STATE OF OKLAHOMA

2nd Session of the 44th Legislature (1994)

HOUSE BILL NO. 2443 By: Webb

AS INTRODUCED

An Act relating to labor; amending 40 O.S. 1991, Sections 1-210, as last amended by Section 5, Chapter 360, O.S.L. 1993, 3-301, as amended by Section 16, Chapter 219, O.S.L. 1993 and 3-806, as amended by Section 29, Chapter 219, O.S.L. 1993 (40 O.S. Supp. 1993, Sections 1-210, 3-301 and 3-806), which relate to the Employment Security Act of 1980; providing exemption for certain individuals from certain unemployment contribution; providing exception; requiring credit of certain penalties upon compliance with certain report requirements; providing an effective date; and declaring an emergency.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 40 O.S. 1991, Section 1-210, as last amended by Section 5, Chapter 360, O.S.L. 1993 (40 O.S. Supp. 1993, Section 1-210), is amended to read as follows:

Section 1-210. EMPLOYMENT. "Employment" means:

(1) Any service performed prior to January 1, 1972, which was employment as defined in this section, prior to such date, and subject to the other provisions of this section, service performed

after December 31, 1971, including service in interstate commerce by:

(a) any officer of a corporation;

(b) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an employee; or

(c) any individual other than an individual who is an employee under subparagraphs (a) or (b) of this paragraph who performs services for remuneration for any person:

(i) as an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages other than milk, or laundry or dry cleaning services, for his principal;

(ii) as a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal, except for sideline sales activities on behalf of some other person, of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants or other similar establishments for merchandise for resale or supplies for use in their business operations;

(d) provided, that for purposes of subparagraph (c) of this paragraph, the term "employment" shall include services described in divisions (i) and (ii) of subparagraph (c) above performed after December 31, 1971, if:

(i) the contract of service contemplates that substantially all of the services are to be performed personally by such individual;

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

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

(2) Service performed after December 31, 1971, and prior to January 1, 1978, by an individual in the employ of this state or any of its instrumentalities, or in the employ of this state and one or more other states or their instrumentalities, for a hospital or institution of higher education, located in this state, including seasonal or temporary employment.

(3) (a) Service performed after December 31, 1971, and prior to January 1, 1978, in the employ of this state, other than services defined in paragraph (2) of this section; that is, each officer or employee in the service of the State of Oklahoma who, after December 31, 1971, and prior to January 1, 1978, receives his compensation for service rendered to the State of Oklahoma on a warrant or check issued pursuant to a payroll certified by a department or by an elected or duly appointed officer of this state or who receives payment for the performance of personal services on a warrant issued pursuant to a payroll certified by a department and drawn by the State Treasurer against appropriations made by the Legislature from any state fund or against trust funds held by the State

Treasurer, excluding any person chosen by election or appointment to fill an elective office, excluding seasonal or temporary employment, and excluding any services performed by an inmate of a state penal institution.

(b) Service performed after December 31, 1977, in the employ of this state or any of its instrumentalities or any political subdivision thereof or any of its instrumentalities or any instrumentality of more than one of the foregoing or any instrumentality of any of the foregoing and one or more other states or political subdivisions; provided, that such service is excluded from "employment" as defined in the Federal Unemployment Tax Act, 26 U.S.C., Section 3306(c)(7), and is not excluded from "employment" under paragraph (7) of this section.

(4) Service performed after December 31, 1971, by an individual in the employ of a community chest, fund, foundation or corporation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation and which does not participate in, or intervene in, including the publishing or distributing of statements, any political campaign on behalf of any candidate for public office; provided that such organization had four or more individuals in employment for some portion of a day in each of twenty (20) different weeks, whether or not such weeks were consecutive, within either the current or preceding calendar year, regardless of whether they were employed at the same moment of time.

