

Approved 1-30-90
Date

MINUTES OF THE SENATE COMMITTEE ON ECONOMIC DEVELOPMENT

The meeting was called to order by Senator Dave Kerr at
Chairperson

8:00 a.m. ~~p.m.~~ on January 25, 1990 in room 123-S of the Capitol.

All members were present except:

Committee staff present:

Bill Edds, Revisor of Statutes' Office
Lynne Holt, Kansas Legislative Research Dept.
Sue Pettet, Secretary to the Committee

Conferees appearing before the committee:

Secretary Ray Siehndel, Dept. of Human Resources
Judy Krueger, Small Business Association

Chairman Kerr called the meeting to order. Senator Francisco made a motion to accept the minutes of the January 23, 1990 meeting. Senator Karr seconded. Motion carried.

Chairman Kerr explained that the Interim Joint Committee on Economic Development studied the Employment Security Law Issue, requesting that the Secretary of Human Resources examine the issue more closely. He introduced Ray Siehndel, Secretary of Human Resources.

Ray Siehndel testified, (Att. 1 & 2.)

He stated that the three most difficult issues facing legislators and administrators in the Kansas Employment Security Law issue is the treatment of; independent contractors, leased employees and casual labor. Legislation must provide for adequate protection of the Kansas Employment Security Trust Fund, but not discourage industry within Kansas.

He stated that the issue of "Independent Contractors" is an issue that is not easily solved. It is difficult to get a clear definition, and even then, the IRS may make its own ruling. The Federal Government has consistently defined covered employment as "...any service, of whatever nature, performed after 1954 by an employee for the person employing him..." The Federal Unemployment Tax Act, (FUTA) is the Federal enforcement agent to see that employers properly report employment.

The IRS is responsible for determining whether services are subject to the FUTA regardless of any state law provision stipulating that the individuals providing a specific type of service are independent contractors.

"Casual Labor" is another issue of major concern. This provision set forth in Section 3306 (c) of FUTA does allow for an exemption for "services not in the course of an employer's trade or business unless remuneration is more than \$50 per quarter and performed by an individual regularly employed by such employer to perform such services."

There was committee discussion regarding whether Kansas laws conform to Federal law regarding "Casual Labor". Mr. Siehndel stated that dealing with this issue is contingent on the willingness of the Legislature to pass legislation which will affect a relatively small amount of funds but will require a definitive listing of circumstances under which a casual labor exemption may be used. The failure to strictly follow guidelines carry several Federal penalties.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON ECONOMIC DEVELOPMENT,

room 123-S Statehouse, at 8:00 a.m./p.m. on January 25, 1990

Judy Krueger, Small Business Administration testified. (Att. 3)
Attachment includes "Amerilink Corporation Case" for information and guidelines. She stated that the \$50.00 limitation on Casual Labor should be raised since it was enacted in 1935.

Senator Salisbury made a motion that the committee introduce a bill that would provide a definition of "Casual Labor". Senator Vidricksen seconded. Motion carried. (Advisory Council of Human Resources will advise.)

Meeting adjourned.

Issue Paper

**Independent Contractors, Leased Employees and Casual Labor
as treated under the Kansas Employment Security Law**

**Presented to the Senate Committee on Economic Development
by Secretary of Human Resources Ray Siehndel
January 25, 1990**

Foreword:

Perhaps three of the most difficult issues facing legislators and administrators in the Kansas Employment Security Law is the treatment of independent contractors, leased employees and casual labor. Any Legislation must provide for adequate protection of the Kansas Employment Security Trust Fund while not being so proscriptive as to discourage industry within Kansas. The problem of dealing with the issues is not unique to Kansas; many other states and the federal government have had great difficulty in establishing legislation which serves the greater public interest.

The following provides an analysis of each issue with a description of actions which have been taken in other jurisdictions or options which the committee may wish to consider.

Independent Contractors:

The Federal Government has consistently defined covered employment as "...any service, of whatever nature, performed after 1954 by an employee for the person employing him..." The Internal Revenue Service is the Federal enforcement agent to see that employers properly report employment under the Federal Unemployment Tax Act (FUTA). The only exception to employment allowed under FUTA are the specific exemptions set forth under Section 3306(c) of the Internal Revenue Code (copy attached). For all other employment issues, the IRS considers individuals who, under the usual common law rules applicable in determining the employer-employee relationship, have the status of an employee. They use a rather complicated form, Form SS-8, Information for Use in Determining Whether a Worker is an Employee for Federal Employment Taxes and Income Tax Withholding, to collect information to make a ruling on employer-employee relationships (copy attached).

Most state apply a broader definition than the FUTA common law test in determining an employment relationship. Over half of the states use the so-called "ABC test" which stipulates that the service for remuneration is considered to be employment unless three criteria are met:

- A. The individual has freedom from direction and control over performance of the work.
- B. The Service is performed either outside the usual course of the business for which it is performed or is outside of all places of business of the enterprise for which it is performed.
- C. The individual is customarily engaged in an independent trade, occupation, profession, or business.

(See table 201--Coverage, Taken from the Comparison of State Unemployment Insurance Laws, U. S. Department of Labor.

Kansas utilizes only the A and B test, and it is currently set forth in the Kansas Statute. (See K.S.A. 440703(i)(3)(D) attached).

The Internal Revenue Service is responsible for determining whether services are subject to the FUTA regardless of any state law provision stipulating that the individuals providing a specific type of service are independent contractors. If such individual's services are not excluded from the definition of employment under Section 3306(c), FUTA, and if such individuals are not independent contractors under the usual common law rules, however, these individuals are excluded under Kansas law, private-for-profit employers would be liable for the full FUTA tax on the services of these individuals.

If the services of these individuals are not exempt from FUTA coverage, they must be covered under state law for contributing employers to be eligible for the Federal offset tax credit. Likewise, the affected worker would not be able to receive benefits based upon those wages excluded under state law.

In the event that such individuals excluded under Kansas law only and not under FUTA perform services for a governmental entity or nonprofit organization, the exclusion would raise an issue of consistency with the coverage requirement in Sections 3304(a)(6)(a) and 3309(a)(1), FUTA. Such an issue could result in loss of certification and thus all employers subject to the state law could lose credits against the Federal tax. Lack of certification may also result in loss of grants for administration of the state's unemployment insurance and employment service grants.

On August 25, 1989, Representative Rochelle Chronister, Chairperson of the Joint Committee on Economic Development, forwarded a letter to the Secretary of Human Resources requesting that the Department conduct a study of the issue of independent contractors. It was requested that the investigation focus on recommendations whereby the Kansas Employment Security Law could be amended to provide greater latitude to the business community in addressing the status of independent

contractors. Furthermore, Chairperson Chronister requested that any recommendations developed as a result of the study be forwarded to the Kansas Employment Security Advisory Council for their response to the study.

Issues relating to independent contractors were shared with the Council on October 26, 1989. An analysis of current Kansas law was provided to the Council which included a discussion of common law tests for the employer/employee relationship. A discussion followed regarding how the federal government and other state employment security agencies deal with the issue. In addition, the effect of the independent contractor issue on the worker's compensation law was discussed.

From these discussions, the Council determined that the only manner in which the issue may be addressed would be to modify the law to list specific exclusions to the employer/employee relationships. The Council further determined that to develop a legislative proposal would be an extremely difficult task because it would be virtually impossible to define all exclusions.

The Council recommended that Chairperson Chronister be advised that (1) development of a legislative proposal would be virtually impossible in that the list of exclusions would probably be subject to continuous amendments, (2) the present Kansas Law provides adequate protection to the trust fund, and (3) the Council would be concerned that any change would not serve the greater public interest although it may serve to minimally encourage new industry.

Subsequent to this meeting, the Interstate Conference of Employment Security Agencies, Inc., a not-for-profit organization comprised of administrators from all state employment security agencies throughout the nation, appointed an ad hoc committee to specifically study the issue of independent contractors. The committee is charged with the responsibility of evaluating current solutions used in each of the states and to develop a means through which the issues of trust fund management and stimulation of new industry may both be addressed.

The ad hoc committee will present a report to conference leadership by late Summer, 1990. The Department and the Council is encouraged that a study of national scope may provide a comprehensive solution to the independent contractor issue. Upon receipt of the ad hoc committee's report, the Department will share the results with the Kansas Employment Security Advisory Council for possible development of a legislative recommendation to be considered by the 1991 Kansas Legislature.

As the above indicates, the issue of independent contractors is complicated and the penalties for failure to conform to Federal legislative guideline can be severe; therefore, any state legislative approach to changing existing statutes which meet federal guidelines should be done cautiously.

Leased Employees:

The Department has found that some employers have turned to an alternative to using independent contractors and are now utilizing the services of "employee leasing companies." Employee or payroll leasing is often and erroneously confused with temporary help operations.

The temporary help companies solicit individuals to be available on a standby basis and provide training in some cases, or at least require specific skills. They solicit contracts for services, call in individuals from their pool and offer jobs provided in the contract. They set the wage, pay the worker, and seldom provide fringe benefits. The worker may reject jobs under certain conditions. Although some "temporary" jobs may be for extended periods, they primarily fill a short-term or one-time need. The worker knows the job is temporary and returns to the inactive pool when it is finished. Usually temporary help people elected this type of employment for whatever reason.

Employee leasing companies simply manage another company's established payroll, assuming no operational or personnel control functions other than payroll accounting, seeking beneficial group discounts on health, retirement and fringe benefits, and assuming the "bureaucratic red tape" that follows employment and wages. Although contracts are often written in language intended to satisfy "direction and control" and other tests used in defining employer-employee relationship, they seldom pass muster in actual practice.

The ease in which employee leasing companies can enter and leave the field is particularly unsettling to the Department. With little or no investment, anyone can set up shop and if it does not work out, they can simply walk away. In other states, some of the largest companies have done just that, leaving a lot of uncollectable payroll tax liability. Another disturbing trend is that workers cannot be identified with their work place because they are in a commingled pool. Such reporting may result in lost coverage for the workers and lost taxes for the fund when a lessor walks away.

Employee leasing is covered under Section 3504 of the Internal Revenue Code for Federal tax purposes. The Internal Revenue Service is protected since Section 3504 holds both the agent and the client liable for taxes covered under the provision. When an employee leasing company defaults, the client is liable for the taxes even if documentation proves that the employee leasing company has been paid the due amount.

Kansas' experience with employee leasing is small in comparison to many other states. Based upon our limited experience, we do not feel that the current provisions of the Kansas Employment Security Law allow such firms to operate in Kansas. K.S.A. 44-703(i)(1)() provides, "'Employment' means any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." Under the common law rules, the employer-employee

relationship remains intact with the client lessee and not the agent lessor.

Recognizing that there are definite advantages to small Kansas businesses through the use of employee leasing, the Department and the Employment Security Advisory Council felt a study should be conducted to determine if employee leasing should be allowed under the Kansas Employment Security Law. As a result of that study, the Council will recommend a proposed amendment to the 1990 Legislature to allow employee leasing companies to operate in accordance with the law. This proposed amendment will address two main concerns of the Council:

- 1) Individual lessee firms and their employees must remain identifiable to the Department of Human Resources.
- 2) Must provide a trust fund protection provision.

The first concern will be satisfied by requiring the lessor employing unit to keep separate records and submit separate Quarterly Contributions and Wage Reports for each client lessee.

The second concern will be satisfied by holding each client lessee jointly and severally liable for any unpaid contributions, interest and penalties due under the law from any lessor employing unit attributable to wages for services performed for the client lessee by employees leased to the client lessee.

Casual Labor:

A major issue of concern to the Joint Committee on Economic Development during the 1989 Session was the possible exemption of workers who fall into the category of casual labor from the term "employment" for unemployment compensation purposes. Workers may be exempted provided that the dollar amount is small and specific circumstances are met. There are currently 32 states, other than Kansas, that provide for an exemption that matches the Federal Unemployment Tax Act (FUTA) provision that is commonly referred to as "casual labor." This provision as set forth in Section 3306(c) of FUTA does allow for an exemption for "services not in the course of an employer's trade or business unless remuneration is more than \$50 per quarter and performed by an individual regularly employed by such employer to perform such services."

Such an amendment could be made to the Kansas Employment Security Law without any conflict with the Federal statutes and with little effect on the employment security fund in instances in which the amount of wages paid is less than \$50. The Employment Security Advisory Council has considered such an amendment and declined to recommend an amendment to the law for such an insignificant amount and which requires such specific circumstances which must be met to qualify for the exemption.

During the 1989 Session, the National Federation of Independent Businesses (NFIB) requested a bill draft before the Senate Labor and Industry Committee which would exempt casual labor from unemployment compensation coverage; however, the suggested exclusion was considerably broader than that allowed under FUTA. There are specific consequences that take place when an exclusion from coverage is made broader under state law than that allowed under FUTA.

First, the proposed exclusion could affect the Federal tax liability of private-for-profit employers subject to FUTA. If an individual is an employee of a private-for-profit employer, the individual may be excluded from state unemployment insurance coverage (and the employer relieved of state U.I. contributions) without violating any Federal requirements. However, relieving the employer of state contributions does not exempt the employer from FUTA tax on wages for services subject to FUTA. The employer would be liable for the full FUTA tax (currently 6.2 percent) on such wages and would not qualify for the tax credits available under Sections 3302(a)(1) and 3302(b), FUTA. In effect, the employer would be paying a Federal tax on the wages with no benefit to the state unemployment fund and no unemployment insurance coverage for the workers involved.

