

SENATE, No. 863

STATE OF NEW JERSEY
219th LEGISLATURE

PRE-FILED FOR INTRODUCTION IN THE 2020 SESSION

Sponsored by:

Senator STEPHEN M. SWEENEY

District 3 (Cumberland, Gloucester and Salem)

SYNOPSIS

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

CURRENT VERSION OF TEXT

Introduced Pending Technical Review by Legislative Counsel.



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

5

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

8

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

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

19 b. The individual's service is either outside the usual course of the
20 business for which that service is performed, or the service is
21 performed outside of all the places of business of the enterprise for
22 which the service is performed; and

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

26 An individual shall not be regarded as an employee for the
27 purposes of this section if the individual is a certified public
28 accountant licensed by the State of New Jersey, or the individual
29 satisfies the requirements to be exempt from being deemed to be in
30 employment as set forth in R.S.43:21-19(i)(7)(J) or R.S.43:21-
31 19(i)(7)(K).

32 For the purposes of this section, "State employment laws" means
33 Article 1 of chapter 11 of Title 34 of the Revised Statutes and all acts
34 supplementing that article (R.S.34:11-2 et al.), P.L.1966, c.113 and all
35 acts supplementing that act (C.34:11-56a et al.), P.L.2005, c.379
36 (C.34:11-56.58 et seq.), and Article 3 of chapter 11 of Title 34 of the
37 Revised Statutes and all acts supplementing that article (R.S.34:11-57
38 et al.), but "State employment laws" do not include the "New Jersey
39 Prevailing Wage Act," P.L.1963, c.150 (C.34:11-56.25 et seq.), "The
40 Public Works Contractor Registration Act," P.L.1999, c.238 (C.34:11-
41 56.48 et seq.), or the "Construction Industry Independent Contractor
42 Act," P.L. 2007, c.114 (C.34:20-1 et seq.).

43

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

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

Matter underlined thus is new matter.

1 4. For purposes of the "New Jersey Prevailing Wage Act,"
2 P.L.1963, c.150 (C.34:11-56.25 et seq.), the "unemployment
3 compensation law," R.S.43:21-1 et seq., the "Temporary Disability
4 Benefits Law," P.L.1948, c.110 (C.43:21-25 et seq.), the "New Jersey
5 Gross Income Tax Act," N.J.S.54A:1-1 et seq., or other applicable
6 State tax laws, P.L.1965, c.173 (C.34:11-4.1 et seq.) and the "New
7 Jersey State Wage and Hour Law," P.L.1966, c.113 (C.34:11-56a et
8 seq.), services performed in the making of improvements to real
9 property by an individual for remuneration paid by an employer shall
10 be deemed to be employment unless and until it is shown to the
11 satisfaction of the Department of Labor and Workforce Development
12 that:

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

16 b. the individual's service is either outside the usual course of the
17 business for which the service is performed~~],~~ or the service is
18 performed outside of all the places of business of the employer for
19 which the service is performed~~],~~ or the service is performed outside of
20 all the places of business of the enterprise for which the service is
21 performed; and

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

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

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

30

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

32 43:21-19. Definitions. As used in this chapter (R.S.43:21-1 et
33 seq.), unless the context clearly requires otherwise:

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

37 (2) "Average annual payroll" means the average of the annual
38 payrolls of any employer for the last three or five preceding calendar
39 years, whichever average is higher, except that any year or years
40 throughout which an employer has had no "annual payroll" because of
41 military service shall be deleted from the reckoning; the "average
42 annual payroll" in such case is to be determined on the basis of the
43 prior three or five calendar years in each of which the employer had an
44 "annual payroll" in the operation of his business, if the employer
45 resumes his business within 12 months after separation, discharge or
46 release from such service, under conditions other than dishonorable,
47 and makes application to have his "average annual payroll" determined
48 on the basis of such deletion within 12 months after he resumes his

1 business; provided, however, that "average annual payroll" solely for
2 the purposes of paragraph (3) of subsection (e) of R.S.43:21-7 means
3 the average of the annual payrolls of any employer on which he paid
4 contributions to the State disability benefits fund for the last three or
5 five preceding calendar years, whichever average is higher; provided
6 further that only those wages be included on which employer
7 contributions have been paid on or before January 31 (or the next
8 succeeding day if such January 31 is a Saturday or Sunday)
9 immediately preceding the beginning of the 12-month period for
10 which the employer's contribution rate is computed.

