

LEGISLATURE OF NEBRASKA

ONE HUNDRED SECOND LEGISLATURE

FIRST SESSION

LEGISLATIVE BILL 261

Introduced by Lathrop, 12.

Read first time January 11, 2011

Committee: Business and Labor

A BILL

- 1 FOR AN ACT relating to the Employment Security Law; to amend section
- 2 48-604, Reissue Revised Statutes of Nebraska; to provide
- 3 a direct seller exemption; to harmonize provisions; and
- 4 to repeal the original section.
- 5 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 48-604, Reissue Revised Statutes of
2 Nebraska, is amended to read:

3 48-604 As used in the Employment Security Law, unless the
4 context otherwise requires, employment shall mean:

5 (1) Any service performed, ~~after June 30, 1941,~~ including
6 service in interstate commerce, for wages under a contract of hire,
7 written or oral, express or implied;

8 (2) The term employment shall include an individual's
9 entire service, performed within or both within and without this
10 state if (a) the service is localized in this state, (b) the service
11 is not localized in any state but some of the service is performed in
12 this state and the base of operations or, if there is no base of
13 operations, then the place from which such service is directed or
14 controlled is in this state or the base of operations or place from
15 which such service is directed or controlled is not in any state in
16 which some part of the service is performed but the individual's
17 residence is in this state, (c) the service shall be deemed to be
18 localized within a state if (i) the service is performed entirely
19 within such state or (ii) the service is performed both within and
20 without such state, but the service performed without such state is
21 incidental to the individual's service within the state, for example,
22 is temporary or transitory in nature or consists of isolated
23 transactions;

24 (3) Services performed outside the state and services
25 performed outside the United States as follows:

1 (a) Services not covered under subdivision (2) of this
2 section and performed entirely without this state, with respect to no
3 part of which contributions are required under an unemployment
4 compensation law of any other state or of the federal government,
5 shall be deemed to be employment subject to the Employment Security
6 Law if the commissioner approves the election of the employer, for
7 whom such services are performed, that the entire service of such
8 individual shall be deemed to be employment subject to such law;

9 (b) Services of an individual wherever performed within
10 the United States or Canada if (i) such service is not covered under
11 the employment compensation law of any other state or Canada and (ii)
12 the place from which the service is directed or controlled is in this
13 state;

14 (c)(i) Services of an individual who is a citizen of the
15 United States, performed outside the United States except in Canada
16 in the employ of an American employer, other than service which is
17 deemed employment under subdivisions (2) and (3)(a) and (b) of this
18 section or the parallel provisions of another state's law, if:

19 (A) The employer's principal place of business in the
20 United States is located in this state;

21 (B) The employer has no place of business in the United
22 States, but the employer is an individual who is a resident of this
23 state; the employer is a corporation or limited liability company
24 which is organized under the laws of this state; or the employer is a
25 partnership or a trust and the number of the partners or trustees who

1 are residents of this state is greater than the number who are
2 residents of any other state; or

3 (C) None of the criteria of subdivisions (A) and (B) of
4 this subdivision are met, but the employer has elected coverage in
5 this state or, the employer having failed to elect coverage in any
6 state, the individual has filed a claim for benefits based on such
7 service under the laws of this state.

8 (ii) American employer, for the purposes of this
9 subdivision, shall mean: (A) An individual who is a resident of the
10 United States; (B) a partnership if two-thirds or more of the
11 partners are residents of the United States; (C) a trust if all the
12 trustees are residents of the United States; or (D) a corporation or
13 limited liability company organized under the laws of the United
14 States or of any state.

15 (iii) The term United States for the purpose of this
16 section includes the states, the District of Columbia, the Virgin
17 Islands, and the Commonwealth of Puerto Rico;

18 (4)(a) ~~Service performed prior to January 1, 1978, which~~
19 ~~is or was service in employment for this state or any instrumentality~~
20 ~~thereof immediately prior to September 2, 1977, including service~~
21 ~~performed after December 31, 1971, in the employ of this state or any~~
22 ~~of its instrumentalities, or in the employ of this state and one or~~
23 ~~more other states or their instrumentalities, for a hospital or~~
24 ~~institution of higher education located in this state; and service~~
25 ~~performed after December 31, 1977, in the employ of this state or any~~

