

MINUTES OF THE HOUSE COMMERCE & ECONOMIC DEVELOPMENT COMMITTEE

The meeting was called to order by Chairman Anthony R. Brown, at 1:30 p.m. on February 18, 2011, in Room 785 of the Docking State Office Building.

All members were present except:

Bruchman Absent
Schwab Absent

Committee staff present:

Renaë Jefferies, Office of the Revisor of Statutes
Ken Wilke, Office of the Revisor of Statutes
Reed Holwegner, Kansas Legislative Research Department
Raney Gilliland, Kansas Legislative Research Department
Joyce Bishop, Committee Assistant

Conferees appearing before the Committee:

Karl Hansen, Chief Legal Counsel, Department of Labor

Others attending:

See attached list.

Chairperson Brown reopened the hearing on **HB 2135, Eliminating penalty for misclassification of employees as independent contractors to avoid tax withholding, contribution and reporting requirements.**

Ken Wilke gave the Revisor's overview of an amendment (Attachment 1).

Karl Hansen, Chief Legal Counsel, Department of Labor, answered questions regarding the amendment from committee members.

Chairperson Brown closed the hearing on the bill.

Chairperson Brown opened the floor for discussion and action on **HB 2135, Eliminating penalty for misclassification of employees as independent contractors to avoid tax withholding, contribution and reporting requirements.**

Representative Sullentrop moved, seconded by Representative Garber, to amend HB 2135 with the amendment contained in Attachment 1. The motion passed on a voice vote.

Representative Suellentrop moved, seconded by Representative Slattery, that the committee recommend to the House a Substitute for HB 2135 be passed.

Representative Slattery moved, seconded by Representative Ruiz, a substitute motion to further amend HB 2135 by striking new section 2 found in Attachment 1 and all related provisions. The motion failed on a voice vote.

Representative Slattery moved, seconded by Representative Finney, a substitute motion to further amend HB 2135 by striking subparagraph (a) (A)(v) found in new section 2 in Attachment 1, regarding a business's reliance upon the advice given by attorneys or accountants. The motion passed on a voice vote.

Representative Slattery moved, seconded by Representative Ruiz, to further amend HB 2135 by striking subparagraph (a) (A)(iv) found in new section 2 in Attachment 1, regarding a business's reliance upon customary worker classifications. The motion failed on a voice vote.

Representative Sullentrop moved, seconded by Representative Mesa, that the Committee recommend to the House a **Substitute for HB 2135** be passed. The motion passed on a voice vote.

The meeting adjourned at 4:05 p.m.

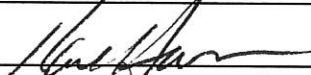
HOUSE COMMERCE & ECONOMIC DEVELOPMENT COMMITTEE

1:30pm,

Room 785, Docking State Office Building

GUEST LIST

DATE: February 18, 2011

NAME	REPRESENTING
Melissa Ward	Nein Law Firm
	KPOL
Justin McFarland	KPOL
Michelle Buller	Cap. Strategies

HOUSE BILL No. 2135

By Committee on Commerce and Economic Development

1-31

1 AN ACT concerning ~~taxation~~; relating to misclassification of employees
2 to avoid tax withholding, contributions and reporting requirements;
3 amending K.S.A. 2010 Supp. 79-3234 and repealing the existing
4 ~~section~~; also repealing K.S.A. 2010 Supp. 44-766.

certain employees

44-703, 44-766 and

5
6 *Be it enacted by the Legislature of the State of Kansas:*

7 Section 1. K.S.A. 2010 Supp. 79-3234 is hereby amended to read as
8 follows: 79-3234. (a) All reports and returns required by this act shall be
9 preserved for three years and thereafter until the director orders them to
10 be destroyed.

sections

11 (b) Except in accordance with proper judicial order, or as provided
12 in subsection (c) or in K.S.A. 17-7511, subsection (g) of K.S.A. 46-1106,
13 K.S.A. 46-1114, or K.S.A. 79-32,153a, and amendments thereto, it shall
14 be unlawful for the secretary, the director, any deputy, agent, clerk or
15 other officer, employee or former employee of the department of revenue
16 or any other state officer or employee or former state officer or employee
17 to divulge, or to make known in any way, the amount of income or any
18 particulars set forth or disclosed in any report, return, federal return or
19 federal return information required under this act; and it shall be unlawful
20 for the secretary, the director, any deputy, agent, clerk or other officer or
21 employee engaged in the administration of this act to engage in the
22 business or profession of tax accounting or to accept employment, with or
23 without consideration, from any person, firm or corporation for the
24 purpose, directly or indirectly, of preparing tax returns or reports required
25 by the laws of the state of Kansas, by any other state or by the United
26 States government, or to accept any employment for the purpose of
27 advising, preparing material or data, or the auditing of books or records to
28 be used in an effort to defeat or cancel any tax or part thereof that has
29 been assessed by the state of Kansas, any other state or by the United
30 States government.

31 (c) The secretary or the secretary's designee may: (1) Publish
32 statistics, so classified as to prevent the identification of particular reports
33 or returns and the items thereof;

34 (2) allow the inspection of returns by the attorney general or other
35 legal representatives of the state;

36 (3) provide the post auditor access to all income tax reports or

Insert New sections 1 and 2 attached and
sections 3 and 4 attached and renumber the
remaining sections accordingly.

1 or the proper official of any state imposing an income tax, or the
 2 authorized representative of either, to inspect the income tax returns made
 3 under this act and the secretary of revenue may make available or furnish
 4 to the taxing officials of any other state or the commissioner of internal
 5 revenue of the United States or other taxing officials of the federal
 6 government, or their authorized representatives, information contained in
 7 income tax reports or returns or any audit thereof or the report of any
 8 investigation made with respect thereto, filed pursuant to the income tax
 9 laws, as the secretary may consider proper, but such information shall not
 10 be used for any other purpose than that of the administration of tax laws
 11 of such state, the state of Kansas or of the United States;

12 (10) communicate to the executive director of the Kansas lottery
 13 information as to whether a person, partnership or corporation is current
 14 in the filing of all applicable tax returns and in the payment of all taxes,
 15 interest and penalties to the state of Kansas, excluding items under formal
 16 appeal, for the purpose of determining whether such person, partnership
 17 or corporation is eligible to be selected as a lottery retailer;

18 (11) communicate to the executive director of the Kansas racing
 19 commission as to whether a person, partnership or corporation has failed
 20 to meet any tax obligation to the state of Kansas for the purpose of
 21 determining whether such person, partnership or corporation is eligible
 22 for a facility owner license or facility manager license pursuant to the
 23 Kansas parimutuel racing act; and

