relationships. Specifically, Section 2776 provides that the holding in Dynamex and Section 2775 do not apply to a bona fide business-to-business contracting relationship if certain criteria are satisfied and, instead, the determination of employee or independent contractor status of the business services provider is governed by Borello. It is not the intent of the author to suggest that under this section, a business service provider must contract with more than one contracting business in order to satisfy the conditions under Section 2776. It is the intent of paragraph (11) of subdivision (a) of Section 2776 to permit, if consistent with the nature of the work, the ability for a business service provider to be able to set their own hours, subject to reasonable project completion dates or reasonable business hours.

"Section 2778 of AB 2257 defines an individual providing professional services for which the determination of classification as an employee or independent contractor is governed by Borello given certain criteria are satisfied, as opposed to the holding in Dynamex and Section 2775. This section references common occupational terms to be understood as generally describing related and varied skills and services. This includes references to the terms 'editor' and 'copyeditor' which are intended to include services provided by an indexer and proofreader. Reference to the term 'graphic design' is intended to include professional services involving the creation of pictures, images or other stylistic visual representations of concepts and ideas in various media and formats. Reference to the term 'marketing' is intended to include professional services provided by promoters or communications specialists, given the work satisfies the conditions in subparagraph (A) of paragraph (2) in subdivision (b) of this section. Lastly, it is intended that the services provided by individuals outlined in subparagraph (K) of paragraph (2) in subdivision (b) will apply with respect to the listed types of publications or works 'in any format or media,' not only to their print versions. Additionally, Section 2782 defines the term 'data aggregator', which is intended to be inclusive of an entity that requests and gathers feedback either directly or for the benefit of third parties.

"Finally, the version of AB 2257 amended on August 25, 2020 has language in Section 3 of Article 1.5 of the bill that fails to capture the intent of the author due to a drafting error in the amendment to Section 17020.12 of the Revenue and Taxation Code. The language as of August 25, 2020 is not accurate and should instead read: 'For the purposes of this part, except as otherwise provided, the determination of whether an individual is an employee shall be governed by Article 1.5 of Chapter 2 of Division 3 of the Labor Code.'

"Thank you for this opportunity to clarify the intent of AB 2257.

"Sincerely,

"LORENA GONZALEZ, Assembly Member

"Eighteith District"

LAW REVIEW AND JOURNAL COMMENTARIES

Mass arbitration: How the newest frontier of mandatory arbitration jurisprudence has created a brand new private enforcement regime in the gig economy era. Cheryl Wilson, 69 U.C.L.A. L. Rev. 372 (2022).

A new framework for ABC test exemptions: When should an employee not be an employee? Charles Lam, 55 Loy. L.A. L. Rev. 281 (2022).

RESEARCH REFERENCES

Encyclopedias

21 Am. Jur. Trials 625, Preparation and Trial of Federal Class Actions.

29 Cal. Jur. 3d Employer and Employee § 11, Employee Distinguished from Independent Contractor.

38 Cal. Jur. 3d Independent Contractors § 3, Generally.
California Civil Practice Employment Litigation § 4:25, Determining Whether Worker is Employee or Independent Contractor.

Forms
West's California Code Forms, Revenue and Taxation § 18406 Comment, Determination of Employment Status.
West's California Code Forms, Revenue and Taxation § 23038 Comment, Definitions.

Other References
Labor & Employment Law ¶ 62119, California Trucking Association; Ravinder Singh; Thomas Odom, Plaintiffs-Appellees v. Rob Bonta Rob Bonta Has Been Substituted for His Predecessor, Xavier Becerra, as California Attorney General Under Fed. R. App. ¶ 43(C)(2)., in His Official Capacity as the Attorney General of the State of California; Andre Schoorl, in His Official Capacity as the Acting Director of the Department of Industrial Relations of the State of California; Julie A. Su, in Her Official Capacity as Secretary of the California Labor Workforce and Development Agency; Patrick W. Henning, in His Official Capacity as the Director of the Employment Development Department; Lilia Garcia-Brower, in Her Official Capacity as Labor Commissioner of the State of California, Division of Labor Standards Enforcement, Defendants-Appellants, and International Brotherhood of Teamsters, Intervenor-Defendant.
Labor & Employment Law ¶ 62147, Raef Lawson, Individually and on Behalf of All Other Similarly Situated Individuals, and in His Capacity as Private Attorney General Representative, Plaintiff-Appellant v. Grubhub, Inc.; Grubhub Holdings, Inc., Defendants-Appellees.

Treatises and Practice Aids
2 California Affirmative Defenses 2d § 39:15 (2d ed.), Contractors--Employees.
California Practice Guide: Employment Litigation Ch. 1-A, Background.
California Practice Guide: Employment Litigation Ch. 3-A, Employer's Obligation to Indemnify Employees.
California Practice Guide: Employment Litigation Ch. 7-A, Title VII and the California Fair Employment and Housing Act.
California Practice Guide: Employment Litigation Ch. 7-E, California Labor Code.
California Practice Guide: Employment Litigation Ch. 11-B, Coverage and Exemptions--In General.
California Practice Guide: Employment Litigation Ch. 13-F, Citations and Related Orders and Notices.
California Practice Guide: Employment Litigation Ch. 15-E, Other Sources of Federal Preemption.
California Practice Guide: Employment Litigation Ch. 19-H, Other Pretrial Procedures.
California Practice Guide: Employment Litigation HIGHLIGHTS, 2020 Update.
California Practice Guide Public Sector Employment Litigation Ch. 1-B, Employees vs. Independent Contractors.
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Judicial Council of California Civil Jury Instructions 2705, Independent Contractor--Affirmative Defense--Worker was Not Hiring Entity'S Employee (Lab. Code, §2775).
Judicial Council of California Civil Jury Instructions 3704, Existence of "Employee" Status Disputed.
Judicial Council of California Civil Jury Instructions TABLE NEW AND REV.
Personal Injury (The Rutter Group, California Practice Guide) Ch. 2(II)-N, Employer Liability to Employee--Avoiding Workers' Compensation "Exclusive Remedy" Rule.
3 Witkin, California Summary 11th Agency and Employment § 35 (2021), Statutory Rule.
3 Witkin, California Summary 11th Agency and Employment § 36 (2021), Scope of Rule.
3 Witkin, California Summary 11th Agency and Employment § 45B (2021), (New) in General.
3 Witkin, California Summary 11th Agency and Employment § 45C (2021), (New) in General.
3 Witkin, California Summary 11th Agency and Employment § 45D (2021), (New) Business-To-Business Contractors.
3 Witkin, California Summary 11th Agency and Employment § 45E (2021), (New) Referral Agencies and Service Providers.
3 Witkin, California Summary 11th Agency and Employment § 45F (2021), (New) Contracts for Professional Services.
3 Witkin, California Summary 11th Agency and Employment § 45G (2021), (New) Real Estate, Home Inspector, and Repossession Agency Licensees.

3 Witkin, California Summary 11th Agency and Employment § 45H (2021), (New) Contracts for Single-Engagement Events.
3 Witkin, California Summary 11th Agency and Employment § 45J (2021), (New) Construction Industry Subcontractors.
3 Witkin, California Summary 11th Agency and Employment § 45K (2021), (New) Individuals Providing Feedback to Data Aggregators.
3 Witkin, California Summary 11th Agency and Employment § 45-I (2021), (New) Occupations Involving Sound Recordings, Musical Compositions and Performances, and Related Services.
2 Witkin, California Summary 11th Workers' Compensation § 189 (2021), In General.
2 Witkin, California Summary 11th Workers' Compensation § 207 (2021), Determining Status.
2 Witkin, California Summary 11th Workers' Compensation § 207A (2021), (New) Test to Determine Status.
2 Witkin, California Summary 11th Workers' Compensation § 208A (2021), (New) Determination of Subcontractor Status.

NOTES OF DECISIONS

1 Construction and application

The parties' characterization of their relationship is not dispositive in determining whether workers are employees or independent contractors for purposes of wage orders, because their actions determine the relationship, not the labels they use. People v. Uber Technologies, Inc. (Cal.App. 1 Dist. 2020) 270 Cal.Rptr.3d 290. Labor and Employment 2235

1.4 Constitutional issues

California statute governing classification of a worker as an employee or an independent contractor and requiring application of a particular test to determine the employment status of workers, including doorknockers and signature gatherers, did not target speech and had only an indirect impact on speech, and statute thus did not violate the First Amendment, even if statute made it more expensive for organizations to use doorknockers and signature gatherers to promote political causes. Mobilize the Message, LLC v. Bonta, C.A.9 (Cal.)2022, 50 F.4th 928. Constitutional Law 1905; Labor and Employment 5

Fact that direct sales persons, newspaper distributors, and newspaper carriers were exempt from California statute governing classification of a worker as an employee or an independent contractor and requiring application of a particular test to determine the employment status of workers, and were instead subject to a different test, did not amount to content-based discrimination and did not cause statute to violate the First Amendment Free Speech Clause, even though workers such as doorknockers and signature gatherers were not similarly exempt from statute, where the exemptions for direct sales persons, newspaper distributors, and newspaper carriers did not depend on the communicative content conveyed by them but rather on their

occupation. Mobilize the Message, LLC v. Bonta, C.A.9 (Cal.)2022, 50 F.4th 928. Constitutional Law 1905; Labor and Employment 5

California statute governing classification of a worker as an employee or an independent contractor was aimed at the employment relationship, a traditional sphere of state regulation, and was thus a regulation of economic activity, not speech, for purposes of First Amendment scrutiny of statute. Mobilize the Message, LLC v. Bonta, C.A.9 (Cal.)2022, 2022 WL 6632087. Constitutional Law 1905

1.5 Preemption

California statute classifying certain workers as employees rather than independent contractors had only a tenuous, remote, or peripheral connection to rates, routes, or services and thus was not preempted by Federal Aviation Administration Authorization Act (FAAAA) as applied to motor carriers; state statute did not single out motor carriers but instead affected them solely in their capacity as employers, and it did not compel a result in a motor carrier's relationship with consumers, such as freezing into place a particular price, route or service that a carrier would otherwise not provide. California Trucking Association v. Bonta, C.A.9 (Cal.)2021, 996 F.3d 644, certiorari denied 142 S.Ct. 2903. Labor and Employment 8; States 18.46

Dynamex ABC test, 416 P.3d 1, for distinguishing between employees and independent contractors in connection with California Industrial Welfare Commission (IWC) wage orders was not preempted by Federal Trade Commission's franchise rule, and thus rule did not render ABC test inapplicable to determine whether employment relationship existed on resale dealers claims, arising under California law and wage orders, against tools and equipment distributor; even though distributor contended that franchise rule required franchisee to exert significant degree of control over franchisee's method of operation, it did not identify any specific provision of rule that contains such requirement, and distributor failed to identify any provision of California law that conflicted with requirement of rule. Salinas v. Cornwell Quality Tools Company, C.D.Cal.2022, 2022 WL 16735359. Labor and Employment 2177; States 18.46

2 ABC test

Under California law, worker is properly classified as employee unless hiring entity establishes all three of following factors: (A) that worker is free from hiring entity's control and direction in connection with performance of work, both under contract for performance of work and in fact; and (B) that worker performs work that is outside usual course of hiring entity's business; and (C) that worker is customarily engaged in independently established trade, occupation, or business of same nature as work performed. Lawson v. Grubhub, Inc., C.A.9 (Cal.)2021, 13 F.4th 908. Labor and Employment 29

Under California law, an employer does not need to prove that a worker in fact provided services for other entities in order to satisfy Prong C of the "ABC" test for determining whether worker is an independent contractor or an employee, under which employer must establish that worker customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed. Sportsman v. A Place for Rover, Inc., N.D.Cal.2021, 2021 WL 3524114. Labor and Employment 29

If the hiring entity fails to prove any one of these conditions, under the so-called "ABC" test for distinguishing between employees and independent contractors under California law, the plaintiffs will prevail on the merits of the question of their status as employees. James v. Uber Technologies Inc., N.D.Cal.2021, 2021 WL 254303. Labor and Employment 29

Under California law, in context of "ABC" test for distinguishing between employees and independent contractors, when worker has not independently decided to engage in independently established business but, instead, is simply designated independent contractor by unilateral action of hiring entity, there is substantial risk that hiring business is attempting to evade demands of

applicable wage order through misclassification. Sportsman v. A Place for Rover, Inc., N.D.Cal.2021, 537 F.Supp.3d 1081. Labor and Employment 29

Under Prong C of California's "ABC" test for distinguishing between employees and independent contractors, which asks whether worker customarily engaged in independently established trade, occupation, or business of the same nature as that involved in the work performed, the question is not whether business prohibited worker from engaging in independently established business; rather, it is whether worker fits common conception of independent contractor, that is, an individual who independently has made decision to go into business for himself or herself" and generally takes the usual steps to establish and promote his or her independent business, for example, through incorporation, licensure, advertisements, routine offerings to provide services of the independent business to the public or to a number of potential customers, and the like. Sportsman v. A Place for Rover, Inc., N.D.Cal.2021, 537 F.Supp.3d 1081. Labor and Employment 29

Under the "ABC" test for distinguishing between employees and independent contractors under California law, freedom to choose one's days and hours of work does not in itself preclude a finding of an employment relationship. Sportsman v. A Place for Rover, Inc., N.D.Cal.2021, 537 F.Supp.3d 1081. Labor and Employment 29

Under California law, pursuant to both the codified "ABC" test and the *Borello* test, 48 Cal.3d 341, 256 Cal.Rptr. 543, 769 P.2d 399, depending on the nature of the work and overall arrangement between the parties, a business need not control the precise manner or details of the work in order to be found to have maintained the necessary control that an employer ordinarily possesses over its employees, but does not possess over a genuine independent contractor. Sportsman v. A Place for Rover, Inc., N.D.Cal.2021, 537 F.Supp.3d 1081. Labor and Employment 29

Under California law, pursuant to the "ABC" test, pet care provider who worked for company which, through its website and mobile phone application, offered and sold pet care services to pet owners, was properly classified as independent contractor rather than employee; provider had complete control over which pet care services to offer, what rate to charge for each service, where to provide services, how to provide services, and if and when to provide services by setting her own schedule and deciding whether to accept a booking request, and, though company controlled how pet care providers and pet owners interacted on its online platform, particularly as to booking and payment, unlike many gig economy companies it operated platform as true marketplace, and did not dictate content of provider's platform profile, which she used to advertise her services and distinguish herself from other service providers, and on which she held herself out as operator of independent business. Sportsman v. A Place for Rover, Inc., N.D.Cal.2021, 537 F.Supp.3d 1081. Labor and Employment 30

California Labor Code provision codifying ABC test for existence of employer-employee relationship to claims under Labor Code generally and to violations of code relating to wage orders did not apply retroactively, and, thus, did not subject janitors' claims against franchisor for reimbursement of insurance and gas expenses, which did not arise under wage orders, to ABC test; provision only applied to work performed on or after date certain, at which point janitors' work on behalf of franchisor had completed. Roman v. Jan-Pro Franchising International, Inc., N.D.Cal.2022, 342 F.R.D. 274. Labor and Employment 2219

In determining whether a worker is an employee or independent contractor, for unemployment insurance tax purposes, for work performed on and after the effective date of the amended definition of employee, the ABC test enumerated under *Dynamex Operations W. v. Superior Court* 4 Cal.5th 903, 956-957, 232 Cal.Rptr.3d 1, 416 P.3d 1, wherein the worker is an employee unless the hiring entity establishes each of three designated factors: (a) that the worker is free from control and direction over performance of the work, both under the contract and in fact; (b) that the work provided is outside the usual course of the business for which the work is performed; and (c) that the worker is customarily engaged in an independently established trade, occupation or business applies. Vendor Surveillance Corporation v. Henning (Cal.App. 4 Dist. 2021) 2021 WL 1034833. Taxation 3285

The "ABC" test for determining whether workers are employees or independent contractors for purposes of wage orders places the burden on the hiring entity to establish that the worker is an independent contractor who was not intended to be included

within wage order's coverage, and to do so by meeting all three factors in the ABC test. People v. Uber Technologies, Inc. (Cal.App. 1 Dist. 2020) 270 Cal.Rptr.3d 290. Labor and Employment 2385(4)

Determination of whether the party acquiring a worker's service is a "hiring entity" is not an additional step in the "ABC" test for determining whether workers are employees or independent contractors for purposes of wage orders; phrase "hiring entity" is intended to be expansive for reasons specific to wage and hour laws and the longstanding social safety net objectives of those laws, and that question collapses into prong B of the ABC test, which looks to whether the work is outside the usual course of putative employer's business. People v. Uber Technologies, Inc. (Cal.App. 1 Dist. 2020) 270 Cal.Rptr.3d 290. Labor and Employment 2235

To prevail on their claim that workers are not their employees for purposes of wage orders, putative employer must establish that all three factors of "ABC" test for determining whether workers are employees or independent contractors apply. People v. Uber Technologies, Inc. (Cal.App. 1 Dist. 2020) 270 Cal.Rptr.3d 290. Labor and Employment 2235

2.5 Exemptions

Direct salesperson exemption set forth in California Unemployment Insurance Code did not apply to render *Dynamex* ABC test, 416 P.3d 1, for distinguishing between employees and independent contractors in connection with California Industrial Welfare Commission (IWC) wage orders, inapplicable to determine whether employment relationship existed on resale dealers claims, arising under California law and wage orders, against tools and equipment distributor; exemption only applied to workers who were engaged in business of primarily in person demonstration and sales of consumer products in home or for resale, and testimony of distributor's director of national sales established that dealers were restricted from selling to wholesale distributors and that typical customers were professional shops. Salinas v. Cornwell Quality Tools Company, C.D.Cal.2022, 2022 WL 16735359. Labor and Employment 2178

3 Abuse of discretion

Trial court did not abuse its discretion in determining People demonstrated a probability of prevailing on the merits of claim that ride-sharing services were in the business of transporting passengers, and not merely technological platform for riders to connect with available drivers, supporting preliminary injunction to prevent misclassification of drivers as independent contractors rather than employees; ride-sharing services solicited riders, screened drivers and set standards for vehicles that could be used, tracked and collected information on drivers and used negative ratings to deactivate drivers, services' revenues were directly connected to the fees that riders paid for each ride, and remuneration could reasonably be seen as flowing from riders to services, then from services to drivers, less any fee associated with the ride. People v. Uber Technologies, Inc. (Cal.App. 1 Dist. 2020) 270 Cal.Rptr.3d 290. Labor and Employment 2435

4 Standing

Trade association of motor carriers sufficiently alleged a threat to initiate proceedings to enforce state statute governing classification of workers as employees or independent contractors, supporting finding of associational standing under Article III for pre-enforcement challenge to statute as purportedly preempted by Federal Aviation Administration Authorization Act (FAAAA); State had refused to disavow enforcement of statute during pendency of litigation, and State had notified the regulatory community that it intended to enforce statute. California Trucking Association v. Bonta, C.A.9 (Cal.)2021, 996 F.3d 644, certiorari denied 142 S.Ct. 2903. Corporations and Business Organizations 3536(4)

Trade association of motor carriers articulated concrete plan to violate state statute governing classification of workers as employees or independent contractors, supporting finding of associational standing under Article III for pre-enforcement challenge to statute as purportedly preempted by Federal Aviation Administration Authorization Act (FAAAA), where

association alleged that its members' policies were presently in conflict with state law and that members would continue with such policies. California Trucking Association v. Bonta, C.A.9 (Cal.)2021, 996 F.3d 644, certiorari denied 142 S.Ct. 2903. Corporations and Business Organizations 3536(4)

5 Certification of class

Commonality requirement was satisfied, as required for certification of proposed class consisting of ride-share service's drivers in state of California who had driven for service within certain time period and who had opted out of service's arbitration agreement, in drivers' putative class action against ride-share service, alleging wage-and-hour claims under California law, arising from drivers allegedly being mislabeled as "independent contractors" as opposed to "employees"; question that would generate a common answer apt to drive resolution of the litigation was that drivers were misclassified as independent contractors because ride-share service failed to satisfy one or more prongs of California's statutory "ABC" test to distinguish employees from independent contractors. James v. Uber Technologies Inc., N.D.Cal.2021, 2021 WL 254303. Federal Civil Procedure 184.5

Predominance requirement was satisfied in regards to threshold employment misclassification claim pursuant to California statute, as required for certification, in situation when common questions of law or fact predominated, of proposed class consisting of ride-share service's drivers in state of California who had driven for service within certain time period and who had opted out of arbitration agreement, in drivers' putative class action against service, alleging wage-and-hour claims under California law, arising from drivers allegedly being mislabeled as "independent contractors," even though question of whether drivers engaged in independently established trade was left for individual resolution; all drivers were subject to same terms, and drivers completed trips regardless of how service charged. James v. Uber Technologies Inc., N.D.Cal.2021, 2021 WL 254303. Federal Civil Procedure 184.5

Superiority requirement was satisfied, as required for certification, in situation where common questions of law or fact predominated, of proposed class consisting of ride-share service's drivers in California who had driven for service within certain time period and who had opted out of arbitration agreement, in drivers' putative class action against service, alleging wage-and-hour claims under California law, arising from drivers allegedly being mislabeled as "independent contractors"; only issue that required individualized analysis was prong of California's statutory "ABC" test to distinguish employees from independent contractors pertaining to worker's independently established trade, and there were no foreseeable manageability issues as court could address numerous common questions in single trial. James v. Uber Technologies Inc., N.D.Cal.2021, 2021 WL 254303. Federal Civil Procedure 184.5

6 Summary judgment

Genuine dispute of material fact existed as to whether distributor of professional-quality tools and equipment for automotive and aviation industries reserved requisite degree and control over its resale dealers to establish employment relationship under first prong of *Dynamex* ABC test, 416 P.3d 1, for distinguishing between employees and independent contractors in connection with California Industrial Welfare Commission (IWC) wage orders, precluding summary judgment in favor of dealer on distributor's affirmative defenses that dealers were independent contractors under California law. Salinas v. Cornwell Quality Tools Company, C.D.Cal.2022, 2022 WL 16735359. Federal Civil Procedure 2498

Genuine dispute of material fact existed as to whether resale dealers of distributor's professional-quality tools and equipment for automotive and aviation industries performed work that was necessary to distributor's business so to establish employment relationship under second prong of *Dynamex* ABC test, 416 P.3d 1, for distinguishing between employees and independent contractors in connection with California Industrial Welfare Commission (IWC) wage orders, precluding summary judgment in favor of dealer on distributor's affirmative defenses that dealers were independent contractors under California law. Salinas v. Cornwell Quality Tools Company, C.D.Cal.2022, 2022 WL 16735359. Federal Civil Procedure 2498

West's Ann. Cal. Labor Code § 2775, CA LABOR § 2775

Current with all laws through Ch. 997 of 2022 Reg.Sess.
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West's Delaware Code Annotated
Title 19. Labor
Part III. Unemployment Compensation
Chapter 33. Unemployment Compensation
Subchapter I. General Provisions

19 Del.C. § 3302

§ 3302. Definitions

Effective: January 27, 2022
Currentness

As used in this chapter, unless the context clearly requires otherwise, the following terms shall have the meanings designated in this section:

(1) “Assessments” means the money payments to the State Unemployment Compensation Fund required by this chapter.

(2) “Base period” means the first 4 of the last 5 completed calendar quarters immediately preceding the first day of an individual's benefit year. However, if the claimant has earned insufficient wages in the first 4 of the last 5 completed calendar quarters to become eligible for benefits, then such claimant's “base period” shall be the 4 most recent completed calendar quarters immediately preceding the first day of the claimant's benefit year.

(3) “Benefit year” with respect to any individual means the 1-year period beginning with the first day of the first week with respect to which the individual first files a valid claim for benefits, and thereafter the 1-year period beginning with the first day of the first week with respect to which the individual next files a valid claim for benefits after the termination of the worker's last preceding benefit year. Provided that, when the last day of such 1-year period falls within a week with respect to which an individual has met the eligibility requirements of this chapter, the ending date of the benefit year may be extended for a period not to exceed 6 days, and provided further that, for the purpose of filing any subsequent claim for benefits, the extension of the benefit year as provided in this paragraph shall not change the benefit year ending date as established prior to such extension.

As used in this paragraph, a “valid claim” is any claim for benefits made in accordance with § 3317 of this title if the individual has been paid wages for employment required under § 3315(5) of this title.

(4) “Benefits” means the money payments payable to an individual, as provided in this chapter, with respect to the individual's unemployment.

(5) “Regular benefits” means benefits payable to an individual under this chapter or under any other state law (including benefits payable to federal civilian employees and to ex-service persons pursuant to 5 U.S.C. Chapter 85) other than additional and extended benefits.

(6) “Calendar quarter” means the period of 3 consecutive calendar months ending on March 31, June 30, September 30 or December 31, excluding, however, any calendar quarter or portion thereof which occurs prior to January 1, 1938, or the equivalent thereof as the Department may by regulation prescribe.

(7) “Department” means the Department of Labor.

(8) “Employer” means:

(A)(i) Any employing unit which after December 31, 1971,

(I) In any calendar quarter in either the current or preceding calendar year paid for service in employment wages of $1,500 or more, or

(II) For some portion of a day in each of 20 different calendar weeks, whether or not such weeks were consecutive, in either the current or preceding calendar year, had in employment at least 1 individual (irrespective of whether the same individual was in employment in each such day);

(ii) Any employing unit for which agricultural labor as defined in paragraph (11)(A)(vii) of this section is performed after December 31, 1977;

(iii) Any employing unit for which domestic service as defined in paragraph (11)(B) of this section is performed after December 31, 1977;

(iv)(I) In determining whether or not an employing unit for which service other than domestic service is also performed is an employer under paragraphs (8)(A)(i) and (ii) of this section the wages earned or the employment of an employee performing domestic service after December 31, 1977, shall not be taken into account;

(II) In determining whether or not an employing unit for which service other than agricultural labor is also performed is an employer under paragraphs (8)(A)(i) and (iii) of this section, the wages earned or the employment of an employee performing service in agricultural labor after December 31, 1977, shall not be taken into account. If an employing unit is determined an employer of agricultural labor, such employing unit shall be determined an employer for the purposes of paragraph (8)(A)(i) of this section;

(B) Any employing unit for which service in employment as defined in paragraph (10)(B)(iii) of this section is performed;

(C) Any employing unit for which service in employment, as defined in paragraph (10)(C) of this section, is performed after December 31, 1971;

(D) Any employing unit (whether or not an employing unit at the time of acquisition) which acquired the organization, trade or business, or substantially all of the assets thereof, of another employing unit which at the time of such acquisition was

an employer subject to this chapter, or which acquired a part of the organization, trade or business of another employing unit which at the time of such acquisition was an employer subject to this chapter;

(E) Any employing unit which acquired the organization, trade or business, or substantially all the assets thereof, of another employing unit (not an employer subject to this chapter) and which would be an employer under paragraph (8)(A) of this section if, subsequent to such acquisition, it were treated as a single unit with such other employing unit;

(F) Any employing unit which, together with 1 or more other employing units, is owned or controlled (by legally enforceable means or otherwise) directly or indirectly by the same interests, or which owns or controls 1 or more other employing units (by legally enforceable means or otherwise), and which if treated as a single unit with such other employing units or interests or both would be an employer under paragraph (8)(A) of this section;

(G) Any employing unit not an employer by reason of any other paragraph of this paragraph (8):

(i) For which, within either the current or preceding calendar year, service is or was performed with respect to which such employing unit is liable for any federal tax against which credit may be taken for assessments required to be paid into a state unemployment fund; or

(ii) Which, as a condition for approval of this part for full tax credit against the tax imposed by the Federal Unemployment Tax Act [26 U.S.C. § 3301 et seq.], is required, pursuant to such Act, to be an "employer" under this part;

(H) Any employing unit which, having become an employer under paragraph (8)(A), (B), (C), (D), (E), (F) or (G) of this section, has not under §§ 3341-3343 of this title ceased to be an employer subject to this chapter; and

(I) For the effective period of its election pursuant to § 3343 of this title, any employing unit which has elected to become subject to this chapter.

(J) For purposes of this paragraph (8), an employee leasing company, a professional employment organization (PEO) or any other similar entity shall not be considered to be the employer of any leased employees. The services performed by leased employees shall be considered to be services performed for the employer client company of the employee leasing company, professional employment organization (PEO) or any similar entity and the employer client company shall be considered to be the employer of its leased employees. An employer client company shall be responsible for reporting the gross wages of its leased employees to the Division of Unemployment Insurance on Form UC-8A (Quarterly Payroll Report) and for paying any assessments due on the taxable wages of its leased employees to the Division of Unemployment Insurance as reported on Form UC-8 (Quarterly Tax Report). The unemployment insurance assessment rate for an employer client company, as determined in accordance with § 3350 of this title, shall include the unemployment insurance claims experience of the employer client company's leased employees. This paragraph does not apply to a temporary help firm as defined in § 3327 of this title unless such temporary help firm provides leased employees to an employer client company. In such cases, the employee leasing segment of the temporary help firm's business shall be subject to this paragraph. For the purpose of this paragraph (8), an "employee leasing company," "professional employment organization (PEO)" or similar entity shall mean an employing unit established to engage in the business of providing leased employees to an employer client company. For the purpose of this paragraph, an "employer client company" shall mean a company who enters into

an agreement with an employee leasing company, professional employment organization (PEO) or similar entity to lease any or all of its regular employees.

For purposes of paragraphs (8)(A) and (C) of this section, employment shall include service which would constitute employment but for the fact that such service is deemed to be performed entirely within another state pursuant to an election under an arrangement entered into (in accordance with § 3131 of this title) by the Department and an agency charged with the administration of any other state or federal unemployment compensation law.

For purposes of paragraphs (8)(A)(i)(II) and (C) of this section, if any week includes both December 31 and January 1, the days of that week up to January 1 shall be deemed 1 calendar week and the days beginning January 1 another such week.

(9)(A) "Employing unit" means any individual or type of organization, including any partnership, association, trust, estate, joint stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof or the legal representative of a deceased person, which has or subsequent to January 1, 1936, had in its employ 1 or more individuals performing services for it within this State. Employing unit also means any governmental entity which has in its employ individuals performing services. All individuals performing services within this State for any employing unit which maintains 2 or more separate establishments within this State shall be deemed to be employed by a single employing unit for all other purposes of this chapter.

(B) Whenever any employing unit contracts with or has under it any contractor or subcontractor for any work which is part of its usual trade, occupation, profession or business, such employing unit shall for all the purposes of this chapter be deemed to employ each individual in the employ of each such contractor or subcontractor for each day during which such individual is engaged in performing such work and shall be liable for the employer assessments with respect to wages paid to such individuals by such contractor or subcontractor, except that any employing unit which becomes liable for and pays assessments with respect to individuals in the employ of any such contractor or subcontractor may recover the same from such contractor or subcontractor. Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all the purposes of this chapter, whether such individual was hired or paid directly by such employing unit or by such agent or employee, providing the employing unit had actual or constructive knowledge of the work, except as provided in paragraph (11)(A)(vii) of this section.

