

ASSEMBLY, No. 1439

STATE OF NEW JERSEY 219th LEGISLATURE

PRE-FILED FOR INTRODUCTION IN THE 2020 SESSION

Sponsored by:

Assemblywoman BETTYLOU DECROCE

District 26 (Essex, Morris and Passaic)

Co-Sponsored by:

**Assemblymen Peterson, S.Kean, 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

Introduced Pending Technical Review by Legislative Counsel.



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-
8 1 et 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
45 have the option of designating that his base year shall be the

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

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

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

42 (3) With respect to a benefit year commencing on or after June
43 1, 1990 for an individual who immediately preceding the benefit
44 year was subject to a disability compensable under the provisions of
45 the workers' compensation law (chapter 15 of Title 34 of the
46 Revised Statutes), "base year" shall mean the first four of the last
47 five completed calendar quarters immediately preceding the
48 individual's period of disability, if the period of disability was not

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

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

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

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

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

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

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

14 (h) "Employer" means:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

46 (C) Service performed after December 31, 1971 by an individual
47 in the employ of a religious, charitable, educational, or other
48 organization, which is excluded from "employment" as defined in

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

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

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

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

14 (iii) Prior to January 1, 1978, in the employ of a school which is
15 not an institution of higher education, and after December 31, 1977,
16 in the employ of a governmental entity referred to in R.S.43:21-19

17 (i) (1) (B), if such service is performed by an individual in the
18 exercise of duties

19 (aa) as an elected official;

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

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

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

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

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

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

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

46 (E) The term "employment" shall include the services of an
47 individual who is a citizen of the United States, performed outside
48 the United States after December 31, 1971 (except in Canada and in

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

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

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

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

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

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

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

47 (H) The term "United States" when used in a geographical sense
48 in subsection R.S.43:21-19 (i) includes the states, the District of

1 Columbia, the Commonwealth of Puerto Rico and, effective on the
2 day after the day on which the U.S. Secretary of Labor approves for
3 the first time under section 3304 (a) of the Internal Revenue Code
4 of 1986 (26 U.S.C. s.3304 (a)) an unemployment compensation law
5 submitted to the Secretary by the Virgin Islands for such approval,
6 the Virgin Islands.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

44 (6) Services performed by an individual for remuneration shall
45 be deemed to be employment subject to this chapter (R.S.43:21-
46 1 et seq.) unless and until it is shown to the satisfaction of the
47 division that:

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

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

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

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

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

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

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

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

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

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

46 (E) Service performed in the employ of any other state or its
47 political subdivisions or of an instrumentality of any other state or

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

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

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

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

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

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

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

47 (L) Services performed in the employ of any veterans'
48 organization chartered by Act of Congress or of any auxiliary

- 1 thereof, no part of the net earnings of which organization, or
2 auxiliary thereof, inures to the benefit of any private shareholder or
3 individual;
- 4 (M) Service performed for or in behalf of the owner or operator
5 of any theater, ballroom, amusement hall or other place of
6 entertainment, not in excess of 10 weeks in any calendar year for
7 the same owner or operator, by any leader or musician of a band or
8 orchestra, commonly called a "name band," entertainer, vaudeville
9 artist, actor, actress, singer or other entertainer;
- 10 (N) Services performed after January 1, 1973 by an individual
11 for a labor union organization, known and recognized as a union
12 local, as a member of a committee or committees reimbursed by the
13 union local for time lost from regular employment, or as a part-time
14 officer of a union local and the remuneration for such services is
15 less than \$1,000.00 in a calendar year;
- 16 (O) Services performed in the sale or distribution of merchandise
17 by home-to-home salespersons or in-the-home demonstrators whose
18 remuneration consists wholly of commissions or commissions and
19 bonuses;
- 20 (P) Service performed in the employ of a foreign government,
21 including service as a consular, nondiplomatic representative, or
22 other officer or employee;
- 23 (Q) Service performed in the employ of an instrumentality
24 wholly owned by a foreign government if (i) the service is of a
25 character similar to that performed in foreign countries by
26 employees of the United States Government or of an instrumentality
27 thereof, and (ii) the division finds that the United States Secretary
28 of State has certified to the United States Secretary of the Treasury
29 that the foreign government, with respect to whose instrumentality
30 exemption is claimed, grants an equivalent exemption with respect
31 to similar services performed in the foreign country by employees
32 of the United States Government and of instrumentalities thereof;
- 33 (R) Service in the employ of an international organization
34 entitled to enjoy the privileges, exemptions and immunities under
35 the International Organizations Immunities Act (22 U.S.C. s.288 et
36 seq.);
- 37 (S) Service covered by an election duly approved by an agency
38 charged with the administration of any other state or federal
39 unemployment compensation or employment security law, in
40 accordance with an arrangement pursuant to R.S.43:21-21 during
41 the effective period of such election;
- 42 (T) Service performed in the employ of a school, college, or
43 university if such service is performed (i) by a student enrolled at
44 such school, college, or university on a full-time basis in an
45 educational program or completing such educational program
46 leading to a degree at any of the severally recognized levels, or (ii)
47 by the spouse of such a student, if such spouse is advised at the time
48 such spouse commences to perform such service that (I) the

