

1 STATE OF OKLAHOMA

2 2nd Session of the 52nd Legislature (2010)

3 SUBCOMMITTEE
4 RECOMMENDATION

5 FOR ENGROSSED
6 SENATE BILL NO. 1280

By: Anderson of the Senate

and

Peters of the House

7
8
9
10 SUBCOMMITTEE RECOMMENDATION

11 An Act relating to labor; amending 40 O.S. 2001,
12 Section 1-210, as last amended by Section 3, Chapter
13 132, O.S.L. 2008 (40 O.S. Supp. 2009, Section 1-210),
14 which relates to definitions; modifying definition of
15 employment; modifying certain exemption for
16 Department of Human Services personal care programs;
17 providing an effective date; and declaring an
18 emergency.

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

20 SECTION 1. AMENDATORY 40 O.S. 2001, Section 1-210, as
21 last amended by Section 3, Chapter 132, O.S.L. 2008 (40 O.S. Supp.
22 2009, Section 1-210), is amended to read as follows:

23 Section 1-210. EMPLOYMENT.

24 "Employment" means:

1 (1) Any service, including service in interstate commerce,
2 performed by:

3 (a) any officer of a corporation; or

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

7 (2) (a) any service, including service in interstate commerce,
8 performed by any individual other than an individual
9 who is an employee under paragraph (1) of this section
10 who performs services for remuneration for any person:

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

16 (ii) as a traveling or city salesperson, other than as
17 an agent-driver or commission-driver, engaged
18 upon a full-time basis in the solicitation on
19 behalf of, and the transmission to, his or her
20 principal, except for sideline sales activities
21 on behalf of some other person, of orders from
22 wholesalers, retailers, contractors, or operators
23 of hotels, restaurants or other similar

24

1 establishments for merchandise for resale or
2 supplies for use in their business operations;

3 (b) provided, the term "employment" shall include services
4 described in divisions (i) and (ii) of subparagraph

5 (a) of this paragraph if:

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

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

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

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

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

17 (5) Service performed by an individual in agricultural labor as
18 defined in subparagraph (a) of paragraph (15) of this section when:

- 19 (a) the service is performed for a person who:
- 20 (i) during any calendar quarter in either the
21 calendar year or the preceding calendar year,
22 paid remuneration in cash of Twenty Thousand
23 Dollars (\$20,000.00) or more to individuals
24 employed in agricultural labor; or

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

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

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

22 (ii) if the individual is not an employee of the other
23 person within the meaning of paragraph (1) of
24

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

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

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

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

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

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

21 (ii) pays, either on his or her own behalf or on
22 behalf of another person, the individuals so
23 furnished by the crew leader for the service in
24 agricultural labor performed by them; and

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

5 (6) The term "employment" shall include domestic service in a
6 private home, local college club or local chapter of a college
7 fraternity or sorority performed for a person who paid cash
8 remuneration of One Thousand Dollars (\$1,000.00) or more in the
9 calendar year or the preceding calendar year to individuals employed
10 in such domestic service in any calendar quarter.

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

13 (a) in the employ of:

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

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

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

1 (c) in the employ of a governmental entity referred to in
2 paragraph (3) of this section if the service is
3 performed by an individual in the exercise of duties:

4 (i) as an elected official;

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

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

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

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

20 (vi) as an election official or election worker if the
21 amount of remuneration received by the individual
22 during the calendar year for services as an
23 election official or election worker is less than
24 One Thousand Dollars (\$1,000.00);

1 (d) by an individual receiving rehabilitation or
2 remunerative work while participating or enrolled in a
3 program in a facility that:

4 (i) conducts a program of rehabilitation for
5 individuals whose earning capacity is impaired by
6 age, physical or mental deficiency, or injury; or

7 (ii) conducts a program that provides remunerative
8 work for individuals who, because of their
9 impaired mental or physical capacity cannot be
10 readily absorbed into the competitive labor
11 market;

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

17 (f) by an inmate of a custodial or penal institution.

18 (8) The term "employment" shall include the service of an
19 individual who is a citizen of the United States, performed outside
20 the United States, except in Canada, in the employ of an American
21 employer other than service which is deemed "employment" under the
22 provisions of paragraphs (11) or (12) of this section or the
23 parallel provisions of another state's law, if:

- 1 (a) the employer's principal place of business in the
2 United States is located in this state;
- 3 (b) the employer has no place of business in the United
4 States, but:
- 5 (i) the employer is an individual who is a resident
6 of this state;
- 7 (ii) the employer is a corporation which is organized
8 under the laws of this state; or
- 9 (iii) the employer is a partnership or a trust and the
10 number of the partners or trustees who are
11 residents of this state is greater than the
12 number who are residents of any one other state;
- 13 (c) none of the criteria of subparagraphs (a) and (b) of
14 this paragraph are met but the employer has elected
15 coverage in this state or, the employer having failed
16 to elect coverage in any state, the individual has
17 filed a claim for benefits, based on such service,
18 under the law of this state;
- 19 (d) an "American employer", for purposes of this
20 subsection, means a person who is:
- 21 (i) an individual who is a resident of the United
22 States;
- 23 (ii) a partnership if two-thirds or more of the
24 partners are residents of the United States;

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

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

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

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

16 (10) Notwithstanding any other provisions of the Employment
17 Security Act of 1980, "employment":

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

23 (b) includes any service which is required to be
24 "employment" for full tax credit to be allowed against

1 the tax imposed by the Federal Unemployment Tax Act of
2 1954, Public Law 591, Chapter 736, as amended, 26
3 U.S.C., Section 3301 et seq.