(10) "Employment" means:

(A) Any service performed prior to January 1, 1978, which was employment as defined in this paragraph prior to such date and, subject to the other provisions of this paragraph, service performed after December 31, 1977, including service in interstate commerce, by

(i) Any officer of a corporation after December 31, 1995.

(ii) Any individual who, under paragraph (10)(K) of this section, has the status of an employee; or

(iii) Any individual other than an individual who is an employee under paragraph (10)(A)(i) or (ii) of this section who performs services for remuneration for any person:

(I) As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk) or laundry or dry cleaning services, for the driver's principal; or

(II) As a traveling or city salesperson, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, the person's principal (except for sideline sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors or operators of hotels, restaurants or other similar establishments for merchandise for resale or supplies for use in their business operations;

(III) As a homeworker performing work, according to specifications furnished by the person for whom the services are performed, on materials or goods furnished by such person which are required to be returned to such person or a person designated by such person;

Provided, that for purposes of paragraph (10)(A)(iii) of this section, the term "employment" shall include services described in paragraphs (10)(A)(iii)(I), (II) and (III) of this section, performed after December 31, 1977, only if:

1. The contract of service contemplates that substantially all of the services are to be performed personally by such individual;

2. The individual does not have a substantial investment in facilities used in connection with the performance of the services (other than in facilities for transportation); and

3. The services are not in the nature of a single transaction that is not part of a continuing relationship with the person for whom the services are performed.

(B)(i) Service performed after December 31, 1971, by an individual in the employ of this State or any of its instrumentalities (or in the employ of this State and 1 or more other states or their instrumentalities) for a hospital or institution of higher education located in this State, provided that such service is excluded from "employment" as defined in the Federal Unemployment Tax Act [26 U.S.C. § 3301 et seq.]; or

(ii) Service performed after June 30, 1972, and before January 1, 1978, by an individual in the employ of this State or any of its instrumentalities, provided that such service is classified by the State Personnel Commission. As used in this paragraph, a "classified employee" is a person holding a career job based on a merit system under a specific pay plan in accordance with merit system screening, regulation and law. Coverage is restricted to services of classified employees not employed on a seasonal or temporary basis.

(iii) Service performed after December 31, 1977, in the employ of this State or any of its instrumentalities or any political subdivision thereof or any of its instrumentalities or any instrumentality of more than 1 of the foregoing or any instrumentality of any of the foregoing and 1 or more other states or political subdivisions, provided that such service is excluded from "employment" as defined in the Federal Unemployment Tax Act by § 3306(c)(7) of that act [26 U.S.C. § 3306(c)(7)] and is not excluded from "employment" under paragraph (10)(D)(iii) of this section.

(C) Service performed after December 31, 1971, by an individual in the employ of a religious, charitable, educational or other organization but only if the following conditions are met:

(i) The service is excluded from "employment" as defined in the Federal Unemployment Tax Act solely by reason of § 3306(c)(8) of that act [26 U.S.C. § 3306(c)(8)]; and

(ii) The organization had 4 or more individuals in employment for some portion of a day in each of 20 different weeks, whether or not such weeks were consecutive, within either the current or preceding calendar year, regardless of whether they were employed at the same moment of time.

(D) For the purposes of paragraphs (10)(B) and (C) of this section, the term "employment" does not apply to service performed:

(i) In the employ of

(I) A church or convention or association of churches; or

(II) An organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches; or

(ii) By a duly ordained, commissioned or licensed minister of a church in the exercise of a ministry or by a member of a religious order in the exercise of duties required by such order; or

(iii) Prior to January 1, 1978, in the employ of a school which is not an institution of higher education; after December 31, 1977, in the employ of a governmental entity referred to in paragraph (10)(B)(iii) of this section if such service is performed by an individual in the exercise of duties:

(I) As an elected official;

(II) As a member of a legislative body, or a member of the judiciary, of a state or political subdivision;

(III) As a member of the State National Guard or Air National Guard;

(IV) As an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood or similar emergency;

(V) In a position which, under or pursuant to the laws of this State, is designated as:

1. A major nontenured policymaking or advisory position, or

2. A policymaking or advisory position the performance of duties of which ordinarily does not require more than 8 hours per week; or

(iv) In a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or of providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market, such service performed by an individual receiving such rehabilitation or remunerative work; or

(v) As part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof by an individual receiving such work relief or work training; or

(vi) Prior to January 1, 1978, for a hospital in a state prison or other state correctional institution and after December 31, 1977, by an inmate of a custodial or penal institution.

(E) The term "employment" shall include the service of an individual who is a citizen of the United States, performed outside the United States after December 31, 1971 (except in Canada, and in the case of the Virgin Islands after December 31, 1971, and prior to January 1 of the year following the year in which the United States Secretary of Labor approves the unemployed compensation law of the Virgin Islands under § 3304(a) [26 U.S.C. § 3304(a)] of the Internal Revenue Code of 1954), in the employ of an American employer (other than service which is deemed "employment" under paragraph (10)(H) or (I) of this section or the parallel provisions of another state's law), if:

(i) The employer's principal place of business in the United States is located in this State; or

(ii) The employer has no place of business in the United States, but

(I) The employer is an individual who is a resident of this State; or

(II) The employer is a corporation which is organized under the laws of this State; or

(III) The employer is a partnership or a trust and the number of partners or trustees who are residents of this State is greater than the number who are residents of any 1 other state; or

(iii) None of the criteria of paragraphs (10)(E)(i) and (ii) of this section is met but the employer has elected coverage in this State or, the employer having failed to elect coverage in any state, the individual has filed a claim for benefits based on such service under the law of this State.

(iv) An "American employer" for purposes of this paragraph means a person who is:

(I) An individual who is a resident of the United States; or

(II) A partnership if $^{2}/_{3}$ or more of the partners are residents of the United States; or

(III) A trust, if all of the trustees are residents of the United States; or

(IV) A corporation organized under the laws of the United States or of any state.

(v) For purposes of this paragraph, the term "United States" includes the states, the District of Columbia and the Commonwealth of Puerto Rico.

(F) Notwithstanding paragraph (10)(H) of this section, all service performed after December 31, 1971, by an officer or member of a crew of an American vessel on or in connection with such vessel if the operating office from which the operation of such vessel operating on navigable waters within, or within and without, the United States is ordinarily and regularly supervised, managed, directed and controlled is within this State.

(G) Notwithstanding any other provisions of this paragraph (10), except as provided in paragraph (10)(A)(i) of this section, service with respect to which a tax is required to be paid under any federal law imposing a tax against which credit may be taken for assessments required to be paid into a state unemployment fund or which as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act [26 U.S.C. § 3301 et seq.] is required to be covered under this chapter.

(H) The term "employment" shall include an individual's entire service, performed within, or both within and without, this State if the service is localized in this State. Service shall be deemed to be localized within this State if:

(i) The service is performed entirely within this State; or

(ii) The service is performed both within and without this State but the service performed without this State is incidental to the individual's service within the State, for example, is temporary or transitory in nature or consists of isolated transactions.

(I) The term "employment" shall include an individual's entire service, performed within, or both within or without, this State if the service is not localized in any state but some of the service is performed in this State and

(i) The individual's base of operation is in this State; or

(ii) If there is no base of operations, then the place from which such service is directed or controlled is in this State; or

(iii) The individual's base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.

(J) Service covered by an election pursuant to § 3343 of this title shall be deemed to be employment during the effective period of the election.

(K) Notwithstanding any other provisions of this chapter and irrespective of whether the common-law relationship of employer and employee exists, services performed by an individual for wages, unless and until it is shown to the satisfaction of the Department that:

(i) Such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under the individual's contract for the performance of services and in fact; and

(ii) Such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and

(iii) Such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

(11) "Employment" does not include:

(A) Service performed by an individual in agricultural labor, except as provided in paragraph (11)(A)(vii) of this section. For purposes of this paragraph, the term "agricultural labor" means any service performed prior to January 1, 1972, which was agricultural labor as defined in this paragraph prior to such date, and remunerated service performed after December 31, 1971:

(i) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training and management of livestock, bees, poultry and fur-bearing animals and wildlife;

(ii) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement or maintenance of such farm and its tools and equipment or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(iii) In connection with the production or harvesting of any commodity defined as an agricultural commodity in § 15(g) of the Agricultural Marketing Act, as amended [12 U.S.C. § 1141j] or in connection with the ginning of cotton or in connection with the operation or maintenance of ditches, canals, reservoirs or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(iv)(I) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity, but only if such operator produced more than ½ of the commodity with respect to which such service is performed;

(II) In the employ of a group of operators of farms (or a cooperative organization of which such operators are members) in the performance of service described in paragraph (11)(A)(iv)(I) of this section but only if such operators produced more than ½ of the commodity with respect to which such service is performed;

(III) Paragraphs (11)(A)(iv)(I) and (II) of this section shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(v) On a farm operated for profit if such service is not in the course of the employer's trade or business.

(vi) As used in paragraph (11)(A) of this section the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animals and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities and orchards.

(vii) The term "employment" shall include service performed after December 31, 1977, by an individual in agricultural labor when:

(I) Such service is performed for a person who:

1. During any calendar quarter in either the current or the preceding calendar year paid remuneration in cash of $20,000 or more to individuals employed in agricultural labor (not taking into account service in agricultural labor performed before January 1, 1980, by an alien referred to in paragraph (11)(A)(vii)(II) of this section, or

2. For some portion of a day in each of 20 different calendar weeks, whether or not such days were consecutive, in either the current or the preceding calendar year, employed in agricultural labor (not taking into account service in agricultural labor performed before January 1, 1980, by an alien referred to in paragraph (11)(A)(vii)(II) of this section) 10 or more individuals, regardless of whether they were employed at the same moment of time.

(II) Such service is not performed in agricultural labor if performed prior to January 1, 1980, by an individual who is an alien admitted to the United States to perform service in agricultural labor pursuant to §§ 214(c) and 101(a)(15)(H) of the Immigration and Nationality Act [8 U.S.C. § 1184(c) and 8 U.S.C. § 1101(a)(15)(H)].

(III) For purposes of this paragraph, any individual who is a member of a crew furnished by a crew leader to perform service in agricultural labor for any other person shall be treated as an employee of such crew leader:

1. If such crew leader holds a valid certificate of registration under the Farm Labor Contractor Registration Act of 1963 [former 7 U.S.C. § 2041 et seq. (See Revisor's note)]; or substantially all the members of such crew operate or maintain tractors, mechanized harvesting or crop dusting equipment or any other mechanized equipment, which is provided by such crew leader; and

2. If such individual is not an employee of such other person within the meaning of paragraph (9)(A) of this section.

(IV) For the purpose of this subparagraph in the case of an individual who is furnished by a crew leader to perform services in agricultural labor for any other person and who is not treated as an employee of such crew leader under paragraph (11)(A)(vii)(III) of this section:

1. Such other person and not the crew leader shall be treated as the employer of such individual; and

2. Such other person shall be treated as having paid cash remuneration to such individual in an amount equal to the amount of cash remuneration paid to such individual by the crew leader (either on the person's own behalf or on behalf of such other person) for the service in agricultural labor performed for such other person.

(V) For the purposes of this subparagraph, the term "crew leader" means an individual who:

1. Furnishes individuals to perform services in agricultural labor for any other person;

2. Pays (either on the person's own behalf or on behalf of such other person) the individuals so furnished by the crew leader for the service in agricultural labor performed by them; and

3. Has not entered into a written agreement with such other person under which such individual is designated as an employee of such other person.

(B) Domestic service in a private home performed prior to January 1, 1978. After December 31, 1977, the term "employment" shall include domestic service in a private home, local college club or local chapter of a college fraternity or sorority performed for a person who paid cash remuneration of $1,000 or more after December 31, 1977, in the current calendar year or the preceding calendar year to individuals employed in such domestic service in any calendar quarter.

(C) Service performed by an individual in the employ of the individual's child or spouse and service performed by a child under the age of 18 in the employ of the child's father or mother.

(D) Service performed after December 31, 1971, in the employ of this State, or of any political subdivision or of any instrumentality of this State or its political subdivision except as provided in paragraph (10)(B) of this section.

(E) Service performed after December 31, 1971, in the employ of a corporation, community chest, fund or foundation organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda or otherwise attempting to influence legislation and which does not participate in, or intervene in (including the publishing or distributing of statements) any political campaign on behalf of any candidate for public office, except as provided in paragraph (10)(C) of this section.

(F) Service with respect to which unemployment compensation is payable under an unemployment compensation system established by an act of Congress. The Department shall enter into agreements with the proper agencies under such act of Congress, which agreements shall become effective 10 days after publication thereof in the manner provided in § 3122 of this title for general rules and shall provide reciprocal treatment to individuals who have, after acquiring potential rights to benefits under this chapter, acquired rights to unemployment compensation under such act of Congress, or who have, after acquiring potential rights to unemployment compensation under such act of Congress, acquired rights to benefits under this chapter.

(G) Service performed by an officer of any building and loan association, fraternal order, society, labor union, political club or political organization service club, alumni association or any corporation, association, society or club organized and operated exclusively for social or civic purposes. The exemptions mentioned in this paragraph shall apply only when the service performed by the officer is a part-time service and only when the remuneration of the officer performing the part-time service does not exceed the sum of $75 in any calendar quarter in any calendar year.

(H) Service performed by an individual for an employer as an insurance agent or real estate agent, or as an insurance solicitor or real estate solicitor, if all such service performed by such individual for such employer is performed for remuneration solely by way of commissions.

(I) Service covered by an arrangement between the Department and the agency charged with the administration of any other state or federal unemployment compensation law pursuant to which all services performed by an individual for an employing unit during the period covered by such employing unit's duly approved election are deemed to be performed entirely within such agency's state.

(J) Service performed after December 31, 1971, in the employ of a school, college or university, if such service is performed by a student who is enrolled and is regularly attending classes at such school, college or university.

(K) Service performed after December 31, 1971, by an individual who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program and such institution has so certified to the employer, except that this subparagraph shall not apply to service performed in a program established for or on behalf of an employer or a group of employers.

(L) Service performed after December 31, 1971, in the employ of a hospital if such service is performed by a patient of the hospital, as defined in paragraph (14) of this section.

(M) Service performed after June 30, 1972, in the employ of this State or any of its political subdivisions by an elected official, an official appointed by the Governor or an official compensated on a fee basis.

(N) Service performed as a direct seller as defined in § 3508 of the Internal Revenue Code of 1954 [26 U.S.C. § 3508], as amended.

(12) "Employment office" means a free public employment office or branch thereof operated by this State or as a part of a state-controlled system of public employment offices or by a federal agency charged with the administration of an unemployment compensation program or free public employment offices.

(13) "Fund" means the Unemployment Compensation Fund established by this title to which all assessments required and from which all benefits provided under this chapter shall be paid.

(14) "Hospital" means an institution which has been licensed, certified or approved by the Department of Health and Social Services as a hospital.

(15)(A) "Institution of higher education," for the purposes of this section, means an educational institution which:

(i) Admits as regular students only individuals having a certificate of graduation from a high school or the recognized equivalent of such a certificate;

(ii) Is legally authorized in this State to provide a program of education beyond high school;

(iii) Provides an educational program for which it awards a bachelor's or higher degree, or provides a program which is acceptable for full credit toward such a degree, a program of postgraduate or postdoctoral studies or a program of training to prepare students for gainful employment in a recognized occupation; and

(iv) Is a public or other nonprofit institution.

(v) Notwithstanding any of the foregoing provisions of this paragraph (15), all colleges and universities in this State are institutions of higher education for purposes of this section.

(B) "Educational institution" (including an institution of higher education) is:

(i) One in which participants, trainees or students are offered an organized course of study or training designed to transfer to them knowledge, skills, information, doctrines, attitudes or abilities from, by or under the guidance of an instructor or teacher; and

(ii) Approved, licensed or issued a permit to operate as a school by the State Department of Education or other governmental agency that is authorized within the State to approve, license or issue a permit for the operations of a school; and

(iii) The courses of study or training which it offers may be academic, technical, trade or preparation for gainful employment in a recognized occupation.

(16) “States” includes, in addition to the states of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico and Virgin Islands.

(17) “Unemployment” exists and an individual is “unemployed” in any week during which the individual performs no services and with respect to which no wages are payable to the individual, or in any week of less than full-time work if the wages payable to the individual with respect to such week are less than the individual's weekly benefit amount plus whichever is the greater of $10 or 50% of the individual's weekly benefit amount. The Department shall prescribe regulations applicable to unemployed individuals making such distinctions in the procedures as to total unemployment, part-total unemployment, partial unemployment of individuals attached to their regular jobs and other forms of short-time work as the Department deems necessary.

(18) “Wages” means all remuneration for personal services, including commissions, bonuses, dismissal payments, holiday pay, back pay awards and the cash value of all remuneration in any medium other than cash.

Gratuities customarily received by an individual in the course of the individual's work from persons other than the individual's employing unit shall be treated as wages received from the individual's employing unit.

The reasonable cash value of remuneration in any medium other than cash and the reasonable amount of gratuities shall be estimated and determined in accordance with rules prescribed by the Department.

(19) “Wages” does not include:

(A) For the purpose of §§ 3345 and 3348 of this title:

(i) After December 31, 1982, that part of the remuneration which, after remuneration equal to $7,200 with respect to employment during any calendar year, is paid to an individual by an employer or the employer's predecessor during such calendar year; or

(ii) After December 31, 1983, that part of the remuneration which, after remuneration equal to $8,000 (or such greater amount as may be specified as the taxable wage base in the Federal Unemployment Tax Act [26 U.S.C. § 3301 et seq.]) with respect to employment during any calendar year, is paid to an individual by an employer or the employer's predecessor during such calendar year; or

(iii) After December 31, 1985, that part of the remuneration which, after remuneration equal to $8,250 (or such greater amount as may be specified as the taxable wage base in the Federal Unemployment Tax Act [26 U.S.C. § 3301 et seq.]) with respect to employment during any calendar year, is paid to an individual by an employer or the employer's predecessor during such calendar year; or

(iv) After December 31, 1986, that part of the remuneration which, after remuneration equal to $8,500 (or such greater amount as may be specified as the taxable wage base in the Federal Unemployment Tax Act [26 U.S.C. § 3301 et seq.]) with respect to employment during any calendar year, is paid to an individual by an employer or the employer's predecessor during such calendar year; or

(v) After December 31, 2007, that part of the remuneration which, after remuneration equal to $10,500 (or such greater amount as may be specified as the taxable wage base in the Federal Unemployment Tax Act [26 U.S.C. § 3301 et seq.]) with respect to employment during any calendar year, is paid to an individual by an employer or the employer's predecessor during such calendar year.

(vi) After December 31, 2013, that part of the remuneration which, after remuneration equal to $18,500 (or such greater amount as may be specified as the taxable wage base in the Federal Unemployment Tax Act (26 U.S.C. § 3301 et seq.)) with respect to employment during any calendar year, is paid to an individual by an employer or the employer's predecessor during such calendar year if the balance in the Unemployment Insurance Trust Fund, as certified by the Director of Unemployment Insurance to the Secretary of Labor, is $125.0 million or less as of the preceding September 30; or that part of the remuneration which, after remuneration equal to $16,500 (or such greater amount as may be specified as the taxable wage base in the Federal Unemployment Tax Act (26 U.S.C. § 3301 et seq.)) with respect to employment during any calendar year, is paid to an individual by an employer or the employer's predecessor during such calendar year if the balance in the Unemployment Insurance Trust Fund, as certified by the Director of Unemployment Insurance to the Secretary of Labor, is greater than $125.0 million, but less than $175.0 million as of the preceding September 30; or that part of the remuneration which, after remuneration equal to $14,500 (or such greater amount as may be specified as the taxable wage base in the Federal Unemployment Tax Act (26 U.S.C. § 3301 et seq.)) with respect to employment during any calendar year, is paid to an individual by an employer or the employer's predecessor during such calendar year if the balance in the Unemployment Insurance Trust Fund, as certified by the Director of Unemployment Insurance to the Secretary of Labor, is at least $175.0 million, but no greater than $ 225.0 million as of the preceding September 30; or that part of the remuneration which, after remuneration equal to $12,500 (or such greater amount as may be specified as the taxable wage base in the Federal Unemployment Tax Act (26 U.S.C. § 3301 et seq.)) with respect to employment during any calendar year, is paid to an individual by an employer or the employer's predecessor during such calendar year if the balance in the Unemployment Insurance Trust Fund, as certified by the Director of Unemployment Insurance to the Secretary of Labor, is greater than $225.0 million, but less than $275.0 million as of the preceding September 30; or that part of the remuneration which, after remuneration equal to $10,500 (or such greater amount as may be specified as the taxable wage base in the Federal Unemployment Tax Act (26 U.S.C. § 3301 et seq.)) with respect to employment during any calendar year, is paid to an individual by an employer or the employer's predecessor during such calendar year if the balance in the Unemployment Insurance Trust Fund, as certified by the Director of Unemployment Insurance to the Secretary of Labor, is $275.0 million or greater as of the preceding September 30.

(vii) For the purpose of this paragraph, the term “employment” shall include service constituting employment under any unemployment compensation law of another state.

(viii) Notwithstanding any other provisions in this section, from July 1, 2019, to October 29, 2020, “wages” does not include that part of the remuneration which, after remuneration equal to $16,500 (or such greater amount as may be specified as the taxable wage base in the Federal Unemployment Tax Act (26 U.S.C. § 3301 et seq.)) with respect to employment during any calendar year, is paid to an individual by an employer or the employer's predecessor during such calendar year.

(ix) Notwithstanding any other provisions in this section, from January 1, 2022, to December 31, 2022, “wages” does not include that part of the remuneration which, after remuneration equal to $14,500 (or such greater amount as may be specified as the taxable wage base in the Federal Unemployment Tax Act (26 U.S.C. § 3301 et seq.)) with respect to employment during any calendar year, is paid to an individual by an employer or the employer's predecessor during such calendar year.

(B) The amount of any payment with respect to services performed after December 31, 1940, to or on behalf of an individual in its employ under a plan or system established by an employing unit which makes provision for individuals in its employ generally or for a class or classes of such individuals (including any amount paid by an employing unit for insurance or annuities or into a fund to provide for any such payment) on account of:

(i) Retirement; or

(ii) Sickness or accident disability; or

(iii) Medical and hospitalization expenses in connection with sickness or accident disability; or

(iv) Death, provided the individual in its employ:

(I) Has not the option to receive instead of provision for such death benefit any part of such payment or if such death benefit is insured any part of the premiums (or contributions to premiums) paid by the individual's employing unit, and

(II) Has not the right, under the provisions of the plan or system or policy of insurance providing for such death benefit, to assign such benefit or to receive a cash consideration in lieu of such benefit either upon withdrawal from the plan or system providing for such benefit or upon termination of such plan or system or policy of insurance or of the individual's services with such employing unit.

(C) The payment by an employing unit (without deduction from the remuneration of the individual in its employ) of the tax imposed upon an individual in its employ under § 3101 of the Federal Internal Revenue Code [26 U.S.C. § 3101] with respect to services performed after December 31, 1954.

(D) Vacation pay paid during or incident to any period of unemployment.

(E) Any attendance bonus paid during or incident to any period of unemployment.

(F) Payments to an employee under Chapter 19 of this title by an employer who has failed to provide the advance notice of a mass layoff, plant closing or relocation that is required by Chapter 19 of this title or the federal Worker Adjustment and Retraining Notification Act (29 U.S.C. § 2101 et seq.) shall not be construed as wages. Unemployment insurance benefits under this title may not be denied or reduced because of the receipt of payments related to an employer's violation of Chapter 19 of this title or the federal Worker Adjustment and Retraining Notification Act (29 U.S.C. § 2101 et seq.).

(20) Repealed.

(21) “Week” means calendar week, ending at midnight Saturday, but all work performed and wages earned during a working shift which starts before midnight Saturday shall be included in the week in which such shift begins. For purposes of partial claims and mass layoff claims, the Department may authorize the employer's payroll week.

(22) “Work” means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied.

(23) “Statewide average weekly wage” shall be the amount computed annually as of July 1 by dividing the aggregate amount of wages irrespective of the limitation on the amount of wages subject to assessment under paragraph (19) of this section for services in employment reported by employers as paid during the first 4 of the last 6 completed calendar quarters immediately preceding the effective date of the computation, by a figure representing 52 times the 12-month average of the number of employees in the pay period containing the twelfth day of each month during the same 4 calendar quarters as reported by such employers. The statewide average weekly wage shall be effective on July 1 of each year computed.

Credits

41 Laws 1937, ch. 258, § 2. Amended by 42 Laws 1939, ch. 196, §§ 1-5; 43 Laws 1941, ch. 278; 43 Laws 1941, ch. 279; 43 Laws 1941, ch. 280, §§ 1, 2; 43 Laws 1941, ch. 281, §§ 1, 2; 43 Laws 1941, ch. 282, § 1; 44 Laws 1943, ch. 207, § 1; 45 Laws 1945, ch. 267, §§ 1-4; 46 Laws 1947, ch. 162, §§ 1, 2; 49 Laws 1953, ch. 220, § 19; 50 Laws 1955, ch. 115, §§ 1-3; 50 Laws 1955, ch. 117, § 1; 50 Laws 1956, ch. 559, § 1; 53 Laws 1961, ch. 79, § 1; 53 Laws 1961, ch. 158; 53 Laws 1961, ch. 232, § 1; 57 Laws 1970, ch. 521, § 1; 57 Laws 1970, ch. 669, §§ 5A, 5B; 58 Laws 1971, ch. 143, § 5; 58 Laws 1972, ch. 359; 58 Laws 1972, ch. 511, § 39; 58 Laws 1972, ch. 522, §§ 6-14; 58 Laws 1972, ch. 530, §§ 1, 2; 58 Laws 1972, ch. 573, §§ 1, 2, 4; 59 Laws 1974, ch. 337, § 1; 60 Laws 1975, ch. 138, § 1; 61 Laws 1977, ch. 186, §§ 1-14; 61 Laws 1978, ch. 452, § 1; 63 Laws 1981, ch. 76, §§ 1, 2, 8; 63 Laws 1982, ch. 427, §§ 2-4; 64 Laws 1983, ch. 91, §§ 3-6; 64 Laws 1983, ch. 114, § 1; 65 Laws 1985, ch. 44, § 1; 65 Laws 1985, ch. 45, § 1; 65 Laws 1986, ch. 367, § 1; 66 Laws 1987, ch. 73, § 1; 66 Laws 1988, ch. 380, § 1; 66 Laws 1988, ch. 390, § 1; 70 Laws 1995, ch. 43, §§ 2, 3, eff. June 1, 1995; 70 Laws 1995, ch. 186, § 1, eff. July 10, 1995; 70 Laws 1995, ch. 229, § 1, eff. Jan. 1, 1996; 71 Laws 1997, ch. 147, § 1, eff. July 1, 1997; 73 Laws 2001, ch. 65, § 20, eff. June 27, 2001; 73 Laws 2002, ch. 271, § 1, eff. May 29, 2002; 76 Laws 2007, ch. 46, §§ 1-3, eff. June 18, 2007; 77 Laws 2009, ch. 71, § 1, eff. Jan. 3, 2010; 79 Laws 2013, ch. 173, §§ 3, 5, eff. Aug. 15, 2013; 79 Laws 2013, ch. 173, § 4, eff. Jan. 1, 2017; 81 Laws 2018, ch. 312, § 2, eff. Jan. 7, 2019; 82 Laws 2019, ch. 80, § 1, eff. June 30, 2019; 83 Laws 2022, ch. 268, § 4, eff. Jan. 27, 2022.

Codifications: 19 Del.C. 1953, § 3302

Notes of Decisions (41)

19 Del.C. § 3302, DE ST TI 19 § 3302

Current through ch. 240 of the 152nd General Assembly (2023-2024). Some statute sections may be more current, see credits for details. Revisions to 2023 Acts by the Delaware Code Revisors were unavailable at the time of publication.

West's Hawai'i Revised Statutes Annotated
Division 1. Government
Title 21. Labor and Industrial Relations
Chapter 383. Hawaii Employment Security Law (Refs & Annos)
Part I. Definitions

HRS § 383-6

§ 383-6. Master and servant relationship, not required when

Currentness

Services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists unless and until it is shown to the satisfaction of the department of labor and industrial relations that:

(1) The individual has been and will continue to be free from control or direction over the performance of such service, both under the individual's contract of hire and in fact;

(2) The service is either outside the usual course of the business for which the service is performed or that the service is performed outside of all the places of business of the enterprise for which the service is performed; and

(3) The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of service.

Credits

Laws 1939, ch. 219, § 2(k)(5); Laws 1941, ch. 304, § 1; R.L. 1945, § 4207; R.L. 1955, § 93-6; Laws 1959, 2nd Sp. Sess., ch. 1, § 27; H.R.S. § 383-6; Laws 1984, ch. 90, § 1.

Notes of Decisions (15)

H R S § 383-6, HI ST § 383-6
Current through the end of the 2023 Regular Session, pending text revision by the revisor of statutes.

End of Document

West's Annotated Indiana Code
Title 22. Labor and Safety
Article 4. Unemployment Compensation System
Chapter 8. Employment Defined

IC 22-4-8-1

22-4-8-1 Definition

Currentness

Sec. 1. (a) "Employment," subject to the other provisions of this section, means service, including service in interstate commerce performed for remuneration or under any contract of hire, written or oral, expressed or implied.

(b) Services performed by an individual for remuneration shall be deemed to be employment subject to this article irrespective of whether the common-law relationship of master and servant exists, unless and until all the following conditions are shown to the satisfaction of the department:

(1) The individual has been and will continue to be free from control and direction in connection with the performance of such service, both under the individual's contract of service and in fact.

(2) The service is performed outside the usual course of the business for which the service is performed.

(3) The individual:

(A) is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed; or

(B) is a sales agent who receives remuneration solely upon a commission basis and who is the master of the individual's own time and effort.

(c) The term also includes the following:

(1) Services performed for remuneration by an officer of a corporation in the officer's official corporate capacity.

(2) Services performed for remuneration for any employing unit by an individual:

(A) as an agent-driver or commission-driver engaged in distributing products, including but not limited to, meat, vegetables, fruit, bakery, beverages, or laundry or dry-cleaning services for the individual's principal; or

(B) as a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, the individual's principal (except for sideline sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations.

(d) For purposes of subsection (c)(2), the term “employment” shall include services described in subsection (c)(2)(A) and (c)(2)(B) only if all the following conditions are met:

(1) The contract of service contemplates that substantially all of the services are to be performed personally by such individual.

(2) The individual does not have a substantial investment in facilities used in connection with the performance of the services (other than in facilities for transportation).

(3) The services are not in the nature of a single transaction that is not part of a continuing relationship with the person for whom the services are performed.