1 political subdivision thereof or any instrumentality of any one or
2 more of the foregoing or any instrumentality which is wholly owned by
3 this state and one or more other states or political subdivisions, or
4 any service performed in the employ of any instrumentality of this
5 state or of any political subdivision thereof and one or more other
6 states or political subdivisions if such service is excluded from
7 employment as defined in the Federal Unemployment Tax Act, as ~~such~~
8 ~~act existed on September 1, 2001, amended,~~ solely by reason of 26
9 U.S.C. 3306(c)(7), ~~as such section existed on September 1, 2001,~~ and
10 is not otherwise excluded under this section;

11 (b) Service performed ~~after December 31, 1971,~~ by an
12 individual in the employ of a religious, charitable, educational, or
13 other organization, but only if the following conditions are met: (i)
14 The service is excluded from employment as defined in the Federal
15 Unemployment Tax Act, as ~~such act existed on September 1, 2001,~~
16 amended, solely by reason of 26 U.S.C. 3306(c)(8), ~~as such section~~
17 ~~existed on September 1, 2001,~~ and is not otherwise excluded under
18 this section; and (ii) the organization had four or more individuals
19 in employment for some portion of a day in each of twenty different
20 weeks, whether or not such weeks were consecutive, within either the
21 current or preceding calendar year, regardless of whether they were
22 employed at the same moment of time;

23 (c)(i) Service performed ~~after December 31, 1977,~~ by an
24 individual in agricultural labor as defined in subdivision (6)(a) of
25 this section when: (A) ~~Such~~ such service is performed for a person

1 who during any calendar quarter in either the current or preceding
2 calendar year paid remuneration in cash of twenty thousand dollars or
3 more to individuals employed in agricultural labor, or for some
4 portion of a day in each of twenty different calendar weeks, whether
5 or not such weeks were consecutive, in either the current or the
6 preceding calendar year, employed in agricultural labor ten or more
7 individuals, regardless of whether they were employed at the same
8 moment of time. ; and

9 ~~(B) Such service is not performed in agricultural labor~~
10 ~~if performed before January 1, 1984, by an individual who is an alien~~
11 ~~admitted to the United States to perform service in agricultural~~
12 ~~labor pursuant to sections 214(c) and 101(a)(15)(H) of the federal~~
13 ~~Immigration and Nationality Act, as such sections existed on~~
14 ~~September 1, 2001.~~

15 (ii) For purposes of this subdivision:

16 (A) Any individual who is a member of a crew furnished by
17 a crew leader to perform services in agricultural labor for any other
18 person shall be treated as an employee of such crew leader if such
19 crew leader holds a valid certificate of registration under the
20 Migrant and Seasonal Agricultural Worker Protection Act, as amended,
21 29 U.S.C. 1801 et seq. ; ~~as the act existed on September 1, 2001;~~
22 substantially all the members of such crew operate or maintain
23 tractors, mechanized harvesting or cropdusting equipment, or any
24 other mechanized equipment, which is provided by such crew leader;
25 and ~~if such individual is not an employee of such other person within~~

1 the meaning of any other provisions of this section;

2 (B) In case any individual who is furnished by a crew
3 leader to perform service in agricultural labor for any other person
4 and who is not treated as an employee of such crew leader under
5 subdivision (A) of this subdivision, such other person and not the
6 crew leader shall be treated as the employer of such individual and
7 such other person shall be treated as having paid cash remuneration
8 to such individual in an amount equal to the amount of cash
9 remuneration paid to such individual by the crew leader, either on
10 his or her own behalf or on behalf of such other person, for the
11 service in agricultural labor performed for such other person; and

12 (C) The term crew leader shall mean an individual who
13 furnishes individuals to perform service in agricultural labor for
14 any other person, pays, either on his or her own behalf or on behalf
15 of such other person, the individuals so furnished by him or her for
16 the service in agricultural labor performed by them, and has not
17 entered into a written agreement with such other person under which
18 such individual is designated as an employee of such other person;
19 and

20 (d) Service performed ~~after December 31, 1977,~~ by an
21 individual in domestic service in a private home, local college club,
22 or local chapter of a college fraternity or sorority if performed for
23 a person who paid cash remuneration of one thousand dollars or more
24 ~~after December 31, 1977,~~ in the current calendar year or the
25 preceding calendar year to individuals employed in such domestic

1 service in any calendar quarter;

2 (5) Services performed by an individual for wages,
3 including wages received under a contract of hire, shall be deemed to
4 be employment unless it is shown to the satisfaction of the
5 commissioner that (a) such individual has been and will continue to
6 be free from control or direction over the performance of such
7 services, both under his or her contract of service and in fact, (b)
8 such service is either outside the usual course of the business for
9 which such service is performed or such service is performed outside
10 of all the places of business of the enterprise for which such
11 service is performed, and (c) such individual is customarily engaged
12 in an independently established trade, occupation, profession, or
13 business. The provisions of this subdivision are not intended to be a
14 codification of the common law and shall be considered complete as
15 written;

