

SECOND REGULAR SESSION

HOUSE BILL NO. 2093

97TH GENERAL ASSEMBLY

INTRODUCED BY REPRESENTATIVES WHITE (Sponsor), HOSKINS, AUSTIN, MCGAUGH, NEELY,
HANSEN, KOENIG, JONES (110), REIBOLDT, WIELAND, ENGLUND, MCNEIL, HUMMEL, RIZZO,
LICHTENEGGER, DIEHL, FREDERICK, SWAN, BARNES, FLANIGAN, GRISAMORE,
WALKER AND LAIR (Co-sponsors).

6339H.011

D. ADAM CRUMBLISS, Chief Clerk

AN ACT

To repeal section 288.034, RSMo, and to enact in lieu thereof one new section relating to the definition of employment as it relates to employment security.

Be it enacted by the General Assembly of the state of Missouri, as follows:

Section A. Section 288.034, RSMo, is repealed and one new section enacted in lieu thereof, to be known as section 288.034, to read as follows:

288.034. 1. "Employment" means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied, and notwithstanding any other provisions of this section, service with respect to which a tax is required to be paid under any federal unemployment tax law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund or which, as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act, is required to be covered under this law.

2. The term "employment" shall include an individual's entire service, performed within or both within and without this state if:

(1) The service is localized in this state; or

(2) The service is not localized in any state but some of the service is performed in this state and the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this state; or the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed but the individual's residence is in this state.

EXPLANATION — Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted from the law. Matter in **bold-face** type in the above bill is proposed language.

16 3. Service performed by an individual for wages shall be deemed to be employment
17 subject to this law:

18 (1) If covered by an election filed and approved pursuant to subdivision (2) of subsection
19 3 of section 288.080;

20 (2) If covered by an arrangement pursuant to section 288.340 between the division and
21 the agency charged with the administration of any other state or federal unemployment insurance
22 law, pursuant to which all services performed by an individual for an employing unit are deemed
23 to be performed entirely within this state.

24 4. Service shall be deemed to be localized within a state if the service is performed
25 entirely within such state; or the service is performed both within and without such state, but the
26 service performed without such state is incidental to the individual's service within the state; for
27 example, is temporary or transitory in nature or consists of isolated transactions.

28 5. Service performed by an individual for remuneration shall be deemed to be
29 employment subject to this law unless it is shown to the satisfaction of the division that such
30 services were performed by an independent contractor. In determining the existence of the
31 independent contractor relationship, the common law of agency right to control shall be applied.
32 The common law of agency right to control test shall include but not be limited to: if the alleged
33 employer retains the right to control the manner and means by which the results are to be
34 accomplished, the individual who performs the service is an employee. If only the results are
35 controlled, the individual performing the service is an independent contractor.

36 6. The term "employment" shall include service performed for wages as an agent-driver
37 or commission-driver engaged in distributing meat products, vegetable products, fruit products,
38 bakery products, beverages (other than milk), or laundry or dry-cleaning services, for his or her
39 principal; or as a traveling or city salesman, other than as an agent-driver or commission-driver,
40 engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his or her
41 principal (except for sideline sales activities on behalf of some other person) of orders from
42 wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar
43 establishments for merchandise for resale or supplies for use in their business operations,
44 provided:

45 (1) The contract of service contemplates that substantially all of the services are to be
46 performed personally by such individual; and

47 (2) The individual does not have a substantial investment in facilities used in connection
48 with the performance of the services (other than in facilities for transportation); and

49 (3) The services are not in the nature of a single transaction that is not part of a
50 continuing relationship with the person for whom the services are performed.

51 7. Service performed by an individual in the employ of this state or any political
52 subdivision thereof or any instrumentality of any one or more of the foregoing which is wholly
53 owned by this state and one or more other states or political subdivisions, or any service
54 performed in the employ of any instrumentality of this state or of any political subdivision
55 thereof, and one or more other states or political subdivisions, provided that such service is
56 excluded from employment as defined in the Federal Unemployment Tax Act by Section
57 3306(c)(7) of that act and is not excluded from employment pursuant to subsection 9 of this
58 section, shall be employment subject to this law.

59 8. Service performed by an individual in the employ of a corporation or any community
60 chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific,
61 testing for public safety, literary, or educational purposes, or for the prevention of cruelty to
62 children or animals, no part of the net earnings of which inures to the benefit of any private
63 shareholder or individual, or other organization described in Section 501(c)(3) of the Internal
64 Revenue Code which is exempt from income tax under Section 501(a) of that code if the
65 organization had four or more individuals in employment for some portion of a day in each of
66 twenty different weeks whether or not such weeks were consecutive within a calendar year
67 regardless of whether they were employed at the same moment of time shall be employment
68 subject to this law.