Credits
Amended by P.L.108-2006, SEC.6.

Notes of Decisions (72)

I.C. 22-4-8-1, IN ST 22-4-8-1
The statutes and Constitution are current with all legislation of the 2023 First Regular Session of the 123rd General Assembly effective through July 1, 2023.

End of Document

West's Louisiana Statutes Annotated
Louisiana Revised Statutes
Title 23. Labor and Workers' Compensation (Refs & Annos)
Chapter 11. Unemployment Compensation (Refs & Annos)
Part I. General Provisions (Refs & Annos)

LSA-R.S. 23:1472

§ 1472. Definitions

Effective: June 11, 2021
Currentness

As used in this Chapter, the following terms shall have the meanings ascribed to them in this Section, unless the context clearly indicates otherwise:

(1) “Administrator” means the secretary of the Louisiana Workforce Commission.

(2) “Agricultural labor” includes all services performed:

(a) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting of any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;

(b) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such services are performed on a farm;

(c) In connection with the production or harvesting of any commodity defined as an agricultural commodity in Section 15(g) of the Agricultural Marketing Act, as amended (46 Stat. 1550, sec. 3; 12 U.S.C. 1141j), or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes, or in connection with the hatching of poultry, the drying of rice, the ginning of moss, and the handling, care, and sale of nursery stock, but only if such service is performed on a farm.

(d) I. In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, an agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such services are performed;

II. In the employ of a group of operators of farms (or a cooperative organization of which such operators are members) in the performance of services described in Subparagraph (I) of this Paragraph, but only if such operators produced more than one-half of the commodity with respect to which such services are performed.

III. The provisions of Subparagraph (I) and (II) of this Paragraph shall not be deemed to be applicable with respect to services performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption;

(e) On a farm operated for profit, in the employ of the owner or tenant or other operator of such farm, if such service is not in the course of the employer's trade or business.

(f) As used in this Subsection, the term “farm” includes stock, dairy, poultry, fruit, fur-bearing animals, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities and orchards;

(3) “American vessel” means any vessel, documented and numbered under the laws of the United States, including any vessel which is neither documented or numbered under the laws of the United States, nor documented under the laws of any foreign country, if its crew is employed solely by one or more citizens or residents of the United States, or corporation organized under the laws of the United States, or of any state.

(4) “Base period” means the first four of the last five complete calendar quarters immediately preceding the first day of an individual's benefit year.

(5) “Benefits” means the money payments payable to an individual, as provided in this Chapter, with respect to his unemployment.

(6) “Benefit year” with respect to any individual means the one-year period beginning with the first day of the first week with respect to which the individual first files a claim for benefits in accordance with R.S. 23:1600(1), and thereafter the one-year period beginning with the first day of the first week with respect to which the individual next files a claim for benefits after the termination of his last preceding benefit year; provided, that at the time of filing such a claim the individual has been paid the wages for insured work required under R.S. 23:1600(5).

(7) “Calendar quarter” means the period of three consecutive calendar months ending on March 31, June 30, September 30, or December 31, or the equivalent thereof as the administrator may by regulations prescribe.

(8) “Contributions” means the money payments to the state unemployment compensation fund, required by this Chapter.

(9) Repealed by Acts 1977, No. 745, § 3.

(10)(a) “Employing unit” means any individual or type of organization, including the state of Louisiana or subdivisions, or instrumentality thereof or of any other state or of the United States except as excluded by any other provision of this Chapter, and any partnership, association, trust, estate, joint-stock company, nontrading corporation, insurance company, corporation, or corporate group, whether domestic or foreign, or the receiver, liquidator, trustee in bankruptcy, trustee, or successor thereof, or the legal representative of a deceased person, which has in its employ one or more individuals performing services for it within

this state. All individuals performing services within this state for any employing unit which maintains two or more separate establishments, whether the employing unit is engaged in a number of different types of businesses or is engaged in the same business in a number of different places within this state, shall be deemed to be employed by a single employing unit for all the purposes of this Chapter.

(b) "Corporate group" means any group of corporations which are one hundred percent subsidiaries of another corporation or of other corporations which are one hundred percent subsidiaries of another corporation where the corporations are engaged in essentially the same kind of business and the employees are paid from a single account maintained by the parent corporation.

(c) Whenever any employing unit contracts with or has under it any contractor or subcontractor for any work which is part of its usual trade, occupation, profession, or business, unless the employing unit as well as each such contractor or subcontractor is an employer as hereinafter defined or within the provisions of R.S. 23:1573 or 1574, the employing unit shall be deemed to employ each individual in the employ of each such contractor or subcontractor during the time such individual is engaged in performing such work; except that any employing unit which is liable for and pays contributions with respect to individuals in the employ of any such contractor or subcontractor, may recover the same from the contractor or subcontractor. If such contractor or subcontractor is an employer as hereinafter defined or within the provisions of R.S. 23:1573 or 1574, he alone shall be liable for the contributions measured by wages to individuals in his employ.

(d) Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit whether such individual was hired or paid directly by such employing unit or by such agent or employee, provided the employing unit had actual or constructive knowledge of the work.

(11) "Employer" means:

(a) Any employing unit which in any calendar quarter in either the current or preceding calendar year paid for services in employment wages of one thousand five hundred dollars or more for some portion of a day in each of twenty different calendar weeks, whether or not such weeks were consecutive, in either the current or the preceding calendar year, had in employment at least one individual regardless of whether the same individual was in employment each day.

(b) Any employing unit, whether or not an employing unit at the time of the acquisition, which acquired the organization, trade or business, or substantially all the assets thereof, of another which at the time of such acquisition was an employer subject to this Chapter; or which acquired a part of the organization, trade or business or assets of another which at the time of such acquisition was an employer subject to this Chapter, provided the part acquired, if treated alone, would have satisfied the employment requirements of Paragraph (a) of this subsection;

(c) Any employing unit, whether or not an employing unit at the time of the acquisition, which acquired the organization, trade or business, or substantially all the assets thereof, of another employing unit, if the combined employment record of the predecessor prior to the date of the acquisition and the employment record of the successor subsequent to the date of the acquisition, both within the same calendar year, would be sufficient to satisfy the employment requirements of Paragraph (a) of this Subsection;

(d) I. Any employing unit for which service in employment, as defined in R.S. 23:1472(12)(F), is performed.

II. In determining whether or not an employing unit for which service other than domestic service is also performed is an employer under Paragraphs (a), (b), or (c) of this Subsection, the wages earned or the employment of an employee performing domestic service shall not be taken into account.

III. In determining whether or not an employing unit for which service other than agricultural labor is also performed is an employer under Paragraphs (a), (b), and (c) of this Subsection, the wages earned or the employment of an employee performing service in agricultural labor shall not be taken into account. If an employing unit is determined an employer of agricultural labor, such employing unit shall be determined to be an employer for the purposes of Paragraph (a) of this Subsection.

(e) Any employing unit not an employer by reason of any other Paragraph of this Subsection (i) for which, within either the current or preceding calendar year, service is or was performed with respect to which such employing unit is liable for any Federal tax against which credit may be taken for contributions required to be paid into a state unemployment fund; or (ii) which, as a condition for approval of this Section for full tax credit against the tax imposed by the Federal Unemployment Tax Act,[1] is required, pursuant to such Act, to be an "employer" under this Section;

(f) Any employing unit which having become an employer under Paragraph (a), (b), (c), (d), or (e) of this subsection, has not ceased to be an employer under the provisions of Part IV of this Chapter;

(g) For the effective period of its election pursuant to Part IV of this Chapter, any other employing unit which has elected to become subject to the provisions hereof;

(h) For purposes of Paragraphs (a) and (d) of this Subsection, if any week includes both December thirty-first and January first, the days of that week up to January first shall be deemed one calendar week and the days beginning January first another such week.

(i) Any Indian tribe or Indian tribal unit, as defined and established pursuant to 25 U.S.C. 450b(e), 26 U.S.C. 3306(u), and 43 U.S.C. 1601 et seq., which is recognized as eligible for the special programs and services provided by the United States under the status of Indians, including any subdivision, subsidiary, or business enterprise wholly owned by any such Indian tribe.

(12) A. "Employment" means, subject to the other provisions of this subsection, any services including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied;

B. The term "employment" shall include an individual's entire service, performed within or both within and without this state, and, in the case of Paragraph (III) hereof, service performed within or without and within and without this state, if;

I. the service is localized in this state, or

II. the service is not localized in any state but some of the service is performed in this State and (a) the base of operations, or if there is no base of operations, then the place from which such service is directed or controlled, is in this State; or (b) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed but the individual's residence is in this State,

III. notwithstanding any other provisions of this subsection an individual's entire service as an officer or member of a crew of an American vessel, wherever performed and whether in intrastate, interstate or foreign commerce, if the employer maintains within this State the operating office from which the operations of the vessel are ordinarily and regularly managed, supervised and controlled; provided that the Administrator may enter into reciprocal arrangements with the appropriate agencies of other states or of the United States, or both, whereby services performed on or with respect to vessels engaged in intrastate, interstate, or foreign commerce for a single employer, wherever performed shall be deemed to be performed within this State or within such other states;

C. Services not covered under Paragraph (B) of this subsection and performed entirely without this State, with respect to no part of which contributions are required and paid under an unemployment compensation law of any other state of the United States, the Virgin Islands or Canada, shall be deemed to be employment subject to this Chapter if the individual performing such services is a resident of this State or the place from which the services are directed or controlled is in this State.

D. Service shall be deemed to be localized within a state if;

I. the service is performed entirely within such state; or

II. the service is performed both within and without such state; but the service performed without such state is incidental to the individual's service within the state, for example, is temporary or transitory in nature or consists of isolated transactions;

E. Services performed by an individual for wages or under any contract of hire, written or oral, express or implied, shall be deemed to be employment subject to this Chapter unless and until it is shown to the satisfaction of the administrator that;

I. such individual has been and will continue to be free from any control or direction over the performance of such services both under his contract and in fact; and

II. such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

III. such individual is customarily engaged in an independently established trade, occupation, profession or business;

F. The term “employment” shall include:

I. Except as excluded by Subparagraph (III) of this Paragraph:

(a) Service performed by an individual in the employ of this state or any of its instrumentalities or in the employ of this state and one or more other states or their instrumentalities.

(b) Service performed in the employ of this state or any of its instrumentalities or any political subdivision thereof or any of its instrumentalities or any instrumentality of more than one of the foregoing or any instrumentality of any of the foregoing and one or more other states or political subdivisions or any Indian tribe or tribal unit, provided that such service is excluded from "employment" as defined in the Federal Unemployment Tax Act by Section 3306(c)(7) of that Act.[2]

II. The term "employment" shall include service performed by an individual in the employ of a religious, charitable, educational or other organization but only if the following conditions are met:

(a) The service is excluded from "employment" as defined in the Federal Unemployment Tax Act solely by reason of Section 3306(c)(8) of that Act;[3] and

(b) The organization had four or more individuals in employment for some portions of a day in each of twenty different weeks, whether or not such weeks were consecutive, within either the current or preceding calendar year, regardless of whether they were employed at the same moment of time.

III. For the purposes of Subparagraphs (I) and (II) of this Paragraph the term "employment" does not apply to service performed:

(a) In the employ of (i) a church or convention or association of churches, or (ii) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches;

(b) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

(c) In the employ of a governmental entity referred to in Subparagraph (I) of this Paragraph if such service is performed by an individual in the exercise of duties:

(i) As an elected official;

(ii) As a member of a legislative body, or a member of the judiciary, of this state or its political subdivisions, or of an Indian tribe.

(iii) As a member of the State National Guard or Air National Guard;

(iv) As an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency;

(v) In a position which, under or pursuant to the laws of this state or tribal law, is designated as (1) a major nontenured policymaking or advisory position, or (2) a policymaking or advisory position the performance of the duties of which ordinarily does not require more than eight hours per week.

(d) In a facility conducted for the purpose of carrying out a program of rehabilitation for an individual whose earning capacity is affected by an injury or a developmental, intellectual, physical, or age-related disability or providing remunerative work for an individual who because of his physical or intellectual capacity cannot be readily absorbed in the competitive labor market by an individual receiving such rehabilitation or remunerative work; however, if an individual's employment is otherwise defined as employment under this Paragraph and the individual is performing work under the AbilityOne Program or a successor program under the laws of the United States, the individual's employment shall be considered employment under this Paragraph.

(e) As part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof or of an Indian tribe, by an individual receiving such work-relief or work-training; or

(f) By an inmate of a custodial or penal institution.

IV. Notwithstanding the provisions of Subparagraphs (I) or (II) of this Paragraph or any other provision of law to the contrary, the term “employment” shall include service performed by an individual in the employ of the Louisiana School for the Visually Impaired and the Louisiana School for the Deaf, or a successor of any of these schools.

V. Service performed by an individual in agricultural labor as defined in Subsection (2) of this Section when:

(a) Such service is performed for a person who:

(i) During any calendar quarter in either the current or preceding calendar year paid remuneration in cash of twenty thousand dollars or more to individuals employed in agricultural labor; or

(ii) For some portion of a day in each of twenty different calendar weeks, whether or not such weeks were consecutive, in either the current or the preceding calendar year, employed in agricultural labor ten or more individuals, regardless of whether they were employed at the same moment of time.

(iii) However, the individuals performing services referred to in (a)(i) and (ii) of this Subparagraph shall not include individuals performing agricultural labor who are aliens admitted to the United States to perform agricultural labor pursuant to Section 214(c)[4] and Section 101(a)(15)(H)[5] of the Immigration and Nationality Act.

(b) For the purposes of this Subparagraph any individual who is a member of a crew furnished by a crew leader to perform service in agricultural labor for any other person shall be treated as an employee of such crew leader:

(i) If such crew leader holds a valid certificate of registration under the Farm Labor Contractor Registration Act of 1963;[6] or substantially all the members of such crew operated or maintained tractors, mechanized harvesting or cropdusting equipment, or any other mechanized equipment, which is provided by such crew leader; and

(ii) If such individual is not an employee of such other person within the meaning of Paragraph (a) of this Subsection.

(c) For the purposes of this Subparagraph, in the case of any individual who is furnished by a crew leader to perform service in agricultural labor for any other person and who is not treated as an employee of such crew leader under (b) hereof:

(i) Such other person and not the crew leader shall be treated as the employer of such individual; and

(ii) Such other person shall be treated as having paid cash remuneration to such individual in an amount equal to the amount of cash remuneration paid to such individual by the crew leader, either on his own or on behalf of such other person, for the service in agricultural labor performed for such other person.

(d) For the purposes of this Subparagraph, the term “crew leader” means an individual who:

(i) Furnished individuals to perform services in agricultural labor for any other person;

(ii) Pays, either on his own behalf or on behalf of such other person, the individuals so furnished by him for the services in agricultural labor performed by them; and

(iii) Has not entered into a written agreement with such other person under which such individual is designated as an employee of such other person.

VI. The term “employment” shall include domestic service in a private home, local college club, or local chapter of a college fraternity or sorority performed for a person who paid cash remuneration of one thousand dollars or more in the current calendar year or the preceding calendar year to individuals employed in such domestic service in any calendar quarter.

VII. Service performed on or after December 21, 2000, by an individual in the employ of an Indian tribe or Indian tribal unit itself, as defined in this Section, provided that any of those exclusions from employment under this Chapter in accordance with the Federal Unemployment Tax Act shall otherwise be applicable to services performed in the employ of an Indian tribe.

G. The term “employment” shall include the service of an individual who is a citizen of the United States, performed outside the United States in the employ of an American employer other than services which are deemed employment under the provisions of Paragraphs (B) and (D) of this Subsection or the parallel provisions of another state's law if:

I. The employer's principal place of business in the United States is located in this state;

II. The employer has no place of business in the United States, but

(a) The employer is an individual who is a resident of this state;

(b) The employer is a corporation which is organized under the laws of this state; or

(c) The employer is a partnership or a trust and the number of the partners or trustees who are residents of this state is greater than the number who are residents of any one other state; or

III. None of the criteria of Subparagraph (I) and (II) of this Paragraph are met but the employer has elected coverage in this state or, the employer having failed to elect coverage in any state, the individual has filed a claim for benefits, based on such service, under the law of this state.

IV. An "American employer" for purposes of this Paragraph means:

(a) An individual who is a resident of the United States;

(b) A partnership if two-thirds or more of the partners are residents of the United States;

(c) A trust, if all of the trustees are residents of the United States; or

(d) A corporation organized under the laws of the United States or of any state.

H. The term "employment" shall not include:

I. Except as described in Subsection (12)(F)(V) of this Section, agricultural labor as defined in Subsection (2) of this Section.

II. Except as described in Subsection (12)(F)(VI) of this Section, domestic service in a private home, local college club, or local chapter of a college fraternity or sorority.

III. service performed as an officer or member of the crew of a vessel not an American vessel;

IV. service performed by an individual in the employ of his son, daughter or spouse, and service performed by a child under the age of twenty-one in the employ of his father or mother;

V. service performed in the employ of the United States Government or an instrumentality of the United States Government immune under the Constitution of the United States from the contributions imposed by this Chapter, except that to the extent that the Congress of the United States shall permit states to require any instrumentalities of the United States (or individuals in their employ) to make payments into an unemployment compensation fund under a state unemployment compensation law, all of the provisions of this Chapter shall be applicable to such instrumentalities and to services performed for such instrumentalities, in the same manner, to the same extent and on the same terms as to all other employers, employing units, individuals and services; provided that if this State should not be certified by the Secretary of Labor under Section 3304 of the Act of Congress known as the Internal Revenue Code, as amended,[7] for any year, then the contributions required under this Chapter from any instrumentality of the United States and the payments required from individuals in its employ pursuant to this Chapter shall

be refunded by the Administrator from the fund in the same manner and within the same period as is provided for refunds of erroneous collections in accordance with the provisions of R.S. 23:1551;

VI. services performed in the employ of any other state or political subdivision thereof or of any instrumentality of any other state exercising sovereign power of a strictly governmental nature and not for the carrying on of a private business;

VII. Repealed by Acts 1977, No. 745, § 8, eff. Jan. 1, 1978.

VIII. except as otherwise provided in Paragraph (F) of this Subsection, service performed in the employ of a corporation, community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation;

IX. service performed by an individual as an insurance agent or as an insurance solicitor, if all such service performed by such individual for his employing units is performed for remuneration solely by way of commission;

X. service with respect to which unemployment compensation is payable under an unemployment compensation system established by an Act of Congress; provided that the Administrator is hereby authorized and directed to enter into agreements with the proper agencies under such Act of Congress, which agreements shall become effective ten days after publication thereof in the manner provided in R.S. 23:1654 for general rules; to provide reciprocal treatment to individuals who have, after acquiring potential rights to benefits under this Chapter, acquired rights to unemployment compensation under such Act of Congress or who have, after acquiring potential rights to unemployment compensation under such Act of Congress, acquired rights to benefits under this Chapter;

XI. casual labor not in the course of the employer's trade or business;

XII. (a) service performed in any calendar quarter in the employ of any organization exempt from income tax under section 501(a) of the Federal Internal Revenue Code,[8] (other than an organization described in Section 401(d))[9] or under Section 521 of such code,[10] if the remuneration for such service is less than fifty dollars, or,

(b) service performed in the employ of a school, college, or university, if such service is performed by a student who is enrolled and is regularly attending classes at such school, college or university, or,

(c) service performed by an individual under the age of twenty-two who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program, and such institution has so certified to the employer, except that this subparagraph shall not apply to service performed in a program established for or on behalf of an employer or group of employers;

XIII. service performed in the employ of a foreign government (including service as a consular or other officer or employee or a non-diplomatic representative);

XIV. service performed in the employ of any instrumentality wholly owned by a foreign government;

(a) if the service is of a character similar to that performed in foreign countries by employees of the United States Government or of an instrumentality thereof; and

(b) if the Secretary of State of the United States shall certify to the Secretary of the Treasury of the United States, that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in a foreign country by employees of the United States Government and instrumentalities thereof;

XV. service performed as a student nurse in the employ of a hospital or nurses' training school by an individual who is enrolled and regularly attending classes in a nurses' training school chartered or approved pursuant to the state law; and service performed as an intern in the employ of a hospital by an individual who has completed a four years' course in medical school chartered or approved pursuant to state law;

XVI. service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

XVII. service performed by an individual as a real estate salesman, if all such service performed by such individual for his employing unit is performed for remuneration solely by way of commission;

XVIII. Service performed by an individual engaged in the trade or business of selling or soliciting the sale of consumer products, in the home or otherwise than in a permanent retail establishment:

(a) If substantially all remuneration for the performance of the services is directly related to sales or other output rather than to the number of hours worked; and

(b) The services performed by the individual are performed pursuant to a written contract between such person and the persons for whom the services are performed and such contract provides that the person will not be treated as an employee with respect to such services for federal tax purposes.

XIX. Service performed for a private for-profit person or entity by an individual as a landman if:

(a) The individual is engaged primarily in negotiation for the acquisition or divestiture of mineral rights, or negotiating business agreements that provide for the exploration for or development of minerals or is otherwise engaged in activities relating to the exploration for, or development, production, or transportation of, minerals.

(b) Substantially all remuneration, paid in cash or otherwise, including but not limited to payments on the basis of a daily rate, for the performance of the services is directly related to the completion by the individual of the specific tasks contracted for rather than to the number of hours worked by the specific individual.

(c) The services performed by the individual are performed under a written contract, between the individual and the person for whom the services are performed, that provides that the individual is to be treated as an independent contractor and not as an employee with respect to the services provided under the contract.

XX. Service performed for a private for-profit person or entity by an individual as a lecturer, consultant, teacher, or instructor of real estate or insurance if:

(a) Substantially all remuneration for the performance of such service is directly related to instruction or other output rather than to the number of hours worked by the specific individual.

(b) The services performed by the individual are performed pursuant to a written contract which provides that such individual will not be treated as an employee with respect to such services for tax purposes.

(c) Such individual performs such services for no more than thirty-two hours annually.

XXI. Service performed by an individual as a member of an Indian tribal council.

XXII. The services performed by an individual who meets the definition of an owner-operator as is defined in R.S. 23:1021(10).

I. Notwithstanding any of the other provisions of this Subsection, a service shall be deemed to be in employment if, with respect to such services, a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment compensation fund, or which as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act[11] is required to be covered under this Chapter. Notwithstanding any provisions of this Chapter to the contrary, services performed for state and local governmental entities, nonprofit organizations, and Indian tribes recognized by the United States are deemed employment unless such services are excluded under the provisions of the Federal Unemployment Tax Act.

J. If the service performed during one-half or more of any pay period by an individual for the person employing him constitutes employment, all the services of such individual for such period shall be deemed to be employment; but if the services performed during more than one-half of any such pay period by an individual for the person employing him do not constitute employment, then none of the services of such individual for such period shall be deemed to be employment. As used in this paragraph, the term “pay period” means a period (of not more than thirty-one consecutive days) for which a payment of remuneration is ordinarily made to the employee by the person employing him. This paragraph shall not be applicable with respect to services performed in a pay period by an individual for the person employing him where any of such service is excepted by R.S. 23:1472(12)(H)(X).

K. Repealed by Acts 1992, No. 453, § 1.

(13) “Employment office” means a free public employment office or branch office thereof, operated by this state or maintained as a part of a state controlled system of public employment offices.

(14) “Employment security administration fund” means the employment security administration fund established by this Chapter, from which administrative expenses under this Chapter shall be paid.

(15) “Fund” means the unemployment compensation fund established by this Chapter, to which all contributions required and from which all benefits provided under this Chapter shall be paid.

(16) “Insured work” means employment for employers.

(17) “Shipping articles” means “articles of agreement” purporting to comply with Title forty-six of the United States code,[12] or any other agreement under which officers or members of the crew are employed on the high seas, and under which they are not entitled to a final settlement of wages until the termination of the period of the employment.

(18) A. “State” includes the states of the United States, the District of Columbia, the Commonwealth of Puerto Rico and the Virgin Islands.

B. The term “United States,” when used in a geographical sense, includes the states, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

C. The provisions of Paragraphs (A) and (B) of this Section, as including the Virgin Islands, shall become effective on the day after the day on which the United States Secretary of Labor approves for the first time under Section 3304(a) of the Internal Revenue Code of 1954[13] an unemployment compensation law submitted to the Secretary by the Virgin Islands for such approval.

(19)(a) “Unemployment”--Any individual shall be deemed to be “unemployed” in any week during which he performs no services and with respect to which no wages are payable to him, or in any week of less than full-time work if the wages payable to him with respect to such week are less than his weekly benefit amount.

(i) For the purpose of this Paragraph, any individual who bears a relationship of spouse, mother or mother-in-law, father or father-in-law, son or step-son or son-in-law, daughter or step-daughter or daughter-in-law, brother or brother-in-law, sister or sister-in-law, to a principal or controlling stockholder or a principal officer of a corporation, partnership, or proprietorship, or is himself a principal or controlling stockholder or a principal officer of a corporation, partnership, or proprietorship, shall not be deemed to be “unemployed” as provided for in this Paragraph, without first providing the administrator with whatever records or evidence the administrator may prescribe by regulation to provide proof and justification of such unemployment. However, the administrator shall not demand proof of the complete dissolution of the entire enterprise in order for the employee to be deemed unemployed.

(ii) Any person meeting the criteria set forth in Item (i) of this Subparagraph who has for the first four of the last five quarters been listed as an employee and for whom unemployment insurance coverage premiums have been paid for that same period

of time and, who, in addition, is no longer eligible to receive any remuneration or dividends from the enterprise for whom he previously worked, shall be considered to have met the criteria for unemployment.

(iii) The administrator shall further prescribe regulations applicable to unemployed individuals making such distinctions in the procedures as to total unemployment, part-total unemployment, partial unemployment of individuals attached to their regular jobs, and other forms of short-time work, as the administrator deems necessary.

(b) Employment, for purposes of unemployment insurance coverage, is employment of workers who work for wages as defined by the Louisiana Employment Security Law; it does not include self-employment.

No individual, who has been paid wages or performed services for an employing unit within eighteen months of the filing of a claim for unemployment benefits, shall be deemed unemployed for the purposes of the Louisiana Employment Security Law if he is or was, during the eighteen month period, the principal or controlling stock or shareholder of the employing unit, unless and until evidence or such other proof such as a certificate of dissolution issued by the Secretary of State is submitted to the satisfaction of the Administrator that the employing unit has been dissolved and is no longer engaged in business or that acts beyond the control of the principal or controlling stock or shareholder occurred to such an extent as to fully justify the person's inability to perform services. Justification for this unemployment would be judged on the reasonableness of a similar employer to become unemployed under the same conditions. Persons potentially qualified for benefits by this section shall not perform any services for the employing unit of any kind whether or not for remuneration or whether or not the services are performed on or off the premises of the employing unit, nor shall he go on the premises of the employing unit and spend any time except the minimal that might be spent by a consumer of the employing units services. Any person who violates any provision of this part will be deemed to have resumed employment. Nothing contained herein shall be deemed to qualify a person who may be otherwise disqualified.

(c) No individual, if he is, or was during the 18 months preceding the filing or renewal of a claim, employed by an employing unit whose principal or controlling stock or shareholder is related to the claimant in any degree as set forth in R.S. 23:1472(19), shall be deemed unemployed unless documentary proof is submitted to the satisfaction of the Administrator that:

(i) The books, records and tax returns of the employing unit reveal such a decline in business or other business reversals so as to necessitate and justify the laying off of an employee.

(ii) The claimant is not performing or has not performed since the filing of his claim for unemployment benefits, any services of any kind whether or not for remuneration or whether or not the services are performed on the premises of the employing unit.

(iii) The claimant does not go upon the premises of the employing unit and spend any time except the minimal time that might be spent by a consumer of the employing units services.

(20)(A) “Wages” means all remuneration for services, including vacation pay, holiday pay, dismissal pay, commissions, bonuses, the cash value of all remuneration in any medium other than cash, and WARN Act payments received pursuant to 29 U.S.C. 2104. The reasonable cash value of remuneration in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the administrator.

(B) Repealed by Acts 1995, No. 42, § 3, eff. June 6, 1995.

(C) The term “wages” shall not include:

I. The amount of any payment made to or on behalf of an individual in its employ under a plan or system established by an employing unit which makes provision for individuals in its employ generally or for a class or classes of individuals, including any amount paid by an employing unit for insurance or annuities, or into a fund to provide for any such payment, on account of retirement, or sickness or accident disability, or medical and hospitalization expenses in connection with sickness or accident disability, or death, provided the individual in its employ

(a) has not the option to receive, instead of provision for such death benefit, any part of such payment or, if such death benefit is insured, any part of the premiums (or contributions to premiums) paid by his employing unit, and

(b) has not the right under the provisions of the plan or system or policy of insurance providing for such death benefit, to assign such benefit, or to receive a cash consideration in lieu of such benefit either upon his withdrawal from the plan or system providing for such benefit or upon termination of such plan or system or policy of insurance or of his services with such employing unit;

II. The payment by an employing unit (without deduction from the remuneration of the individual in its employ) of the tax imposed upon a worker under Section 1400 of the United States Internal Revenue Code.

III. Dismissal payments which the employing unit is not legally required to make.

IV. Salary, wages, or other remunerations paid to the owner or owners who are sole proprietors of an unincorporated employing unit.

V. Any payment made to, or on behalf of, an employee or his beneficiary under a cafeteria plan as provided in 26 U.S.C. 125 of the U.S. Internal Revenue Code, if such payment would not be treated as wages without regard to such plan and it is reasonable to believe that 26 U.S.C. 125 would not treat such payments as wages constructively received.

(D) “Wages” paid with respect to employment performed under shipping articles and which are not paid on regularly recurring paydays, at intervals of not more than thirty-one days, shall:

I. For the purposes of R.S. 23:1531 through 1541, be considered as having been paid as of a date or dates determined under rules or regulations of the department irrespective of when actual payment was made to the individual; and

II. For the purposes of R.S. 23:1592, 1594, 1595, and 1600, be considered as having been paid in the respective calendar quarters in which the services of the individual were being performed. However, vacation pay shall be treated as provided in R.S. 23:1601(7)(d).

(21) “Week” means such period of seven consecutive days, as the administrator may by regulation prescribe. The administrator may by regulation prescribe that a week shall be deemed to be “in,” “within,” or “during” that benefit year which includes the greater part of such week.

(22) “Louisiana Unemployment Compensation Law,” means the Louisiana Employment Security Law.

(23) “Institution of higher education,” for the purposes of paragraph (F) of Subsection (12) of this section, means an educational institution which:

(A) admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate;

(B) is legally authorized in this State to provide a program of education beyond high school;

(C) provides an educational program for which it awards a bachelor's or higher degree, or provides a program which is acceptable for full credit toward such a degree, a program of post-graduate or post-doctoral studies, or a program of training to prepare students for gainful employment in a recognized occupation; and

(D) is a public or other nonprofit institution.

