S T A T E O F N E W Y O R K

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2009-2010 Regular Sessions

I N A S S E M B L Y

March 12, 2009

Introduced by M. of A. BALL, TOWNSEND, ERRIGO, MILLER, CALHOUN, McDONOUGH, GIGLIO -- Multi-Sponsored by -- M. of A. CROUCH, QUINN -- read once and referred to the Committee on Labor

AN ACT to amend the tax law, the workers' compensation law and the labor law, in relation to classifications of employees; and to repeal certain provisions of the workers' compensation law and the labor law relating thereto

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 170 of the tax law is amended by adding a new subdivision 9 to read as follows:

9. THE DEPARTMENT SHALL PROMULGATE AND REGULARLY UPDATE RULES AND REGULATIONS DEFINING AND ESTABLISHING A PROCEDURE FOR DETERMINING WHETHER A PERSON IS AN EMPLOYEE.

(A) EMPLOYEE SHALL NOT INCLUDE ANY PERSON PERFORMING A SERVICE IF:

(I) THE PERSON IS FREE FROM CONTROL AND DIRECTION IN CONNECTION WITH THE PERFORMANCE OF THE SERVICE, BOTH UNDER HIS OR HER CONTRACT FOR THE PERFORMANCE OF SERVICE AND IN FACT;

(II) THE SERVICE IS PERFORMED OUTSIDE THE USUAL COURSE OF THE BUSINESS OF AN EMPLOYER; AND

(III) THE PERSON IS CUSTOMARILY ENGAGED IN AN INDEPENDENTLY ESTABLISHED TRADE, OCCUPATION, PROFESSION OR BUSINESS OF THE SAME NATURE AS THAT INVOLVED IN THE SERVICE PERFORMED.

(B) THE FAILURE TO WITHHOLD FEDERAL OR STATE INCOME TAXES, OR TO PAY UNEMPLOYMENT COMPENSATION CONTRIBUTIONS OR WORKERS' COMPENSATION PREMIUMS WITH RESPECT TO A PERSON'S WAGES SHALL BE CONSIDERED IN MAKING A DETERMINATION PURSUANT TO THIS SUBDIVISION.

(C) A PERSON'S EXERCISE OF THE OPTION TO SECURE WORKERS' COMPENSATION INSURANCE WITH A CARRIER AS A SOLE PROPRIETOR OR PARTNERSHIP SHALL NOT BE CONSIDERED IN MAKING A DETERMINATION PURSUANT TO THIS SUBDIVISION.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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S 2. Paragraphs (a) and (b) of subdivision 2 of section 171-h of the tax law, as amended by chapter 398 of the laws of 1997, are amended to read as follows:

(a) (I) "employee" means an individual who is an employee [within the meaning of chapter twenty-four of the internal revenue code of 1986] AS DETERMINED BY THE DEPARTMENT, and does not include:

(A) an employee of a federal or state agency performing intelligence or counterintelligence functions if the head of such agency has determined that a report made pursuant to this section with respect to the individual could endanger the safety of the employee or compromise an ongoing investigation or intelligence mission; OR

(B)(I) ANY INDIVIDUAL WHO IS FREE FROM CONTROL AND DIRECTION IN CONNECTION WITH THE PERFORMANCE OF A SERVICE, BOTH UNDER HIS OR HER CONTRACT FOR THE PERFORMANCE OF SERVICE OR IN FACT;

(II) THE SERVICE IS PERFORMED OUTSIDE OF THE USUAL COURSE OF BUSINESS OF THE EMPLOYER; AND

(III) THE INDIVIDUAL IS CUSTOMARILY ENGAGED IN AN INDEPENDENTLY ESTABLISHED TRADE, OCCUPATION, PROFESSION OR BUSINESS OF THE SAME NATURE AS THAT INVOLVED IN THE SERVICE PERFORMED;

(II) THE FAILURE TO WITHHOLD FEDERAL OR STATE INCOME TAXES, OR TO PAY UNEMPLOYMENT COMPENSATION CONTRIBUTIONS OR WORKERS' COMPENSATION PREMIUMS WITH RESPECT TO AN INDIVIDUAL'S WAGES SHALL NOT BE CONSIDERED IN MAKING A DETERMINATION PURSUANT TO THIS PARAGRAPH.

