

ASSEMBLY, No. 3022

STATE OF NEW JERSEY 218th LEGISLATURE

INTRODUCED FEBRUARY 8, 2018

Sponsored by:

Assemblyman ANTHONY M. BUCCO

District 25 (Morris and Somerset)

Assemblywoman BETTYLOU DECROCE

District 26 (Essex, Morris and Passaic)

Co-Sponsored by:

Assemblymen Wolfe, Peterson, S.Kean, Assemblywoman Handlin,

Assemblyman Howarth, Assemblywoman N.Munoz, Assemblymen

Bramnick, DiMaio, Clifton and McGuckin

SYNOPSIS

Revises test for employment or independent contractor status under certain State labor laws.

CURRENT VERSION OF TEXT

As introduced.



(Sponsorship Updated As Of: 7/31/2018)

1 AN ACT concerning employment status and amending R.S.43:21-19.

2

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

5

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

7 43:21-19. Definitions. As used in this chapter (R.S.43:21-1 et
8 seq.), unless the context clearly requires otherwise:

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

12 (2) "Average annual payroll" means the average of the annual
13 payrolls of any employer for the last three or five preceding
14 calendar years, whichever average is higher, except that any year or
15 years throughout which an employer has had no "annual payroll"
16 because of military service shall be deleted from the reckoning; the
17 "average annual payroll" in such case is to be determined on the
18 basis of the prior three or five calendar years in each of which the
19 employer had an "annual payroll" in the operation of his business, if
20 the employer resumes his business within 12 months after
21 separation, discharge or release from such service, under conditions
22 other than dishonorable, and makes application to have his "average
23 annual payroll" determined on the basis of such deletion within 12
24 months after he resumes his business; provided, however, that
25 "average annual payroll" solely for the purposes of paragraph (3) of
26 subsection (e) of R.S.43:21-7 means the average of the annual
27 payrolls of any employer on which he paid contributions to the
28 State disability benefits fund for the last three or five preceding
29 calendar years, whichever average is higher; provided further that
30 only those wages be included on which employer contributions have
31 been paid on or before January 31 (or the next succeeding day if
32 such January 31 is a Saturday or Sunday) immediately preceding
33 the beginning of the 12-month period for which the employer's
34 contribution rate is computed.

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

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

42 With respect to a benefit year commencing on or after July 1,
43 1995, if an individual does not have sufficient qualifying weeks or
44 wages in his base year to qualify for benefits, the individual shall

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

Matter underlined thus is new matter.

1 have the option of designating that his base year shall be the
2 "alternative base year," which means the last four completed
3 calendar quarters immediately preceding the individual's benefit
4 year; except that, with respect to a benefit year commencing on or
5 after October 1, 1995, if the individual also does not have sufficient
6 qualifying weeks or wages in the last four completed calendar
7 quarters immediately preceding his benefit year to qualify for
8 benefits, "alternative base year" means the last three completed
9 calendar quarters immediately preceding his benefit year and, of the
10 calendar quarter in which the benefit year commences, the portion
11 of the quarter which occurs before the commencing of the benefit
12 year.

13 The division shall inform the individual of his options under this
14 section as amended by P.L.1995, c.234. If information regarding
15 weeks and wages for the calendar quarter or quarters immediately
16 preceding the benefit year is not available to the division from the
17 regular quarterly reports of wage information and the division is not
18 able to obtain the information using other means pursuant to State
19 or federal law, the division may base the determination of eligibility
20 for benefits on the affidavit of an individual with respect to weeks
21 and wages for that calendar quarter. The individual shall furnish
22 payroll documentation, if available, in support of the affidavit. A
23 determination of benefits based on an alternative base year shall be
24 adjusted when the quarterly report of wage information from the
25 employer is received if that information causes a change in the
26 determination.