(E) Notwithstanding any of the foregoing provisions of this subsection, all colleges and universities in this State are institutions of higher education for purposes of this section.

(24) “Hospital” means an institution which has been licensed by the Louisiana Department of Health as a hospital.

Credits

Amended by Acts 1950, No. 498, §§ 2, 3; Acts 1952, No. 538, §§ 1 to 3; Acts 1956, No. 377, § 1; Acts 1956, No. 403, § 1; Acts 1960, No. 438, § 1; Acts 1960, No. 439, § 1; Acts 1962, No. 248, § 1; Acts 1964, No. 213, § 1; Acts 1968, No. 42, § 1; Acts 1971, No. 136, §§ 1 to 5, eff. Jan. 1, 1972; Acts 1972, No. 165, §§ 1, 2; Acts 1972, No. 337, §§ 1 to 5; Acts 1973, No. 88, § 1; Acts 1975, No. 466, § 1; Acts 1976, No. 40, § 1, eff. June 18, 1976; Acts 1977, No. 745, §§ 1, 2, 4 to 7, 9, 10; Acts 1978, No. 521, § 1; Acts 1979, No. 738, § 1, eff. July 20, 1979; Acts 1985, No. 566, § 1, eff. Oct. 6, 1985; Acts 1986, No. 886, § 1; Acts 1987, No. 115, § 1; Acts 1987, No. 906, § 1, eff. July 1, 1987; Acts 1987, 1st Ex.Sess., No. 1, § 1, eff. Sept. 17, 1987; Acts 1988, No. 493, § 1; Acts 1989, No. 512, § 1, eff. Jan. 1, 1990; Acts 1989, No. 660, § 1; Acts 1989, No. 694, § 1; Acts 1990, No. 867, § 1; Acts 1992, No. 447, § 1, eff. June 20, 1992; Acts 1994, 3rd Ex.Sess., No. 36, § 1; Acts 1995, No. 99, § 1, eff. June 12, 1995; Acts 1995, No. 992, § 1; Acts 1998, 1st Ex.Sess., No. 106, § 1, eff. May 5, 1998; Acts 1999, No. 116, § 1, eff. June 9, 1999; Acts 2001, 1st Ex.Sess., No. 4, § 1, eff. Mar. 27, 2001; Acts 2008, No. 743, § 2, eff. July 1, 2008; Acts 2012, No. 675, § 1; Acts 2012, No. 786, § 1; Acts 2014, No. 349, § 1; Acts 2014, No. 811, § 12, eff. June 23, 2014; Acts 2021, No. 194, § 1, eff. June 11, 2021.

Editors' Notes

STATE OF EMERGENCY AND EXTENSION OF EMERGENCY PROVISIONS FOR HURRICANES--PROCLAMATIONS

<For Proclamations and any extensions thereof, including suspensions of statutory provisions, relating to the State of Emergency for hurricanes, see Proclamations set forth under the Chapter 6 heading of Title 29 in LSA.>

Notes of Decisions (82)

Footnotes

1 26 U.S.C.A. § 3301 et seq.

2 26 U.S.C.A. § 3306(c)(7).

3 26 U.S.C.A. § 3306(c)(8).

4 8 U.S.C.A. § 1184(c).

5 8 U.S.C.A. § 1101(a)(15)(H).

6 7 U.S.C.A. § 2041 et seq. (Repealed by Pub.L. 97-470, Title V, § 523, Jan. 14, 1983, 96 Stat. 2600. See 29 U.S.C.A. § 1801 et seq., relating to migrant and seasonal agricultural worker protection; registration, see 29 U.S.C.A. § 1811 et seq.)

7 26 U.S.C.A. § 3304.

8 26 U.S.C.A. § 501(a).

9 26 U.S.C.A. § 401(d).

10 26 U.S.C.A. § 521.

11 26 U.S.C.A. § 3301 et seq.

12 46 U.S.C.A.

13 26 U.S.C.A. § 3304(a).

LSA-R.S. 23:1472, LA R.S. 23:1472
Current through the 2023 First Extraordinary, Regular, and Veto Sessions.

End of Document

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 149. Labor and Industries (Refs & Annos)

M.G.L.A. 149 § 148

§ 148. Payment of wages; commissions; exemption by contract; persons deemed employers; provision for cashing check or draft; violation of statute

Effective: April 15, 2009
Currentness

Every person having employees in his service shall pay weekly or bi-weekly each such employee the wages earned by him to within six days of the termination of the pay period during which the wages were earned if employed for five or six days in a calendar week, or to within seven days of the termination of the pay period during which the wages were earned if such employee is employed seven days in a calendar week, or in the case of an employee who has worked for a period of less than five days, hereinafter called a casual employee, shall, within seven days after the termination of such period, pay the wages earned by such casual employee during such period, but any employee leaving his employment shall be paid in full on the following regular pay day, and, in the absence of a regular pay day, on the following Saturday; and any employee discharged from such employment shall be paid in full on the day of his discharge, or in Boston as soon as the laws requiring pay rolls, bills and accounts to be certified shall have been complied with; and the commonwealth, its departments, officers, boards and commissions shall so pay every mechanic, workman and laborer employed by it or them, and every person employed in any other capacity by it or them in any penal or charitable institution, and every county and city shall so pay every employee engaged in its business the wages or salary earned by him, unless such mechanic, workman, laborer or employee requests in writing to be paid in a different manner; and every town shall so pay each employee engaged in its business if so required by him; but an employee absent from his regular place of labor at a time fixed for payment shall be paid thereafter on demand; provided, however, that the department of telecommunications and energy, after hearing, may authorize a railroad corporation or a parlor or sleeping car corporation to pay the wages of any of its employees less frequently than weekly, if such employees prefer less frequent payments, and if their interests and the interests of the public will not suffer thereby; and provided, further, that employees engaged in a bona fide executive, administrative or professional capacity as determined by the attorney general and employees whose salaries are regularly paid on a weekly basis or at a weekly rate for a work week of substantially the same number of hours from week to week may be paid bi-weekly or semi-monthly unless such employee elects at his own option to be paid monthly; and provided, further, that employees engaged in agricultural work may be paid their wages monthly; in either case, however, failure by a railroad corporation or a parlor or sleeping car corporation to pay its employees their wages as authorized by the said department, or by an employer of employees engaged in agricultural work to pay monthly the wages of his or her employees, shall be deemed a violation of this section; and provided, further, that an employer may make payment of wages prior to the time that they are required to be paid under the provisions of this section, and such wages together with any wages already earned and due under this section, if any, may be paid weekly, bi-weekly, or semi-monthly to a salaried employee, but in no event shall wages remain unpaid by an employer for more than six days from the termination of the pay period in which such wages were earned by the employee. For the purposes of this section the words salaried employee shall mean any employee whose remuneration is on a weekly, bi-weekly, semi-monthly, monthly or annual basis, even though deductions or increases may be made in a particular pay period. The word “wages” shall include any holiday or vacation payments due an

employee under an oral or written agreement. An employer, when paying an employee his wage, shall furnish to such employee a suitable pay slip, check stub or envelope showing the name of the employer, the name of the employee, the day, month, year, number of hours worked, and hourly rate, and the amounts of deductions or increases made for the pay period.

Compensation paid to public and non-public school teachers shall be deemed to be fully earned at the end of the school year, and proportionately earned during the school year; provided, however, that payment of such compensation may be deferred to the extent that equal payments may be established for a 12 month period including amounts payable in July and August subsequent to the end of the school year.

Every railroad corporation shall furnish each employee with a statement accompanying each payment of wages listing current accrued total earnings and taxes and shall also furnish said employee with each such payment a listing of his daily wages and the method used to compute such wages.

This section shall apply, so far as apt, to the payment of commissions when the amount of such commissions, less allowable or authorized deductions, has been definitely determined and has become due and payable to such employee, and commissions so determined and due such employees shall be subject to the provisions of section one hundred and fifty.

This section shall not apply to an employee of a hospital which is supported in part by contributions from the commonwealth or from any city or town, nor to an employee of an incorporated hospital which provides treatment to patients free of charge, or which is conducted as a public charity, unless such employee requests such hospital to pay him weekly. This section shall not apply to an employee of a co-operative association if he is a shareholder therein, unless he requests such association to pay him weekly, nor to casual employees as hereinbefore defined employed by the commonwealth or by any county, city or town.

No person shall by a special contract with an employee or by any other means exempt himself from this section or from section one hundred and fifty. The president and treasurer of a corporation and any officers or agents having the management of such corporation shall be deemed to be the employers of the employees of the corporation within the meaning of this section. Every public officer whose duty it is to pay money, approve, audit or verify pay rolls, or perform any other official act relative to payment of any public employees, shall be deemed to be an employer of such employees, and shall be responsible under this section for any failure to perform his official duty relative to the payment of their wages or salaries, unless he is prevented from performing the same through no fault on his part.

Any employer paying wages to an employee by check or draft shall provide for such employee such facilities for the cashing of such check or draft at a bank or elsewhere, without charge by deduction from the face amount thereof or otherwise, as shall be deemed by the attorney general to be reasonable. The state treasurer may in his discretion in writing exempt himself and any other public officer from the provisions of this paragraph.

An employer paying his employees on a weekly basis on July first, nineteen hundred and ninety-two shall, prior to paying said employees on a bi-weekly basis, provide each employee with written notice of such change at least ninety days in advance of the first such bi-weekly paycheck.

Whoever violates this section shall be punished or shall be subject to a civil citation or order as provided in section 27C.

Credits

Amended by St.1932, c. 101, § 1; St.1935, c. 350; St.1936, c. 160; St.1943, c. 378; St.1943, c. 467; St.1943, c. 563; St.1946, c. 414; St.1951, c. 28; St.1955, c. 506; St.1956, c. 259; St.1960, c. 416; St.1966, c. 319; St.1970, c. 760, § 12; St.1971, c. 387; St.1971, c. 590; St.1977, c. 664; St.1979, c. 633; St.1987, c. 559, § 29; St.1990, c. 162, § 1; St.1991, c. 138, § 331; St.1992, c. 133, §§ 502 to 504; St.1993, c. 110, § 181; St.1996, c. 151, §§ 426, 427; St.1997, c. 164, § 117; St.1998, c. 236, § 10; St.2008, c. 532, eff. April 15, 2009.

Notes of Decisions (535)

M.G.L.A. 149 § 148, MA ST 149 § 148
Current through Chapter 76 of the 2023 1st Annual Session. Some sections may be more current, see credits for details.

End of Document

 KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or PreemptedPreempted by Carey v. Gatehouse Media Massachusetts I, Inc., Mass.App.Ct., Feb. 27, 2018

 KeyCite Yellow Flag - Negative TreatmentProposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 149. Labor and Industries (Refs & Annos)

M.G.L.A. 149 § 148B

§ 148B. Persons performing service not authorized under this chapter deemed employees; exception

Effective: July 19, 2004
Currentness

(a) For the purpose of this chapter and chapter 151, an individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless:--

(1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and

(2) the service is performed outside the usual course of the business of the employer; and,

(3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

(b) The failure to withhold federal or state income taxes or to pay unemployment compensation contributions or workers compensation premiums with respect to an individual's wages shall not be considered in making a determination under this section.

(c) An individual's exercise of the option to secure workers' compensation insurance with a carrier as a sole proprietor or partnership pursuant to subsection (4) of section 1 of chapter 152 shall not be considered in making a determination under this section.

(d) Whoever fails to properly classify an individual as an employee according to this section and in so doing fails to comply, in any respect, with chapter 149, or section 1, 1A, 1B, 2B, 15 or 19 of chapter 151, or chapter 62B, shall be punished and shall be subject to all of the criminal and civil remedies, including debarment, as provided in section 27C of this chapter. Whoever fails to properly classify an individual as an employee according to this section and in so doing violates chapter 152 shall be punished as provided in section 14 of said chapter 152 and shall be subject to all of the civil remedies, including debarment, provided in section 27C of this chapter. Any entity and the president and treasurer of a corporation and any officer or agent having the management of the corporation or entity shall be liable for violations of this section.

(e) Nothing in this section shall limit the availability of other remedies at law or in equity.

Credits

Added by St.1990, c. 464. Amended by St.1992, c. 286, § 214; St.1993, c. 110, § 165; St.1998, c. 236, § 12; St.2004, c. 193, § 26, eff. July 19, 2004.

Notes of Decisions (207)

M.G.L.A. 149 § 148B, MA ST 149 § 148B

Current through Chapter 76 of the 2023 1st Annual Session. Some sections may be more current, see credits for details.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title II. Actions and Proceedings Therein (Ch. 223-236)
Chapter 231. Pleading and Practice (Refs & Annos)

M.G.L.A. 231 § 85W

§ 85W. Officers and directors of charitable corporations; tort liability

Currentness

Except as provided otherwise in this section and in section eighty-five V, no person who serves without compensation, other than reimbursement for actual expenses, as an officer, director or trustee of any nonprofit charitable organization including those corporations qualified under 26 USC section 501(c)(3) shall be liable for any civil damages as a result of any acts or omissions relating solely to the performance of his duties as an officer, director or trustee; provided, however, that the immunity conferred by this section shall not apply to any acts or omissions intentionally designed to harm or to any grossly negligent acts or omissions which result in harm to the person. Nothing in this section shall be construed as affecting or modifying any existing legal basis for determining the liability, or any defense thereto, of any person not covered by the immunity conferred by this section.

Nothing in this section shall be construed as affecting or modifying the liability of any person subject to this section for acts or omissions which are committed in the course of activities primarily commercial in nature even though carried on to obtain revenue to be used for charitable purposes, nor for any cause of action arising out of such person's operation of an automobile.

Credits
Added by St.1987, c. 345.

Notes of Decisions (13)

M.G.L.A. 231 § 85W, MA ST 231 § 85W
Current through Chapter 76 of the 2023 1st Annual Session. Some sections may be more current, see credits for details.

End of Document

Revised Statutes Annotated of the State of New Hampshire
Title XXIII. Labor (Ch. 273 to 283) (Refs & Annos)
Chapter 282-a. Unemployment Compensation (Refs & Annos)
Definitions

N.H. Rev. Stat. § 282-A:9

282-A:9 Employment.

Effective: July 1, 2011
Currentness

I. "Employment" means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, expressed or implied, together with service performed within the state which constitutes "employment" under the provisions of the Federal Unemployment Tax Act.[1] Notwithstanding any other provision of this section, the term "employment" shall also include all service performed after January 1, 1947, by an officer or member of the crew of an American vessel on or in connection with such vessel, provided that there is located within this state the operating office from which the operations of such vessel operating on navigable waters within or within and without the United States is ordinarily and regularly supervised, managed, directed and controlled. The term "employment" shall include an individual's entire service, performed within or both within and without this state, if:

(a) The service is localized within the state (i.e., performed either entirely within the state or performed both within and without the state if the service performed without is incidental to that performed within); or

(b) If the service cannot be considered as localized in any state but some of the service is performed in the state and (i) the individual's base of operations, or if there is no base of operations, then the place from which such service is directed or controlled, is in the state; or (ii) the individual's base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

II. In no event shall services performed without this state be deemed to be employment subject to this chapter if contributions are required to be paid with respect thereto under an unemployment compensation law of any other state or of the federal government. The commissioner of the department of employment security may adopt rules by which an employing unit may elect that the services performed for it entirely without this state by a resident of this state shall be deemed to constitute employment subject to this chapter.

III. Services performed by an individual for wages shall be deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the commissioner of the department of employment security that:

(a) Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and

(b) Such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(c) Such individual is customarily engaged in an independently established trade, occupation, profession, or business.

IV. The term "employment" shall not include:

(a) Agricultural labor, as defined in RSA 282-A:19, unless such services are covered under section 3306(c)(1)[2] of the Federal Unemployment Tax Act;

(b) Domestic service in a private home, local college club, or local chapter of a college fraternity or sorority, unless performed for a person who paid cash remuneration of $1,000 or more to individuals employed in such domestic service in any calendar quarter in the calendar year or the preceding calendar year;

(c) Casual labor not in the course of the employer's trade or business;

(d) [Repealed.]

(e) Service as an officer or member of a crew of an American vessel performed on or in connection with such vessel if there is not located in this state the operating office from which the operations of the vessel operating on navigable waters within or without the United States are ordinarily and regularly supervised, managed, directed and controlled;

(f) Service performed in the employ of the United States government or of an instrumentality of the United States which is (A) wholly owned by the United States, or (B) exempt from the tax imposed by section 3301[3] of the Internal Revenue Code of 1954 by virtue of any other provision of law; provided that, if this state should not be certified by the secretary of the United States department of labor under section 3304[4] of the Internal Revenue Code of 1954 for any year, then the contributions required of any instrumentalities of the United States government under this chapter with respect to such year shall be deemed to have been erroneously collected within the meaning of RSA 282-A:149 and shall be refunded by the commissioner of employment security from the fund in accordance with the provisions of said RSA 282-A:149;

(g)(1) Service performed in the employ of a school, college, hospital or university, if such service is performed by a student, intern or resident who is enrolled and is regularly attending classes or by the spouse of such a student, if such spouse is advised, at the time such spouse commences to perform such service, that the employment of such spouse to perform such service is provided under a program to provide financial assistance to such student, intern or resident, and such employment will not be covered by any program of unemployment compensation;

(2) Service performed by an individual who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program, and such

institution has so certified to the employer, except that this subparagraph shall not apply to service performed in a program established for or on behalf of an employer or group of employers;

(h) Service performed in the employ of a hospital if such service is performed by a patient of such hospital;

(i) Service performed by an inmate of a custodial or penal institution for the state, its political subdivisions, or an organization described in section 501(c)(3)[5] and exempt under section 501(a)[6] of the Internal Revenue Code;

(j) Service performed after June 30, 1939, for an employer as defined in the Railroad Unemployment Insurance Act,[7] and service performed after June 30, 1939, as an employee representative;

(k) Service performed by an individual for an employing unit as an insurance agent or as an insurance solicitor if all such service performed by such individual for such employing unit is performed for remuneration solely by way of commission;

(l) Service performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution or service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by the individual at a fixed price, his or her compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged him or her, whether or not he or she is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back;

(m) Service performed in any calendar quarter by an individual in the employ of a labor organization exempt from income tax under section 501[8] of the Internal Revenue Code of 1954 if the remuneration for such service during such calendar quarter does not exceed $50;

(n) Service performed on behalf of or for a corporation or association by an officer or director thereof, for which service no wages, as defined in RSA 282-A:15 or in the rules of the commissioner, are paid or payable to such officer or director or any person, organization or association;

(o) Service performed by an individual in the exercise of duties:

(1) As an elected official;

(2) As a member of a legislative body or as a member of the judiciary of the state or political subdivision;

(3) As a member of the state national guard or the air national guard;

(4) As an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency;

(5) In a position which is designated by state law as a major non-tenured policymaking or advisory position or as a policymaking or advisory position whose duties ordinarily do not require more than 8 hours per week to perform;

(6) As described in subparagraphs (p)(3) and (4), for the state or any of its political subdivisions;

(7) As an election official or election worker if the amount of remuneration received by the individual during the calendar year for all such services is less than $1,000.

(p) The following services performed in the employ of an organization described in section 501(c)(3)[5] and exempt under section 501(a)[6] of the Internal Revenue Code:

(1) Service in the employ of a church or convention or association of churches, or an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches or an elementary or secondary school operated primarily for religious purposes; or

(2) Service by a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

(3) Service in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, or providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market by an individual receiving such rehabilitation or remunerative work; or

(4) Service by an individual receiving work relief or work training as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof;

(q) Service performed by an individual for an employing unit as a licensed real estate broker or a licensed real estate salesman if performance of such service requires the holding of a license and all such service performed by such individual for such employing unit is performed for remuneration solely by way of commission;

(r) Service performed by a full-time student in the employ of an organized camp:

(1) If such camp:

(A) Did not operate for more than 7 months in the calendar year and did not operate for more than 7 months in the preceding calendar year; or

(B) Had average gross receipts for any 6 months in the preceding calendar year which were not more than 33- ½ percent of its average gross receipts for the other 6 months in the preceding calendar year; and

(2) If such full-time student performed services in the employ of such camp for less than 13 calendar weeks in such calendar year;

(s) Services by a direct seller if:

(1) Such person:

(A) Is engaged in the trade or business of selling, or soliciting the sale of, consumer products to any buyer on a buy-sell basis, a deposit-commission basis, or any similar basis which the commissioner prescribes by rule, for resale by the buyer or any other person in the home or otherwise than in a permanent retail establishment; or

(B) Is engaged in the trade or business of selling, or soliciting the sale of, consumer products in the home or otherwise than in a permanent retail establishment; or

(C) Is engaged in the trade or business of the delivering or distribution of newspapers or shopping news, including any services directly related to such trade or business;

(2) Substantially all the remuneration, whether or not paid in cash, for the performance of the services described in subparagraph (s)(1) is directly related to sales or other output, including the performance of services, rather than to the number of hours worked; and

(3) The services performed by the person are performed pursuant to a written contract between such person and the person for whom the services are performed and such contract provides that the person will not be treated as an employee with respect to such services for federal or unemployment compensation tax purposes;

(t) Service performed by an individual for an employing unit as a real estate appraiser if all such service performed by such individual for such employing unit is performed for remuneration solely by way of a fee; provided, however, that such exemption shall not apply to such service performed for the state or any of its political subdivisions or for an organization described in section 501(c)(3)[5] and exempt under section 501(a)[6] of the Internal Revenue Code.

(u) Service performed by an individual in the employ of such individual's son, daughter, or spouse, and service performed by a child under the age of 21 in the employ of the child's father or mother;

(v) Service performed by an individual in, or as an officer or member of the crew of a vessel while it is engaged in, the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including service performed by any such individual as an ordinary incident to any such activity, except:

(1) Service performed in connection with the catching or taking of salmon or halibut, for commercial purposes; and

(2) Service performed on or in connection with a vessel of more than 10 net tons, as determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States.

(w) Service performed by an individual who, on a temporary, part-time, contract basis, demonstrates products, offers samples of products or promotional materials to customers, conducts store audits or performs mystery shopping as part of an advertising or sales promotion for the products when such activities are conducted in the field or over the telephone on premises not used or controlled by the person for whom such contract services are being provided, however such exemptions shall not apply to such service performed for the state or any of its political subdivisions or for an organization described in section 501(c)(3)[5] and exempt under section 501(a)[6] of the Internal Revenue Code.

(x) Participation in the New Hampshire return to work program in the department of employment security which provides a structured, supervised training opportunity to individuals through a designated employer/training partner. Individuals participate on a voluntary basis and claimants continue to receive unemployment compensation during the training period as long as they remain otherwise eligible. All participants in the training program shall be at least 18 years old and registered with the department to receive employment services. The training program duration is a maximum of 6 weeks and a maximum of 24 hours per week.

V. Included And Excluded Service. If the services performed during ½ or more of any pay period by an employee for the person employing him constitute employment, all the services of such employee for such period shall be deemed to be employment; but, if the services performed during more than ½ of any such pay period by an employee for the person employing him do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment. As used in this paragraph, the term “pay period” means a period of not more than 31 consecutive days for which a payment of remuneration is ordinarily made to the employee by the person employing him. This paragraph shall not be applicable with respect to services performed in a pay period by an employee for the person employing him, where any of such services is excepted by subparagraph IV(j).

VI. Homeworkers. Service performed wholly or in part at an individual's own home or any other place, whether done for himself or others, for which remuneration or payment is made on the basis of pieces of work done, or quantity or lot of work done, or in proportion to the piece or part thereof completed, or by the hour, shall be employment; and the moneys so paid shall be wages within the meaning of this chapter. The employing unit which pays such wages shall be the employing unit of such individual for the purpose of this chapter.

VII. For the purposes of paragraph I, the exclusions under subparagraphs IV (o)(2), IV (o)(5), and IV (p)(4) shall apply to Indian tribes.

VIII. “Full-time work” is work in employment of at least 37.5 hours a week.

IX. “Part-time work” is work in employment of at least 20 hours a week but less than 37.5 hours a week.

Credits

Source. 1937, 178:1. 1939, 138:1-7. 1941, 103:1-11. RL 218:1. 1943, 56:1. 1945, 16:1; 58:1; 138:1-7. 1947, 59:1-6. 1949, 185:1-4; 262:1. 1950, 5, part 18. 1951, 34:1; 36:1; 105; 140:1, 2. 1953, 209:1. RSA 282:1(H). 1955, 141:1-6. 1957, 118:1; 313:1-3. 1961, 88:1-6. 1963, 194:1, 2. 1967, 400:2, 3. 1969, 460:1, 3. 1971, 156:1, 2, 4-16. 1973, 118:1; 589:7. 1975, 90:1; 393:1. 1977, 424:10; 441:2-4. 1979, 328:2, 13-16; 348:1, 2. 1981, 311:2; 408:3; 416:1. 1982, 35:10. 1985, 340:1. 1990, 106:1. 1991, 311:1, 2. 1993, 87:1; 260:1. 1996, 49:1-3, 6, I. 1998, 98:1-3. 1999, 244:1. 2000, 290:1. 2003, 116:2, 3, 15. 2008, 297:1, eff. Aug. 26, 2008. 2010, 145:2, eff. June 14, 2010. 2011, 82:1, eff. July 1, 2011.

Notes of Decisions (30)

Footnotes

1 26 U.S.C.A. § 3301 et seq.

2 26 U.S.C.A. § 3306(c)(1).

3 26 U.S.C.A. § 3301.

4 26 U.S.C.A. § 3304.

5 26 U.S.C.A. § 501(c)(3).

6 26 U.S.C.A. § 501(a).

7 45 U.S.C.A. § 351 et seq.

8 26 U.S.C.A. § 501.

N.H. Rev. Stat. § 282-A:9, NH ST § 282-A:9
Current through Chapter 243 (End) of the 2023 Reg. Sess. Some statute sections may be more current, see credit for details.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

New Jersey Statutes Annotated
Title 43. Pensions and Retirement and Unemployment Compensation
Subtitle 9. Social Security
Chapter 21. Unemployment Compensation (Refs & Annos)
Article 1. Unemployment Compensation Law (Refs & Annos)
General Provisions

N.J.S.A. 43:21-19

43:21-19. Definitions

Effective: July 28, 2022
Currentness

Definitions. As used in this chapter (R.S.43:21-1 et seq.), unless the context clearly requires otherwise:

(a)(1) "Annual payroll" means the total amount of wages paid during a calendar year (regardless of when earned) by an employer for employment.

(2) "Average annual payroll" means the average of the annual payrolls of any employer for the last three or five preceding calendar years, whichever average is higher, except that any year or years throughout which an employer has had no "annual payroll" because of military service shall be deleted from the reckoning; the "average annual payroll" in such case is to be determined on the basis of the prior three or five calendar years in each of which the employer had an "annual payroll" in the operation of his business, if the employer resumes his business within 12 months after separation, discharge or release from such service, under conditions other than dishonorable, and makes application to have his "average annual payroll" determined on the basis of such deletion within 12 months after he resumes his business; provided, however, that "average annual payroll" solely for the purposes of paragraph (3) of subsection (e) of R.S.43:21-7 means the average of the annual payrolls of any employer on which he paid contributions to the State disability benefits fund for the last three or five preceding calendar years, whichever average is higher; provided further that only those wages be included on which employer contributions have been paid on or before January 31 (or the next succeeding day if such January 31 is a Saturday or Sunday) immediately preceding the beginning of the 12-month period for which the employer's contribution rate is computed.

(b) "Benefits" means the money payments payable to an individual, as provided in this chapter (R.S.43:21-1 et seq.), with respect to his unemployment.

(c)(1) "Base year" with respect to benefit years commencing on or after July 1, 1986, shall mean the first four of the last five completed calendar quarters immediately preceding an individual's benefit year.

With respect to a benefit year commencing on or after July 1, 1995, if an individual does not have sufficient qualifying weeks or wages in his base year to qualify for benefits, the individual shall have the option of designating that his base year shall be the "alternative base year," which means the last four completed calendar quarters immediately preceding the individual's benefit year; except that, with respect to a benefit year commencing on or after October 1, 1995, if the individual also does

not have sufficient qualifying weeks or wages in the last four completed calendar quarters immediately preceding his benefit year to qualify for benefits, "alternative base year" means the last three completed calendar quarters immediately preceding his benefit year and, of the calendar quarter in which the benefit year commences, the portion of the quarter which occurs before the commencing of the benefit year.

The division shall inform the individual of his options under this section as amended by P.L.1995, c. 234. If information regarding weeks and wages for the calendar quarter or quarters immediately preceding the benefit year is not available to the division from the regular quarterly reports of wage information and the division is not able to obtain the information using other means pursuant to State or federal law, the division may base the determination of eligibility for benefits on the affidavit of an individual with respect to weeks and wages for that calendar quarter. The individual shall furnish payroll documentation, if available, in support of the affidavit. A determination of benefits based on an alternative base year shall be adjusted when the quarterly report of wage information from the employer is received if that information causes a change in the determination.

(2) With respect to a benefit year commencing on or after June 1, 1990 for an individual who immediately preceding the benefit year was subject to a disability compensable under the provisions of the "Temporary Disability Benefits Law," P.L.1948, c. 110 (C.43:21-25 et seq.), "base year" shall mean the first four of the last five completed calendar quarters immediately preceding the individual's period of disability, if the employment held by the individual immediately preceding the period of disability is no longer available at the conclusion of that period and the individual files a valid claim for unemployment benefits after the conclusion of that period. For the purposes of this paragraph, "period of disability" means the period defined as a period of disability by section 3 of the "Temporary Disability Benefits Law," P.L.1948, c. 110 (C.43:21-27). An individual who files a claim under the provisions of this paragraph (2) shall not be regarded as having left work voluntarily for the purposes of subsection (a) of R.S.43:21-5.

(3) With respect to a benefit year commencing on or after June 1, 1990 for an individual who immediately preceding the benefit year was subject to a disability compensable under the provisions of the workers' compensation law (chapter 15 of Title 34 of the Revised Statutes), "base year" shall mean the first four of the last five completed calendar quarters immediately preceding the individual's period of disability, if the period of disability was not longer than two years, if the employment held by the individual immediately preceding the period of disability is no longer available at the conclusion of that period and if the individual files a valid claim for unemployment benefits after the conclusion of that period. For the purposes of this paragraph, "period of disability" means the period from the time at which the individual becomes unable to work because of the compensable disability until the time that the individual becomes able to resume work and continue work on a permanent basis. An individual who files a claim under the provisions of this paragraph (3) shall not be regarded as having left work voluntarily for the purposes of subsection (a) of R.S.43:21-5.

