

# MAINE STATE LEGISLATURE

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# 124th MAINE LEGISLATURE

## FIRST REGULAR SESSION-2009

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**Legislative Document**

**No. 1361**

S.P. 496

In Senate, April 2, 2009

### **An Act To Amend the Laws Governing Direct Support Providers of Shared Living Residential Services**

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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 MILLS of Somerset.

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

2 **Sec. 1. 26 MRSA §663, sub-§3, ¶J**, as amended by PL 2007, c. 22, §2, is further  
3 amended to read:

4 J. Members of the family of the employer who reside with and are dependent upon  
5 the employer; and

6 **Sec. 2. 26 MRSA §663, sub-§3, ¶K**, as amended by PL 2005, c. 255, §1, is  
7 further amended to read:

8 K. A salaried employee who works in a bona fide executive, administrative or  
9 professional capacity and whose regular compensation, when converted to an annual  
10 rate, exceeds 3000 times the State's minimum hourly wage or the annualized rate  
11 established by the United States Department of Labor under the federal Fair Labor  
12 Standards Act, whichever is higher; and

13 **Sec. 3. 26 MRSA §663, sub-§3, ¶L** is enacted to read:

14 L. Any direct support provider or respite care provider who provides shared living  
15 residential services, also known as foster care, to clients of the Department of Health  
16 and Human Services with developmental disabilities or autism through a contract  
17 with an agency authorized by the Department of Health and Human Services to  
18 provide such services.

19 **Sec. 4. 26 MRSA §1043, sub-§11, ¶F**, as amended by PL 2007, c. 230, §1, is  
20 further amended to read:

21 F. The term "employment" does not include:

22 (1) Service performed in the employ of this State, or of any political subdivision  
23 thereof, or of any instrumentality of this State or its political subdivisions, except  
24 as provided by this subsection;

25 (2) Service performed in the employ of the United States Government or an  
26 instrumentality of the United States immune under the Constitution of the United  
27 States from the contributions imposed by this chapter, except that on and after  
28 January 1, 1940 to the extent that the Congress of the United States has permitted  
29 states to require any instrumentalities of the United States to make payments into  
30 an unemployment compensation fund under a state unemployment compensation  
31 or employment security law, all of the provisions of this chapter are applicable to  
32 such instrumentalities and to services performed for such instrumentalities in the  
33 same manner, to the same extent and on the same terms as to all other employers,  
34 employing units, individuals and services. If this State is not certified for any  
35 year by the Secretary of Labor under section 3304 of the Federal Internal  
36 Revenue Code, the payments required of such instrumentalities with respect to  
37 that year must be refunded by the commissioner from the fund in the same  
38 manner and within the same period as is provided in section 1225, subsection 5,  
39 with respect to contributions erroneously collected;

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(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;

(6) Service performed by an individual in the employ of that individual's son, daughter or spouse and service performed by a child under the age of 18 in the employ of that child's father or mother, except for periods of such service for which unemployment insurance contributions are paid;

(6-1) Services performed by a student attending an elementary, secondary or postsecondary school while participating in a cooperative program of education and occupational training or on-the-job training that is part of the school curriculum;

(9) Service performed with respect to which unemployment compensation is payable under the Railroad Unemployment Insurance Act (52 Stat. 1094);

(10) Services performed in the employ of any other state, or any political subdivision thereof; or any instrumentality of any one or more of the foregoing that is wholly owned by one or more states or political subdivisions and any services performed in the employ of any instrumentality of one or more other states or their political subdivisions to the extent that the instrumentality is, with respect to such a service, immune under the Constitution of the United States from the tax imposed by section 3301 of the Federal Internal Revenue Code, except as provided in paragraph A-1, subparagraph (1);

(11) Service performed in any calendar quarter in the employ of any organization exempt from income tax under section 501(a) of the Federal Internal Revenue Code other than an organization described in section 401(a) or under section 521 of the Code, if the remuneration for such service is less than \$150;

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

1 (17) Service performed in the employ of an instrumentality wholly owned by a  
2 foreign government:

3 (a) If the service is of a character similar to that performed in foreign  
4 countries by employees of the United States Government or an  
5 instrumentality thereof; and

6 (b) If the commissioner finds that the United States Secretary of State has  
7 certified to the United States Secretary of the Treasury that the foreign  
8 government, with respect to whose instrumentality exemption is claimed,  
9 grants an equivalent exemption with respect to similar service performed in  
10 the foreign country by employees of the United States Government and of  
11 instrumentalities thereof;