24 (12) provide such information to the executive director of the
 25 Kansas public employees retirement system for the purpose of
 26 determining that certain individuals' reported compensation is in
 27 compliance with the Kansas public employees retirement act, at K.S.A.
 28 74-4901 et seq., and amendments thereto; and

29 ~~(13) provide taxpayer information of persons suspected of violating~~
 30 ~~K.S.A. 2010 Supp. 44-766, and amendments thereto, to the staff attorneys~~
 31 ~~of the department of labor for the purpose of determining compliance by~~
 32 ~~any person with the provisions of K.S.A. 2010 Supp. 44-766, and~~
 33 ~~amendments thereto, which information shall be limited to withholding~~
 34 ~~tax and payroll information, the identity of any person that has been or is~~
 35 ~~currently being audited or investigated in connection with the~~
 36 ~~administration and enforcement of the withholding and declaration of~~
 37 ~~estimated tax act, K.S.A. 79-3294 et seq., as amended, and the results or~~
 38 ~~status of such audit or investigation.~~

39 (d) Any person receiving information under the provisions of
 40 subsection (c) shall be subject to the confidentiality provisions of
 41 subsection (b) and to the penalty provisions of subsection (e).

42 (e) Any violation of subsection (b) or (c) is a class A nonperson
 43 misdemeanor and, if the offender is an officer or employee of the state,

(13)(i) provide taxpayer information of persons
 suspected of violating K.S.A. 2010 Supp. 44-766, and
 amendments thereto, to the secretary of labor or such
 secretary's designee for the purpose of determining
 compliance by any person with the provisions of K.S.A.
 2010 Supp. 44-703(i)(3)(D) and 44-766, and
 amendments thereto. The information to be provided
 shall include all relevant information in the possession
 of the department of revenue necessary for the secretary
 of labor to make a proper determination of compliance
 with the provisions of K.S.A. 2010 Supp. 44-
 703(i)(3)(D) and 44-766, and amendments thereto, and
 to calculate any unemployment contribution taxes due.
 Such information to be provided by the department of
 revenue shall include, but not be limited to, withholding
 tax and payroll information, the identity of any person
 that has been or is currently being audited or
 investigated in connection with the administration and
 enforcement of the withholding and declaration of
 estimated tax act, K.S.A. 79-3294 et seq., as amended
 and supplemented, and the results or status of such audit
 or investigation.

(ii) Any person receiving tax information under the
 provisions of this paragraph shall be subject to the same
 duty of confidentiality imposed by law upon the
 personnel of the department of revenue and shall
 be subject to any civil or criminal penalties imposed by
 law for violations of such duty of confidentiality.

(iii) Each of the secretary of labor and the secretary of
 revenue may adopt rules and regulations necessary to
 effect the provisions of this paragraph.

1 such officer or employee shall be dismissed from office.

2 (f) Nothing in this section shall be construed to allow disclosure of
3 the amount of income or any particulars set forth or disclosed in any
4 report, return, federal return or federal return information, where such
5 disclosure is prohibited by the federal internal revenue code as in effect
6 on September 1, 1996, and amendments thereto, related federal internal
7 revenue rules or regulations, or other federal law.

6 8 ~~Sec. 17.~~ K.S.A. 2010 Supp. 44-766 and 79-3234 are hereby repealed. 44-703,

7 9 ~~Sec. 18.~~ This act shall take effect and be in force from and after its
10 publication in the statute book.

11

12

New Section 1. (a) The secretary or the secretary's designee shall make all determinations regarding the proper classification of any worker pursuant to K.S.A. 44-703 (i)(3), and amendments thereto.

(b) If the department of revenue has reason to believe that a business has not properly classified a worker pursuant to K.S.A. 44-703 (i)(3), and amendments thereto, the department of revenue shall request a determination of such worker's classification pursuant to K.S.A. 44-703 (i)(3), and amendments thereto, from the secretary. The department of revenue shall submit to the secretary all relevant information, including withholding tax and payroll information, in the possession of the department of revenue necessary to make such determination.

(1) If the secretary deems it necessary to obtain additional information from the department of revenue in order to make such determination or to calculate any assessment of unemployment insurance contributions due, the secretary shall notify the department of revenue. The department of revenue shall obtain and remit the requested information to the secretary.

(2) The department of revenue shall accept the secretary's determination made pursuant to subsection(a) and shall rely on such determination in the department of revenue's examination and assessment of the business with regard to such worker.

(3) Relying upon the information provided by the department of revenue pursuant to this section, and amendments thereto, and upon making the determination required by subsection(a), the secretary shall notify the business of any unemployment insurance contributions due pursuant to this act. The secretary shall not engage a separate investigation into the same matter once a determination has been made pursuant to subsection (a) based upon information so obtained through the department of revenue.

(4) Information shared with the secretary by the department of revenue pursuant to this section, shall be held by the secretary to the same confidentiality standards as may be required by statutes governing the department of revenue.

(c) Upon investigation and determination by the secretary that a business has misclassified a worker, the secretary shall notify the department of revenue that a determination has been made, referring the matter for collection of applicable income withholding taxes.

(1) Upon request of the department of revenue, the secretary shall make available for its review any information relied upon by the secretary in making the determination.

(2) Information shared with the department of revenue by the secretary pursuant to this section shall be held by the department of revenue to the same confidentiality standards as may be required by statutes governing the department of labor.

(d) Each of the secretary of labor and the secretary of revenue may adopt rules and regulations necessary to effect the purposes of this section.

(e) This section shall be a part of and supplemental to the employment security law.

New Section 2. The secretary shall make the determination of employment required by K.S.A. 44-703(i)(3)(D), and amendments thereto, by examining the totality of the circumstances in which the individual renders service and shall exercise strict impartiality in the conduct of any such determination.

(a) The secretary shall first seek to determine whether the business in question has a reasonable basis upon which it relied when it determined the classification of a worker as an employee or independent contractor. If a reasonable basis is found, the classification shall be deemed valid. (1) A business has a reasonable basis for its classification of workers if:

(A) Any of the following circumstances are present:

(i) The business reasonably relied upon a judicial decision regarding employment classification matters rendered by a federal or state court of competent jurisdiction in the state of Kansas.

