

2013 -- S 0572

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STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2013

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A N A C T

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

Introduced By: Senators Gallo, and Lynch

Date Introduced: February 28, 2013

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, and 42 and 44 of  
6 this title. Chapters 37-13, and title 44 shall be the same as those factors used by the Internal  
7 Revenue Service in its code and regulations-; provided, that a person performing any service,  
8 except as provided 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 and in fact for the performance of the service;

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

13 (3) 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 only by meeting the following criteria:

16 (i) The individual possesses the essential tools, equipment and other assets necessary to  
17 perform the services independent of the person for whom the services are performed;

18 (ii) The individual's arrangement with the person for whom the services are performed is

1 such that the individual shall realize a profit or suffer a loss as a result of performing the service  
2 or the individual performs the services through a business in which the individual has a  
3 proprietary interest;

4 (iii) The individual maintains a business office or location that is separate from the  
5 location of the person for whom the services are being performed;

6 (iv) The individual has previously performed the services in accordance with paragraphs  
7 (i), (ii) and (iii) and/or holds himself/herself out to other persons as available to perform the same  
8 or similar services in accordance with (i), (ii) and (iii) while free from direction or control over  
9 performance of the services; and

10 (v) The individual maintains adequate liability insurance during the term of the contract.

11 (b) If the provider of the services furnishes and operates capital machinery and/or a  
12 specialized or heavy commercial vehicle as the major component of the service provided, it shall  
13 be considered a factor in demonstrating lack of direction or control by the procurer for purposes  
14 of satisfying the requirements in subdivision (a)(1) above.

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

18 (d) Notwithstanding the presumption established in this section and the inability to satisfy  
19 the requirements under subdivisions (a)(1) through (a)(3) above, a provider of services may still  
20 overcome the presumption by application of the remaining factors used by the Internal Revenue  
21 Service, with the exception of those excluded under subsection (c) above.

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

26 **28-42-8. Exemptions from "employment".** -- "Employment" does not include:

27 (1) Domestic service in a private home performed for a person who did not pay cash  
28 remuneration of one thousand dollars (\$1,000) or more in any calendar quarter after December  
29 31, 1977, in the current calendar year or the preceding calendar year to individuals employed in  
30 that domestic service in a private home;

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

34 (3) Service performed in the employ of any other state or any of its political

1 subdivisions, the United States government, an instrumentality of any other state or states or their  
2 political subdivisions, or of an instrumentality of the United States, except that if the Congress of  
3 the United States permits states to require any instrumentalities of the United States to make  
4 payments into an unemployment fund under a state unemployment compensation act, then, to the  
5 extent permitted by Congress, and from and after the date as of which permission becomes  
6 effective, all of the provisions of chapters 42 -- 44 of this title shall be applicable to those  
7 instrumentalities and to services performed for those instrumentalities, in the same manner, to the  
8 same extent, and on the same terms as to all other employers, employing units, individuals, and  
9 services. If this state is not certified by the Secretary of Labor under 26 U.S.C. section 3304 for  
10 any year, then the payments required of those instrumentalities with respect to that year shall be  
11 deemed to have been erroneously collected within the meaning of section 28-43-12 and shall be  
12 refunded by the director from the fund in accordance with section 28-43-12;

13 (4) Service performed:

14 (i) In the employ of:

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

16 (B) An organization which is operated primarily for religious purposes and which is  
17 operated, supervised, controlled, or principally supported by a church or convention or  
18 association of churches;

19 (ii) By a duly ordained, commissioned, or licensed minister of a church in the exercise of  
20 his or her ministry or by a member of a religious order in the exercise of duties required by that  
21 order;

22 (iii) In a facility conducted for the purpose of carrying out a program of rehabilitation for  
23 individuals whose earning capacity is impaired by age, physical or mental deficiency, or injury or  
24 providing remunerative work for individuals who, because of their impaired physical or mental  
25 capacity, cannot be readily absorbed in the competitive labor market, by an individual receiving  
26 that rehabilitation or remunerative work;

27 (iv) As part of an unemployment work relief or work training program assisted or  
28 financed in whole or in part by any federal agency or an agency of a state or one of its political  
29 subdivisions, by an individual receiving that work relief or work training;

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

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

32 (5) Service with respect to which unemployment compensation is payable under an  
33 unemployment compensation system established by an act of Congress. The director is authorized  
34 and directed to enter into agreements with the proper agencies under that act of Congress, which

1 agreements shall become effective ten (10) days after their publication as in the manner provided  
2 in section 28-42-34 to provide reciprocal treatment to individuals who have, after acquiring  
3 potential rights to benefits under chapters 42 -- 44 of this title acquired rights to unemployment  
4 compensation under that act of Congress, or who have, after acquiring potential rights to  
5 unemployment compensation under that act of Congress, acquired rights to benefits under those  
6 chapters;

7 (6) Service covered by an election duly approved by the agency charged with the  
8 administration of any other state or federal employment security law in accordance with an  
9 arrangement pursuant to section 28-42-58 during the effective period of that election, except as  
10 provided in section 28-42-3(15)(i);

11 (7) Services performed by an individual in any calendar quarter on or after January 1,  
12 1972 in the employ of any organization exempt from income tax under 26 U.S.C. section  
13 501(a)(other than services performed for an organization defined in section 28-42-3(24) or for  
14 any organization described in 26 U.S.C. section 401(a) or under 26 U.S.C. section 521) if the  
15 remuneration for that service is less than fifty dollars (\$50.00);

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

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

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

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

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

1 of employers;

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

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

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

10 (14) Services performed by a member of an ~~Americorp~~ [Americorps](#) program- : and

11 [\(15\) Services performed by a newspaper carrier.](#)

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

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EXPLANATION  
BY THE LEGISLATIVE COUNCIL  
OF

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RELATING TO LABOR AND LABOR RELATIONS -- EMPLOYMENT SECURITY--  
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1           This act would provide that the determination whether a person is an employee or  
2 independent contractor shall follow the IRS code, and also that a person performing any service  
3 except under section 28-42-18 would be presumed an employee with certain exceptions.

4           This act would take effect upon passage.

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