12 (18) Service performed as a student nurse in the employ of a hospital or a nurses'  
13 training school by an individual who is enrolled and is regularly attending classes  
14 in a nurses' training school chartered or approved pursuant to state law and  
15 service performed as an intern in the employ of a hospital by an individual who  
16 has completed a 4 years' course in a medical school chartered or approved  
17 pursuant to state law;

18 (19) Service performed by an individual for a person as a real estate broker, a  
19 real estate sales representative, an insurance agent or an insurance solicitor, if all  
20 such service performed by that individual for that person is performed for  
21 remuneration solely by way of commission;

22 (20) Service performed by an individual under the age of 18 in the delivery or  
23 distribution of newspapers or shopping news except delivery or distribution to  
24 any point for subsequent delivery or distribution;

25 (21) Service performed in the employ of any organization that is excluded from  
26 the term "employment" as defined in the Federal Unemployment Tax Act solely  
27 by reason of section 3306(c)(7) or (8) if:

28 (a) Service is performed in the employ of a church or convention or  
29 association of churches or an organization that is operated primarily for  
30 religious purposes and that is operated, supervised, controlled or principally  
31 supported by a church or convention or association of churches;

32 (b) Service is performed by a duly ordained, commissioned or licensed  
33 minister of a church in the exercise of that minister's ministry or by a member  
34 of a religious order in the exercise of duties required by that order;

35 (c) Prior to January 1, 1978, service is performed in the employ of a school  
36 primarily operated as an elementary, secondary or preparatory school for  
37 higher education that is not an institution of higher education;

38 (d) Service is performed in a facility conducted for the purpose of carrying  
39 out a program of rehabilitation for individuals whose earning capacity is  
40 impaired by age or physical or mental deficiency or injury or providing  
41 remunerative work for individuals who, because of their impaired physical or  
42 mental capacity, cannot be readily absorbed in the competitive labor market  
43 by an individual receiving such rehabilitation or remunerative work;

- 1 (e) Service is performed as part of an unemployment work-relief or work-  
2 training program assisted or financed in whole or in part by any federal  
3 agency or an agency of a state or political subdivision thereof by an  
4 individual receiving that work-relief or work-training;
- 5 (f) Service is performed in the employ of a hospital as defined in subsection  
6 26 by a patient of that hospital;
- 7 (g) Services are performed prior to January 1, 1978 for a hospital in a state  
8 prison or other state correctional institution by an inmate of that prison or  
9 correctional institution and after December 31, 1977 by an inmate of a  
10 custodial or penal institution;
- 11 (h) Service is performed in the employ of a school, college or university if  
12 that service is performed by a student who is enrolled and is regularly  
13 attending classes at such a school, college or university; or
- 14 (i) Prior to January 1, 1978, service is performed in the employ of a school  
15 that is not an institution of higher education and after December 31, 1977,  
16 service is performed in the employ of a governmental entity referred to in  
17 paragraph A-1, subparagraph (1) if that service is performed by an individual  
18 in the exercise of duties:
- 19 (i) As an elected official;
  - 20 (ii) As a member of a legislative body or a member of the judiciary of a  
21 state or political subdivision of a state;
  - 22 (iii) As a member of the State National Guard or Air National Guard;
  - 23 (iv) As an employee serving on a temporary basis in case of fire, storm,  
24 snow, earthquake, flood or similar emergency;
  - 25 (v) In a position that, under or pursuant to the laws of this State, is  
26 designated as a major nontenured policymaking or advisory position or a  
27 policymaking or advisory position the performance of the duties of which  
28 ordinarily does not require more than 8 hours per week; or
  - 29 (vi) As an election official or election worker if the amount of  
30 remuneration received by the individual during the calendar year for  
31 services as an election official or election worker is less than \$1,000;
- 32 (29) Services performed by a hairdresser who holds a booth license and operates  
33 within another hairdressing establishment if operated under a booth rental  
34 agreement or other rental agreement;
- 35 (30) Services performed by a barber who holds a booth license and operates  
36 within another barbering establishment if operated under a booth rental  
37 agreement or other rental agreement;
- 38 (31) Services performed by a contract interviewer engaged in marketing research  
39 or public opinion interviewing when such interviewing is conducted in the field  
40 or over the telephone on premises not used or controlled by the person for whom  
41 such contract services are being provided;