(III) AN INDIVIDUAL'S EXERCISE OF THE OPTION TO SECURE WORKERS' COMPENSATION INSURANCE WITH A CARRIER AS A SOLE PROPRIETOR OR PARTNERSHIP SHALL NOT BE CONSIDERED IN MAKING A DETERMINATION PURSUANT TO THIS PARAGRAPH.

(b) "employer" means an individual or entity [within the meaning given the term employer in section three thousand four hundred one (d) of the internal revenue code of 1986] ENGAGED IN THE EMPLOYMENT OF ANY EMPLOYEE OR EMPLOYEES and includes:

(i) any governmental entity, and

(ii) any labor organization as defined in section two (5) of the national labor relations act, including any entity (also known as a "hiring hall") which is used by such labor organization and an employer to carry out the requirements described in section eight (f)(3) of the national labor relations act with respect to any agreement that may exist between the labor organization and the employer.

S 3. Section 611 of the tax law is amended by adding a new subsection (c) to read as follows:

(C) UNDOCUMENTED WORKER. A PERSON NOR A RESIDENT OF THIS STATE NOR A NONRESIDENT, AND CONSIDERED AN UNDOCUMENTED WORKER AS DETERMINED BY THE DEPARTMENT, EARNING INCOME IN THIS STATE, SHALL BE TAXED AS A RESIDENT PURSUANT TO THE PROVISIONS OF THIS ARTICLE. SHOULD SUCH PERSON FAIL TO COMPLY WITH THE PROVISIONS OF THIS ARTICLE, EACH EMPLOYER WHO PAID INCOME TO SUCH UNDOCUMENTED WORKER SHALL BE RESPONSIBLE FOR COMPLYING WITH THE PROVISIONS OF THIS ARTICLE IN THE PLACE AND STEAD OF THE UNDOCUMENTED WORKER.

S 4. Subsection (e) of section 697 of the tax law is amended by adding a new paragraph 3-b to read as follows:

(3-B) NOTHING IN THIS SUBSECTION SHALL BE CONSTRUED TO PROHIBIT THE DEPARTMENT, ITS EMPLOYEES OR OFFICERS FROM REVIEWING THE WAGE PAYMENT RECORDS AND CONTRACTS OF ANY PERSON OR ENTITY FOR THE PURPOSE OF DETERMINING THE CLASSIFICATION OF ANY INDIVIDUAL AS AN EMPLOYEE OF SUCH PERSON OR EMPLOYER. ALL INFORMATION DERIVED FROM ANY SUCH REVIEW MAY BE DISCLOSED TO THE DEPARTMENT OF LABOR AND THE WORKERS' COMPENSATION

BOARD, AND THEIR OFFICERS AND EMPLOYEES IN CONNECTION WITH THEIR LAWFUL DUTIES.

S 5. Subdivision 4 of section 2 of the workers' compensation law is REPEALED and a new subdivision 4 is added to read as follows:

4. "EMPLOYEE" MEANS A PERSON ENGAGED IN EMPLOYMENT IN ONE OF THE OCCUPATIONS ENUMERATED IN SECTION THREE OF THIS ARTICLE OR ANY OTHER EMPLOYMENT AS DETERMINED BY THE DEPARTMENT OF TAXATION AND FINANCE.

(A) SUCH TERM SHALL NOT INCLUDE ANY PERSON PERFORMING A SERVICE IF:

(I) THE PERSON IS FREE FROM CONTROL AND DIRECTION IN CONNECTION WITH THE PERFORMANCE OF THE SERVICE, BOTH UNDER HIS OR HER CONTRACT FOR THE PERFORMANCE OF SERVICE AND IN FACT;

(II) THE SERVICE IS PERFORMED OUTSIDE THE USUAL COURSE OF THE BUSINESS OF AN EMPLOYER; AND

(III) THE PERSON IS CUSTOMARILY ENGAGED IN AN INDEPENDENTLY ESTABLISHED TRADE, OCCUPATION, PROFESSION OR BUSINESS OF THE SAME NATURE AS THAT INVOLVED IN THE SERVICE PERFORMED.