(d) "Benefit year" with respect to any individual means the 364 consecutive calendar days beginning with the day on, or as of, which he first files a valid claim for benefits, and thereafter beginning with the day on, or as of, which the individual next files a valid claim for benefits after the termination of his last preceding benefit year. Any claim for benefits made in accordance with subsection (a) of R.S.43:21-6 shall be deemed to be a "valid claim" for the purpose of this subsection if (1) he is unemployed for the week in which, or as of which, he files a claim for benefits; and (2) he has fulfilled the conditions imposed by subsection (e) of R.S.43:21-4.

(e)(1) "Division" means the Division of Unemployment and Temporary Disability Insurance of the Department of Labor and Workforce Development, and any transaction or exercise of authority by the director of the division thereunder, or under this chapter (R.S.43:21-1 et seq.), shall be deemed to be performed by the division.

(2) “Controller” means the Office of the Assistant Commissioner for Finance and Controller of the Department of Labor and Workforce Development, established by the 1982 Reorganization Plan of the Department of Labor.

(f) “Contributions” means the money payments to the State Unemployment Compensation Fund, required by R.S.43:21-7. “Payments in lieu of contributions” means the money payments to the State Unemployment Compensation Fund by employers electing or required to make payments in lieu of contributions, as provided in section 3 or section 4 of P.L.1971, c. 346 (C.43:21-7.2 or 43:21-7.3).

(g) “Employing unit” means the State or any of its instrumentalities or any political subdivision thereof or any of its instrumentalities or any instrumentality of more than one of the foregoing or any instrumentality of any of the foregoing and one or more other states or political subdivisions or any individual or type of organization, any partnership, association, trust, estate, joint-stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has or subsequent to January 1, 1936, had in its employ one or more individuals performing services for it within this State. All individuals performing services within this State for any employing unit which maintains two or more separate establishments within this State shall be deemed to be employed by a single employing unit for all the purposes of this chapter (R.S.43:21-1 et seq.). Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all the purposes of this chapter (R.S.43:21-1 et seq.), whether such individual was hired or paid directly by such employing unit or by such agent or employee, provided the employing unit had actual or constructive knowledge of the work.

(h) “Employer” means:

(1) Any employing unit which in either the current or the preceding calendar year paid remuneration for employment in the amount of $1,000.00 or more;

(2) Any employing unit (whether or not an employing unit at the time of acquisition) which acquired the organization, trade or business, or substantially all the assets thereof, of another which, at the time of such acquisition, was an employer subject to this chapter (R.S.43:21-1 et seq.);

(3) Any employing unit which acquired the organization, trade or business, or substantially all the assets thereof, of another employing unit and which, if treated as a single unit with such other employing unit, would be an employer under paragraph (1) of this subsection;

(4) Any employing unit which together with one or more other employing units is owned or controlled (by legally enforceable means or otherwise), directly or indirectly by the same interests, or which owns or controls one or more other employing units (by legally enforceable means or otherwise), and which, if treated as a single unit with such other employing unit or interest, would be an employer under paragraph (1) of this subsection;

(5) Any employing unit for which service in employment as defined in R.S.43:21-19 (i) (1) (B) (i) is performed after December 31, 1971; and as defined in R.S.43:21-19 (i) (1) (B) (ii) is performed after December 31, 1977;

(6) Any employing unit for which service in employment as defined in R.S.43:21-19 (i) (1) (c) is performed after December 31, 1971 and which in either the current or the preceding calendar year paid remuneration for employment in the amount of $1,000.00 or more;

(7) Any employing unit not an employer by reason of any other paragraph of this subsection (h) for which, within either the current or preceding calendar year, service is or was performed with respect to which such employing unit is liable for any federal tax against which credit may be taken for contributions required to be paid into a state unemployment fund; or which, as a condition for approval of the "unemployment compensation law" for full tax credit against the tax imposed by the Federal Unemployment Tax Act,[1] is required pursuant to such act to be an employer under this chapter (R.S.43:21-1 et seq.);

(8) (Deleted by amendment, P.L.1977, c. 307.)

(9) (Deleted by amendment, P.L.1977, c. 307.)

(10) (Deleted by amendment, P.L.1977, c. 307.)

(11) Any employing unit subject to the provisions of the Federal Unemployment Tax Act within either the current or the preceding calendar year, except for employment hereinafter excluded under paragraph (7) of subsection (i) of this section;

(12) Any employing unit for which agricultural labor in employment as defined in R.S.43:21-19 (i) (1) (I) is performed after December 31, 1977;

(13) Any employing unit for which domestic service in employment as defined in R.S.43:21-19 (i) (1) (J) is performed after December 31, 1977;

(14) Any employing unit which, having become an employer under the "unemployment compensation law" (R.S.43:21-1 et seq.), has not under R.S.43:21-8 ceased to be an employer; or for the effective period of its election pursuant to R.S.43:21-8, any other employing unit which has elected to become fully subject to this chapter (R.S.43:21-1 et seq.).

(i)(1) "Employment" means:

(A) Any service performed prior to January 1, 1972, which was employment as defined in the "unemployment compensation law" (R.S.43:21-1 et seq.) prior to such date, and, subject to the other provisions of this subsection, service performed on or after January 1, 1972, including service in interstate commerce, performed for remuneration or under any contract of hire, written or oral, express or implied.

(B)(i) Service performed after December 31, 1971 by an individual in the employ of this State or any of its instrumentalities or in the employ of this State and one or more other states or their instrumentalities for a hospital or institution of higher education located in this State, if such service is not excluded from "employment" under paragraph (D) below.

(ii) Service performed after December 31, 1977, in the employ of this State or any of its instrumentalities or any political subdivision thereof or any of its instrumentalities or any instrumentality of more than one of the foregoing or any instrumentality of the foregoing and one or more other states or political subdivisions, if such service is not excluded from "employment" under paragraph (D) below.

(C) Service performed after December 31, 1971 by an individual in the employ of a religious, charitable, educational, or other organization, which is excluded from "employment" as defined in the Federal Unemployment Tax Act, solely by reason of section 3306 (c)(8) of that act,[2] if such service is not excluded from "employment" under paragraph (D) below.

(D) For the purposes of paragraphs (B) and (C), the term "employment" does not apply to services performed:

(i) In the employ of (I) a church or convention or association of churches, or (II) an organization, or school which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches;

(ii) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

(iii) Prior to January 1, 1978, in the employ of a school which is not an institution of higher education, and after December 31, 1977, in the employ of a governmental entity referred to in R.S.43:21-19 (i) (1) (B), if such service is performed by an individual in the exercise of duties

(aa) as an elected official;

(bb) as a member of a legislative body, or a member of the judiciary, of a state or political subdivision;

(cc) as a member of the State National Guard or Air National Guard;

(dd) as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood or similar emergency;

(ee) in a position which, under or pursuant to the laws of this State, is designated as a major nontenured policy-making or advisory position, or a policy-making or advisory position, the performance of the duties of which ordinarily does not require more than eight hours per week; or

(iv) By an individual receiving rehabilitation or remunerative work in a facility conducted for the purpose of carrying out a program of rehabilitation of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market;

(v) By an individual receiving work relief or work training as part of an unemployment work relief or work training program assisted in whole or in part by any federal agency or an agency of a state or political subdivision thereof; or

(vi) Prior to January 1, 1978, for a hospital in a State prison or other State correctional institution by an inmate of the prison or correctional institution and after December 31, 1977, by an inmate of a custodial or penal institution.

(E) The term "employment" shall include the services of an individual who is a citizen of the United States, performed outside the United States after December 31, 1971 (except in Canada and in the case of the Virgin Islands, after December 31, 1971) and prior to January 1 of the year following the year in which the U.S. Secretary of Labor approves the unemployment compensation law of the Virgin Islands, under section 3304 (a) of the Internal Revenue Code of 1986 (26 U.S.C. s.3304 (a)) in the employ of an American employer (other than the service which is deemed employment under the provisions of R.S.43:21-19 (i) (2) or (5) or the parallel provisions of another state's unemployment compensation law), if

(i) The American employer's principal place of business in the United States is located in this State; or

(ii) The American employer has no place of business in the United States, but (I) the American employer is an individual who is a resident of this State; or (II) the American employer is a corporation which is organized under the laws of this State; or (III) the American employer is a partnership or trust and the number of partners or trustees who are residents of this State is greater than the number who are residents of another state; or

(iii) None of the criteria of divisions (i) and (ii) of this subparagraph (E) is met but the American employer has elected to become an employer subject to the "unemployment compensation law" (R.S.43:21-1 et seq.) in this State, or the American employer having failed to elect to become an employer in any state, the individual has filed a claim for benefits, based on such service, under the law of this State;

(iv) An "American employer," for the purposes of this subparagraph (E), means (I) an individual who is a resident of the United States; or (II) a partnership, if two-thirds or more of the partners are residents of the United States; or (III) a trust, if all the trustees are residents of the United States; or (IV) a corporation organized under the laws of the United States or of any state.

(F) Notwithstanding R.S.43:21-19 (i) (2), all service performed after January 1, 1972 by an officer or member of the crew of an American vessel or American aircraft on or in connection with such vessel or aircraft, if the operating office from which the operations of such vessel or aircraft operating within, or within and without, the United States are ordinarily and regularly supervised, managed, directed, and controlled, is within this State.

(G) Notwithstanding any other provision of this subsection, service in this State with respect to which the taxes required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund or which as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act is required to be covered under the "unemployment compensation law" (R.S.43:21-1 et seq.).

(H) The term "United States" when used in a geographical sense in subsection R.S.43:21-19 (i) includes the states, the District of Columbia, the Commonwealth of Puerto Rico and, effective on the day after the day on which the U.S. Secretary of Labor

approves for the first time under section 3304 (a) of the Internal Revenue Code of 1986 (26 U.S.C. s.3304 (a)) an unemployment compensation law submitted to the Secretary by the Virgin Islands for such approval, the Virgin Islands.

(I)(i) Service performed after December 31, 1977 in agricultural labor in a calendar year for an entity which is an employer as defined in the "unemployment compensation law," (R.S.43:21-1 et seq.) as of January 1 of such year; or for an employing unit which

(aa) during any calendar quarter in either the current or the preceding calendar year paid remuneration in cash of $20,000.00 or more for individuals employed in agricultural labor, or

(bb) for some portion of a day in each of 20 different calendar weeks, whether or not such weeks were consecutive, in either the current or the preceding calendar year, employed in agricultural labor 10 or more individuals, regardless of whether they were employed at the same moment in time.

(ii) for the purposes of this subsection any individual who is a member of a crew furnished by a crew leader to perform service in agricultural labor for any other entity shall be treated as an employee of such crew leader

(aa) if such crew leader holds a certification of registration under the Migrant and Seasonal Agricultural Worker Protection Act, Pub.L.97-470 (29 U.S.C. s.1801 et seq.), or P.L.1971, c. 192 (C.34:8A-7 et seq.); or substantially all the members of such crew operate or maintain tractors, mechanized harvesting or cropdusting equipment, or any other mechanized equipment, which is provided by such crew leader; and

(bb) if such individual is not an employee of such other person for whom services were performed.

(iii) For the purposes of subparagraph (I) (i) in the case of any individual who is furnished by a crew leader to perform service in agricultural labor or any other entity and who is not treated as an employee of such crew leader under (I) (ii)

(aa) such other entity and not the crew leader shall be treated as the employer of such individual; and

(bb) such other entity shall be treated as having paid cash remuneration to such individual in an amount equal to the amount of cash remuneration paid to such individual by the crew leader (either on his own behalf or on behalf of such other entity) for the service in agricultural labor performed for such other entity.

(iv) For the purpose of subparagraph (I)(ii), the term "crew leader" means an individual who

(aa) furnishes individuals to perform service in agricultural labor for any other entity;

(bb) pays (either on his own behalf or on behalf of such other entity) the individuals so furnished by him for the service in agricultural labor performed by them; and

(cc) has not entered into a written agreement with such other entity under which such individual is designated as an employee of such other entity.

(J) Domestic service after December 31, 1977 performed in the private home of an employing unit which paid cash remuneration of $1,000.00 or more to one or more individuals for such domestic service in any calendar quarter in the current or preceding calendar year.

(2) The term “employment” shall include an individual's entire service performed within or both within and without this State if:

(A) The service is localized in this State; or

(B) The service is not localized in any state but some of the service is performed in this State, and (i) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this State; or (ii) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.

(3) Services performed within this State but not covered under paragraph (2) of this subsection shall be deemed to be employment subject to this chapter (R.S.43:21-1 et seq.) if contributions are not required and paid with respect to such services under an unemployment compensation law of any other state or of the federal government.

(4) Services not covered under paragraph (2) of this subsection and performed entirely without this State, with respect to no part of which contributions are required and paid under an unemployment compensation law of any other state or of the federal government, shall be deemed to be employment subject to this chapter (R.S.43:21-1 et seq.) if the individual performing such services is a resident of this State and the employing unit for whom such services are performed files with the division an election that the entire service of such individual shall be deemed to be employment subject to this chapter (R.S.43:21-1 et seq.).

(5) Service shall be deemed to be localized within a state if:

(A) The service is performed entirely within such state; or

(B) The service is performed both within and without such state, but the service performed without such state is incidental to the individual's service within the state; for example, is temporary or transitory in nature or consists of isolated transactions.

(6) Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter (R.S.43:21-1 et seq.) unless and until it is shown to the satisfaction of the division that:

(A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact;

(B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

(7) Provided that such services are also exempt under the Federal Unemployment Tax Act, as amended, or that contributions with respect to such services are not required to be paid into a state unemployment fund as a condition for a tax offset credit against the tax imposed by the Federal Unemployment Tax Act, as amended, the term "employment" shall not include:

(A) Agricultural labor performed prior to January 1, 1978; and after December 31, 1977, only if performed in a calendar year for an entity which is not an employer as defined in the "unemployment compensation law," (R.S.43:21-1 et seq.) as of January 1 of such calendar year; or unless performed for an employing unit which

(i) during a calendar quarter in either the current or the preceding calendar year paid remuneration in cash of $20,000.00 or more to individuals employed in agricultural labor, or

(ii) for some portion of a day in each of 20 different calendar weeks, whether or not such weeks were consecutive, in either the current or the preceding calendar year, employed in agricultural labor 10 or more individuals, regardless of whether they were employed at the same moment in time;

(B) Domestic service in a private home performed prior to January 1, 1978; and after December 31, 1977, unless performed in the private home of an employing unit which paid cash remuneration of $1,000.00 or more to one or more individuals for such domestic service in any calendar quarter in the current or preceding calendar year;

(C) Service performed by an individual in the employ of his son, daughter or spouse, and service performed by a child under the age of 18 in the employ of his father or mother;

(D) Service performed prior to January 1, 1978, in the employ of this State or of any political subdivision thereof or of any instrumentality of this State or its political subdivisions, except as provided in R.S.43:21-19 (i) (1) (B) above, and service in the employ of the South Jersey Port Corporation or its successors;

(E) Service performed in the employ of any other state or its political subdivisions or of an instrumentality of any other state or states or their political subdivisions to the extent that such instrumentality is with respect to such service exempt under the Constitution of the United States from the tax imposed under the Federal Unemployment Tax Act, as amended, except as provided in R.S.43:21-19 (i) (1) (B) above;

(F) Service performed in the employ of the United States Government or of any instrumentality of the United States exempt under the Constitution of the United States from the contributions imposed by the "unemployment compensation law," except that to the extent that the Congress of the United States shall permit states to require any instrumentalities of the United States to make payments into an unemployment fund under a state unemployment compensation law, all of the provisions of this act shall be applicable to such instrumentalities, and to service performed for such instrumentalities, in the same manner, to the

same extent and on the same terms as to all other employers, employing units, individuals and services; provided that if this State shall not be certified for any year by the Secretary of Labor of the United States under section 3304 of the federal Internal Revenue Code of 1986 (26 U.S.C. s.3304), the payments required of such instrumentalities with respect to such year shall be refunded by the division from the fund in the same manner and within the same period as is provided in R.S.43:21-14 (f) with respect to contributions erroneously paid to or collected by the division;

(G) Services performed in the employ of fraternal beneficiary societies, orders, or associations operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system and providing for the payment of life, sick, accident, or other benefits to the members of such society, order, or association, or their dependents;

(H) Services performed as a member of the board of directors, a board of trustees, a board of managers, or a committee of any bank, building and loan, or savings and loan association, incorporated or organized under the laws of this State or of the United States, where such services do not constitute the principal employment of the individual;

(I) Service with respect to which unemployment insurance is payable under an unemployment insurance program established by an Act of Congress;

(J) Service performed by agents of mutual fund brokers or dealers in the sale of mutual funds or other securities, by agents of insurance companies, exclusive of industrial insurance agents or by agents of investment companies, if the compensation to such agents for such services is wholly on a commission basis;

(K) Services performed by real estate salesmen or brokers who are compensated wholly on a commission basis;

(L) Services performed in the employ of any veterans' organization chartered by an Act of Congress or of any auxiliary thereof, no part of the net earnings of which organization, or auxiliary thereof, inures to the benefit of any private shareholder or individual;

(M) Service performed for or in behalf of the owner or operator of any theater, ballroom, amusement hall or other place of entertainment, not in excess of 10 weeks in any calendar year for the same owner or operator, by any leader or musician of a band or orchestra, commonly called a “name band,” entertainer, vaudeville artist, actor, actress, singer or other entertainer;

(N) Services performed after January 1, 1973 by an individual for a labor union organization, known and recognized as a union local, as a member of a committee or committees reimbursed by the union local for time lost from regular employment, or as a part-time officer of a union local and the remuneration for such services is less than $1,000.00 in a calendar year;

(O) Services performed in the sale or distribution of merchandise by home-to-home salespersons or in-the-home demonstrators whose remuneration consists wholly of commissions or commissions and bonuses;

(P) Service performed in the employ of a foreign government, including service as a consular, nondiplomatic representative, or other officer or employee;

(Q) Service performed in the employ of an instrumentality wholly owned by a foreign government if (i) the service is of a character similar to that performed in foreign countries by employees of the United States Government or of an instrumentality thereof, and (ii) the division finds that the United States Secretary of State has certified to the United States Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar services performed in the foreign country by employees of the United States Government and of instrumentalities thereof;

(R) Service in the employ of an international organization entitled to enjoy the privileges, exemptions and immunities under the International Organizations Immunities Act (22 U.S.C. s.288 et seq.);

(S) Service covered by an election duly approved by an agency charged with the administration of any other state or federal unemployment compensation or employment security law, in accordance with an arrangement pursuant to R.S.43:21-21 during the effective period of such election;

(T) Service performed in the employ of a school, college, or university if such service is performed (i) by a student enrolled at such school, college, or university on a full-time basis in an educational program or completing such educational program leading to a degree at any of the severally recognized levels, or (ii) by the spouse of such a student, if such spouse is advised at the time such spouse commences to perform such service that (I) the employment of such spouse to perform such service is provided under a program to provide financial assistance to such student by such school, college, or university, and (II) such employment will not be covered by any program of unemployment insurance;

(U) Service performed by an individual who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on, as a student in a full-time program, taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program, and such institution has so certified to the employer, except that this subparagraph shall not apply to service performed in a program established for or on behalf of an employer or group of employers;

(V) Service performed in the employ of a hospital, if such service is performed by a patient of the hospital; service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and regularly attending classes in a nurses' training school approved under the laws of this State;

(W) Services performed after the effective date of this amendatory act by agents of mutual benefit associations if the compensation to such agents for such services is wholly on a commission basis;

(X) Services performed by operators of motor vehicles weighing 18,000 pounds or more, licensed for commercial use and used for the highway movement of motor freight, who own their equipment or who lease or finance the purchase of their equipment through an entity which is not owned or controlled directly or indirectly by the entity for which the services were performed and who were compensated by receiving a percentage of the gross revenue generated by the transportation move or by a schedule of payment based on the distance and weight of the transportation move;

(Y) (Deleted by amendment, P.L.2009, c. 211.)

(Z) Services performed, using facilities provided by a travel agent, by a person, commonly known as an outside travel agent, who acts as an independent contractor, is paid on a commission basis, sets his own work schedule and receives no benefits, sick leave, vacation or other leave from the travel agent owning the facilities.

(AA) Services provided by a commercial fisherman whose compensation is comprised solely of a percentage of fish caught or a percentage of the proceeds from the sale of the catch.

(8) If one-half or more of the services in any pay period performed by an individual for an employing unit constitutes employment, all the services of such individual shall be deemed to be employment; but if more than one-half of the service in any pay period performed by an individual for an employing unit does not constitute employment, then none of the service of such individual shall be deemed to be employment. As used in this paragraph, the term "pay period" means a period of not more than 31 consecutive days for which a payment for service is ordinarily made by an employing unit to individuals in its employ.

(9) Services performed by the owner of a limousine franchise (franchisee) shall not be deemed to be employment subject to the "unemployment compensation law," R.S.43:21-1 et seq., with regard to the franchisor if:

(A) The limousine franchisee is incorporated;

(B) The franchisee is subject to regulation by the Interstate Commerce Commission;

(C) The limousine franchise exists pursuant to a written franchise arrangement between the franchisee and the franchisor as defined by section 3 of P.L.1971, c. 356 (C.56:10-3); and

(D) The franchisee registers with the Department of Labor and Workforce Development and receives an employer registration number.

(10) Services performed by a legal transcriber, or certified court reporter certified pursuant to P.L.1940, c. 175 (C.45:15B-1 et seq.), shall not be deemed to be employment subject to the "unemployment compensation law," R.S.43:21-1 et seq., if those services are provided to a third party by the transcriber or reporter who is referred to the third party pursuant to an agreement with another legal transcriber or legal transcription service, or certified court reporter or court reporting service, on a freelance basis, compensation for which is based upon a fee per transcript page, flat attendance fee, or other flat minimum fee, or combination thereof, set forth in the agreement.

For purposes of this paragraph (10): "legal transcription service" and "legal transcribing" mean making use, by audio, video or voice recording, of a verbatim record of court proceedings, depositions, other judicial proceedings, meetings of boards, agencies, corporations, or other bodies or groups, and causing that record to be printed in readable form or produced on a computer screen in readable form; and "legal transcriber" means a person who engages in "legal transcribing."

(j) "Employment office" means a free public employment office, or branch thereof operated by this State or maintained as a part of a State-controlled system of public employment offices.

(k) (Deleted by amendment, P.L.1984, c. 24.)

(*l*) "State" includes, in addition to the states of the United States of America, the District of Columbia, the Virgin Islands and Puerto Rico.

(m) "Unemployment."

(1) An individual shall be deemed "unemployed" for any week during which:

(A) The individual is not engaged in full-time work and with respect to which his remuneration is less than his weekly benefit rate, including any week during which he is on vacation without pay; provided such vacation is not the result of the individual's voluntary action, except that for benefit years commencing on or after July 1, 1984, an officer of a corporation, or a person who has more than a 5% equitable or debt interest in the corporation, whose claim for benefits is based on wages with that corporation shall not be deemed to be unemployed in any week during the individual's term of office or ownership in the corporation; or

(B) The individual is eligible for and receiving a self-employment assistance allowance pursuant to the requirements of P.L.1995, c. 394 (C.43:21-67 et al.).

(2) The term "remuneration" with respect to any individual for benefit years commencing on or after July 1, 1961, and as used in this subsection, shall include only that part of the same which in any week exceeds 20% of his weekly benefit rate (fractional parts of a dollar omitted) or $5.00, whichever is the larger, and shall not include any moneys paid to an individual by a county board of elections for work as a board worker on an election day or for work pursuant to subsection d. of section 1 of P.L.2021, c. 40 (C.19:15A-1) during the early voting period.

(3) An individual's week of unemployment shall be deemed to commence only after the individual has filed a claim at an unemployment insurance claims office, except as the division may by regulation otherwise prescribe.

(n) "Unemployment compensation administration fund" means the unemployment compensation administration fund established by this chapter (R.S.43:21-1 et seq.), from which administrative expenses under this chapter (R.S.43:21-1 et seq.) shall be paid.

(*o*) "Wages" means remuneration paid by employers for employment. If a worker receives gratuities regularly in the course of his employment from other than his employer, his "wages" shall also include the gratuities so received, if reported in writing to his employer in accordance with regulations of the division, and if not so reported, his "wages" shall be determined in accordance with the minimum wage rates prescribed under any labor law or regulation of this State or of the United States, or the amount of remuneration actually received by the employee from his employer, whichever is the higher.

(p) "Remuneration" means all compensation for personal services, including commission and bonuses and the cash value of all compensation in any medium other than cash.

(q) “Week” means for benefit years commencing on or after October 1, 1984, the calendar week ending at midnight Saturday, or as the division may by regulation prescribe.

(r) “Calendar quarter” means the period of three consecutive calendar months ending March 31, June 30, September 30, or December 31.

(s) “Investment company” means any company as defined in subsection a. of section 1 of P.L.1938, c. 322 (C.17:16A-1).

(t)(1) (Deleted by amendment, P.L.2001, c. 17).

(2) “Base week,” commencing on or after January 1, 1996 and before January 1, 2001, means:

(A) Any calendar week during which the individual earned in employment from an employer remuneration not less than an amount which is 20% of the Statewide average weekly remuneration defined in subsection (c) of R.S.43:21-3 which amount shall be adjusted to the next higher multiple of $1.00 if not already a multiple thereof, except that if in any calendar week an individual subject to this subparagraph (A) is in employment with more than one employer, the individual may in that calendar week establish a base week with respect to each of the employers from whom the individual earns remuneration equal to not less than the amount defined in this subparagraph (A) during that week; or

(B) If the individual does not establish in his base year 20 or more base weeks as defined in subparagraph (A) of this paragraph (2), any calendar week of an individual's base year during which the individual earned in employment from an employer remuneration not less than an amount 20 times the minimum wage in effect pursuant to section 5 of P.L.1966, c. 113 (C.34:11-56a4) on October 1 of the calendar year preceding the calendar year in which the benefit year commences, which amount shall be adjusted to the next higher multiple of $1.00 if not already a multiple thereof, except that if in any calendar week an individual subject to this subparagraph (B) is in employment with more than one employer, the individual may in that calendar week establish a base week with respect to each of the employers from whom the individual earns remuneration not less than the amount defined in this subparagraph (B) during that week.

(3) “Base week,” commencing on or after January 1, 2001, means any calendar week during which the individual earned in employment from an employer remuneration not less than an amount 20 times the minimum wage in effect pursuant to section 5 of P.L.1966, c. 113 (C.34:11-56a4) on October 1 of the calendar year preceding the calendar year in which the benefit year commences, which amount shall be adjusted to the next higher multiple of $1.00 if not already a multiple thereof, except that if in any calendar week an individual subject to this paragraph (3) is in employment with more than one employer, the individual may in that calendar week establish a base week with respect to each of the employers from whom the individual earns remuneration equal to not less than the amount defined in this paragraph (3) during that week.

(u) “Average weekly wage” means the amount derived by dividing an individual's total wages received during his base year base weeks (as defined in subsection (t) of this section) from that most recent base year employer with whom he has established at least 20 base weeks, by the number of base weeks in which such wages were earned. In the event that such claimant had no employer in his base year with whom he had established at least 20 base weeks, then such individual's average weekly wage shall be computed as if all of his base week wages were received from one employer and as if all his base weeks of employment had been performed in the employ of one employer.

For the purpose of computing the average weekly wage, the monetary alternative in subparagraph (B) of paragraph (2) of subsection (e) of R.S.43:21-4 shall only apply in those instances where the individual did not have at least 20 base weeks in the base year. For benefit years commencing on or after July 1, 1986, "average weekly wage" means the amount derived by dividing an individual's total base year wages by the number of base weeks worked by the individual during the base year; provided that for the purpose of computing the average weekly wage, the maximum number of base weeks used in the divisor shall be 52.

(v) "Initial determination" means, subject to the provisions of R.S.43:21-6(b)(2) and (3), a determination of benefit rights as measured by an eligible individual's base year employment with a single employer covering all periods of employment with that employer during the base year.

(w) "Last date of employment" means the last calendar day in the base year of an individual on which he performed services in employment for a given employer.

(x) "Most recent base year employer" means that employer with whom the individual most recently, in point of time, performed service in employment in the base year.

(y)(1) "Educational institution" means any public or other nonprofit institution (including an institution of higher education):

(A) In which participants, trainees, or students are offered an organized course of study or training designed to transfer to them knowledge, skills, information, doctrines, attitudes or abilities from, by or under the guidance of an instructor or teacher;

(B) Which is approved, licensed or issued a permit to operate as a school by the State Department of Education or other government agency that is authorized within the State to approve, license or issue a permit for the operation of a school; and

(C) Which offers courses of study or training which may be academic, technical, trade, or preparation for gainful employment in a recognized occupation.

(2) "Institution of higher education" means an educational institution which:

(A) Admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate;

(B) Is legally authorized in this State to provide a program of education beyond high school;

(C) Provides an educational program for which it awards a bachelor's or higher degree, or provides a program which is acceptable for full credit toward such a degree, a program of post-graduate or post-doctoral studies, or a program of training to prepare students for gainful employment in a recognized occupation; and

(D) Is a public or other nonprofit institution.

Notwithstanding any of the foregoing provisions of this subsection, all colleges and universities in this State are institutions of higher education for purposes of this section.

(z) "Hospital" means an institution which has been licensed, certified or approved under the law of this State as a hospital.

Credits

L.1938, c. 312, p. 710, § 1. Amended by L.1938, c. 314, p. 786, § 1; L.1939, c. 94, p. 204, § 6A; L.1940, c. 247, p. 943, § 3; L.1941, c. 374, p. 972, § 1; L.1941, c. 385, p. 992, § 1; L.1942, c. 2, p. 13, § 1; L.1945, c. 73, p. 369, § 3; L.1946, c. 37, p. 79, § 1; L.1946, c. 278, p. 950, § 1; L.1947, c. 35, p. 102, § 4; L.1948, c. 318, p. 1273, § 1; L.1950, c. 304, p. 1031, § 1; L.1951, c. 212, p. 759, § 1; L.1952, c. 187, p. 665, § 8; L.1953, c. 218, p. 1641, § 1; L.1955, c. 203, p. 800, § 3; L.1956, c. 65, p. 140, § 1; L.1961, c. 43, p. 462, § 9; L.1962, c. 49, § 1; L.1963, c. 66, § 1; L.1964, c. 111, § 1; L.1967, c. 30, § 7, eff. Jan. 1, 1968; L.1968, c. 360, § 1, eff. Jan. 1, 1969; L.1968, c. 366, § 1, eff. Jan. 1, 1969; L.1968, c. 469, § 1, eff. March 6, 1968; L.1970, c. 279, § 1, eff. Dec. 3, 1970; L.1971, c. 24, § 1, eff. Jan. 1, 1972; L.1971, c. 346, § 10, eff. Jan. 1, 1972; L.1973, c. 94, § 1, eff. April 25, 1973; L.1974, c. 86, § 7, eff. Jan. 1, 1975; L.1977, c. 307, § 8, eff. Dec. 30, 1977; L.1979, c. 379, § 1, eff. Feb. 5, 1980; L.1984, c. 24, § 12; L.1984, c. 216, § 2; L.1985, c. 378, § 1, eff. Oct. 1, 1985; L.1985, c. 389, § 1, eff. Oct. 1, 1985; L.1989, c. 265, § 1, eff. Jan. 4, 1990; L.1991, c. 486, § 1, eff. Jan. 18, 1992; L.1993, c. 312, § 1, eff. Dec. 23, 1993; L.1994, c. 112, § 2, eff. Sept. 29, 1994; L.1995, c. 234, § 3, eff. Aug. 22, 1995; L.1995, c. 394, § 9, eff. July 8, 1996; L.2001, c. 17, § 2, eff. Jan. 29, 2001; L.2002, c. 94, § 2, eff. Nov. 8, 2002; L.2009, c. 211, § 1, eff. Jan. 16, 2010; L.2017, c. 230, § 1, eff. Aug. 7, 2017; L.2021, c. 346, § 1, eff. Jan. 10, 2022; L.2022, c. 71, § 4, eff. July 28, 2022.

