

3 Senate Bill No. 1280

4 SENATE BILL NO. 1280 - By: Anderson of the Senate and Peters of the
5 House.

6 An Act relating to labor; amending 40 O.S. 2001, Section 1-
7 210, as last amended by Section 3, Chapter 132, O.S.L. 2008
8 (40 O.S. Supp. 2009, Section 1-210), which relates to
9 definitions; modifying definition of employment; modifying
10 certain exemption for Department of Human Services personal
11 care programs; providing an effective date; and declaring an
12 emergency.

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

14 SECTION 1. AMENDATORY 40 O.S. 2001, Section 1-210, as
15 last amended by Section 3, Chapter 132, O.S.L. 2008 (40 O.S. Supp.
16 2009, Section 1-210), is amended to read as follows:

17 Section 1-210. EMPLOYMENT.

18 "Employment" means:

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

21 (a) any officer of a corporation; or

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

25 (2) (a) any service, including service in interstate commerce,
26 performed by any individual other than an individual

1 who is an employee under paragraph (1) of this section
2 who performs services for remuneration for any person:
3 (i) as an agent-driver or commission-driver engaged
4 in distributing meat products, vegetable
5 products, fruit products, bakery products,
6 beverages other than milk, or laundry or dry
7 cleaning services, for his or her principal; or
8 (ii) as a traveling or city salesperson, other than as
9 an agent-driver or commission-driver, engaged
10 upon a full-time basis in the solicitation on
11 behalf of, and the transmission to, his or her
12 principal, except for sideline sales activities
13 on behalf of some other person, of orders from
14 wholesalers, retailers, contractors, or operators
15 of hotels, restaurants or other similar
16 establishments for merchandise for resale or
17 supplies for use in their business operations;
18 (b) provided, the term "employment" shall include services
19 described in divisions (i) and (ii) of subparagraph
20 (a) of this paragraph if:
21 (i) the contract of service contemplates that
22 substantially all of the services are to be
23 performed personally by such individual;

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

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

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

17 (4) Service performed by an individual in the employ of a
18 community chest, fund, foundation or corporation, organized and
19 operated exclusively for religious, charitable, scientific, testing
20 for public safety, literary or educational purposes, or for the
21 prevention of cruelty to children or animals, no part of the net
22 earnings of which inures to the benefit of any private shareholder
23 or individual, no substantial part of the activities of which is

1 carrying on propaganda, or otherwise attempting to influence
2 legislation and which does not participate in, or intervene in,
3 including the publishing or distributing of statements, any
4 political campaign on behalf of any candidate for public office;
5 provided that such organization had four or more individuals in
6 employment for some portion of a day in each of twenty (20)
7 different weeks, whether or not such weeks were consecutive, within
8 either the calendar year or preceding calendar year, regardless of
9 whether they were employed at the same moment of time.

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

12 (a) the service is performed for a person who:

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

18 (ii) for some portion of a day in each of twenty (20)
19 different calendar weeks, whether or not the
20 weeks were consecutive, in either the calendar
21 year or the preceding calendar year, employed in
22 agricultural labor ten or more individuals,

1 regardless of whether they were employed at the
2 same moment of time.

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

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

17 (ii) if the individual is not an employee of the other
18 person within the meaning of paragraph (1) of
19 this section or subparagraph (d) of this
20 paragraph.

21 (c) for the purposes of this paragraph, in the case of any
22 individual who is furnished by a crew leader to
23 perform service in agricultural labor for any other

1 person and who is not treated as an employee of the
2 crew leader under subparagraph (b) of this paragraph:
3 (i) the other person and not the crew leader shall be
4 treated as the employer of the individual; and
5 (ii) the other person shall be treated as having paid
6 cash remuneration to the individual in an amount
7 equal to the amount of cash remuneration paid to
8 the individual by the crew leader, either on his
9 or her own behalf or on behalf of the other
10 person, for the service in agricultural labor
11 performed for the other person.

12 (d) for the purposes of this paragraph, the term "crew
13 leader" means an individual who:
14 (i) furnishes individuals to perform service in
15 agricultural labor for any other person;
16 (ii) pays, either on his or her own behalf or on
17 behalf of another person, the individuals so
18 furnished by the crew leader for the service in
19 agricultural labor performed by them; and
20 (iii) has not entered into a written agreement with the
21 other person (farm operator) under which the
22 individual is designated as an employee of the
23 other person.

