

Definition of Employee in the Workers' Compensation Statute

21 V.S.A. § 601(14):

(14) "Worker" and "employee" means an individual who has entered into the employment of, or works under contract of service or apprenticeship with, an employer. Any reference to a worker who has died as the result of a work injury shall include a reference to the worker's dependents, and any reference to a worker who is a minor or incompetent shall include a reference to the minor's committee, guardian, or next friend. The term "worker" or "employee" does not include:

(A) An individual whose employment is of casual nature, and not for the purpose of the employer's trade or business.

(B) An individual engaged in amateur sports even if an employer contributes to the support of such sports.

(C) An individual engaged in agriculture or farm employment for an employer whose aggregate payroll is less than \$10,000.00 in a calendar year, unless the employer notifies the Commissioner that the employer wishes to be included within the provisions of this chapter; the existence of a contract of insurance shall be considered sufficient notice.

(D) A member of the employer's family dwelling in the employer's house; but, if in any contract of insurance the wages or salary of such a member of the employer's family is included in the payroll on which the premium is based, then that family member shall, in the event of sustaining an injury arising out of and in the course of employment be deemed an employee and compensated accordingly.

(E) Any individual engaged in any type of service in or about a private dwelling unless the employer notifies the Commissioner that the employer wishes to be included within the provisions of this chapter; the existence of a contract of insurance shall be considered sufficient notice.

(F) The sole proprietor or partner owner or partner owners of an unincorporated business provided:

(i) The individual performs work that is distinct and separate from that of the person with whom the individual contracts.

(ii) The individual controls the means and manner of the work performed.

(iii) The individual holds him or herself out as in business for him or herself.

(iv) The individual holds him or herself out for work for the general public and does not perform work exclusively for or with another person.

(v) The individual is not treated as an employee for purposes of income or employment taxation with regard to the work performed.

(vi) The services are performed pursuant to a written agreement or contract between the individual and another person, and the written agreement or contract explicitly states that the individual is not considered to be an employee under this chapter, is working independently, has no employees, and has not contracted with other independent contractors. The written contract or agreement shall also include information regarding the right of the individual to purchase workers' compensation insurance coverage and the individual's election not to purchase that coverage. However, if the individual who is party to the agreement or contract under this subdivision is found to have employees, those employees may file a claim for benefits under this chapter against either or both parties to the agreement.

(G) An individual who performs services as a real estate broker or real estate salesperson, provided:

(i) the individual is licensed to broker or sell real estate pursuant to 26 V.S.A. chapter 41;

(ii) all the individual's compensation from performing real estate broker or sales services is based on commissions from sales production or results and is not based on time worked or an hourly wage;

(iii) the services are performed pursuant to a written agreement or contract between the individual and the real estate sales or broker business or another person with whom the individual is affiliated or associated and the written agreement or contract explicitly states that the individual is not considered to be an employee under this chapter and is not eligible for coverage under this chapter; and

(iv) the individual is not treated as an employee for the purposes of federal income and employment taxation with regard to the real estate broker or sales services performed.

(H) With the approval of the Commissioner, a corporation or a limited liability company (L.L.C.) may elect to file exclusions from the provisions of this chapter. A corporation or an L.L.C. may elect to exclude up to four executive officers or managers or members from coverage requirements under this chapter. If all officers of the corporation or all managers or members of an L.L.C. make such election, receive approval, and the business has no employees, the corporation or L.L.C. shall not be required to purchase workers' compensation coverage. If after election, the officer, manager, or member experiences a personal injury and files a claim under this chapter, the employer shall have all the defenses available in a personal injury claim. However, this election shall not prevent any other individual, other than the individual excluded under this section, found to be an employee of the corporation or L.L.C. to recover workers' compensation from either the corporation, L.L.C., or the statutory employer.

Exclusions from Definition of Employment in the Unemployment Insurance Statute

21 V.S.A. § 1301(6)

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(B) Services performed by an individual for wages shall be deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the Commissioner that:

(i) Such individual has been and will continue to be free from control or direction over the performance of such services, both under his or her contract of service 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; and

(iii) Such individual is customarily engaged in an independently established trade, occupation, profession, or business.