27 (2) With respect to a benefit year commencing on or after June
28 1, 1990 for an individual who immediately preceding the benefit
29 year was subject to a disability compensable under the provisions of
30 the "Temporary Disability Benefits Law," P.L.1948, c.110
31 (C.43:21-25 et seq.), "base year" shall mean the first four of the last
32 five completed calendar quarters immediately preceding the
33 individual's period of disability, if the employment held by the
34 individual immediately preceding the period of disability is no
35 longer available at the conclusion of that period and the individual
36 files a valid claim for unemployment benefits after the conclusion
37 of that period. For the purposes of this paragraph, "period of
38 disability" means the period defined as a period of disability by
39 section 3 of the "Temporary Disability Benefits Law," P.L.1948,
40 c.110 (C.43:21-27). An individual who files a claim under the
41 provisions of this paragraph (2) shall not be regarded as having left
42 work voluntarily for the purposes of subsection (a) of R.S.43:21-5.

43 (3) With respect to a benefit year commencing on or after June
44 1, 1990 for an individual who immediately preceding the benefit
45 year was subject to a disability compensable under the provisions of
46 the workers' compensation law (chapter 15 of Title 34 of the
47 Revised Statutes), "base year" shall mean the first four of the last
48 five completed calendar quarters immediately preceding the

1 individual's period of disability, if the period of disability was not
2 longer than two years, if the employment held by the individual
3 immediately preceding the period of disability is no longer
4 available at the conclusion of that period and if the individual files a
5 valid claim for unemployment benefits after the conclusion of that
6 period. For the purposes of this paragraph, "period of disability"
7 means the period from the time at which the individual becomes
8 unable to work because of the compensable disability until the time
9 that the individual becomes able to resume work and continue work
10 on a permanent basis. An individual who files a claim under the
11 provisions of this paragraph (3) shall not be regarded as having left
12 work voluntarily for the purposes of subsection (a) of R.S.43:21-5.

13 (d) "Benefit year" with respect to any individual means the 364
14 consecutive calendar days beginning with the day on, or as of,
15 which he first files a valid claim for benefits, and thereafter
16 beginning with the day on, or as of, which the individual next files a
17 valid claim for benefits after the termination of his last preceding
18 benefit year. Any claim for benefits made in accordance with
19 subsection (a) of R.S.43:21-6 shall be deemed to be a "valid claim"
20 for the purpose of this subsection if (1) he is unemployed for the
21 week in which, or as of which, he files a claim for benefits; and (2)
22 he has fulfilled the conditions imposed by subsection (e) of
23 R.S.43:21-4.

24 (e) (1) "Division" means the Division of Unemployment and
25 Temporary Disability Insurance of the Department of Labor and
26 Workforce Development, and any transaction or exercise of
27 authority by the director of the division thereunder, or under this
28 chapter (R.S.43:21-1 et seq.), shall be deemed to be performed by
29 the division.

30 (2) "Controller" means the Office of the Assistant
31 Commissioner for Finance and Controller of the Department of
32 Labor and Workforce Development, established by the 1982
33 Reorganization Plan of the Department of Labor.

34 (f) "Contributions" means the money payments to the State
35 Unemployment Compensation Fund, required by R.S.43:21-7.
36 "Payments in lieu of contributions" means the money payments to
37 the State Unemployment Compensation Fund by employers electing
38 or required to make payments in lieu of contributions, as provided
39 in section 3 or section 4 of P.L.1971, c.346 (C.43:21-7.2 or 43:21-
40 7.3).

41 (g) "Employing unit" means the State or any of its
42 instrumentalities or any political subdivision thereof or any of its
43 instrumentalities or any instrumentality of more than one of the
44 foregoing or any instrumentality of any of the foregoing and one or
45 more other states or political subdivisions or any individual or type
46 of organization, any partnership, association, trust, estate, joint-
47 stock company, insurance company or corporation, whether
48 domestic or foreign, or the receiver, trustee in bankruptcy, trustee or

1 successor thereof, or the legal representative of a deceased person,
2 which has or subsequent to January 1, 1936, had in its employ one
3 or more individuals performing services for it within this State. All
4 individuals performing services within this State for any employing
5 unit which maintains two or more separate establishments within
6 this State shall be deemed to be employed by a single employing
7 unit for all the purposes of this chapter (R.S.43:21-1 et seq.). Each
8 individual employed to perform or to assist in performing the work
9 of any agent or employee of an employing unit shall be deemed to
10 be employed by such employing unit for all the purposes of this
11 chapter (R.S.43:21-1 et seq.), whether such individual was hired or
12 paid directly by such employing unit or by such agent or employee;
13 provided the employing unit had actual or constructive knowledge
14 of the work.