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

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

9 (a) in the employ of:

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

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

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

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

- 1 (i) as an elected official;
- 2 (ii) as a member of a legislative body, or a member of
- 3 the judiciary of a state or political
- 4 subdivision;
- 5 (iii) as a member of the State National Guard or Air
- 6 National Guard;
- 7 (iv) as an employee serving on a temporary basis in
- 8 case of fire, storm, snow, earthquake, flood or
- 9 similar emergency;
- 10 (v) in a position which, under or pursuant to the
- 11 laws of this state, is designated as a major
- 12 nontenured policymaking or advisory position, or
- 13 a policymaking or advisory position the
- 14 performance of the duties of which ordinarily
- 15 does not require more than eight (8) hours per
- 16 week;
- 17 (vi) as an election official or election worker if the
- 18 amount of remuneration received by the individual
- 19 during the calendar year for services as an
- 20 election official or election worker is less than
- 21 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;

1 (ii) a partnership if two-thirds or more of the
2 partners are residents of the United States;
3 (iii) a trust, if all of the trustees are residents of
4 the United States; or
5 (iv) a corporation organized under the laws of the
6 United States or of any state; and
7 (e) the term "United States", for the purposes of this
8 subsection, includes the states, the District of
9 Columbia, the Commonwealth of Puerto Rico and the
10 Virgin Islands.

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

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

20 (a) includes any service with respect to which a tax is
21 required to be paid under any federal law imposing a
22 tax against which credit may be taken for

1 contributions required to be paid into a state
2 unemployment fund; and
3 (b) includes any service which is required to be
4 "employment" for full tax credit to be allowed against
5 the tax imposed by the Federal Unemployment Tax Act of
6 1954, Public Law 591, Chapter 736, as amended, 26
7 U.S.C., Section 3301 et seq.

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

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

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

13 (i) the individual's base of operations, or, if there
14 is no base of operations, then the place from
15 which the individual's employment is directed or
16 controlled is in this state; or

17 (ii) the individual's base of operations or place from
18 which the service is directed or controlled is
19 not in any state in which some part of the
20 service is performed but the individual's
21 residence is in this state.

22 (12) (a) Services covered by an election pursuant to Section 3-
23 203 of this title; and

1 (b) services covered by an arrangement pursuant to Section
2 4-701 et seq. of this title between the Oklahoma
3 Employment Security Commission and the agency charged
4 with the administration of any other state or federal
5 unemployment compensation law, pursuant to which all
6 services performed by an individual for an employing
7 unit are deemed to be performed entirely within this
8 state,

9 shall be deemed to be employment if the Commission has approved
10 an election of the employing unit for whom such services are
11 performed, pursuant to which the entire service of such individual
12 during the period covered by such election is deemed to be insured
13 work.

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

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

16 or

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

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

1 of hire shall be deemed to be employment subject to the Employment
2 Security Act of 1980 unless and until it is shown to the
3 satisfaction of the Commission that:

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

8 (b) such individual is customarily engaged in an
9 independently established business; or

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

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

16 (a) services performed by an individual in agricultural
17 labor, except as provided under paragraph (5) of this
18 section. Services performed by an individual who is a
19 nonresident alien admitted to the United States to
20 perform agricultural labor, pursuant to 8 U.S.C.
21 Sections 1101(a), 1184(c) and 1188. For purposes of
22 this subparagraph, the term "agricultural labor" means
23 remunerated service performed in agricultural labor as

1 defined in the Federal Unemployment Tax Act, 26
2 U.S.C., Section 3306(k);

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

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

12 (d) service performed in the employ of the United States
13 government or an instrumentality of the United States
14 exempt under the Constitution of the United States
15 from the contributions imposed by the Employment
16 Security Act of 1980, except that to the extent that
17 the Congress of the United States shall permit states
18 to require any instrumentalities of the United States
19 to make payments into an unemployment fund under a
20 state unemployment compensation law, all of the
21 provisions of the Employment Security Act of 1980
22 shall be applicable to such instrumentalities, and to
23 services performed for such instrumentalities, in the

1 same manner, to the same extent, and on the same terms
2 as to all other employers, employing units,
3 individuals and services; provided that if this state
4 shall not be certified for any year by the Secretary
5 of Labor of the United States under the Federal
6 Internal Revenue Code, 26 U.S.C., Section 3304(c), the
7 payments required of such instrumentalities with
8 respect to the year shall be refunded by the
9 Commission from the fund in the same manner and within
10 the same period as is provided in Section 3-304 of
11 this title with respect to contributions erroneously
12 collected;

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

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

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

21 (i) if the service is of a character similar to that
22 performed in foreign countries by employees of

1 the United States government or of an
2 instrumentality thereof, and
3 (ii) if the Commission finds that the United States
4 Secretary of State has certified to the United
5 States Secretary of the Treasury that the foreign
6 government, with respect to whose instrumentality
7 exemption is claimed, grants an equivalent
8 exemption with respect to similar service
9 performed in the foreign country by employees of
10 the United States government and of
11 instrumentalities thereof;

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

21 (i) service performed as a student nurse in the employ of
22 a hospital or a nurses' training school by an
23 individual who is enrolled and is regularly attending

1 classes in a nurses' training school chartered or
2 approved pursuant to state law; and service performed
3 as an intern in the employ of a hospital by an
4 individual who has completed a four-year course in a
5 medical school chartered or approved pursuant to state
6 law;