(C) The term “employment” shall not include:

(i)(I) Service performed by an individual in agricultural labor except as provided in subdivision (6)(A)(vii) of this section. For purposes of this subdivision, the term “agricultural labor” means any service performed prior to January 1, 1972 which was agricultural labor as defined in this subdivision prior to such date, and remunerated service performed after December 31, 1971: (aa) 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 fur-bearing animals and wildlife; (bb) in the employ of the owner or tenant or other operator of a farm, in connection with the operation, 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; (cc) 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. 1550, sec. 3; 12 U.S.C. § 1141j) 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; (dd) 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 one-half of the commodity with respect to which such service is performed; (ee) 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 subdivision (dd) of this subdivision (C)(i)(I), but only if such operators produced more than one-half of the commodity with respect to which such service is performed; (ff) on a farm operated for profit if such service is not in the course of the employer's trade or business.

(II) As used in subdivision (6)(C)(i)(I), 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.

(III) The provisions of (dd) and (ee) of subdivision (6)(C)(i)(I) 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.

(ii) Domestic service in a private home except as provided in subdivision (6)(A)(viii) of this section;

(iii)(I) 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 that service is \$50.00 or more and the service is performed by an individual who is regularly employed by the employer to perform the service. For purposes of this subdivision, an individual shall be deemed to be regularly employed by an employer during a calendar quarter if: (aa) on each of some 24 days during the quarter the individual performs for the employer for some portion of the day service not in the course of the employer’s trade or business; or (bb) the individual was regularly employed (as

determined under the preceding subdivision) by the employer in the performance of the service during the preceding calendar quarter.

(II) The term “service not in the course of the employer’s trade or business” includes service that does not promote or advance the trade or business of the employer. Services performed for a corporation do not come within the exception.

(iv) Service performed by an individual in the employ of his or her son, daughter, or spouse, and service performed by a minor in the employ of his or her father or mother; or service by one member of a family to another under circumstances which, under the general law, do not give rise to the relation of employer and employee;

(v) Service performed in the employ of the U.S. government or of an instrumentality of the United States, but if the Congress of the United States shall permit states to require that the U.S. government or any instrumentalities of the United States shall make payments into an unemployment fund under a state unemployment compensation act, then, to the extent permitted by Congress, and from and after the date as of which such permission becomes effective, all of the provisions of this chapter shall be applicable to the U.S. government or 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; provided that if this State should not be certified by the secretary of labor under section 3304 of the Federal Unemployment Tax Act for any year, then the payments required of the U.S. government or such instrumentalities with respect to such year shall be deemed to have been erroneously collected within the meaning of section 1337 of this title and shall be refunded by the Commissioner from the Fund in accordance with the provisions of said section 1337;

(vi)(I) Before January 1, 1978, service performed in the employ of a state, a political subdivision thereof, or an instrumentality of one or more states or political subdivisions except as otherwise provided in this chapter with respect to service for a hospital or institution of higher education located in this State, and except as to any town, city, or other municipal corporation, as defined by 24 V.S.A. § 1751, or an instrumentality thereof, that duly elects otherwise, as provided by this chapter with the Commissioner’s approval;

(II) After December 31, 1977, in the employ of a governmental entity referred to in subdivision (6)(A)(x) of this section if such service is performed by an individual in the exercise of duties: (aa) as an elected official; (bb) as a member of a legislative body, or a member of the judiciary, of a state or political subdivision; (cc) as a member of the State National Guard or Air National Guard; (dd) as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency; or (ee) in a position which, under or pursuant to the laws of this State, is designated as a policymaking or advisory position the performance of the duties of which ordinarily does not require more than eight hours per week.

(vii) For the purposes of subdivisions (6)(A)(ix) and (6)(A)(x) of this section, the term “employment” does not include service performed:

(I) 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; or

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

(III) prior to January 1, 1978, in the employ of a school which is not an institution of higher education; or

(IV) in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is limited due to being an elder or having a disability or injury or providing remunerative work for individuals who because of having a disability cannot be readily absorbed in the competitive labor market by an individual receiving such rehabilitation or remunerative work; or

(V) as part of an unemployment 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, by an individual receiving such work relief or work training; or

(VI) prior to January 1, 1978, for a hospital in a state prison or other state correctional institution by an inmate of the prison or correctional institution and after December 31, 1977, by an inmate of a custodial or penal institution.

