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Legislative Document

No. 1600

H.P. 1208

House of Representatives, December 16, 2011

**An Act To Provide That Persons Hiring Assistants To Provide
Home Care for Relatives Are Not Employers for Purposes of
Unemployment Compensation Laws**

(EMERGENCY)

Approved for introduction by a majority of the Legislative Council pursuant to Joint Rule 203.

Received by the Clerk of the House on December 14, 2011. Referred to the Committee on Labor, Commerce, Research and Economic Development pursuant to Joint Rule 308.2 and ordered printed pursuant to Joint Rule 401.

A handwritten signature in cursive script, reading "Heather J.R. Priest".

HEATHER J.R. PRIEST
Clerk

Presented by Representative WATERHOUSE of Bridgton.
Cosponsored by Senator HASTINGS of Oxford and
Representatives: Speaker NUTTING of Oakland, SARTY of Denmark.

1 **Emergency preamble. Whereas,** acts and resolves of the Legislature do not
2 become effective until 90 days after adjournment unless enacted as emergencies; and

3 **Whereas,** under current unemployment compensation laws certain persons hired to
4 provide home care assistance are considered employees; and

5 **Whereas,** coverage of those home care assistants under the unemployment
6 compensation laws has a burdensome effect on families in need of home care services
7 that needs to be addressed immediately; and

8 **Whereas,** in the judgment of the Legislature, these facts create an emergency within
9 the meaning of the Constitution of Maine and require the following legislation as
10 immediately necessary for the preservation of the public peace, health and safety; now,
11 therefore,

12 **Be it enacted by the People of the State of Maine as follows:**

13 **Sec. 1. 26 MRSA §1043, sub-§11, ¶F,** as amended by PL 2011, c. 66, §1 and c.
14 70, §1, is repealed and the following enacted in its place:

15 F. The term "employment" does not include:

16 (1) Service performed in the employ of this State, or of any political subdivision
17 thereof, or of any instrumentality of this State or its political subdivisions, except
18 as provided by this subsection;

19 (2) Service performed in the employ of the United States Government or an
20 instrumentality of the United States immune under the United States Constitution
21 from the contributions imposed by this chapter, except that on and after January
22 1, 1940 to the extent that the Congress of the United States has permitted states to
23 require any instrumentalities of the United States to make payments into an
24 unemployment compensation fund under a state unemployment compensation or
25 employment security law, all of the provisions of this chapter are applicable to
26 such instrumentalities and to services performed for such instrumentalities in the
27 same manner, to the same extent and on the same terms as to all other employers,
28 employing units, individuals and services. If this State is not certified for any
29 year by the Secretary of Labor under Section 3304 of the federal Internal
30 Revenue Code, the payments required of such instrumentalities with respect to
31 that year must be refunded by the commissioner from the fund in the same
32 manner and within the same period as is provided in section 1225, subsection 5,
33 with respect to contributions erroneously collected;

34 (3) Service with respect to which unemployment compensation is payable under
35 an unemployment compensation system or employment security system
36 established by an Act of Congress. The commissioner is authorized and directed
37 to enter into agreements with the proper agencies under such an Act of Congress,
38 which agreements become effective 10 days after publication thereof in the
39 manner provided in section 1082, subsection 2, for regulations, to provide
40 reciprocal treatment to individuals who have, after acquiring potential rights to
41 benefits under this chapter, acquired rights to unemployment compensation under

- 1 such an Act of Congress, or who have, after acquiring potential rights to
2 unemployment compensation under such an Act of Congress, acquired rights to
3 benefits under this chapter;
- 4 (4) Agricultural labor as defined in subsection 1, except as provided in paragraph
5 A-2;
- 6 (4-1) Services performed by an individual who is an alien admitted to the United
7 States to perform agricultural labor pursuant to the United States Immigration
8 and Nationality Act, Sections 214(c) and 101(a)(15)(H);
- 9 (5) Domestic service in a private home, except as provided in paragraph A-3;
- 10 (6) Service performed by an individual in the employ of that individual's son,
11 daughter or spouse and service performed by a child under the age of 18 in the
12 employ of that child's father or mother, except for periods of such service for
13 which unemployment insurance contributions are paid;
- 14 (6-1) Services performed by a student attending an elementary, secondary or
15 postsecondary school while participating in a cooperative program of education
16 and occupational training or on-the-job training that is part of the school
17 curriculum;
- 18 (9) Service performed with respect to which unemployment compensation is
19 payable under the federal Railroad Unemployment Insurance Act;
- 20 (10) Services performed in the employ of any other state, or any political
21 subdivision thereof, or any instrumentality of any one or more of the foregoing
22 that is wholly owned by one or more states or political subdivisions and any
23 services performed in the employ of any instrumentality of one or more other
24 states or their political subdivisions to the extent that the instrumentality is, with
25 respect to such a service, immune under the United States Constitution from the
26 tax imposed by Section 3301 of the federal Internal Revenue Code, except as
27 provided in paragraph A-1, subparagraph (1);
- 28 (11) Service performed in any calendar quarter in the employ of any
29 organization exempt from income tax under Section 501(a) of the federal Internal
30 Revenue Code other than an organization described in Section 401(a) or under
31 Section 521 of the code, if the remuneration for such service is less than \$150;
- 32 (16) Service performed in the employ of a foreign government, including service
33 as a consular or other officer or employee or a nondiplomatic representative;
- 34 (17) Service performed in the employ of an instrumentality wholly owned by a
35 foreign government:
- 36 (a) If the service is of a character similar to that performed in foreign
37 countries by employees of the United States Government or an
38 instrumentality thereof; and
- 39 (b) If the commissioner finds that the United States Secretary of State has
40 certified to the United States Secretary of the Treasury that the foreign
41 government, with respect to whose instrumentality exemption is claimed,
42 grants an equivalent exemption with respect to similar service performed in