Second, in the circumstances that any of the excluded services of casual labor are performed for a governmental entity or nonprofit organization, the exclusion would raise an issue of consistency with the coverage requirement in Section 3304(a)(6)(A) and 3309(a)(1), FUTA. Section 3304(a)(6)(A) requires that services for governmental entities and nonprofit organizations must be covered under the same terms and conditions as other covered services under state law. If the exclusion would affect employees of governmental entities or nonprofit organizations, the result is loss of certification for tax credits. A withholding of certification will result in all employers subject to the state law losing credits against the Federal tax. Lack of certification may also result in loss of grants for administration of the state's unemployment insurance and employment services programs.

Summary:

The Internal Revenue Code and the Federal Unemployment Tax Act jealously guard against any circumstances in which a state law may be passed which is not in conformity with Federal legislation. Penalties include (1) loss of certification credits for employers within that state which means that the employer may be subject to double taxation or (2) loss of administrative grants for administration of the unemployment insurance and employment service programs.

Studies conducted for and reviewed by the Kansas Employment Security Advisory Council have resulted in a legislative proposal in the area of employee leasing firms. The proposal will provide for establishing the legal existence of such firms in Kansas while protecting the trust fund and providing for ready identification of the entity for

which an employee actually provided services.

The solutions available for independent contractors and casual labor are less clear. As indicated above, a national study of the independent contractor issue should shed light on how states may pass legislation which ensures that all Federal guidelines are met. Study results will be shared with the Employment Security Advisory Council on receipt. Dealing with the issue of casual labor is contingent on the willingness of the Legislature to pass legislation which will affect a relatively small amount of funds and which will require a definitive listing of circumstances under which a casual labor exemption may be utilized. This issue is clouded further by the severe Federal penalties for failure to strictly follow guidelines.

P.L. 88-650, § 4(c):

Added Code Sec. 3306(b)(9) to read as above effective with respect to remuneration paid on or after the first day of the first calendar month which begins more than 10 days after October 13, 1964, the date of enactment.

P.L. 87-792, § 7:

Amended Code Sec. 3306(b)(5) by striking out subparagraph (B) and inserting in lieu thereof new paragraphs (B)

and (C) to read as above. Effective 1-1-63. Prior to amendment, subparagraph (B) read as follows:

"(B) under or to an annuity plan which, at the time of such payment, meets the requirements of section 401(a)(3), (4), (5), and (6);"

[Sec. 3306(c)]

(c) EMPLOYMENT—For purposes of this chapter, the term "employment" means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and (A) any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, and (B) any service, of whatever nature, performed after 1971 outside the United States (except in a contiguous country with which the United States has an agreement relating to unemployment compensation) by a citizen of the United States as an employee of an American employer (as defined in subsection (j)(3)), except—

(1) agricultural labor (as defined in subsection (k)) unless—

(A) such labor is performed for a person who—

(i) during any calendar quarter in the calendar year or the preceding calendar year paid remuneration in cash of \$20,000 or more to individuals employed in agricultural labor (including labor performed by an alien referred to in subparagraph (B)); or

(ii) on each of some 20 days during the calendar year or the preceding calendar year, each day being in a different calendar week, employed in agricultural labor (including labor performed by an alien referred to in subparagraph (B)) for some portion of the day (whether or not at the same moment of time) 10 or more individuals; and

(B) such labor is not agricultural labor performed before January 1, 1993, by an individual who is an alien admitted to the United States to perform agricultural labor pursuant to sections 214(c) and 101(a)(15)(II) of the Immigration and Nationality Act;

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

(3) service not in the course of the employer's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for such service is \$50 or more and such service is performed by an individual who is regularly employed by such employer to perform such service. For purposes of this paragraph, an individual shall be deemed to be regularly employed by an employer during a calendar quarter only if—

(A) on each of some 24 days during such quarter such individual performs for such employer for some portion of the day service not in the course of the employer's trade or business, or

(B) such individual was regularly employed (as determined under subparagraph (A)) by such employer in the performance of such service during the preceding calendar quarter;

(4) service performed on or in connection with a vessel or aircraft not an American vessel or American aircraft, if the employee is employed on and in connection with such vessel or aircraft when outside the United States;

(5) service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of 21 in the employ of his father or mother;

(6) service performed in the employ of the United States Government or of an instrumentality of the United States which is—

(A) wholly or partially owned by the United States, or

1-8

- (B) exempt from the tax imposed by section 3301 by virtue of any provision of law which specifically refers to such section (or the corresponding section of prior law) in granting such exemption;
- (7) service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more States or political subdivisions; and any service performed in the employ of any instrumentality of one or more States or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under the Constitution of the United States from the tax imposed by section 3301;
- (8) service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a);
- (9) service performed by an individual as an employee or employee representative as defined in section 1 of the Railroad Unemployment Insurance Act (45 U.S.C. 351);
- (10)(A) service performed in any calendar quarter in the employ of any organization exempt from income tax under section 501(a) (other than an organization described in section 401(a)) or under section 521, if the remuneration for such service is less than \$50, or
- (B) service performed in the employ of a school, college, or university, if such service is performed (i) by a student who is enrolled and is regularly attending classes at such school, college, or university, 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, or
- (C) 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, or
- (D) service performed in the employ of a hospital, if such service is performed by a patient of such hospital;
- (11) service performed in the employ of a foreign government (including service as a consular or other officer or employee or a nondiplomatic representative);
- (12) service performed in the employ of an instrumentality wholly owned by a foreign government—
- (A) if the service is of a character similar to that performed in foreign countries by employees of the United States Government or of an instrumentality thereof; and
- (B) if the Secretary of State shall certify to the Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States Government and of instrumentalities thereof;
- (13) service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to State law; and service performed as an intern in the employ of a hospital by an individual who has completed a 4 years' course in a medical school chartered or approved pursuant to State law;
- (14) service performed by an individual for a person as an insurance agent or as an insurance solicitor, if all such service performed by such individual for such person is performed for remuneration solely by way of commission;
- (15) (A) service performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;
- (B) service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are sold by him at a fixed price, his compensation being based on the retention of the

excess of such price over the amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back;

(16) service performed in the employ of an international organization;

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

(A) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and

(B) service performed on or in connection with a vessel of more than 10 net tons (determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States);

[Caution: Code Sec. 3306(c)(18), below, as added by P.L. 97-34, conflicts with Code Sec. 3306(c)(17).—CCH.]

(18) service described in section 3121(b)(20);

(19) service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), or (M) of section 101(a)(15) of the Immigration and Nationality Act, as amended (8 U.S.C. 1101(a)(15)(F) or (J)), and which is performed to carry out the purpose specified in subparagraph (F), (J), or (M), as the case may be; or

[Caution: Code Sec. 3306(c)(20), below, as added by P.L. 97-248, applies to remuneration paid after December 31, 1982, and before January 1, 1984.—CCH.]

(20) service performed by a full time student (as defined in subsection (q)) in the employ of an organized camp—

(A) if such camp—

(i) did not operate for more than 7 months in the calendar year and did not operate for more than 7 months in the preceding calendar year, or

(ii) had average gross receipts for any 6 months in the preceding calendar year which were not more than $33\frac{1}{3}$ percent of its average gross receipts for the other 6 months in the preceding calendar year; and

(B) if such full time student performed services in the employ of such camp for less than 13 calendar weeks in such calendar year.

Amendments

P.L. 100-647, § 1001(d)(2)(C)(iii):

Act Sec. 1001(d)(2)(C)(iii) amended Code Sec. 3306(c)(19) by striking out "(F) or (J)" each place it appears and inserting in lieu thereof "(F), (J), or (M)".

The above amendment is effective as if included in the provision of the Tax Reform Act of 1986 (P.L. 99-514) to which it relates.

P.L. 99-595:

Amended Code Sec. 3306(c)(1)(B) by striking out "before January 1, 1988," and inserting in lieu thereof "before January 1, 1993,".

The above amendment is effective 10-31-86.

P.L. 99-272, § 13303(a):

Act Sec. 13303(a) amended Code Sec. 3306(c)(1)(B) by striking out "January 1, 1986" and inserting in lieu thereof "January 1, 1988,". Effective 4-7-86.

P.L. 98-135, § 202:

Amended Code Sec. 3306(c)(1)(B) by striking out "January 1, 1984" and inserting in lieu thereof "January 1, 1986". Effective 10-24-83.

P.L. 97-248, § 276(a)(1):

Amended Code Sec. 3306(c)(10)(C) by striking out "under the age of 22" immediately following "individual", effective with respect to services performed after September 3, 1982.

P.L. 97-248, § 276(b)(1):

Amended Code Sec. 3306(c) by striking out "or" at the end of paragraph (18); by striking out the period at the end of paragraph (19) and inserting in lieu thereof "or"; and by adding at the end thereof new paragraph (20) to read as above applicable to remuneration paid after December 31, 1982 and before January 1, 1984.

P.L. 97-248, § 277:

Amended Code Sec. 3306(c)(1)(B) by striking out "January 1, 1982" and inserting "January 1, 1984", effective with respect to services performed after September 3, 1982.

P.L. 97-34, § 822(a), as amended by P.L. 97-362, § 203 and P.L. 99-272, § 13303:

Amended Code Sec. 3306(c) by striking out "or" at the end of paragraph (17), by redesignating paragraph (18) as paragraph (19), and by adding a new paragraph (18) to read as above, effective with respect to remuneration paid after December 31, 1980 ("after December 31, 1980 and before January 1, 1985", prior to P.L. 99-272, and "during 1981", prior to P.L. 97-362).

Information for Use in Determining Whether a Worker Is an Employee for Federal Employment Taxes and Income Tax Withholding

Paperwork Reduction Act Notice.—We ask for this information to carry out the Internal Revenue laws of the United States. We need it to ensure that taxpayers are complying with these laws and to allow us to figure and collect the right amount of tax. If you want a determination on employment status, you are required to give us this information.

If a written determination is desired for more than one class of workers, a separate Form SS-8 should be completed for one worker from each class whose status is typical of that class. A written determination for any worker will be applicable to other workers of the same class, if the facts are not materially different from those of the worker whose status was ruled upon.

Please return Form SS-8 to the Internal Revenue Service office that provided the form. If the Internal Revenue Service did not ask you to complete this form but you wish a determination on whether a worker is an employee, file Form SS-8 with your District Director.

Instructions

This form should be completed carefully. If the firm is completing the form, it should be completed for **ONE** individual who is representative of the class of workers whose status is in question.

Name of firm (or person) for whom the worker performed services		Name of worker	
Address of firm		Address of worker	
Trade name		Telephone number	Worker's social security number
Telephone number	Firm's taxpayer identification number		

Check type of firm

Individual Partnership Corporation Other (specify) ▶

This form is being completed by FIRM WORKER

If the form is being completed by the worker, do you object to disclosing your name or the information on this form to the firm? Yes No

(If your answer is YES, we are not able to furnish you a determination on the basis of this form. You may write to your District Director for further information. **Do not complete the rest of the form, unless the IRS requests it.**)

All items must be answered or marked "Unknown" or "Not Applicable" (NA). **If you need more space, attach another sheet.** This form is designed to cover many work activities, so some of the questions may not pertain to you.

Total number of workers in this class (if more than one, please answer item 19) ▶ _____

This information is about services performed by the worker from ▶ _____ (Month, day, year) to _____ (Month, day, year)

What was the first date on which the worker performed services of any kind for the firm? ▶ _____ (Month, day, year)

Is the worker still performing services for the firm? Yes No

If "No," what was the date of termination? ▶ _____ (Month, day, year)

In which IRS district are you located? _____

1a Describe the firm's business _____

1b Describe the work done by the worker _____

2a If the work is done under a written agreement between the firm and the worker, attach a copy.
2b If the agreement is not in writing, describe the terms and conditions of the work arrangement _____

2c If the actual working arrangement differs in any way from the agreement, explain the differences and why they occur

3a Is the worker given training by the firm?
If yes:
What kind?
How often?

3b Is the worker given instructions in the way the work is to be done?
If yes, give specific examples.

3c Attach representative copies of any written instructions or procedures.

3d Does the firm have the right to change the methods used by the worker or direct that person on how to do the work?
Explain your answer

3e Does the operation of the firm's business require that the worker be supervised or controlled in the performance of the service?
Explain your answer

4a The firm engages the worker for:
Particular job Indefinite period Other (explain)

4b Is the worker required to follow a routine or a schedule established by the firm?
If yes, what is the routine or schedule?

4c Does the worker report to the firm or its representative?
If yes:
How often?
For what purpose?
In what manner (in person, in writing, by telephone, etc.)?
Attach copies of report forms used in reporting to the firm.

4d Does the worker furnish a time record to the firm?
If yes, attach copies of time records.

5a State the kind and value of tools and equipment furnished by:
The firm
The worker

5b State the kind and value of supplies and materials furnished by:
The firm
The worker

5c What expenses are incurred by the worker in the performance of services for the firm?

5d Does the firm reimburse the worker for any expenses?
If yes, specify the reimbursed expenses

6a Is it understood that the worker will perform the services personally?

6b Does the worker have helpers?
If yes: Are the helpers hired by: Firm Worker
If hired by the worker, is the firm's approval necessary?
Who pays the helpers? Firm Worker
Are social security taxes and Federal income tax withheld from the helpers' wages?
If yes: Who reports and pays these taxes? Firm Worker
Who reports the helpers' incomes to the Internal Revenue Service? Firm Worker
If the worker pays the helpers, does the firm repay the worker?
What services do the helpers perform?

