

LEGISLATURE OF NEBRASKA
ONE HUNDRED FOURTH LEGISLATURE
SECOND SESSION

LEGISLATIVE BILL 972

Introduced by Harr, 8.

Read first time January 14, 2016

Committee: Business and Labor

- 1 A BILL FOR AN ACT relating to the Employment Security Law; to amend
- 2 section 48-604, Revised Statutes Cumulative Supplement, 2014; to
- 3 change provisions relating to an exclusion from the definition of
- 4 employment; and to repeal the original section.
- 5 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 48-604, Revised Statutes Cumulative Supplement,
2 2014, is amended to read:

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

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

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

22 (3) Services performed outside the state and services performed
23 outside the United States as follows:

24 (a) Services not covered under subdivision (2) of this section and
25 performed entirely without this state, with respect to no part of which
26 contributions are required under an unemployment compensation law of any
27 other state or of the federal government, shall be deemed to be
28 employment subject to the Employment Security Law if the commissioner
29 approves the election of the employer, for whom such services are
30 performed, that the entire service of such individual shall be deemed to
31 be employment subject to such law;

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

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

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

12 (B) The employer has no place of business in the United States, but
13 the employer is an individual who is a resident of this state; the
14 employer is a corporation or limited liability company which is organized
15 under the laws of this state; or the employer is a partnership or a trust
16 and the number of the partners or trustees who are residents of this
17 state is greater than the number who are residents of any other state; or

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

23 (ii) American employer, for the purposes of this subdivision, shall
24 mean: (A) An individual who is a resident of the United States; (B) a
25 partnership if two-thirds or more of the partners are residents of the
26 United States; (C) a trust if all the trustees are residents of the
27 United States; or (D) a corporation or limited liability company
28 organized under the laws of the United States or of any state.

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

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

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

21 (c)(i) Service performed by an individual in agricultural labor as
22 defined in subdivision (6)(a) of this section when such service is
23 performed for a person who during any calendar quarter in either the
24 current or preceding calendar year paid remuneration in cash of twenty
25 thousand dollars or more to individuals employed in agricultural labor,
26 or for some portion of a day in each of twenty different calendar weeks,
27 whether or not such weeks were consecutive, in either the current or the
28 preceding calendar year, employed in agricultural labor ten or more
29 individuals, regardless of whether they were employed at the same moment
30 of time.

31 (ii) For purposes of this subdivision:

1 (A) Any individual who is a member of a crew furnished by a crew
2 leader to perform services in agricultural labor for any other person
3 shall be treated as an employee of such crew leader if such crew leader
4 holds a valid certificate of registration under the Migrant and Seasonal
5 Agricultural Worker Protection Act, as amended, 29 U.S.C. 1801 et seq. ;
6 substantially all the members of such crew operate or maintain tractors,
7 mechanized harvesting or cropdusting equipment, or any other mechanized
8 equipment, which is provided by such crew leader; and such individual is
9 not an employee of such other person within the meaning of any other
10 provisions of this section;

11 (B) In case any individual who is furnished by a crew leader to
12 perform service in agricultural labor for any other person and who is not
13 treated as an employee of such crew leader under subdivision (A) of this
14 subdivision, such other person and not the crew leader shall be treated
15 as the employer of such individual and such other person shall be treated
16 as having paid cash remuneration to such individual in an amount equal to
17 the amount of cash remuneration paid to such individual by the crew
18 leader, either on his or her own behalf or on behalf of such other
19 person, for the service in agricultural labor performed for such other
20 person; and

21 (C) The term crew leader shall mean an individual who furnishes
22 individuals to perform service in agricultural labor for any other
23 person, pays, either on his or her own behalf or on behalf of such other
24 person, the individuals so furnished by him or her for the service in
25 agricultural labor performed by them, and has not entered into a written
26 agreement with such other person under which such individual is
27 designated as an employee of such other person; and

28 (d) Service performed by an individual in domestic service in a
29 private home, local college club, or local chapter of a college
30 fraternity or sorority if performed for a person who paid cash
31 remuneration of one thousand dollars or more in the current calendar year

1 or the preceding calendar year to individuals employed in such domestic
2 service in any calendar quarter;

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

16 (6) The term employment shall not include:

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

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

24 (ii) In the employ of the owner, tenant, or other operator of a
25 farm, in connection with the operation, management, conservation,
26 improvement, or maintenance of such farm and its tools and equipment or
27 in salvaging timber or clearing land of brush and other debris left by a
28 windstorm, if the major part of such service is performed on a farm;

29 (iii) In connection with the production or harvesting of any
30 commodity defined as an agricultural commodity in section 15(g) of the
31 federal Agricultural Marketing Act, as amended, 12 U.S.C. 1141j, in

1 connection with the operation or maintenance of ditches, canals,
2 reservoirs, or waterways, not owned or operated for profit, used
3 exclusively for supplying and storing water for farming purposes;

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

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

22 As used in this section, the term farm includes stock, dairy,
23 poultry, fruit, fur-bearing animal, and truck farms, plantations,
24 ranches, nurseries, ranges, greenhouses, or other similar structures used
25 primarily for the raising of agricultural or horticultural commodities,
26 and orchards;

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

30 (c) Service not in the course of the employer's trade or business
31 performed in any calendar quarter by an employee, unless the cash