16 (6) The term employment shall not include:

17 (a) Agricultural labor, except as provided in subdivision
18 (4)(c) of this section, including all services performed:

19 (i) On a farm, in the employ of any employer, in
20 connection with cultivating the soil or in connection with raising or
21 harvesting any agricultural or horticultural commodity, including the
22 raising, shearing, feeding, caring for, training, and management of
23 livestock, bees, poultry, fur-bearing animals, and wildlife;

24 (ii) In the employ of the owner, tenant, or other
25 operator of a farm, in connection with the operation, management,

1 conservation, improvement, or maintenance of such farm and its tools
2 and equipment or in salvaging timber or clearing land of brush and
3 other debris left by a windstorm, if the major part of such service
4 is performed on a farm;

5 (iii) In connection with the production or harvesting of
6 any commodity defined as an agricultural commodity in section 15(g)
7 of the ~~Federal~~ federal Agricultural Marketing Act, as ~~such section~~
8 ~~existed on September 1, 2001; amended, 12 U.S.C. 1141j,~~ in connection
9 with the operation or maintenance of ditches, canals, reservoirs, or
10 waterways, not owned or operated for profit, used exclusively for
11 supplying and storing water for farming purposes;

12 (iv)(A) In the employ of the operator of a farm in
13 handling, planting, drying, packing, packaging, processing, freezing,
14 grading, storing, or delivering to storage or to market or to a
15 carrier for transportation to market, in its unmanufactured state,
16 any agricultural or horticultural commodity, but only if such
17 operator produced more than one-half of the commodity with respect to
18 which such service is performed, or (B) in the employ of a group of
19 operators of farms, or a cooperative organization of which such
20 operators are members, in the performance of service described in
21 subdivision (A) of this subdivision, but only if such operators
22 produced more than one-half of the commodity with respect to which
23 such service is performed. Subdivisions (A) and (B) of this
24 subdivision shall not be deemed to be applicable with respect to
25 service performed in connection with commercial canning or commercial

1 freezing or in connection with any agricultural or horticultural
2 commodity after its delivery to a terminal market for distribution
3 for consumption; or

4 (v) On a farm operated for profit if such service is not
5 in the course of the employer's trade or business.

6 As used in this section, the term farm includes stock,
7 dairy, poultry, fruit, fur-bearing animal, and truck farms,
8 plantations, ranches, nurseries, ranges, greenhouses, or other
9 similar structures used primarily for the raising of agricultural or
10 horticultural commodities, and orchards;

11 (b) Domestic service, except as provided in subdivision
12 (4)(d) of this section, in a private home, local college club, or
13 local chapter of a college fraternity or sorority;

14 (c) Service not in the course of the employer's trade or
15 business performed in any calendar quarter by an employee, unless the
16 cash remuneration paid for such service is fifty dollars or more and
17 such service is performed by an individual who is regularly employed
18 by such employer to perform such service and, for the purposes of
19 this subdivision, an individual shall be deemed to be regularly
20 employed by an employer during a calendar quarter only if (i) on each
21 of some twenty-four days during such quarter such individual performs
22 for such employer for some portion of the day service not in the
23 course of the employer's trade or business, or (ii) such individual
24 was regularly employed, as determined under subdivision (i) of this
25 subdivision, by such employer in the performance of such service

1 during the preceding calendar quarter;

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

6 (e) Service performed in the employ of the United States
7 Government or an instrumentality of the United States immune under
8 the Constitution of the United States from the contributions imposed
9 by sections 48-648 and 48-649, except that, to the extent that the
10 Congress of the United States shall permit states to require any
11 instrumentalities of the United States to make payments into an
12 unemployment fund under a state unemployment compensation act, all of
13 the Employment Security Law shall be applicable to such
14 instrumentalities and to services performed for such
15 instrumentalities in the same manner, to the same extent, and on the
16 same terms as to all other employers, individuals, and services,
17 except that if this state is not certified for any year by the
18 Secretary of Labor of the United States under section 3304 of the
19 Internal Revenue Code as defined in section 49-801.01, the payments
20 required of such instrumentalities with respect to such year shall be
21 refunded by the commissioner from the fund in the same manner and
22 within the same period as is provided in section 48-660, with respect
23 to contributions erroneously collected;

24 (f) Service performed in the employ of this state or any
25 political subdivision thereof or any instrumentality of any one or