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

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

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

9 (i) the individual's base of operations, or, if there
10 is no base of operations, then the place from
11 which the individual's employment is directed or
12 controlled is in this state; or

13 (ii) the individual's base of operations or place from
14 which the service is directed or controlled is
15 not in any state in which some part of the
16 service is performed but the individual's
17 residence is in this state.

18 (12) (a) Services covered by an election pursuant to Section 3-
19 203 of this title; and

20 (b) services covered by an arrangement pursuant to Section
21 4-701 et seq. of this title between the Oklahoma
22 Employment Security Commission and the agency charged
23 with the administration of any other state or federal
24 unemployment compensation law, pursuant to which all

1 services performed by an individual for an employing
2 unit are deemed to be performed entirely within this
3 state,

4 shall be deemed to be employment if the Commission has approved
5 an election of the employing unit for whom such services are
6 performed, pursuant to which the entire service of such individual
7 during the period covered by such election is deemed to be insured
8 work.

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

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

11 or

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

17 (14) Notwithstanding any other provision of this subsection,
18 services performed by an individual for wages or under any contract
19 of hire shall be deemed to be employment subject to the Employment
20 Security Act of 1980 unless and until it is shown to the
21 satisfaction of the Commission that:

22 (a) such individual has been and will continue to be free
23 from control or direction over the performance of the
24

1 services, both under the contract of hire and in fact;
2 and

3 (b) such individual is customarily engaged in an
4 independently established business; or

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

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

11 (a) services performed by an individual in agricultural
12 labor, except as provided under paragraph (5) of this
13 section. Services performed by an individual who is a
14 nonresident alien admitted to the United States to
15 perform agricultural labor, pursuant to 8 U.S.C.
16 Sections 1101(a), 1184(c) and 1188. For purposes of
17 this subparagraph, the term "agricultural labor" means
18 remunerated service performed in agricultural labor as
19 defined in the Federal Unemployment Tax Act, 26
20 U.S.C., Section 3306(k);

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

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

6 (d) service performed in the employ of the United States
7 government or an instrumentality of the United States
8 exempt under the Constitution of the United States
9 from the contributions imposed by the Employment
10 Security Act of 1980, except that to the extent that
11 the Congress of the United States shall permit states
12 to require any instrumentalities of the United States
13 to make payments into an unemployment fund under a
14 state unemployment compensation law, all of the
15 provisions of the Employment Security Act of 1980
16 shall be applicable to such instrumentalities, and to
17 services performed for such instrumentalities, in the
18 same manner, to the same extent, and on the same terms
19 as to all other employers, employing units,
20 individuals and services; provided that if this state
21 shall not be certified for any year by the Secretary
22 of Labor of the United States under the Federal
23 Internal Revenue Code, 26 U.S.C., Section 3304(c), the
24 payments required of such instrumentalities with

1 respect to the year shall be refunded by the
2 Commission from the fund in the same manner and within
3 the same period as is provided in Section 3-304 of
4 this title with respect to contributions erroneously
5 collected;

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

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

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

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

18 (ii) if the Commission finds that the United States
19 Secretary of State has certified to the United
20 States Secretary of the Treasury that the foreign
21 government, with respect to whose instrumentality
22 exemption is claimed, grants an equivalent
23 exemption with respect to similar service
24 performed in the foreign country by employees of

1 the United States government and of
2 instrumentalities thereof;

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

12 (i) service performed as a student nurse in the employ of
13 a hospital or a nurses' training school by an
14 individual who is enrolled and is regularly attending
15 classes in a nurses' training school chartered or
16 approved pursuant to state law; and service performed
17 as an intern in the employ of a hospital by an
18 individual who has completed a four-year course in a
19 medical school chartered or approved pursuant to state
20 law;

21 (j) service performed by an individual for a person, firm,
22 association, trust, partnership or corporation as an
23 insurance agent, or as an insurance solicitor or as a
24 licensed real estate agent, if all such service

1 performed by such individual for such person is
2 performed for remuneration solely by way of
3 commissions or fees;

4 (k) service performed by an individual under the age of
5 eighteen (18) in the delivery and distribution of
6 newspapers or shopping news, not including delivery or
7 distribution to any point for subsequent delivery or
8 distribution, and services performed by an individual
9 eighteen (18) years of age or older who meets the
10 definition of a "direct seller" as defined in 26
11 U.S.C., Section 3508(b)(2), that states in pertinent
12 part:

