

SENATE, No. 4204

STATE OF NEW JERSEY
218th LEGISLATURE

INTRODUCED NOVEMBER 7, 2019

Sponsored by:

Senator STEPHEN M. SWEENEY

District 3 (Cumberland, Gloucester and Salem)

SYNOPSIS

Concerns employment status of individuals with respect to wage and hour and unemployment laws.

CURRENT VERSION OF TEXT

As introduced.



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2

1 AN ACT concerning the employment status of individuals with
2 respect to State wage and hour and unemployment laws,
3 supplementing Article 3 of chapter 11 of Title 34 of the Revised
4 Statutes, and amending P.L.2007, c.114 and R.S.43:21-19.

5
6 **BE IT ENACTED** by the Senate and General Assembly of the State
7 of New Jersey:

8
9 1. (New section) For the purposes of all State employment
10 laws, individuals who perform services for remuneration shall be
11 deemed employees, not independent contractors, and shall be
12 subject to the provisions of those laws, and shall be entitled to all
13 rights and remedies provided by those laws, unless and until it is
14 shown to the satisfaction of the Commissioner of Labor and
15 Workforce Development that:

16 a. The individual has been and will continue to be free from
17 control or direction over the performance of the service, both under
18 the individual's contract of service and in fact; and

19 b. The individual's service is outside the usual course of the
20 business for which that service is performed; and

21 c. The individual is customarily engaged in an independently
22 established trade, occupation, profession or business of the same
23 nature as that involved in the work performed.

24 For the purposes of this section, "State employment laws" means
25 Article 1 of chapter 11 of Title 34 of the Revised Statutes and all
26 acts supplementing that article (R.S.34:11-2 et al.), P.L.1966, c.113
27 and all acts supplementing that act (C.34:11-56a et al.), P.L.2005,
28 c.379 (C.34:11-56.58 et seq.), and Article 3 of chapter 11 of Title
29 34 of the Revised Statutes and all acts supplementing that article
30 (R.S.34:11-57 et al.), but "State employment laws" do not include
31 the "New Jersey Prevailing Wage Act," P.L.1963, c.150 (C.34:11-
32 56.25 et seq.), "The Public Works Contractor Registration Act,"
33 P.L.1999, c.238 (C.34:11-56.48 et seq.), or the "Construction
34 Industry Independent Contractor Act," P.L. 2007, c.114 (C.34:20-1
35 et seq.).

36
37 2. Section 4 of P.L.2007, c.114 (C. 34:20-4) is amended to read
38 as follows:

39 4. For purposes of the "New Jersey Prevailing Wage Act,"
40 P.L.1963, c.150 (C.34:11-56.25 et seq.), the "unemployment
41 compensation law," R.S.43:21-1 et seq., the "Temporary Disability
42 Benefits Law," P.L.1948, c.110 (C.43:21-25 et seq.), the "New
43 Jersey Gross Income Tax Act," N.J.S.54A:1-1 et seq., or other
44 applicable State tax laws, P.L.1965, c.173 (C.34:11-4.1 et seq.) and
45 the "New Jersey State Wage and Hour Law," P.L.1966, c.113

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

1 (C.34:11-56a et seq.), services performed in the making of
2 improvements to real property by an individual for remuneration
3 paid by an employer shall be deemed to be employment unless and
4 until it is shown to the satisfaction of the Department of Labor and
5 Workforce Development that:

6 a. the individual has been and will continue to be free from
7 control or direction over the performance of that service, both under
8 his contract of service and in fact; and

9 b. the individual's service is **either** outside the usual course
10 of the business for which the service is performed**,** or the service is
11 performed outside of all the places of business of the employer for
12 which the service is performed**;** and

13 c. the individual is customarily engaged in an independently
14 established trade, occupation, profession or business of the same
15 nature as that involved in the work performed.

16 The failure to withhold federal or State income taxes or to pay
17 unemployment compensation contributions or workers'
18 compensation premiums with respect to an individual's wages shall
19 not be considered in making a determination under this section.

20 (cf: P.L.2007, c.114, s.4)

21

22 3. R.S.43:21-19 is amended to read as follows:

23 43:21-19. Definitions. As used in this chapter (R.S.43:21-1 et
24 seq.), unless the context clearly requires otherwise:

25 (a) (1) "Annual payroll" means the total amount of wages paid
26 during a calendar year (regardless of when earned) by an employer
27 for employment.

28 (2) "Average annual payroll" means the average of the annual
29 payrolls of any employer for the last three or five preceding
30 calendar years, whichever average is higher, except that any year or
31 years throughout which an employer has had no "annual payroll"
32 because of military service shall be deleted from the reckoning; the
33 "average annual payroll" in such case is to be determined on the
34 basis of the prior three or five calendar years in each of which the
35 employer had an "annual payroll" in the operation of his business, if
36 the employer resumes his business within 12 months after
37 separation, discharge or release from such service, under conditions
38 other than dishonorable, and makes application to have his "average
39 annual payroll" determined on the basis of such deletion within 12
40 months after he resumes his business; provided, however, that
41 "average annual payroll" solely for the purposes of paragraph (3) of
42 subsection (e) of R.S.43:21-7 means the average of the annual
43 payrolls of any employer on which he paid contributions to the
44 State disability benefits fund for the last three or five preceding
45 calendar years, whichever average is higher; provided further that
46 only those wages be included on which employer contributions have
47 been paid on or before January 31 (or the next succeeding day if
48 such January 31 is a Saturday or Sunday) immediately preceding

1 the beginning of the 12-month period for which the employer's
2 contribution rate is computed.

3 (b) "Benefits" means the money payments payable to an
4 individual, as provided in this chapter (R.S.43:21-1 et seq.), with
5 respect to his unemployment.

6 (c) (1) "Base year" with respect to benefit years commencing on
7 or after July 1, 1986, shall mean the first four of the last five
8 completed calendar quarters immediately preceding an individual's
9 benefit year.