(ii) the business previously received a ruling from the internal revenue service, the department of revenue, or the department of labor validating the business's classification of workers;

(iii) the business has been previously audited by the internal revenue service, the department of revenue, or the department of labor at a time when the business classified workers similarly situated in the same manner to those workers currently in question, and such audit did not result in reclassification of those workers so similarly situated;

(iv) the business reasonably relied on the application of worker classifications customary among a significant segment of its industry; or

(v) the business relied on the advice of a licensed attorney or accountant possessing expertise in the proper classification of workers and a familiarity with the facts regarding such business's workforce; and

(B) The business showed consistency in its practices by:

(i) The business classified the worker in question and any similarly situated worker in the same manner; and

(ii) the business has consistently and properly reported to the appropriate taxing authorities wages or payments to the workers in question and those similarly situated.

(c) If a reasonable basis as articulated herein cannot be ascertained, then when making a determination the secretary shall then consider the following factors:

(1) Must the individual comply with specific instructions from the business regarding when, where, and how to perform services so provided?

(2) Are the activities of the individual integrated into the ongoing operations of the business?

(3) If needed to accomplish the desired end result, does the individual have the responsibility to hire, supervise, and pay assistants?

(4) Must the individual work exclusively for the business in question?

(5) Is payment by the business to the individual for services contingent on completion of established benchmarks or tasks?

(6) Does the individual provide significant tools, materials or other equipment used in the accomplishment of the desired end result?

(7) Is the individual responsible for any expenses incurred in the performance of services?

(8) Can the individual suffer a loss in the course of performing services?

(d) The secretary shall seek to educate the business by assisting the business in identifying facts which may establish either classification.

(e) If imposition of a penalty or interest could otherwise be imposed by this act due to a misclassification of a worker, before imposition of such assessment, the secretary shall consider the appropriateness of the penalty or interest to the business charged with the violation of misclassifying a worker given the circumstances in which the misclassification occurred.

(f) This section shall be a part of and supplemental to the employment security law.

Sec. 3

K.S.A. 2010 Supp. 44-703 is hereby amended to read as follows: 44-703. As used in this act, unless the context clearly requires otherwise:

(a) (1) "Annual payroll" means the total amount of wages paid or payable by an employer during the calendar year.

(2) "Average annual payroll" means the average of the annual payrolls of any employer for the last three calendar years immediately preceding the computation date as hereinafter defined if the employer has been continuously subject to contributions during those three calendar years and has paid some wages for employment during each of such years. In determining contribution rates for the calendar year, if an employer has not been continuously subject to contribution for the three calendar years immediately preceding the computation date but has paid wages subject to contributions during only the two calendar years immediately preceding the computation date, such employer's "average annual payroll" shall be the average of the payrolls for those two calendar years.

(3) "Total wages" means the total amount of wages paid or payable by an employer during the calendar year, including that part of remuneration in

Ken Wilke

House Commerce & Economic
Development Committee
Date: 02/18/2011
Attachment #: 1-6

excess of the limitation prescribed as provided in subsection (o)(1) of this section.

(b) "Base period" means the first four of the last five completed calendar quarters immediately preceding the first day of an individual's benefit year, except that the base period in respect to combined wage claims means the base period as defined in the law of the paying state.

(1) (A) If an individual lacks sufficient base period wages in order to establish a benefit year in the matter set forth above and satisfies the requirements of subsection (g) of K.S.A. 44-705 and subsection (hh) of K.S.A. 44-703, and amendments thereto, the claimant shall have an alternative base period substituted for the current base period so as not to prevent establishment of a valid claim. For the purposes of this subsection, "alternative base period" means the last four completed quarters immediately preceding the date the qualifying injury occurred. In the event the wages in the alternative base period have been used on a prior claim, then they shall be excluded from the new alternative base period.

(B) If an individual lacks sufficient base period wages in order to

establish a benefit year in the manner set forth above the claimant shall have an alternative base period substituted for the current base period. For the purposes of this subsection, "alternative base period" means eligibility shall be determined using a base period that consists of the four most recently completed calendar quarters preceding the start of the benefit year.

(2) For the purposes of this chapter, the term "base period" includes the alternative base period.

(c) (1) "Benefits" means the money payments payable to an individual, as provided in this act, with respect to such individual's unemployment.

(2) "Regular benefits" means benefits payable to an individual under this act or under any other state law, including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C. chapter 85, other than extended benefits.

(d) "Benefit year" with respect to any individual, means the period beginning with the first day of the first week for which such individual files a valid claim for benefits, and such benefit year shall continue for one full year. In the case of a combined wage claim, the benefit year shall be the benefit

year of the paying state. Following the termination of a benefit year, a subsequent benefit year shall commence on the first day of the first week with respect to which an individual next files a claim for benefits. When such filing occurs with respect to a week which overlaps the preceding benefit year, the subsequent benefit year shall commence on the first day immediately following the expiration date of the preceding benefit year. Any claim for benefits made in accordance with subsection (a) of K.S.A. 44-709, and amendments thereto, shall be deemed to be a "valid claim" for the purposes of this subsection if the individual has been paid wages for insured work as required under subsection (e) of K.S.A. 44-705 and amendments thereto. Whenever a week of unemployment overlaps two benefit years, such week shall, for the purpose of granting waiting-period credit or benefit payment with respect thereto, be deemed to be a week of unemployment within that benefit year in which the greater part of such week occurs.

(e) "Commissioner" or "secretary" means the secretary of labor.

(f) (1) "Contributions" means the money payments to the state employment security fund which are required to be made by employers on

account of employment under K.S.A. 44-710, and amendments thereto, and voluntary payments made by employers pursuant to such statute.

(2) "Payments in lieu of contributions" means the money payments to the state employment security fund from employers which are required to make or which elect to make such payments under subsection (e) of K.S.A. 44-710 and amendments thereto.

(g) "Employing unit" means any individual or type of organization, including any partnership, association, limited liability company, agency or department of the state of Kansas and political subdivisions thereof, trust, estate, joint-stock company, insurance company or corporation, whether domestic or foreign including nonprofit corporations, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representatives of a deceased person, which has in its employ one or more individuals performing services for it within this state. All individuals performing services within this state for any employing unit which maintains two or more separate establishments within this state shall be deemed to be employed by a single employing unit for all the purposes of this act. Each individual employed to

perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all the purposes of this act, whether such individual was hired or paid directly by such employing unit or by such agent or employee, provided the employing unit had actual or constructive knowledge of the employment.

(h) "Employer" means:

(1) (A) Any employing unit for which agricultural labor as defined in subsection (w) of this section is performed and which during any calendar quarter in either the current or preceding calendar year paid remuneration in cash of \$20,000 or more to individuals employed in agricultural labor or for some portion of a day in each of 20 different calendar weeks, whether or not such weeks were consecutive, in either the current or the preceding calendar year, employed in agricultural labor 10 or more individuals, regardless of whether they were employed at the same moment of time.