7 (j) service performed by an individual for a person, firm,
8 association, trust, partnership or corporation as an
9 insurance agent, or as an insurance solicitor or as a
10 licensed real estate agent, if all such service
11 performed by such individual for such person is
12 performed for remuneration solely by way of
13 commissions or fees;

14 (k) service performed by an individual under the age of
15 eighteen (18) in the delivery and distribution of
16 newspapers or shopping news, not including delivery or
17 distribution to any point for subsequent delivery or
18 distribution, and services performed by an individual
19 eighteen (18) years of age or older who meets the
20 definition of a "direct seller" as defined in 26
21 U.S.C., Section 3508(b)(2), that states in pertinent
22 part:

- 1 (i) the individual must be engaged in the delivery or
2 distribution of newspapers or shopping news,
3 including any services directly related to such
4 trade or business,
- 5 (ii) substantially all the remuneration, whether or
6 not paid in cash, for the performance of the
7 services described in clause (i) of this
8 subdivision is directly related to sales or other
9 output, including the performance of services,
10 rather than the number of hours worked, and
- 11 (iii) the services performed by the individual are
12 performed pursuant to a written contract between
13 the person and the person for whom the services
14 are performed and the contract provides that the
15 person will not be treated as an employee with
16 respect to the services;
- 17 (1) service performed in the employ of a school, college
18 or university, if the service is performed:
- 19 (i) by a student who is enrolled and is regularly
20 attending classes at the school, college, or
21 university, or

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

- 4 (I) the employment of the spouse to perform the
5 service is provided under a program to
6 provide financial assistance to the student
7 by the school, college, or university, and
8 (II) the employment will not be covered by any
9 program of unemployment insurance;

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

- 1 (n) service performed in the employ of a hospital, if the
2 service is performed by a patient of the hospital;
- 3 (o) services performed by cooperative extension personnel
4 holding federal appointments employed by state
5 institutions of higher learning;
- 6 (p) earnings of employees being paid by state warrants who
7 are presently covered by the Federal Unemployment
8 Compensation Act, 5 U.S.C., Section 8501 et seq., by
9 virtue of their federal status;
- 10 (q) cosmetology services performed by an individual in a
11 beauty shop, as defined by Section 199.1 of Title 59
12 of the Oklahoma Statutes, pursuant to an agreement
13 whereby the owner of the beauty shop leases or rents
14 facilities for cosmetology to such individual;
- 15 (r) barbering services performed by an individual in a
16 barber shop, as defined by Section 61.5 of Title 59 of
17 the Oklahoma Statutes, pursuant to an agreement
18 whereby the owner of the barber shop leases or rents
19 facilities for barbering to such individual;
- 20 (s) ~~in-home services performed in a medical care program~~
21 ~~such as the personal care services program, or social~~
22 ~~services program, as certified and approved by the~~
23 ~~Department of Human Services or the Center for~~

1 ~~Medicare and Medicaid Services~~ or as a participant in
2 a work or training program administered by the
3 Department of Human Services;

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

7 (u) service performed by an individual whose remuneration
8 consists solely of commissions, overrides, bonuses,
9 and differentials related to sales or other output
10 derived from in-person sales to, or solicitation of
11 orders from, ultimate consumers primarily in the home,
12 or otherwise than in a permanent retail establishment;

13 (v) service performed by a person, commonly referred to as
14 "owner-operator", who owns or leases a truck-tractor
15 or truck for hire, provided the owner-operator
16 actually operates the truck-tractor or truck and,
17 further, that the entity contracting with the owner-
18 operator is not the lessor of the truck-tractor or
19 truck;

20 (w) services performed as a chopper of cotton who weeds or
21 thins cotton crops by hand or hoe. This subsection
22 shall be interpreted and applied consistently with the

1 Federal Unemployment Tax Act, 26 U.S.C., Sections
2 3304(a)(6)(A) and 3306(k); or

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

5 (i) if the individual is engaged primarily in
6 negotiating for the acquisition or divestiture of
7 mineral rights or negotiating business agreements
8 that provide for the exploration for or
9 development of minerals,

10 (ii) if substantially all remuneration paid in cash or
11 otherwise for the performance of the services is
12 directly related to the completion by the
13 individual of the specific tasks contracted for
14 rather than to the number of hours worked by the
15 individual, and

16 (iii) if the services performed by the individual are
17 performed under a written contract between the
18 individual and the person for whom the services
19 are performed; provided that the individual is to
20 be treated as an independent contractor and not
21 as an employee with respect to the services
22 provided under the contract.

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

1 SECTION 3. It being immediately necessary for the preservation
2 of the public peace, health and safety, an emergency is hereby
3 declared to exist, by reason whereof this act shall take effect and
4 be in full force from and after its passage and approval.
5 COMMITTEE REPORT BY: COMMITTEE ON BUSINESS & LABOR, dated 2-8-10 -
6 DO PASS, As Coauthored.