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

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. (New section) For the purposes of all State employment laws, individuals who are suffered or permitted to work shall be deemed employees, not independent contractors, and shall be subject to the provisions of those laws, and shall be entitled to all rights and remedies provided by those laws, unless and until it is shown to the satisfaction of the Commissioner of Labor and Workforce Development that:

   a. The individual has been and will continue to be free from control or direction over the performance of the service, both under the individual’s contract of service and in fact; and
   b. The individual’s service is either outside the usual course of the business for which that service is performed, or the service is performed outside of all the places of business of the enterprise for which the service is performed; and
   c. The individual is customarily engaged in an independently established business or enterprise of the same nature as that involved in the work performed.

An individual shall not be regarded as an employee for the purposes of this section if the individual is a certified public accountant licensed by the State of New Jersey, or the individual satisfies the requirements to be exempt from being deemed to be in employment as set forth in R.S.43:21-19(i)(7)(J) or R.S.43:21-19(i)(7)(K).


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

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.

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

b. the individual’s service is either outside the usual course of the business for which the service is performed, or the service is performed outside of all the places of business of the employer for which the service is performed, or the service is performed outside of all the places of business of the enterprise for which the service is performed; and

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

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.

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

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

43:21-19. 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
commencement 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
"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, 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, 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
(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
(preceding calendar year paid remuneration in cash of $20,000.00 or
more for individuals employed in agricultural labor, or
(aa) during any calendar quarter in either the current or the
preceding calendar year paid remuneration in cash of $20,000.00 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.).
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.

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

(B) The individual's service is either outside the usual course of the 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, or that the service is performed outside of all the places of business of the enterprise for which the service is performed; and

(C) The individual is customarily engaged in an independently established business or enterprise of the same nature as that involved in the work performed.

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 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.

(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.

(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 equal to 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.

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

4. This act shall take effect on the first anniversary of the enactment.

STATEMENT

This bill provides that, for the purposes of all State employment laws, individuals who are suffered or permitted to work are employees, not independent contractors, and are subject to the provisions of those laws, and entitled to all remedies for any violations of those laws, unless and until it is shown to the satisfaction of the Commissioner that:

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

b. The individual’s service is either outside the usual course of the business for which that service is performed, or the work is performed outside of all the places of business of the enterprise for which the service is performed; and

c. The individual is customarily engaged in an independently established business or enterprise of the same nature as that involved in the work performed.


In addition, the bill modifies the similar “a.b.c.” test in the State "unemployment compensation law" (R.S.43:21-1 et seq.), and the "Construction Industry Independent Contractor Act," P.L. 2007, c.114 (C.34:20-1 et seq.), both of which currently provide that service performed by an individual is not regarded as an employment subject to that law if:
a. The individual has been and will continue to be free from control or direction over the performance of the service, both under his contract of service and in fact; and

b. The individual’s service is either outside the usual course of the 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.

The bill modifies the “c.” criteria of the “a.b.c.” test in those laws from covering an individual customarily engaged in “an independently established trade, occupation, profession or business,” to instead covering an individual customarily engaged in “an independently established business or enterprise of the same nature as that involved in the work performed.”