7 At what location are the services performed? Firm's Worker's Other (specify)

8a Type of pay worker receives:
 Salary Commission Hourly wage Piecework Lump sum Other (specify)

8b Does the firm guarantee a minimum amount of pay to the worker? Yes No

8c Does the firm allow the worker a drawing account or advances against pay? Yes No

If yes: Is the worker paid such advances on a regular basis? Yes No

How does the worker repay such advances?

9a Is the worker eligible for a pension, bonuses, paid vacations, sick pay, etc.? Yes No

If yes (specify)

9b Does the firm carry workmen's compensation insurance on the worker? Yes No

9c Does the firm deduct social security tax from amounts paid the worker? Yes No

9d Does the firm deduct Federal income taxes from amounts paid the worker? Yes No

9e How does the firm report the worker's income to the Internal Revenue Service?
 Form W-2 Form 1099 Does not report Other (specify)

9f Does the firm bond the worker? Yes No

10a Approximately how many hours a day does the worker perform services for the firm? Yes No Unkown

10b Does the worker perform similar services for others? Yes No Unkown

If yes: Are these services performed on a daily basis for other firms? Yes No Unkown

Percentage of time spent in performing these services for:

This firm% Other firms% Unkown

Does the firm have priority on the worker's time? Yes No

If no, explain

10c Is the worker prohibited from competing with the firm either while performing services or during any later period? Yes No

11a Can the firm discharge the worker at any time without incurring a liability? Yes No

If no, explain

11b Can the worker terminate the services at any time without incurring a liability? Yes No

If no, explain

12a Does the worker perform services for the firm under:
 The firm's business name The worker's own business name Other (specify)

12b Does the worker advertise or maintain a business listing in the telephone directory, a trade journal, etc.? Yes No Unkown

If yes, specify

12c Does the worker represent himself or herself to the public as being in business to perform the same or similar services? Yes No Unkown

If yes, how?

12d Does the worker have his or her own shop or office? Yes No Unkown

If yes, where?

12e Does the firm represent the worker as an employee of the firm to its customers? Yes No

If no, how is the worker represented?

12f How did the firm learn of the worker's services? Yes No Unkown

13 Is a license necessary for the work? Yes No Unkown

If yes, what kind of license is required?

By whom is it issued?

By whom is the license fee paid?

14 Does the worker have a financial investment in a business related to the services performed? Yes No Unkown

If yes, specify and give amounts of the investment

15 Can the worker incur a loss in the performance of the service for the firm? Yes No

If yes, how?

16a Has any other government agency ruled on the status of the firm's workers? Yes No

If yes, attach a copy of the ruling.

16b Is the same issue being considered by any IRS office in connection with the audit of the worker's tax return or the firm's tax return, or has it recently been considered? Yes No

If yes, for which year(s)?

17a Does the worker assemble or process a product at home or away from the firm's place of business? Yes No

If yes:
Who furnishes materials or goods used by the worker? Firm Worker
Is the worker furnished a pattern or given instructions to follow in making the product? Yes No
Is the worker required to return the finished product to the firm or to someone designated by the firm? Yes No

Answer Items 18a through 18n if the worker is a salesman or provides a service directly to customers.

- 18a Are leads to prospective customers furnished by the firm? Yes No Does not apply
- 18b Is the worker required to pursue or report on leads? Yes No Does not apply
- 18c Is the worker required to adhere to prices, terms, and conditions of sale established by the firm? Yes No
- 18d Are orders submitted to and subject to approval by the firm? Yes No
- 18e Is the worker expected to attend sales meetings? Yes No
If yes: Is the worker subject to any kind of penalty for failing to attend? Yes No
- 18f Does the firm assign a specific territory to the worker? Yes No Does not apply
- 18g Who does the customer pay? Firm Worker
If worker, does the worker remit the total amount to the firm? Yes No
- 18h Does the worker sell a consumer product in a home or establishment other than a permanent retail establishment? Yes No
- 18i List the products and/or services distributed by the worker, such as meat, vegetables, fruit, bakery products, beverages (other than milk), or laundry or dry cleaning services. If more than one type of product and/or service is distributed, specify the principal one.
- 18j Were the route or territory and a list of customers assigned to the worker by the firm or another person? Yes No
If yes, please identify the person who made the assignment.
- 18k Did the worker pay the firm or person for the privilege of serving customers on the route or in the territory? Yes No
If yes, how much did the worker pay (not including any amount paid for a truck or racks, etc.)? \$
What factors were considered in determining the value of the route or territory?
- 18l How are new customers obtained by the worker? Explain fully, showing whether the new customers called the firm for service, were solicited by the worker, or both.
- 18m Does the worker sell life insurance? Yes No
If yes:
Is the selling of life insurance or annuity contracts for the firm the worker's entire business activity? Yes No
If no, state the extent of the worker's other business activities
Does the worker sell other types of insurance for the firm? Yes No
If yes, state the percentage of the worker's total working time spent in selling such other types of insurance%
State if, at the time the contract was entered into between the firm and the worker, their intention was that the worker would be considered as selling life insurance for the firm (a) on a full-time basis, or (b) on a part-time basis. State the manner in which such intention was expressed.
- 18n Is the worker either a traveling salesperson or city salesperson? Yes No
If yes:
Specify from whom the worker principally solicits orders on behalf of the firm.
If the worker solicits orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments, specify the percentage of the worker's time spent in such solicitation.%
Is the merchandise purchased by the customers for resale, or is it purchased for use in their business operations? If used by the customers in their business operations, describe the merchandise and state whether it is equipment that is installed on their premises or is a consumable supply.
- 19 Attach the names and addresses of the total number of workers in this class from page 1, or the names and addresses of 10 such workers if there are more than 10.
- 20 Attach a detailed explanation for any other reason why you believe the worker is an independent contractor or is an employee of the firm.

Under section 6110 of the Internal Revenue Code, the text and related background file documents of any ruling, determination letter, or technical advice memorandum will be open to public inspection. This section provides that, before the text and background file documents are made public, identifying and certain other information must be deleted.

If the only items you want deleted are names, addresses, and taxpayer identifying numbers, please check this box
If you believe additional deletions should be made, please submit a copy of this form and copies of all supporting documents indicating, in brackets, those parts you believe should be deleted in accordance with section 6610(c) of the Code. Attach a separate statement indicating which specific exemption provided by section 6110(c) applies to each bracketed part.

Under penalties of perjury, I declare that I have examined this request, including accompanying documents, and to the best of my knowledge and belief, the facts presented are true, correct, and complete.

Signature ►

Title ►

Date ►

If this form is used by the firm in requesting a written determination, the form should be signed by an officer or member of the firm.
If this form is used by the worker in requesting a written determination, the form should be signed by the worker. If the worker wants a written determination with respect to services performed for two or more firms, a separate statement should be furnished for each firm.
Additional copies of this form may be obtained from any Internal Revenue Service office.

1-14

COVERAGE

Table 102.--Coverage as Determined by Employer--Employee Relationship

State	Services considered employment unless-			Other provisions
	Workers are free from control over performance	Service is outside regular course or place of employer's business	Worker is customarily in an independent business	
(1)	(2)	(3)	(4)	(5)
Ala.	. . . . .	. . . . .	. . . . .	Master-servant.
Alaska	X	and X	and X	. . . . .
Ariz.	. . . . .	. . . . .	. . . . .	Service of employee. ^{1/}
Ark.	X	and X	and X	. . . . .
Calif.	. . . . .	. . . . .	. . . . .	Contract of hire. ^{2/}
Colo.	X	. . . . .	and X	. . . . .
Conn.	X	and X	and X	. . . . .
Del.	X	and X	and X	. . . . .
D.C.	. . . . .	. . . . .	. . . . .	Contract of hire and master-servant. ^{2/3/}
Fla.	. . . . .	. . . . .	. . . . .	Service of employee. ^{1/}
Ga.	X	and X	and X	. . . . .
Hawaii	X	and X	and X	. . . . .
Idaho	X	. . . . .	and X	. . . . .
Ill.	X	and X	and X	. . . . .
Ind.	X	and X	and X	. . . . .
Iowa	X	. . . . .	. . . . .	Contract of hire. ^{2/}
Kans.	X	and X	. . . . .	. . . . .
Ky.	. . . . .	. . . . .	. . . . .	Master-servant. ^{4/}
La.	X	and X	and X	. . . . .
Maine	X	and X	and X	. . . . .
Md.	X	and X	and X	. . . . .
Mass.	X	and X	and X	. . . . .
Mich.	X	. . . . .	. . . . .	Contract of hire. ^{2/}
Minn.	. . . . .	. . . . .	X	Master-servant.
Miss.	X	. . . . .	. . . . .	Master-servant.
Mo.	X	and X	and X	. . . . .
Mont.	X	. . . . .	and X	. . . . .
Nebr.	X	and X	and X	. . . . .
Nev.	X	and X	and X	. . . . .
N.H.	X	and X	and X	. . . . .
N.J.	X	and X	and X	. . . . .
N.Mex.	X	and X	and X	. . . . .
N.Y.	. . . . .	. . . . .	. . . . .	Contract of hire. ^{2/}
N.C.	. . . . .	. . . . .	. . . . .	Contract of hire creating employee relationship.
N.Dak.	X	and X	and X	Contract of hire.
Ohio	X	and X	and X	. . . . .

(Table continued on next page)

1-15

COVERAGE

Table 102.--Coverage as Determined by Employer-Employee Relationship (Continued)

State	Services considered employment unless-			Other provisions
	Workers are free from control over performance	Service is outside regular course or place of employer's business	Worker is customarily in an independent business	
(1)	(2)	(3)	(4)	(5)
Okla.	. . . . .	. . . . .	. . . . .	Master-servant.
Oreg.	X	. . . . .	and X	. . . . .
Pa.	X	. . . . .	and X	. . . . .
P.R.	X	and X	and X	. . . . .
R.I.	X	and X	and X	. . . . .
S.C.	. . . . .	. . . . .	. . . . .	Contract of hire. ^{2/}
S.Dak.	X	. . . . .	and X	. . . . .
Tenn.	X	and X	and X	. . . . .
Tex.	X	. . . . .	. . . . .	Contract of hire. ^{2/}
Utah	X	. . . . .	and X	. . . . .
Vt.	X	and X	and X	. . . . .
Va.	X	and X	and X	. . . . .
V.I.	X	and X	and X	. . . . .
Wash.	X	and X	and X	. . . . .
W.Va.	X	and X	and X	. . . . .
Wis.	X	. . . . .	and X	. . . . .
Wyo.	X	and X	and X	. . . . .

^{1/}Service performed by an employee for the person or employing unit employing him.

^{2/}Service under any contract of hire, written or oral, express or implied.

^{3/}By regulation.

^{4/}By judicial interpretation.

1-16

- (A) The service is not localized in any state, and
(B) the individual is one of a class of employees who are required to travel outside this state in performance of their duties, and
(C) the individual's base of operations is in this state, or if there is no base of operations, then the place from which service is directed or controlled is in this state.

(3) The term "employment" shall also include:

(A) Services performed within this state but not covered by the provisions of subsection (i)(1) or subsection (i)(2) shall be deemed to be employment subject to this act 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.

(B) Services 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 act only if the individual performing such services is a resident of this state and the secretary approved the election of the employing unit for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this act.

(C) Services covered by an arrangement pursuant to subsection (1) of K.S.A. 44-714 and amendments thereto between the secretary and the agency charged with the administration of any other state or federal unemployment compensation law, pursuant to which all services performed by an individual for an employing unit are deemed to be performed entirely within this state, shall be deemed to be employment if the secretary has approved an election of the employing unit for whom such services are performed, pursuant to which the entire service of such individual during the period covered by such election is deemed to be insured work.

(D) Services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the secretary that: (i) Such individual has been and will continue to be free from control or direction over the performance of such services, both under the individual's contract, of hire and in fact; and (ii) such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed.

(E) Service performed by an individual in the employ of this state or any instrumentality thereof, any political subdivision of this state or any instrumentality thereof, any instrumentality of more than one of the foregoing or any instrumentality which is jointly owned by this state or a political subdivision thereof and one or more other states or political subdivisions of this or other states, provided that such service is excluded from "employment" as defined in the federal unemployment tax act by reason of section 3306(c)(7) of that act and is not excluded from "employment" under subsection (i)(4)(A) of this section.

(F) Service performed by an individual in the employ of a religious, charitable, educational or other organization which is excluded from the term "employment" as defined in the federal unemployment tax act solely by reason of section 3306(c)(8) of that act, and is not excluded from employment under paragraphs (I) through (M) of subsection (i)(4).

Cor. Admin meeting 1/5/90

States UI Agencies Currently Collecting Tax Revenues not Due
the State's Unemployment Fund
November, 1989

STATE	NAME OF TAX/FUND AUTHORIZING STATUTE	USE
Alabama	Employment Security Administrative Enhancement 25-4-31, 54 and 143, UI Law	Claimant placement, general administ- ration of employment security, economic development
California	1. TDI 984, UI Law 2. Personal Income Tax 13021, UI Law 3. Employment and Training Tax, 976.6, 1611, UI Law	1. TDI 2. Goes to General Revenues 3. Employment and Training programs
Delaware	Blue Collar Job Training Tax 3401, 3402 UI Law	Counseling, training and placement of dislocated workers; similar services for "school-to-work" programs, industrial training
Georgia	Administrative Assessment Tax 34-8-110, UI Law	Offset Federal cuts improve service to the public, including computers and special employment services to claimants
Iowa	Administrative Contribution Surcharge 96.7.12, UI Law	Costs of "rural and satellite job service offices."
Louisiana	Debt Service 23-15321, UI Law	Repay bonds issued to pay off Title XII loans.