10 With respect to a benefit year commencing on or after July 1,
11 1995, if an individual does not have sufficient qualifying weeks or
12 wages in his base year to qualify for benefits, the individual shall
13 have the option of designating that his base year shall be the
14 "alternative base year," which means the last four completed
15 calendar quarters immediately preceding the individual's benefit
16 year; except that, with respect to a benefit year commencing on or
17 after October 1, 1995, if the individual also does not have sufficient
18 qualifying weeks or wages in the last four completed calendar
19 quarters immediately preceding his benefit year to qualify for
20 benefits, "alternative base year" means the last three completed
21 calendar quarters immediately preceding his benefit year and, of the
22 calendar quarter in which the benefit year commences, the portion
23 of the quarter which occurs before the commencing of the benefit
24 year.

25 The division shall inform the individual of his options under this
26 section as amended by P.L.1995, c.234. If information regarding
27 weeks and wages for the calendar quarter or quarters immediately
28 preceding the benefit year is not available to the division from the
29 regular quarterly reports of wage information and the division is not
30 able to obtain the information using other means pursuant to State
31 or federal law, the division may base the determination of eligibility
32 for benefits on the affidavit of an individual with respect to weeks
33 and wages for that calendar quarter. The individual shall furnish
34 payroll documentation, if available, in support of the affidavit. A
35 determination of benefits based on an alternative base year shall be
36 adjusted when the quarterly report of wage information from the
37 employer is received if that information causes a change in the
38 determination.

39 (2) With respect to a benefit year commencing on or after June
40 1, 1990 for an individual who immediately preceding the benefit
41 year was subject to a disability compensable under the provisions of
42 the "Temporary Disability Benefits Law," P.L.1948, c.110
43 (C.43:21-25 et seq.), "base year" shall mean the first four of the last
44 five completed calendar quarters immediately preceding the
45 individual's period of disability, if the employment held by the
46 individual immediately preceding the period of disability is no
47 longer available at the conclusion of that period and the individual
48 files a valid claim for unemployment benefits after the conclusion

1 of that period. For the purposes of this paragraph, "period of
2 disability" means the period defined as a period of disability by
3 section 3 of the "Temporary Disability Benefits Law," P.L.1948,
4 c.110 (C.43:21-27). An individual who files a claim under the
5 provisions of this paragraph (2) shall not be regarded as having left
6 work voluntarily for the purposes of subsection (a) of R.S.43:21-5.

7 (3) With respect to a benefit year commencing on or after June
8 1, 1990 for an individual who immediately preceding the benefit
9 year was subject to a disability compensable under the provisions of
10 the workers' compensation law (chapter 15 of Title 34 of the
11 Revised Statutes), "base year" shall mean the first four of the last
12 five completed calendar quarters immediately preceding the
13 individual's period of disability, if the period of disability was not
14 longer than two years, if the employment held by the individual
15 immediately preceding the period of disability is no longer
16 available at the conclusion of that period and if the individual files a
17 valid claim for unemployment benefits after the conclusion of that
18 period. For the purposes of this paragraph, "period of disability"
19 means the period from the time at which the individual becomes
20 unable to work because of the compensable disability until the time
21 that the individual becomes able to resume work and continue work
22 on a permanent basis. An individual who files a claim under the
23 provisions of this paragraph (3) shall not be regarded as having left
24 work voluntarily for the purposes of subsection (a) of R.S.43:21-5.

25 (d) "Benefit year" with respect to any individual means the 364
26 consecutive calendar days beginning with the day on, or as of,
27 which he first files a valid claim for benefits, and thereafter
28 beginning with the day on, or as of, which the individual next files a
29 valid claim for benefits after the termination of his last preceding
30 benefit year. Any claim for benefits made in accordance with
31 subsection (a) of R.S.43:21-6 shall be deemed to be a "valid claim"
32 for the purpose of this subsection if (1) he is unemployed for the
33 week in which, or as of which, he files a claim for benefits; and (2)
34 he has fulfilled the conditions imposed by subsection (e) of
35 R.S.43:21-4.

36 (e) (1) "Division" means the Division of Unemployment and
37 Temporary Disability Insurance of the Department of Labor and
38 Workforce Development, and any transaction or exercise of
39 authority by the director of the division thereunder, or under this
40 chapter (R.S.43:21-1 et seq.), shall be deemed to be performed by
41 the division.

42 (2) "Controller" means the Office of the Assistant
43 Commissioner for Finance and Controller of the Department of
44 Labor and Workforce Development, established by the 1982
45 Reorganization Plan of the Department of Labor.

46 (f) "Contributions" means the money payments to the State
47 Unemployment Compensation Fund, required by R.S.43:21-7.
48 "Payments in lieu of contributions" means the money payments to

1 the State Unemployment Compensation Fund by employers electing
2 or required to make payments in lieu of contributions, as provided
3 in section 3 or section 4 of P.L.1971, c.346 (C.43:21-7.2 or 43:21-
4 7.3).

5 (g) "Employing unit" means the State or any of its
6 instrumentalities or any political subdivision thereof or any of its
7 instrumentalities or any instrumentality of more than one of the
8 foregoing or any instrumentality of any of the foregoing and one or
9 more other states or political subdivisions or any individual or type
10 of organization, any partnership, association, trust, estate, joint-
11 stock company, insurance company or corporation, whether
12 domestic or foreign, or the receiver, trustee in bankruptcy, trustee or
13 successor thereof, or the legal representative of a deceased person,
14 which has or subsequent to January 1, 1936, had in its employ one
15 or more individuals performing services for it within this State. All
16 individuals performing services within this State for any employing
17 unit which maintains two or more separate establishments within
18 this State shall be deemed to be employed by a single employing
19 unit for all the purposes of this chapter (R.S.43:21-1 et seq.). Each
20 individual employed to perform or to assist in performing the work
21 of any agent or employee of an employing unit shall be deemed to
22 be employed by such employing unit for all the purposes of this
23 chapter (R.S.43:21-1 et seq.), whether such individual was hired or
24 paid directly by such employing unit or by such agent or employee;
25 provided the employing unit had actual or constructive knowledge
26 of the work.