(5) Service performed after December 31, 1977, by an individual in agricultural labor as defined in division (ii) of subparagraph (a) of paragraph (15) of this section when:

(a) such service is performed for a person who:

(i) during any calendar quarter in either the current or the preceding calendar year paid remuneration in cash of Twenty Thousand Dollars ($20,000.00) or more to individuals employed in agricultural labor; or

(ii) for some portion of a day in each of twenty (20) different calendar weeks, whether or not such weeks were consecutive, in either the current or the preceding calendar year, employed in agricultural labor ten or more individuals, regardless of whether they were employed at the same moment of time.

(b) for the purposes of this paragraph any individual who is a member of a crew furnished by a crew leader to perform service in agricultural labor for any other person shall be treated as an employee of such crew leader:

(i) if such crew leader holds a valid certificate of registration under the Farm Labor Contractor Registration Act of 1963, Public Law 95-562, 29 U.S.C., Sections 1801 through 1872; or substantially all the members of such crew operate or maintain tractors, mechanized harvesting or crop-dusting equipment, or any other mechanized equipment, which is provided by such crew leader; and

(ii) if such individual is not an employee of such other person within the meaning of paragraph (1)

of this section or subparagraph (d) of this paragraph.

(c) for the purposes of this paragraph, in the case of any individual who is furnished by a crew leader to perform service in agricultural labor for any other person and who is not treated as an employee of such crew leader under subparagraph (b) of this paragraph:

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

(ii) such other person shall be treated as having paid cash remuneration to such individual in an amount equal to the amount of cash remuneration paid to such individual by the crew leader, either on his own behalf or on behalf of such other person, for the service in agricultural labor performed for such other person.

(d) for the purposes of this paragraph, the term "crew leader" means an individual who:

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

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

(iii) has not entered into a written agreement with such other person (farm operator) under which such individual is designated as an employee of such other person.

(6) The term "employment" shall include domestic service after December 31, 1977, in a private home, local college club or local chapter of a college fraternity or sorority performed for a person

who paid cash remuneration of One Thousand Dollars ($1,000.00) or more after December 31, 1977, in the current calendar year or the preceding calendar year to individuals employed in such domestic service in any calendar quarter.

(7) For the purposes of paragraphs (2), (3) and (4) of this section the term "employment" does not apply to service performed:

(a) in the employ of:

(i) a church or convention or association of churches; or

(ii) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

(b) by a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

(c) prior to January 1, 1978, in the employ of a school which is not an institution of higher education; after December 31, 1977, in the employ of a governmental entity referred to in paragraphs (2) and (3) of this section if such service is performed by an individual in the exercise of duties:

(i) as an elected official;

(ii) as a member of a legislative body, or a member of the judiciary of a state or political subdivision;

(iii) as a member of the State National Guard or Air National Guard;

(iv) as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood or similar emergency;

(v) in a position which, under or pursuant to the laws of this state, is designated as a major nontenured policymaking or advisory position, or a policymaking or advisory position the performance of the duties of which ordinarily does not require more than eight (8) hours per week;

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

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

(f) prior to January 1, 1978, for a hospital in a state prison or other state correctional institution by an inmate of the prison or correctional institution and after December 31, 1977, by an inmate of a custodial or penal institution.

(8) The term "employment" shall include the service of an individual who is a citizen of the United States, performed outside the United States, except in Canada, after December 31, 1971, in the

employ of an American employer other than service which is deemed "employment" under the provisions of paragraphs (11) or (12) of this section or the parallel provisions of another state's law, if:

(a) the employer's principal place of business in the United States is located in this state;

(b) the employer has no place of business in the United States, but:

(i) the employer is an individual who is a resident of this state;

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

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

(c) none of the criteria of subparagraphs (a) and (b) of this paragraph are met but the employer has elected coverage in this state or, the employer having failed to elect coverage in any state, the individual has filed a claim for benefits, based on such service, under the law of this state;

(d) an "American employer", for purposes of this subsection, means a person who is:

(i) an individual who is a resident of the United States;

(ii) a partnership if two-thirds or more of the partners are residents of the United States;

(iii) a trust, if all of the trustees are residents of the United States; or

(iv) a corporation organized under the laws of the United States or of any state; and

(e) the term "United States", for the purposes of this subsection, includes the states, the District of Columbia, the Commonwealth of Puerto Rico and the Virgin Islands.