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

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

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

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

45 (2) With respect to a benefit year commencing on or after June 1,
46 1990 for an individual who immediately preceding the benefit year
47 was subject to a disability compensable under the provisions of the
48 "Temporary Disability Benefits Law," P.L.1948, c.110 (C.43:21-25 et

1 seq.), "base year" shall mean the first four of the last five completed
2 calendar quarters immediately preceding the individual's period of
3 disability, if the employment held by the individual immediately
4 preceding the period of disability is no longer available at the
5 conclusion of that period and the individual files a valid claim for
6 unemployment benefits after the conclusion of that period. For the
7 purposes of this paragraph, "period of disability" means the period
8 defined as a period of disability by section 3 of the "Temporary
9 Disability Benefits Law," P.L.1948, c.110 (C.43:21-27). An
10 individual who files a claim under the provisions of this paragraph (2)
11 shall not be regarded as having left work voluntarily for the purposes
12 of subsection (a) of R.S.43:21-5.

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

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

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

46 (2) "Controller" means the Office of the Assistant Commissioner
47 for Finance and Controller of the Department of Labor and Workforce

1 Development, established by the 1982 Reorganization Plan of the
2 Department of Labor.

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

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

30 (h) "Employer" means:

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

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

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

43 (4) Any employing unit which together with one or more other
44 employing units is owned or controlled (by legally enforceable means
45 or otherwise), directly or indirectly by the same interests, or which
46 owns or controls one or more other employing units (by legally
47 enforceable means or otherwise), and which, if treated as a single unit

- 1 with such other employing unit or interest, would be an employer
2 under paragraph (1) of this subsection;
- 3 (5) Any employing unit for which service in employment as
4 defined in R.S.43:21-19 (i) (1) (B) (i) is performed after December 31,
5 1971; and as defined in R.S.43:21-19 (i) (1) (B) (ii) is performed after
6 December 31, 1977;
- 7 (6) Any employing unit for which service in employment as
8 defined in R.S.43:21-19 (i) (1) (c) is performed after December 31,
9 1971 and which in either the current or the preceding calendar year
10 paid remuneration for employment in the amount of \$1,000.00 or
11 more;
- 12 (7) Any employing unit not an employer by reason of any other
13 paragraph of this subsection (h) for which, within either the current or
14 preceding calendar year, service is or was performed with respect to
15 which such employing unit is liable for any federal tax against which
16 credit may be taken for contributions required to be paid into a state
17 unemployment fund; or which, as a condition for approval of the
18 "unemployment compensation law" for full tax credit against the tax
19 imposed by the Federal Unemployment Tax Act, is required pursuant
20 to such act to be an employer under this chapter (R.S.43:21-1 et seq.);
- 21 (8) (Deleted by amendment; P.L.1977, c.307.)
- 22 (9) (Deleted by amendment; P.L.1977, c.307.)
- 23 (10) (Deleted by amendment; P.L.1977, c.307.)
- 24 (11) Any employing unit subject to the provisions of the Federal
25 Unemployment Tax Act within either the current or the preceding
26 calendar year, except for employment hereinafter excluded under
27 paragraph (7) of subsection (i) of this section;
- 28 (12) Any employing unit for which agricultural labor in
29 employment as defined in R.S.43:21-19 (i) (1) (I) is performed after
30 December 31, 1977;
- 31 (13) Any employing unit for which domestic service in
32 employment as defined in R.S.43:21-19 (i) (1) (J) is performed after
33 December 31, 1977;
- 34 (14) Any employing unit which having become an employer under
35 the "unemployment compensation law" (R.S.43:21-1 et seq.), has not
36 under R.S.43:21-8 ceased to be an employer; or for the effective
37 period of its election pursuant to R.S.43:21-8, any other employing
38 unit which has elected to become fully subject to this chapter
39 (R.S.43:21-1 et seq.).
- 40 (i) (1) "Employment" means:
- 41 (A) Any service performed prior to January 1, 1972, which was
42 employment as defined in the "unemployment compensation law"
43 (R.S.43:21-1 et seq.) prior to such date, and, subject to the other
44 provisions of this subsection, service performed on or after January 1,
45 1972, including service in interstate commerce, performed for
46 remuneration or under any contract of hire, written or oral, express or
47 implied.