87-1

Massachusetts	<p>1. Re-employment and Job Placement Fund, Chapter 151A, Section 14I</p> <p>2. Unemployment Health Insurance Contribution; Chapter 23 Acts of 1988 (Not codified?)</p> <p>3. Medical security contribution. Same as 2.</p>	<p>1. For activities authorized under Titles III and IX, SSA, and Wagner-Peyser.</p> <p>2. To provide health coverage for UI claimants. (Effective 1990.)</p> <p>3. To provide for universal health insurance. (Effective 1990.)</p>
Montana	Administrative Fund 39-51-406, UI Law	Administering local operations if other money is lacking.
Nevada	Employment of Claimants Tax 612.2 - 5, UI Law	Employment Training Program to foster job creation, minimize UI costs, provide skilled workers
New Jersey	TDI, Title 43, Subtitle 9, Chapter 21	Temporary Disability Income
	Uncompensated Health Care Offset, Section 30, State Appropriations Act	Self-explanatory. (Assumes this is a separate tax.)
North Carolina	Employment Security Reserve Fund, 96-5(c) and 96-5(f)	Funds employability programs, including ABE, GED, skills training, job counseling; continue operation of local offices, to provide employer refunds, pay interest on loans.
Ohio	Automation Surcharge 4141.251, UI Law	"Costs of automation of the bureau" of Employment Services.
Oregon	<p>1. Unnamed Administrative Tax Sec. 3, chapter 449</p> <p>2. Wage Security Fund Sec. 4, chapter 409</p>	<p>1. Administration of all employment security programs.</p> <p>2. Pays back wages to employees of defunct businesses.</p>
Puerto Rico	TDI Title 139 State Code	TDI

61-1

Rhode Island	1. TDI Title 28, Chapter 39, 40 and 41 2. Job Development Assessment, 28-42-84, 28-43-8.5, UI Law	1. TDI 2. Reimburse SESA for loss of Federal ES/UI funds, pay for job training, counseling and assessment services
South Carolina	Employment Security Administrative Contingency Assessment 41-27-410, 910 <u>et seq.</u>	Reemployment, supplement employment security services with job search, placement, screening, etc.
South Dakota	Invest in South Dakota's Future Fee 61-5-24.1, UI Law	Research and economic development projects.
Washington	Special Employment Assistance Tax 50.24.014, UI Law	ES programs for UI claimants, assis- tance to agricultural industry, research

02-1

Table 7 — RATES FOR NEW EMPLOYERS

State	Rate for Newly Covered Employers Applicable Until They Qualify for Rate Based on Experience — Usual Standard Rate of 5.4% plus surcharges in some States except:
Alabama ¹	2.7%
Alaska ¹	Average industry tax rate
Arizona ¹	2.7%
Arkansas ¹	2.9% plus 0.1% extended benefit tax
California ¹	3.4%
Colorado	Standard rate of 2.7% or actual experience rate or average industry tax rate, whichever is greater.
Connecticut	Higher of 1.0% or State's 5-year benefit cost ratio, not to exceed 5.4%
Delaware ^{1,2}	Average assessment rate for all employers but not less than 1%
Dist. of Col. ¹	Higher of 2.7% or same rate as average rate for all employers for last CY
Florida ¹	2.7%
Georgia ¹	2.64% plus .06% administrative assessment
Hawaii	3.6% plus fund solvency rate, max. 5.4%
Idaho	3.7%
Illinois	Higher of 2.7%, or 2.7% times the State experience factor, or average industry rate for employer plus fund building surcharge of 0.4%
Indiana	2.7%
Iowa ^{1,2}	12th benefit ratio rank in current rate schedule, but not less than 1%, plus .06% administrative assessment, 21st benefit ratio rank for construction
Kansas	1.0% plus higher of average of all covered employers or average of industry division, but not less than 2.0%
Kentucky ²	Not less than 3%
Louisiana	Average rate for employers in the same standard industry classification but not less than 1%
Maine	Average contribution rate, but not higher than 4.0% or below 1.0%
Maryland	Higher of 1.0% or State's 5-year benefit cost ratio, or rate that applies to employers with .0000 benefit ratio, but not to exceed 2.8%
Massachusetts ¹	3.0%
Michigan ²	2.7% for first 2 years, for third and fourth year of subjectivity, rate is based on a percentage of benefit charges plus flat rates of 1.8% and 1.0%, respectively
Minnesota ²	Higher of 1.0% or State's 5-year benefit cost ratio, not to exceed 5.4%
Mississippi ¹	2.7%
Missouri ¹	1.0% for newly covered nonprofit employers and governmental entities electing contributions. For others, 2.7% or average for the industry, whichever is higher. These rates may be increased or decreased based on fund balance.
Montana	2.0% to 3.8% depending on rate schedule in effect
Nebraska	3.5%
Nevada	3.0%
New Hampshire	2.7% less any fund balance reduction in effect, which may range from 0.2% to 1.5%

Table 7—RATES FOR NEW EMPLOYERS

State	Rate for Newly Covered Employers Applicable Until They Qualify for Rate Based on Experience — Usual Standard Rate of 5.4% plus surcharges in some States except:
New Jersey	2.8% to 3.4% depending on rate schedule in effect
New Mexico	2.7%
New York ¹	2.6% or 2.7%, depending on rate schedule in effect and applicability of additional rates to all employers, maximum 3.7%
North Carolina ¹	2.25% plus 20% (0.45%) for State Reserve Fund
North Dakota	3.25%, except those in industries with negative reserve shall pay max. rate
Ohio ¹	Greater of average rate for the industry or 3.0%
Oklahoma	3.1%
Oregon	2.7%-3.5%, depending on rate schedule in effect
Pennsylvania ^{1,2}	3.5%
Rhode Island ¹	Higher of 1.0% or State's 5-year benefit cost ratio, not to exceed 4.2%
South Carolina	2.64%
South Dakota ²	2.25% for first year, 1.75% thereafter if positive, until experience rated, (plus investment fee of 0.70%)
Tennessee ¹	2.7% except where industry reserve ratio is -4% or less, rate shall be determined by matching reserve ratio to appropriate schedule
Texas	Greater of average rate in employer's industry or 2.7%
Utah	Benefit cost rate for employer's industry, 1.0%-8%.
Vermont	Lower of average industry tax rate or rate class eleven (2.6% to 4.8%) but not less than 1%
Virginia ¹	2.5%, plus fund building and pool costs
Washington	Average industry tax rate but not less than 1.0%
West Virginia ^{1,2}	2.7%
Wisconsin ^{1,2}	2.7%, except an additional 1.3% will be added if account is overdrawn and payroll is \$20,000 or more
Wyoming ¹	Average rate for employer's industry but not less than 1.0% plus applicable adjustment factor

FOOTNOTES FOR TABLE 7

1. States noted provide for additional solvency rates or surcharges, usually when funds drop below prescribed levels. These usually apply to rated employers, but in some states they may also apply to new employers.
2. For newly covered employers except those in the construction industry; *Delaware, Iowa, Kentucky, Michigan, Minnesota, Pennsylvania, South Dakota, West Virginia, Wisconsin.*

Driscoll

<u>State</u>	<u>Exemption for casual labor</u>
Alabama	Not in course of employer's trade or business; less than \$50 cash per quarter; by individual not regularly employed.
Alaska	Same.
Arizona	Same.
Arkansas	Same.
California	Same.
Colorado	Same.
Connecticut	No provision which exempts casual labor.
District of Columbia	Not in the course of employer's trade or business.
Florida	Same.
Georgia	Same.
Hawaii	Not in course of employer's trade or business; less than \$50 cash per quarter; by individual not regularly employed.
Idaho	No provision which exempts casual labor.
Illinois	No provision which exempts casual labor.
Indiana	Not in course of employer's trade or business; less than \$50 cash per quarter; by individual not regularly employed.
Iowa	No provision which exempts casual labor.
Kansas	No provision which exempts casual labor.
Kentucky	Not in course of employer's trade or business; less than \$50 cash per quarter; by individual not regularly employed.
Louisiana	Not in the course of the employer's trade or business.
Maine	No provision which exempts casual labor.
Maryland	Not in the course of the employer's trade or business.

<u>State</u>	<u>Exemption for casual labor</u>
Massachusetts	Not in course of employer's trade or business; less than \$50 cash per quarter; by individual not regularly employed.
Michigan	No provision which exempts casual labor.
Minnesota	Not in the course of the employer's trade or business. [Uses FUTA to define employment.]
Mississippi	Not in the course of the employer's trade or business.
Missouri	No provision which exempts casual labor.
Montana	Not in course of employer's trade or business; less than \$50 cash per quarter; by individual not regularly employed.
Nebraska	Not in course of employer's trade or business; less than \$50 cash per quarter; by individual not regularly employed.
Nevada	No provision which exempts casual labor.
New Hampshire	Not in the course of employer's trade or business. [Uses FUTA to define employment.]
New Jersey	No provision which exempts casual labor.
New Mexico	No provision which exempts casual labor.
New York	No provision which exempts casual labor.
North Carolina	Not in the course of employer's trade or business.
North Dakota	Not in course of employer's trade or business; less than \$50 cash per quarter; by individual not regularly employed.
Ohio	Not in the course of employer's trade or business. Incidental service by officer of financial institution, or director's fees if less than sixty dollars.
Oklahoma	No provision which exempts casual labor.
Oregon	Not in the course of employer's trade or business unless 18 weeks or more in a year or \$225 or more a quarter.

State

Exemption for casual labor

Pennsylvania	Not in course of employer's trade or business; less than \$50 cash per quarter; by individual not regularly employed.
Rhode Island	Incidental, occasional, irregular service not in course of employer's trade or business unless performed for a corporation.
South Carolina	Not in the course of the employer's trade or business.
South Dakota	No provision which exempts casual labor.
Tennessee	No provision which exempts casual labor.
Texas	No provision which exempts casual labor.
Utah	Not in the course of the employer's trade or business.
Vermont	Not in course of employer's trade or business; less than \$50 cash per quarter; by individual not regularly employed unless for a corporation.
Virginia	Not in course of employer's trade or business; less than \$50 cash per quarter; by individual not regularly employed.
Washington	Not in the course of the employer's trade or business.
West Virginia	No provision which exempts casual labor.
Wisconsin	No provision which exempts casual labor.
Wyoming	No provision which exempts casual labor.

Source:
Commerce Clearing House Publications
January 23, 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

filed
FILED

JAN 18 1990

**EYVON MENDENHALL
U. S. DISTRICT COURT
E. DISTRICT OF MO.**

ELIZABETH DOLE, SECRETARY OF LABOR,)
UNITED STATES DEPARTMENT OF LABOR,)

Plaintiff,)

vs.)

AMERILINK CORPORATION,)

Defendant.)

No. 88-2122C(6)

ORDER AND JUDGMENT

In accordance with the Court's Memorandum Opinion filed herewith this date,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment be and it is entered in favor of defendant and plaintiff takes nothing herein.

Dated this 15th day of January, 1990.

[Signature]
UNITED STATES DISTRICT JUDGE

FILED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JAN 18 1990

EYVON MENDENHALL
U. S. DISTRICT COURT
E. DISTRICT OF MO.

ELIZABETH DOLE, SECRETARY OF LABOR,)
UNITED STATES DEPARTMENT OF LABOR,)
)
Plaintiff,)
)
vs.)
)
AMERILINK CORPORATION,)
)
Defendant.)

No. 88-2122C(6)

MEMORANDUM OPINION

The Secretary of Labor brings this civil action pursuant to the Fair Labor Standards Act, 29 U.S.C. §§201-219, against Amerilink Corporation ("Amerilink") alleging that defendant violated minimum wage and overtime requirements with regard to its cable television installers.

This case was tried to the Court sitting without a jury. The Court having considered the pleadings, the testimony of the witnesses, the documents in evidence, and the stipulations of the parties, and being fully advised in the premises, hereby makes the following findings of fact and conclusions of law, as required by Fed.R.Civ.P. 52.

I. Findings of Fact

1. During the period from November 1, 1986 to the date of trial, cable TV installers provided installation services for Amerilink to the various cable systems in the greater St. Louis area.

2. Amerilink compensates the installers on a "per job" basis. (Tr. 18, 294)

3. The installers do not bid on their pay or the type of work Amerilink does. However, when a household requires a custom installation, Amerilink

occasionally uses an installer's assistance in formulating Amerilink's bid to the cable company.

4. The installers obtain a geographically-grouped list of jobs to be done each day from the Amerilink offices. (Tr. 51, 294) The installers pick out their routes as they arrive at the Amerilink offices with those arriving earliest obtaining the best routes. When several installers arrive simultaneously at the offices, those with the most seniority choose first. The best routes are those which list jobs in close geographic proximity to each other resulting in the least possible travel time between jobs. Similarly, jobs which can be done quickly, based, for instance, on the layout of the home in which the cable is to be installed, are also desirable jobs.

5. Amerilink requires the installers to purchase their own tools. (Tr. 16, 21, 45, 70, 110, 127) Amerilink supplies the materials to be installed.

6. Amerilink requires the installers to furnish their own trucks and to place a magnetic sign on the vehicle reading "Cable Television."