69 9. For the purposes of subsections 7 and 8 of this section, the term "employment" does
70 not apply to service performed:

71 (1) In the employ of a church or convention or association of churches, or an
72 organization which is operated primarily for religious purposes and which is operated,
73 supervised, controlled, or principally supported by a church or convention or association of
74 churches; or

75 (2) By a duly ordained, commissioned, or licensed minister of a church in the exercise
76 of such minister's ministry or by a member of a religious order in the exercise of duties required
77 by such order; or

78 (3) In the employ of a governmental entity referred to in subdivision (3) of subsection
79 1 of section 288.032 if such service is performed by an individual in the exercise of duties:

80 (a) As an elected official;

81 (b) As a member of a legislative body, or a member of the judiciary, of a state or political
82 subdivision;

83 (c) As a member of the state National Guard or Air National Guard;

84 (d) As an employee serving on a temporary basis in case of fire, storm, snow, earthquake,
85 flood or similar emergency;

86 (e) In a position which, under or pursuant to the laws of this state, is designated as (i) a
87 major nontenured policy-making or advisory position, or (ii) a policy-making or advisory
88 position the performance of the duties of which ordinarily does not require more than eight hours
89 per week; or

90 (4) In a facility conducted for the purpose of carrying out a program of rehabilitation for
91 individuals whose earning capacity is impaired by age or physical or mental deficiency or injury
92 or providing remunerative work for individuals who because of their impaired physical or mental
93 capacity cannot be readily absorbed in the competitive labor market, by an individual receiving
94 such rehabilitation or remunerative work; or

95 (5) As part of an unemployment work-relief or work-training program assisted or
96 financed in whole or in part by any federal agency or an agency of a state or political subdivision
97 thereof, by an individual receiving such work relief or work training; or

98 (6) By an inmate of a custodial or penal institution; or

99 (7) In the employ of a school, college, or university, if such service is performed (i) by
100 a student who is enrolled and is regularly attending classes at such school, college, or university,
101 or (ii) by the spouse of such a student, if such spouse is advised, at the time such spouse
102 commences to perform such service, that (I) the employment of such spouse to perform such
103 service is provided under a program to provide financial assistance to such student by such
104 school, college, or university, and (II) such employment will not be covered by any program of
105 unemployment insurance.

106 10. The term "employment" shall include the service of an individual who is a citizen
107 of the United States, performed outside the United States (except in Canada), if:

108 (1) The employer's principal place of business in the United States is located in this state;
109 or

110 (2) The employer has no place of business in the United States, but:

111 (a) The employer is an individual who is a resident of this state; or

112 (b) The employer is a corporation which is organized under the laws of this state; or

113 (c) The employer is a partnership or a trust and the number of the partners or trustees
114 who are residents of this state is greater than the number who are residents of any one other state;
115 or

116 (3) None of the criteria of subdivisions (1) and (2) of this subsection is met but the
117 employer has elected coverage in this state or, the employer having failed to elect coverage in
118 any state, the individual has filed a claim for benefits, based on such service, under the law of
119 this state;

120 (4) As used in this subsection and in subsection 11 of this section, the term "United
121 States" includes the states, the District of Columbia and the Commonwealth of Puerto Rico.

11. An "American employer", for the purposes of subsection 10 of this section, means a person who is:

(1) An individual who is a resident of the United States; or

(2) A partnership, if two-thirds or more of the partners are residents of the United States;

or

(3) A trust, if all of the trustees are residents of the United States; or

(4) A corporation organized under the laws of the United States or of any state.

12. The term "employment" shall not include:

(1) Service performed by an individual in agricultural labor;

(a) For the purposes of this subdivision, the term "agricultural labor" means remunerated service performed:

a. On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife;

b. In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

c. In connection with the production or harvesting of any commodity defined as an agricultural commodity in Section 15(g) of the Federal Agricultural Marketing Act, as amended (46 Stat. 1550, Sec. 3; 12 U.S.C. 1441j), or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

d. (i) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(ii) In the employ of a group of operators of farms (or a cooperative organization of which such operators are members) in the performance of services described in item (i) of this subparagraph, but only if such operators produced more than one-half of the commodity with respect to which such service is performed;

(iii) The provisions of items (i) and (ii) of this subparagraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or

158 commercial freezing or in connection with any agricultural or horticultural commodity after its
159 delivery to a terminal market for distribution for consumption; or

160 e. On a farm operated for profit if such service is not in the course of the employer's trade
161 or business. As used in this [paragraph] **subparagraph**, the term "farm" includes stock, dairy,
162 poultry, fruit, furbearing animals, and truck farms, plantations, ranches, nurseries, ranges,
163 greenhouses or other similar structures, used primarily for the raising of agricultural or
164 horticultural commodities, and orchards;