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

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

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

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

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

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

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

34 (aa) as an elected official;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27 (bb) 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 labor
30 10 or more individuals, regardless of whether they were employed at
31 the same moment in time.

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

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

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

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

- 1 (aa) such other entity and not the crew leader shall be treated as
2 the employer of such individual; and
- 3 (bb) such other entity shall be treated as having paid cash
4 remuneration to such individual in an amount equal to the amount of
5 cash remuneration paid to such individual by the crew leader (either on
6 his own behalf or on behalf of such other entity) for the service in
7 agricultural labor performed for such other entity.
- 8 (iv) For the purpose of subparagraph (I)(ii), the term "crew leader"
9 means an individual who
- 10 (aa) furnishes individuals to perform service in agricultural labor
11 for any other entity;
- 12 (bb) pays (either on his own behalf or on behalf of such other
13 entity) the individuals so furnished by him for the service in
14 agricultural labor performed by them; and
- 15 (cc) has not entered into a written agreement with such other
16 entity under which such individual is designated as an employee of
17 such other entity.
- 18 (J) Domestic service after December 31, 1977 performed in the
19 private home of an employing unit which paid cash remuneration of
20 \$1,000.00 or more to one or more individuals for such domestic
21 service in any calendar quarter in the current or preceding calendar
22 year.
- 23 (2) The term "employment" shall include an individual's entire
24 service performed within or both within and without this State if:
- 25 (A) The service is localized in this State; or
- 26 (B) The service is not localized in any state but some of the service
27 is performed in this State, and (i) the base of operations, or, if there is
28 no base of operations, then the place from which such service is
29 directed or controlled, is in this State; or (ii) the base of operations or
30 place from which such service is directed or controlled is not in any
31 state in which some part of the service is performed, but the
32 individual's residence is in this State.
- 33 (3) Services performed within this State but not covered under
34 paragraph (2) of this subsection shall be deemed to be employment
35 subject to this chapter (R.S.43:21-1 et seq.) if contributions are not
36 required and paid with respect to such services under an
37 unemployment compensation law of any other state or of the federal
38 government.
- 39 (4) Services not covered under paragraph (2) of this subsection and
40 performed entirely without this State, with respect to no part of which
41 contributions are required and paid under an unemployment
42 compensation law of any other state or of the federal government, shall
43 be deemed to be employment subject to this chapter (R.S.43:21-1 et
44 seq.) if the individual performing such services is a resident of this
45 State and the employing unit for whom such services are performed
46 files with the division an election that the entire service of such
47 individual shall be deemed to be employment subject to this chapter
48 (R.S.43:21-1 et seq.).

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

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

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

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

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

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

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

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

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

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

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

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

1 (C) Service performed by an individual in the employ of his son,
2 daughter or spouse, and service performed by a child under the age of
3 18 in the employ of his father or mother;

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

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

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

34 (G) Services performed in the employ of fraternal beneficiary
35 societies, orders, or associations operating under the lodge system or
36 for the exclusive benefit of the members of a fraternity itself operating
37 under the lodge system and providing for the payment of life, sick,
38 accident, or other benefits to the members of such society, order, or
39 association, or their dependents;

40 (H) Services performed as a member of the board of directors, a
41 board of trustees, a board of managers, or a committee of any bank,
42 building and loan, or savings and loan association, incorporated or
43 organized under the laws of this State or of the United States, where
44 such services do not constitute the principal employment of the
45 individual;

46 (I) Service with respect to which unemployment insurance is
47 payable under an unemployment insurance program established by an
48 Act of Congress;

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

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

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

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

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

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

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

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

45 (8) If one-half or more of the services in any pay period performed
46 by an individual for an employing unit constitutes employment, all the
47 services of such individual shall be deemed to be employment; but if
48 more than one-half of the service in any pay period performed by an

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

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

11 (A) The limousine franchisee is incorporated;

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

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

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

20 (10) Services performed by a legal transcriber, or certified court
21 reporter certified pursuant to P.L.1940, c.175 (C.45:15B-1 et seq.),
22 shall not be deemed to be employment subject to the "unemployment
23 compensation law," R.S.43:21-1 et seq., if those services are provided
24 to a third party by the transcriber or reporter who is referred to the
25 third party pursuant to an agreement with another legal transcriber or
26 legal transcription service, or certified court reporter or court reporting
27 service, on a freelance basis, compensation for which is based upon a
28 fee per transcript page, flat attendance fee, or other flat minimum fee,
29 or combination thereof, 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, corporations,
34 or other bodies or groups, and causing that record to be printed in
35 readable form or produced on a computer screen in readable form; and
36 "legal transcriber" means a person who engages in "legal transcribing."