(B) For the purpose of this subsection (h)(1), any individual who is a member of a crew furnished by a crew leader to perform service in agricultural labor for any other person shall be treated as an employee of such

crew leader if:

(i) Such crew leader holds a valid certificate of registration under the federal migrant and seasonal agricultural workers protection act or substantially all the members of such crew operate or maintain tractors, mechanized harvesting or cropdusting equipment or any other mechanized equipment, which is provided by such crew leader; and

(ii) such individual is not in the employment of such other person within the meaning of subsection (i) of this section.

(C) For the purpose of this subsection (h)(1), in the case of any individual who is furnished by a crew leader to perform service in agricultural labor for any other person and who is not treated as an employee of such crew leader:

(i) Such other person and not the crew leader shall be treated as the employer of such individual; and

(ii) such other person shall be treated as having paid cash remuneration to such individual in an amount equal to the amount of cash remuneration paid to such individual by the crew leader, either on the crew leader's own

behalf or on behalf of such other person, for the service in agricultural labor performed for such other person.

(D) For the purposes of this subsection (h)(1) "crew leader" means an individual who:

(i) Furnishes individuals to perform service in agricultural labor for any other person;

(ii) pays, either on such individual's own behalf or on behalf of such other person, the individuals so furnished by such individual for the service in agricultural labor performed by them; and

(iii) has not entered into a written agreement with such other person under which such individual is designated as an employee of such other person.

(2) (A) Any employing unit which for calendar year 2007 and each calendar year thereafter: (i) In any calendar quarter in either the current or preceding calendar year paid for service in employment wages of \$1,500 or more, (ii) for some portion of a day in each of 20 different calendar weeks, whether or not such weeks were consecutive, in either the current or

preceding calendar year, had in employment at least one individual, whether or not the same individual was in employment in each such day, or (iii) elects to have an unemployment tax account established at the time of initial registration in accordance with subsection (c) of K.S.A. 44-711, and amendments thereto.

(B) Employment of individuals to perform domestic service or agricultural labor and wages paid for such service or labor shall not be considered in determining whether an employing unit meets the criteria of this subsection (h)(2).

(3) Any employing unit for which service is employment as defined in subsection (i)(3)(E) of this section.

(4) (A) Any employing unit, whether or not it is an employing unit under subsection (g) of this section, which acquires or in any manner succeeds to (i) substantially all of the employing enterprises, organization, trade or business, or (ii) substantially all the assets, of another employing unit which at the time of such acquisition was an employer subject to this act;

(B) any employing unit which is controlled substantially, either directly

or indirectly by legally enforceable means or otherwise, by the same interest or interests, whether or not such interest or interests are an employing unit under subsection (g) of this section, which acquires or in any manner succeeds to a portion of an employer's annual payroll, which is less than 100% of such employer's annual payroll, and which intends to continue the acquired portion as a going business.

(5) Any employing unit which paid cash remuneration of \$1,000 or more in any calendar quarter in the current or preceding calendar year to individuals employed in domestic service as defined in subsection (aa) of this section.

(6) Any employing unit which having become an employer under this subsection (h) has not, under subsection (b) of K.S.A. 44-711, and amendments thereto, ceased to be an employer subject to this act.

(7) Any employing unit which has elected to become fully subject to this act in accordance with subsection (c) of K.S.A. 44-711 and amendments thereto.

(8) Any employing unit not an employer by reason of any other

paragraph of this subsection (h), for which within either the current or preceding calendar year services in employment are or were performed with respect to which such employing unit is liable for any federal tax against which credit may be taken for contributions required to be paid into a state unemployment compensation fund; or which, as a condition for approval of this act for full tax credit against the tax imposed by the federal unemployment tax act, is required, pursuant to such act, to be an "employer" under this act.

(9) Any employing unit described in section 501(c)(3) of the federal internal revenue code of 1986 which is exempt from income tax under section 501(a) of the code that had four or more individuals in employment for some portion of a day in each of 20 different weeks, whether or not such weeks were consecutive, within either the current or preceding calendar year, regardless of whether they were employed at the same moment of time.

(i) "Employment" means:

(1) Subject to the other provisions of this subsection, service, including service in interstate commerce, performed by

(A) Any active officer of a corporation; or

(B) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or

, subject to the provisions of K.S.A. 44-703(i)(3)(D)

(C) any individual other than an individual who is an employee under subsection (i)(1)(A) or subsection (i)(1)(B) above who performs services for remuneration for any person:

(i) 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 such individual's principal; or

(ii) as a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, a principal (except for side-line 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.

For purposes of subsection (i)(1)(C), the term "employment" shall include services described in paragraphs (i) and (ii) above only if:

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

(2) The term "employment" shall include an individual's entire service within the United States, even though performed entirely outside this state if,

(A) The service is not localized in any state, and

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

(C) the individual's base of operations is in this state, or if there is no

base of operations, then the place from which service is directed or controlled is in this state.

(3) The term "employment" shall also include:

(A) Services performed within this state but not covered by the provisions of subsection (i)(1) or subsection (i)(2) shall be deemed to be employment subject to this act if contributions are not required and paid with respect to such services under an unemployment compensation law of any other state or of the federal government.

(B) Services performed entirely without this state, with respect to no part of which contributions are required and paid under an unemployment compensation law of any other state or of the federal government, shall be deemed to be employment subject to this act only if the individual performing such services is a resident of this state and the secretary approved the election of the employing unit for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this act.

(C) Services covered by an arrangement pursuant to subsection (l) of

K.S.A. 44-714, and amendments thereto, between the secretary and the agency charged with the administration of any other state or federal unemployment compensation law, pursuant to which all services performed by an individual for an employing unit are deemed to be performed entirely within this state, shall be deemed to be employment if the secretary has approved an election of the employing unit for whom such services are performed, pursuant to which the entire service of such individual during the period covered by such election is deemed to be insured work.

(D) Services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the secretary that: (i) Such individual has been and will continue to be free from control or direction over the performance of such services, both under the individual's contract of hire and in fact; and (ii) such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed.]

if the business for which activities of the individual are performed retains not only the right to control the end result of the activities performed, but the manner and means by which the end result is accomplished.