27 (h) "Employer" means:

28 (1) Any employing unit which in either the current or the
29 preceding calendar year paid remuneration for employment in the
30 amount of \$1,000.00 or more;

31 (2) Any employing unit (whether or not an employing unit at the
32 time of acquisition) which acquired the organization, trade or
33 business, or substantially all the assets thereof, of another which, at
34 the time of such acquisition, was an employer subject to this chapter
35 (R.S.43:21-1 et seq.);

36 (3) Any employing unit which acquired the organization, trade
37 or business, or substantially all the assets thereof, of another
38 employing unit and which, if treated as a single unit with such other
39 employing unit, would be an employer under paragraph (1) of this
40 subsection;

41 (4) Any employing unit which together with one or more other
42 employing units is owned or controlled (by legally enforceable
43 means or otherwise), directly or indirectly by the same interests, or
44 which owns or controls one or more other employing units (by
45 legally enforceable means or otherwise), and which, if treated as a
46 single unit with such other employing unit or interest, would be an
47 employer under paragraph (1) of this subsection;

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1 (5) Any employing unit for which service in employment as
2 defined in R.S.43:21-19 (i) (1) (B) (i) is performed after December
3 31, 1971; and as defined in R.S.43:21-19 (i) (1) (B) (ii) is
4 performed after December 31, 1977;

5 (6) Any employing unit for which service in employment as
6 defined in R.S.43:21-19 (i) (1) (c) is performed after December 31,
7 1971 and which in either the current or the preceding calendar year
8 paid remuneration for employment in the amount of \$1,000.00 or
9 more;

10 (7) Any employing unit not an employer by reason of any other
11 paragraph of this subsection (h) for which, within either the current
12 or preceding calendar year, service is or was performed with respect
13 to which such employing unit is liable for any federal tax against
14 which credit may be taken for contributions required to be paid into
15 a state unemployment fund; or which, as a condition for approval of
16 the "unemployment compensation law" for full tax credit against
17 the tax imposed by the Federal Unemployment Tax Act, is required
18 pursuant to such act to be an employer under this chapter
19 (R.S.43:21-1 et seq.);

20 (8) (Deleted by amendment; P.L.1977, c.307.)

21 (9) (Deleted by amendment; P.L.1977, c.307.)

22 (10) (Deleted by amendment; P.L.1977, c.307.)

23 (11) Any employing unit subject to the provisions of the Federal
24 Unemployment Tax Act within either the current or the preceding
25 calendar year, except for employment hereinafter excluded under
26 paragraph (7) of subsection (i) of this section;

27 (12) Any employing unit for which agricultural labor in
28 employment as defined in R.S.43:21-19 (i) (1) (I) is performed after
29 December 31, 1977;

30 (13) Any employing unit for which domestic service in
31 employment as defined in R.S.43:21-19 (i) (1) (J) is performed after
32 December 31, 1977;

33 (14) Any employing unit which having become an employer
34 under the "unemployment compensation law" (R.S.43:21-1 et seq.),
35 has not under R.S.43:21-8 ceased to be an employer; or for the
36 effective period of its election pursuant to R.S.43:21-8, any other
37 employing unit which has elected to become fully subject to this
38 chapter (R.S.43:21-1 et seq.).

39 (i) (1) "Employment" means:

40 (A) Any service performed prior to January 1, 1972, which was
41 employment as defined in the "unemployment compensation law"
42 (R.S.43:21-1 et seq.) prior to such date, and, subject to the other
43 provisions of this subsection, service performed on or after January
44 1, 1972, including service in interstate commerce, performed for
45 remuneration or under any contract of hire, written or oral, express
46 or implied.

47 (B) (i) Service performed after December 31, 1971 by an
48 individual in the employ of this State or any of its instrumentalities

1 or in the employ of this State and one or more other states or their
2 instrumentalities for a hospital or institution of higher education
3 located in this State, if such service is not excluded from
4 "employment" under paragraph (D) below.

5 (ii) Service performed after December 31, 1977, in the employ
6 of this State or any of its instrumentalities or any political
7 subdivision thereof or any of its instrumentalities or any
8 instrumentality of more than one of the foregoing or any
9 instrumentality of the foregoing and one or more other states or
10 political subdivisions, if such service is not excluded from
11 "employment" under paragraph (D) below.

12 (C) Service performed after December 31, 1971 by an individual
13 in the employ of a religious, charitable, educational, or other
14 organization, which is excluded from "employment" as defined in
15 the Federal Unemployment Tax Act, solely by reason of section
16 3306 (c)(8) of that act, if such service is not excluded from
17 "employment" under paragraph (D) below.

18 (D) For the purposes of paragraphs (B) and (C), the term
19 "employment" does not apply to services performed

20 (i) In the employ of (I) a church or convention or association of
21 churches, or (II) an organization, or school which is operated
22 primarily for religious purposes and which is operated, supervised,
23 controlled or principally supported by a church or convention or
24 association of churches;

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

28 (iii) Prior to January 1, 1978, in the employ of a school which is
29 not an institution of higher education, and after December 31, 1977,
30 in the employ of a governmental entity referred to in R.S.43:21-19
31 (i) (1) (B), if such service is performed by an individual in the
32 exercise of duties

33 (aa) as an elected official;

34 (bb) as a member of a legislative body, or a member of the
35 judiciary, of a state or political subdivision;

36 (cc) as a member of the State National Guard or Air National
37 Guard;

38 (dd) as an employee serving on a temporary basis in case of fire,
39 storm, snow, earthquake, flood or similar emergency;

40 (ee) in a position which, under or pursuant to the laws of this
41 State, is designated as a major nontenured policy making or
42 advisory position, or a policy making or advisory position, the
43 performance of the duties of which ordinarily does not require more
44 than eight hours per week; or