7. Amerilink requires the installers to wear shirts bearing the identifying "Cable Television" insignia. The installers may, but are not required to, purchase these shirts from Amerilink.

8. If an installation is done improperly, or does not meet Amerilink's quality standards, the installers either redo the installation for no further payment, or they are charged back for the payment to another installer for redoing the work.

9. Installers carry their own workers' compensation insurance. They are free to arrange for the insurance themselves, or Amerilink purchases the insurance and deducts the premiums from the installers' pay checks.

10. The installers pay their own income taxes and social security.

11. The installers may employ helpers to assist them in getting jobs done and several of them do so on a regular basis. The installers pay their helpers. Amerilink exercises no control over the installers' use of helpers, except with regard to the quality of the helpers' work.

12. The installers differ with regard to their understanding of whether they are expected to provide their own liability insurance. They are expected to pay any deductible amounts if they damage property they work on.

13. The installers are free to work for other contractors. They seldom do so, however, because of the time constraints involved with completing the work they accept from Amerilink.

14. The installers work on their own throughout each day. Amerilink does not supervise them. Amerilink exercises no control over the manner in which the installers perform their jobs except with respect to quality. The installers set their own hours.

II. Conclusions of Law

The Fair Labor Standards Act, 29 U.S.C. §§201 - 219, provides minimum and overtime pay scales for covered employees. "Employee" is defined as "any individual employed by an employer." 29 U.S.C. §203(e)(1). The statutory definitions of "employer" ("any person acting directly or indirectly in the interest of an employer in relation to an employee"), 29 U.S.C. §203(d), and "employ" ("includes to suffer or permit to work"), 29 U.S.C. §203(g), are equally broad and comprehensive in order to accomplish the remedial purposes of the act. See e.g., United States v. Rosenwasser, 323 U.S. 360, 362-63 (1945). Therefore, the courts do not apply the traditional common law analysis to distinguish between "employees," to whom the Act applies, and "independent contractors," to whom it does not. Rather, the analysis focuses on the "economic reality" of the

employment relationship. Sec'y of Labor, U.S. Dept. of Labor v. Lauritzen, 835 F.2d 1529, 1534 (7th Cir. 1987); Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042, 1043 (5th Cir.), cert. denied, ___ U.S. ___, 108 S.Ct. 286 (1987). The ultimate determination is the degree to which the employee is dependent for his livelihood upon the employer. Usery v. Pilgrim Equipment Co., 527 F.2d 1308, 1311-12 (5th Cir.), cert. denied, 429 U.S. 826 (1976), or, on the other hand, whether "the individual is or is not, as a matter of economic fact, in business for himself." Id. [Citations omitted.] Merely labelling the individual as employee or independent contractor is not dispositive. Donovan v. Tehco, Inc., 642 F.2d 141, 143 (5th Cir. 1981).

In performing its analysis, the Court is guided by six criteria:

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

Lauritzen, 835 F.2d at 1535. The Court may not make its determination based on one particular factor, but rather must look to all the circumstances of the work activity. Lauritzen, 835 F.2d at 1534, citing Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947). Moreover, "the factors are not exhaustive, nor can they be applied mechanically to arrive at a final determination of employee status." Brock v. Mr. W Fireworks, Inc., 814 F.2d at 1043.

A. Control

The facts of this case persuade the Court that the control Amerilink exercises over its installers is not sufficient to implicate employee status. First, the installers not only can, but do, employ helpers to assist them. The installers are completely in charge of hiring, firing, paying and otherwise directing the helpers. Amerilink does not enter into these negotiations and arrangements in any way. While it is true that the helpers are constrained by the same specifications and quality control as the installers, the Court does not find that this fact alone alters the independence with which the installers and their helpers work.

Second, Amerilink exercises no control over the manner in which the installers perform their tasks. Again, the Court recognizes that Amerilink does impose quality controls on the installers. Nevertheless, this constraint inheres in any subcontractor relationship and the Court does not find this isolated instance of control dispositive. Amerilink does not exercise control with regard to the hours the installers work, the jobs the installers perform, or even whether the installers work at all. The installers do not wear uniforms, but merely a generic "cable television" insignia on their shirts.

As a whole, the facts of this case indicate that Amerilink does not exercise a degree of control sufficient to persuade the Court that the installers are employees.

The Court finds that the installers also have an opportunity for profit or loss independent of Amerilink's success or failure. Although none of the installers are incorporated or otherwise formally organized as independent business entities, they operate as independent self-determining businesses as a practical reality. The installers spend significant amounts of money on their trucks and tools. These sums represent a substantial investment in the

installers' businesses, and these are sums which the installers must expend in order to do work for Amerilink. The company does not provide these tools. The Court finds that such an investment weighs in favor of independent contractor status. A carpenter or electrician performing subcontractor services will be expected to bring whatever tools he needs to the job; a clerical employee, by contrast, expects to find his pens, paper, adding machine, and typewriter at his work station, provided by the employer.

Further, the installers are responsible for purchasing their own insurance, as well as rectifying and paying for any damage they cause or faulty installation.

The above details create an overall impression of economic independence from Amerilink. Any profit or loss that the installers experience is their own and results from their own efforts. Therefore, the Court concludes that the installers not only have the opportunity for individual profit and loss, but that this opportunity is directly related to their managerial skill.

Further, the installers possess the special skills of carpenters and electricians. These skills are required in order to obtain Amerilink jobs. The courts have held that "lack of the requirement of specialized skills is indicative of employee status." Dole v. Snell, 875 F.2d 802 (10th Cir. 1989). Conversely, the requirement of specialized skills would seem to indicate independent contractor status.

With respect to independent initiative, the installers all testified that they earn as little or as much as they desire depending upon their initiative in arriving at the Amerilink offices early enough to get good routes and in their ability and willingness to work longer hours and complete jobs more

quickly. This, in turn, depends to an extent on their organizational skill with regard to the hiring of helpers as well as their expertise at installation.

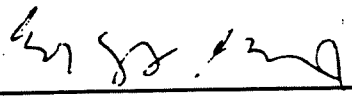
The installers are not permanent Amerilink employees. They change jobs extremely often. Some of them work for Amerilink more than once through any given year, sometimes for no more than four to six weeks at a time. Moreover, cable installation is not by its nature seasonal, such as was the case in Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042 (5th Cir.), cert. denied, ___ U.S. ___, 108 S.Ct. 286 (1987); nor is the work intrinsically transient, Brock v. Superior Care, Inc., 840 F.2d 1054, 1061 (2nd Cir. 1988) (nursing profession is by its nature transient). The Court concludes that the transiency of installers' relationships with Amerilink indicates independence.

Finally, the Court notes that cable installation is not only integral to Amerilink's business, it is the only work Amerilink does. This aspect of the installers' employment on its face would seem to weigh in favor of employee status. Nevertheless, the cases have clearly held that one factor, alone, should not be allowed to tip the balance. See, e.g., Halferty v. Pulse Drug Co., Inc., 821 F.2d 261, 265 (5th Cir. 1987). More importantly, however, the Court finds that the fact that Amerilink only performs cable installation does not alter the overall impression that the installers are economically independent from Amerilink.

III. Conclusion

For all of the foregoing reasons the Court finds that the installers working for Amerilink are independent contractors and the wage and hour limitations of the Fair Labor Standards Act do not apply to them. Accordingly, the Court finds in favor of defendant as set forth in its accompanying order and judgment.

Dated this 15th day of January, 1990.



UNITED STATES DISTRICT JUDGE

CONTRACT LABOR

Everything you NEVER wanted to know . . .
and much, much more

As a business owner or manager, aren't you safe in assuming that anyone you hire to perform a temporary job can be treated as contract labor rather than an employee? Surely a casual laborer can be classified differently from the rest of your employees . . . right? What about that written contract labor agreement you got from your CPA or attorney . . . if an individual signs the agreement doesn't that prove he is contract labor? And, of course, the fact that you issue 1099's and don't withhold taxes clearly documents that you are doing everything right.

NONE OF THESE ASSERTIONS IS TRUE! If you are counting on them to insulate your business from complications with the TEC or IRS, read on.

"Contract labor" is the most widely used misnomer in business today. What we are really talking about is the distinction between an employee - someone over whose work you exercise control and for whom you have extensive wage reporting and tax responsibility, and an independent contractor - an individual in business for himself who bears responsibility for paying his own taxes and over whose work you have no right of control. It is understandable that most employers would like to be free from the technical and financial burdens associated with employer status and that is why so many businesses try to avoid or minimize these burdens by categorizing workers as independent contractors or "contract labor" instead of employees. What many business owners do not know or refuse to recognize is that there is more to being an independent contractor than an individual simply agreeing to be classified as one.

THE TEC AND CONTRACT LABOR

Most business people, particularly fledgling entrepreneurs and owners of small businesses, are fearful of attracting the attention of the Internal Revenue Service. This is especially true if they are not that knowledgeable about employment laws and regulations and do not have the resources to seek "expert" advice. Unfortunately, it seems to be a little known fact that a major IRS migraine can start out as a minor TEC headache.

The TEC is charged with auditing businesses to insure that employee wages are being reported and proper taxes paid on those wages. The only way an individual is covered by unemployment insurance is for the employer to be in compliance with the law. Individuals whose wages are exempted by law or who do NOT qualify for employee status are not covered by the insurance program in the event they should lose their jobs. Therefore, the determination of whether an individual is an employee or independent contractor is an integral part of the TEC's en-

What is an Independent Contractor?

For purposes of unemployment insurance law, anyone who provides services for your business is PRESUMED to be your employee until you prove to the Commission that you have no right to exercise direction or control over the work performed. This means that the occasional person employed to fill in for a sick or vacationing employee is your employee. Likewise, the individual you hire to help you over a temporary busy spell is your employee. And someone hired to do miscellaneous work or chores at your place of business, even if just for a few hours, is also most probably your employee. The issue of who has direction or control of the work depends more upon the actual, day-to-day practice of the work than upon the way the relationship is theoretically described on paper.

**CONTRACT LABOR,
Page 2**

enforcement responsibility. Should the agency determine that individuals who have been treated as independent contractors are really employees, back taxes, penalties and interest are assessed. Eventually, the IRS comes calling for its share. . . a most unpleasant, not to mention expensive. . . experience. What seems to amaze many employers is that the TEC has the authority to make this determination. Make no mistake about it. The TEC not only has the statutory authority, but also the legal obligation, to collect taxes on the wages of all individuals who qualify as employees under the Texas Unemployment Compensation Act.

To avoid problems, it is best to ask yourself some questions up front:

- **Is the service provided by the individuals in question essential to, and an integral part of, the service you provide to the general public? The more unable you are to offer your primary service without the help of the people whose status is at issue, the more likely it is that they will be your employees.**
- **What opportunity for profit or risk of loss is there for the worker? What kind of investment, other than his time, does the worker have in the enterprise? An employee gets paid for his time. An employee is not expected to provide his own workplace, materials, tools, supplies or otherwise to invest his own money in your business. If an employee makes a costly mistake you can fire him, but you cannot legally force him to work without pay. An independent contractor, on the other hand, is an independent business person with expenses of his own. He will be expected to provide or purchase everything he needs to do the job. If he fails to perform the work according to specifications, he would be required to redo the work at no extra compensation or face legal action for breach of contract.**
- **What is the compensation arrangement? Is the worker paid by the job? Does he negotiate his compensation? A real independent contractor's main concern is not your bottom line but his own. Because he is responsible for his own overhead, including the hiring of any helpers he may need, there is always a real element of negotiation in any bona fide contract for services. Usually, but not always, an independent contractor is paid by the job. It is up to him to figure out how much he needs to bring the job in at a profit. If he miscalculates, the loss is his.**
- **Does the worker provide his services to the public at large? Does he have his own office? Does he advertise his services through newspapers, Yellow Pages, specialized journals? Again, we are looking for evidence that the individual is in control of the service he provides and that he provides that service to anyone with whom he can negotiate an acceptable price. It is obvious that non-competition agreements are unacceptable to an individual in business for himself. Such provisions are a strong indication of an employment relationship.**
- **Does the worker provide his services on a continuous basis? The more long term, continuous, and exclusive the relationship, the more likely it is to be employment.**
- **Is the worker required to provide services under the name of your business? Does he represent himself to the public as being in your employ? If the general public would perceive the person to be a representative of your business because of business cards, uniforms or vehicle advertising, this would be more indicative of an employee than an independent contractor.**
- **Do you retain the right to dictate how the work should be performed? Do you require the worker to work a certain schedule, to report to the company if he will not be on the job, to get your approval for any helpers hired? When you are contracting for outside services, you are normally interested in the final product - the result. You are not concerned with the steps taken to reach**

CONTRACT LABOR,

Page 3

that result. Aside from a mutually agreed upon time frame for project completion, you would have no interest in how the independent contractor allocates his time or that of his helpers. Nor would you have any control over or interest in the contractor's right to hire his own employees.

These are a sample of the types of questions asked by the TEC tax department in order to determine whether direction or control of the work actually resides with the business being audited. While this discussion is not exhaustive, it should clearly illustrate that "contract labor" is much more than just extra or temporary help.

INDEPENDENT CONTRACTORS AND UNEMPLOYMENT BENEFITS

If there is one thing less understood than what actually constitutes an independent contractor, it is how independent contractors fit into the unemployment insurance system. Just because an individual is an independent contractor does not mean that he: 1) cannot file a claim for benefits, or 2) cannot receive benefits. An independent contractor needs two things in order to get benefits - enough wages from employment in his base period to qualify monetarily and a non-disqualifying separation from the last work he performed.