1 employment of such spouse to perform such service is provided
2 under a program to provide financial assistance to such student by
3 such school, college, or university, and (II) such employment will
4 not be covered by any program of unemployment insurance;

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

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

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

26 (X) Services performed by operators of motor vehicles weighing
27 18,000 pounds or more, licensed for commercial use and used for
28 the highway movement of motor freight, who own their equipment
29 or who lease or finance the purchase of their equipment through an
30 entity which is not owned or controlled directly or indirectly by the
31 entity for which the services were performed and who were
32 compensated by receiving a percentage of the gross revenue
33 generated by the transportation move or by a schedule of payment
34 based on the distance and weight of the transportation move;

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

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

42 (8) If one-half or more of the services in any pay period
43 performed by an individual for an employing unit constitutes
44 employment, all the services of such individual shall be deemed to
45 be employment; but if more than one-half of the service in any pay
46 period performed by an individual for an employing unit does not
47 constitute employment, then none of the service of such individual
48 shall be deemed to be employment. As used in this paragraph, the

1 term "pay period" means a period of not more than 31 consecutive
2 days for which a payment for service is ordinarily made by an
3 employing unit to individuals in its employ.

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

8 (A) The limousine franchisee is incorporated;

9 (B) The franchisee is subject to regulation by the Interstate
10 Commerce Commission;

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

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

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

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

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

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

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

43 (m) "Unemployment."

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

46 (A) The individual is not engaged in full-time work and with
47 respect to which his remuneration is less than his weekly benefit
48 rate, including any week during which he is on vacation without

1 pay; provided such vacation is not the result of the individual's
2 voluntary action, except that for benefit years commencing on or
3 after July 1, 1984, an officer of a corporation, or a person who has
4 more than a 5% equitable or debt interest in the corporation, whose
5 claim for benefits is based on wages with that corporation shall not
6 be deemed to be unemployed in any week during the individual's
7 term of office or ownership in the corporation; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

43 (u) "Average weekly wage" means the amount derived by
44 dividing an individual's total wages received during his base year
45 base weeks (as defined in subsection (t) of this section) from that
46 most recent base year employer with whom he has established at
47 least 20 base weeks, by the number of base weeks in which such
48 wages were earned. In the event that such claimant had no employer

1 in his base year with whom he had established at least 20 base
2 weeks, then such individual's average weekly wage shall be
3 computed as if all of his base week wages were received from one
4 employer and as if all his base weeks of employment had been
5 performed in the employ of one employer.

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

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

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

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

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

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

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

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

40 (2) "Institution of higher education" means an educational
41 institution which:

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

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

47 (C) Provides an educational program for which it awards a
48 bachelor's or higher degree, or provides a program which is

1 acceptable for full credit toward such a degree, a program of post-
2 graduate or post-doctoral studies, or a program of training to
3 prepare students for gainful employment in a recognized
4 occupation; and

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

6 Notwithstanding any of the foregoing provisions of this
7 subsection, all colleges and universities in this State are institutions
8 of higher education for purposes of this section.

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

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

12

13 2. This act shall take effect immediately.

14

15

16

STATEMENT

17

18 This bill revises the test used to determine whether a worker is
19 an employee or an independent contractor under certain State labor
20 laws.

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

30 The "ABC" test provides that an individual who performs
31 services for remuneration is presumed to be an employee unless the
32 employer can show to the satisfaction of the Department of Labor
33 and Workforce Development that:

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

37 (B) Such service is either outside the usual course of the business
38 for which such service is performed, or that such service is
39 performed outside of all the places of business of the enterprise for
40 which such service is performed; and

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

43 If an employer fails to prove any one of the three criteria for
44 showing a worker is an independent contractor, the worker will be
45 classified as an employee, and will be eligible for benefits pursuant
46 to the labor laws listed above. Additionally, the employer and
47 employee will be required to comply with the contribution and
48 participation obligations of the respective labor laws.

A1439 B.DECROCE

20

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