45 (iv) By an individual receiving rehabilitation or remunerative
46 work in a facility conducted for the purpose of carrying out a
47 program of rehabilitation of individuals whose earning capacity is
48 impaired by age or physical or mental deficiency or injury or

1 providing remunerative work for individuals who because of their
2 impaired physical or mental capacity cannot be readily absorbed in
3 the competitive labor market;

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

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

12 (E) The term "employment" shall include the services of an
13 individual who is a citizen of the United States, performed outside
14 the United States after December 31, 1971 (except in Canada and in
15 the case of the Virgin Islands, after December 31, 1971) and prior
16 to January 1 of the year following the year in which the U.S.
17 Secretary of Labor approves the unemployment compensation law
18 of the Virgin Islands, under section 3304 (a) of the Internal
19 Revenue Code of 1986 (26 U.S.C. s.3304 (a)) in the employ of an
20 American employer (other than the service which is deemed
21 employment under the provisions of R.S.43:21-19 (i) (2) or (5) or
22 the parallel provisions of another state's unemployment
23 compensation law), if

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

26 (ii) The American employer has no place of business in the
27 United States, but (I) the American employer is an individual who
28 is a resident of this State; or (II) the American employer is a
29 corporation which is organized under the laws of this State; or (III)
30 the American employer is a partnership or trust and the number of
31 partners or trustees who are residents of this State is greater than the
32 number who are residents of another state; or

33 (iii) None of the criteria of divisions (i) and (ii) of this
34 subparagraph (E) is met but the American employer has elected to
35 become an employer subject to the "unemployment compensation
36 law" (R.S.43:21-1 et seq.) in this State, or the American employer
37 having failed to elect to become an employer in any state, the
38 individual has filed a claim for benefits, based on such service,
39 under the law of this State;

40 (iv) An "American employer," for the purposes of this
41 subparagraph (E), means (I) an individual who is a resident of the
42 United States; or (II) a partnership, if two-thirds or more of the
43 partners are residents of the United States; or (III) a trust, if all the
44 trustees are residents of the United States; or (IV) a corporation
45 organized under the laws of the United States or of any state.

46 (F) Notwithstanding R.S.43:21-19 (i) (2), all service performed
47 after January 1, 1972 by an officer or member of the crew of an
48 American vessel or American aircraft on or in connection with such

1 vessel or aircraft, if the operating office from which the operations
2 of such vessel or aircraft operating within, or within and without,
3 the United States are ordinarily and regularly supervised, managed,
4 directed, and controlled, is within this State.

5 (G) Notwithstanding any other provision of this subsection,
6 service in this State with respect to which the taxes required to be
7 paid under any federal law imposing a tax against which credit may
8 be taken for contributions required to be paid into a state
9 unemployment fund or which as a condition for full tax credit
10 against the tax imposed by the Federal Unemployment Tax Act is
11 required to be covered under the "unemployment compensation
12 law" (R.S.43:21-1 et seq.).

13 (H) The term "United States" when used in a geographical sense
14 in subsection R.S.43:21-19 (i) includes the states, the District of
15 Columbia, the Commonwealth of Puerto Rico and, effective on the
16 day after the day on which the U.S. Secretary of Labor approves for
17 the first time under section 3304 (a) of the Internal Revenue Code
18 of 1986 (26 U.S.C. s.3304 (a)) an unemployment compensation law
19 submitted to the Secretary by the Virgin Islands for such approval,
20 the Virgin Islands.

21 (I) (i) Service performed after December 31, 1977 in agricultural
22 labor in a calendar year for an entity which is an employer as
23 defined in the "unemployment compensation law," (R.S.43:21-1 et
24 seq.) as of January 1 of such year; or for an employing unit which

25 (aa) during any calendar quarter in either the current or the
26 preceding calendar year paid remuneration in cash of \$20,000.00 or
27 more for individuals employed in agricultural labor, or

28 (bb) for some portion of a day in each of 20 different calendar
29 weeks, whether or not such weeks were consecutive, in either the
30 current or the preceding calendar year, employed in agricultural
31 labor 10 or more individuals, regardless of whether they were
32 employed at the same moment in time.

33 (ii) for the purposes of this subsection any individual who is a
34 member of a crew furnished by a crew leader to perform service in
35 agricultural labor for any other entity shall be treated as an
36 employee of such crew leader

37 (aa) if such crew leader holds a certification of registration
38 under the Migrant and Seasonal Agricultural Worker Protection
39 Act, Pub.L.97-470 (29 U.S.C. s.1801 et seq.), or P.L.1971, c.192
40 (C.34:8A-7 et seq.); or substantially all the members of such crew
41 operate or maintain tractors, mechanized harvesting or cropdusting
42 equipment, or any other mechanized equipment, which is provided
43 by such crew leader; and

44 (bb) if such individual is not an employee of such other person
45 for whom services were performed.

46 (iii) For the purposes of subparagraph (I) (i) in the case of any
47 individual who is furnished by a crew leader to perform service in

1 agricultural labor or any other entity and who is not treated as an
2 employee of such crew leader under (I) (ii)

3 (aa) such other entity and not the crew leader shall be treated as
4 the employer of such individual; and

5 (bb) such other entity shall be treated as having paid cash
6 remuneration to such individual in an amount equal to the amount
7 of cash remuneration paid to such individual by the crew leader
8 (either on his own behalf or on behalf of such other entity) for the
9 service in agricultural labor performed for such other entity.

10 (iv) For the purpose of subparagraph (I)(ii), the term "crew
11 leader" means an individual who

12 (aa) furnishes individuals to perform service in agricultural
13 labor for any other entity;

14 (bb) pays (either on his own behalf or on behalf of such other
15 entity) the individuals so furnished by him for the service in
16 agricultural labor performed by them; and

17 (cc) has not entered into a written agreement with such other
18 entity under which such individual is designated as an employee of
19 such other entity.

20 (J) Domestic service after December 31, 1977 performed in the
21 private home of an employing unit which paid cash remuneration of
22 \$1,000.00 or more to one or more individuals for such domestic
23 service in any calendar quarter in the current or preceding calendar
24 year.