In short, when it comes to claims there is no distinction between an independent contractor and any other claimant. There are many independent contractors who qualify monetarily for unemployment insurance because they have, in the last year and a half, performed enough work in an employee capacity to earn qualifying wage credits from other employers. On the other hand, an individual who has worked exclusively as an independent contractor for at least a year and a half prior to providing services for your business will not have any wage credits from employment. A claim from this person would be disallowed.

Once the hurdle of wage credits is crossed, the reason for the work separation becomes determinative of the claimant's right to benefits. It is a practical fact that most work separations involving independent contractors are layoffs. They finish the job they were hired to do...there is no more work available. If this is the case, the independent contractor/claimant will be awarded benefits. If, on the other hand, the contractor did not finish the job or was guilty of some misconduct on the job, then he would be subject to possible disqualification.

The reason for this confusing state of affairs lies in the wording of the Texas Unemployment Compensation Act. The Act requires every claimant to list his last work on the initial claim form. It does not require that he list his last employment. The distinction is simple. "Work" is any service performed for wages even if it is performed in the capacity of an independent contractor, even if it is performed for someone who is not an employer under the law, like Aunt Bertha. "Employment" is service performed for wages under the direction or control of an employer who pays taxes to the TEC.

WHAT TO DO ABOUT UNFAIR COMPETITION?

Employers frequently complain that while they are in compliance with the law, their competitors are not. The TEC will investigate charges of non-compliance but must have the names of specific businesses in order to do so. A blanket charge that an entire industry is out of compliance is not helpful. Section 3(a)(1) of the Open Records Act allows the TEC to protect from disclosure the identity of anyone who reports a possible violation of the Texas Unemployment Compensation Act.

SUMMARY

The unemployment insurance system is now a little over 50 years old. Since the program's inception the trend has been to broaden coverage in order to protect as many American workers as possible from the financially devastating effects of sudden unemployment. The legal presumption that services performed for wages constitute employment is in keeping with the basic objective of the system and must be the starting point for any assessment of worker status.

N-3(1189)

3-12

WRITE TO KNOW

Dear Commissioner Nabers:

Does an employer have to pay unauthorized overtime to an employee? Is it legal to have a contract or company policy which denies payment of overtime unless the overtime has been authorized?

S. W.
Austin, Texas

Dear S.W.:

According to the U. S. Department of Labor, payment cannot be denied if the overtime was actually worked, regardless of whether it was authorized or not. It is simply up to the employer to control its workforce and ensure that the overtime hours are not worked.

There is nothing to prevent an employer from having a policy which forbids unauthorized overtime, but the penalty for violating the policy must be something other than the company's refusal to pay for the time worked. For example, a written warning or reprimand to the employee would be appropriate.

Dear Commissioner Nabers:

We have a recurring problem that needs attention. An employee who works for us on an "as needed" basis is always filing for unemployment benefits and although we always protest the claims, we still lose. Why does the TEC fail to take into account that this man has another job and this is not his main livelihood? A recent column of yours said that a worker who is hired for regularly scheduled, part-time work cannot supplement the part-time work with unemployment benefits. If this is true, please explain why it does not apply in our situation.

P.R.
Bastrop, Texas

Dear P.R.:

I am glad you wrote. It sounds like this does need clarification.

An employee who works on an "as needed basis," is NOT a regularly scheduled, part-time employee. The latter is guaranteed and works a set number of hours every week according to an agreed schedule. An employee who is used only as needed is considered to be laid off at the end of every work assignment because he has no guarantee of receiving any more work. If your employee has other part-time work, then he must report earnings from that job and his benefits will be reduced, but as long as you continue to use him on an as-needed basis, you must continue to deal with the unemployment insurance system.

Stay in Touch

Use this form to request publications.

Check if you are not currently receiving your own copy of **TexasBusinessToday** and would like to be added to the mailing list.

The office of Commissioner Mary Scott Nabers offers publications of interest to employers. Check to request free copies:

Did You Know? A flyer explaining contract labor. List of questions employers should ask in assessing working relationships.

Texas Unemployment Compensation Act-1989. New and revised (includes amendments enacted by the 1989 Legislature).

Employers' Business Issues. This is the packet of information provided at Texas Business Council meetings.

Personnel Policies and Practices Handbook. Are you writing or revising an employee handbook? Here's a checklist with sample language of areas to be covered, including attendance, benefits, equal employment opportunities and leave policies.

Name

Company

Address

City/State/ZIP

Telephone

Clip (or copy) and mail to:
Commissioner Mary Scott Nabers
Texas Employment Commission
614 TEC Building, 101 East 15th Street
Austin, Texas 78778-0001

3-13

[§ 23,047] Vessels Operated by General Agents of United States

(g) The permission granted by subsection (f) shall apply in the same manner and under the same conditions (including the obligation to comply with all requirements of State unemployment compensation laws) to general agents of the Secretary of Commerce with respect to service performed by officers and members of the crew on or in connection with American vessels—

- (1) owned by or bareboat chartered to the United States, and
- (2) whose business is conducted by such general agents.

As to any such vessel, the State permitted to require contributions on account of such service shall be the State to which the general agent would make contributions if the vessel were operated for his own account. Such general agents are designated, for this purpose, instrumentalities of the United States neither wholly nor partially owned by it and shall not be exempt from the tax imposed by section 3301. The permission granted by this subsection is subject to the same conditions and limitations as are imposed in subsection (f), except that clause (B) of the second sentence of subsection (b) shall apply.

[§ 23,048] Requirement by State of Contributions

(h) Any State may, as to service performed, and on account of which contributions are made pursuant to subsection (g)—

- (1) require contributions from persons performing such service under its unemployment compensation law or temporary disability insurance law administered in connection therewith, and
- (2) require general agents of the Secretary of Commerce to make contributions under such temporary disability insurance law and to make such deductions from wages or remuneration as are required by such unemployment compensation or temporary disability insurance law.

[§ 23,049] General Agent as Legal Entity

(i) Each general agent of the Secretary of Commerce making contributions pursuant to subsection (g) or (h) shall, for purposes of such subsections, be considered a legal entity in his capacity as an instrumentality of the United States, separate and distinct from his identity as a person employing individuals on his own account.

[§ 23,050] Denial of Credits in Certain Cases

(j) Any person required, pursuant to the permission granted by this section, to make contributions to an unemployment fund under a State unemployment compensation law approved by the Secretary of Labor under section 3304 shall not be entitled to the credits permitted, with respect to the unemployment compensation law of a State, by subsections (a) and (b) of section 3302 against the tax imposed by section 3301 for any taxable year, if, on October 31 of such taxable year, the Secretary of Labor certifies to the Secretary his finding, after reasonable notice and opportunity for hearing to the State agency, that the unemployment compensation law of such State is inconsistent with any one or more of the conditions on the basis of which such permission is granted or that, in the application of the State law with respect to the 12-month period ending on such October 31, there has been a substantial failure to comply with any one or more of such conditions. For purposes of section 3310, a finding of the Secretary of Labor under this subsection shall be treated as a finding under section 3304(c).

DEFINITIONS

[§ 23,060] Employer

Sec. 3306. (a) For purposes of this chapter—

(1) **IN GENERAL**—The term "employer" means, with respect to any calendar year, any person who—

(A) during any calendar quarter in the calendar year or the preceding calendar year paid wages of \$1,500 or more, or

(B) on each of some 20 days during the calendar year or during the preceding calendar year, each day being in a different calendar week, employed at least one individual in employment for some portion of the day. For purposes of this paragraph, there shall not be taken into account any wages paid to, or employment of, an employee performing domestic services referred to in paragraph (3).

(2) **AGRICULTURAL LABOR.**—In the case of agricultural labor, the term “employer” means, with respect to any calendar year, any person who—

(A) during any calendar quarter in the calendar year or the preceding calendar year paid wages of \$20,000 or more for agricultural labor, or

(B) on each of some 20 days during the calendar year or during the preceding calendar year, each day being in a different calendar week, employed at least 10 individuals in employment in agricultural labor for some portion of the day.

(3) **DOMESTIC SERVICE.**—In the case of domestic service in a private home, local college club, or local chapter of a college fraternity or sorority, the term “employer” means, with respect to any calendar year, any person who during any calendar quarter in the calendar year or the preceding calendar year paid wages in cash of \$1,000 or more for such service.

(4) **SPECIAL RULE.**—A person treated as an employer under paragraph (3) shall not be treated as an employer with respect to wages paid for any service other than domestic service referred to in paragraph (3) unless such person is treated as an employer under paragraph (1) or (2) with respect to such other service.

[§ 23,061]

Wages

(b) For purposes of this chapter, the term “wages” means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except that such term shall not include—

(1) that part of the remuneration which, after remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) equal to \$7,000 with respect to employment has been paid to an individual by an employer during any calendar year, is paid to such individual by such employer during such calendar year. If an employer (hereinafter referred to as successor employer) during any calendar year acquires substantially all the property used in a trade or business of another employer (hereinafter referred to as a predecessor), or used in a separate unit of a trade or business of a predecessor, and immediately after the acquisition employs in his trade or business an individual who immediately prior to the acquisition was employed in the trade or business of such predecessor, then, for the purpose of determining whether the successor employer has paid remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment equal to \$7,000 to such individual during such calendar year, any remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment paid (or considered under this paragraph as having been paid) to such individual by such predecessor during such calendar year and prior to such acquisition shall be considered as having been paid by such successor employer;

(2) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision

for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of—

(A) sickness or accident disability (but, in the case of payments made to an employee or any of his dependents, this subparagraph shall exclude from the term "wages" only payments which are received under a workmen's compensation law), or

(B) medical or hospitalization expenses in connection with sickness or accident disability, or

(C) death;

(3) [Repealed.]

(4) any payment on account of sickness or accident disability, or medical or hospitalization expenses in connection with sickness or accident disability, made by an employer to, or on behalf of, an employee after the expiration of 6 calendar months following the last calendar month in which the employee worked for such employer;

(5) any payment made to, or on behalf of, an employee or his beneficiary—

(A) from or to a trust described in section 401(a) which is exempt from tax under section 501(a) at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust, or

(B) under or to an annuity plan which, at the time of such payment, is a plan described in section 403(a),

(C) under a simplified employee pension (as defined in section 408(k)(1)), other than any contributions described in section 408(k)(6),

(D) under or to an annuity contract described in section 403(b), other than a payment for the purchase of such contract which is made by reason of a salary reduction agreement (whether evidenced by a written instrument or otherwise),

(E) under or to an exempt governmental deferred compensation plan (as defined in section 3121(v)(3)),

(F) to supplement pension benefits under a plan or trust described in any of the foregoing provisions of this paragraph to take into account some portion or all of the increase in the cost of living (as determined by the Secretary of Labor) since retirement but only if such supplemental payments are under a plan which is treated as a welfare plan under section 3(2)(B)(ii) of the Employee Retirement Income Security Act of 1974; or

(G) under a cafeteria plan (within the meaning of section 125),

(6) the payment by an employer (without deduction from the remuneration of the employee)—

(A) of the tax imposed upon an employee under section 3101, or

(B) of any payment required from an employee under a State unemployment compensation law;

with respect to remuneration paid to an employee for domestic service in a private home of the employer or for agricultural labor;

(7) remuneration paid in any medium other than cash to an employee for service not in the course of the employer's trade or business;

(8) [Repealed.]

(9) remuneration paid to or on behalf of an employee if (and to the extent that) at the time of the payment of such remuneration it is reasonable to believe that a corresponding deduction is allowable under section 217;

(10) any payment or series of payments by an employer to an employee or any of his dependents which is paid—

(A) upon or after the termination of an employee's employment relationship because of (i) death, or (ii) retirement for disability, and

(B) under a plan established by the employer which makes provision for his employees generally or a class or classes of his employees (or for such employees or class or classes of employees and their dependents),

other than any such payment or series of payments which would have been paid if the employee's employment relationship had not been so terminated;

(11) remuneration for agricultural labor paid in any medium other than cash;

(12) any contribution, payment, or service, provided by an employer which may be excluded from the gross income of an employee, his spouse, or his dependents, under the provisions of section 120 (relating to amounts received under qualified group legal services plans);

(13) any payment made, or benefit furnished, to or for the benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127 or 129;

(14) the value of any meals or lodging furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119;

(15) any payment made by an employer to a survivor or the estate of a former employee after the calendar year in which such employee died; or

(16) any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 117, or 132.

Except as otherwise provided in regulations prescribed by the Secretary, any third party which makes a payment included in wages solely by reason of the parenthetical matter contained in subparagraph (A) of paragraph (2) shall be treated for purposes of this chapter and chapter 22 as the employer with respect to such wages.

Nothing in the regulations prescribed for purposes of chapter 24 (relating to income tax withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "wages" in the regulations prescribed for purposes of this chapter.

1986 Amendments:

Section 122(e)(3) of the Tax Reform Act of 1986 (H. R. 3838, P. L. 99-514), applicable to prizes and awards granted after December 31, 1986, substituted "74(c), 117, or" for "117 or" in paragraph (16).

Prior to amendment by section 1106(g)(8) of the Tax Reform Act of 1986 (H. R. 3838, P. L. 99-514), applicable to years beginning after December 31, 1986, subparagraph (5)(C) read as follows:

"(C) under a simplified employee pension if, at the time of the payment, it is reasonable to believe that the employee will be entitled to a deduction under section 219(b)(2) for such payment."