165 (b) The term "employment" shall include service performed after December 31, 1977,
166 by an individual in agricultural labor as defined in paragraph (a) of this subdivision when such
167 service is performed for a person who, during any calendar quarter, paid remuneration in cash
168 of twenty thousand dollars or more to individuals employed in agricultural labor or for some
169 portion of a day in a calendar year in each of twenty different calendar weeks, whether or not
170 such weeks were consecutive, employed in agricultural labor ten or more individuals, regardless
171 of whether they were employed at the same moment of time;

172 (c) For the purposes of this subsection any individual who is a member of a crew
173 furnished by a crew leader to perform service in agricultural labor for any other person shall be
174 considered as employed by such crew leader:

175 a. If such crew leader holds a valid certificate of registration under the Farm Labor
176 Contractor Registration Act of 1963; or substantially all the members of such crew operate or
177 maintain tractors, mechanized harvesting or crop-dusting equipment, or any other mechanized
178 equipment, which is provided by such crew leader; [and]

179 b. If such individual is not in employment by such other person;

180 c. If any individual is furnished by a crew leader to perform service in agricultural labor
181 for any other person and that individual is not in the employment of the crew leader:

182 (i) Such other person and not the crew leader shall be treated as the employer of such
183 individual; and

184 (ii) Such other person shall be treated as having paid cash remuneration to such
185 individual in an amount equal to the amount of cash remuneration paid to such individual by the
186 crew leader (either on his or her own behalf or on behalf of such other person) for the service in
187 agricultural labor performed for such other person; **and**

188 d. For the purposes of this subsection, the term "crew leader" means an individual who:

189 (i) Furnishes individuals to perform service in agricultural labor for any other person;

190 (ii) Pays (either on his or her own behalf or on behalf of such other person) the
191 individuals so furnished by him or her for the service in agricultural labor performed by them;
192 and

193 (iii) Has not entered into a written agreement with such other person under which such
194 individual is designated as in employment by such other person;

195 (2) Domestic service in a private home except as provided in subsection 13 of this
196 section;

197 (3) Service performed by an individual under the age of eighteen years in the delivery
198 or distribution of newspapers or shopping news but shall not include delivery or distribution to
199 any point for subsequent delivery or distribution;

200 (4) Service performed by an individual in, and at the time of, the sale of newspapers or
201 magazines to ultimate consumers under an arrangement under which the newspapers or
202 magazines are to be sold by him or her at a fixed price, his or her compensation being based on
203 the retention of the excess of such price over the amount at which the newspapers or magazines
204 are charged to him or her, whether or not he or she is guaranteed a minimum amount of
205 compensation for such service, or is entitled to be credited with the unsold newspapers or
206 magazines turned back;

207 (5) Service performed by an individual in the employ of his or her son, daughter, or
208 spouse, and service performed by a child under the age of twenty-one in the employ of his or her
209 father or mother;

210 (6) Except as otherwise provided in this law, service performed in the employ of a
211 corporation, community chest, fund or foundation, organized and operated exclusively for
212 religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty
213 to children or animals, no part of the net earnings of which inures to the benefit of any private
214 shareholder or individual;

215 (7) Services with respect to which unemployment insurance is payable under an
216 unemployment insurance system established by an act of Congress;

217 (8) Service performed in the employ of a foreign government;

218 (9) Service performed in the employ of an instrumentality wholly owned by a foreign
219 government;

220 (a) If the service is of a character similar to that performed in foreign countries by
221 employees of the United States government or of an instrumentality thereof; and

222 (b) If the division finds that the foreign government, with respect to whose
223 instrumentality exemption is claimed, grants an equivalent exemption with respect to similar
224 service performed in the foreign country by employees of the United States government and of
225 instrumentalities thereof. The certification of the United States Secretary of State to the United
226 States Secretary of Treasury shall constitute prima facie evidence of such equivalent exemption;

227 (10) Service covered by an arrangement between the division and the agency charged
228 with the administration of any other state or federal unemployment insurance law pursuant to

229 which all services performed by an individual for an employing unit during the period covered
230 by the employing unit's approved election are deemed to be performed entirely within the
231 jurisdiction of such other state or federal agency;

232 (11) Service performed in any calendar quarter in the employ of a school, college or
233 university not otherwise excluded, if such service is performed by a student who is enrolled and
234 regularly attending classes at such school, college, or university, and the remuneration for such
235 service does not exceed fifty dollars (exclusive of board, room, and tuition);

236 (12) Service performed by an individual for a person as a licensed insurance agent, a
237 licensed insurance broker, or an insurance solicitor, if all such service performed by such
238 individual for such person is performed for remuneration solely by way of commissions;

239 (13) Domestic service performed in the employ of a local college club or of a local
240 chapter of a college fraternity or sorority, except as provided in subsection 13 of this section;

