

MAINE STATE LEGISLATURE

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124th MAINE LEGISLATURE

FIRST REGULAR SESSION-2009

Legislative Document

No. 987

S.P. 370

In Senate, March 12, 2009

An Act To Clarify the Definition of "Employee" in the Employment Security Law

Reference to the Committee on Labor suggested and ordered printed.

A handwritten signature in cursive script that reads "Joy J. O'Brien".

JOY J. O'BRIEN
Secretary of the Senate

Presented by Senator MARRACHÉ of Kennebec.
Cosponsored by Representative TUTTLE of Sanford and
Senator: JACKSON of Aroostook, Representatives: BECK of Waterville, BUTTERFIELD of
Bangor, DRISCOLL of Westbrook, TRINWARD of Waterville.

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Be it enacted by the People of the State of Maine as follows:

Sec. 1. 26 MRSA §1043, sub-§11, ¶F, as amended by PL 2007, c. 230, §1, is further amended to read:

- F. The term "employment" does not include:
- (1) Service performed in the employ of this State, or of any political subdivision thereof, or of any instrumentality of this State or its political subdivisions, except as provided by this subsection;
 - (2) Service performed in the employ of the United States Government or an instrumentality of the United States immune under the Constitution of the United States from the contributions imposed by this chapter, except that on and after January 1, 1940 to the extent that the Congress of the United States has permitted states to require any instrumentalities of the United States to make payments into an unemployment compensation fund under a state unemployment compensation or employment security law, all of the provisions of this chapter are applicable to such instrumentalities and to services performed for such instrumentalities in the same manner, to the same extent and on the same terms as to all other employers, employing units, individuals and services. If this State is not certified for any year by the Secretary of Labor under section 3304 of the Federal Internal Revenue Code, the payments required of such instrumentalities with respect to that year must be refunded by the commissioner from the fund in the same manner and within the same period as is provided in section 1225, subsection 5, with respect to contributions erroneously collected;
 - (3) Service with respect to which unemployment compensation is payable under an unemployment compensation system or employment security system established by an Act of Congress. The commissioner is authorized and directed to enter into agreements with the proper agencies under such an Act of Congress, which agreements become effective 10 days after publication thereof in the manner provided in section 1082, subsection 2, for regulations, to provide reciprocal treatment to individuals who have, after acquiring potential rights to benefits under this chapter, acquired rights to unemployment compensation under such an Act of Congress, or who have, after acquiring potential rights to unemployment compensation under such an Act of Congress, acquired rights to benefits under this chapter;
 - (4) Agricultural labor as defined in subsection 1, except as provided in paragraph A-2;
 - (4-1) Agricultural labor, if performed by an individual who is an alien, other than a citizen of a contiguous country with which the United States has an agreement with respect to unemployment compensation, admitted to the United States to perform agricultural labor pursuant to the United States Immigration and Nationality Act, Sections 214(c) and 101(a) (15) (H);
 - (5) Domestic service in a private home, except as provided in paragraph A-3;

- 1 (6) Service performed by an individual in the employ of that individual's son,
2 daughter or spouse and service performed by a child under the age of 18 in the
3 employ of that child's father or mother, except for periods of such service for
4 which unemployment insurance contributions are paid;
- 5 (6-1) Services performed by a student attending an elementary, secondary or
6 postsecondary school while participating in a cooperative program of education
7 and occupational training or on-the-job training that is part of the school
8 curriculum;
- 9 (9) Service performed with respect to which unemployment compensation is
10 payable under the Railroad Unemployment Insurance Act (52 Stat. 1094);
- 11 (10) Services performed in the employ of any other state, or any political
12 subdivision thereof, or any instrumentality of any one or more of the foregoing
13 that is wholly owned by one or more states or political subdivisions and any
14 services performed in the employ of any instrumentality of one or more other
15 states or their political subdivisions to the extent that the instrumentality is, with
16 respect to such a service, immune under the Constitution of the United States
17 from the tax imposed by section 3301 of the Federal Internal Revenue Code,
18 except as provided in paragraph A-1, subparagraph (1);
- 19 (11) Service performed in any calendar quarter in the employ of any
20 organization exempt from income tax under section 501(a) of the Federal Internal
21 Revenue Code other than an organization described in section 401(a) or under
22 section 521 of the Code, if the remuneration for such service is less than \$150;
- 23 (16) Service performed in the employ of a foreign government, including service
24 as a consular or other officer or employee or a nondiplomatic representative;
- 25 (17) Service performed in the employ of an instrumentality wholly owned by a
26 foreign government:
 - 27 (a) If the service is of a character similar to that performed in foreign
28 countries by employees of the United States Government or an
29 instrumentality thereof; and
 - 30 (b) If the commissioner finds that the United States Secretary of State has
31 certified to the United States Secretary of the Treasury that the foreign
32 government, with respect to whose instrumentality exemption is claimed,
33 grants an equivalent exemption with respect to similar service performed in
34 the foreign country by employees of the United States Government and of
35 instrumentalities thereof;
- 36 (18) Service performed as a student nurse in the employ of a hospital or a nurses'
37 training school by an individual who is enrolled and is regularly attending classes
38 in a nurses' training school chartered or approved pursuant to state law and
39 service performed as an intern in the employ of a hospital by an individual who
40 has completed a 4 years' course in a medical school chartered or approved
41 pursuant to state law;
- 42 (19) Service performed by an individual for a person as a real estate broker, a
43 real estate sales representative, an insurance agent or an insurance solicitor, if all