(E) Service performed by an individual in the employ of this state or any instrumentality thereof, any political subdivision of this state or any instrumentality thereof, or in the employ of an Indian tribe, as defined pursuant to section 3306(u) of the federal unemployment tax act, any instrumentality of more than one of the foregoing or any instrumentality which is jointly owned by this state or a political subdivision thereof or Indian tribes and one or more other states or political subdivisions of this or other states, provided that such service is excluded from "employment" as defined in the federal unemployment tax act by reason of section 3306(c)(7) of that act and is not excluded from "employment" under subsection (i)(4)(A) of this section. For purposes of this section, the exclusions from employment in subsections (i)(4)(A) and (i)(4)(L) shall also be applicable to services performed in the employ of an Indian tribe.

(F) Service performed by an individual in the employ of a religious, charitable, educational or other organization which is excluded from the term "employment" as defined in the federal unemployment tax act solely by reason of section 3306(c)(8) of that act, and is not excluded from employment

under paragraphs (I) through (M) of subsection (i)(4).

(G) The term "employment" shall include the service of an individual who is a citizen of the United States, performed outside the United States except in Canada, in the employ of an American employer (other than service which is deemed "employment" under the provisions of subsection (i)(2) or subsection (i)(3) or the parallel provisions of another state's law), if:

(i) The employer's principal place of business in the United States is located in this state; or

(ii) the employer has no place of business in the United States, but

(A) The employer is an individual who is a resident of this state; or

(B) the employer is a corporation which is organized under the laws of this state; or

(C) the employer is a partnership or a trust and the number of the partners or trustees who are residents of this state is greater than the number who are residents of any other state; or

(iii) none of the criteria of paragraphs (i) and (ii) above of this subsection (i)(3)(G) are met but the employer has elected coverage in this

state or, the employer having failed to elect coverage in any state, the individual has filed a claim for benefits, based on such service, under the law of this state.

(H) An "American employer," for purposes of subsection (i)(3)(G), means a person who is:

- (i) An individual who is a resident of the United States; or
- (ii) a partnership if 2/3 or more of the partners are residents of the United States; or
- (iii) a trust, if all of the trustees are residents of the United States; or
- (iv) a corporation organized under the laws of the United States or of any state.

(I) Notwithstanding subsection (i)(2) of this section, all service performed by an officer or member of the crew of an American vessel or American aircraft on or in connection with such vessel or aircraft, if the operating office, from which the operations of such vessel or aircraft operating within, or within and without, the United States are ordinarily and regularly supervised, managed, directed and controlled is within this state.

(J) Notwithstanding any other provisions of this subsection (i), service with respect to which a tax 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 compensation fund or which as a condition for full tax credit against the tax imposed by the federal unemployment tax act is required to be covered under this act.

(K) Domestic service 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 in any calendar quarter in the current calendar year or the preceding calendar year to individuals employed in such domestic service.

(4) The term "employment" shall not include: (A) Service performed in the employ of an employer specified in subsection (h)(3) of this section if such service is performed by an individual in the exercise of duties:

- (i) As an elected official;
- (ii) as a member of a legislative body, or a member of the judiciary, of a state, political subdivision or of an Indian tribe;

(iii) as a member of the state national guard or air national guard;

(iv) as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood or similar emergency;

(v) in a position which, under or pursuant to the laws of this state or tribal law, is designated as a major nontenured policymaking or advisory position or as a policymaking or advisory position the performance of the duties of which ordinarily does not require more than eight hours per week;

(B) service with respect to which unemployment compensation is payable under an unemployment compensation system established by an act of congress;

(C) service performed by an individual in the employ of such individual's son, daughter or spouse, and service performed by a child under the age of 21 years in the employ of such individual's father or mother;

(D) service performed in the employ of the United States government or an instrumentality of the United States exempt under the constitution of the United States from the contributions imposed by this act, except that to the extent that the congress of the United States shall permit states to require any

instrumentality of the United States to make payments into an unemployment fund under a state unemployment compensation law, all of the provisions of this act shall be applicable to such instrumentalities, and to services performed for such instrumentalities, in the same manner, to the same extent and on the same terms as to all other employers, employing units, individuals and services. If this state shall not be certified for any year by the federal security agency under section 3304(c) of the federal internal revenue code of 1986, the payments required of such instrumentalities with respect to such year shall be refunded by the secretary from the fund in the same manner and within the same period as is provided in subsection (f) of K.S.A. 44-717, and amendments thereto, with respect to contributions erroneously collected;

(E) service covered by an arrangement between the secretary and the agency charged with the administration of any other state or federal unemployment compensation law pursuant to which all services performed by an individual for an employing unit during the period covered by such employing unit's duly approved election, are deemed to be performed entirely within the jurisdiction of such other state or federal agency;

(F) service performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

(G) service performed by an individual for an employing unit as an insurance agent or as an insurance solicitor, if all such service performed by such individual for such employing unit is performed for remuneration solely by way of commission;

(H) service performed in any calendar quarter in the employ of any organization exempt from income tax under section 501(a) of the federal internal revenue code of 1986 (other than an organization described in section 401(a) or under section 521 of such code) if the remuneration for such service is less than \$50. In construing the application of the term "employment," if services performed during 1/2 or more of any pay period by an individual for the person employing such individual constitute employment, all the services of such individual for such period shall be deemed to be employment; but if the services performed during more than 1/2 of any such pay period by an individual for the person employing such individual do not constitute

employment, then none of the services of such individual for such period shall be deemed to be employment. As used in this subsection (i)(4)(H) the term "pay period" means a period (of not more than 31 consecutive days) for which a payment of remuneration is ordinarily made to the individual by the person employing such individual. This subsection (i)(4)(H) shall not be applicable with respect to services with respect to which unemployment compensation is payable under an unemployment compensation system established by an act of congress;

(I) services performed in the employ of a church or convention or association of churches, or an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

(J) service performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of such individual's ministry or by a member of a religious order in the exercise of duties required by such order;

(K) service performed in a facility conducted for the purpose of carrying out a program of:

(i) Rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, or

(ii) providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market, by an individual receiving such rehabilitation or remunerative work;

(L) service performed as part of an employment work-relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof or of an Indian tribe, by an individual receiving such work relief or work training;

(M) service performed by an inmate of a custodial or correctional institution;

(N) service performed, in the employ of a school, college, or university, if such service is performed by a student who is enrolled and is regularly attending classes at such school, college or university;

(O) service performed by an individual who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and

curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program, and such institution has so certified to the employer, except that this subsection (i)(4)(O) shall not apply to service performed in a program established for or on behalf of an employer or group of employers;

(P) service performed in the employ of a hospital licensed, certified or approved by the secretary of health and environment, if such service is performed by a patient of the hospital;

(Q) services performed as a qualified real estate agent. As used in this subsection (i)(4)(Q) the term "qualified real estate agent" means any individual who is licensed by the Kansas real estate commission as a salesperson under the real estate brokers' and salespersons' license act and for whom:

(i) Substantially all of the remuneration, whether or not paid in cash, for

the services performed by such individual as a real estate salesperson is directly related to sales or other output, including the performance of services, rather than to the number of hours worked; and

(ii) the services performed by the individual are performed pursuant to a written contract between such individual and the person for whom the services are performed and such contract provides that the individual will not be treated as an employee with respect to such services for state tax purposes;

(R) services performed for an employer by an extra in connection with any phase of motion picture or television production or television commercials for less than 14 days during any calendar year. As used in this subsection, the term "extra" means an individual who pantomimes in the background, adds atmosphere to the set and performs such actions without speaking and "employer" shall not include any employer which is a governmental entity or any employer described in section 501(c)(3) of the federal internal revenue code of 1986 which is exempt from income taxation under section 501(a) of the code;

(S) services performed by an oil and gas contract pumper. As used in

this subsection (i)(4)(S), "oil and gas contract pumper" means a person performing pumping and other services on one or more oil or gas leases, or on both oil and gas leases, relating to the operation and maintenance of such oil and gas leases, on a contractual basis for the operators of such oil and gas leases and "services" shall not include services performed for a governmental entity or any organization described in section 501(c)(3) of the federal internal revenue code of 1986 which is exempt from income taxation under section 501(a) of the code;

(T) service not in the course of the employer's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for such service is \$200 or more and such service is performed by an individual who is regularly employed by such employer to perform such service. For purposes of this paragraph, an individual shall be deemed to be regularly employed by an employer during a calendar quarter only if:

(i) On each of some 24 days during such quarter such individual performs for such employer for some portion of the day service not in the

course of the employer's trade or business, or

(ii) such individual was regularly employed, as determined under subparagraph (i), by such employer in the performance of such service during the preceding calendar quarter.

Such excluded service shall not include any services performed for an employer which is a governmental entity or any employer described in section 501(c)(3) of the federal internal revenue code of 1986 which is exempt from income taxation under section 501(a) of the code;

(U) service which is performed by any person who is a member of a limited liability company and which is performed as a member or manager of that limited liability company; and

(V) services performed as a qualified direct seller. The term "direct seller" means any person if:

(i) Such person:

(a) is engaged in the trade or business of selling or soliciting the sale of consumer products to any buyer on a buy-sell basis or a deposit-commission basis for resale, by the buyer or any other person, in the home or otherwise

rather than in a permanent retail establishment; or

(b) is engaged in the trade or business of selling or soliciting the sale of consumer products in the home or otherwise than in a permanent retail establishment;

(ii) substantially all the remuneration whether or not paid in cash for the performance of the services described in subparagraph (i) is directly related to sales or other output including the performance of services rather than to the number of hours worked;

(iii) the services performed by the person are performed pursuant to a written contract between such person and the person for whom the services are performed and such contract provides that the person will not be treated as an employee for federal and state tax purposes;

(iv) for purposes of this act, a sale or a sale resulting exclusively from a solicitation made by telephone, mail, or other telecommunications method, or other nonpersonal method does not satisfy the requirements of this subsection;

(W) service performed as an election official or election worker, if the

amount of remuneration received by the individual during the calendar year for services as an election official or election worker is less than \$1,000;

(X) service performed by agricultural workers who are aliens admitted to the United States to perform labor pursuant to section 1101 (a)(15)(H)(ii) (a) of the immigration and nationality act; and

(Y) service performed by an owner-operator of a motor vehicle that is leased or contracted to a licensed motor carrier with the services of a driver and is not treated under the terms of the lease agreement or contract with the licensed motor carrier as an employee for purposes of the federal insurance contribution act, 26 U.S.C. § 3101 et seq., the federal social security act, 42 U.S.C. § 301 et seq., the federal unemployment tax act, 26 U.S.C. § 3301 et seq., and the federal statutes prescribing income tax withholding at the source, 26 U.S.C. § 3401 et seq. Employees or agents of the owner-operator shall not be considered employees of the licensed motor carrier for purposes of employment security taxation or compensation. As used in this subsection (Y), the following definitions apply: (i) "Motor vehicle" means any automobile, truck-trailer, semitrailer, tractor, motor bus or any other self-

propelled or motor-driven vehicle used upon any of the public highways of Kansas for the purpose of transporting persons or property; (ii) "licensed motor carrier" means any person, firm, corporation or other business entity that holds a certificate of convenience and necessity or a certificate of public service from the state corporation commission or is required to register motor carrier equipment pursuant to 49 U.S.C. § 14504; and (iii) "owner-operator" means a person, firm, corporation or other business entity that is the owner of a single motor vehicle that is driven exclusively by the owner under a lease agreement or contract with a licensed motor carrier.

(j) "Employment office" means any office operated by this state and maintained by the secretary of labor for the purpose of assisting persons to become employed.

(k) "Fund" means the employment security fund established by this act, to which all contributions and reimbursement payments required and from which all benefits provided under this act shall be paid and including all money received from the federal government as reimbursements pursuant to section 204 of the federal-state extended compensation act of 1970, and

amendments thereto.

(l) "State" includes, in addition to the states of the United States of America, any dependency of the United States, the Commonwealth of Puerto Rico, the District of Columbia and the Virgin Islands.

(m) "Unemployment." An individual shall be deemed "unemployed" with respect to any week during which such individual performs no services and with respect to which no wages are payable to such individual, or with respect to any week of less than full-time work if the wages payable to such individual with respect to such week are less than such individual's weekly benefit amount.

(n) "Employment security administration fund" means the fund established by this act, from which administrative expenses under this act shall be paid.

