

2012 -- S 2343

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STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2012

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A N A C T

RELATING TO LABOR AND LABOR RELATIONS - EMPLOYMENT SECURITY -  
GENERAL PROVISIONS

Introduced By: Senators Jabour, McCaffrey, Doyle, Miller, and Lynch

Date Introduced: February 07, 2012

Referred To: Senate Labor

It is enacted by the General Assembly as follows:

1 SECTION 1. Sections 28-42-7 and 28-42-8 of the General Laws in Chapter 28-42  
2 entitled "Employment Security - General Provisions" are hereby amended to read as follows:

3 ~~28-42-7. Independent contractor and employee distinguished.~~ Employee  
4 presumption – independent contractor exception. – (a) The determination of independent  
5 contractor ~~or as opposed to~~ employee status for purposes of chapters 12, 14, 42 -- 44 of this title  
6 chapter 37-13, and title 44 shall be the same as those factors used by the Internal Revenue Service  
7 in its code and regulations; provided, that a person performing any service, except as provided  
8 under section 28-42-8, shall be presumed an "employee" unless:

9 (1) The person is free from control and direction in connection with the performance of  
10 the service, both under his or her contract for the performance of the service and either:

11 (i) The service is performed outside the usual course of the business of the procurer of the  
12 service or outside of all the places of business of the procurer of the service; or

13 (ii) The person is engaged in an independently established trade, occupation, profession  
14 or business of the same nature as that involved in the service performed. This requirement is  
15 satisfied, among other ways, where the service performed has historically been recognized as an  
16 independent trade, occupation, profession or business and persons engaged therein have  
17 historically been treated as independent contractors for tax purposes.

18 (b) If the provider of the services furnishes and operates capital machinery and/or a

1 specialized or heavy commercial vehicle as the major component of the service provided, it shall  
2 be considered a factor demonstrating lack of direction or control by the procurer for purposes of  
3 satisfying subdivision (a)(1) above.

4 (c) The failure to withhold federal or state income taxes or to pay unemployment  
5 compensation contributions or workers' compensation premiums with respect to a person's  
6 compensation shall not be considered in making a determination under this section.

7 (d) Notwithstanding the presumption established in this section and the inability to satisfy  
8 the requirements under subdivision (a)(1) and paragraph (i) or (ii) above, a provider of services  
9 may still overcome the presumption by application of the remaining factors used by the Internal  
10 Revenue Service, with the exception of those excluded under subsection (c) above.

11 (e) Any person, business, corporation, employer or entity of any kind failing to properly  
12 classify a worker as an employee according to this section shall be subject to liability and  
13 penalties as provided under chapter 28-14 in addition to any other liability, penalties or relief to  
14 which they may be subject under applicable law.

15 **28-42-8. Exemptions from "employment".** -- "Employment" does not include:

16 (1) Domestic service in a private home performed for a person who did not pay cash  
17 remuneration of one thousand dollars (\$1,000) or more in any calendar quarter after December  
18 31, 1977, in the current calendar year or the preceding calendar year to individuals employed in  
19 that domestic service in a private home;

20 (2) Service performed by an individual in the employ of his or her son, daughter, or  
21 spouse, and service performed by a child under the age of eighteen (18) in the employ of his or  
22 her father or mother;

23 (3) Service performed in the employ of any other state or any of its political  
24 subdivisions, the United States government, an instrumentality of any other state or states or their  
25 political subdivisions, or of an instrumentality of the United States, except that if the Congress of  
26 the United States permits states to require any instrumentalities of the United States to make  
27 payments into an unemployment fund under a state unemployment compensation act, then, to the  
28 extent permitted by Congress, and from and after the date as of which permission becomes  
29 effective, all of the provisions of chapters 42 -- 44 of this title shall be applicable to those  
30 instrumentalities and to services performed for those instrumentalities, in the same manner, to the  
31 same extent, and on the same terms as to all other employers, employing units, individuals, and  
32 services. If this state is not certified by the Secretary of Labor under 26 U.S.C. section 3304 for  
33 any year, then the payments required of those instrumentalities with respect to that year shall be  
34 deemed to have been erroneously collected within the meaning of section 28-43-12 and shall be

1 refunded by the director from the fund in accordance with section 28-43-12;