25 (2) The term "employment" shall include an individual's entire
26 service performed within or both within and without this State if:

27 (A) The service is localized in this State; or

28 (B) The service is not localized in any state but some of the
29 service is performed in this State, and (i) the base of operations, or,
30 if there is no base of operations, then the place from which such
31 service is directed or controlled, is in this State; or (ii) the base of
32 operations or place from which such service is directed or
33 controlled is not in any state in which some part of the service is
34 performed, but the individual's residence is in this State.

35 (3) Services performed within this State but not covered under
36 paragraph (2) of this subsection shall be deemed to be employment
37 subject to this chapter (R.S.43:21-1 et seq.) if contributions are not
38 required and paid with respect to such services under an
39 unemployment compensation law of any other state or of the federal
40 government.

41 (4) Services not covered under paragraph (2) of this subsection
42 and performed entirely without this State, with respect to no part of
43 which contributions are required and paid under an unemployment
44 compensation law of any other state or of the federal government,
45 shall be deemed to be employment subject to this chapter
46 (R.S.43:21-1 et seq.) if the individual performing such services is a
47 resident of this State and the employing unit for whom such
48 services are performed files with the division an election that the

1 entire service of such individual shall be deemed to be employment
2 subject to this chapter (R.S.43:21-1 et seq.).

3 (5) Service shall be deemed to be localized within a state if:

4 (A) The service is performed entirely within such state; or

5 (B) The service is performed both within and without such state,
6 but the service performed without such state is incidental to the
7 individual's service within the state; for example, is temporary or
8 transitory in nature or consists of isolated transactions.

9 (6) Services performed by an individual for remuneration shall
10 be deemed to be employment subject to this chapter (R.S.43:21-1 et
11 seq.) unless and until it is shown to the satisfaction of the division
12 that:

13 (A) **【Such】** The individual has been and will continue to be free
14 from control or direction over the performance of **【such】** the
15 service, both under his contract of service and in fact; and

16 (B) **【Such】** The individual's service is **【either】** outside the usual
17 course of the business for which **【such】** the service is performed**【,**
18 or that such service is performed outside of all the places of
19 business of the enterprise for which such service is performed**】**; and

20 (C) **【Such】** The individual is customarily engaged in an
21 independently established trade, occupation, profession or business
22 of the same nature as that involved in the work performed.

23 (7) Provided that such services are also exempt under the
24 Federal Unemployment Tax Act, as amended, or that contributions
25 with respect to such services are not required to be paid into a state
26 unemployment fund as a condition for a tax offset credit against the
27 tax imposed by the Federal Unemployment Tax Act, as amended,
28 the term "employment" shall not include:

29 (A) Agricultural labor performed prior to January 1, 1978; and
30 after December 31, 1977, only if performed in a calendar year for
31 an entity which is not an employer as defined in the "unemployment
32 compensation law," (R.S.43:21-1 et seq.) as of January 1 of such
33 calendar year; or unless performed for an employing unit which

34 (i) during a calendar quarter in either the current or the
35 preceding calendar year paid remuneration in cash of \$20,000.00 or
36 more to individuals employed in agricultural labor, or

37 (ii) for some portion of a day in each of 20 different calendar
38 weeks, whether or not such weeks were consecutive, in either the
39 current or the preceding calendar year, employed in agricultural
40 labor 10 or more individuals, regardless of whether they were
41 employed at the same moment in time;

42 (B) Domestic service in a private home performed prior to
43 January 1, 1978; and after December 31, 1977, unless performed in
44 the private home of an employing unit which paid cash
45 remuneration of \$1,000.00 or more to one or more individuals for
46 such domestic service in any calendar quarter in the current or
47 preceding calendar year;

- 1 (C) Service performed by an individual in the employ of his son,
2 daughter or spouse, and service performed by a child under the age
3 of 18 in the employ of his father or mother;
- 4 (D) Service performed prior to January 1, 1978, in the employ of
5 this State or of any political subdivision thereof or of any
6 instrumentality of this State or its political subdivisions, except as
7 provided in R.S.43:21-19 (i) (1) (B) above, and service in the
8 employ of the South Jersey Port Corporation or its successors;
- 9 (E) Service performed in the employ of any other state or its
10 political subdivisions or of an instrumentality of any other state or
11 states or their political subdivisions to the extent that such
12 instrumentality is with respect to such service exempt under the
13 Constitution of the United States from the tax imposed under the
14 Federal Unemployment Tax Act, as amended, except as provided in
15 R.S.43:21-19 (i) (1) (B) above;
- 16 (F) Service performed in the employ of the United States
17 Government or of any instrumentality of the United States exempt
18 under the Constitution of the United States from the contributions
19 imposed by the "unemployment compensation law," except that to
20 the extent that the Congress of the United States shall permit states
21 to require any instrumentalities of the United States to make
22 payments into an unemployment fund under a state unemployment
23 compensation law, all of the provisions of this act shall be
24 applicable to such instrumentalities, and to service performed for
25 such instrumentalities, in the same manner, to the same extent and
26 on the same terms as to all other employers, employing units,
27 individuals and services; provided that if this State shall not be
28 certified for any year by the Secretary of Labor of the United States
29 under section 3304 of the federal Internal Revenue Code of 1986
30 (26 U.S.C. s.3304), the payments required of such instrumentalities
31 with respect to such year shall be refunded by the division from the
32 fund in the same manner and within the same period as is provided
33 in R.S.43:21-14 (f) with respect to contributions erroneously paid to
34 or collected by the division;
- 35 (G) Services performed in the employ of fraternal beneficiary
36 societies, orders, or associations operating under the lodge system
37 or for the exclusive benefit of the members of a fraternity itself
38 operating under the lodge system and providing for the payment of
39 life, sick, accident, or other benefits to the members of such society,
40 order, or association, or their dependents;
- 41 (H) Services performed as a member of the board of directors, a
42 board of trustees, a board of managers, or a committee of any bank,
43 building and loan, or savings and loan association, incorporated or
44 organized under the laws of this State or of the United States, where
45 such services do not constitute the principal employment of the
46 individual;