15 (h) "Employer" means:

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

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

24 (3) Any employing unit which acquired the organization, trade
25 or business, or substantially all the assets thereof, of another
26 employing unit and which, if treated as a single unit with such other
27 employing unit, would be an employer under paragraph (1) of this
28 subsection;

29 (4) Any employing unit which together with one or more other
30 employing units is owned or controlled (by legally enforceable
31 means or otherwise), directly or indirectly by the same interests, or
32 which owns or controls one or more other employing units (by
33 legally enforceable means or otherwise), and which, if treated as a
34 single unit with such other employing unit or interest, would be an
35 employer under paragraph (1) of this subsection;

36 (5) Any employing unit for which service in employment as
37 defined in R.S.43:21-19 (i) (1) (B) (i) is performed after December
38 31, 1971; and as defined in R.S.43:21-19 (i) (1) (B) (ii) is
39 performed after December 31, 1977;

40 (6) Any employing unit for which service in employment as
41 defined in R.S.43:21-19 (i) (1) (c) is performed after December 31,
42 1971 and which in either the current or the preceding calendar year
43 paid remuneration for employment in the amount of \$1,000.00 or
44 more;

45 (7) Any employing unit not an employer by reason of any other
46 paragraph of this subsection (h) for which, within either the current
47 or preceding calendar year, service is or was performed with respect
48 to which such employing unit is liable for any federal tax against

1 which credit may be taken for contributions required to be paid into
2 a state unemployment fund; or which, as a condition for approval of
3 the "unemployment compensation law" for full tax credit against
4 the tax imposed by the Federal Unemployment Tax Act, is required
5 pursuant to such act to be an employer under this chapter
6 (R.S.43:21-1 et seq.);

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

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

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

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

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

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

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

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

27 (A) Any service performed prior to January 1, 1972, which was
28 employment as defined in the "unemployment compensation law"
29 (R.S.43:21-1 et seq.) prior to such date, and, subject to the other
30 provisions of this subsection, service performed on or after January
31 1, 1972, including service in interstate commerce, performed for
32 remuneration or under any contract of hire, written or oral, express
33 or implied.

34 (B) (i) Service performed after December 31, 1971 by an
35 individual in the employ of this State or any of its instrumentalities
36 or in the employ of this State and one or more other states or their
37 instrumentalities for a hospital or institution of higher education
38 located in this State, if such service is not excluded from
39 "employment" under paragraph (D) below.

40 (ii) Service performed after December 31, 1977, in the employ
41 of this State or any of its instrumentalities or any political
42 subdivision thereof or any of its instrumentalities or any
43 instrumentality of more than one of the foregoing or any
44 instrumentality of the foregoing and one or more other states or
45 political subdivisions, if such service is not excluded from
46 "employment" under paragraph (D) below.

47 (C) Service performed after December 31, 1971 by an individual
48 in the employ of a religious, charitable, educational, or other

1 organization, which is excluded from "employment" as defined in
2 the Federal Unemployment Tax Act, solely by reason of section
3 3306 (c)(8) of that act, if such service is not excluded from
4 "employment" under paragraph (D) below.

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

7 (i) In the employ of (I) a church or convention or association of
8 churches, or (II) an organization, or school which is operated
9 primarily for religious purposes and which is operated, supervised,
10 controlled or principally supported by a church or convention or
11 association of churches;

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

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

20 (aa) as an elected official;

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

23 (cc) as a member of the State National Guard or Air National
24 Guard;

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

27 (ee) in a position which, under or pursuant to the laws of this
28 State, is designated as a major nontenured policy making or
29 advisory position, or a policy making or advisory position, the
30 performance of the duties of which ordinarily does not require more
31 than eight hours per week; or

32 (iv) By an individual receiving rehabilitation or remunerative
33 work in a facility conducted for the purpose of carrying out a
34 program of rehabilitation of individuals whose earning capacity is
35 impaired by age or physical or mental deficiency or injury or
36 providing remunerative work for individuals who because of their
37 impaired physical or mental capacity cannot be readily absorbed in
38 the competitive labor market;