- 1 such service performed by that individual for that person is performed for
- 2 remuneration solely by way of commission;
- 3 (20) Service performed by an individual under the age of 18 in the delivery or
- 4 distribution of newspapers or shopping news except delivery or distribution to
- 5 any point for subsequent delivery or distribution;
- 6 (21) Service performed in the employ of any organization that is excluded from
- 7 the term "employment" as defined in the Federal Unemployment Tax Act solely
- 8 by reason of section 3306(c)(7) or (8) if:
 - 9 (a) Service is performed in the employ of a church or convention or
 - 10 association of churches or an organization that is operated primarily for
 - 11 religious purposes and that is operated, supervised, controlled or principally
 - 12 supported by a church or convention or association of churches;
 - 13 (b) Service is performed by a duly ordained, commissioned or licensed
 - 14 minister of a church in the exercise of that minister's ministry or by a member
 - 15 of a religious order in the exercise of duties required by that order;
 - 16 (c) Prior to January 1, 1978, service is performed in the employ of a school
 - 17 primarily operated as an elementary, secondary or preparatory school for
 - 18 higher education that is not an institution of higher education;
 - 19 (d) Service is performed in a facility conducted for the purpose of carrying
 - 20 out a program of rehabilitation for individuals whose earning capacity is
 - 21 impaired by age or physical or mental deficiency or injury or providing
 - 22 remunerative work for individuals who, because of their impaired physical or
 - 23 mental capacity, cannot be readily absorbed in the competitive labor market
 - 24 by an individual receiving such rehabilitation or remunerative work;
 - 25 (e) Service is performed as part of an unemployment work-relief or work-
 - 26 training program assisted or financed in whole or in part by any federal
 - 27 agency or an agency of a state or political subdivision thereof by an
 - 28 individual receiving that work-relief or work-training;
 - 29 (f) Service is performed in the employ of a hospital as defined in subsection
 - 30 26 by a patient of that hospital;
 - 31 (g) Services are performed prior to January 1, 1978 for a hospital in a state
 - 32 prison or other state correctional institution by an inmate of that prison or
 - 33 correctional institution and after December 31, 1977 by an inmate of a
 - 34 custodial or penal institution;
 - 35 (h) Service is performed in the employ of a school, college or university if
 - 36 that service is performed by a student who is enrolled and is regularly
 - 37 attending classes at such a school, college or university; or
 - 38 (i) Prior to January 1, 1978, service is performed in the employ of a school
 - 39 that is not an institution of higher education and after December 31, 1977,
 - 40 service is performed in the employ of a governmental entity referred to in
 - 41 paragraph A-1, subparagraph (1) if that service is performed by an individual
 - 42 in the exercise of duties:

