

ASSEMBLY, No. 899

STATE OF NEW JERSEY 220th LEGISLATURE

PRE-FILED FOR INTRODUCTION IN THE 2022 SESSION

Sponsored by:

Assemblyman BRIAN BERGEN

District 25 (Morris and Somerset)

SYNOPSIS

Revises factors for determining 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. As used in this chapter (R.S.43:21-1 et seq.), unless the
7 context clearly requires otherwise:

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

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

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

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

41 With respect to a benefit year commencing on or after July 1,
42 1995, if an individual does not have sufficient qualifying weeks or
43 wages in his base year to qualify for benefits, the individual shall
44 have the option of designating that his base year shall be the
45 "alternative base year," which means the last four completed

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

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

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

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

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

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

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

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

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

39 (g) "Employing unit" means the State or any of its
40 instrumentalities or any political subdivision thereof or any of its
41 instrumentalities or any instrumentality of more than one of the
42 foregoing or any instrumentality of any of the foregoing and one or
43 more other states or political subdivisions or any individual or type
44 of organization, any partnership, association, trust, estate, joint-
45 stock company, insurance company or corporation, whether
46 domestic or foreign, or the receiver, trustee in bankruptcy, trustee or
47 successor thereof, or the legal representative of a deceased person,
48 which has or subsequent to January 1, 1936, had in its employ one

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

13 (h) "Employer" means:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 1 3306 (c)(8) of that act, if such service is not excluded from
2 "employment" under paragraph (D) below.
- 3 (D) For the purposes of paragraphs (B) and (C), the term
4 "employment" does not apply to services performed
- 5 (i) In the employ of (I) a church or convention or association of
6 churches, or (II) an organization, or school which is operated
7 primarily for religious purposes and which is operated, supervised,
8 controlled or principally supported by a church or convention or
9 association of churches;
- 10 (ii) By a duly ordained, commissioned, or licensed minister of a
11 church in the exercise of his ministry or by a member of a religious
12 order in the exercise of duties required by such order;
- 13 (iii) Prior to January 1, 1978, in the employ of a school which is
14 not an institution of higher education, and after December 31, 1977,
15 in the employ of a governmental entity referred to in R.S.43:21-19
- 16 (i) (1) (B), if such service is performed by an individual in the
17 exercise of duties
- 18 (aa) as an elected official;
- 19 (bb) as a member of a legislative body, or a member of the
20 judiciary, of a state or political subdivision;
- 21 (cc) as a member of the State National Guard or Air National
22 Guard;
- 23 (dd) as an employee serving on a temporary basis in case of
24 fire, storm, snow, earthquake, flood or similar emergency;
- 25 (ee) in a position which, under or pursuant to the laws of this
26 State, is designated as a major nontenured policy making or
27 advisory position, or a policy making or advisory position, the
28 performance of the duties of which ordinarily does not require more
29 than eight hours per week; or
- 30 (iv) By an individual receiving rehabilitation or remunerative
31 work in a facility conducted for the purpose of carrying out a
32 program of rehabilitation of individuals whose earning capacity is
33 impaired by age or physical or mental deficiency or injury or
34 providing remunerative work for individuals who because of their
35 impaired physical or mental capacity cannot be readily absorbed in
36 the competitive labor market;
- 37 (v) By an individual receiving work-relief or work-training as
38 part of an unemployment work-relief or work-training program
39 assisted in whole or in part by any federal agency or an agency of a
40 state or political subdivision thereof; or
- 41 (vi) Prior to January 1, 1978, for a hospital in a State prison or
42 other State correctional institution by an inmate of the prison or
43 correctional institution and after December 31, 1977, by an inmate
44 of a custodial or penal institution.
- 45 (E) The term "employment" shall include the services of an
46 individual who is a citizen of the United States, performed outside
47 the United States after December 31, 1971 (except in Canada and in
48 the case of the Virgin Islands, after December 31, 1971) and prior

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

45 (aa) furnishes individuals to perform service in agricultural labor
46 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.43:21-1 et
46 seq.) unless and until it is shown to the satisfaction of the division
47 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

8 (C) Such individual is customarily engaged in an independently
9 established trade, occupation, profession or business.】

10 To determine whether an individual is an employee or an
11 independent contractor, the division shall consider all information
12 that provides evidence of the degree of control and the degree of
13 independence. Facts that provide evidence of the degree of control
14 and independence fall into three categories:

15 (A) behavioral control;

16 (B) financial control; and

17 (C) the type of relationship of the parties.

18 In making an employment determination pursuant to this
19 paragraph, the division shall consider any guidance on determining
20 a worker's employment status provided by the federal Internal
21 Revenue Service in the Department of the Treasury.

