

35A-4-204 Definition of employment.

(1) Subject to the other provisions of this section, "employment" means any service performed for wages or under any contract of hire, whether written or oral, express or implied, including service in interstate commerce, and service as an officer of a corporation.

(2) "Employment" includes an individual's entire service performed within or both within and without this state if one of Subsections (2)(a) through (k) is satisfied.

(a) The service is localized in this state. Service is localized within this state if:

(i) the service is performed entirely within the state; or

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

(b)

(i) The service is not localized in any state but some of the service is performed in this state and the individual's base of operations, or, if there is no base of operations, the place from which the service is directed or controlled, is in this state; or

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

(c)

(i)

(A) The service is performed entirely outside this state and is not localized in any state;

(B) the worker is one of a class of employees who are required to travel outside this state in performance of their duties; and

(C)

(I) the base of operations is in this state; or

(II) if there is no base of operations, the place from which the service is directed or controlled is in this state.

(ii) Services covered by an election under Subsection 35A-4-310(3), and services covered by an arrangement under Section 35A-4-106 between the division and the agency charged with the administration of any other state or federal unemployment compensation law, under which all services performed by an individual for an employing unit are considered to be performed entirely within this state, are considered to be employment if the division has approved an election of the employing unit for whom the services are performed, under which the entire service of the individual during the period covered by the election is considered to be insured work.

(d)

(i) The service is performed in the employ of the state, a county, city, town, school district, or other political subdivision of the state, or in the employ of an Indian tribe or tribal unit or an instrumentality of any one or more of the foregoing which is wholly owned by the state or one of its political subdivisions or Indian tribes or tribal units if:

(A) the service is excluded from employment as defined in the Federal Unemployment Tax Act, 26 U.S.C. 3306(c)(7);

(B) the service is not excluded from employment by Section 35A-4-205; and

(C) as to any county, city, town, school district, or political subdivision of this state, or an instrumentality of the same or Indian tribes or tribal units, that service is either:

(I) required to be treated as covered employment as a condition of eligibility of employers in this state for Federal Unemployment Tax Act employer tax credit;

(II) required to be treated as covered employment by any other requirement of the Federal Unemployment Tax Act, as amended; or

(III) not required to be treated as covered employment by any requirement of the Federal Unemployment Tax Act, but coverage of the service is elected by a majority of the members of the governing body of the political subdivision or instrumentality or tribal unit in accordance with Section 35A-4-310.

- (ii) Benefits paid on the basis of service performed in the employ of this state shall be financed by payments to the division instead of contributions in the manner and amounts prescribed by Subsections 35A-4-311(2)(a) and (4).
- (iii) Benefits paid on the basis of service performed in the employ of any other governmental entity or tribal unit described in this Subsection (2) shall be financed by payments to the division in the manner and amount prescribed by the applicable provisions of Section 35A-4-311.
- (e) The service is performed by an individual in the employ of a religious, charitable, educational, or other organization, but only if:
 - (i) the service is excluded from employment as defined in the Federal Unemployment Tax Act, 26 U.S.C. 3306(c)(8), solely by reason of Section 3306(c)(8) of that act; and
 - (ii) the organization had four or more individuals in employment for some portion of a day in each of 20 different weeks, whether or not the weeks were consecutive, within either the current or preceding calendar year, regardless of whether they were employed at the same moment of time.
- (f)
 - (i) The service is performed outside the United States, except in Canada, in the employ of an American employer, other than service that is considered employment under the provisions of this Subsection (2) or the parallel provisions of another state's law if:
 - (A) the employer's principal place of business in the United States is located in this state;
 - (B) the employer has no place of business in the United States but is:
 - (I) an individual who is a resident of this state;
 - (II) a corporation that is organized under the laws of this state; or
 - (III) a partnership or trust in which the number of partners or trustees who are residents of this state is greater than the number who are residents of any one other state; or
 - (C) none of the criteria of Subsections (2)(f)(i)(A) and (B) is met but:
 - (I) the employer has elected coverage in this state; or
 - (II) the employer fails to elect coverage in any state and the individual has filed a claim for benefits based on that service under the law of this state.
 - (ii) "American employer" for purposes of this Subsection (2) means a person who is:
 - (A) an individual who is a resident of the United States;
 - (B) a partnership if 2/3 or more of the partners are residents of the United States;
 - (C) a trust if all of the trustees are residents of the United States;
 - (D) a corporation organized under the laws of the United States or of any state;
 - (E) a limited liability company organized under the laws of the United States or of a state;
 - (F) a limited liability partnership organized under the laws of the United States or of any state;or
 - (G) a joint venture if 2/3 or more of the members are individuals, partnerships, corporations, limited liability companies, or limited liability partnerships that qualify as American employers.
- (g) The service is performed:
 - (i) by an officer or member of the crew of an American vessel on or in connection with the vessel; and
 - (ii) the operating office from which the operations of the vessel, operating on navigable waters within, or within and without, the United States, is ordinarily and regularly supervised, managed, directed, and controlled within this state.
- (h) A tax with respect to the service in this state is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund or that, as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act, is required to be covered under this chapter.
- (i)
 - (i) Notwithstanding Subsection 35A-4-205(1)(p), the service is performed:
 - (A) as an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages other than milk, or laundry or dry cleaning

services, for the driver's principal; or

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

(ii) The term "employment" as used in this Subsection (2) includes services described in Subsection (2)(i)(i) performed only if:

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

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

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

(j) The service is performed by an individual in agricultural labor as defined in Section 35A-4-206.

(k) The service is domestic service performed in a private home, local college club, or local chapter of a college fraternity or sorority performed for a person who paid cash remuneration of \$1,000 or more during any calendar quarter in either the current calendar year or the preceding calendar year to individuals employed in the domestic service.

(3) Services performed by an individual for wages or under any contract of hire, written or oral, express or implied, are considered to be employment subject to this chapter, unless it is shown to the satisfaction of the division that:

(a) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of hire for services; and

(b) the individual has been and will continue to be free from control or direction over the means of performance of those services, both under the individual's contract of hire and in fact.

(4) If an employer, consistent with a prior declaratory ruling or other formal determination by the division, has treated an individual as independently established and it is later determined that the individual is in fact an employee, the department may by rule provide for waiver of the employer's retroactive liability for contributions with respect to wages paid to the individual prior to the date of the division's later determination, except to the extent the individual has filed a claim for benefits.

Amended by Chapter 22, 2006 General Session