39 (v) By an individual receiving work-relief or work-training as
40 part of an unemployment work-relief or work-training program
41 assisted in whole or in part by any federal agency or an agency of a
42 state or political subdivision thereof; or

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

47 (E) The term "employment" shall include the services of an
48 individual who is a citizen of the United States, performed outside

1 the United States after December 31, 1971 (except in Canada and in
2 the case of the Virgin Islands, after December 31, 1971) and prior
3 to January 1 of the year following the year in which the U.S.
4 Secretary of Labor approves the unemployment compensation law
5 of the Virgin Islands, under section 3304 (a) of the Internal
6 Revenue Code of 1986 (26 U.S.C. s.3304 (a)) in the employ of an
7 American employer (other than the service which is deemed
8 employment under the provisions of R.S.43:21-19 (i) (2) or (5) or
9 the parallel provisions of another state's unemployment
10 compensation law), if

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

13 (ii) The American employer has no place of business in the
14 United States, but (I) the American employer is an individual who
15 is a resident of this State; or (II) the American employer is a
16 corporation which is organized under the laws of this State; or (III)
17 the American employer is a partnership or trust and the number of
18 partners or trustees who are residents of this State is greater than the
19 number who are residents of another state; or

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

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

33 (F) Notwithstanding R.S.43:21-19 (i) (2), all service performed
34 after January 1, 1972 by an officer or member of the crew of an
35 American vessel or American aircraft on or in connection with such
36 vessel or aircraft, if the operating office from which the operations
37 of such vessel or aircraft operating within, or within and without,
38 the United States are ordinarily and regularly supervised, managed,
39 directed, and controlled, is within this State.

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

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

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

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

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

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

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

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

35 (iii) For the purposes of subparagraph (I) (i) in the case of any
36 individual who is furnished by a crew leader to perform service in
37 agricultural labor or any other entity and who is not treated as an
38 employee of such crew leader under (I) (ii)

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

41 (bb) such other entity shall be treated as having paid cash
42 remuneration to such individual in an amount equal to the amount
43 of cash remuneration paid to such individual by the crew leader
44 (either on his own behalf or on behalf of such other entity) for the
45 service in agricultural labor performed for such other entity.

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

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

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

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

9 (J) Domestic service after December 31, 1977 performed in the
10 private home of an employing unit which paid cash remuneration of
11 \$1,000.00 or more to one or more individuals for such domestic
12 service in any calendar quarter in the current or preceding calendar
13 year.

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

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

17 (B) The service is not localized in any state but some of the
18 service is performed in this State, and (i) the base of operations, or,
19 if there is no base of operations, then the place from which such
20 service is directed or controlled, is in this State; or (ii) the base of
21 operations or place from which such service is directed or
22 controlled is not in any state in which some part of the service is
23 performed, but the individual's residence is in this State.

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

30 (4) Services not covered under paragraph (2) of this subsection
31 and performed entirely without this State, with respect to no part of
32 which contributions are required and paid under an unemployment
33 compensation law of any other state or of the federal government,
34 shall be deemed to be employment subject to this chapter
35 (R.S.43:21-1 et seq.) if the individual performing such services is a
36 resident of this State and the employing unit for whom such
37 services are performed files with the division an election that the
38 entire service of such individual shall be deemed to be employment
39 subject to this chapter (R.S.43:21-1 et seq.).

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

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

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

46 (6) Services performed by an individual for remuneration shall
47 be deemed to be employment subject to this chapter (R.S.43:21-1 et

1 seq.) unless and until it is shown to the satisfaction of the division
2 that:

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

6 (B) **【Such service is either outside the usual course of the**
7 **business for which such service is performed, or that such service is**
8 **performed outside of all the places of business of the enterprise for**
9 **which such service is performed; and】** (Deleted by amendment,
10 P.L. , c.)(pending before the Legislature as this bill)

11 (C) **【Such individual is customarily engaged in an independently**
12 **established trade, occupation, profession or business.】** (Deleted by
13 amendment, P.L. , c.)(pending before the Legislature as this
14 bill)

