



125th MAINE LEGISLATURE

FIRST REGULAR SESSION-2011

Legislative Document

No. 315

S.P. 95

In Senate, February 8, 2011

An Act Relating to the Status of a Private Investigator as an Independent Contractor

Reference to the Committee on Labor, Commerce, Research and Economic Development suggested and ordered printed.

Joseph G. Carleton Jr.

JOSEPH G. CARLETON, JR.
Secretary of the Senate

Presented by Senator THOMAS of Somerset.
Cosponsored by Representative HASKELL of Portland.

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

2 **Sec. 1. 26 MRSA §1043, sub-§11, ¶F,** as amended by PL 2009, c. 637, §12, is
3 further amended to read:

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

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

8 (2) Service performed in the employ of the United States Government or an
9 instrumentality of the United States immune under the Constitution of the United
10 States from the contributions imposed by this chapter, except that on and after
11 January 1, 1940 to the extent that the Congress of the United States has permitted
12 states to require any instrumentalities of the United States to make payments into
13 an unemployment compensation fund under a state unemployment compensation
14 or employment security law, all of the provisions of this chapter are applicable to
15 such instrumentalities and to services performed for such instrumentalities in the
16 same manner, to the same extent and on the same terms as to all other employers,
17 employing units, individuals and services. If this State is not certified for any
18 year by the Secretary of Labor under section 3304 of the Federal Internal
19 Revenue Code, the payments required of such instrumentalities with respect to
20 that year must be refunded by the commissioner from the fund in the same
21 manner and within the same period as is provided in section 1225, subsection 5,
22 with respect to contributions erroneously collected;

23 (3) Service with respect to which unemployment compensation is payable under
24 an unemployment compensation system or employment security system
25 established by an Act of Congress. The commissioner is authorized and directed
26 to enter into agreements with the proper agencies under such an Act of Congress,
27 which agreements become effective 10 days after publication thereof in the
28 manner provided in section 1082, subsection 2, for regulations, to provide
29 reciprocal treatment to individuals who have, after acquiring potential rights to
30 benefits under this chapter, acquired rights to unemployment compensation under
31 such an Act of Congress, or who have, after acquiring potential rights to
32 unemployment compensation under such an Act of Congress, acquired rights to
33 benefits under this chapter;

34 (4) Agricultural labor as defined in subsection 1, except as provided in paragraph
35 A-2;

36 (4-1) Services performed by an individual who is an alien admitted to the United
37 States to perform agricultural labor pursuant to the United States Immigration
38 and Nationality Act, Sections 214(c) and 101(a) (15) (H);

39 (5) Domestic service in a private home, except as provided in paragraph A-3;

40 (6) Service performed by an individual in the employ of that individual's son,
41 daughter or spouse and service performed by a child under the age of 18 in the

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

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

- 1 (ii) As a member of a legislative body or a member of the judiciary of a
2 state or political subdivision of a state;
- 3 (iii) As a member of the State National Guard or Air National Guard;
- 4 (iv) As an employee serving on a temporary basis in case of fire, storm,
5 snow, earthquake, flood or similar emergency;
- 6 (v) In a position that, under or pursuant to the laws of this State, is
7 designated as a major nontenured policymaking or advisory position or a
8 policymaking or advisory position the performance of the duties of which
9 ordinarily does not require more than 8 hours per week; or
- 10 (vi) As an election official or election worker if the amount of
11 remuneration received by the individual during the calendar year for
12 services as an election official or election worker is less than \$1,000;
- 13 (29) Services performed by a hairdresser who holds a booth license and operates
14 within another hairdressing establishment if operated under a booth rental
15 agreement or other rental agreement;
- 16 (30) Services performed by a barber who holds a booth license and operates
17 within another barbering establishment if operated under a booth rental
18 agreement or other rental agreement;
- 19 (31) Services performed by a contract interviewer engaged in marketing research
20 or public opinion interviewing when such interviewing is conducted in the field
21 or over the telephone on premises not used or controlled by the person for whom
22 such contract services are being provided;
- 23 (32) After December 31, 1981, services performed by an individual on a boat
24 engaged in catching fish or other forms of aquatic animal life, unless those
25 services would be included in the definition of "employment" for federal
26 unemployment tax purposes under the Federal Unemployment Act, United States
27 Code, Title 26, Section 3306(c), as it may be amended. Also included in this
28 exemption are services performed in harvesting shellfish for depuration from
29 designated areas as authorized by Title 12, section 6856;
- 30 (33) Services performed by a member or leader of a musical group, band or
31 orchestra or an entertainer when the services are performed under terms of a
32 contract entered into by the leader or an agent of the musical group, band,
33 orchestra or entertainer with an employing unit for whom the services are being
34 performed, provided the leader or agent is not an employer by reason of
35 subsection 9 or of section 1222, subsection 3;
- 36 (34) Services performed in the delivery or distribution of newspapers or
37 magazines to the ultimate consumer by an individual who is compensated by
38 receiving or retaining a commission or profit on the sale of the newspaper or
39 magazine;
- 40 (35) Services performed by a homemaker in the knitted outerwear industry as
41 those terms are defined, on the effective date of this subparagraph, in 29 Code of
42 Federal Regulations, Part 530, Section 530.1;

