

HOUSE BILL NO. 4338

February 24, 2021, Introduced by Reps. Haadsma, Sabo, Brabec, Cavanagh, Tate, Witwer, Rabhi, Brenda Carter, Shannon, Sowerby, Hope, Sneller, Ellison, Coleman, Young, Koleszar, Manoogian, Puri, Hertel, Aiyash, Tyrone Carter, Cherry, Steckloff, Cambensy, Garza, Peterson, Weiss, Neeley, Hood, Hammoud, Brixie, Scott, Bolden, Stone, Liberati, Clemente, Cynthia Johnson, Thanedar, Kuppa, Breen, Pohutsky, Camilleri, Lasinski, Jones, Anthony and Yancey and referred to the Committee on Government Operations.

A bill to amend 1936 (Ex Sess) PA 1, entitled
"Michigan employment security act,"
by amending section 42 (MCL 421.42), as amended by 2014 PA 241.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 42. (1) "Employment" means service, including service in
2 interstate commerce, performed for remuneration or under any
3 contract of hire, written or oral, express or implied.

4 (2) "Employment" includes an individual's entire service,
5 performed within or both within and without this state if any of

1 the following apply:

2 (a) The service is localized in this state. Service shall be
3 deemed to be localized within a state if the service is performed
4 entirely within the state; or the service is performed both within
5 and without the state, but the service performed without the state
6 is incidental to the individual's service within the state, such as
7 service ~~which~~**that** is temporary or transitory in nature or consists
8 of isolated transactions.

9 (b) The service is not localized in a state, but some of the
10 service **is** performed in this state, and the base of operations, or,
11 if there is not a base of operations, then the place from which the
12 service is directed or controlled, is in this state; or the base of
13 operations or place from which the service is directed or
14 controlled is not in a state in which some part of the service is
15 performed, but the individual's residence is in this state.

16 (c) After December 31, 1964, the service is not localized in
17 any state but is performed by an employee on or in connection with
18 an American aircraft, if either the contract of service is entered
19 into within this state or if the contract of service is not entered
20 into within this state or within any other state and during the
21 performance of the contract of service and while the employee is
22 employed on the aircraft, it touches at an airfield in this state,
23 and the employee is employed on and in connection with the aircraft
24 when outside the United States. The unemployment agency may enter
25 into reciprocal agreements with other states with respect to
26 aircraft which touch airfields in more than 1 state.

27 (3) Service performed within this state but not covered under
28 subsection (2) and not excluded under section 43 shall be deemed to
29 be employment subject to this act if contributions are not required

1 and paid with respect to those services under an unemployment
2 compensation law of any other state or of the federal government.

3 (4) Services ~~not~~ covered under subsection (2), performed
4 entirely without this state, for which contributions are not
5 required and paid under an unemployment compensation law of any
6 other state or of the federal government, shall be deemed to be
7 employment subject to this act if the unemployment agency approves
8 the election of the employer for whom the services are performed
9 that the entire service of the individual shall be deemed to be
10 employment subject to this act. ~~Such an~~ **The employer's** election may
11 be canceled by the employer by filing a written notice with the
12 unemployment agency before January 30 of any year stating the
13 employer's desire to cancel the election or at any time by
14 submitting to the unemployment agency satisfactory proof that the
15 services designated in the election are covered by an unemployment
16 compensation law of another state or of the federal government, or
17 if the services are covered by an arrangement pursuant to section
18 11 between the unemployment agency and the agency charged with the
19 administration of any other state or federal unemployment
20 compensation law, pursuant to which all services performed by an
21 individual for an employing unit are deemed to be performed
22 entirely within the state, shall be deemed to be employment if the
23 unemployment agency has approved an election of the employing unit
24 for which the services are performed, pursuant to which the entire
25 service of the individual during the period covered by the election
26 is deemed to be employment.