(B) THE FAILURE TO WITHHOLD FEDERAL OR STATE INCOME TAXES, OR TO PAY UNEMPLOYMENT COMPENSATION CONTRIBUTIONS OR WORKERS' COMPENSATION PREMIUMS WITH RESPECT TO A PERSON'S WAGES SHALL NOT BE CONSIDERED IN MAKING A DETERMINATION PURSUANT TO THIS SUBDIVISION.

(C) A PERSON'S EXERCISE OF THE OPTION TO SECURE WORKERS' COMPENSATION INSURANCE WITH A CARRIER AS A SOLE PROPRIETOR OR PARTNERSHIP SHALL NOT BE CONSIDERED IN MAKING A DETERMINATION PURSUANT TO THIS SUBDIVISION.

S 6. Subdivision 5 of section 201 of the workers' compensation law is REPEALED and a new subdivision 5 is added to read as follows:

5. "EMPLOYEE" MEANS A PERSON ENGAGED IN ANY EMPLOYMENT AS DETERMINED BY THE DEPARTMENT OF TAXATION AND FINANCE.

(A) SUCH TERM SHALL NOT INCLUDE ANY PERSON PERFORMING A SERVICE IF:

(I) THE PERSON IS FREE FROM CONTROL AND DIRECTION IN CONNECTION WITH THE PERFORMANCE OF THE SERVICE, BOTH UNDER HIS OR HER CONTRACT FOR THE PERFORMANCE OF SERVICE AND IN FACT;

(II) THE SERVICE IS PERFORMED OUTSIDE THE USUAL COURSE OF THE BUSINESS OF AN EMPLOYER; AND

(III) THE PERSON IS CUSTOMARILY ENGAGED IN AN INDEPENDENTLY ESTABLISHED TRADE, OCCUPATION, PROFESSION OR BUSINESS OF THE SAME NATURE AS THAT INVOLVED IN THE SERVICE PERFORMED.

(B) THE FAILURE TO WITHHOLD FEDERAL OR STATE INCOME TAXES, OR TO PAY UNEMPLOYMENT COMPENSATION CONTRIBUTIONS OR WORKERS' COMPENSATION PREMIUMS WITH RESPECT TO A PERSON'S WAGES SHALL NOT BE CONSIDERED IN MAKING A DETERMINATION PURSUANT TO THIS SUBDIVISION.

(C) A PERSON'S EXERCISE OF THE OPTION TO SECURE WORKERS' COMPENSATION INSURANCE WITH A CARRIER AS A SOLE PROPRIETOR OR PARTNERSHIP SHALL NOT BE CONSIDERED IN MAKING A DETERMINATION PURSUANT TO THIS SUBDIVISION.

S 7. Subdivision 5 of section 2 of the labor law is amended to read as follows:

5. "Employee" means a mechanic, workingman or laborer working for another for hire AS DETERMINED BY THE DEPARTMENT OF TAXATION AND FINANCE.

(A) SUCH TERM SHALL NOT INCLUDE ANY PERSON PERFORMING A SERVICE IF:

(I) THE PERSON IS FREE FROM CONTROL AND DIRECTION IN CONNECTION WITH THE PERFORMANCE OF THE SERVICE, BOTH UNDER HIS OR HER CONTRACT FOR THE PERFORMANCE OF SERVICE AND IN FACT;

(II) THE SERVICE IS PERFORMED OUTSIDE THE USUAL COURSE OF THE BUSINESS OF AN EMPLOYER; AND

(III) THE PERSON IS CUSTOMARILY ENGAGED IN AN INDEPENDENTLY ESTABLISHED TRADE, OCCUPATION, PROFESSION OR BUSINESS OF THE SAME NATURE AS THAT INVOLVED IN THE SERVICE PERFORMED.