- 1 (36) Service performed by a full-time student, as defined in subsection 30, in the
2 employ of a youth camp licensed under Title 22, section 2495 if the full-time
3 student performed services in the employ of the camp for less than 13 calendar
4 weeks in the calendar year and the camp:
- 5 (a) Did not operate for more than 7 months in the calendar year and did not
6 operate for more than 7 months in the preceding calendar year; or
- 7 (b) Had average gross receipts for any 6 months in the preceding calendar
8 year that were not more than 33 1/3% of its average gross receipts for the
9 other 6 months in the preceding calendar year;
- 10 (37) Services performed by an individual as a home stitcher as long as that
11 employment is not subject to federal unemployment tax;
- 12 (38) Services performed by a person licensed as a guide as required by Title 12,
13 section 12853, as long as that employment is not subject to federal
14 unemployment tax;
- 15 (39) Services performed by a direct seller as defined in 26 United States Code,
16 Section 3508, Subsection (b), Paragraph (2). This subparagraph does not include
17 a person selling major improvements or renovations to the structure of a home,
18 business or property;
- 19 (40) Services performed by lessees of taxicabs, as long as that employment is not
20 subject to federal unemployment tax. This subparagraph may not be construed to
21 affect a determination regarding a lessee's status as an independent contractor for
22 workers' compensation purposes;
- 23 (41) Services provided by a dance instructor to students of a dance studio when
24 there is a contract between the instructor and the studio under which the
25 instructor's services are not offered exclusively to the studio, the studio does not
26 control the scheduling of the days and times of classes other than beginning and
27 end dates, the instructor is paid by the class and not on an hourly or salary basis,
28 the compensation rate is the result of negotiation between the instructor and the
29 studio and the instructor is given the freedom to develop the curriculum;
- 30 (42) Services performed by participants enrolled in programs or projects under
31 the national service laws including the federal National and Community Service
32 Act of 1990, as amended, 42 United States Code, Section 12501 et seq., and the
33 federal Domestic Volunteer Service Act, as amended, 42 United States Code,
34 Section 4950 et seq.;
- 35 (43) Services of an author in furnishing text or other material to a publisher who:
- 36 (a) Does not control the author's work except to propose topics or to edit
37 material submitted;
- 38 (b) Does not restrict the author from publishing elsewhere;
- 39 (c) Furnishes neither a place of employment nor equipment for the author's
40 use;
- 41 (d) Does not direct or control the time devoted to the work; and

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- (e) Pays only for material that is accepted for publication.
- This exception does not apply if the employment is subject to federal unemployment tax; ~~and~~
- (44) Services provided by an owner-operator of a truck or truck tractor while it is leased to a motor carrier, as defined in 49 Code of Federal Regulations, 390.5 (2000), as long as that employment is not subject to federal unemployment tax; and
 - (45) Services performed by a private investigator, as defined in Title 32, section 8103, subsection 5, if the following requirements are met:
 - (a) There is a written contract between the private investigator and the party requesting services;
 - (b) The private investigator offering the services operates independently of the party requesting services, except for the time frame and quality of finished work as specified in the contract;
 - (c) Compensation for services is negotiated between the 2 parties and is paid for each service performed; and
 - (d) The party requesting services furnishes neither equipment nor the place of employment to the private investigator.

SUMMARY

This bill excepts a private investigator from the definition of "employment" in the Employment Security Law if there is a written contract between the parties; the private investigator operates independently; compensation for services is negotiated; and the party requesting services furnishes neither equipment nor the place of employment to the private investigator.