27 (5) Before January 1, 2013, services performed by an
28 individual for remuneration are not employment subject to this act,
29 unless the individual is under the employer's control or direction

as to the performance of the services both under a contract for hire and in fact. Service performed by an individual for remuneration under an exclusive contract that provides for the individual's control and direction by a person, firm, or corporation possessing a public service permit or by a certificated motor carrier transporting goods or property for hire are employment subject to this act. Service is employment under this act if it is performed by an individual who by lease, contract, or arrangement places at the disposal of a person, firm, or corporation a piece of motor vehicle equipment and under a contract of hire that provides for the individual's control and direction, is engaged by the person, firm, or corporation to operate the motor vehicle equipment.

(6) ~~On~~ **Except as otherwise provided in this subsection, on** and after January 1, 2013, services are employment if the services are performed by an individual who the agency determines to be in an employer-employee relationship using the 20-factor test announced by the ~~internal revenue service~~ **Internal Revenue Service** of the United States ~~department of treasury~~ **Department of Treasury** in revenue ruling 87-41, 1987-1 C.B. 296. An individual from whom an employer is required to withhold federal income tax is prima facie considered to perform services in employment under this act. **Except as otherwise provided in this subsection, on and after January 1, 2021, services are not employment if the unemployment agency determines that the individual performing the services is, under contract and in fact, free from the control and direction of the hiring entity in connection with the performance of the services, the services are not in the usual course of the hiring entity's business, and the individual is customarily engaged in an**

1 independently established trade, occupation, or business of the
2 same nature as the services performed. For claims submitted during
3 either of the following, services described in this subsection are
4 employment:

5 (a) An emergency declared by the governor because of an
6 infectious disease.

7 (b) The period of time that an order issued by the director of
8 the department of health and human services under section 2253 of
9 the public health code, 1978 PA 368, MCL 333.2253, is in effect.

10 (7) ~~(6)~~ Notwithstanding section 43, services performed for an
11 employing unit, for which the employing unit is liable for federal
12 tax against which credit may be taken for contributions required to
13 be paid into a state unemployment compensation fund, except service
14 performed by an individual holding a visa described in section
15 101(a)(15)(H)(ii)(b) of the immigration and nationality act, 8 USC
16 1101, shall be deemed to constitute employment for the purposes of
17 this act, but only to the extent that the services constitute
18 employment with respect to which federal tax is payable.

19 Notwithstanding any other provision of this act, ~~or any amendatory~~
20 ~~act,~~ services performed for an employing unit which are required to
21 be covered under this act, as a condition for its certification by
22 the United States ~~secretary of labor,~~ shall **Secretary of Labor,**
23 constitute employment for the purposes of this act. The
24 unemployment agency may waive the provisions of this subsection
25 with respect to services performed within this state if the
26 employing unit is an employer solely by reason of section 41(7) and
27 establishes that the services are covered by the election of the
28 employing unit under any other state unemployment compensation law.
29 This subsection does not apply to the exceptions provided in

1 section 43(q).

2 (8) ~~(7)~~ Notwithstanding subsection (2), all service performed
 3 after December 31, 1964 ~~by~~ by an officer or member of the crew of an
 4 American vessel on or in connection with the vessel is deemed to be
 5 employment subject to this act if the operating office, from which
 6 the operations of the vessel operating on navigable waters within,
 7 or within and without, the United States are ordinarily and
 8 regularly supervised, managed, directed, and controlled, is within
 9 this state.

10 (9) (a) ~~(8) (a)~~ Service performed before January 1, 1978 ~~by~~ by an
 11 individual in the classified civil service of this state and
 12 service performed by an individual for a school district, a
 13 community college district, a school or educational facility owned
 14 or operated by the state other than an institution of higher
 15 education, or a political subdivision of the state is employment
 16 subject to this act.

17 (b) Service performed after December 31, 1977 ~~in~~ in the employ
 18 of a governmental entity as defined in section 50a is employment
 19 subject to this act.

20 (10) ~~(9)~~ "Employment" includes service performed after
 21 December 31, 1971 ~~by~~ by an individual in the employ of this state or
 22 any of its instrumentalities for a state hospital or state
 23 institution of higher education, or in the employ of this state and
 24 1 or more other states or their instrumentalities for a hospital or
 25 institution of higher education located in this state. Coverage of
 26 services performed for these hospitals and institutions of higher
 27 education after December 31, 1977 ~~shall~~ shall be determined pursuant to
 28 subsection ~~(8) (b)~~. (9) (b).