1 (32) After December 31, 1981, services performed by an individual on a boat  
2 engaged in catching fish or other forms of aquatic animal life, unless those  
3 services would be included in the definition of "employment" for federal  
4 unemployment tax purposes under the Federal Unemployment Act, United States  
5 Code, Title 26, Section 3306(c), as it may be amended. Also included in this  
6 exemption are services performed in harvesting shellfish for depuration from  
7 designated areas as authorized by Title 12, section 6856;

8 (33) Services performed by a member or leader of a musical group, band or  
9 orchestra or an entertainer when the services are performed under terms of a  
10 contract entered into by the leader or an agent of the musical group, band,  
11 orchestra or entertainer with an employing unit for whom the services are being  
12 performed, provided the leader or agent is not an employer by reason of  
13 subsection 9 or of section 1222, subsection 3;

14 (34) Services performed in the delivery or distribution of newspapers or  
15 magazines to the ultimate consumer by an individual who is compensated by  
16 receiving or retaining a commission or profit on the sale of the newspaper or  
17 magazine;

18 (35) Services performed by a homemaker in the knitted outerwear industry as  
19 those terms are defined, on the effective date of this subparagraph, in 29 Code of  
20 Federal Regulations, Part 530, Section 530.1;

21 (36) Service performed by a full-time student, as defined in subsection 30, in the  
22 employ of an organized camp if the full-time student performed services in the  
23 employ of the camp for less than 13 calendar weeks in the calendar year and the  
24 camp:

25 (a) Did not operate for more than 7 months in the calendar year and did not  
26 operate for more than 7 months in the preceding calendar year; or

27 (b) Had average gross receipts for any 6 months in the preceding calendar  
28 year that were not more than 33 1/3% of its average gross receipts for the  
29 other 6 months in the preceding calendar year;

30 (37) Services performed by an individual as a home stitcher as long as that  
31 employment is not subject to federal unemployment tax;

32 (38) Services performed by a person licensed as a guide as required by Title 12,  
33 section 12853, as long as that employment is not subject to federal  
34 unemployment tax;

35 (39) Services performed by a direct seller as defined in 26 United States Code,  
36 Section 3508, Subsection (b), Paragraph (2). This subparagraph does not include  
37 a person selling major improvements or renovations to the structure of a home,  
38 business or property;

39 (40) Services performed by lessees of taxicabs, as long as that employment is  
40 not subject to federal unemployment tax. This subparagraph may not be  
41 construed to affect a determination regarding a lessee's status as an independent  
42 contractor for workers' compensation purposes;

1 (41) Services provided by a dance instructor to students of a dance studio when  
2 there is a contract between the instructor and the studio under which the  
3 instructor's services are not offered exclusively to the studio, the studio does not  
4 control the scheduling of the days and times of classes other than beginning and  
5 end dates, the instructor is paid by the class and not on an hourly or salary basis,  
6 the compensation rate is the result of negotiation between the instructor and the  
7 studio and the instructor is given the freedom to develop the curriculum;

8 (42) Services performed by participants enrolled in programs or projects under  
9 the national service laws including the federal National and Community Service  
10 Act of 1990, as amended, 42 United States Code, Section 12501 et seq., and the  
11 federal Domestic Volunteer Service Act, as amended, 42 United States Code,  
12 Section 4950 et seq.;

13 (43) Services of an author in furnishing text or other material to a publisher  
14 who:

15 (a) Does not control the author's work except to propose topics or to edit  
16 material submitted;

17 (b) Does not restrict the author from publishing elsewhere;

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

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

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

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

24 (44) Services provided by an owner-operator of a truck or truck tractor while it  
25 is leased to a motor carrier, as defined in 49 Code of Federal Regulations, 390.5  
26 (2000), as long as that employment is not subject to federal unemployment tax;  
27 and

28 (45) Services performed by a direct support provider or respite care provider to  
29 provide shared living residential services, also known as foster care, to clients of  
30 the Department of Health and Human Services with developmental disabilities or  
31 autism through a contract with an agency authorized by the Department of Health  
32 and Human Services to provide such services.

33 **Sec. 5. 39-A MRSA §102, sub-§11, ¶G is enacted to read:**

34 G. "Employee" does not include any direct support provider or respite care provider  
35 who provides shared living residential services, also known as foster care, to clients  
36 of the Department of Health and Human Services with developmental disabilities or  
37 autism through a contract with an agency authorized by the Department of Health and  
38 Human Services to provide such services.



**SUMMARY**

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This bill exempts services performed by certain direct support providers, including respite care providers, from the definition of "employment" in the laws governing unemployment compensation and exempts certain direct support providers from the definition of "employee" in the laws governing minimum wages and workers' compensation.