- 1 (i) As an elected official;
- 2 (ii) As a member of a legislative body or a member of the judiciary of a
3 state or political subdivision of a state;
- 4 (iii) As a member of the State National Guard or Air National Guard;
- 5 (iv) As an employee serving on a temporary basis in case of fire, storm,
6 snow, earthquake, flood or similar emergency;
- 7 (v) In a position that, under or pursuant to the laws of this State, is
8 designated as a major nontenured policymaking or advisory position or a
9 policymaking or advisory position the performance of the duties of which
10 ordinarily does not require more than 8 hours per week; or
- 11 (vi) As an election official or election worker if the amount of
12 remuneration received by the individual during the calendar year for
13 services as an election official or election worker is less than \$1,000;
- 14 (29) Services performed by a hairdresser, cosmetologist, massage therapist or
15 manicurist who holds a ~~booth~~ license and operates within another hairdressing,
16 cosmetologist, massage therapist or manicurist establishment if operated under a
17 booth rental agreement or other rental agreement;
- 18 (30) Services performed by a barber who holds a booth license and operates
19 within another barbering establishment if operated under a booth rental
20 agreement or other rental agreement;
- 21 (31) Services performed by a contract interviewer engaged in marketing research
22 or public opinion interviewing when such interviewing is conducted in the field
23 or over the telephone on premises not used or controlled by the person for whom
24 such contract services are being provided;
- 25 (32) After December 31, 1981, services performed by an individual on a boat
26 engaged in catching fish or other forms of aquatic animal life, unless those
27 services would be included in the definition of "employment" for federal
28 unemployment tax purposes under the Federal Unemployment Act, United States
29 Code, Title 26, Section 3306(c), as it may be amended. Also included in this
30 exemption are services performed in harvesting shellfish for depuration from
31 designated areas as authorized by Title 12, section 6856;
- 32 (33) Services performed by a member or leader of a musical group, band or
33 orchestra or an entertainer when the services are performed under terms of a
34 contract entered into by the leader or an agent of the musical group, band,
35 orchestra or entertainer with an employing unit for whom the services are being
36 performed, provided the leader or agent is not an employer by reason of
37 subsection 9 or of section 1222, subsection 3;
- 38 (34) Services performed in the delivery or distribution of newspapers or
39 magazines to the ultimate consumer by an individual who is compensated by
40 receiving or retaining a commission or profit on the sale of the newspaper or
41 magazine;

- 1 (35) Services performed by a homemaker in the knitted outerwear industry as
2 those terms are defined, on the effective date of this subparagraph, in 29 Code of
3 Federal Regulations, Part 530, Section 530.1;
- 4 (36) Service performed by a full-time student, as defined in subsection 30, in the
5 employ of an organized camp if the full-time student performed services in the
6 employ of the camp for less than 13 calendar weeks in the calendar year and the
7 camp:
- 8 (a) Did not operate for more than 7 months in the calendar year and did not
9 operate for more than 7 months in the preceding calendar year; or
- 10 (b) Had average gross receipts for any 6 months in the preceding calendar
11 year that were not more than 33 1/3% of its average gross receipts for the
12 other 6 months in the preceding calendar year;
- 13 (37) Services performed by an individual as a home stitcher as long as that
14 employment is not subject to federal unemployment tax;
- 15 (38) Services performed by a person licensed as a guide as required by Title 12,
16 section 12853, as long as that employment is not subject to federal
17 unemployment tax;
- 18 (39) Services performed by a direct seller as defined in 26 United States Code,
19 Section 3508, Subsection (b), Paragraph (2). This subparagraph does not include
20 a person selling major improvements or renovations to the structure of a home,
21 business or property;
- 22 (40) Services performed by lessees of taxicabs, as long as that employment is
23 not subject to federal unemployment tax. This subparagraph may not be
24 construed to affect a determination regarding a lessee's status as an independent
25 contractor for workers' compensation purposes;
- 26 (41) Services provided by a dance instructor to students of a dance studio when
27 there is a contract between the instructor and the studio under which the
28 instructor's services are not offered exclusively to the studio, the studio does not
29 control the scheduling of the days and times of classes other than beginning and
30 end dates, the instructor is paid by the class and not on an hourly or salary basis,
31 the compensation rate is the result of negotiation between the instructor and the
32 studio and the instructor is given the freedom to develop the curriculum;
- 33 (42) Services performed by participants enrolled in programs or projects under
34 the national service laws including the federal National and Community Service
35 Act of 1990, as amended, 42 United States Code, Section 12501 et seq., and the
36 federal Domestic Volunteer Service Act, as amended, 42 United States Code,
37 Section 4950 et seq.;
- 38 (43) Services of an author in furnishing text or other material to a publisher
39 who:
- 40 (a) Does not control the author's work except to propose topics or to edit
41 material submitted;
- 42 (b) Does not restrict the author from publishing elsewhere;

1 (c) Furnishes neither a place of employment nor equipment for the author's
2 use;

3 (d) Does not direct or control the time devoted to the work; and

4 (e) Pays only for material that is accepted for publication.

5 This exception does not apply if the employment is subject to federal
6 unemployment tax; and

7 (44) Services provided by an owner-operator of a truck or truck tractor while it
8 is leased to a motor carrier, as defined in 49 Code of Federal Regulations, 390.5
9 (2000), as long as that employment is not subject to federal unemployment tax.

10

SUMMARY

11 This bill exempts licensed cosmetologists, massage therapists and manicurists who
12 operate within an establishment owned by another under a booth rental agreement or
13 other rental agreement from the definition of employment for purposes of unemployment
14 compensation law.