(9) Notwithstanding paragraph (11) of this section, all service performed after December 31, 1971, by an officer or member of the crew of an American vessel on or in connection with such vessel, if the operating office, from which the operations of such vessel operating on navigable waters within, or within and without, the United States are ordinarily and regularly supervised, managed, directed and controlled is within this state.

(10) Notwithstanding any other provisions of the Employment Security Act of 1980, Section 1-101 et seq. of this title, "employment":

(a) includes any service with respect to which a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund~~,~~; and

(b) includes any service which is required to be "employment" for full tax credit to be allowed against the tax imposed by the Federal Unemployment Tax Act of 1954, Public Law 591, Chapter 736, as amended, 26 U.S.C., Section 3301 et seq.

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

(a) the service is localized in this state; or

(b) the service is not localized in any state but some of the service is performed in this state and:

(i) the individual's base of operations, or, if there is no base of operations, then the place from

which the individual's employment is directed or controlled is in this state; or

(ii) the individual's 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.

(12) (a) Services covered by an election pursuant to Section 3-203 of this title~~,~~; and

(b) services covered by an arrangement pursuant to Section 4-701 et seq. of this title between the Commission and the agency charged with the administration of any other state or federal unemployment compensation law, pursuant to which all services performed by an individual for an employing unit are deemed to be performed entirely within this state, shall be deemed to be employment if the Commission has approved an election of the employing unit for whom such services are performed, pursuant to which the entire service of such individual during the period covered by such election is deemed to be insured work.

(13) Service shall be deemed to be localized within a state if:

(a) the service is performed entirely within such state; or

(b) the service is performed both within and without such state, but the service performed without such state is incidental to the individual's service within the state; for example, is temporary or transitory in nature or consists of isolated transactions.

(14) Notwithstanding any other provision of this subsection, services performed by an individual for wages or under any contract

of hire shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the Commission that:

(a) such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of hire and in fact; and

(b) such individual is customarily engaged in an independently established trade, occupation, profession, or business; or

(c) such service is outside the usual course of the business for which such service is performed and that such service is performed outside of all the places of business of the enterprise for which such service is performed.

(15) The term "employment" shall not include:

(a) (i) services performed prior to January 1, 1978, in the employ of the owner or tenant operating a farm, in connection with the cultivation of the soil, the harvesting of crops, or the raising, feeding, or management of livestock, poultry, bees, furbearing animals and wildlife, nurseries, or greenhouses or in connection with the processing, packing or marketing of produce of such farms, nurseries or greenhouses and as an incident to such operations, as provided in this division.

(ii) services performed after December 31, 1977, by an individual in agricultural labor, except as provided under paragraph (5) of this section. For purposes of this subparagraph, the term "agricultural labor" means remunerated service

performed in agricultural labor as defined in the Federal Unemployment Tax Act, 26 U.S.C. 3306(k)~~.~~;

(b) domestic service, except as provided under paragraph (6) of this section, in a private home, local college club, or local chapter of a college fraternity or sorority;

(c) service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one (21) in the employ of his father or mother, or both father and mother;

(d) service performed in the employ of the United States government or an instrumentality of the United States exempt under the Constitution of the United States from the contributions imposed by the Employment Security Act of 1980, except that to the extent that the Congress of the United States shall permit states to require any instrumentalities of the United States to make payments into an unemployment fund under a state unemployment compensation law, all of the provisions of the Employment Security Act of 1980 shall be applicable to such instrumentalities, and to services performed for such instrumentalities, in the same manner, to the same extent, and on the same terms as to all other employers, employing units, individuals and services; provided that if this state shall not be certified for any year by the Secretary of Labor of the United States under Section 3304(c) of the Federal Internal Revenue Code, 26 U.S.C., Section 3304(c), the payments required of such instrumentalities with respect to such year shall be refunded by the Commission from the fund in the same manner and within the same period as is provided in

Section 3-304 of this title with respect to contributions erroneously collected;