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

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

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

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

41 (B) Domestic service in a private home performed prior to
42 January 1, 1978; and after December 31, 1977, unless performed in
43 the private home of an employing unit which paid cash
44 remuneration of \$1,000.00 or more to one or more individuals for
45 such domestic service in any calendar quarter in the current or
46 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
3 of 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
8 employ 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
20 the extent that the Congress of the United States shall permit states
21 to require any instrumentalities of the United States to make
22 payments into an unemployment fund under a state unemployment
23 compensation law, all of the provisions of this act shall be
24 applicable to such instrumentalities, and to service performed for
25 such instrumentalities, in the same manner, to the same extent and
26 on the same terms as to all other employers, employing units,
27 individuals and services; provided that if this State shall not be
28 certified for any year by the Secretary of Labor of the United States
29 under section 3304 of the federal Internal Revenue Code of 1986
30 (26 U.S.C. s.3304), the payments required of such instrumentalities
31 with respect to such year shall be refunded by the division from the
32 fund in the same manner and within the same period as is provided
33 in R.S.43:21-14 (f) with respect to contributions erroneously paid to
34 or collected by the division;

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

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

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

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

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

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

28 (V) Service performed in the employ of a hospital, if such
29 service is performed by a patient of the hospital; service performed
30 as a student nurse in the employ of a hospital or a nurses' training
31 school by an individual who is enrolled and regularly attending
32 classes in a nurses' training school approved under the laws of this
33 State;

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

38 (X) Services performed by operators of motor vehicles weighing
39 18,000 pounds or more, licensed for commercial use and used for
40 the highway movement of motor freight, who own their equipment
41 or who lease or finance the purchase of their equipment through an
42 entity which is not owned or controlled directly or indirectly by the
43 entity for which the services were performed and who were
44 compensated by receiving a percentage of the gross revenue
45 generated by the transportation move or by a schedule of payment
46 based on the distance and weight of the transportation move;

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

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

7 (8) If one-half or more of the services in any pay period
8 performed by an individual for an employing unit constitutes
9 employment, all the services of such individual shall be deemed to
10 be employment; but if more than one-half of the service in any pay
11 period performed by an individual for an employing unit does not
12 constitute employment, then none of the service of such individual
13 shall be deemed to be employment. As used in this paragraph, the
14 term "pay period" means a period of not more than 31 consecutive
15 days for which a payment for service is ordinarily made by an
16 employing unit to individuals in its employ.

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

21 (A) The limousine franchisee is incorporated;

22 (B) The franchisee is subject to regulation by the Interstate
23 Commerce Commission;

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

27 (D) The franchisee registers with the Department of Labor and
28 Workforce Development and receives an employer registration
29 number.

30 (10) Services performed by a legal transcriber, or certified court
31 reporter certified pursuant to P.L.1940, c.175 (C.45:15B-1 et seq.),
32 shall not be deemed to be employment subject to the
33 "unemployment compensation law," R.S.43:21-1 et seq., if those
34 services are provided to a third party by the transcriber or reporter
35 who is referred to the third party pursuant to an agreement with
36 another legal transcriber or legal transcription service, or certified
37 court reporter or court reporting service, on a freelance basis,
38 compensation for which is based upon a fee per transcript page, flat
39 attendance fee, or other flat minimum fee, or combination thereof,
40 set forth in the agreement.

41 For purposes of this paragraph (10): "legal transcription service"
42 and "legal transcribing" mean making use, by audio, video or voice
43 recording, of a verbatim record of court proceedings, depositions,
44 other judicial proceedings, meetings of boards, agencies,
45 corporations, or other bodies or groups, and causing that record to
46 be printed in readable form or produced on a computer screen in
47 readable form; and "legal transcriber" means a person who engages
48 in "legal transcribing."

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

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

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

8 (m) "Unemployment."

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

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

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

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

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

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

39 (o) "Wages" means remuneration paid by employers for
40 employment. If a worker receives gratuities regularly in the course
41 of his employment from other than his employer, his "wages" shall
42 also include the gratuities so received, if reported in writing to his
43 employer in accordance with regulations of the division, and if not
44 so reported, his "wages" shall be determined in accordance with the
45 minimum wage rates prescribed under any labor law or regulation
46 of this State or of the United States, or the amount of remuneration
47 actually received by the employee from his employer, whichever is
48 the higher.