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1 (I) Service with respect to which unemployment insurance is
2 payable under an unemployment insurance program established by
3 an Act of Congress;

4 (J) Service performed by agents of mutual fund brokers or
5 dealers in the sale of mutual funds or other securities, by agents of
6 insurance companies, exclusive of industrial insurance agents or by
7 agents of investment companies, if the compensation to such agents
8 for such services is wholly on a commission basis;

9 (K) Services performed by real estate salesmen or brokers who
10 are compensated wholly on a commission basis;

11 (L) Services performed in the employ of any veterans'
12 organization chartered by Act of Congress or of any auxiliary
13 thereof, no part of the net earnings of which organization, or
14 auxiliary thereof, inures to the benefit of any private shareholder or
15 individual;

16 (M) Service performed for or in behalf of the owner or operator
17 of any theater, ballroom, amusement hall or other place of
18 entertainment, not in excess of 10 weeks in any calendar year for
19 the same owner or operator, by any leader or musician of a band or
20 orchestra, commonly called a "name band," entertainer, vaudeville
21 artist, actor, actress, singer or other entertainer;

22 (N) Services performed after January 1, 1973 by an individual
23 for a labor union organization, known and recognized as a union
24 local, as a member of a committee or committees reimbursed by the
25 union local for time lost from regular employment, or as a part-time
26 officer of a union local and the remuneration for such services is
27 less than \$1,000.00 in a calendar year;

28 (O) Services performed in the sale or distribution of merchandise
29 by home-to-home salespersons or in-the-home demonstrators whose
30 remuneration consists wholly of commissions or commissions and
31 bonuses;

32 (P) Service performed in the employ of a foreign government,
33 including service as a consular, nondiplomatic representative, or
34 other officer or employee;

35 (Q) Service performed in the employ of an instrumentality
36 wholly owned by a foreign government if (i) the service is of a
37 character similar to that performed in foreign countries by
38 employees of the United States Government or of an instrumentality
39 thereof, and (ii) the division finds that the United States Secretary
40 of State has certified to the United States Secretary of the Treasury
41 that the foreign government, with respect to whose instrumentality
42 exemption is claimed, grants an equivalent exemption with respect
43 to similar services performed in the foreign country by employees
44 of the United States Government and of instrumentalities thereof;

45 (R) Service in the employ of an international organization
46 entitled to enjoy the privileges, exemptions and immunities under
47 the International Organizations Immunities Act (22 U.S.C. s.288 et
48 seq.);

1 (S) Service covered by an election duly approved by an agency
2 charged with the administration of any other state or federal
3 unemployment compensation or employment security law, in
4 accordance with an arrangement pursuant to R.S.43:21-21 during
5 the effective period of such election;

6 (T) Service performed in the employ of a school, college, or
7 university if such service is performed (i) by a student enrolled at
8 such school, college, or university on a full-time basis in an
9 educational program or completing such educational program
10 leading to a degree at any of the severally recognized levels, or (ii)
11 by the spouse of such a student, if such spouse is advised at the time
12 such spouse commences to perform such service that (I) the
13 employment of such spouse to perform such service is provided
14 under a program to provide financial assistance to such student by
15 such school, college, or university, and (II) such employment will
16 not be covered by any program of unemployment insurance;

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

28 (V) Service performed in the employ of a hospital, if such
29 service is performed by a patient of the hospital; service performed
30 as a student nurse in the employ of a hospital or a nurses' training
31 school by an individual who is enrolled and regularly attending
32 classes in a nurses' training school approved under the laws of this
33 State;

34 (W) Services performed after the effective date of this
35 amendatory act by agents of mutual benefit associations if the
36 compensation to such agents for such services is wholly on a
37 commission basis;

38 (X) Services performed by operators of motor vehicles weighing
39 18,000 pounds or more, licensed for commercial use and used for
40 the highway movement of motor freight, who own their equipment
41 or who lease or finance the purchase of their equipment through an
42 entity which is not owned or controlled directly or indirectly by the
43 entity for which the services were performed and who were
44 compensated by receiving a percentage of the gross revenue
45 generated by the transportation move or by a schedule of payment
46 based on the distance and weight of the transportation move;

47 (Y) (Deleted by amendment, P.L.2009, c.211.)

1 (Z) Services performed, using facilities provided by a travel
2 agent, by a person, commonly known as an outside travel agent,
3 who acts as an independent contractor, is paid on a commission
4 basis, sets his own work schedule and receives no benefits, sick
5 leave, vacation or other leave from the travel agent owning the
6 facilities.

7 (8) If one-half or more of the services in any pay period
8 performed by an individual for an employing unit constitutes
9 employment, all the services of such individual shall be deemed to
10 be employment; but if more than one-half of the service in any pay
11 period performed by an individual for an employing unit does not
12 constitute employment, then none of the service of such individual
13 shall be deemed to be employment. As used in this paragraph, the
14 term "pay period" means a period of not more than 31 consecutive
15 days for which a payment for service is ordinarily made by an
16 employing unit to individuals in its employ.

17 (9) Services performed by the owner of a limousine franchise
18 (franchisee) shall not be deemed to be employment subject to the
19 "unemployment compensation law," R.S.43:21-1 et seq., with
20 regard to the franchisor if:

21 (A) The limousine franchisee is incorporated;

22 (B) The franchisee is subject to regulation by the Interstate
23 Commerce Commission;

24 (C) The limousine franchise exists pursuant to a written
25 franchise arrangement between the franchisee and the franchisor as
26 defined by section 3 of P.L.1971, c.356 (C.56:10-3); and

27 (D) The franchisee registers with the Department of Labor and
28 Workforce Development and receives an employer registration
29 number.