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

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

41 (l) "State" includes, in addition to the states of the United States of
42 America, the District of Columbia, the Virgin Islands and Puerto 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 rate,
48 including any week during which he is on vacation without pay;

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

8 (B) The individual is eligible for and receiving a self-employment
9 assistance allowance pursuant to the requirements of P.L.1995, c.394
10 (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 this
13 subsection, shall include only that part of the same which in any week
14 exceeds 20% of his weekly benefit rate (fractional parts of a dollar
15 omitted) or \$5.00, whichever is the larger, and shall not include any
16 moneys paid to an individual by a county board of elections for work
17 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 by
21 regulation otherwise prescribe.

22 (n) "Unemployment compensation administration fund" means the
23 unemployment compensation administration fund established by this
24 chapter (R.S.43:21-1 et seq.), from which administrative expenses
25 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 of
28 his employment from other than his employer, his "wages" shall also
29 include the gratuities so received, if reported in writing to his employer
30 in accordance with regulations of the division, and if not so reported,
31 his "wages" shall be determined in accordance with the minimum
32 wage rates prescribed under any labor law or regulation of this State or
33 of the United States, or the amount of remuneration actually received
34 by the employee from his employer, whichever is the higher.

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

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

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

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

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

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

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

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

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

39 (u) "Average weekly wage" means the amount derived by dividing
40 an individual's total wages received during his base year base weeks
41 (as defined in subsection (t) of this section) from that most recent base
42 year employer with whom he has established at least 20 base weeks,
43 by the number of base weeks in which such wages were earned. In the
44 event that such claimant had no employer in his base year with whom
45 he had established at least 20 base weeks, then such individual's
46 average weekly wage shall be computed as if all of his base week
47 wages were received from one employer and as if all his base weeks of
48 employment had been performed in the employ of one employer.

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

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

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

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

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

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

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

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

35 (2) "Institution of higher education" means an educational
36 institution which:

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

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

42 (C) Provides an educational program for which it awards a
43 bachelor's or higher degree, or provides a program which is acceptable
44 for full credit toward such a degree, a program of post-graduate or
45 post-doctoral studies, or a program of training to prepare students for
46 gainful employment in a recognized occupation; and

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

1 Notwithstanding any of the foregoing provisions of this subsection,
2 all colleges and universities in this State are institutions of higher
3 education for purposes of this section.

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

7
8 4. This act shall take effect on the first anniversary of the
9 enactment.

10

11

12

STATEMENT

13

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

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

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

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

30 The bill defines "State wage and hour laws" as Article 1 of chapter
31 11 of Title 34 of the Revised Statutes and all acts supplementing that
32 article (R.S.34:11-2 et al.), P.L.1966, c.113 and all acts supplementing
33 that act (C.34:11-56a et al.), P.L.2005, c.379 (C.34:11-56.58 et seq.),
34 and Article 3 of chapter 11 of Title 34 of the Revised Statutes
35 (R.S.34:11-57 et seq.). The bill, however, excludes from that
36 definition the "New Jersey Prevailing Wage Act," P.L.1963, c.150
37 (C.34:11-56.25 et seq.), "The Public Works Contractor Registration
38 Act," P.L.1999, c.238 (C.34:11-56.48 et seq.), and the "Construction
39 Industry Independent Contractor Act," P.L. 2007, c.114 (C.34:20-1 et
40 seq.).

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

- 1 a. The individual has been and will continue to be free from
2 control or direction over the performance of the service, both under his
3 contract of service and in fact; and
- 4 b. The individual's service is either outside the usual course of the
5 business for which the 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
- 8 c. The individual is customarily engaged in an independently
9 established trade, occupation, profession or business.
- 10 The bill modifies the "c." criteria of the "a.b.c." test in those laws
11 from covering an individual customarily engaged in "an independently
12 established trade, occupation, profession or business," to instead
13 covering an individual customarily engaged in "an independently
14 established business or enterprise of the same nature as that involved
15 in the work performed."