1 the foreign country by employees of the United States Government and of
2 instrumentalities thereof;

3 (18) Service performed as a student nurse in the employ of a hospital or a nurse
4 training school by an individual who is enrolled and is regularly attending classes
5 in a nurse training school chartered or approved pursuant to state law and service
6 performed as an intern in the employ of a hospital by an individual who has
7 completed a 4-year course in a medical school chartered or approved pursuant to
8 state law;

9 (19) Service performed by an individual for a person as a real estate broker, a
10 real estate sales representative, an insurance agent or an insurance solicitor, if all
11 such service performed by that individual for that person is performed for
12 remuneration solely by way of commission;

13 (20) Service performed by an individual under the age of 18 in the delivery or
14 distribution of newspapers or shopping news except delivery or distribution to
15 any point for subsequent delivery or distribution;

16 (21) Service performed in the employ of any organization that is excluded from
17 the term "employment" as defined in the Federal Unemployment Tax Act solely
18 by reason of 26 United States Code, Section 3306(c)(7) or (8) if:

19 (a) Service is performed in the employ of a church or convention or
20 association of churches or an organization that is operated primarily for
21 religious purposes and that is operated, supervised, controlled or principally
22 supported by a church or convention or association of churches;

23 (b) Service is performed by a duly ordained, commissioned or licensed
24 minister of a church in the exercise of that minister's ministry or by a member
25 of a religious order in the exercise of duties required by that order;

26 (c) Prior to January 1, 1978, service is performed in the employ of a school
27 primarily operated as an elementary, secondary or preparatory school for
28 higher education that is not an institution of higher education;

29 (d) Service is performed in a facility conducted for the purpose of carrying
30 out a program of rehabilitation for individuals whose earning capacity is
31 impaired by age or physical or mental deficiency or injury or providing
32 remunerative work for individuals who, because of their impaired physical or
33 mental capacity, cannot be readily absorbed in the competitive labor market
34 by an individual receiving such rehabilitation or remunerative work;

35 (e) Service is performed as part of an unemployment work-relief or work-
36 training program assisted or financed in whole or in part by any federal
37 agency or an agency of a state or political subdivision thereof by an
38 individual receiving that relief or training;

39 (f) Service is performed in the employ of a hospital as defined in subsection
40 26 by a patient of that hospital;

41 (g) Services are performed prior to January 1, 1978 for a hospital in a state
42 prison or other state correctional institution by an inmate of that prison or

- 1 correctional institution or after December 31, 1977 by an inmate of a
2 custodial or penal institution;
- 3 (h) Service is performed in the employ of a school, college or university if
4 that service is performed by a student who is enrolled and is regularly
5 attending classes at such a school, college or university; or
- 6 (i) Prior to January 1, 1978, service is performed in the employ of a school
7 that is not an institution of higher education or after December 31, 1977,
8 service is performed in the employ of a governmental entity referred to in
9 paragraph A-1, subparagraph (1) if that service is performed by an individual
10 in the exercise of duties:
- 11 (i) As an elected official;
- 12 (ii) As a member of a legislative body or a member of the judiciary of a
13 state or political subdivision of a state;
- 14 (iii) As a member of the Maine Army National Guard or the Maine Air
15 National Guard;
- 16 (iv) As an employee serving on a temporary basis in case of fire, storm,
17 snow, earthquake, flood or similar emergency;
- 18 (v) In a position that, under or pursuant to the laws of this State, is
19 designated as a major nontenured policymaking or advisory position or a
20 policymaking or advisory position the performance of the duties of which
21 ordinarily does not require more than 8 hours per week; or
- 22 (vi) As an election official or election worker if the amount of
23 remuneration received by the individual during the calendar year for
24 services as an election official or election worker is less than \$1,000;
- 25 (29) Services performed under a booth rental agreement or other rental
26 agreement by:
- 27 (a) A hairdresser who holds a booth license and operates within another
28 hairdressing establishment; or
- 29 (b) A tattoo artist if the services performed by the tattoo artist are not subject
30 to federal unemployment tax;
- 31 (30) Services performed by a barber who holds a booth license and operates
32 within another barbering establishment if operated under a booth rental
33 agreement or other rental agreement;
- 34 (31) Services performed by a contract interviewer engaged in marketing research
35 or public opinion interviewing when such interviewing is conducted in the field
36 or over the telephone on premises not used or controlled by the person for whom
37 such contract services are being provided;
- 38 (32) After December 31, 1981, services performed by an individual on a boat
39 engaged in catching fish or other forms of aquatic animal life, unless those
40 services would be included in the definition of "employment" for federal
41 unemployment tax purposes under the Federal Unemployment Tax Act, 26