1 remuneration paid for such service is fifty dollars or more and such
2 service is performed by an individual who is regularly employed by such
3 employer to perform such service and, for the purposes of this
4 subdivision, an individual shall be deemed to be regularly employed by an
5 employer during a calendar quarter only if (i) on each of some twenty-
6 four days during such quarter such individual performs for such employer
7 for some portion of the day service not in the course of the employer's
8 trade or business, or (ii) such individual was regularly employed, as
9 determined under subdivision (i) of this subdivision, by such employer in
10 the performance of such service during the preceding calendar quarter;

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

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

31 (f) Service performed in the employ of this state or any political

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

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

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

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

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

31 (iv) As part of an unemployment work relief or work-training program

1 assisted or financed in whole or in part by any federal agency or an
2 agency of a state or political subdivision thereof, by an individual
3 receiving such work relief or work training; or

4 (v) By an inmate of a custodial or penal institution;

5 (h) Service with respect to which unemployment compensation is
6 payable under an unemployment compensation system established by an act
7 of Congress;

8 (i) Service performed in any calendar quarter in the employ of any
9 organization exempt from income tax under section 501(a) of the Internal
10 Revenue Code as defined in section 49-801.01, other than an organization
11 described in section 401(a) of the Internal Revenue Code as defined in
12 section 49-801.01, or under section 521 thereof, if the remuneration for
13 such service is less than fifty dollars;

14 (j) Service performed in the employ of a school, college, or
15 university, if such service is performed (i) by a student who is
16 enrolled, regularly attending classes at, and working for such school,
17 college, or university pursuant to a financial assistance arrangement
18 with such school, college, or university or (ii) by the spouse of such
19 student, if such spouse is advised, at the time such spouse commences to
20 perform such service, that (A) the employment of such spouse to perform
21 such service is provided under a program to provide financial assistance
22 to such student by such school, college, or university and (B) such
23 employment will not be covered by any program of unemployment insurance;

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

30 (l) Service performed by an individual as a real estate salesperson,
31 as an insurance agent, or as an insurance solicitor, if all such service

1 performed by such individual is performed for remuneration solely by way
2 of commission;

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

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

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

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

29 (q) Service performed for a motor carrier, as defined in 49 U.S.C.
30 13102 or section 75-302, as amended, by a lessor leasing one or more
31 motor vehicles driven by the lessor or one or more drivers provided by

1 the lessor under a lease, with the motor carrier as lessee, executed
2 pursuant to 49 C.F.R. part 376, Title 291, Chapter 3, as amended, of the
3 rules and regulations of the Public Service Commission, or the rules and
4 regulations of the Division of Motor Carrier Services. This shall not
5 preclude the determination of an employment relationship between the
6 lessor and any personnel provided by the lessor in the conduct of the
7 service performed for the lessee;

8 (r) Service performed by an individual for a business engaged in
9 compilation of marketing data bases if such service consists only of the
10 processing of data and is performed in the residence of the individual;

11 (s) Service performed by an individual as a volunteer research
12 subject who is paid on a per study basis for scientific, medical, or
13 drug-related testing for any organization other than one described in
14 section 501(c)(3) of the Internal Revenue Code as defined in section
15 49-801.01 or any governmental entity;

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

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

18 (A) Engaged in the trade or business of selling or soliciting the
19 sale of consumer products or services to any buyer on a buy-sell basis or
20 a deposit-commission basis for resale, by the buyer or any other person,
21 in the home or otherwise than in a permanent retail establishment;

22 (B) Engaged in the trade or business of selling or soliciting the
23 sale of consumer products or services in the home or otherwise than in a
24 permanent retail establishment; or

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

28 (ii) Substantially all the remuneration, whether or not paid in
29 cash, for the performance of the services described in subdivision (t)(i)
30 of this subdivision is directly related to sales or other output,
31 including the performance of services, rather than to the number of hours

1 worked; and

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

9 (u) Service performed by an individual who is a participant in the
10 National and Community Service State Grant Program, also known as
11 AmeriCorps, because a participant is not considered an employee of the
12 organization receiving assistance under the national service laws through
13 which the participant is engaging in service pursuant to 42 U.S.C.
14 12511(30)(B); and

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

17 (7) If the services performed during one-half or more of any pay
18 period by an individual for the person employing him or her constitute
19 employment, all the services of such individual for such period shall be
20 deemed to be employment, but if the services performed during more than
21 one-half of any such pay period by an individual for the person employing
22 him or her do not constitute employment, then none of the services of
23 such individual for such period shall be deemed to be employment. As used
24 in this subdivision, the term pay period means a period, of not more than
25 thirty-one consecutive days, for which a payment of remuneration is
26 ordinarily made to such individual by the person employing him or her.
27 This subdivision shall not be applicable with respect to services
28 performed in a pay period by an individual for the person employing him
29 or her when any of such service is excepted by subdivision (6)(h) of this
30 section; and

31 (8) Notwithstanding the foregoing exclusions from the definition of

1 employment, services shall be deemed to be in employment if with respect
2 to such services a tax is required to be paid under any federal law
3 imposing a tax against which credit may be taken for contributions
4 required to be paid into a state unemployment compensation fund or which
5 as a condition for full tax credit against the tax imposed by the Federal
6 Unemployment Tax Act, as amended, is required to be covered under the
7 Employment Security Law.

8 Sec. 2. Original section 48-604, Revised Statutes Cumulative
9 Supplement, 2014, is repealed.