15 (7) Provided that such services are also exempt under the
16 Federal Unemployment Tax Act, as amended, or that contributions
17 with respect to such services are not required to be paid into a state
18 unemployment fund as a condition for a tax offset credit against the
19 tax imposed by the Federal Unemployment Tax Act, as amended,
20 the term "employment" shall not include:

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

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

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

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

40 (C) Service performed by an individual in the employ of his son,
41 daughter or spouse, and service performed by a child under the age
42 of 18 in the employ of his father or mother;

43 (D) Service performed prior to January 1, 1978, in the employ of
44 this State or of any political subdivision thereof or of any
45 instrumentality of this State or its political subdivisions, except as
46 provided in R.S.43:21-19 (i) (1) (B) above, and service in the
47 employ of the South Jersey Port Corporation or its successors;

1 (E) Service performed in the employ of any other state or its
2 political subdivisions or of an instrumentality of any other state or
3 states or their political subdivisions to the extent that such
4 instrumentality is with respect to such service exempt under the
5 Constitution of the United States from the tax imposed under the
6 Federal Unemployment Tax Act, as amended, except as provided in
7 R.S.43:21-19 (i) (1) (B) above;

8 (F) Service performed in the employ of the United States
9 Government or of any instrumentality of the United States exempt
10 under the Constitution of the United States from the contributions
11 imposed by the "unemployment compensation law," except that to
12 the extent that the Congress of the United States shall permit states
13 to require any instrumentalities of the United States to make
14 payments into an unemployment fund under a state unemployment
15 compensation law, all of the provisions of this act shall be
16 applicable to such instrumentalities, and to service performed for
17 such instrumentalities, in the same manner, to the same extent and
18 on the same terms as to all other employers, employing units,
19 individuals and services; provided that if this State shall not be
20 certified for any year by the Secretary of Labor of the United States
21 under section 3304 of the federal Internal Revenue Code of 1986
22 (26 U.S.C. s.3304), the payments required of such instrumentalities
23 with respect to such year shall be refunded by the division from the
24 fund in the same manner and within the same period as is provided
25 in R.S.43:21-14 (f) with respect to contributions erroneously paid to
26 or collected by the division;

27 (G) Services performed in the employ of fraternal beneficiary
28 societies, orders, or associations operating under the lodge system
29 or for the exclusive benefit of the members of a fraternity itself
30 operating under the lodge system and providing for the payment of
31 life, sick, accident, or other benefits to the members of such society,
32 order, or association, or their dependents;

33 (H) Services performed as a member of the board of directors, a
34 board of trustees, a board of managers, or a committee of any bank,
35 building and loan, or savings and loan association, incorporated or
36 organized under the laws of this State or of the United States, where
37 such services do not constitute the principal employment of the
38 individual;

39 (I) Service with respect to which unemployment insurance is
40 payable under an unemployment insurance program established by
41 an Act of Congress;

42 (J) Service performed by agents of mutual fund brokers or
43 dealers in the sale of mutual funds or other securities, by agents of
44 insurance companies, exclusive of industrial insurance agents or by
45 agents of investment companies, if the compensation to such agents
46 for such services is wholly on a commission basis;

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

1 (L) Services performed in the employ of any veterans'
2 organization chartered by Act of Congress or of any auxiliary
3 thereof, no part of the net earnings of which organization, or
4 auxiliary thereof, inures to the benefit of any private shareholder or
5 individual;

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

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

18 (O) Services performed in the sale or distribution of merchandise
19 by home-to-home salespersons or in-the-home demonstrators whose
20 remuneration consists wholly of commissions or commissions and
21 bonuses;

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

25 (Q) Service performed in the employ of an instrumentality
26 wholly owned by a foreign government if (i) the service is of a
27 character similar to that performed in foreign countries by
28 employees of the United States Government or of an instrumentality
29 thereof, and (ii) the division finds that the United States Secretary
30 of State has certified to the United States Secretary of the Treasury
31 that the foreign government, with respect to whose instrumentality
32 exemption is claimed, grants an equivalent exemption with respect
33 to similar services performed in the foreign country by employees
34 of the United States Government and of instrumentalities thereof;