Editors' Notes

ASSEMBLY LABOR COMMITTEE STATEMENT

Assembly, No. 2893--L.1991, c. 486

The Assembly Labor Committee reports favorably the Assembly Committee Substitute for Assembly Bill No. 2893.

This committee substitute amends the "unemployment compensation law," (R.S.43:21-1 et seq.) to provide that if an individual, after receiving temporary disability or workers' compensation benefits, applies for unemployment compensation benefits, the base year used to determine the individual's eligibility for unemployment benefits and the level of benefits shall be the first four of the last five full calendar quarters immediately preceding the individual's period of disability. In the case of an individual who received worker's compensation, the provisions of the substitute apply only if the period of disability is not more than two years.

At present, the base year for determining unemployment compensation benefit eligibility is the first four of the last five full calendar quarters immediately prior to the application for the benefits. Consequently, an individual who is unable to obtain work after being disabled for a large part of the base year is often prevented from obtaining unemployment benefits, no matter how long the individual was employed before the disability. This substitute would remedy that situation by insuring that, with respect to unemployment compensation benefits, a worker unable to find work is not penalized for a previous disability.

The bill also requires the Department of Labor to notify individuals receiving temporary disability of workers' compensation benefits of the conditions under which they are eligible to receive unemployment compensation benefits following or period of disability.

GOVERNOR'S RECONSIDERATION AND RECOMMENDATION STATEMENT

Senate, No. 2690--L.1985, c. 389

* * * * * *

This legislation exempts services performed by certain certified shorthand reporters from coverage under the Unemployment Compensation Law and provides retroactive tax forgiveness to all freelance shorthand reporters, referring shorthand reporters and referring shorthand reporting services for any unemployment compensation or temporary disability contributions assessed prior to the effective date of this act.

Although I agree that freelance certified shorthand reporters are sufficiently independent to be excluded as employees for purposes of unemployment insurance, I am recommending the deletion of language which inadvertently restricts the applicability of this exemption along with other language which is unnecessary for the purpose of establishing the exemption.

The exemption proposed by this bill requires that, among other things, the charge to the third party for services performed by a certified shorthand reporter is billed or collected by the referring reporter or shorthand reporting service. While this system of billing and collecting fees represents the normal industry practice, there are occasions where a certified shorthand reporter may directly bill the third party for services rendered or collect the fees for these services. Because the method of billing for or collecting fees is not in and of itself indicative of the independent character of a certified shorthand reporter, I am proposing the elimination of this language. As a result, all certified shorthand reporters who meet the other criteria established in the bill will be exempt from the coverage of the Unemployment Compensation Law regardless of the method in which their services are billed for or collected.

I am also recommending the elimination of language providing that the exemption will apply regardless of whether the performance of the certified shorthand reporter services are under the control or direction of the referring reporter or shorthand reporting service and regardless of whether the reporter is customarily engaged in an independent court reporting business apart from the referring reporter or reporting service. This language is parallel to the provisions of N.J.S. 43:21-19(i)(6), which establishes the standards for independent contractors for purposes of exclusion from the Unemployment Compensation Law. Because this legislation excludes the services performed by certain certified shorthand reporters from the definition of “employment” provided by N.J.S. 43:21-19(i)(7), this language is inapplicable and unnecessary.

I am further proposing the deletion of Section 2 of the bill, which provides that any unemployment or disability insurance tax payable by freelance shorthand reporters or shorthand reporting services assessed prior to the effective date of this act shall not be collected. The legitimacy of these taxes has been established by a series of administrative decisions going back as far as 1973 and has recently been affirmed by an Appellate Division decision. Until the enactment of any exception for certified shorthand reporters, these taxes will continue to be properly due and payable. Furthermore, it represents questionable public policy to retroactively forgive properly assessed taxes, as the better practice is to have all newly enacted tax exemptions apply prospectively. In addition, any retroactive tax forgiveness would give rise to problems of fairness in regard to those certified shorthand reporters and reporting services which have already paid all required taxes.

Finally, I am recommending that this bill become effective on October 1, 1985 in order to conform to tax reporting periods.

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GOVERNOR'S RECONSIDERATION AND RECOMMENDATION STATEMENT

Senate, No. 2840--L.1985, c. 378

* * * * * *

This legislation exempts certain operators of commercial vehicles from the "unemployment compensation law," R.S. 43:21-1 et seq. The bill is intended to apply to truck drivers who own or lease their own vehicles.

While I agree that certain truck drivers who own or lease their own vehicles are independent contractors and should be exempt from the "unemployment compensation law," I believe that this legislation is overly broad and could apply to other operators of commercial vehicles. Because this bill would apply to operators of all commercial motor vehicles, regardless of size, I am concerned that certain operators of small motor vehicles who are currently considered to be employees may be terminated or disenfranchised from the protection of unemployment and disability insurance through no choice of their own. In an attempt to restrict the applicability of this bill to larger motor vehicles, I am recommending that the exemption pertain only to motor vehicles which weigh 18,000 lbs. or more. This will serve to protect the interest of small motor vehicle operators while effectuating the legislative intent to provide an exception to independent truck drivers.

I am also proposing a clarification to the Assembly Committee amendment to this bill, which provides that "No operator shall subcontract for any purpose other than the movement of motor freight." Although this amendment was intended to restrict the applicability of the bill to the highway movement of motor freight, it can be construed to prohibit a commercial vehicle operator from subcontracting for purposes unrelated to the movement of motor freight, such as the repair or servicing of his motor vehicle. In order to avoid a situation under which motor vehicle operators may be treated differently for unemployment purposes based solely upon subcontracting for purposes unrelated to the movement of motor freight, I have recommended language which effectuates the intent of the amendment in a more lucid manner.

Finally, I have recommended that the effective date of this bill be amended in order to coincide with the beginning of the next tax period.

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Notes of Decisions (137)

Footnotes

1 26 U.S.C.A. § 3301 et seq.

2 26 U.S.C.A. § 3306 et seq.

N. J. S. A. 43:21-19, NJ ST 43:21-19
Current with laws through L.2023, c. 171 and J.R. No. 15.

End of Document

West's New Mexico Statutes Annotated
Chapter 51. Unemployment Compensation
Article 1. Unemployment Compensation (Refs & Annos)

N. M. S. A. 1978, § 51-1-42

§ 51-1-42. Definitions

Effective: January 1, 2015
Currentness

As used in the Unemployment Compensation Law:

A. “base period” means the first four of the last five completed calendar quarters immediately preceding the first day of an individual's benefit year, except that “base period” means for benefit years beginning on or after January 1, 2005 for an individual who does not have sufficient wages in the base period as defined to qualify for benefits pursuant to Section 51-1-5 NMSA 1978, the individual's base period shall be the last four completed calendar quarters immediately preceding the first day of the individual's benefit year if that period qualifies the individual for benefits pursuant to Section 51-1-5 NMSA 1978; provided that:

(1) wages that fall within the base period of claims established pursuant to this subsection are not available for reuse in qualifying for a subsequent benefit year; and

(2) in the case of a combined-wage claim pursuant to the arrangement approved by the federal secretary of labor, the base period is that base period applicable under the unemployment compensation law of the paying state;

B. “benefits” means the cash unemployment compensation payments payable to an eligible individual pursuant to Section 51-1-4 NMSA 1978 with respect to the individual's weeks of unemployment;

C. “contributions” means the money payments required by Section 51-1-9 NMSA 1978 to be made into the fund by an employer on account of having individuals performing services for the employer;

D. “employing unit” means any individual or type of organization, including any partnership, association, cooperative, trust, estate, joint-stock company, agricultural enterprise, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, household, fraternity or club, the legal representative of a deceased person or any state or local government entity to the extent required by law to be covered as an employer, that has in its employ one or more individuals performing services for it within this state. An individual performing services for an employing unit that maintains two or more separate establishments within this state shall be deemed to be employed by a single employing unit for all the purposes of the Unemployment Compensation Law. An individual performing services for a contractor, subcontractor or agent that is performing work or services for an employing unit, as described in this subsection, that are within the scope of the employing unit's usual trade, occupation, profession or business, shall be deemed to be in the

employ of the employing unit for all purposes of the Unemployment Compensation Law unless the contractor, subcontractor or agent is itself an employer within the provisions of Subsection E of this section;

E. "employer" includes:

(1) an employing unit that:

(a) unless otherwise provided in this section, paid for service in employment as defined in Subsection F of this section wages of four hundred fifty dollars ($450) or more in any calendar quarter in either the current or preceding calendar year or had in employment, as defined in Subsection F of this section, for some portion of a day in each of twenty different calendar weeks during either the current or the preceding calendar year, and irrespective of whether the same individual was in employment in each such day, at least one individual;

(b) for the purposes of Subparagraph (a) of this paragraph, if any week includes both December 31 and January 1, the days of that week up to January 1 shall be deemed one calendar week and the days beginning January 1, another such week; and

(c) for purposes of defining an "employer" under Subparagraph (a) of this paragraph, the wages or remuneration paid to individuals performing services in employment in agricultural labor or domestic services as provided in Paragraphs (6) and (7) of Subsection F of this section shall not be taken into account; except that any employing unit determined to be an employer of agricultural labor under Paragraph (6) of Subsection F of this section shall be an employer under Subparagraph (a) of this paragraph so long as the employing unit is paying wages or remuneration for services other than agricultural services;

(2) any individual or type of organization that acquired the trade or business or substantially all of the assets thereof, of an employing unit that at the time of the acquisition was an employer subject to the Unemployment Compensation Law; provided that where such an acquisition takes place, the secretary may postpone activating the individual or type of organization pursuant to Section 51-1-11 NMSA 1978 until such time as the successor employer has employment as defined in Subsection F of this section;

(3) an employing unit that acquired all or part of the organization, trade, business or assets of another employing unit and that, if treated as a single unit with the other employing unit or part thereof, would be an employer under Paragraph (1) of this subsection;

(4) an employing unit not an employer by reason of any other paragraph of this subsection:

(a) for which, within either the current or preceding calendar year, service is or was performed with respect to which such employing unit is liable for any federal tax against which credit may be taken for contributions required to be paid into a state unemployment fund; or

(b) that, as a condition for approval of the Unemployment Compensation Law for full tax credit against the tax imposed by the Federal Unemployment Tax Act,[1] is required, pursuant to that act, to be an "employer" under the Unemployment Compensation Law;

(5) an employing unit that, having become an employer under Paragraph (1), (2), (3) or (4) of this subsection, has not, under Section 51-1-18 NMSA 1978, ceased to be an employer subject to the Unemployment Compensation Law;

(6) for the effective period of its election pursuant to Section 51-1-18 NMSA 1978, any other employing unit that has elected to become fully subject to the Unemployment Compensation Law;

(7) an employing unit for which any services performed in its employ are deemed to be performed in this state pursuant to an election under an arrangement entered into in accordance with Subsection A of Section 51-1-50 NMSA 1978; and

(8) an Indian tribe as defined in 26 USCA Section 3306(u) for which service in employment is performed;

F. "employment":

(1) means any service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied;

(2) means an individual's entire service, performed within or both within and without this state if:

(a) the service is primarily localized in this state with services performed outside the state being only incidental thereto; or

(b) the service is not localized in any state but some of the service is performed in this state and: 1) the base of operations or, if there is no base of operations, the place from which such service is directed or controlled, is in this state; or 2) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed but the individual's residence is in this state;

(3) means services performed within this state but not covered under Paragraph (2) of this subsection if contributions or payments in lieu of contributions are not required and paid with respect to such services under an unemployment compensation law of any other state, the federal government or Canada;

(4) means services covered by an election pursuant to Section 51-1-18 NMSA 1978 and services covered by an election duly approved by the secretary in accordance with an arrangement pursuant to Paragraph (1) of Subsection A of Section 51-1-50 NMSA 1978 shall be deemed to be employment during the effective period of the election;

(5) means services performed by an individual for an employer for wages or other remuneration unless and until it is established by a preponderance of evidence that:

(a) the individual has been and will continue to be free from control or direction over the performance of the services both under the individual's contract of service and in fact;

(b) the service is either outside the usual course of business for which the service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(c) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the contract of service;

(6) means service performed after December 31, 1977 by an individual in agricultural labor as defined in Subsection Q of this section if:

(a) the service is performed for an employing unit that: 1) paid remuneration in cash of twenty thousand dollars ($20,000) or more to individuals in that employment during any calendar quarter in either the current or the preceding calendar year; or 2) employed in agricultural labor ten or more individuals for some portion of a day in each of twenty different calendar weeks in either the current or preceding calendar year, whether or not the weeks were consecutive, and regardless of whether the individuals were employed at the same time;

(b) the service is not performed before January 1, 1980 by an individual who is an alien admitted to the United States to perform service in agricultural labor pursuant to Sections 214(c) and 101(15)(H)[2] of the federal Immigration and Nationality Act;[3] and

(c) for purposes of this paragraph, an individual who is a member of a crew furnished by a crew leader to perform service in agricultural labor for a farm operator or other person shall be treated as an employee of the crew leader: 1) if the crew leader meets the requirements of a crew leader as defined in Subsection L of this section; or 2) substantially all the members of the crew operate or maintain mechanized agricultural equipment that is provided by the crew leader; and 3) the individuals performing the services are not, by written agreement or in fact, within the meaning of Paragraph (5) of this subsection, performing services in employment for the farm operator or other person;

(7) means service performed after December 31, 1977 by an individual in domestic service in a private home, local college club or local chapter of a college fraternity or sorority for a person or organization that paid cash remuneration of one thousand dollars ($1,000) in any calendar quarter in the current or preceding calendar year to individuals performing such services;

(8) means service performed after December 31, 1971 by an individual in the employ of a religious, charitable, educational or other organization but only if the following conditions are met:

(a) the service is excluded from “employment” as defined in the Federal Unemployment Tax Act[4] solely by reason of Section 3306(c)(8) of that act; and

(b) the organization meets the requirements of "employer" as provided in Subparagraph (a) of Paragraph (1) of Subsection E of this section;

(9) means service of an individual who is a citizen of the United States, performed outside the United States, except in Canada, after December 31, 1971 in the employ of an American employer, other than service that is deemed "employment" under the provisions of Paragraph (2) of this subsection or the parallel provisions of another state's law, if:

(a) the employer's principal place of business in the United States is located in this state;

(b) the employer has no place of business in the United States, but: 1) the employer is an individual who is a resident of this state; 2) the employer is a corporation organized under the laws of this state; or 3) the employer is a partnership or a trust and the number of the partners or trustees who are residents of this state is greater than the number who are residents of any one other state; or

(c) none of the criteria of Subparagraphs (a) and (b) of this paragraph are met, but the employer has elected coverage in this state or, the employer having failed to elect coverage in any state, the individual has filed a claim for benefits, based on such service, under the law of this state.

"American employer" for the purposes of this paragraph means a person who is: 1) an individual who is a resident of the United States; 2) a partnership if two-thirds or more of the partners are residents of the United States; 3) a trust if all of the trustees are residents of the United States; or 4) a corporation organized under the laws of the United States or of any state. For the purposes of this paragraph, "United States" includes the United States, the District of Columbia, the commonwealth of Puerto Rico and the Virgin Islands;

(10) means, notwithstanding any other provisions of this subsection, service with respect to which a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund or which as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act is required to be covered under the Unemployment Compensation Law;

(11) means service performed in the employ of an Indian tribe if:

(a) the service is excluded from "employment" as defined in 26 USCA Section 3306(c) solely by reason of 26 USCA Section 3306(c)(7); and

(b) the service is not otherwise excluded from employment pursuant to the Unemployment Compensation Law;

(12) does not include:

(a) service performed in the employ of: 1) a church or convention or association of churches; or 2) an organization that is operated primarily for religious purposes and that is operated, supervised, controlled or principally supported by a church or convention or association of churches;

(b) service performed by a duly ordained, commissioned or licensed minister of a church in the exercise of such ministry or by a member of a religious order in the exercise of duties required by such order;

(c) service performed by an individual in the employ of the individual's son, daughter or spouse, and service performed by a child under the age of majority in the employ of the child's father or mother;

(d) service performed in the employ of the United States government or an instrumentality of the United States immune under the constitution of the United States from the contributions imposed by the Unemployment Compensation Law except that to the extent that the congress of the United States shall permit states to require any instrumentalities of the United States to make payments into an unemployment fund under a state unemployment compensation act, all of the provisions of the Unemployment Compensation Law shall be applicable to such instrumentalities, and to service performed for such instrumentalities in the same manner, to the same extent and on the same terms as to all other employers, employing units, individuals and services; provided that if this state shall not be certified for any year by the secretary of labor of the United States under Section 3304 of the federal Internal Revenue Code of 1986, 26 U.S.C. Section 3304, the payments required of such instrumentalities with respect to such year shall be refunded by the department from the fund in the same manner and within the same period as is provided in Subsection D of Section 51-1-36 NMSA 1978 with respect to contributions erroneously collected;

(e) service performed in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market, by an individual receiving that rehabilitation or remunerative work;

(f) service with respect to which unemployment compensation is payable under an unemployment compensation system established by an act of congress;

(g) service performed in the employ of a foreign government, including service as a consular or other officer or employee or a nondiplomatic representative;

(h) service performed by an individual for a person as an insurance agent or as an insurance solicitor, if all such service performed by the individual for the person is performed for remuneration solely by way of commission;

(i) service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

(j) service covered by an election duly approved by the agency charged with the administration of any other state or federal unemployment compensation law, in accordance with an arrangement pursuant to Paragraph (1) of Subsection A of Section 51-1-50 NMSA 1978 during the effective period of the election;

(k) service performed, as part of an unemployment work-relief or work-training program assisted or financed in whole or part by any federal agency or an agency of a state or political subdivision thereof, by an individual receiving the work relief or work training;

(l) service performed by an individual who is enrolled at a nonprofit or public educational institution that normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at the institution that combines academic instruction with work experience, if the service is an integral part of such program and the institution has so certified to the employer, except that this subparagraph shall not apply to service performed in a program established for or on behalf of an employer or group of employers;

(m) service performed in the employ of a hospital, if the service is performed by a patient of the hospital, or services performed by an inmate of a custodial or penal institution for any employer;

(n) service performed by real estate salespersons for others when the services are performed for remuneration solely by way of commission;

(o) service performed in the employ of a school, college or university if the service is performed by a student who is enrolled and is regularly attending classes at the school, college or university;

(p) service performed by an individual for a fixed or contract fee officiating at a sporting event that is conducted by or under the auspices of a nonprofit or governmental entity if that person is not otherwise an employee of the entity conducting the sporting event;

(q) service performed for a private, for-profit person or entity by an individual as a product demonstrator or product merchandiser if the service is performed pursuant to a written contract between that individual and a person or entity whose principal business is obtaining the services of product demonstrators and product merchandisers for third parties, for demonstration and merchandising purposes and the individual: 1) is compensated for each job or the compensation is based on factors related to the work performed; 2) provides the equipment used to perform the service, unless special equipment is required and provided by the manufacturer through an agency; 3) is responsible for completion of a specific job and for any failure to complete the job; 4) pays all expenses, and the opportunity for profit or loss rests solely with the individual; and 5) is responsible for operating costs, fuel, repairs and motor vehicle insurance. For the purpose of this subparagraph, “product demonstrator” means an individual who, on a temporary, part-time basis, demonstrates or gives away samples of a food or other product as part of an advertising or sales promotion for the product and who is not otherwise employed directly by the manufacturer, distributor or retailer, and “product merchandiser” means an individual who, on a temporary, part-time basis builds or resets a product display and who is not otherwise directly employed by the manufacturer, distributor or retailer; or

(r) service performed for a private, for-profit person or entity by an individual as a landman if substantially all remuneration paid in cash or otherwise for the performance of the services is directly related to the completion by the individual of the specific tasks contracted for rather than to the number of hours worked by the individual. For the purposes of this subparagraph, “landman” means a land professional who has been engaged primarily in: 1) negotiating for the acquisition or divestiture of mineral rights; 2) negotiating business agreements that provide for the exploration for

or development of minerals; 3) determining ownership of minerals through the research of public and private records; and 4) reviewing the status of title, curing title defects and otherwise reducing title risk associated with ownership of minerals; managing rights or obligations derived from ownership of interests and minerals; or utilizing or pooling of interest in minerals; and

(13) for the purposes of this subsection, if the services performed during one-half or more of any pay period by an individual for the person employing the individual constitute employment, all the services of the individual for the period shall be deemed to be employment, but, if the services performed during more than one-half of any such pay period by an individual for the person employing the individual do not constitute employment, then none of the services of the individual for the period shall be deemed to be employment. As used in this paragraph, the term "pay period" means a period, of not more than thirty-one consecutive days, for which a payment of remuneration is ordinarily made to the individual by the person employing the individual. This paragraph shall not be applicable with respect to services performed in a pay period by an individual for the person employing the individual where any of such service is excepted by Subparagraph (f) of Paragraph (12) of this subsection;

G. "employment office" means a free public employment office, or branch thereof, operated by this state or maintained as a part of a state-controlled system of public employment offices;

H. "fund" means the unemployment compensation fund established by the Unemployment Compensation Law to which all contributions and payments in lieu of contributions required under the Unemployment Compensation Law and from which all benefits provided under the Unemployment Compensation Law shall be paid;

I. "unemployment" means, with respect to an individual, any week during which the individual performs no services and with respect to which no wages are payable to the individual and during which the individual is not engaged in self-employment or receives an award of back pay for loss of employment. The secretary shall prescribe by rule what constitutes part-time and intermittent employment, partial employment and the conditions under which individuals engaged in such employment are eligible for partial unemployment benefits, but no individual who is otherwise eligible shall be deemed ineligible for benefits solely for the reason that the individual seeks, applies for or accepts only part-time work, instead of full-time work, if the part-time work is for at least twenty hours per week;

J. "state", when used in reference to any state other than New Mexico, includes, in addition to the states of the United States, the District of Columbia, the commonwealth of Puerto Rico and the Virgin Islands;

K. "unemployment compensation administration fund" means the fund established by Subsection A of Section 51-1-34 NMSA 1978 from which administrative expenses under the Unemployment Compensation Law shall be paid. "Employment security department fund" means the fund established by Subsection B of Section 51-1-34 NMSA 1978 from which certain administrative expenses under the Unemployment Compensation Law shall be paid;

L. "crew leader" means a person who:

(1) holds a valid certificate of registration as a crew leader or farm labor contractor under the federal Migrant and Seasonal Agricultural Worker Protection Act;[5]

(2) furnishes individuals to perform services in agricultural labor for any other person;

(3) pays, either on the crew leader's own behalf or on behalf of such other person, the individuals so furnished by the crew leader for service in agricultural labor; and

(4) has not entered into a written agreement with the other person for whom the crew leader furnishes individuals in agricultural labor that the individuals will be the employees of the other person;

M. “week” means such period of seven consecutive days, as the secretary may by rule prescribe. The secretary may by rule prescribe that a week shall be deemed to be “in”, “within” or “during” the benefit year that includes the greater part of such week;

N. “calendar quarter” means the period of three consecutive calendar months ending on March 31, June 30, September 30 or December 31;

O. “insured work” means services performed for employers who are covered under the Unemployment Compensation Law;

P. “benefit year” with respect to an individual means the one-year period beginning with the first day of the first week of unemployment with respect to which the individual first files a claim for benefits in accordance with Subsection A of Section 51-1-8 NMSA 1978 and thereafter the one-year period beginning with the first day of the first week of unemployment with respect to which the individual next files such a claim for benefits after the termination of the individual's last preceding benefit year; provided that at the time of filing such a claim the individual has been paid the wage required under Paragraph (5) of Subsection A of Section 51-1-5 NMSA 1978;

Q. “agricultural labor” includes all services performed:

(1) on a farm, in the employ of a person, in connection with cultivating the soil or in connection with raising or harvesting an agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training and management of livestock, bees, poultry and fur-bearing animals and wildlife;

(2) in the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation or maintenance of the farm and its tools and equipment, if the major part of the service is performed on a farm;

(3) in connection with the operation or maintenance of ditches, canals, reservoirs or waterways used exclusively for supplying and storing water for farming purposes when such ditches, canals, reservoirs or waterways are owned and operated by the farmers using the water stored or carried therein; and

(4) in handling, planting, drying, packing, packaging, processing, freezing, grading, storing or delivery to storage or to market or to a carrier for transportation to market any agricultural or horticultural commodity but only if the service is performed as an incident to ordinary farming operations. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in

connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal and truck farms, plantations, ranches, nurseries, greenhouses, ranges and orchards;

R. "payments in lieu of contributions" means the money payments made into the fund by an employer pursuant to the provisions of Subsection B of Section 51-1-13 NMSA 1978 or Subsection E of Section 51-1-59 NMSA 1978;

S. "department" means the workforce solutions department; and

T. "wages" means all remuneration for services, including commissions and bonuses and the cash value of all remuneration in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash shall be established and determined in accordance with rules prescribed by the secretary; provided that the term "wages" shall not include:

(1) subsequent to December 31, 1977, that part of the remuneration in excess of the base wage as determined by the secretary for each calendar year. The base wage upon which contribution shall be paid during any calendar year shall be sixty percent of the state's average annual earnings computed by the division by dividing total wages reported to the division by contributing employers for the second preceding calendar year before the calendar year the computed base wage becomes effective by the average annual employment reported by contributing employers for the same period rounded to the next higher multiple of one hundred dollars ($100); provided that the base wage so computed for any calendar year shall not be less than seven thousand dollars ($7,000). Wages paid by an employer to an individual in the employer's employ during any calendar year in excess of the base wage in effect for that calendar year shall be reported to the department but shall be exempt from the payment of contributions unless such wages paid in excess of the base wage become subject to tax under a federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund;

(2) the amount of any payment with respect to services performed after June 30, 1941 to or on behalf of an individual in the employ of an employing unit under a plan or system established by the employing unit that makes provision for individuals in its employ generally or for a class or classes of individuals, including any amount paid by an employing unit for insurance or annuities, or into a fund, to provide for any payment, on account of:

(a) retirement if the payments are made by an employer to or on behalf of an employee under a simplified employee pension plan that provides for payments by an employer in addition to the salary or other remuneration normally payable to the employee or class of employees and does not include any payments that represent deferred compensation or other reduction of an employee's normal taxable wages or remuneration or any payments made to a third party on behalf of an employee as part of an agreement of deferred remuneration;

(b) sickness or accident disability if the payments are received under a workers' compensation or occupational disease disablement law;

(c) medical and hospitalization expenses in connection with sickness or accident disability; or

(d) death; provided the individual in its employ has not the option to receive, instead of provision for the death benefit, any part of such payment, or, if such death benefit is insured, any part of the premiums or contributions to premiums paid by the individual's employing unit and has not the right under the provisions of the plan or system or policy of insurance providing for the death benefit to assign the benefit, or to receive a cash consideration in lieu of the benefit either upon the individual's withdrawal from the plan or system providing for the benefit or upon termination of the plan or system or policy of insurance or of the individual's service with the employing unit;

(3) remuneration for agricultural labor paid in any medium other than cash;

(4) a payment made to, or on behalf of, an employee or an employee's beneficiary under a cafeteria plan within the meaning of Section 125 of the federal Internal Revenue Code of 1986;

(5) a payment made, or benefit furnished to or for the benefit of an employee if at the time of the payment or such furnishing it is reasonable to believe that the employee will be able to exclude the payment or benefit from income under Section 129 of the federal Internal Revenue Code of 1986;

(6) a payment made by an employer to a survivor or the estate of a former employee after the calendar year in which the employee died;

(7) a payment made to, or on behalf of, an employee or the employee's beneficiary under an arrangement to which Section 408(p) of the federal Internal Revenue Code of 1986 applies, other than any elective contributions under Paragraph (2)(A)(i) of that section;

(8) a payment made to or for the benefit of an employee if at the time of the payment it is reasonable to believe that the employee will be able to exclude the payment from income under Section 106 of the federal Internal Revenue Code of 1986; or

(9) the value of any meals or lodging furnished by or on behalf of the employer if at the time the benefit is provided it is reasonable to believe that the employee will be able to exclude such items from income under Section 119 of the federal Internal Revenue Code of 1986.

Credits

L. 1936, Sp. Sess., Ch. 1, § 19. Amended by L. 1937, Ch. 129, § 6; L. 1939, Ch. 175, § 9; L. 1941, Ch. 205, § 11; L. 1943, Ch. 107, § 1; L. 1947, Ch. 209, § 8; L. 1971, Ch. 209, § 6; L. 1973, Ch. 216, § 9; L. 1977, Ch. 321, § 6; L. 1979, Ch. 280, § 44; L. 1980, Ch. 50, § 4; L. 1981, Ch. 354, § 10; L. 1983, Ch. 199, § 8; L. 1985, Ch. 31, § 6; L. 1987, Ch. 207, § 1; L. 1993, Ch. 209, § 6; L. 1994, Ch. 27, § 1; L. 1997, Ch. 120, § 1, eff. July 1, 1997; L. 1998, Ch. 91, § 9, eff. July 1, 1998; L. 2000, Ch. 3, § 4, eff. July 1, 2000; L. 2000, Ch. 7, § 4, eff. July 1, 2000; L. 2001, Ch. 249, § 2; L. 2003, Ch. 47, § 6, eff. Jan. 1, 2004; L. 2005, Ch. 3, § 5, eff. Feb. 8, 2005; L. 2007, Ch. 137, § 5, eff. July 1, 2007; L. 2010, Ch. 55, § 4, eff. July 1, 2010; L. 2013, Ch. 133, § 5, eff. Jan. 1, 2015.

Formerly 1941 Comp., § 57-822; 1953 Comp., § 59-9-22.

Notes of Decisions (7)

Footnotes

1 26 U.S.C.A. § 3301 et seq.

2 8 U.S.C.A. § 1101(a)(15)(H).

3 8 U.S.C.A. § 1184(c).

4 26 U.S.C.A. § 3306(c)(8).