13 (i) the individual must be engaged in the delivery or
14 distribution of newspapers or shopping news,
15 including any services directly related to such
16 trade or business,

17 (ii) substantially all the remuneration, whether or
18 not paid in cash, for the performance of the
19 services described in clause (i) of this
20 subdivision is directly related to sales or other
21 output, including the performance of services,
22 rather than the number of hours worked, and

23 (iii) the services performed by the individual are
24 performed pursuant to a written contract between

1 the person and the person for whom the services
2 are performed and the contract provides that the
3 person will not be treated as an employee with
4 respect to the services;

5 (l) service performed in the employ of a school, college
6 or university, if the service is performed:

7 (i) by a student who is enrolled and is regularly
8 attending classes at the school, college, or
9 university, or

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

13 (I) the employment of the spouse to perform the
14 service is provided under a program to
15 provide financial assistance to the student
16 by the school, college, or university, and

17 (II) the employment will not be covered by any
18 program of unemployment insurance;

19 (m) service performed by an individual who is enrolled at
20 a nonprofit or public educational institution which
21 normally maintains a regular faculty and curriculum
22 and normally has a regularly organized body of
23 students in attendance at the place where its
24 educational activities are carried on as a student in

1 a full-time program, taken for credit at the
2 institution, which combines academic instruction with
3 work experience, if the service is an integral part of
4 the program, and the institution has so certified to
5 the employer, except that this provision shall not
6 apply to service performed in a program established
7 for or on behalf of an employer or group of employers;

8 (n) service performed in the employ of a hospital, if the
9 service is performed by a patient of the hospital;

10 (o) services performed by cooperative extension personnel
11 holding federal appointments employed by state
12 institutions of higher learning;

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

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

22 (r) barbering services performed by an individual in a
23 barber shop, as defined by Section 61.5 of Title 59 of
24 the Oklahoma Statutes, pursuant to an agreement

1 whereby the owner of the barber shop leases or rents
2 facilities for barbering to such individual;

3 (s) ~~in-home services performed in a medical care program~~
4 ~~such as the personal care services program, or social~~
5 ~~services program, as certified and approved by the~~
6 ~~Department of Human Services or the Center for~~
7 ~~Medicare and Medicaid Services~~ or as a participant in
8 a work or training program administered by the
9 Department of Human Services;

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

13 (u) service performed by an individual whose remuneration
14 consists solely of commissions, overrides, bonuses,
15 and differentials related to sales or other output
16 derived from in-person sales to, or solicitation of
17 orders from, ultimate consumers primarily in the home,
18 or otherwise than in a permanent retail establishment;

19 (v) service performed by a person, commonly referred to as
20 "owner-operator", who owns or leases a truck-tractor
21 or truck for hire, provided the owner-operator
22 actually operates the truck-tractor or truck and,
23 further, that the entity contracting with the owner-

1 operator is not the lessor of the truck-tractor or
2 truck;

3 (w) services performed as a chopper of cotton who weeds or
4 thins cotton crops by hand or hoe. This subsection
5 shall be interpreted and applied consistently with the
6 Federal Unemployment Tax Act, 26 U.S.C., Sections
7 3304(a)(6)(A) and 3306(k); ~~or~~

8 (x) services performed for a private for-profit person or
9 entity by an individual as a landman:

10 (i) if the individual is engaged primarily in
11 negotiating for the acquisition or divestiture of
12 mineral rights or negotiating business agreements
13 that provide for the exploration for or
14 development of minerals,

15 (ii) if substantially all remuneration paid in cash or
16 otherwise for the performance of the services is
17 directly related to the completion by the
18 individual of the specific tasks contracted for
19 rather than to the number of hours worked by the
20 individual, and

21 (iii) if the services performed by the individual are
22 performed under a written contract between the
23 individual and the person for whom the services
24 are performed; provided that the individual is to

1 be treated as an independent contractor and not
2 as an employee with respect to the services
3 provided under the contract; or

4 (y) service performed by individuals as a participant in a
5 Transitional Jobs Program when:

6 (i) the Transitional Jobs Program provides temporary
7 employment for the participant while assisting
8 the participant with seeking regular employment
9 in the community,

10 (ii) the Transitional Jobs Program provides employment
11 counseling, job search and job placement
12 assistance,

13 (iii) participation in the Transitional Jobs Program
14 does not exceed one hundred eighty (180) calendar
15 days, and

16 (iv) the provider of the Transitional Jobs Program is
17 a nonprofit organization.

18 SECTION 2. This act shall become effective July 1, 2010.

19 SECTION 3. It being immediately necessary for the preservation
20 of the public peace, health and safety, an emergency is hereby
21 declared to exist, by reason whereof this act shall take effect and
22 be in full force from and after its passage and approval.

23
24 52-2-10419 SDR 03/29/10

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24