- 1 (p) "Remuneration" means all compensation for personal
2 services, including commission and bonuses and the cash value of
3 all compensation in any medium other than cash.
- 4 (q) "Week" means for benefit years commencing on or after
5 October 1, 1984, the calendar week ending at midnight Saturday, or
6 as the division may by regulation prescribe.
- 7 (r) "Calendar quarter" means the period of three consecutive
8 calendar months ending March 31, June 30, September 30, or
9 December 31.
- 10 (s) "Investment company" means any company as defined in
11 subsection a. of section 1 of P.L.1938, c.322 (C.17:16A-1).
- 12 (t) (1) (Deleted by amendment, P.L.2001, c.17).
- 13 (2) "Base week," commencing on or after January 1, 1996 and
14 before January 1, 2001, means:
- 15 (A) Any calendar week during which the individual earned in
16 employment from an employer remuneration not less than an
17 amount which is 20% of the Statewide average weekly
18 remuneration defined in subsection (c) of R.S.43:21-3 which
19 amount shall be adjusted to the next higher multiple of \$1.00 if not
20 already a multiple thereof, except that if in any calendar week an
21 individual subject to this subparagraph (A) 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 equal to not less than the
25 amount defined in this subparagraph (A) during that week; or
- 26 (B) If the individual does not establish in his base year 20 or
27 more base weeks as defined in subparagraph (A) of this paragraph
28 (2), any calendar week of an individual's base year during which the
29 individual earned in employment from an employer remuneration
30 not less than an amount 20 times the minimum wage in effect
31 pursuant to section 5 of P.L.1966, c.113 (C.34:11-56a4) on October
32 1 of the calendar year preceding the calendar year in which the
33 benefit year commences, which amount shall be adjusted to the next
34 higher multiple of \$1.00 if not already a multiple thereof, except
35 that if in any calendar week an individual subject to this
36 subparagraph (B) is in employment with more than one employer,
37 the individual may in that calendar week establish a base week with
38 respect to each of the employers from whom the individual earns
39 remuneration not less than the amount defined in this subparagraph
40 (B) during that week.
- 41 (3) "Base week," commencing on or after January 1, 2001,
42 means any calendar week during which the individual earned in
43 employment from an employer remuneration not less than an
44 amount 20 times the minimum wage in effect pursuant to section 5
45 of P.L.1966, c.113 (C.34:11-56a4) on October 1 of the calendar
46 year preceding the calendar year in which the benefit year
47 commences, which amount shall be adjusted to the next higher
48 multiple of \$1.00 if not already a multiple thereof, except that if in

1 any calendar week an individual subject to this paragraph (3) is in
2 employment with more than one employer, the individual may in
3 that calendar week establish a base week with respect to each of the
4 employers from whom the individual earns remuneration equal to
5 not less than the amount defined in this paragraph (3) during that
6 week.

7 (u) "Average weekly wage" means the amount derived by
8 dividing an individual's total wages received during his base year
9 base weeks (as defined in subsection (t) of this section) from that
10 most recent base year employer with whom he has established at
11 least 20 base weeks, by the number of base weeks in which such
12 wages were earned. In the event that such claimant had no employer
13 in his base year with whom he had established at least 20 base
14 weeks, then such individual's average weekly wage shall be
15 computed as if all of his base week wages were received from one
16 employer and as if all his base weeks of employment had been
17 performed in the employ of one employer.

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

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

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

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

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

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

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

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

4 (2) "Institution of higher education" means an educational
5 institution which:

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

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

11 (C) Provides an educational program for which it awards a
12 bachelor's or higher degree, or provides a program which is
13 acceptable for full credit toward such a degree, a program of post-
14 graduate or post-doctoral studies, or a program of training to
15 prepare students for gainful employment in a recognized
16 occupation; and

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

18 Notwithstanding any of the foregoing provisions of this
19 subsection, all colleges and universities in this State are institutions
20 of higher education for purposes of this section.

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

23 (cf: P.L.2017, c.230)

24

25 2. This act shall take effect on the 90th day next following
26 enactment.

27

28

29

STATEMENT

30

31 This bill revises the factors that are used to determine whether a
32 worker is an employee or an independent contractor under certain
33 State labor laws.

34 The "ABC" test is widely used under current State labor law for
35 determining whether a worker is an employee or an independent
36 contractor. It is used to determine employee and employer
37 obligations and entitlements under the following laws: the
38 "unemployment compensation law," the "Temporary Disability
39 Benefits Law," the New Jersey wage payment law, and the "New
40 Jersey State Wage and Hour Law." It is also used under the "New
41 Jersey Gross Income Tax Act," for purposes of determining whether
42 an employer is required to deduct and withhold State income taxes.

43 The "ABC" test provides that an individual who performs
44 services for remuneration is presumed to be an employee unless the
45 employer can show to the satisfaction of the Department of Labor
46 and Workforce Development 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

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

10 If an employer fails to prove any one of the three criteria for
11 showing a worker is an independent contractor, the worker will be
12 classified as an employee, and will be eligible for benefits pursuant
13 to the labor laws listed above. Additionally, the employer and
14 employee will be required to comply with the contribution and
15 participation obligations of the respective labor laws.

16 This bill revises the factors for showing a worker is an
17 independent contract. Under the bill, to determine whether an
18 individual is an employee or an independent contractor, all
19 information that provides evidence of the degree of control and the
20 degree of independence is to be considered. Facts that provide
21 evidence of the degree of control and independence fall into three
22 categories:

23 (A) behavioral control;

24 (B) financial control; and

25 (C) the type of relationship of the parties.

26 In making an employment determination any guidance on
27 determining a worker's employment status provided by the federal
28 Internal Revenue Service in the United States Department of the
29 Treasury is to be considered. This bill aligns the test for
30 employment status under State law with the test in use by the
31 Internal Revenue Service in the Department of the Treasury.