Section 1151(d)(2) of the Tax Reform Act of 1986 (H. R. 3838, P. L. 99-514),

applicable to tax years beginning after December 31, 1983, deleted "or" at the end of subparagraph (5)(E), added "or" at the end of subparagraph (5)(F), and added subparagraph (5)(G).

Section 1899A(44) of the Tax Reform Act of 1986 (H. R. 3838, P. L. 99-514), effective October 22, 1986, substituted "workmen's compensation" for "workman's compensation" in subparagraph (2)(A).

Section 1899A(45) of the Tax Reform Act of 1986 (H. R. 3838, P. L. 99-514), effective October 22, 1986, substituted a semicolon for a comma at the end of paragraph (13).

1984 Amendments:

Section 2662(f) of the Deficit Reduction Act of 1984 (H. R. 4170, P. L. 98-369)

changed the effective date of section 324 of the 1963 Amendments. See section 324 of the 1963 Amendments at § 18,930, and section 2664 at § 18,931.

Section 531(d)(3) of the Deficit Reduction Act of 1984 (H. R. 4170, P. L. 98-369), effective 1/1/85, added "(including benefits)" in the first sentence of section 3306(b), and added paragraph (16), making the appropriate technical corrections.

Section 491(d)(37) of the Deficit Reduction Act of 1984 amended section 3121(b)(5), effective with respect to obligations issued after December 31, 1983, by deleting former subparagraph (C) and redesignating the following subparagraphs to be (D), (E), and (F), respectively. Former subparagraph (C) read as follows: "(C) under or to a bond purchase plan which, at the time of such payment, is a qualified bond purchase plan described in section 405(a), or".

1983 Amendments:

Section 201(a) of the FSC Amendments of 1983, applicable to remuneration paid after October 24, 1983, added paragraph (15).

Section 3306(b) is amended by section 324 of the Social Security Amendments of 1983 (generally effective with respect to remuneration paid after December 31, 1984, but subject to special limitations set out in section 324(d)(2) of the 1983 Amendments (see § 18,930)), as follows:

Sections 324(b)(3)(E) and (b)(4)(A) of the Social Security Amendments of 1983 amend paragraph (2) by striking out subparagraph (A) and redesignating subparagraphs (B), (C), and (D) as (A), (B), and (C), respectively, and by amending redesignated subparagraph (2)(A) to read as follows:

"(A) sickness or accident disability (but in the case of payments made to an employee or any of his dependents, this subparagraph shall exclude from the term 'wages' only payments which are received under a workman's compensation law), or";

Section 324(b)(3)(B) of the Social Security Amendments of 1983 repeals paragraphs (3) and (8), which formerly read as follows:

"(3) any payment made to an employee (including any amount paid by an em-

ployer for insurance or annuities, or into a fund, to provide for any such payment) on account of retirement;"

"(8) any payment (other than vacation or sick pay) made to an employee after the month in which he attains the age of 65, if he did not work for the employer in the period for which such payment is made;"

Section 324(b)(2) of the Social Security Amendments of 1983 amends paragraph (5) by striking out "or" at the end of subparagraph (C); by striking out the semicolon at the end of subparagraph (D) and inserting in lieu thereof a comma; and by adding at the end of paragraph (5) subparagraphs (E) through (G) (currently (D) through (F)).

Section 324(b)(3)(C) of the Social Security Amendments of 1983 amends paragraph (10)(A) by inserting "or" after "death" and by striking out "or (iii) retirement after attaining an age specified in the plan referred to in subparagraph (B) or in a pension plan of the employer,".

Section 324(b)(4)(B) of the Social Security Amendments of 1983 added at the end of section 3306(b) the first new flush sentence.

Section 3306(b) is amended by section 327(c) of the Social Security Amendments of 1983, effective with respect to remuneration paid after 12/31/84, by striking out "or" at the end of paragraph (12); by striking out the period at the end of paragraph (13) and inserting in lieu thereof "; or," and by adding the new paragraph (14):

By adding at the end thereof, effective as prescribed in section 327(d)(2) of the Amendments (see sec. 327(d)(3) at § 18,930, the second flush sentence.

Section 328(c) of the Social Security Amendments of 1983, effective with respect to remuneration paid after December 31, 1984, amends subparagraph (D) of section 3306(b)(5) by striking out "section 219" and inserting in lieu thereof "section 219(b)(2)".

1983 Amendments:

Section 271(a) of the Tax Equity and Fiscal Responsibility Act of 1982, applicable to remuneration paid after December 31, 1982, substituted "\$7,000" for "\$6,000" twice in paragraph (b)(1).

§ 23,062

Employment

(c) For purposes of this chapter, the term "employment" means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, (A) and any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, and (B) any service, of whatever nature, performed after 1971 outside the United States (except in a contiguous country with which the United States has an agreement

relating to unemployment compensation) by a citizen of the United States as an employee of an American employer (as defined in subsection (j)(3)), except—

- (1) agricultural labor (as defined in subsection (k)) unless—
 - (A) such labor is performed for a person who—
 - (i) during any calendar quarter in the calendar year or the preceding calendar year paid remuneration in cash of \$20,000 or more to individuals employed in agricultural labor (including labor performed by an alien referred to in subparagraph (B)), or
 - (ii) on each of some 20 days during the calendar year or the preceding calendar year, each day being in a different calendar week, employed in agricultural labor (including labor performed by an alien referred to in subparagraph (B)) for some portion of the day (whether or not at the same moment of time) 10 or more individuals; and
 - (B) such labor is not agricultural labor performed before January 1, 1993, by an individual who is an alien admitted to the United States to perform agricultural labor pursuant to sections 214(c) and 101(a)(15)(H) of the Immigration and Nationality Act;
- (2) domestic service in a private home, local college club, or local chapter of a college fraternity or sorority unless performed for a person who paid cash remuneration of \$1,000 or more to individuals employed in such domestic service in any calendar quarter in the calendar year or the preceding calendar year;
- (3) service not in the course of the employer's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for such service is \$50 or more and such service is performed by an individual who is regularly employed by such employer to perform such service. For purposes of this paragraph, an individual shall be deemed to be regularly employed by an employer during a calendar quarter only if—
 - (A) on each of some 24 days during such quarter such individual performs for such employer for some portion of the day service not in the course of the employer's trade or business, or
 - (B) such individual was regularly employed (as determined under subparagraph (A)) by such employer in the performance of such service during the preceding calendar quarter;
- (4) service performed on or in connection with a vessel or aircraft not an American vessel or American aircraft, if the employee is employed on and in connection with such vessel or aircraft when outside the United States;
- (5) service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of 21 in the employ of his father or mother;
- (6) service performed in the employ of the United States Government or of an instrumentality of the United States which is—
 - (A) wholly or partially owned by the United States, or
 - (B) exempt from the tax imposed by section 3301 by virtue of any provision of law which specifically refers to such section (or the corresponding section of prior law) in granting such exemption;
- (7) service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more States or political subdivisions; and any service performed in the employ of any instrumentality of one or more States or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under the Constitution of the United States from the tax imposed by section 3301;
- (8) service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a);

(9) service performed by an individual as an employee or employee representative as defined in section 1 of the Railroad Unemployment Insurance Act (52 Stat. 1094, 1095; 45 U. S. C. 351);

(10)(A) service performed in any calendar quarter in the employ of any organization exempt from income tax under section 501(a) (other than an organization described in section 401(a)), or under section 521, if the remuneration for such service is less than \$50, or

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

(C) 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, or

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

(11) service performed in the employ of a foreign government (including service as a consular or other officer or employee or a nondiplomatic representative);

(12) service performed in the employ of an instrumentality wholly owned by a foreign government—

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

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

(13) service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to State law; and service performed as an intern in the employ of a hospital by an individual who has completed a 4 years' course in a medical school chartered or approved pursuant to State law;

(14) service performed by an individual for a person as an insurance agent or as an insurance solicitor, if all such service performed by such individual for such person is performed for remuneration solely by way of commission;

(15)(A) service performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

(B) service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him at a fixed

price, his compensation being based on the retention of the excess of price over the amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back;

(16) service performed in the employ of an international organization;

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

(A) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and

(B) service performed on or in connection with a vessel of more than 10 net tons (determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States);

(18) service described in section 3121(b)(20);

(19) service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F) or (J) of section 101(a)(15) of the Immigration and Nationality Act, as amended, and which is performed to carry out the purpose specified in subparagraph (F) or (J), as the case may be; or

(20) service performed by a full time student (as defined in subsection (q)) in the employ of an organized camp—

(A) if such camp—

(i) did not operate for more than 7 months in the calendar year and did not operate for more than 7 months in the preceding calendar year, or

(ii) had average gross receipts for any 6 months in the preceding calendar year which were not more than 33⅓ percent of its average gross receipts for the other 6 months in the preceding calendar year; and

(B) if such full time student performed services in the employ of such camp for less than 13 calendar weeks in such calendar year.

1986 Amendments:

P. L. 99-595 (H. R. 5679), effective October 31, 1986, substituted "before January 1, 1993" for "before January 1, 1988" in subparagraph (1)(B).

Section 13303(a) of the Consolidated Omnibus Budget Reconciliation Act of 1985 (P. L. 99-272), effective April 7, 1986, substituted "1988" for "1986" in paragraph (c)(1)(B).

Section 13303(b) of the Consolidated Omnibus Budget Reconciliation Act of 1985 (P. L. 99-272), effective April 7, 1986, provides that notwithstanding paragraph 276(b)(3) of the Tax Equity and Fiscal Responsibility Act of 1982, the amendments made by paragraphs (1) and (2) of such section 276(b) (see the reduced type under "1982 Amendments," below) also apply to remuneration paid after September 19, 1985.

Section 13303(c) of the Consolidated Omnibus Budget Reconciliation Act of 1985 (P. L. 99-272), changed the effective date of section 3306(c)(18) from "after December 31, 1980, and before January 1, 1985" to "after December 31, 1980".

1984 Amendments:

Section 1074 of the Deficit Reduction Act of 1984 (H. R. 4170, P. L. 98-369) changed the effective date of section 3306(c)(18) from "after December 31, 1980, and before January 1, 1983" to "after December 31, 1980, and before January 1, 1985".

1983 Amendments:

Section 202 of the FSC Amendments of 1983, effective October 24, 1983, substituted "1986" for "1984" in subparagraph (c)(1)(B).

1982 Amendments:

Section 276(a)(1) of the Tax Equity and Fiscal Responsibility Act of 1982, applicable with respect to services performed after September 3, 1982, deleted "under the age of 22" which formerly followed "service performed by an individual" in subparagraph (10)(C).

Section 276(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982, applicable to remuneration paid after December 31, 1982, and before January 1, 1984 (but see the change made by section 13303(b)

NEWS RELEASE

COMMENTARY COLUMN

For more information call:
Sheelah R. Yawitz, President
Missouri Merchants & Manufacturers Association
314/537-1360

September 14, 1989
Page 1 of 2

New Missouri Law Makes Compliance Easier for Business!

Good news for business. Our Missouri legislators passed, and the Governor signed into law an important bill making it easier for business to be in compliance with Missouri's definition of 'Independent Contractor' as it applies to determination of employee status.

Too frequently Missouri employers found that they were in compliance with Internal Revenue Service and Federal Employment Security tests to meet the definition of 'Independent Contractor' but they were NOT in compliance with Missouri's very narrow interpretations of a 3-point test. Bearing in mind the difficulties of business trying to understand and comply with all the numerous laws, our Missouri General Assembly passed legislation that will simplify this problem. The following 3 point 'Independent Contractor' test has been removed from Missouri statutes:

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

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

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

Effective June 30, 1989, in determining the existence of the 'Independent Contractors' relationship as used by Missouri's Division of Employment Security, the common law of agency right to control shall be applied. The common law agency right to control test shall include but not be limited to: if the alleged employer retains the right to control the manner and means by which the results are to be accomplished, the individual who performs the service is an employee. If only the results are controlled, the individual performing the service is an independent contractor. Now Missouri's guidelines will coincide with federal guidelines.

OFFICES:

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314-537-1360

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Kansas City, MO 64145
(816) 941-9450

county in which the livestock dealer resides, or, if a nonresident, in Cole County, and the court shall be authorized to enter an order barring further purchases or sales of livestock. Such order shall remain in effect until the administrative hearing provided for in this section shall be had.

2. At the hearing, the livestock dealer or other person engaging in livestock transactions and the state shall have the opportunity to present in person or by counsel such statements, testimony, evidence and argument as may be pertinent to the charges or to any defense. The director may subpoena any persons or documents incident to the hearing, may take testimony orally, by deposition or by exhibit, in the same manner and with the same fees and mileage as prescribed in judicial proceedings in civil cases. The director or his designated representative may also administer oaths to those giving evidence. Following the hearing, the director may:

(1) Assess a penalty upon such livestock dealer or other person engaging in livestock transactions in an amount not to exceed ten thousand dollars for each violation of sections 276.600 to 276.661; or

(2) Dismiss the case.

3. Any person aggrieved by a decision of the director after a hearing pursuant to this section may appeal to the circuit court.

Approved June 30, 1989.

Effective 90 days after adjournment.

EMPLOYMENT SECURITY—DEFINITIONS

H.B.Nos. 380 & 427

WEST'S NO. 92

AN ACT to repeal section 288.034, RSMo Supp. 1988, relating to employment security, and to enact in lieu thereof one new section relating to the same subject, with an emergency clause.