5 29 U.S.C.A. § 1801 et seq.

NMSA 1978, § 51-1-42, NM ST § 51-1-42
Current through effective July 1, 2023 of the 2023 First Regular Session of the 56th Legislature (2023). The First Regular Session convened January 12, 2023 and adjourned March 18, 2023. The General Effective date is June 16, 2023.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Revised Statutes of Nebraska Annotated
Chapter 48. Labor
Article 6. Employment Security

Neb.Rev.St. § 48-604

48-604. Employment, defined

Currentness

As used in the Employment Security Law, unless the context otherwise requires, employment shall mean:

(1) Any service performed, including service in interstate commerce, for wages under a contract of hire, written or oral, express or implied;

(2) The term employment shall include an individual's entire service, performed within or both within and without this state if (a) the service is localized in this state, (b) the service is not localized in any state but some of the service is performed in this state and the base of operations or, if there is no base of operations, then the place from which such service is directed or controlled is in this state or the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed but the individual's residence is in this state, (c) the service shall be deemed to be localized within a state if (i) the service is performed entirely within such state or (ii) the service is performed both within and without such state, but the service performed without such state is incidental to the individual's service within the state, for example, is temporary or transitory in nature or consists of isolated transactions;

(3) Services performed outside the state and services performed outside the United States as follows:

(a) Services not covered under subdivision (2) of this section and performed entirely without this state, with respect to no part of which contributions are required under an unemployment compensation law of any other state or of the federal government, shall be deemed to be employment subject to the Employment Security Law if the commissioner approves the election of the employer, for whom such services are performed, that the entire service of such individual shall be deemed to be employment subject to such law;

(b) Services of an individual wherever performed within the United States or Canada if (i) such service is not covered under the employment compensation law of any other state or Canada and (ii) the place from which the service is directed or controlled is in this state; and

(c)(i) Services of an individual who is a citizen of the United States, performed outside the United States except in Canada in the employ of an American employer, other than service which is deemed employment under subdivisions (2) and (3) (a) and (b) of this section or the parallel provisions of another state's law, if:

(A) The employer's principal place of business in the United States is located in this state;

(B) The employer has no place of business in the United States, but the employer is an individual who is a resident of this state; the employer is a corporation or limited liability company which is organized under the laws of this state; or the employer is a partnership or a trust and the number of the partners or trustees who are residents of this state is greater than the number who are residents of any other state; or

(C) None of the criteria of subdivisions (A) and (B) of this subdivision are met, but the employer has elected coverage in this state or, the employer having failed to elect coverage in any state, the individual has filed a claim for benefits based on such service under the laws of this state.

(ii) American employer, for the purposes of this subdivision, shall mean: (A) An individual who is a resident of the United States; (B) a partnership if two-thirds or more of the partners are residents of the United States; (C) a trust if all the trustees are residents of the United States; or (D) a corporation or limited liability company organized under the laws of the United States or of any state.

(iii) The term United States for the purpose of this section includes the states, the District of Columbia, the Virgin Islands, and the Commonwealth of Puerto Rico;

(4)(a) Service performed in the employ of this state or any political subdivision thereof or any instrumentality of any one or more of the foregoing or any instrumentality which is wholly owned by this state and one or more other states or political subdivisions, or any service performed in the employ of any instrumentality of this state or of any political subdivision thereof and one or more other states or political subdivisions if such service is excluded from employment as defined in the Federal Unemployment Tax Act, as amended, solely by reason of 26 U.S.C. 3306(c)(7), and is not otherwise excluded under this section;

(b) Service performed by an individual in the employ of a religious, charitable, educational, or other organization, but only if the following conditions are met: (i) The service is excluded from employment as defined in the Federal Unemployment Tax Act, as amended, solely by reason of 26 U.S.C. 3306(c)(8), and is not otherwise excluded under this section; and (ii) the organization had four or more individuals in employment for some portion of a day in each of twenty different weeks, whether or not such weeks were consecutive, within either the current or preceding calendar year, regardless of whether they were employed at the same moment of time;

(c)(i) Service performed by an individual in agricultural labor if such service is performed for a person who during any calendar quarter in either the current or preceding calendar year paid remuneration in cash of twenty thousand dollars or more to individuals employed in agricultural labor, or for some portion of a day in each of twenty different calendar weeks, whether or not such weeks were consecutive, in either the current or the preceding calendar year, employed in agricultural labor ten or more individuals, regardless of whether they were employed at the same moment of time.

(ii) For purposes of this subdivision:

(A) Any individual who is a member of a crew furnished by a crew leader to perform services in agricultural labor for any other person shall be treated as an employee of such crew leader if such crew leader holds a valid certificate of registration under the Migrant and Seasonal Agricultural Worker Protection Act, as amended, 29 U.S.C. 1801 et seq.; substantially all the members of such crew operate or maintain tractors, mechanized harvesting or cropdusting equipment, or any other mechanized equipment, which is provided by such crew leader; and such individual is not an employee of such other person within the meaning of any other provisions of this section; and

(B) In case any individual who is furnished by a crew leader to perform service in agricultural labor for any other person and who is not treated as an employee of such crew leader under subdivision (A) of this subdivision, such other person and not the crew leader shall be treated as the employer of such individual and such other person shall be treated as having paid cash remuneration to such individual in an amount equal to the amount of cash remuneration paid to such individual by the crew leader, either on his or her own behalf or on behalf of such other person, for the service in agricultural labor performed for such other person; and

(d) Service performed by an individual in domestic service in a private home, local college club, or local chapter of a college fraternity or sorority if performed for a person who paid cash remuneration of one thousand dollars or more in the current calendar year or the preceding calendar year to individuals employed in such domestic service in any calendar quarter;

(5) Services performed by an individual for wages, including wages received under a contract of hire, shall be deemed to be employment unless it is shown to the satisfaction of the commissioner that (a) such individual has been and will continue to be free from control or direction over the performance of such services, both under his or her contract of service and in fact, (b) such service is either outside the usual course of the business for which such service is performed or such service is performed outside of all the places of business of the enterprise for which such service is performed, and (c) such individual is customarily engaged in an independently established trade, occupation, profession, or business. The provisions of this subdivision are not intended to be a codification of the common law and shall be considered complete as written;

(6) The term employment shall not include:

(a) Agricultural labor, except as provided in subdivision (4)(c) of this section;

(b) Domestic service, except as provided in subdivision (4)(d) of this section, in a private home, local college club, or local chapter of a college fraternity or sorority;

(c) Service not in the course of the employer's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for such service is fifty dollars or more and such service is performed by an individual who is regularly employed by such employer to perform such service and, for the purposes of this subdivision, an individual shall be deemed to be regularly employed by an employer during a calendar quarter only if (i) on each of some twenty-four days during such quarter such individual performs for such employer for some portion of the day service not in the course of the employer's trade or business, or (ii) such individual was regularly employed, as determined under subdivision (c)(i) of this subdivision, by such employer in the performance of such service during the preceding calendar quarter;

(d) Service performed by an individual in the employ of his or her son, daughter, or spouse and service performed by a child under the age of twenty-one in the employ of his or her father or mother;

(e) Service performed in the employ of the United States Government or an instrumentality of the United States immune under the Constitution of the United States from the contributions imposed by sections 48-648 and 48-649 to 48-649.04, except that, to the extent that the Congress of the United States shall permit states to require any instrumentalities of the United States to make payments into an unemployment fund under a state unemployment compensation act, all of the Employment Security Law shall be applicable to such instrumentalities and to services performed for such instrumentalities in the same manner, to the same extent, and on the same terms as to all other employers, individuals, and services, except that if this state is not certified for any year by the Secretary of Labor of the United States under section 3304 of the Internal Revenue Code as defined in section 49-801.01, the payments required of such instrumentalities with respect to such year shall be refunded by the commissioner from the fund in the same manner and within the same period as is provided in section 48-660, with respect to contributions erroneously collected;

(f) Service performed in the employ of this state or any political subdivision thereof or any instrumentality of any one or more of the foregoing if such services are performed by an individual in the exercise of his or her duties: (i) As an elected official; (ii) as a member of the legislative body or a member of the judiciary of a state or political subdivision thereof; (iii) as a member of the Army National Guard or Air National Guard; (iv) as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency; or (v) as an election official or election worker if the amount of remuneration received by the individual during the calendar year for services as an election official or election worker is less than one thousand dollars;

(g) For the purposes of subdivisions (4)(a) and (4)(b) of this section, service performed:

(i) In the employ of (A) a church or convention or association of churches or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

(ii) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his or her ministry or by a member of a religious order in the exercise of the duties required by such order;

(iii) In a facility conducted for the purpose of carrying out a program of rehabilitation for an individual whose earning capacity is impaired by age or physical or mental deficiency or injury, or providing remunerative work for the individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market, by an individual receiving such rehabilitation or remunerative work;

(iv) As part of an unemployment work relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof, by an individual receiving such work relief or work training; or

(v) By an inmate of a custodial or penal institution;

(h) Service with respect to which unemployment compensation is payable under an unemployment compensation system established by an act of Congress;

(i) Service performed in any calendar quarter in the employ of any organization exempt from income tax under section 501(a) of the Internal Revenue Code as defined in section 49-801.01, other than an organization described in section 401(a) of the Internal Revenue Code as defined in section 49-801.01, or under section 521 thereof, if the remuneration for such service is less than fifty dollars;

(j) Service performed in the employ of a school, college, or university, if such service is performed (i) by a student who is enrolled, regularly attending classes at, and working for such school, college, or university pursuant to a financial assistance arrangement with such school, college, or university or (ii) by the spouse of such student, if such spouse is advised, at the time such spouse commences to perform such service, that (A) the employment of such spouse to perform such service is provided under a program to provide financial assistance to such student by such school, college, or university and (B) such employment will not be covered by any program of unemployment insurance;

(k) Service performed as a student nurse in the employ of a hospital or nurses training school by an individual who is enrolled and is regularly attending classes in a nurses training school chartered or approved pursuant to state law; and service performed as an intern in the employ of a hospital by an individual who has completed a four-year course in a medical school chartered or approved pursuant to state law;

(l) Service performed by an individual as a real estate salesperson, as an insurance agent, or as an insurance solicitor, if all such service performed by such individual is performed for remuneration solely by way of commission;

(m) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

(n) Service performed by an individual in the sale, delivery, or distribution of newspapers or magazines under a written contract in which (i) the individual acknowledges that the individual performing the service and the service are not covered and (ii) the newspapers and magazines are sold by him or her at a fixed price with his or her compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him or her, whether or not he or she is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back;

(o) Service performed by an individual who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on, as a student in a full-time program, taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program, and such institution has so certified to the employer, except that this subdivision shall not apply to service performed in a program established for or on behalf of an employer or a group of employers;

(p) Service performed in the employ of a hospital, if such service is performed by a patient of the hospital;

(q) Service performed for a motor carrier, as defined in 49 U.S.C. 13102 or section 75-302, as amended, by a lessor leasing one or more motor vehicles driven by the lessor or one or more drivers provided by the lessor under a lease, with the motor carrier as lessee, executed pursuant to 49 C.F.R. part 376, Title 291, Chapter 3, as amended, of the rules and regulations of the Public Service Commission, or the rules and regulations of the Division of Motor Carrier Services. This shall not

preclude the determination of an employment relationship between the lessor and any personnel provided by the lessor in the conduct of the service performed for the lessee;

(r) Service performed by an individual for a business engaged in compilation of marketing databases if such service consists only of the processing of data and is performed in the residence of the individual;

(s) Service performed by an individual as a volunteer research subject who is paid on a per study basis for scientific, medical, or drug-related testing for any organization other than one described in section 501(c)(3) of the Internal Revenue Code as defined in section 49-801.01 or any governmental entity;

(t) Service performed by a direct seller if:

(i) Such person is engaged in sales primarily in person and is:

(A) Engaged in the trade or business of selling or soliciting the sale of consumer products or services to any buyer on a buy-sell basis or a deposit-commission basis for resale, by the buyer or any other person, in the home or otherwise than in a permanent retail establishment;

(B) Engaged in the trade or business of selling or soliciting the sale of consumer products or services in the home or otherwise than in a permanent retail establishment; or

(C) Engaged in the trade or business of the delivering or distribution of newspapers or shopping news, including any services directly related to such trade or business;

(ii) Substantially all the remuneration, whether or not paid in cash, for the performance of the services described in subdivision (t)(i) of this subdivision is directly related to sales or other output, including the performance of services, rather than to the number of hours worked; and

(iii) The services performed by the person are performed pursuant to a written contract between such person and the person for whom the services are performed and the contract provides that the person will not be treated as an employee for federal and state tax purposes. Sales by a person whose business is conducted primarily by telephone or any other form of electronic sales or solicitation is not service performed by a direct seller under this subdivision;

(u) Service performed by an individual who is a participant in the National and Community Service State Grant Program, also known as AmeriCorps, because a participant is not considered an employee of the organization receiving assistance under the national service laws through which the participant is engaging in service pursuant to 42 U.S.C. 12511(30)(B); and

(v) Service performed at a penal or custodial institution by a person committed to a penal or custodial institution;

(7) If the services performed during one-half or more of any pay period by an individual for the person employing him or her constitute employment, all the services of such individual for such period shall be deemed to be employment, but if the services performed during more than one-half of any such pay period by an individual for the person employing him or her do not constitute employment, then none of the services of such individual for such period shall be deemed to be employment. As used in this subdivision, the term pay period means a period, of not more than thirty-one consecutive days, for which a payment of remuneration is ordinarily made to such individual by the person employing him or her. This subdivision shall not be applicable with respect to services performed in a pay period by an individual for the person employing him or her when any of such service is excepted by subdivision (6)(h) of this section; and

(8) Notwithstanding the foregoing exclusions from the definition of employment, services shall be deemed to be in employment if with respect to such services a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment compensation fund or which as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act, as amended, is required to be covered under the Employment Security Law.

Credits

Laws 1937, ch. 108, § 2, p. 372; Laws 1939, ch. 56, § 1, p. 230; Laws 1940, Sp. Sess., ch. 2, § 1, p. 54; Laws 1941, ch. 94, § 1, p. 375; Laws 1945, ch. 115, § 1, p. 376; Laws 1947, ch. 175, § 2, p. 566; Laws 1953, ch. 167, § 3, p. 523; Laws 1959, ch. 228, § 1, p. 795; Laws 1961, ch. 238, § 2, p. 704; Laws 1971, LB 651, § 3; Laws 1972, LB 1392, § 2; Laws 1977, LB 509, § 3; Laws 1979, LB 581, § 2; Laws 1983, LB 248, § 2; Laws 1983, LB 319, § 1; Laws 1984, LB 745, § 1; Laws 1985, LB 339, § 4; Laws 1986, LB 799, § 1; Laws 1993, LB 121, § 291; Laws 1994, LB 1337, § 3; Laws 1995, LB 424, § 1; Laws 1995, LB 574, § 52; Laws 1997, LB 79, § 1; Laws 1997, LB 129, § 1; Laws 1997, LB 130, § 1; Laws 1999, LB 168, § 2; Laws 2000, LB 953, § 1; Laws 2001, LB 387, § 1; Laws 2003, LB 199, § 2; Laws 2011, LB 261, § 1, eff. Aug. 27, 2011; Laws 2016, LB 830, § 1, eff. July 21, 2016; Laws 2017, LB 172, § 7, eff. Jan. 1, 2018.

Codifications: C.S. Supp., 1941, § 48-702; R.S. 1943, § 48-604.

Notes of Decisions (32)

Neb. Rev. St. § 48-604, NE ST § 48-604
Current through the end of the 1st Regular Session of the 108th Legislature (2023)

West's Nevada Revised Statutes Annotated
Title 53. Labor and Industrial Relations (Chapters 606-618)
Chapter 612. Unemployment Compensation
General Provisions

N.R.S. 612.085

612.085. “Employment”: Services deemed employment unless specific facts shown

Currentness

Services performed by a person for wages shall be deemed to be employment subject to this chapter unless it is shown to the satisfaction of the Administrator that:

1. The person has been and will continue to be free from control or direction over the performance of the services, both under his or her contract of service and in fact;

2. The service is either outside the usual course of the business for which the service is performed or that the service is performed outside of all the places of business of the enterprises for which the service is performed; and

3. The service is performed in the course of an independently established trade, occupation, profession or business in which the person is customarily engaged, of the same nature as that involved in the contract of service.

Credits
Added by Laws 1937, c. 129, § 2 (renumbered as § 2.9) [part]. Amended by Laws 1945, p. 299; Laws 1949, p. 257; Laws 1951, pp. 253, 474; Laws 1955, p. 698; NRS amended by Laws 1993, p. 1804.

Notes of Decisions (12)

N. R. S. 612.085, NV ST 612.085
Current through legislation of the 82nd Regular Session (2023) effective through October 1, 2023. Text subject to revision and classification by the Legislative Counsel Bureau.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Vermont Statutes Annotated
Title Twenty-One. Labor
Chapter 17. Unemployment Compensation (Refs & Annos)
Subchapter 1. General Benefits

21 V.S.A. § 1301

§ 1301. Definitions

Effective: July 1, 2023
Currentness

As used in this chapter:

(1) "Benefits" and "compensation" means the money payments payable to an individual, as provided in this chapter, with respect to his or her unemployment.

(2) "Commissioner" means the Commissioner of Labor established by this chapter, or his or her authorized representative.

(3) "Contributions" means the money payments to the State Unemployment Compensation Fund required by this chapter.

(4) "Employing unit" means any individual or type of organization, including any partnership, association, labor organization as defined in section 2(5) of the National Labor Relations Act,[1] trust, estate, joint stock company, insurance company, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee, or successor thereof, or the legal representative of a deceased person, any federal, state, or local governmental entity, which has had in its employ since January 1, 1936, one or more individuals performing services for it within this State. All individuals performing services within this State for any employing unit which maintains two or more separate establishments within this State shall be deemed to be employed by a single employing unit for all the purposes of this chapter.

(5) "Employer" includes:

<Text of subdiv. (5)(A) effective until July 1, 2024.>

(A) Any employing unit which, after December 31, 1971 in any calendar quarter in either the current or preceding calendar year paid for service in employment, as hereinafter defined, wages of $1,500.00 or more, or for some portion of a day in each of 20 different calendar weeks, whether or not such weeks were consecutive, in either the current or the preceding calendar year, had in employment, as hereinafter defined, at least one individual (irrespective of whether the same individual was in employment in each such day). When an employing unit described in either this subdivision or subdivision (5)(B) of this section, becomes an employer within any calendar year, it shall be subject to this chapter for the whole of such calendar year.

<Text of subdiv. (5)(A) effective July 1, 2024.>

(A) Any employing unit that in any calendar quarter in either the current or preceding calendar year paid for service in employment, as defined pursuant to subdivision (6) of this section, wages of $1,500.00 or more, or for some portion of a day in each of 20 different calendar weeks, whether or not such weeks were consecutive, in either the current or the preceding calendar year, had in employment at least one individual (irrespective of whether the same individual was in employment in each such day). When an employing unit described in either this subdivision or subdivision (B) of this subdivision (5), becomes an employer within any calendar year, it shall be subject to this chapter for the whole of the calendar year.

<Text of subdiv. (5)(B)(i) effective until July 1, 2024.>

(B)(i) Any employing unit for which service in employment for a religious, charitable, educational, or other organization as defined in subdivision (6)(A)(ix) of this section is performed after December 31, 1971; except as provided in subdivision (5)(C) of this section.

<Text of subdiv. (5)(B)(i) effective July 1, 2024.>

(B)(i) Any employing unit for which service in employment for a religious, charitable, educational, or other organization as defined in subdivision (6)(A)(ix) of this section is performed after December 31, 1971, except as provided in subdivision (C) of this subdivision (5).

(ii) Any employing unit for which service in employment for the State and any of its instrumentalities, for a hospital or an institution of higher education as defined in subdivision (6)(A)(x)(I) of this section is performed after December 31, 1971; except as provided in subdivision (5)(C) of this section.

(iii) Any employing unit for which service in employment for the State or any political subdivision thereof as defined in subdivision (6)(A)(x)(II) of this section is performed after December 31, 1977; except as provided in subdivision (5)(C) of this section.

(iv) Any employing unit for which agricultural labor as described in subdivision (6)(A)(vii)(I) of this section is performed after December 31, 1977.

(v) Any employing unit for which domestic service in employment as described in subdivision (6)(A)(viii) is performed after December 31, 1977.

(C) An employing unit as described in subdivisions (5)(A) and (B) of this section except:

(i) In determining whether or not an employing unit for which service other than domestic service is also performed is an employer under this subdivision, the wages earned or the employment of an employee performing domestic service as described in subdivision (5)(B)(v) of this section after December 31, 1977, shall not be taken into account unless the total cash remuneration paid in any calendar quarter for domestic services is $1,000.00 or more.

(ii) In determining whether or not an employing unit for which service other than agricultural labor is also performed is an employer under this subdivision, the wages earned or the employment of an employee performing service in agricultural labor after December 31, 1977 shall not be taken into account unless the agricultural labor is in accordance with subdivision (6)(A)(vii)(I) of this section. If an employing unit is determined an employer of agricultural labor, such employing unit shall be determined an employer for purposes of subdivision (5)(A) of this section.

(D) Any individual or employing unit which acquired the organization, trade, or business of another which at the time of such acquisition was an employer subject to this chapter.

(E)(i) Any employing unit that filed with and had approved by the Commissioner, on the proper forms prescribed and supplied by the Commissioner, its written election to become fully subject to this chapter for not less than two calendar years. Such employing unit, not otherwise subject to this chapter, that files with the Commissioner its written election to become an employer subject to this chapter for not less than two calendar years, shall, with the written approval of such election by the Commissioner, become an employer subject to this chapter to the same extent as all other employers, as of the date stated in the approval.

(ii) Any employing unit for which services that are excluded from the term "employment" by subdivisions (6)(A)(ix) and (6)(C)(i) and (ii) of this section are performed may, by election and approval, elect that all services performed by individuals in its employ, in one or more establishments or places of business, shall be deemed to constitute employment for all the purposes of this chapter for not less than two calendar years. Upon the written approval of such election by the Commissioner such services shall be deemed to constitute employment subject to this chapter from the date stated in the approval.

(iii) Any such employing unit may cease to be subject under either subdivision (5)(E)(i) or (ii) of this section, as of January 1, of any calendar year subsequent to such two calendar years, only if at least 30 days prior to such first day of January it has filed with the Commissioner a written notice of its intention to cancel such election but this requirement may be waived by the Commissioner for good cause.

(F) Any employing unit which acquires a part of the organization, trade, or business of another, which part, if a separate organization, trade, or business, would have been an employer. Any employing unit which acquires the organization, trade, or business, or acquires substantially all the assets of another employing unit, if the employment record of such acquiring employing unit subsequent to such an acquisition, together with the employment record of the acquired unit prior to such acquisition, both within the same calendar year, would be sufficient to constitute an employing unit an "employer."

(G) Any employing unit not an employer by reason of any other provision of this subdivision for which, within either the current or preceding calendar year, service is or was performed with respect to which such employing unit is liable for any federal tax against which credit may be taken for contributions required to be paid into a state unemployment fund; or which, as a condition for approval of this chapter for full tax credit against the tax imposed by the Federal Unemployment Tax Act,[2] is required, pursuant to such act, to be an "employer" under this chapter.

<Text of subdiv. (6)(A)(i) effective until July 1, 2024.>

(6)(A)(i) “Employment,” subject to the other provisions of this subdivision (6), means service within the jurisdiction of this State, performed prior to January 1, 1978, which was employment as defined in this subdivision prior to such date and, subject to the other provisions of this subdivision, service performed after December 31, 1977, by an employee, as defined in subsections 3306(i) and (o) of the Federal Unemployment Tax Act,[3] including service in interstate commerce, performed for wages or under any contract of hire, written or oral, expressed or implied. Services partly within and partly without this State may by election as hereinbefore provided be treated as if wholly within the jurisdiction of this State. And whenever an employing unit shall have elected to come under the provisions of a similar act of a state where a part of the services of an employee are performed, the Commissioner, upon his or her approval of said election as to any such employee, may treat the services covered by said approved election as having been performed wholly without the jurisdiction of this State.

<Text of subdiv. (6)(A)(i) effective July 1, 2024.>

(6)(A)(i) “Employment,” subject to the other provisions of this subdivision (6), means service within the jurisdiction of this State performed by an employee, as defined in subsections 3306(i) and (o) of the Federal Unemployment Tax Act, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, expressed or implied. Services partly within and partly outside this State may by election as provided in subdivision (5)(E)(i) of this section be treated as if wholly within the jurisdiction of this State. If an employing unit has elected to come under the provisions of a similar act of a state where a part of the services of an employee are performed, the Commissioner, upon approving the election as to the employee, may treat the services covered by the election as having been performed wholly outside the jurisdiction of this State.

(ii) The term “employment” shall include an individual's entire service, performed within, or both within and without, this State if the service is localized in this State. Service shall be deemed to be localized within a state if:

(I) the service is performed entirely within such state; or

(II) the service is performed both within and without such state but the service performed without such state is incidental to the individual's service within the state; for example, is temporary or transitory in nature or consists of isolated transactions.

(iii) The term “employment” shall include an individual's entire service, performed within, or both within and outside, this State if the service is not localized in any state but some of the service is performed in this State and:

(I) the individual's base of operations is in this State; or

(II) if there is no base of operations, then the place from which such service is directed or controlled is in this State; or

(III) the individual's base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.

(iv) The term “employment” shall include an individual's service wherever performed within the United States, the Virgin Islands, or Canada, if:

(I) such service is not covered under the unemployment compensation law of any other state, the Virgin Islands, or Canada; and

(II) the place from which the service is directed or controlled is in this State.

(v) The term “employment” shall include the service of an individual who is a citizen of the United States, performed outside the United States after December 31, 1971 (except in Canada) or after December 31, 1977 in the case of the Virgin Islands in the employ of an American employer (other than service which is deemed “employment” under the provisions of subdivisions (6)(A)(ii), (iii), or (iv) of this section or the parallel provisions of another state's law), if:

(I) the employer's principal place of business in the United States is located in this State; or

(II) the employer has no place of business in the United States, but the employer is an individual who is a resident of this State; or the employer is a corporation which is organized under the laws of this State; or the employer is a partnership or a trust and the number of the partners or trustees who are residents of this State is greater than the number who are residents of any one other state; or

(III) none of the criteria of subdivisions (6)(A)(v)(I) and (II) of this subdivision is met but the employer has elected coverage in this State or, the employer having failed to elect coverage in any state, the individual has filed a claim for benefits, based on such service under the law of this State.

(IV) an “American employer,” for purposes of this subdivision means a person who is:

(aa) an individual who is a resident of the United States; or

(bb) a partnership if two-thirds or more of the partners are residents of the United States; or

(cc) a trust, if all of the trustees are residents of the United States; or

(dd) a corporation organized under the law of the United States or of any state.

(vi) The term “employment” shall also include all service performed after July 1, 1946 by an officer or member of the crew of an American vessel on or in connection with such vessel, provided that the operating office, from which the operations of such vessel operating on navigable waters within or within and without the United States is ordinarily and regularly supervised, managed, directed, and controlled, is within this State.

(vii) The term “employment” shall also include all service performed after December 31, 1977, by an individual in agricultural labor as defined in subdivision (6)(C)(i)(I) of this section when:

(I) such service is performed for a person who:

(aa) during any calendar quarter in either the current or the preceding calendar year paid remuneration in cash of $20,000.00 or more to individuals employed in agricultural labor, not taking into account service in agricultural labor performed before January 1, 1980, by an alien referred to in subdivision (6)(A)(vii)(II) of this section; or

(bb) for some portion of a day in each of 20 different calendar weeks, whether or not such weeks were consecutive, in either the current or the preceding calendar year, employed in agricultural labor (not taking into account service in agricultural labor performed before January 1, 1980, by an alien referred to in subdivision (6)(A)(vii)(II) of this section) 10 or more individuals, regardless of whether they were employed at the same moment of time.

(II) such service is not performed in agricultural labor if performed before January 1, 1980, or after December 31, 1986, by an individual who is an alien admitted to the United States to perform service in agricultural labor pursuant to sections 214(c)[4] and 101(a)(15)(H)[5] of the Immigration and Nationality Act, provided, that if section 3306 in the Federal Unemployment Tax Act[6] is amended so as to include such service in the definition of employment in agricultural labor beginning on or after January 1, 1988, then such service shall be employment in agricultural labor under this chapter.

(III) for the purposes of this subdivision any individual who is a member of a crew furnished by a crew leader to perform service in agricultural labor for any other person shall be treated as an employee of such crew leader:

(aa) if such crew leader holds a valid certificate of registration under the Farm Labor Contractor Registration Act of 1963; or substantially all the members of such crew operate or maintain tractors, mechanized harvesting or cropdusting equipment, or any other mechanized equipment, which is provided by such crew leader; and

(bb) if the individual is not an employee of such other person within the meaning of subdivision (6)(A) of this section.

(IV) for the purposes of this subdivision (vii), in the case of any individual who is furnished by a crew leader to perform service in agricultural labor for any other person and who is not treated as an employee of such crew leader under subdivision (6)(A)(vii)(III) of this section:

(aa) the other person and not the crew leader shall be treated as the employer of such individual; and

(bb) the other person shall be treated as having paid cash remuneration to such individual in an amount equal to the amount of cash remuneration paid to such individual by the crew leader (either on the crew leader's own behalf or on behalf of such other person) for the service in agricultural labor performed for such other person.

(V) for the purposes of this subdivision (vii) the term “crew leader” means an individual who:

(aa) furnishes individuals to perform service in agricultural labor for any other person;

(bb) pays (either on the crew leader's own behalf or on behalf of such other persons) the individuals so furnished by the crew leader for the service in agricultural labor performed by them; and

(cc) has not entered into a written agreement with such other person under which such individual is designated as an employee of such other person.

(viii) The term "employment" shall also include domestic service as used in subdivision (6)(C)(ii) of this section after December 31, 1977, in a private home, in a local college club or local chapter of a college fraternity or sorority, performed for a person who paid cash remuneration of $1,000.00 or more in any calendar quarter after December 31, 1977, in the current calendar year or the preceding calendar year to individuals employed in such domestic service.

<Text of subdiv. (6)(A)(ix) effective until July 1, 2024.>

(ix) The term "employment" shall also include service for any employing unit which is performed after December 31, 1971 by an individual in the employ of a religious, charitable, educational, or other organization but only if:

(I) the service is excluded from "employment" as defined in the Federal Unemployment Tax Act solely by reason of section 3306(c)(8) of that act;[7] and

(II) the organization had four or more individuals in employment for some portion of a day in each of 20 different weeks, whether or not such weeks were consecutive, within either the current or preceding calendar year, regardless of whether they were employed at the same moment of time.