2 (4) Service performed:

3 (i) In the employ of:

4 (A) A church or convention or association of churches, or

5 (B) An organization which is operated primarily for religious purposes and which is

6 operated, supervised, controlled, or principally supported by a church or convention or

7 association of churches;

8 (ii) By a duly ordained, commissioned, or licensed minister of a church in the exercise of

9 his or her ministry or by a member of a religious order in the exercise of duties required by that

10 order;

11 (iii) In a facility conducted for the purpose of carrying out a program of rehabilitation for

12 individuals whose earning capacity is impaired by age, physical or mental deficiency, or injury or

13 providing remunerative work for individuals who, because of their impaired physical or mental

14 capacity, cannot be readily absorbed in the competitive labor market, by an individual receiving

15 that rehabilitation or remunerative work;

16 (iv) As part of an unemployment work relief or work training program assisted or

17 financed in whole or in part by any federal agency or an agency of a state or one of its political

18 subdivisions, by an individual receiving that work relief or work training;

19 (v) In the employ of a hospital by a patient of the hospital; or

20 (vi) By an inmate of a custodial or penal institution;

21 (5) Service with respect to which unemployment compensation is payable under an

22 unemployment compensation system established by an act of Congress. The director is authorized

23 and directed to enter into agreements with the proper agencies under that act of Congress, which

24 agreements shall become effective ten (10) days after their publication as in the manner provided

25 in section 28-42-34 to provide reciprocal treatment to individuals who have, after acquiring

26 potential rights to benefits under chapters 42 -- 44 of this title acquired rights to unemployment

27 compensation under that act of Congress, or who have, after acquiring potential rights to

28 unemployment compensation under that act of Congress, acquired rights to benefits under those

29 chapters;

30 (6) Service covered by an election duly approved by the agency charged with the

31 administration of any other state or federal employment security law in accordance with an

32 arrangement pursuant to section 28-42-58 during the effective period of that election, except as

33 provided in section 28-42-3(15)(i);

34 (7) Services performed by an individual in any calendar quarter on or after January 1,

1 1972 in the employ of any organization exempt from income tax under 26 U.S.C. section  
2 501(a)(other than services performed for an organization defined in section 28-42-3(24) or for  
3 any organization described in 26 U.S.C. section 401(a) or under 26 U.S.C. section 521) if the  
4 remuneration for that service is less than fifty dollars (\$50.00);

5 (8) Service which is occasional, incidental, and occurs irregularly, and is not in the  
6 course of the employing unit's trade or business. Service for a corporation shall not be excluded;

7 (9) Service as a golf caddy, except as to service performed solely for a club with respect  
8 to which the club alone bears the expense. A golf caddy, except as in this specifically provided  
9 subdivision, shall not be construed to be an "employee" as defined in section 28-42-3(14);

10 (10) Notwithstanding any provisions of titles 5 and 27, service performed by an  
11 individual as a real estate salesperson if all the service performed by that individual is performed  
12 for remuneration solely by way of commission;

13 (11) Notwithstanding any provisions of titles 5 and 27, service performed by an  
14 individual as an insurance broker, agent, or subagent if all the service performed by that  
15 individual is performed for remuneration solely by way of commission. This exemption shall not  
16 apply to service performed as industrial and debit insurance agents;

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

25 (13) Service performed by an individual on a boat engaged in catching fish or other  
26 forms of aquatic animal life under an arrangement with the owner or operator of that boat  
27 pursuant to which:

28 (i) That individual does not receive any cash remuneration other than a share of the  
29 boat's catch of fish or other forms of aquatic animal life or a share of the proceeds from the sale  
30 of that catch; and

31 (ii) The operating crew of that boat is normally made up of fewer than ten (10)  
32 individuals; ~~and~~

33 (14) Services performed by a member of an Americorp program; ~~and~~ [and](#)

34 [\(15\) Services performed by a newspaper deliverer.](#)

1 SECTION 2. This act shall take effect upon passage.

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EXPLANATION  
BY THE LEGISLATIVE COUNCIL  
OF

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- 1           This act would clarify the definition of independent contractor by providing a
- 2           presumption that a person is an employee unless certain specific conditions are met.
- 3           This act would take effect upon passage.

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