241 (14) Services performed after March 31, 1982, in programs authorized and funded by
242 the Comprehensive Employment and Training Act by participants of such programs, except those
243 programs with respect to which unemployment insurance coverage is required by the
244 Comprehensive Employment and Training Act or regulations issued pursuant thereto;

245 (15) Service performed by an individual who is enrolled at a nonprofit or public
246 educational institution which normally maintains a regular faculty and curriculum and normally
247 has a regularly organized body of students in attendance at the place where its educational
248 activities are carried on, as a student in a full-time program, taken for credit at such institution,
249 which combines academic instruction with work experience, if such service is an integral part
250 of such program, and such institution has so certified to the employer; except, that this
251 subdivision shall not apply to service performed in a program established for or on behalf of an
252 employer or group of employers;

253 (16) Services performed by a licensed real estate salesperson or licensed real estate
254 broker if substantially all of the remuneration, whether or not paid in cash, for the services
255 performed, rather than to the number of hours worked, is directly related to sales or other output,
256 including the performance of services, performed pursuant to a written contract between such
257 individual and the person for whom the services are performed and such contract provides that
258 the individual will not be treated as an employee with respect to such services for federal tax
259 purposes;

260 (17) Services performed as a direct seller who is engaged in the trade or business of the
261 delivering or distribution of newspapers or shopping news, including any services directly related
262 to such trade or business, or services performed as a direct seller who is engaged in the trade or
263 business of selling, or soliciting the sale of, consumer products in the home or otherwise than in,
264 or affiliated with, a permanent, fixed retail establishment, if eighty percent or more of the

265 remuneration, whether or not paid in cash, for the services performed rather than the number of
266 hours worked is directly related to sales performed pursuant to a written contract between such
267 direct seller and the person for whom the services are performed, and such contract provides that
268 the individual will not be treated as an employee with respect to such services for federal tax
269 purposes;

270 (18) Services performed as a volunteer research subject who is paid on a per-study basis
271 for scientific, medical or drug-related testing for any organization other than one described in
272 Section 501(c)(3) of the Internal Revenue Code or any governmental entity;

273 **(19) Services performed for board, lodging, aid, or sustenance received from any**
274 **religious, charitable, or relief organization.**

275 13. The term "employment" shall include domestic service as defined in subdivisions
276 (2) and (13) of subsection 12 of this section performed after December 31, 1977, if the
277 employing unit for which such service is performed paid cash wages of one thousand dollars or
278 more for such services in any calendar quarter after December 31, 1977.

279 14. The term "employment" shall include or exclude the entire service of an individual
280 for an employing unit during a pay period in which such individual's services are not all excluded
281 under the foregoing provisions, on the following basis: if the services performed during one-half
282 or more of any pay period constitute employment as otherwise defined in this law, all the
283 services performed during such period shall be deemed to be employment; but if the services
284 performed during more than one-half of any such pay period do not constitute employment as
285 otherwise defined in this law, then none of the services for such period shall be deemed to be
286 employment. (As used in this subsection, the term "pay period" means a period of not more than
287 thirty-one consecutive days for which a payment of remuneration is ordinarily made to the
288 individual by the employing unit employing such individual.) This subsection shall not be
289 applicable with respect to service performed in a pay period where any such service is excluded
290 pursuant to subdivision (8) of subsection 12 of this section.

291 15. The term "employment" shall not include the services of a full-time student who
292 performed such services in the employ of an organized summer camp for less than thirteen
293 calendar weeks in such calendar year.

294 16. For the purpose of subsection 15 of this section, an individual shall be treated as a
295 full-time student for any period:

296 (1) During which the individual is enrolled as a full-time student at an educational
297 institution; or

298 (2) Which is between academic years or terms if:

299 (a) The individual was enrolled as a full-time student at an educational institution for the
300 immediately preceding academic year or term; and

301 (b) There is a reasonable assurance that the individual will be so enrolled for the
302 immediately succeeding academic year or term after the period described in paragraph (a) of this
303 subdivision.

304 17. For the purpose of subsection 15 of this section, an "organized summer camp" shall
305 mean a summer camp which:

306 (1) Did not operate for more than seven months in the calendar year and did not operate
307 for more than seven months in the preceding calendar year; or

308 (2) Had average gross receipts for any six months in the preceding calendar year which
309 were not more than thirty-three and one-third percent of its average gross receipts for the other
310 six months in the preceding calendar year.

311 18. The term "employment" shall not mean service performed by a remodeling
312 salesperson acting as an independent contractor; however, if the federal Internal Revenue Service
313 determines that a contractual relationship between a direct provider and an individual acting as
314 an independent contractor pursuant to the provisions of this subsection is in fact an
315 employer-employee relationship for the purposes of federal law, then that relationship shall be
316 considered as an employer-employee relationship for the purposes of this chapter.

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