<Text of subdiv. (6)(A)(ix) effective July 1, 2024.>

(ix) The term "employment" shall also include service for any employing unit performed by an individual in the employ of a religious, charitable, educational, or other organization if the service is excluded from "employment" as defined in the Federal Unemployment Tax Act solely by reason of subdivision 3306(c)(8) of that act.

(x)(I) The term "employment" shall also include service for any employing unit which is performed after December 31, 1971 by an individual in the employ of this State or any of its instrumentalities, or in the employ of this State and one or more other states or their instrumentalities, for a hospital or institution of higher education located in this State provided that such service is excluded from "employment" as defined in the Federal Unemployment Tax Act solely by reason of section 3306(c)(7) of that act[8] and is not excluded from "employment" under subdivision (6)(C)(vii) of this section.

(II) The term "employment" shall also include service for any employing unit which is performed after December 31, 1977 by an individual in the employ of this State or any political subdivision thereof or any of its instrumentalities or any instrumentality of one or more of the foregoing; and service performed for this State or any political subdivision thereof and one or more other states or political subdivisions thereof or any instrumentality of the foregoing which

is wholly owned by such states or political subdivisions, provided that such service is excluded from "employment" as defined in the Federal Unemployment Tax Act by section 3306(c)(7) of that act[9] and is not excluded from "employment" under subdivision (6)(C)(vii) of this section.

(B) Services performed by an individual for wages shall be deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the Commissioner that:

(i) Such individual has been and will continue to be free from control or direction over the performance of such services, both under his or her contract of service and in fact; and

(ii) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(iii) Such individual is customarily engaged in an independently established trade, occupation, profession, or business.

(C) The term "employment" shall not include:

(i)(I) Service performed by an individual in agricultural labor except as provided in subdivision (6)(A)(vii) of this section. For purposes of this subdivision, the term "agricultural labor" means any service performed prior to January 1, 1972 which was agricultural labor as defined in this subdivision prior to such date, and remunerated service performed after December 31, 1971:

(aa) on a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;

(bb) in the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(cc) in connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended (12 U.S.C. § 1141j) or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(dd) in the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(ee) in the employ of a group of operators of farms, or a cooperative organization of which such operators are members, in the performance of service described in subdivision (dd) of this subdivision (C)(i)(I), but only if such operators produced more than one-half of the commodity with respect to which such service is performed;

(ff) on a farm operated for profit if such service is not in the course of the employer's trade or business.

(II) As used in subdivision (6)(C)(i)(I), the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(III) The provisions of (dd) and (ee) of subdivision (6)(C)(i)(I) shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

(ii) Domestic service in a private home except as provided in subdivision (6)(A)(viii) of this section;

(iii)(I) Service not in the course of the employer's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for that service is $50.00 or more and the service is performed by an individual who is regularly employed by the employer to perform the service. For purposes of this subdivision, an individual shall be deemed to be regularly employed by an employer during a calendar quarter if:

(aa) on each of some 24 days during the quarter the individual performs for the employer for some portion of the day service not in the course of the employer's trade or business; or

(bb) the individual was regularly employed (as determined under the preceding subdivision) by the employer in the performance of the service during the preceding calendar quarter.

(II) The term "service not in the course of the employer's trade or business" includes service that does not promote or advance the trade or business of the employer. Services performed for a corporation do not come within the exception.

(iv) Service performed by an individual in the employ of his or her son, daughter, or spouse, and service performed by a minor in the employ of his or her father or mother; or service by one member of a family to another under circumstances which, under the general law, do not give rise to the relation of employer and employee;

(v) Service performed in the employ of the U.S. government or of an instrumentality of the United States but if the Congress of the United States shall permit states to require that the U.S. government or any instrumentalities of the United States, shall make payments into an unemployment fund under a state unemployment compensation act, then, to the extent permitted by Congress, and from and after the date as of which such permission becomes effective, all of the provisions of this chapter shall be applicable to the U.S. government or such instrumentalities, in the same manner, to the same extent and on the same terms as to all other employers, employing units, individuals, and services; provided that if this State should not be certified by the Secretary of Labor under section 3304 of the Federal Unemployment Tax

Act[10] for any year, then the payments required of the U.S. government or such instrumentalities with respect to such year shall be deemed to have been erroneously collected within the meaning of section 1337 of this title and shall be refunded by the Commissioner from the Fund in accordance with the provisions of section 1337;

(vi)(I) Before January 1, 1978, service performed in the employ of a state, a political subdivision thereof, or an instrumentality of one or more states or political subdivisions except as otherwise provided in this chapter with respect to service for a hospital or institution of higher education located in this State, and except as to any town, city, or other municipal corporation, as defined by 24 V.S.A. § 1751, or an instrumentality thereof, that duly elects otherwise, as provided by this chapter with the Commissioner's approval;

(II) After December 31, 1977, in the employ of a governmental entity referred to in subdivision (6)(A)(x) of this section if such service is performed by an individual in the exercise of duties:

(aa) as an elected official;

(bb) as a member of a legislative body, or a member of the judiciary, of a state or political subdivision;

(cc) as a member of the State National Guard or Air National Guard;

(dd) as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency; or

(ee) in a position which, under or pursuant to the laws of this State, is designated as a policymaking or advisory position the performance of the duties of which ordinarily does not require more than eight hours per week.

(vii) For the purposes of subdivisions (6)(A)(ix) and (6)(A)(x) of this section, the term “employment” does not include service performed:

(I) in the employ of a church or convention or association of churches, or an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

(II) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his or her ministry or by a member of a religious order in the exercise of duties required by such order;

(III) prior to January 1, 1978, in the employ of a school which is not an institution of higher education;

(IV) in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is limited due to being an elder or having a disability or injury or providing remunerative work for individuals

who because of having a disability cannot be readily absorbed in the competitive labor market by an individual receiving such rehabilitation or remunerative work;

(V) as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof, by an individual receiving such work relief or work training; or

(VI) prior to January 1, 1978, for a hospital in a state prison or other state correctional institution by an inmate of the prison or correctional institution and after December 31, 1977, by an inmate of a custodial or penal institution.

(viii) Service with respect to which unemployment compensation is payable under an unemployment compensation system established by an act of Congress; provided, that the Commissioner is hereby authorized and directed to enter into agreements with the proper agencies under such act of Congress, which agreements shall become effective 10 days after publication thereof in one or more newspapers of general circulation in this State, to provide reciprocal treatment to individuals who have, after acquiring potential rights to unemployment compensation under such act of Congress, acquired rights to benefits under this chapter;

(ix) Service performed on and after July 1, 1939, with respect to which unemployment compensation is payable under an act of Congress entitled "Railroad Unemployment Insurance Act";[11]

(x) Service as an officer or member of a crew of an American vessel performed on or in connection with such vessel, if the operating office, from which the operations of the vessel operating on navigable waters within or without the United States are ordinarily and regularly supervised, managed, directed, and controlled, is without this State;

(xi) Service performed on or in connection with a vessel not an American vessel by an individual, if the individual performs services on and in connection with such vessel when outside the United States; and, for the purpose of this section, the term "American vessel" means any vessel documented or numbered under the laws of the United States; and includes any vessel which is neither documented or numbered under the laws of the United States nor documented under the laws of any foreign country, if its crew performs services solely for one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any state;

(xii) Service performed by an individual in, or as an officer or member of the crew of a vessel while it is engaged in, the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including service performed by any such individual as an ordinary incident to any such activity, except:

(I) Service performed in connection with the catching or taking of salmon or halibut, for commercial purposes; and

(II) Service performed on or in connection with a vessel of more than 10 net tons, determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States;

(xiii) Service performed in any calendar quarter in the employ of any organization exempt from income tax under Section 501(a) (other than an organization described in Section 401(a)) or under Section 521 of the federal Internal Revenue Code, if the remuneration for such service is less than $50.00;

(xiv) Service performed, in the employ of a school, college, or university, if such service is performed by a student who is enrolled and is regularly attending classes at such school, college, or university, or by the spouse of such a student, if the spouse is advised, at the time such spouse commences to perform such service, that the employment of such spouse to perform such service is provided under a program to provide financial assistance to such student by school, college, or university, and such employment will not be covered by any program of unemployment insurance;

(xv) Service performed by an individual under the age of 22 who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program, and such institution has so certified to the employer, except that this subdivision shall not apply to service performed in a program established for or on behalf of an employer or group of employers;

(xvi) Service performed in the employ of a hospital, if such service is performed by a patient of the hospital, as defined in this section;

(xvii) Service performed by an individual for a person as an insurance agent or as an insurance solicitor, if all such service performed by such individual for such person is performed for remuneration solely by way of commission;

(xviii) Service performed by an individual for a person as a salesman, agent, or solicitor if the state law requires the individual to be registered or licensed to engage in the performance of the service and if the individual in the performance of such service is an independent contractor under common law rules and if the individual performs all such service for remuneration solely by way of commission;

(xix) Service performed by an individual engaged in the harvesting of timber, or in the transportation of timber from the place where harvested to market, or service performed by an individual engaged as a stone artisan, including sculpting, etching, or carving quarried stone when:

(I) such individual has been and will continue to be free from control or direction over the performance of such services, both under his or her contract of service and in fact; and

(II) such individual is customarily engaged in an independently established trade, occupation, profession, or business; and

(III) such individual furnishes substantially all of the equipment, tools, and supplies necessary in carrying out his or her contractual obligations to his or her clients.

(xx) Service performed by a full-time student as defined in subsection (III) in the employ of an organized camp.

(I) if such camp:

(aa) did not operate for more than seven months in the calendar year and did not operate for more than seven months in the preceding calendar year; or

(bb) had average gross receipts for any six months in the preceding calendar year which were not more than 33 ⅓ percent of its average gross receipts for the other six months in the preceding calendar year; and

(II) if such full-time student performed services in the employ of such camp for less than 13 calendar weeks in such calendar year; provided, that if the individual does not enroll in the immediately succeeding academic year or term, then the services of such individual as defined in this subsection shall be deemed to be employment for all purposes under this chapter.

(III) full-time student. For the purposes of subdivision (xx), an individual shall be treated as a full-time student for any period:

(aa) during which the individual is enrolled as a full-time student at an educational institution; or

(bb) which is between academic years or terms if (A) the individual was enrolled as a full-time student at an educational institution for the immediately preceding year or term; and (B) there is a reasonable assurance that the individual will be so enrolled for the immediately succeeding academic year or term after the period described in subdivision (A).

(xxi) Service performed by a direct seller if the individual is in compliance with all the following:

(I) The individual is engaged in the trade or business of selling or soliciting the sale of consumer products, including services or other intangibles, in the home or a location other than in a permanent retail establishment, including whether the sale or solicitation of a sale is to any buyer on a buy-sell basis, a deposit-commission basis, or any similar basis for resale by the buyer or any other person.

(II) Substantially all the remuneration, whether or not received in cash, for the performance of the services described in subdivision (I) of this subdivision (C)(xxi) is directly related to sales or other output, including the performance of services, rather than to the number of hours worked.

(III) The services performed by the individual are performed pursuant to a written contract between the individual and the person for whom the services are performed, and the contract provides that the individual will not be treated as an employee for federal and state tax purposes.

(D) Notwithstanding any other provisions of this subdivision, service with respect to which a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund or which as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act is required to be covered under this chapter.

(7) “Employment office” means a free public employment office, or branch thereof, of the Vermont Employment Service Division, or an office maintained by another state as a part of a state-controlled system of free public employment offices, or by a federal agency or any agency of a foreign government charged with the administration of an unemployment compensation program or free public employment offices; or such other agencies as the Secretary of Labor may approve.

(8) “Fund” means the Unemployment Compensation Fund established by this chapter, to which all contributions required and from which all benefits provided under this chapter shall be paid.

(9) “Total and partial unemployment.”

(A) An individual shall be deemed “totally unemployed” in any week during which the individual performs no services and with respect to which no wages are earned by him or her.

(B) An individual shall be deemed “partially unemployed” in any week of less than full time work if the wages earned by him or her with respect to such week are less than the weekly benefit amount he or she would be entitled to receive if totally unemployed and eligible.

(C) As used in this subdivision, “wages” includes only that part of remuneration in any one week rounded to the next higher dollar which is in excess of the amount specified in section 1338a of this title.

(D) An individual's week of unemployment shall be deemed to commence only after his or her registration at an employment office, except as the Vermont Employment Security Board may by regulation otherwise prescribe.

(10) “State” means the states of the United States of America, the Commonwealth of Puerto Rico, the District of Columbia and after December 31, 1977, the Virgin Islands.

(11) “Unemployment Compensation Administration Fund” means the Unemployment Compensation Administration Fund established by this chapter, from which administrative expenses under this chapter shall be paid.

(12) “Wages” means all remuneration paid for services rendered by an individual, including commissions and bonuses and the cash value of all remuneration paid in any medium other than cash. Gratuities customarily received by an individual in the course of his or her employment from persons other than the individual's employer and reported by the individual to the individual's employer shall be treated as wages paid by the individual's employer. The reasonable cash value of remuneration paid in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the Board. The term “wages” as used in this chapter shall not include:

(A) The amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his or her dependents under a plan or system established by an employer which makes provision for his or her employees generally (or for his or her employees generally and their dependents) or for a class or classes of his or her employees (or for a class or classes of his or her employees and their dependents), on account of:

(i) sickness or accident disability (but, in the case of payments made directly to an employee or any of his or her dependents, this subparagraph shall exclude from the term "wages" only payments which are received under a workers' compensation law);

(ii) medical or hospitalization expenses in connection with sickness or accident disability; or

(iii) death.

(B) Any payment on account of sickness or accident disability, or medical or hospitalization expenses in connection with sickness or accident disability, made by an employer to, or on behalf of, an employee after the expiration of six calendar months following the last calendar month in which the employee worked for such employer.

(C) Any payment made to, or on behalf of, an employee or his or her beneficiary (i) from or to a trust described in Section 401(a) of the U.S. Internal Revenue Code which is exempt from tax under Section 501(a) of the U.S. Internal Revenue Code at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust, or (ii) under or to an annuity plan which, at the time of such payment, is a plan described in Section 403(a) of the U.S. Internal Revenue Code.

(D) The payment by an employer (without deduction from the remuneration of the employee) of the tax imposed upon an employee under Section 3101 of the U.S. Internal Revenue Code.

(E) Any amounts received from the federal government by members of the National Guard and organized reserve, as drill pay, including longevity pay and allowances.

(F) Provided; that if the definition of "wages" in section 3306 of the Federal Unemployment Tax Act[12] is amended so as to no longer exclude from such definition any or all of the payments or amounts enumerated in subdivisions (12)(A) through (E) of this section, then any or all such payments or amounts shall no longer be excluded from the definition of "wages" under this chapter, effective on a date to coincide with the effective date of such amendment (or amendments) to the Federal Unemployment Tax Act.

(G) Any foster care payments excluded from the definition of gross income under Section 131 of the U.S. Internal Revenue Code.

(13) "Week" means such period or periods of seven consecutive days, as the Board may by regulation prescribe.

(14) “Calendar quarter” means a period of three consecutive calendar months ending on March 31, June 30, September 30, or December 31, or the equivalent thereof as the Board may by regulation prescribe.

(15) An individual's “weekly benefit amount” with respect to any week means the amount of benefits he or she would be entitled to receive for such week if totally unemployed and eligible for benefits therein.

(16)(A) “Benefit year,” with respect to any individual, means the one-year period beginning with the first day of the week with respect to which the individual first files a valid claim for benefits in accordance with section 1346 of this title, and thereafter the one-year period beginning with the first day of the first week with respect to which the individual next files such a claim for benefits after the termination of his or her last preceding benefit year.

(B) Repealed.

(17)(A) For benefit years beginning prior to January 3, 1988, the “base period” is the period of 52 weeks ending with the day immediately preceding the first day of a claimant's benefit year. Such period shall be extended by one week for each week, not to exceed 18, in which the claimant had no earnings because of sickness or disability as certified by a duly licensed physician.

(B) For benefit years beginning on January 3, 1988 and subsequent thereto the “base period” shall be the period made up of the first four of the most recently completed five calendar quarters immediately preceding the first day of a claimant's benefit year, and for any individual who fails to meet the eligibility requirements of section 1338 of this title in this base period, the Commissioner shall make a redetermination of entitlement based upon a base period which consists of the last four completed calendar quarters immediately preceding the first day of the claimant's benefit year.

(C) For any individual who fails to qualify for benefits under subdivision (B) of this subdivision, the Commissioner shall make a redetermination of entitlement based upon a base period which consists of the last three completed calendar quarters and all wages paid prior to the effective date of the claimant's initial claim in the calendar quarter in which the initial claim was filed.

(D) All wages which fall within the “base period” of valid claims under this section shall not be available for reuse in qualifying for any subsequent benefit years under section 1338 or 1318 of this title.

(18) “Institution of higher education” means an educational institution which (A) admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate; (B) is legally authorized in this State to provide a program of education beyond high school; (C) provides an educational program for which it awards a bachelor's or higher degree, or provides a program which is acceptable for full credit toward such a degree, a program of post-graduate or post-doctoral studies, or a program of training to prepare students for gainful employment in a recognized occupation; and (D) is a public or other nonprofit institution. Notwithstanding any of the foregoing provisions, all colleges and universities in this State are institutions of higher education for purposes of this chapter.

(19) “Hospital” means an institution that has been licensed, certified, or approved by the Department of Health as a hospital or an institution that is operated by the State of Vermont or any of its instrumentalities as a hospital.

(20) “Rate year” means the period beginning on July 1 of a year and ending on June 30 of the following year.

(21) “Bona fide employer” means the federal government, state governments and political subdivisions of state governments, railroads, tax exempt nonprofit organizations, established agricultural employers, employers liable under the unemployment compensation laws of this State, and an employer who has been assigned an employer identification number by the U.S. Internal Revenue Service.

(22) “Rounding.” Notwithstanding any other provisions of this law to the contrary, any amount of unemployment compensation payable to any individual for any week if not an even dollar amount, shall be rounded to the next lower full dollar amount.

(23) “Valid claim” means a claim for benefits filed by an individual who, at the time of filing the claim, has had sufficient wages in employment with an employer or employers to qualify for benefits pursuant to section 1338 of this title. The filing of a valid claim is a prerequisite to the making of a determination of an individual's eligibility for benefits under section 1343 of this title and a determination of an individual's disqualification for benefits under section 1344 of this title.

(24) “Self-employment”:

(A) Except as provided in subdivision (B) of this subdivision (24), an individual shall be deemed “self-employed” or “engaged in self-employment” in any week during which he or she is engaged, not in the employ of another, in the formation, development, or operation of a trade, business, enterprise, profession, or any other activity which he or she has undertaken for the purpose of producing income and which is in the form of a sole proprietorship, partnership, joint venture, or other similar entity.

(B) An individual who is able to work and available for full-time work shall not be deemed to be self-employed or engaged in self-employment solely by reason of continued participation without substantial change during a period of unemployment in any activity undertaken while customarily employed by an employer in full-time work (whether or not such work constituted employment) and continued subsequent to separation from such work when such activity is not engaged in as a primary source of livelihood. Earnings from such a sideline activity shall not constitute wages or disqualifying income for unemployment purposes.

(25) “Son,” “daughter,” and “child” include an individual's biological child, foster child, adoptive child, stepchild, a child for whom the individual is listed as a parent on the child's birth certificate, a legal ward of the individual, a child of the individual's spouse, or a child that the individual has day-to-day responsibilities to care for and financially support.

(26) “Spouse” includes an individual's domestic partner or civil union partner. As used in this subdivision, “domestic partner” means another individual with whom an individual has an enduring domestic relationship of a spousal nature, provided that the individual and the individual's domestic partner:

(A) have shared a residence for at least six months;

(B) are at least 18 years of age;

(C) are not married to, in a civil union with, or considered the domestic partner of another individual;

(D) are not related by blood closer than would bar marriage under State law; and

(E) have agreed between themselves to be responsible for each other's welfare.

Credits

1959, No. 10; 1959, No. 33; 1959, No. 107, § 1; 1959, No. 120; 1959, No. 262, § 35; 1959, Adj. Sess., No. 329, § 22; 1961, No. 210, §§ 15, 16; 1963, No. 84,§§ 1, 2; 1963, No. 122; 1965, No. 64; 1967, No. 43, § 1; 1967, No. 184; 1967, Adj. Sess., No. 247, § 1; 1971, No. 77, § 1; 1971, Adj. Sess., No. 184, § 7; 1973, No. 74, § 1; 1975, No. 40; 1977, No. 64, §§ 1-7, 21, 22; 1979, No. 53; 1979, Adj. Sess., No. 120, §§ 1-5; 1981, No. 66, § 5(b); 1981, No. 86, § 8; 1983, No. 16, §§ 1, 2, 10, 12; 1985, No. 50, §§ 1-3; 1985, Adj. Sess., No. 146, § 3; 1987, No. 31; 1987, No. 66; 1987, Adj. Sess., No. 227, §§ 1, 3; 1991, No. 82, § 1; 1991, Adj. Sess., No. 183, § 1; 1993, Adj. Sess., No. 227, § 17; 1997, Adj. Sess., No. 101, §§ 1, 6; 2003, Adj. Sess., No. 131, § 2; 2005, Adj. Sess., No. 103, § 3; 2005, Adj. Sess., No. 136, § 1; 2007, Adj. Sess., No. 104, § 1, eff. July 1, 2008; 2013, Adj. Sess., No. 96, § 139, eff. July 1, 2014; 2023, No. 53, § 124, eff. June 8, 2023; 2023, No. 76, §§ 39, 40, eff. July 1, 2023, and July 1, 2024.

Formerly: 1957, No. 105, § 1; 1957, No. 104; 1957, No. 72; 1955, No. 119; 1955, No. 59, § 1; 1953, No. 146, §§ 1, 2; 1953, No. 80, § 1; 1953, No. 67, § 1; 1953, No. 65, § 1; 1949, No. 126, § 1; 1949, No. 125, § 1; V.S. 1947, § 5343; 1947, No. 194, § 1; 1945, No. 141, § 1; 1943, No. 124, §§ 1-3; 1943, No. 121, §§ 1, 2; 1941, No. 149; 1941, No. 148, §§ 1-3; 1939, No. 181, §§ 1-6; 1937, No. 171, §§ 1, 2; 1936, Sp. Sess., No. 1, § 2.

Notes of Decisions (93)

Footnotes

1 29 U.S.C.A. § 152.

2 See 26 U.S.C.A. § 3301 et seq.

3 See 26 U.S.C.A. § 3306.

4 8 U.S.C.A. § 1184.

5 8 U.S.C.A. § 1101.

6 See 26 U.S.C.A. § 3306.

7 See 26 U.S.C.A. § 3306.

8 See 26 U.S.C.A. § 3306.

9 See 26 U.S.C.A. § 3306.

10 See 26 U.S.C.A. § 3304.

11 45 U.S.C.A. § 351.

12 See 26 U.S.C.A. § 3306

21 V.S.A. § 1301, VT ST T. 21 § 1301
Current through Chapters 81 (end) and M-16 (end) of the Regular Session of the 2022-2023 Vermont General Assembly (2023).

West's Revised Code of Washington Annotated
Title 50. Unemployment Compensation (Refs & Annos)
Chapter 50.04. Definitions (Refs & Annos)

West's RCWA 50.04.140

50.04.140. Employment--Exception tests

Currentness

Services performed by an individual for remuneration shall be deemed to be employment subject to this title unless and until it is shown to the satisfaction of the commissioner that:

(1)(a) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his or her contract of service and in fact; and

(b) Such service is either outside the usual course of business for which such service is performed, or that such service is performed outside of all the places of business of the enterprises for which such service is performed; and

(c) Such individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service.

(2) Or as a separate alternative, it shall not constitute employment subject to this title if it is shown that:

(a) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his or her contract of service and in fact; and

(b) Such service is either outside the usual course of business for which such service is performed, or that such service is performed outside of all the places of business of the enterprises for which such service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the service is performed; and

(c) Such individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service, or such individual has a principal place of business for the work the individual is conducting that is eligible for a business deduction for federal income tax purposes; and

(d) On the effective date of the contract of service, such individual is responsible for filing at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting; and

(e) On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, such individual has established an account with the department of revenue, and other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier number from the state of Washington; and

(f) On the effective date of the contract of service, such individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting.

Credits

[1991 c 246 § 6; 1945 c 35 § 15; Rem. Supp. 1945 § 9998-154. Prior: 1943 c 127 § 13; 1941 c 253 § 14; 1939 c 214 § 16; 1937 c 162 § 19.]

OFFICIAL NOTES

Effective date--Conflict with federal requirements--1991 c 246: See notes following RCW 51.08.195.

Notes of Decisions (45)

West's RCWA 50.04.140, WA ST 50.04.140
Current with all legislation from the 2023 Regular and First Special Sessions of the Washington Legislature.

Code of Federal Regulations
Title 16. Commercial Practices
Chapter I. Federal Trade Commission
Subchapter D. Trade Regulation Rules
Part 436. Disclosure Requirements and Prohibitions Concerning Franchising (Refs & Annos)
Subpart A. Definitions

16 C.F.R. § 436.1

§ 436.1 Definitions.

Effective: July 1, 2007
Currentness

Unless stated otherwise, the following definitions apply throughout part 436:

(a) Action includes complaints, cross claims, counterclaims, and third-party complaints in a judicial action or proceeding, and their equivalents in an administrative action or arbitration.

(b) Affiliate means an entity controlled by, controlling, or under common control with, another entity.

(c) Confidentiality clause means any contract, order, or settlement provision that directly or indirectly restricts a current or former franchisee from discussing his or her personal experience as a franchisee in the franchisor's system with any prospective franchisee. It does not include clauses that protect franchisor's trademarks or other proprietary information.

(d) Disclose, state, describe, and list each mean to present all material facts accurately, clearly, concisely, and legibly in plain English.

(e) Financial performance representation means any representation, including any oral, written, or visual representation, to a prospective franchisee, including a representation in the general media, that states, expressly or by implication, a specific level or range of actual or potential sales, income, gross profits, or net profits. The term includes a chart, table, or mathematical calculation that shows possible results based on a combination of variables.

(f) Fiscal year refers to the franchisor's fiscal year.

(g) Fractional franchise means a franchise relationship that satisfies the following criteria when the relationship is created:

(1) The franchisee, any of the franchisee's current directors or officers, or any current directors or officers of a parent or affiliate, has more than two years of experience in the same type of business; and

(2) The parties have a reasonable basis to anticipate that the sales arising from the relationship will not exceed 20% of the franchisee's total dollar volume in sales during the first year of operation.

(h) Franchise means any continuing commercial relationship or arrangement, whatever it may be called, in which the terms of the offer or contract specify, or the franchise seller promises or represents, orally or in writing, that:

(1) The franchisee will obtain the right to operate a business that is identified or associated with the franchisor's trademark, or to offer, sell, or distribute goods, services, or commodities that are identified or associated with the franchisor's trademark;

(2) The franchisor will exert or has authority to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the franchisee's method of operation; and

(3) As a condition of obtaining or commencing operation of the franchise, the franchisee makes a required payment or commits to make a required payment to the franchisor or its affiliate.

(i) Franchisee means any person who is granted a franchise.

(j) Franchise seller means a person that offers for sale, sells, or arranges for the sale of a franchise. It includes the franchisor and the franchisor's employees, representatives, agents, subfranchisors, and third-party brokers who are involved in franchise sales activities. It does not include existing franchisees who sell only their own outlet and who are otherwise not engaged in franchise sales on behalf of the franchisor.

(k) Franchisor means any person who grants a franchise and participates in the franchise relationship. Unless otherwise stated, it includes subfranchisors. For purposes of this definition, a “subfranchisor” means a person who functions as a franchisor by engaging in both pre-sale activities and post-sale performance.

(l) Leased department means an arrangement whereby a retailer licenses or otherwise permits a seller to conduct business from the retailer's location where the seller purchases no goods, services, or commodities directly or indirectly from the retailer, a person the retailer requires the seller to do business with, or a retailer-affiliate if the retailer advises the seller to do business with the affiliate.

(m) Parent means an entity that controls another entity directly, or indirectly through one or more subsidiaries.

(n) Person means any individual, group, association, limited or general partnership, corporation, or any other entity.

(o) Plain English means the organization of information and language usage understandable by a person unfamiliar with the franchise business. It incorporates short sentences; definite, concrete, everyday language; active voice; and tabular presentation of information, where possible. It avoids legal jargon, highly technical business terms, and multiple negatives.

(p) Predecessor means a person from whom the franchisor acquired, directly or indirectly, the major portion of the franchisor's assets.

(q) Principal business address means the street address of a person's home office in the United States. A principal business address cannot be a post office box or private mail drop.

(r) Prospective franchisee means any person (including any agent, representative, or employee) who approaches or is approached by a franchise seller to discuss the possible establishment of a franchise relationship.

(s) Required payment means all consideration that the franchisee must pay to the franchisor or an affiliate, either by contract or by practical necessity, as a condition of obtaining or commencing operation of the franchise. A required payment does not include payments for the purchase of reasonable amounts of inventory at bona fide wholesale prices for resale or lease.

(t) Sale of a franchise includes an agreement whereby a person obtains a franchise from a franchise seller for value by purchase, license, or otherwise. It does not include extending or renewing an existing franchise agreement where there has been no interruption in the franchisee's operation of the business, unless the new agreement contains terms and conditions that differ materially from the original agreement. It also does not include the transfer of a franchise by an existing franchisee where the franchisor has had no significant involvement with the prospective transferee. A franchisor's approval or disapproval of a transfer alone is not deemed to be significant involvement.

(u) Signature means a person's affirmative step to authenticate his or her identity. It includes a person's handwritten signature, as well as a person's use of security codes, passwords, electronic signatures, and similar devices to authenticate his or her identity.

(v) Trademark includes trademarks, service marks, names, logos, and other commercial symbols.

(w) Written or in writing means any document or information in printed form or in any form capable of being preserved in tangible form and read. It includes: type-set, word processed, or handwritten document; information on computer disk or CD–ROM; information sent via email; or information posted on the Internet. It does not include mere oral statements.

SOURCE: 72 FR 15544, March 30, 2007, unless otherwise noted.

AUTHORITY: 15 U.S.C. 41–58.

Notes of Decisions (9)

Current through Jan. 10, 2024, 89 FR 1743. Some sections may be more current. See credits for details.

RULE 16(k) STATEMENT

I hereby certify that this brief complies with the rules of court pertaining to the filing of briefs, including Mass. R. App. P. 16(a)(13), 16(e), 18, 20 (the specified portions of this brief include 10,952 words in Times New Roman 14-point font).

/s/ Matthew J. Iverson
Matthew J. Iverson

CERTIFICATE OF SERVICE

Pursuant to Mass. R. A. P. 13(d), I hereby certify, under the penalties of perjury, that on January 12, 2024, I made service of the foregoing Brief on the attorneys of record for each party by email and/or through the Electronic Filing System as follows:

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