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

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

44 (T) Service performed in the employ of a school, college, or
45 university if such service is performed (i) by a student enrolled at
46 such school, college, or university on a full-time basis in an
47 educational program or completing such educational program
48 leading to a degree at any of the severally recognized levels, or (ii)

1 by the spouse of such a student, if such spouse is advised at the time
2 such spouse commences to perform such service that (I) the
3 employment of such spouse to perform such service is provided
4 under a program to provide financial assistance to such student by
5 such school, college, or university, and (II) such employment will
6 not be covered by any program of unemployment insurance;

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

18 (V) Service performed in the employ of a hospital, if such
19 service is performed by a patient of the hospital; service performed
20 as a student nurse in the employ of a hospital or a nurses' training
21 school by an individual who is enrolled and regularly attending
22 classes in a nurses' training school approved under the laws of this
23 State;

24 (W) Services performed after the effective date of this
25 amendatory act by agents of mutual benefit associations if the
26 compensation to such agents for such services is wholly on a
27 commission basis;

28 (X) Services performed by operators of motor vehicles weighing
29 18,000 pounds or more, licensed for commercial use and used for
30 the highway movement of motor freight, who own their equipment
31 or who lease or finance the purchase of their equipment through an
32 entity which is not owned or controlled directly or indirectly by the
33 entity for which the services were performed and who were
34 compensated by receiving a percentage of the gross revenue
35 generated by the transportation move or by a schedule of payment
36 based on the distance and weight of the transportation move;

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

38 (Z) Services performed, using facilities provided by a travel
39 agent, by a person, commonly known as an outside travel agent,
40 who acts as an independent contractor, is paid on a commission
41 basis, sets his own work schedule and receives no benefits, sick
42 leave, vacation or other leave from the travel agent owning the
43 facilities.

44 (8) If one-half or more of the services in any pay period
45 performed by an individual for an employing unit constitutes
46 employment, all the services of such individual shall be deemed to
47 be employment; but if more than one-half of the service in any pay
48 period performed by an individual for an employing unit does not

1 constitute employment, then none of the service of such individual
2 shall be deemed to be employment. As used in this paragraph, the
3 term "pay period" means a period of not more than 31 consecutive
4 days for which a payment for service is ordinarily made by an
5 employing unit to individuals in its employ.

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

10 (A) The limousine franchisee is incorporated;

11 (B) The franchisee is subject to regulation by the Interstate
12 Commerce Commission;

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

16 (D) The franchisee registers with the Department of Labor and
17 Workforce Development and receives an employer registration
18 number.

19 (10) Services performed by a legal transcriber, or certified court
20 reporter certified pursuant to P.L.1940, c.175 (C.45:15B-1 et seq.),
21 shall not be deemed to be employment subject to the
22 "unemployment compensation law," R.S.43:21-1 et seq., if those
23 services are provided to a third party by the transcriber or reporter
24 who is referred to the third party pursuant to an agreement with
25 another legal transcriber or legal transcription service, or certified
26 court reporter or court reporting service, on a freelance basis,
27 compensation for which is based upon a fee per transcript page, flat
28 attendance fee, or other flat minimum fee, or combination thereof,
29 set forth in the agreement.

30 For purposes of this paragraph (10): "legal transcription service"
31 and "legal transcribing" mean making use, by audio, video or voice
32 recording, of a verbatim record of court proceedings, depositions,
33 other judicial proceedings, meetings of boards, agencies,
34 corporations, or other bodies or groups, and causing that record to
35 be printed in readable form or produced on a computer screen in
36 readable form; and "legal transcriber" means a person who engages
37 in "legal transcribing."

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

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

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

45 (m) "Unemployment."

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

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

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

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

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

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

29 (o) "Wages" means remuneration paid by employers for
30 employment. If a worker receives gratuities regularly in the course
31 of his employment from other than his employer, his "wages" shall
32 also include the gratuities so received, if reported in writing to his
33 employer in accordance with regulations of the division, and if not
34 so reported, his "wages" shall be determined in accordance with the
35 minimum wage rates prescribed under any labor law or regulation
36 of this State or of the United States, or the amount of remuneration
37 actually received by the employee from his employer, whichever is
38 the higher.