(e) prior to January 1, 1978, service performed in the employ of this state or of any other state, or of any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by this state or by one or more states or political subdivisions; and any service performed in the employ of any instrumentality of this state or of one or more states or political subdivisions to the extent that the instrumentality is, with respect to such service, exempt under the Constitution of the United States from the tax imposed by Section 3301 of the Federal Internal Revenue Code, 26 U.S.C. 3301, except as otherwise provided in paragraphs (2) and (3) of this section;

(f) service with respect to which unemployment compensation is payable under an unemployment compensation system established by an act of Congress;

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

(h) service performed in the employ of an instrumentality wholly owned by a foreign government:

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

(ii) if the Commission finds that the United States Secretary of State has certified to the United States Secretary of the Treasury that the foreign government, with respect to whose instrumentality

exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States government and of instrumentalities thereof;

(i) service covered by an arrangement between the Commission and the agency charged with the administration of any other state or federal unemployment compensation law pursuant to which all services performed by an individual for an employing unit during the period covered by such employing unit's duly approved election, are deemed to be performed entirely within the jurisdiction of such other state or federal agency;

(j) service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to state law; and service performed as an intern in the employ of a hospital by an individual who has completed a four-year course in a medical school chartered or approved pursuant to state law;

(k) service performed by an individual for a person, firm, association, trust, partnership or corporation as an insurance agent, or as an insurance solicitor or as a licensed real estate agent, if all such service performed by such individual for such person is performed for remuneration solely by way of commissions or fees;

(l) service performed by an individual under the age of eighteen (18) in the delivery and distribution of

newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

(m) service performed in the employ of a school, college or university, if such service is performed:

(i) by a student who is enrolled and is regularly attending classes at such school, college, or university~~,~~; or

(ii) by the spouse of such a student, if such spouse is advised, at the time such spouse commences to perform such service, that:

(I) the employment of such spouse to perform such service is provided under a program to provide financial assistance to such student by such school, college, or university~~;~~, and

(II) such employment will not be covered by any program of unemployment insurance;

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

(o) service performed in the employ of a hospital, if such service is performed by a patient of such hospital;

(p) services performed by cooperative extension personnel holding federal appointments employed by state institutions of higher learning;

(q) earnings of employees being paid by state warrants who are presently covered by the Federal Unemployment Compensation Act, 5 U.S.C., Section 8501 et seq., by virtue of their federal status;

(r) cosmetology services performed by an individual in a beauty shop, as defined by Section 199.1 of Title 59 of the Oklahoma Statutes, pursuant to an agreement whereby the owner of the beauty shop leases or rents facilities for cosmetology to such individual;

(s) barbering services performed by an individual in a barber shop, as defined by Section 70 of Title 59 of the Oklahoma Statutes, pursuant to an agreement whereby the owner of the barber shop leases or rents facilities for barbering to such individual;

(t) in-home services performed in a medical care program such as the nontechnical medical care program, or social services program, as certified and approved by the Department of Human Services or the Federal Health Care Financing Administration or as a participant in a work or training program administered by the Department of Human Services;

(u) riding services performed by a jockey and services performed by a trainer of race horses in an approved race licensed by the Oklahoma Horse Racing Commission;

(v) service performed by an individual whose remuneration consists solely of commissions, overrides, bonuses, and differentials related to sales or other output derived from in-person sales to, or solicitation of

orders from, ultimate consumers primarily in the home, or otherwise than in a permanent retail establishment;

(w) service performed by a person, commonly referred to as "owner-operator", who owns or leases a truck-tractor or truck for hire, provided said owner-operator actually operates the truck-tractor or truck and, further, that the entity contracting with the owner-operator is not the lessor of the truck-tractor or truck;

~~x.~~ (x) services performed as a chopper of cotton who weeds or thins cotton crops by hand or hoe. This subsection shall be interpreted and applied consistently with the Federal Unemployment Tax Act, 26 U.S.C., Sections 3304(a)(6)(A) and 3306(k); and

(y) services performed by an individual who owns more than eighty percent (80%) of the stock of any corporation or company. Provided, such individual may elect to include these services as "employment" as defined under the provisions of Section 1-101 et seq. of this title.