29 (11) ~~(10)~~ "Employment" includes service performed after

1 December 31, 1971 ~~—~~by an individual in the employ of a religious,
2 charitable, educational, or other organization which is excluded
3 from the term "employment" as defined in the federal unemployment
4 tax act solely by reason of section 3306(c)(8) of the unemployment
5 tax act.

6 (12) ~~(11)~~—"Employment" includes service performed after
7 December 31, 1971 ~~—~~by an individual for his **or her** principal as an
8 agent driver or commission driver engaged in distributing
9 beverages, meat, vegetable, fruit, bakery, dairy, or other food
10 products, or laundry or dry cleaning services; or as a traveling or
11 city salesman, other than as an agent driver or commission driver,
12 engaged upon a full-time basis in the solicitation on behalf of,
13 and the transmission to, his **or her** principal except for sideline
14 sales activities on behalf of some other person, of orders from
15 wholesalers, retailers, contractors, operators of hotels,
16 restaurants, or other similar establishments for merchandise for
17 resale or supplies for use in their business operations. For
18 purposes of this subsection, "employment" includes services
19 performed after December 31, 1971, only if all of the following
20 apply:

21 (a) The contract of service contemplates that substantially
22 all of the services are to be performed personally by the
23 individual.

24 (b) The individual does not have a substantial investment in
25 facilities used in connection with the performance of the services
26 other than in facilities for transportation.

27 (c) The services are not in the nature of a single transaction
28 which is not part of a continuing relationship with the person for
29 whom the services are performed.

1 (13) ~~(12)~~ "Employment" includes service performed by a United
 2 States citizen outside the United States after December 31, 1971,
 3 except in Canada, and in the Virgin Islands after December 31,
 4 1971, and before January 1 of the year following the year in which
 5 the United States ~~secretary of labor~~ **Secretary of Labor** approves
 6 the unemployment compensation law of the Virgin Islands under
 7 section 3304(a) of the internal revenue code, while in the employ
 8 of an American employer and is other than service which is
 9 employment pursuant to subsection (2) or a parallel provision of
 10 another state's law, if the requirements of subdivision (a), (b),
 11 or (c) are met:

12 (a) The employer's principal place of business in the United
 13 States is located in this state.

14 (b) The employer does not have a place of business in the
 15 United States, but the employer is any of the following:

16 (i) An individual who is a resident of this state.

17 (ii) A corporation which is organized under the laws of this
 18 state.

19 (iii) A partnership or a trust, and the number of the partners
 20 or trustees who are residents of this state is greater than the
 21 number who are residents of any one other state.

22 (c) None of the criteria of subdivisions (a) and (b) is met
 23 but the employer elected coverage of the service under this act, or
 24 the employer failed to elect coverage in any state and the
 25 individual filed a claim for benefits based on the service under
 26 the law of this state.

27 (d) An "American employer", for purposes of this subsection,
 28 means a person who is one of the following:

29 (i) An individual who is a resident of the United States.

1 (ii) A partnership if 2/3 or more of the partners are residents
2 of the United States.

3 (iii) A trust, if all of the trustees are residents of the
4 United States.

5 (iv) A corporation organized under the laws of the United
6 States or of any state.

7 (e) As used in this subsection, "United States" includes the
8 states, the District of Columbia, and the Commonwealth of Puerto
9 Rico.

10 **(14)** ~~(13)~~ Notwithstanding any other provision of this act, ~~the~~
11 ~~term~~ "employment" includes an individual's service, wherever
12 performed within the United States, the Virgin Islands, or Canada,
13 if the service is not covered under the unemployment compensation
14 law of any other state, the Virgin Islands, or Canada, and the
15 place from which the service is directed or controlled is in this
16 state.

17 Enacting section 1. This amendatory act is retroactive and
18 applies to services performed on or after January 1, 2021.