(viii) Service with respect to which unemployment compensation is payable under an unemployment compensation system established by an act of Congress; provided, that the Commissioner is hereby authorized and directed to enter into agreements with the proper agencies under such act of Congress, which agreements shall become effective 10 days after publication thereof in one or more newspapers of general circulation in this State, to provide reciprocal treatment to individuals who have, after acquiring potential rights to unemployment compensation under such act of Congress, acquired rights to benefits under this chapter;

(ix) Service performed on and after July 1, 1939, with respect to which unemployment compensation is payable under an act of Congress entitled "Railroad Unemployment Insurance Act";

(x) Service as an officer or member of a crew of an American vessel performed on or in connection with such vessel, if the operating office, from which the operations of the vessel operating on navigable waters within or without the United States are ordinarily and regularly supervised, managed, directed and controlled, is without this State;

(xi) Service performed on or in connection with a vessel not an American vessel by an individual, if the individual performs services on and in connection with such vessel when outside the United States; and, for the purpose of this section, the term "American vessel" means any vessel documented or numbered under the laws of the United States; and includes any vessel which is neither documented or numbered under the laws of the United States nor documented under the laws of any foreign country, if its crew performs services 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;

(xii) Service performed by an individual in, or as an officer or member of the crew of a vessel while it is engaged in, the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic

forms of animal and vegetable life, including service performed by any such individual as an ordinary incident to any such activity, except:

(I) Service performed in connection with the catching or taking of salmon or halibut, for commercial purposes; and

(II) Service performed on or in connection with a vessel of more than 10 net tons, determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States;

(xiii) Service performed in any calendar quarter in the employ of any organization exempt from income tax under Section 501(a) (other than an organization described in Section 401(a) or under Section 521 of the federal Internal Revenue Code, if the remuneration for such service is less than \$50.00;

(xiv) 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, or by the spouse of such a student, if the spouse is advised, at the time such spouse commences to perform such service, that the employment of such spouse to perform such service is provided under a program to provide financial assistance to such student by school, college, or university, and such employment will not be covered by any program of unemployment insurance;

(xv) Service performed by an individual under the age of 22 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 subdivision shall not apply to service performed in a program established for or on behalf of an employer or group of employers;

(xvi) Service performed in the employ of a hospital, if such service is performed by a patient of the hospital, as defined in this section;

(xvii) Service performed by an individual for a person as an insurance agent or as an insurance solicitor, if all such service performed by such individual for such person is performed for remuneration solely by way of commission;

(xviii) Service performed by an individual for a person as a salesman, agent or solicitor if the state law requires the individual to be registered or licensed to engage in the performance of the service and if the individual in the performance of such service is an independent contractor under common law rules and if the individual performs all such service for remuneration solely by way of commission;

(xix) Service performed by an individual engaged in the harvesting of timber, or in the transportation of timber from the place where harvested to market, or service performed by an individual engaged as a stone artisan including but not limited to sculpting, etching, or carving quarried stone when:

(I) such individual has been and will continue to be free from control or direction over the performance of such services, both under his or her contract of service and in fact; and

(II) such individual is customarily engaged in an independently established trade, occupation, profession, or business; and

(III) such individual furnishes substantially all of the equipment, tools, and supplies necessary in carrying out his or her contractual obligations to his or her clients.

(xx) Service performed by a full-time student as defined in subsection (III) in the employ of an organized camp.

(I) if such camp: (aa) did not operate for more than seven months in the calendar year and did not operate for more than seven months in the preceding calendar year; or (bb) had average gross receipts for any six months in the preceding calendar year which were not more than 33 1/3 percent of its average gross receipts for the other six months in the preceding calendar year; and

(II) if such full-time student performed services in the employ of such camp for less than 13 calendar weeks in such calendar year; provided, that if the individual does not enroll in the immediately succeeding academic year or term, then the

services of such individual as defined in this subsection shall be deemed to be employment for all purposes under this chapter.

(III) full-time student. For the purposes of subdivision (xx), an individual shall be treated as a full-time student for any period: (aa) during which the individual is enrolled as a full-time student at an educational institution; or (bb) which is between academic years or terms if (A) the individual was enrolled as a full-time student at an educational institution for the immediately preceding year or term; and (B) there is a reasonable assurance that the individual will be so enrolled for the immediately succeeding academic year or term after the period described in subdivision (A).

(xxi) Service performed by a direct seller if the individual is in compliance with all the following:

(I) The individual is engaged in the trade or business of selling or soliciting the sale of consumer products, including services or other intangibles, in the home or a location other than in a permanent retail establishment, including whether the sale or solicitation of a sale is to any buyer on a buy-sell basis, a deposit-commission basis, or any similar basis for resale by the buyer or any other person.

(II) Substantially all the remuneration, whether or not received in cash, for the performance of the services described in subdivision (I) of this subdivision (C)(xxi) 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 individual are performed pursuant to a written contract between the individual and the person for whom the services are performed, and the contract provides that the individual will not be treated as an employee for federal and state tax purposes.

(D) Notwithstanding any other provisions of this subdivision, 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 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 chapter.