SECTION 2. AMENDATORY 40 O.S. 1991, Section 3-301, as amended by Section 16, Chapter 219, O.S.L. 1993 (40 O.S. Supp. 1993, Section 3-301), is amended to read as follows:

Section 3-301. PENALTY AND INTEREST ON PAST-DUE CONTRIBUTIONS. A. If contributions are not paid on the date on which they are due and payable as prescribed by the Oklahoma Employment Security Commission, the whole or part thereafter remaining unpaid shall bear interest at the rate of one percent (1%) per month for each month or fraction thereof from and after such date until payment is received by the Commission. The date on which payment of contributions is

deemed to have been received may be determined by such rules as the Commission may prescribe.

B. If any employer fails or refuses to file contribution and wage reports required under the provisions of this act within fifteen (15) days after written notice has been mailed to the employer by the Commission or its representative regardless whether or not any wages or taxable wages were paid, there shall accrue a penalty of One Hundred Dollars ($100.00) and in addition to such penalty, there shall be a penalty of ten percent (10%) added to the total contributions due, collected and paid. Such penalties shall be in addition to any interest due. The provisions of this subsection shall not apply to employers as provided in subsection B of Section 3-806 of this title. <u>If any employer subsequently files the overdue contribution and wage reports in accordance with the provisions of Section 3-101 et seq. of this title after the penalty has been imposed, the Commission shall credit Seventy-five Dollars ($75.00) of the One Hundred Dollar ($100.00) penalty to the employer on any subsequent contribution and wage reports.</u>

SECTION 3. AMENDATORY 40 O.S. 1991, Section 3-806, as amended by Section 29, Chapter 219, O.S.L. 1993 (40 O.S. Supp. 1993, Section 3-806), is amended to read as follows:

Section 3-806. PAYMENT OF IN-LIEU CONTRIBUTIONS. A. At the end of each calendar quarter the Oklahoma Employment Security Commission shall notify in writing each nonprofit organization, or the agent of a group of such organizations, which has elected to make payments in lieu of contributions, the amount, if any, equal to the full amount of regular benefits plus one-half (1/2) of the amount of extended benefits paid by the Commission during such quarter that is attributable to service in the employ of such organization or the members of a group of such organizations. Such full amount shall include all amounts so paid to its former employees as benefits, including amounts paid in error. Such

notification shall be deemed and treated as an assessment of contributions and the payment of the amount owing shall be collected as contributions, interest, penalty and fees, if any, are collected, in accordance with the provisions of this act. The employer, or group of employers, shall have the rights and remedies provided by this act with respect to assessments of contributions, including the right of protest, hearing and appeal. If no protest is filed or if filed and confirmed by the Commission or its authorized representatives, said assessment shall be immediately due and payable and shall bear interest after forty-five (45) days at the rate of one percent (1%) per month until paid. If any nonprofit organization or group of organizations fails or refuses to pay said assessment after same has become delinquent within forty-five (45) days after written request has been mailed to such organization or the agent of such group by the Commission or its representative, a penalty of five percent (5%) of the amount due shall be added thereto, collected and paid. In the case of group accounts, assessments and penalty and interest provided in this subsection may be prorated in accordance with Section 3-809. All collections made shall be deposited in the Unemployment Compensation Fund.

B. Such electing organization, or group of organizations, shall file reports of wages paid, in the same time and manner as required of said nongovernmental employers for profit. If any such electing organization, or group of organizations, fails or refuses to file said wage report within fifteen (15) days after written notice a penalty of Ten Dollars ($10.00) for each day until such report is filed with a maximum of One Hundred Dollars ($100.00) is hereby imposed against such organization or group and shall be collected and paid. <u>If an organization subsequently files the overdue wage report in accordance with the provisions of Section 3-301 of this title, the Commission shall credit all but twenty-five percent (25%)</u>

of the penalties imposed by this section on any subsequent wage reports of the organization.

C. Payments made by any nonprofit organization under the provisions of this section shall not be deducted or deductible, in whole or in part, from the remuneration of individuals in the employ of the organization.

SECTION 4. This act shall become effective July 1, 1994.

SECTION 5. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

44-2-8611 JAF