(o) "Wages" means all compensation for services, including commissions, bonuses, back pay and the cash value of all remuneration, including benefits, paid in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash, shall be estimated and

determined in accordance with rules and regulations prescribed by the secretary. Compensation payable to an individual which has not been actually received by that individual within 21 days after the end of the pay period in which the compensation was earned shall be considered to have been paid on the 21st day after the end of that pay period. Effective January 1, 1986, gratuities, including tips received from persons other than the employing unit, shall be considered wages when reported in writing to the employer by the employee. Employees must furnish a written statement to the employer, reporting all tips received if they total \$20 or more for a calendar month whether the tips are received directly from a person other than the employer or are paid over to the employee by the employer. This includes amounts designated as tips by a customer who uses a credit card to pay the bill. Notwithstanding the other provisions of this subsection (o), wages paid in back pay awards or settlements shall be allocated to the week or weeks and reported in the manner as specified in the award or agreement, or, in the absence of such specificity in the award or agreement, such wages shall be allocated to the week or weeks in which such wages, in the judgment of the

secretary, would have been paid. The term "wages" shall not include:

(1) That part of the remuneration which has been paid in a calendar year to an individual by an employer or such employer's predecessor in excess of \$3,000 for all calendar years prior to 1972, \$4,200 for the calendar years 1972 to 1977, inclusive, \$6,000 for calendar years 1978 to 1982, inclusive, \$7,000 for the calendar year 1983, and \$8,000 with respect to employment during any calendar year following 1983, except that if the definition of the term "wages" as contained in the federal unemployment tax act is amended to include remuneration in excess of \$8,000 paid to an individual by an employer under the federal act during any calendar year, wages shall include remuneration paid in a calendar year to an individual by an employer subject to this act or such employer's predecessor with respect to employment during any calendar year up to an amount equal to the dollar limitation specified in the federal unemployment tax act. For the purposes of this subsection (o)(1), the term "employment" shall include service constituting employment under any employment security law of another state or of the federal government;

(2) the amount of any payment (including any amount paid by an employing unit for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of such employee's dependents under a plan or system established by an employer which makes provisions for employees generally, for a class or classes of employees or for such employees or a class or classes of employees and their dependents, on account of (A) sickness or accident disability, except in the case of any payment made to an employee or such employee's dependents, this subparagraph shall exclude from the term "wages" only payments which are received under a workers compensation law. Any third party which makes a payment included as wages by reason of this subparagraph (2)(A) shall be treated as the employer with respect to such wages, or (B) medical and hospitalization expenses in connection with sickness or accident disability, or (C) death;

(3) any payment on account of sickness or accident disability, or medical or hospitalization expenses in connection with sickness or accident disability, made by an employer to, or on behalf of, an employee after the

expiration of six calendar months following the last calendar month in which the employee worked for such employer;

(4) any payment made to, or on behalf of, an employee or such employee's beneficiary:

(A) From or to a trust described in section 401(a) of the federal internal revenue code of 1986 which is exempt from tax under section 501(a) of the federal internal revenue code of 1986 at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust;

(B) under or to an annuity plan which, at the time of such payment, is a plan described in section 403(a) of the federal internal revenue code of 1986;

(C) under a simplified employee pension as defined in section 408(k)(1) of the federal internal revenue code of 1986, other than any contribution described in section 408(k)(6) of the federal internal revenue code of 1986;

(D) under or to an annuity contract described in section 403(b) of the federal internal revenue code of 1986, other than a payment for the purchase of such contract which was made by reason of a salary reduction agreement

whether evidenced by a written instrument or otherwise;

(E) under or to an exempt governmental deferred compensation plan as defined in section 3121(v)(3) of the federal internal revenue code of 1986;

(F) to supplement pension benefits under a plan or trust described in any of the foregoing provisions of this subparagraph to take into account some portion or all of the increase in the cost of living, as determined by the secretary of labor, since retirement but only if such supplemental payments are under a plan which is treated as a welfare plan under section 3(2)(B)(ii) of the federal employee retirement income security act of 1974; or

(G) under a cafeteria plan within the meaning of section 125 of the federal internal revenue code of 1986;

(5) the payment by an employing unit (without deduction from the remuneration of the employee) of the tax imposed upon an employee under section 3101 of the federal internal revenue code of 1986 with respect to remuneration paid to an employee for domestic service in a private home of the employer or for agricultural labor;

(6) remuneration paid in any medium other than cash to an employee

for service not in the course of the employer's trade or business;

(7) remuneration paid to or on behalf of an employee if and to the extent that at the time of the payment of such remuneration it is reasonable to believe that a corresponding deduction is allowable under section 217 of the federal internal revenue code of 1986 relating to moving expenses;

(8) any payment or series of payments by an employer to an employee or any of such employee's dependents which is paid:

(A) Upon or after the termination of an employee's employment relationship because of (i) death or (ii) retirement for disability; and

(B) under a plan established by the employer which makes provisions for employees generally, a class or classes of employees or for such employees or a class or classes of employees and their dependents, other than any such payment or series of payments which would have been paid if the employee's employment relationship had not been so terminated;

(9) remuneration for agricultural labor paid in any medium other than cash;

(10) any payment made, or benefit furnished, to or for the benefit of an

employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 129 of the federal internal revenue code of 1986 which relates to dependent care assistance programs;

(11) the value of any meals or lodging furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119 of the federal internal revenue code of 1986;

(12) any payment made by an employer to a survivor or the estate of a former employee after the calendar year in which such employee died;

(13) any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 117 or 132 of the federal internal revenue code of 1986;

(14) any payment made, or benefit furnished, to or for the benefit of an employee, if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit

from income under section 127 of the federal internal revenue code of 1986 relating to educational assistance to the employee; or

(15) any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(d) of the federal internal revenue code of 1986 relating to health savings accounts.

Nothing in any paragraph of subsection (o), other than paragraph (1), shall exclude from the term "wages": (1) Any employer contribution under a qualified cash or deferred arrangement, as defined in section 401(k) of the federal internal revenue code of 1986, to the extent that such contribution is not included in gross income by reason of section 402(a)(8) of the federal internal revenue code of 1986; or (2) any amount treated as an employer contribution under section 414(h)(2) of the federal internal revenue code of 1986.

Any amount deferred under a nonqualified deferred compensation plan shall be taken into account for purposes of this section as of the later of when the services are performed or when there is no substantial risk of forfeiture of

the rights to such amount. Any amount taken into account as wages by reason of this paragraph, and the income attributable thereto, shall not thereafter be treated as wages for purposes of this section. For purposes of this paragraph, the term "nonqualified deferred compensation plan" means any plan or other arrangement for deferral of compensation other than a plan described in subsection (o)(4).

(p) "Week" means such period or periods of seven consecutive calendar days, as the secretary may by rules and regulations prescribe.

(q) "Calendar quarter" means the period of three consecutive calendar months ending March 31, June 30, September 30 or December 31, or the equivalent thereof as the secretary may by rules and regulations prescribe.

(r) "Insured work" means employment for employers.

(s) "Approved training" means any vocational training course or course in basic education skills, including a job training program authorized under the federal workforce investment act of 1998, approved by the secretary or a person or persons designated by the secretary.

(t) "American vessel" or "American aircraft" means any vessel or

aircraft documented or numbered or otherwise registered under the laws of the United States; and any vessel or aircraft which is neither documented or numbered or otherwise registered under the laws of the United States nor documented under the laws of any foreign country, if its crew performs service solely for one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any state.