1 more of the foregoing if such services are performed by an individual
2 in the exercise of his or her duties: (i) As an elected official;
3 (ii) as a member of the legislative body or a member of the judiciary
4 of a state or political subdivision thereof; (iii) as a member of the
5 Army National Guard or Air National Guard; (iv) as an employee
6 serving on a temporary basis in case of fire, storm, snow,
7 earthquake, flood, or similar emergency; (v) in a position which,
8 under or pursuant to the state law, is designated a major nontenured
9 policymaking or advisory position, or a policymaking or advisory
10 position, the performance of the duties of which ordinarily does not
11 require more than eight hours per week; or (vi) as an election
12 official or election worker if the amount of remuneration received by
13 the individual during the calendar year for services as an election
14 official or election worker is less than one thousand dollars;

15 (g) For the purposes of subdivisions (4)(a) and (4)(b) of
16 this section, service performed:

17 (i) In the employ of (A) a church or convention or
18 association of churches or (B) an organization which is operated
19 primarily for religious purposes and which is operated, supervised,
20 controlled, or principally supported by a church or convention or
21 association of churches;

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

1 ~~(iii) Prior to January 1, 1978, in the employ of a school~~
2 ~~which is not an institution of higher education;~~

3 ~~(iv)~~-(iii) In a facility conducted for the purpose of
4 carrying out a program of rehabilitation for an individual whose
5 earning capacity is impaired by age or physical or mental deficiency
6 or injury, or providing remunerative work for the individuals who
7 because of their impaired physical or mental capacity cannot be
8 readily absorbed in the competitive labor market, by an individual
9 receiving such rehabilitation or remunerative work;

10 ~~(v)~~-(iv) As part of an unemployment work relief or work-
11 training program assisted or financed in whole or in part by any
12 federal agency or an agency of a state or political subdivision
13 thereof, by an individual receiving such work relief or work
14 training; or

15 ~~(vi) Prior to January 1, 1978, for a hospital in a state~~
16 ~~prison or other state correctional institution by an inmate of the~~
17 ~~prison or correctional institution and after December 31, 1977, by~~
18 (v) By an inmate of a custodial or penal institution;

19 (h) Service with respect to which unemployment
20 compensation is payable under an unemployment compensation system
21 established by an act of Congress;

22 (i) Service performed in any calendar quarter in the
23 employ of any organization exempt from income tax under section
24 501(a) of the Internal Revenue Code as defined in section 49-801.01,
25 other than an organization described in section 401(a) of the

1 Internal Revenue Code as defined in section 49-801.01, or under
2 section 521 thereof, if the remuneration for such service is less
3 than fifty dollars;

4 (j) Service performed in the employ of a school, college,
5 or university, if such service is performed (i) by a student who is
6 enrolled, regularly attending classes at, and working for such
7 school, college, or university pursuant to a financial assistance
8 arrangement with such school, college, or university or (ii) by the
9 spouse of such student, if such spouse is advised, at the time such
10 spouse commences to perform such service, that (A) the employment of
11 such spouse to perform such service is provided under a program to
12 provide financial assistance to such student by such school, college,
13 or university and (B) such employment will not be covered by any
14 program of unemployment insurance;

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

22 (l) Service performed by an individual as a real estate
23 salesperson, as an insurance agent, or as an insurance solicitor, if
24 all such service performed by such individual is performed for
25 remuneration solely by way of commission;

1 (m) Service performed by an individual under the age of
2 eighteen in the delivery or distribution of newspapers or shopping
3 news, not including delivery or distribution to any point for
4 subsequent delivery or distribution;

5 (n) Service performed by an individual in the sale,
6 delivery, or distribution of newspapers or magazines under a written
7 contract in which (i) the individual acknowledges that the individual
8 performing the service and the service are not covered and (ii) the
9 newspapers and magazines are sold by him or her at a fixed price with
10 his or her compensation being based on the retention of the excess of
11 such price over the amount at which the newspapers or magazines are
12 charged to him or her, whether or not he or she is guaranteed a
13 minimum amount of compensation for such service, or is entitled to be
14 credited with the unsold newspapers or magazines turned back;

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

1 (p) Service performed in the employ of a hospital, if
2 such service is performed by a patient of the hospital;