1 United States Code, Section 3306(c), as it may be amended. Also included in
2 this exemption are services performed in harvesting shellfish for depuration from
3 designated areas as authorized by Title 12, section 6856;

4 (33) Services performed by a member or leader of a musical group, band or
5 orchestra or an entertainer when the services are performed under terms of a
6 contract entered into by the leader or an agent of the musical group, band,
7 orchestra or entertainer with an employing unit for whom the services are being
8 performed, as long as the leader or agent is not an employer by reason of
9 subsection 9 or of section 1222, subsection 3;

10 (34) Services performed in the delivery or distribution of newspapers or
11 magazines to the ultimate consumer by an individual who is compensated by
12 receiving or retaining a commission or profit on the sale of the newspaper or
13 magazine;

14 (35) Services performed by a homemaker in the knitted outerwear industry as
15 those terms are defined, on the effective date of this subparagraph, in 29 Code of
16 Federal Regulations, Part 530, Section 530.1;

17 (36) Services performed by a full-time student, as defined in subsection 30, in
18 the employ of a youth camp licensed under Title 22, section 2495 if the full-time
19 student performed services in the employ of the camp for less than 13 calendar
20 weeks in the calendar year and the camp:

21 (a) Did not operate for more than 7 months in the calendar year and did not
22 operate for more than 7 months in the preceding calendar year; or

23 (b) Had average gross receipts for any 6 months in the preceding calendar
24 year that were not more than 33 1/3% of its average gross receipts for the
25 other 6 months in the preceding calendar year;

26 (37) Services performed by an individual as a home stitcher as long as that
27 employment is not subject to federal unemployment tax;

28 (38) Services performed by a person licensed as a guide as required by Title 12,
29 section 12853, as long as that employment is not subject to federal
30 unemployment tax;

31 (39) Services performed by a direct seller as defined in 26 United States Code,
32 Section 3508(b)(2). This subparagraph does not include a person selling major
33 improvements or renovations to the structure of a home, business or property;

34 (40) Services performed by lessees of taxicabs, as long as that employment is not
35 subject to federal unemployment tax. This subparagraph may not be construed to
36 affect a determination regarding a lessee's status as an independent contractor for
37 workers' compensation purposes;

38 (41) Services provided by a dance instructor to students of a dance studio when
39 there is a contract between the instructor and the studio under which the
40 instructor's services are not offered exclusively to the studio, the studio does not
41 control the scheduling of the days and times of classes other than beginning and
42 end dates, the instructor is paid by the class and not on an hourly or salary basis,

1 the compensation rate is the result of negotiation between the instructor and the
2 studio and the instructor is given the freedom to develop the curriculum;

3 (42) Services performed by participants enrolled in programs or projects under
4 the national service laws including the National and Community Service Act of
5 1990, as amended, 42 United States Code, Section 12501 et seq., and the federal
6 Domestic Volunteer Service Act, as amended, 42 United States Code, Section
7 4950 et seq.;

8 (43) Services of an author in furnishing text or other material to a publisher who:

9 (a) Does not control the author's work except to propose topics or to edit
10 material submitted;

11 (b) Does not restrict the author from publishing elsewhere;

12 (c) Furnishes neither a place of employment nor equipment for the author's
13 use;

14 (d) Does not direct or control the time devoted to the work; and

15 (e) Pays only for material that is accepted for publication.

16 This exception does not apply if the employment is subject to federal
17 unemployment tax;

18 (44) Services provided by an owner-operator of a truck or truck tractor while it is
19 leased to a motor carrier, as defined in 49 Code of Federal Regulations, 390.5
20 (2000), as long as that employment is not subject to federal unemployment tax;

21 (45) Services performed by a professional investigator, as defined in Title 32,
22 section 8103, subsection 5, as long as that employment is not subject to federal
23 unemployment tax and the following requirements are met:

24 (a) There is a written contract between the professional investigator and the
25 party requesting services;

26 (b) The professional investigator offering the services operates
27 independently of the party requesting services, except for the time frame and
28 quality of finished work as specified in the contract;

29 (c) Compensation for services is negotiated between the 2 parties and is paid
30 for each service performed; and

31 (d) The party requesting services furnishes neither equipment nor the place
32 of employment to the professional investigator; and

33 (46) Personal care services or health care services performed in the home for an
34 individual by a person retained to provide those services by the individual, a
35 family member of the individual or a person sharing a household with the
36 individual.

37 **Emergency clause.** In view of the emergency cited in the preamble, this
38 legislation takes effect when approved.

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SUMMARY

This bill provides that personal care services or health care services performed in the home for an individual by a person retained to provide those services by the individual, a family member of the individual or a person sharing a household with the individual are not considered employment for the purposes of the unemployment compensation laws. The bill also corrects cross-references and updates language to incorporate subsequent statutory changes.