(u) "Institution of higher education," for the purposes of this section, means an educational institution which:

(1) Admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate;

(2) is legally authorized in this state to provide a program of education beyond high school;

(3) provides an educational program for which it awards a bachelor's or higher degree, or provides a program which is acceptable for full credit toward such a degree, a program of postgraduate or postdoctoral studies, or a program of training to prepare students for gainful employment in a

recognized occupation; and

(4) is a public or other nonprofit institution.

Notwithstanding any of the foregoing provisions of this subsection (u), all colleges and universities in this state are institutions of higher education for purposes of this section, except that no college, university, junior college or other postsecondary school or institution which is operated by the federal government or any agency thereof shall be an institution of higher education for purposes of the employment security law.

(v) "Educational institution" means any institution of higher education, as defined in subsection (u) of this section, or any institution, except private for profit institutions, in which participants, trainees or students are offered an organized course of study or training designed to transfer to them knowledge, skills, information, doctrines, attitudes or abilities from, by or under the guidance of an instructor or teacher and which is approved, licensed or issued a permit to operate as a school by the state department of education or other government agency that is authorized within the state to approve, license or issue a permit for the operation of a school or to an Indian tribe in the

operation of an educational institution. The courses of study or training which an educational institution offers may be academic, technical, trade or preparation for gainful employment in a recognized occupation.

(w) (1) "Agricultural labor" means any remunerated service:

(A) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife.

(B) In the employ of the owner or tenant or other operator of a farm, in connection with the operating, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm.

(C) In connection with the production or harvesting of any commodity defined as an agricultural commodity in section (15)(g) of the agricultural marketing act, as amended (46 Stat. 1500, sec. 3; 12 U.S.C. 1141j) or in

connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes.

(D) (i) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than 1/2 of the commodity with respect to which such service is performed;

(ii) in the employ of a group of operators of farms (or a cooperative organization of which such operators are members) in the performance of service described in paragraph (i) above of this subsection (w)(1)(D), but only if such operators produced more than 1/2 of the commodity with respect to which such service is performed;

(iii) the provisions of paragraphs (i) and (ii) above of this subsection (w)(1)(D) shall not be deemed to be applicable with respect to service

performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

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

(2) "Agricultural labor" does not include service performed prior to January 1, 1980, by an individual who is an alien admitted to the United States to perform service in agricultural labor pursuant to sections 214(c) and 101(a)(15)(H) of the federal immigration and nationality act.

(3) As used in this subsection (w), the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses, or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(4) For the purpose of this section, if an employing unit does not maintain sufficient records to separate agricultural labor from other employment, all services performed during any pay period by an individual for the person employing such individual shall be deemed to be agricultural

labor if services performed during 1/2 or more of such pay period constitute agricultural labor; but if the services performed during more than 1/2 of any such pay period by an individual for the person employing such individual do not constitute agricultural labor, then none of the services of such individual for such period shall be deemed to be agricultural labor. As used in this subsection (w), the term "pay period" means a period of not more than 31 consecutive days for which a payment of remuneration is ordinarily made to the individual by the person employing such individual.

(x) "Reimbursing employer" means any employer who makes payments in lieu of contributions to the employment security fund as provided in subsection (e) of K.S.A. 44-710 and amendments thereto.

(y) "Contributing employer" means any employer other than a reimbursing employer or rated governmental employer.

(z) "Wage combining plan" means a uniform national arrangement approved by the United States secretary of labor in consultation with the state unemployment compensation agencies and in which this state shall participate, whereby wages earned in one or more states are transferred to

another state, called the "paying state," and combined with wages in the paying state, if any, for the payment of benefits under the laws of the paying state and as provided by an arrangement so approved by the United States secretary of labor.

(aa) "Domestic service" means any service for a person in the operation and maintenance of a private household, local college club or local chapter of a college fraternity or sorority, as distinguished from service as an employee in the pursuit of an employer's trade, occupation, profession, enterprise or vocation.

(bb) "Rated governmental employer" means any governmental entity which elects to make payments as provided by K.S.A. 44-710d and amendments thereto.

(cc) "Benefit cost payments" means payments made to the employment security fund by a governmental entity electing to become a rated governmental employer.

(dd) "Successor employer" means any employer, as described in subsection (h) of this section, which acquires or in any manner succeeds to

(1) substantially all of the employing enterprises, organization, trade or business of another employer or (2) substantially all the assets of another employer.

(ee) "Predecessor employer" means an employer, as described in subsection (h) of this section, who has previously operated a business or portion of a business with employment to which another employer has succeeded.

(ff) "Lessor employing unit" means any independently established business entity which engages in the business of providing leased employees to a client lessee.

(gg) "Client lessee" means any individual, organization, partnership, corporation or other legal entity leasing employees from a lessor employing unit.

(hh) "Qualifying injury" means a personal injury by accident arising out of and in the course of employment within the coverage of the Kansas workers compensation act, K.S.A. 44-501 et seq., and amendments thereto.

Sec.4.

K.S.A. 2010 Supp. 44-766 is hereby amended to read as follows: **44-**

766. (a) No person shall knowingly and intentionally misclassify an employee as an independent contractor for the sole or primary purpose of avoiding either state income tax withholding and reporting requirements or state unemployment insurance contributions reporting requirements.

[(b) Any person violating subsection (a) shall be subject to a penalty pursuant to K.S.A. 79-3228, and amendments thereto.]

(b)(1) Any person violating subsection (a) shall upon first violation be subject to a civil penalty in an amount computed in the manner prescribed in K.S.A. 79-3228 and amendments thereto.

(2) Any person violating subsection (a) shall upon a second violation shall be subject to a civil penalty computed as prescribed in paragraph (1) and in addition upon conviction, shall be guilty of a class C nonperson misdemeanor.

(3) Any person violating subsection (a) shall upon a third or subsequent violation shall be subject to a civil penalty computed as prescribed in paragraph (1) and in addition upon conviction, shall be guilty of a severity level 10, nonperson felony.

(c) Criminal violations of subsection (a) may be prosecuted by the attorney general or the district or county attorney for the county in which the violation occurred.

(d) Any civil penalty assessed hereunder shall be remitted to the secretary and deposited in the state treasury.

(e) Any penalty provided in this section shall be in addition to any other penalty and remedy that may otherwise be imposed under the employment security act and such remedies shall be cumulative.

(f) This section shall be a part of and supplemental to the employment security law.

Date: 02/18/2011
House Commerce & Economic Development Committee
Attachment #: 1-55