3 (q) Service performed for a motor carrier, as defined in
4 49 U.S.C. 13102, ~~as such section existed on September 1, 2001,~~ or
5 section 75-302, as amended, by a lessor leasing one or more motor
6 vehicles driven by the lessor or one or more drivers provided by the
7 lessor under a lease, with the motor carrier as lessee, executed
8 pursuant to 49 C.F.R. part 376, ~~as such part existed on September 1,~~
9 ~~2001,~~ Title 291, Chapter 3, as amended, of the rules and regulations
10 of the Public Service Commission, or the rules and regulations of the
11 Division of Motor Carrier Services. This shall not preclude the
12 determination of an employment relationship between the lessor and
13 any personnel provided by the lessor in the conduct of the service
14 performed for the lessee; ~~The existence of such a lease either~~
15 ~~prior to, on the date of, or after August 26, 1983, shall preclude a~~
16 ~~determination of liability as defined by the Employment Security Law~~
17 ~~after September 1, 1982;~~

18 (r) Service performed by an individual for a business
19 engaged in compilation of marketing data bases if such service
20 consists only of the processing of data and is performed in the
21 residence of the individual; ~~The performance of such service prior~~
22 ~~to, on, or after August 26, 1983, shall preclude a determination of~~
23 ~~liability as defined by the Employment Security Law after January 1,~~
24 ~~1983;~~

25 (s) Service performed by an individual as a volunteer

1 research subject who is paid on a per study basis for scientific,
2 medical, or drug-related testing for any organization other than one
3 described in section 501(c)(3) of the Internal Revenue Code as
4 defined in section 49-801.01 or any governmental entity;

5 (t) Service performed by a direct seller if:

6 (i) Such person is engaged in sales primarily in person
7 and is:

8 (A) ~~engaged~~ Engaged in the trade or business of selling
9 or soliciting the sale of consumer products or services to any buyer
10 on a buy-sell basis or a deposit-commission basis for resale, by the
11 buyer or any other person, in the home or otherwise than in a
12 permanent retail establishment; ~~or~~

13 (B) ~~engaged~~ Engaged in the trade or business of selling
14 or soliciting the sale of consumer products or services in the home
15 or otherwise than in a permanent retail establishment; or

16 (C) Engaged in the trade or business of the delivering or
17 distribution of newspapers or shopping news, including any services
18 directly related to such trade or business;

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

24 (iii) ~~the~~ The services performed by the person are
25 performed pursuant to a written contract between such person and the

1 person for whom the services are performed and the contract provides
2 that the person will not be treated as an employee for federal and
3 state tax purposes. Sales by a person whose business is conducted
4 primarily by telephone or any other form of electronic sales or
5 solicitation is not service performed by a direct seller under this
6 subdivision;

7 (u) Service performed by an individual who is a
8 participant in the National and Community Service State Grant
9 Program, also known as AmeriCorp, because a participant is not
10 considered an employee of the program in which the participant is
11 enrolled pursuant to 42 U.S.C. 12511(17)(B); ~~as such section~~
12 ~~existed on September 1, 2001;~~ and

13 (v) Service performed at a penal or custodial institution
14 by a person committed to a penal or custodial institution;

15 (7) If the services performed during one-half or more of
16 any pay period by an individual for the person employing him or her
17 constitute employment, all the services of such individual for such
18 period shall be deemed to be employment, but if the services
19 performed during more than one-half of any such pay period by an
20 individual for the person employing him or her do not constitute
21 employment, then none of the services of such individual for such
22 period shall be deemed to be employment. As used in this subdivision,
23 the term pay period means a period, of not more than thirty-one
24 consecutive days, for which a payment of remuneration is ordinarily
25 made to such individual by the person employing him or her. This

1 subdivision shall not be applicable with respect to services
2 performed in a pay period by an individual for the person employing
3 him or her when any of such service is excepted by subdivision (6)(h)
4 of this section; and

5 (8) Notwithstanding the foregoing exclusions from the
6 definition of employment, services shall be deemed to be in
7 employment if with respect to such services a tax is required to be
8 paid under any federal law imposing a tax against which credit may be
9 taken for contributions required to be paid into a state unemployment
10 compensation fund or which as a condition for full tax credit against
11 the tax imposed by the Federal Unemployment Tax Act, as ~~the act~~
12 ~~existed on September 1, 2001, amended,~~ is required to be covered
13 under the Employment Security Law. ~~;~~ and

14 ~~(9) Any extension of the definition of employment by this~~
15 ~~section to include services heretofore excluded shall not be~~
16 ~~effective until after December 31, 1977, and section 48-604 as it~~
17 ~~existed prior to its amendments by Laws 1977, LB 509, shall be~~
18 ~~applicable to services performed prior to January 1, 1978.~~

19 Sec. 2. Original section 48-604, Reissue Revised Statutes
20 of Nebraska, is repealed.