30 (10) Services performed by a legal transcriber, or certified court
31 reporter certified pursuant to P.L.1940, c.175 (C.45:15B-1 et seq.),
32 shall not be deemed to be employment subject to the
33 "unemployment compensation law," R.S.43:21-1 et seq., if those
34 services are provided to a third party by the transcriber or reporter
35 who is referred to the third party pursuant to an agreement with
36 another legal transcriber or legal transcription service, or certified
37 court reporter or court reporting service, on a freelance basis,
38 compensation for which is based upon a fee per transcript page, flat
39 attendance fee, or other flat minimum fee, or combination thereof,
40 set forth in the agreement.

41 For purposes of this paragraph (10): "legal transcription service"
42 and "legal transcribing" mean making use, by audio, video or voice
43 recording, of a verbatim record of court proceedings, depositions,
44 other judicial proceedings, meetings of boards, agencies,
45 corporations, or other bodies or groups, and causing that record to
46 be printed in readable form or produced on a computer screen in
47 readable form; and "legal transcriber" means a person who engages
48 in "legal transcribing."

1 (j) "Employment office" means a free public employment
2 office, or branch thereof operated by this State or maintained as a
3 part of a State-controlled system of public employment offices.

4 (k) (Deleted by amendment, P.L.1984, c.24.)

5 (l) "State" includes, in addition to the states of the United States
6 of America, the District of Columbia, the Virgin Islands and Puerto
7 Rico.

8 (m) "Unemployment."

9 (1) An individual shall be deemed "unemployed" for any week
10 during which:

11 (A) The individual is not engaged in full-time work and with
12 respect to which his remuneration is less than his weekly benefit
13 rate, including any week during which he is on vacation without
14 pay; provided such vacation is not the result of the individual's
15 voluntary action, except that for benefit years commencing on or
16 after July 1, 1984, an officer of a corporation, or a person who has
17 more than a 5% equitable or debt interest in the corporation, whose
18 claim for benefits is based on wages with that corporation shall not
19 be deemed to be unemployed in any week during the individual's
20 term of office or ownership in the corporation; or

21 (B) The individual is eligible for and receiving a self-
22 employment assistance allowance pursuant to the requirements of
23 P.L.1995, c.394 (C.43:21-67 et al.).

24 (2) The term "remuneration" with respect to any individual for
25 benefit years commencing on or after July 1, 1961, and as used in
26 this subsection, shall include only that part of the same which in
27 any week exceeds 20% of his weekly benefit rate (fractional parts
28 of a dollar omitted) or \$5.00, whichever is the larger, and shall not
29 include any moneys paid to an individual by a county board of
30 elections for work as a board worker on an election day.

31 (3) An individual's week of unemployment shall be deemed to
32 commence only after the individual has filed a claim at an
33 unemployment insurance claims office, except as the division may
34 by regulation otherwise prescribe.

35 (n) "Unemployment compensation administration fund" means
36 the unemployment compensation administration fund established by
37 this chapter (R.S.43:21-1 et seq.), from which administrative
38 expenses under this chapter (R.S.43:21-1 et seq.) shall be paid.

39 (o) "Wages" means remuneration paid by employers for
40 employment. If a worker receives gratuities regularly in the course
41 of his employment from other than his employer, his "wages" shall
42 also include the gratuities so received, if reported in writing to his
43 employer in accordance with regulations of the division, and if not
44 so reported, his "wages" shall be determined in accordance with the
45 minimum wage rates prescribed under any labor law or regulation
46 of this State or of the United States, or the amount of remuneration
47 actually received by the employee from his employer, whichever is
48 the higher.

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1 (p) "Remuneration" means all compensation for personal
2 services, including commission and bonuses and the cash value of
3 all compensation in any medium other than cash.

4 (q) "Week" means for benefit years commencing on or after
5 October 1, 1984, the calendar week ending at midnight Saturday, or
6 as the division may by regulation prescribe.

7 (r) "Calendar quarter" means the period of three consecutive
8 calendar months ending March 31, June 30, September 30, or
9 December 31.

10 (s) "Investment company" means any company as defined in
11 subsection a. of section 1 of P.L.1938, c.322 (C.17:16A-1).

12 (t) (1) (Deleted by amendment, P.L.2001, c.17).

13 (2) "Base week," commencing on or after January 1, 1996 and
14 before January 1, 2001, means:

15 (A) Any calendar week during which the individual earned in
16 employment from an employer remuneration not less than an
17 amount which is 20% of the Statewide average weekly
18 remuneration defined in subsection (c) of R.S.43:21-3 which
19 amount shall be adjusted to the next higher multiple of \$1.00 if not
20 already a multiple thereof, except that if in any calendar week an
21 individual subject to this subparagraph (A) is in employment with
22 more than one employer, the individual may in that calendar week
23 establish a base week with respect to each of the employers from
24 whom the individual earns remuneration equal to not less than the
25 amount defined in this subparagraph (A) during that week; or

26 (B) If the individual does not establish in his base year 20 or
27 more base weeks as defined in subparagraph (A) of this paragraph
28 (2), any calendar week of an individual's base year during which the
29 individual earned in employment from an employer remuneration
30 not less than an amount 20 times the minimum wage in effect
31 pursuant to section 5 of P.L.1966, c.113 (C.34:11-56a4) on October
32 1 of the calendar year preceding the calendar year in which the
33 benefit year commences, which amount shall be adjusted to the next
34 higher multiple of \$1.00 if not already a multiple thereof, except
35 that if in any calendar week an individual subject to this
36 subparagraph (B) is in employment with more than one employer,
37 the individual may in that calendar week establish a base week with
38 respect to each of the employers from whom the individual earns
39 remuneration not less than the amount defined in this subparagraph
40 (B) during that week.