Be it enacted by the General Assembly of the state of Missouri, as follows:

Section A. Section 288.034, RSMo Supp. 1988, is repealed and one new section enacted in lieu thereof, to be known as section 288.034, to read as follows:

288.034. 1. "Employment" means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied, and notwithstanding any other provisions of this section, service with respect to which a tax is required to be paid under any federal unemployment tax law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund or which, as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act, is required to be covered under this law.

2. The term "employment" shall include an individual's entire service, performed within or both within and without this state if:

(1) The service is localized in this state; or

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

3. Service performed by an individual for wages shall be deemed to be employment subject to this law:

(1) If covered by an election filed and approved pursuant to subdivision (2) of subsection 3 of section 288.080;

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(2) If covered by an arrangement pursuant to section 288.340 between the division and the agency charged with the administration of any other state or federal unemployment insurance law, pursuant to which all services performed by an individual for an employing unit are deemed to be performed entirely within this state.

4. Service shall be deemed to be localized within a state if the service is performed entirely within such state; or 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.

5. Service performed by an individual for remuneration shall be deemed to be employment subject to this law unless it is shown to the satisfaction of the division that such services were performed by an independent contractor. In determining the existence of the independent contractor relationship, the common law of agency right to control shall be applied. The common law agency right to control test shall include but not be limited to: if the alleged employer retains the right to control the manner and means by which the results are to be accomplished, the individual who performs the service is an employee. If only the results are controlled, the individual performing the service is an independent contractor.

6. The term "employment" shall include service performed for wages as an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or drycleaning services, for his principal; or as a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for sideline sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations, provided:

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

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

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

7. Service performed by an individual in the employ of this state or any political subdivision thereof or any instrumentality of any one or more of the foregoing which is wholly owned by this state and one or more other states or political subdivisions, or any service performed in the employ of any instrumentality of this state or of any political subdivision thereof, and one or more other states or political subdivisions, provided that such service is excluded from "employment" as defined in the Federal Unemployment Tax Act by section 3306(c)(7) of that act and is not excluded from "employment" under subsection 9 of this section, shall be "employment" subject to this law.

8. Service performed by an individual in the employ of a corporation or any community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, or other organization described in section 501(c)(3) of the Internal Revenue Code which is exempt from income tax under section 501(a) of that code if the organization had four or more individuals in employment for some portion of a day in each of twenty different weeks whether or not such weeks were consecutive within a calendar year regardless of whether they were employed at the same moment of time shall be "employment" subject to this law.

9. For the purposes of subsections 7 and 8 of this section, the term "employment" does not apply to service performed:

(1) In the employ of a church or convention or association of churches, or an organization which is operated primarily for religious purposes and which is operated, supervised,

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controlled, or principally supported by a church or convention or association of churches; or

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

(3) In the employ of a governmental entity referred to in subdivision (3) of subsection 1 of section 288.032 if such service is performed by an individual in the exercise of duties:

(a) As an elected official;

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

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

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

(e) In a position which, under or pursuant to the laws of this state, is designated as (i) a major nontenured policymaking or advisory position, or (ii) a policymaking or advisory position the performance of the duties of which ordinarily does not require more than eight hours per week; or

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

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

(6) By an inmate of a custodial or penal institution; or

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

10. The term "employment" shall include the service of an individual who is a citizen of the United States, performed outside the United States (except in Canada), if:

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

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

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

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

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

(3) None of the criteria of subdivisions (1) and (2) of this subsection is met but the employer has elected coverage in this state or, the employer having failed to elect coverage in any state, the individual has filed a claim for benefits, based on such service, under the law of this state;

(4) As used in this subsection and in subsection 11 of this section, the term "United States" includes the states, the District of Columbia and the Commonwealth of Puerto Rico.

11. An "American employer", for the purposes of subsection 10 of this section, means a person who is:

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

(2) A partnership, if States; or

(3) A trust, if all of

(4) A corporation or

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

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

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

12. The term "employment" shall not include:

(1) Service performed by an individual in agricultural labor;

(a) For the purposes of this subdivision, the term "agricultural labor" means remunerated service performed:

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

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

c. In connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15(g) of the Federal Agricultural Marketing Act, as amended (46 Stat. 1550, Sec. 3; 12 U.S.C. 1441j), or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

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

ii. In the employ of a group of operators of farms (or a cooperative organization of which such operators are members) in the performance of services described in item i of this subparagraph, but only if such operators produced more than one-half of the commodity with respect to which such service is performed;

iii. The provisions of items i and ii of this subparagraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

e. On a farm operated for profit if such service is not in the course of the employer's trade or business. As used in this paragraph, the term "farm" includes stock, dairy, poultry, fruit, furbearing animals, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures, used primarily for the raising of agricultural or horticultural commodities, and orchards;

(b) The term "employment" shall include service performed after December 31, 1977, by an individual in agricultural labor as defined in paragraph (a) of this subdivision when such service is performed for a person who, during any calendar quarter, paid remuneration in cash of twenty thousand dollars or more to individuals employed in agricultural labor or for some portion of a day in a calendar year in each of twenty different calendar weeks, whether or not such weeks were consecutive, employed in agricultural labor ten or more individuals, regardless of whether they were employed at the same moment of time;

(c) 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 person shall be considered as employed by such crew leader:

a. If such crew leader holds a valid certificate of registration under the Farm Labor Contractor Registration Act of 1963; or substantially all the members of such crew operate or maintain tractors, mechanized harvesting or cropdusting equipment, or any other mechanized equipment, which is provided by such crew leader; and

3-26

- b. If such individual is not in employment by such other person;
- c. If any individual is furnished by a crew leader to perform service in agricultural labor for any other person and that individual is not in the employment of the crew leader:
- i. Such other person and not the crew leader shall be treated as the employer of such individual; and
 - ii. Such other person shall be treated as having paid cash remuneration to such individual in an amount equal to the amount of cash remuneration paid to such individual by the crew leader (either on his own behalf or on behalf of such other person) for the service in agricultural labor performed for such other person;
- d. For the purposes of this subsection, the term "crew leader" means an individual who:
- i. Furnishes individuals to perform service in agricultural labor for any other person;
 - ii. Pays (either on his own behalf or on behalf of such other person) the individuals so furnished by him for the service in agricultural labor performed by them; and
 - iii. Has not entered into a written agreement with such other person under which such individual is designated as in employment by such other person;
- (2) Domestic service in a private home except as provided in subsection 13 of this section;
- (3) Service performed by an individual under the age of eighteen years in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;
- (4) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of his father or mother;
- (5) Except as otherwise provided in this law, service performed in the employ of a corporation, community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual;
- (6) Services with respect to which unemployment insurance is payable under an unemployment insurance system established by an act of Congress;
- (7) Service performed in the employ of a foreign government;
- (8) Service performed in the employ of an instrumentality wholly owned by a foreign government:
- (a) If the service is of a character similar to that performed in foreign countries by employees of the United States government or of an instrumentality thereof; and
 - (b) If the division finds that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States government and of instrumentalities thereof. The certification of the United States Secretary of State to the United States Secretary of Treasury shall constitute prima facie evidence of such equivalent exemption;
- (9) Service covered by an arrangement between the division and the agency charged with the administration of any other state or federal unemployment insurance law pursuant to which all services performed by an individual for an employing unit during the period covered by the employing unit's approved election are deemed to be performed entirely within the jurisdiction of such other state or federal agency;
- (10) Service performed in any calendar quarter in the employ of a school, college or university not otherwise excluded, if such service is performed by a student who is enrolled and regularly attending classes at such school, college, or university, and the remuneration for such service does not exceed fifty dollars (exclusive of board, room, and tuition);

(11) Service performed by an individual for such person in licensed insurance business;

(12) Domestic service in a chapter of a college or university section;

(13) Services performed by an individual in the Comprehensive Employment and Training Act, except those programs required by the Commission pursuant thereto;

(14) Service performed by an individual in an educational institution normally has a regular schedule of educational activities at such institution, where such service is an integral part of the employ; except, that such service is established for or on behalf of such institution;

(15) Services performed by an individual as a broker if at least eight services performed by such individual are performed pursuant to a contract with whom the services are performed; such services shall be treated as an employee;

(16) Services performed by an individual in selling, or soliciting the sale of, goods or services affiliated with, a permanent establishment, whether the number of hours worked by such individual under such contract between such individual and such contract project, with respect to such services;

(17) Services performed by an individual on a basis for scientific, mechanical, or other research described in section 50;

13. The term "employee" means an individual and in subdivision (12) if the employing unit has a gross annual revenue of one thousand dollars or more in 1977.

14. The term "employee" means an individual for an employing unit (as defined in the foregoing provisions of this law) who performs one-half or more of the services performed by such individual if the services performed by such individual constitute employment for a period shall be deemed to be a period of remuneration is or was received by him.) This subsection shall not apply to a period where any such services are performed.

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(11) Service performed by an individual for a person as a licensed insurance agent, a licensed insurance broker, or an insurance solicitor, if all such service performed by such individual for such person is performed for remuneration solely by way of commissions;

(12) Domestic service performed in the employ of a local college club or of a local chapter of a college fraternity or sorority except as provided in subsection 13 of this section;

(13) Services performed after March 31, 1982, in programs authorized and funded by the Comprehensive Employment and Training Act by participants of such programs, except those programs with respect to which unemployment insurance coverage is required by the Comprehensive Employment and Training Act or regulations issued pursuant thereto;

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

(15) Services performed by a licensed real estate salesperson or licensed real estate broker if at least eighty percent of the remuneration, whether or not paid in cash, for the services performed rather than to the number of hours worked is directly related to sales performed pursuant to a written contract between such individual and the person for whom the services are performed and such contract provides that the individual will not be treated as an employee with respect to such services for federal tax purposes;

(16) Services performed as a direct seller who is engaged in the trade or business of selling, or soliciting the sale of, consumer products in the home or otherwise than in, or affiliated with, a permanent, fixed retail establishment, if eighty percent or more of the remuneration, whether or not paid in cash, for the services performed rather than the number of hours worked is directly related to sales performed pursuant to a written contract between such direct seller and the person for whom the services are performed, and such contract provides that the individual will not be treated as an employee with respect to such services for federal tax purposes;

(17) Services performed as a volunteer research subject who is paid on a per study basis for scientific, medical or drug related testing for any organization other than one described in section 501(c)(3) of the Internal Revenue Code or any governmental entity.

13. The term "employment" shall include domestic service as defined in subdivision (2) and in subdivision (12) of subsection 12 of this section performed after December 31, 1977, if the employing unit for which such service is performed paid cash wages of one thousand dollars or more for such services in any calendar quarter after December 31, 1977.

14. The term "employment" shall include or exclude the entire service of an individual for an employing unit during a pay period in which his services are not all excluded under the foregoing provisions, on the following basis: If the services performed during one-half or more of any pay period constitute employment as otherwise defined in this law, all the services performed during such period shall be deemed to be employment; but if the services performed during more than one-half of any such pay period do not constitute employment as otherwise defined in this law, then none of the services for such period shall be deemed to be employment. (As used in this subsection, the term "pay period" means a period of not more than thirty-one consecutive days for which a payment of remuneration is ordinarily made to the individual by the employing unit employing him.) This subsection shall not be applicable with respect to service performed in a pay period where any such service is excluded under subdivision (7) of subsection 12 of this section.

15. The term "employment" shall not include the services of a full-time student who performed such services in the employ of an organized summer camp for less than thirteen calendar weeks in such calendar year.

16. For the purpose of subsection 15 of this section, an individual shall be treated as a full-time student for any period:

(1) During which the individual is enrolled as a full-time student at an educational institution; or

(2) Which is between academic years or terms if:

(a) The individual was enrolled as a full-time student at an educational institution for the immediately preceding academic year or term; and

(b) There is a reasonable assurance that the individual will be so enrolled for the immediately succeeding academic year or term after the period described in paragraph (a) of this subdivision.

17. For the purpose of subsection 15 of this section, an organized summer camp shall mean a summer camp which:

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

(2) Had average gross receipts for any six months in the preceding calendar year which were not more than thirty-three and one-third percent of its average gross receipts for the other six months in the preceding calendar year.

18. The term "employment" shall not mean service performed by a remodeling salesperson acting as an independent contractor, however, if the federal Internal Revenue Service determines that a contractual relationship between a direct provider and an individual acting as an independent contractor under the provisions of this subdivision is in fact an employer-employee relationship for the purposes of federal law, then that relationship shall be considered as an employer-employee relationship for the purposes of this chapter.

Section B. This act is declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval.

Approved June 30, 1989.

Effective June 30, 1989.

ZONING—BUILDINGS AND STRUCTURES

H.B.No. 498

WEST'S NO. 93

AN ACT to repeal section 89.120, RSMo 1986, relating to certain zoning regulations, and to enact in lieu thereof one new section relating to the same subject.

Be it enacted by the General Assembly of the state of Missouri, as follows:

Section A. Section 89.120, RSMo 1986, is repealed and one new section enacted in lieu thereof, to be known as section 89.120, to read as follows:

89.120. 1. In case any building or structure is erected, constructed, reconstructed, altered, converted or maintained, or any building, structure or land is used in violation of sections 89.010 to 89.140 or of any ordinance or other regulation made under authority conferred hereby, the proper local authorities of the municipality, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, conversion, maintenance or use, to restrain, correct, or abate such violation, to prevent the occupancy of such building, structure, or land, or to prevent any illegal act, conduct, business, or use in or about such

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