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

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

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

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

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

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

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

17 (B) If the individual does not establish in his base year 20 or
18 more base weeks as defined in subparagraph (A) of this paragraph
19 (2), any calendar week of an individual's base year during which the
20 individual earned in employment from an employer remuneration
21 not less than an amount 20 times the minimum wage in effect
22 pursuant to section 5 of P.L.1966, c.113 (C.34:11-56a4) on October
23 1 of the calendar year preceding the calendar year in which the
24 benefit year commences, which amount shall be adjusted to the next
25 higher multiple of \$1.00 if not already a multiple thereof, except
26 that if in any calendar week an individual subject to this
27 subparagraph (B) is in employment with more than one employer,
28 the individual may in that calendar week establish a base week with
29 respect to each of the employers from whom the individual earns
30 remuneration not less than the amount defined in this subparagraph
31 (B) during that week.

32 (3) "Base week," commencing on or after January 1, 2001,
33 means any calendar week during which the individual earned in
34 employment from an employer remuneration not less than an
35 amount 20 times the minimum wage in effect pursuant to section 5
36 of P.L.1966, c.113 (C.34:11-56a4) on October 1 of the calendar
37 year preceding the calendar year in which the benefit year
38 commences, which amount shall be adjusted to the next higher
39 multiple of \$1.00 if not already a multiple thereof, except that if in
40 any calendar week an individual subject to this paragraph (3) is in
41 employment with more than one employer, the individual may in
42 that calendar week establish a base week with respect to each of the
43 employers from whom the individual earns remuneration equal to
44 not less than the amount defined in this paragraph (3) during that
45 week.

46 (u) "Average weekly wage" means the amount derived by
47 dividing an individual's total wages received during his base year
48 base weeks (as defined in subsection (t) of this section) from that

1 most recent base year employer with whom he has established at
2 least 20 base weeks, by the number of base weeks in which such
3 wages were earned. In the event that such claimant had no employer
4 in his base year with whom he had established at least 20 base
5 weeks, then such individual's average weekly wage shall be
6 computed as if all of his base week wages were received from one
7 employer and as if all his base weeks of employment had been
8 performed in the employ of one employer.

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

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

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

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

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

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

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

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

43 (2) "Institution of higher education" means an educational
44 institution which:

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

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

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

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

10 Notwithstanding any of the foregoing provisions of this
11 subsection, all colleges and universities in this State are institutions
12 of higher education for purposes of this section.

13 (z) "Hospital" means an institution which has been licensed,
14 certified or approved under the law of this State as a hospital.
15 (cf: P.L.2017, c.230, s.1)

16

17 2. This act shall take effect immediately.

18

19

20

STATEMENT

21

22 This bill revises the test used to determine whether a worker is
23 an employee or an independent contractor under certain State labor
24 laws.

25 The "ABC" test is widely used under current State labor law for
26 determining whether a worker is an employee or an independent
27 contractor. It is used to determine employee and employer
28 obligations and entitlements under the following laws: the
29 "unemployment compensation law," the "Temporary Disability
30 Benefits Law," the New Jersey wage payment law, and the "New
31 Jersey State Wage and Hour Law." It is also used under the "New
32 Jersey Gross Income Tax Act," for purposes of determining whether
33 an employer is required to deduct and withhold State income taxes.

34 The "ABC" test provides that an individual who performs
35 services for remuneration is presumed to be an employee unless the
36 employer can show to the satisfaction of the Department of Labor
37 and Workforce Development that:

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

41 (B) Such service is either outside the usual course of the business
42 for which such service is performed, or that such service is
43 performed outside of all the places of business of the enterprise for
44 which such service is performed; and

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

47 If an employer fails to prove any one of the three criteria for
48 showing a worker is an independent contractor, the worker will be

1 classified as an employee, and will be eligible for benefits pursuant
2 to the labor laws listed above. Additionally, the employer and
3 employee will be required to comply with the contribution and
4 participation obligations of the respective labor laws.

5 This bill eliminates the B and C factors of the employment status
6 test, thereby limiting the test to factor A, whether the individual has
7 been and will continue to be free from control of the employer. By
8 limiting the factors used in the employment status test to the control
9 test, it will be easier for employers to comply with regulations and
10 categorize workers for purposes of State labor laws.