41 (3) "Base week," commencing on or after January 1, 2001,
42 means any calendar week during which the individual earned in
43 employment from an employer remuneration not less than an
44 amount 20 times the minimum wage in effect pursuant to section 5
45 of P.L.1966, c.113 (C.34:11-56a4) on October 1 of the calendar
46 year preceding the calendar year in which the benefit year
47 commences, which amount shall be adjusted to the next higher
48 multiple of \$1.00 if not already a multiple thereof, except that if in

1 any calendar week an individual subject to this paragraph (3) is in
2 employment with more than one employer, the individual may in
3 that calendar week establish a base week with respect to each of the
4 employers from whom the individual earns remuneration equal to
5 not less than the amount defined in this paragraph (3) during that
6 week.

7 (u) "Average weekly wage" means the amount derived by
8 dividing an individual's total wages received during his base year
9 base weeks (as defined in subsection (t) of this section) from that
10 most recent base year employer with whom he has established at
11 least 20 base weeks, by the number of base weeks in which such
12 wages were earned. In the event that such claimant had no employer
13 in his base year with whom he had established at least 20 base
14 weeks, then such individual's average weekly wage shall be
15 computed as if all of his base week wages were received from one
16 employer and as if all his base weeks of employment had been
17 performed in the employ of one employer.

18 For the purpose of computing the average weekly wage, the
19 monetary alternative in subparagraph (B) of paragraph (2) of
20 subsection (e) of R.S.43:21-4 shall only apply in those instances
21 where the individual did not have at least 20 base weeks in the base
22 year. For benefit years commencing on or after July 1, 1986,
23 "average weekly wage" means the amount derived by dividing an
24 individual's total base year wages by the number of base weeks
25 worked by the individual during the base year; provided that for the
26 purpose of computing the average weekly wage, the maximum
27 number of base weeks used in the divisor shall be 52.

28 (v) "Initial determination" means, subject to the provisions of
29 R.S.43:21-6(b)(2) and (3), a determination of benefit rights as
30 measured by an eligible individual's base year employment with a
31 single employer covering all periods of employment with that
32 employer during the base year.

33 (w) "Last date of employment" means the last calendar day in
34 the base year of an individual on which he performed services in
35 employment for a given employer.

36 (x) "Most recent base year employer" means that employer with
37 whom the individual most recently, in point of time, performed
38 service in employment in the base year.

39 (y) (1) "Educational institution" means any public or other
40 nonprofit institution (including an institution of higher education):

41 (A) In which participants, trainees, or students are offered an
42 organized course of study or training designed to transfer to them
43 knowledge, skills, information, doctrines, attitudes or abilities from,
44 by or under the guidance of an instructor or teacher;

45 (B) Which is approved, licensed or issued a permit to operate as
46 a school by the State Department of Education or other government
47 agency that is authorized within the State to approve, license or
48 issue a permit for the operation of a school; and

1 (C) Which offers courses of study or training which may be
2 academic, technical, trade, or preparation for gainful employment in
3 a recognized occupation.

4 (2) "Institution of higher education" means an educational
5 institution which:

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

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

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

17 (D) Is a public or other nonprofit institution.

18 Notwithstanding any of the foregoing provisions of this
19 subsection, all colleges and universities in this State are institutions
20 of higher education for purposes of this section.

21 (z) "Hospital" means an institution which has been licensed,
22 certified or approved under the law of this State as a hospital.

23 (cf: P.L.2017, c.230, s.1)

24

25 4. This act shall take effect immediately.

26

27

28

STATEMENT

29

30 This bill provides that, for the purposes of all State employment
31 laws, individuals who perform services for remuneration are
32 employees, not independent contractors, and are subject to the
33 provisions of those laws, and entitled to all remedies for any
34 violations of those laws, unless and until it is shown to the
35 satisfaction of the Commissioner that:

36 a. The individual has been and will continue to be free from
37 control or direction over the performance of the service, both under
38 the individual's contract of service and in fact; and

39 b. The individual's service is either outside the usual course of
40 the business for which that service is performed; and

41 c. The individual is customarily engaged in an independently
42 established trade, occupation, profession or business of the same
43 nature as that involved in the work performed.

44 The bill defines "State wage and hour laws" as Article 1 of
45 chapter 11 of Title 34 of the Revised Statutes and all acts
46 supplementing that article (R.S.34:11-2 et al.), P.L.1966, c.113 and
47 all acts supplementing that act (C.34:11-56a et al.), P.L.2005, c.379
48 (C.34:11-56.58 et seq.), and Article 3 of chapter 11 of Title 34 of

1 the Revised Statutes (R.S.34:11-57 et seq.). The bill, however,
2 excludes from that definition the "New Jersey Prevailing Wage
3 Act," P.L.1963, c.150 (C.34:11-56.25 et seq.), "The Public Works
4 Contractor Registration Act," P.L.1999, c.238 (C.34:11-56.48 et
5 seq.), and the "Construction Industry Independent Contractor Act,"
6 P.L. 2007, c.114 (C.34:20-1 et seq.).

7 In addition, the bill modifies the similar "a.b.c." test in the State
8 "unemployment compensation law" (R.S.43:21-1 et seq.), and the
9 "Construction Industry Independent Contractor Act," P.L. 2007,
10 c.114 (C.34:20-1 et seq.), both of which currently provide that
11 service performed by an individual is not regarded as an
12 employment subject to that law if:

13 a. The individual has been and will continue to be free from
14 control or direction over the performance of the service, both under
15 his contract of service and in fact; and

16 b. The individual's service is either outside the usual course of
17 the business for which the service is performed, or that such service
18 is performed outside of all the places of business of the enterprise
19 for which such service is performed; and

20 c. The individual is customarily engaged in an independently
21 established trade, occupation, profession or business.

22 The bill modifies "b." of the "a.b.c." test in the unemployment
23 compensation and construction industry independent contractor
24 laws so that service is not exempt from being considered
25 employment for that law solely because the service is performed
26 outside of all the places of business of the enterprise for which the
27 service is performed.

28 The bill modifies "c." of the "a.b.c." test in those laws by
29 indicating that the exemption from being considered employment
30 because the individual is customarily engaged in an independently
31 established trade, occupation, profession or business only applies if
32 they are of the same nature as the trade, occupation, profession or
33 business involved in the work performed.