(B) THE FAILURE TO WITHHOLD FEDERAL OR STATE INCOME TAXES, OR TO PAY UNEMPLOYMENT COMPENSATION CONTRIBUTIONS OR WORKERS' COMPENSATION PREMIUMS WITH RESPECT TO A PERSON'S WAGES SHALL NOT BE CONSIDERED IN MAKING A DETERMINATION PURSUANT TO THIS SUBDIVISION.

(C) A PERSON'S EXERCISE OF THE OPTION TO SECURE WORKERS' COMPENSATION INSURANCE WITH A CARRIER AS A SOLE PROPRIETOR OR PARTNERSHIP SHALL NOT BE CONSIDERED IN MAKING A DETERMINATION PURSUANT TO THIS SUBDIVISION.

S 8. Subdivision 2 of section 190 of the labor law, as added by chapter 548 of the laws of 1966, is amended to read as follows:

2. "Employee" means any person employed for hire by an employer in any employment AS DETERMINED BY THE DEPARTMENT OF TAXATION AND FINANCE.

(A) SUCH TERM SHALL NOT INCLUDE ANY PERSON PERFORMING A SERVICE IF:

(I) THE PERSON IS FREE FROM CONTROL AND DIRECTION IN CONNECTION WITH THE PERFORMANCE OF THE SERVICE, BOTH UNDER HIS OR HER CONTRACT FOR THE PERFORMANCE OF SERVICE AND IN FACT;

(II) THE SERVICE IS PERFORMED OUTSIDE THE USUAL COURSE OF THE BUSINESS OF AN EMPLOYER; AND

(III) THE PERSON IS CUSTOMARILY ENGAGED IN AN INDEPENDENTLY ESTABLISHED TRADE, OCCUPATION, PROFESSION OR BUSINESS OF THE SAME NATURE AS THAT INVOLVED IN THE SERVICE PERFORMED.

(B) THE FAILURE TO WITHHOLD FEDERAL OR STATE INCOME TAXES, OR TO PAY UNEMPLOYMENT COMPENSATION CONTRIBUTIONS OR WORKERS' COMPENSATION PREMIUMS WITH RESPECT TO A PERSON'S WAGES SHALL NOT BE CONSIDERED IN MAKING A DETERMINATION PURSUANT TO THIS SUBDIVISION.

(C) A PERSON'S EXERCISE OF THE OPTION TO SECURE WORKERS' COMPENSATION INSURANCE WITH A CARRIER AS A SOLE PROPRIETOR OR PARTNERSHIP SHALL NOT BE CONSIDERED IN MAKING A DETERMINATION PURSUANT TO THIS SUBDIVISION.

S 9. Section 511 of the labor law is amended by adding a new subdivision 23 to read as follows:

23. (A) NOTWITHSTANDING ANY OTHER PROVISION OF THIS SECTION, EMPLOYMENT SHALL BE DEFINED BY THE DEPARTMENT OF TAXATION AND FINANCE. EMPLOYMENT SHALL NOT INCLUDE WORK BY ANY PERSON PERFORMING A SERVICE IF:

(I) THE PERSON IS FREE FROM CONTROL AND DIRECTION IN CONNECTION WITH THE PERFORMANCE OF THE SERVICE, BOTH UNDER HIS OR HER CONTRACT FOR THE PERFORMANCE OF THE SERVICE AND IN FACT;

(II) THE SERVICE IS PERFORMED OUTSIDE THE USUAL COURSE OF THE BUSINESS OF AN EMPLOYER; AND

(III) THE PERSON IS CUSTOMARILY ENGAGED IN AN INDEPENDENTLY ESTABLISHED TRADE, OCCUPATION, PROFESSION OR BUSINESS OF THE SAME NATURE AS THAT INVOLVED IN THE SERVICE PERFORMED.

(B) THE FAILURE TO WITHHOLD FEDERAL OR STATE INCOME TAXES, OR TO PAY UNEMPLOYMENT COMPENSATION CONTRIBUTIONS OR WORKERS' COMPENSATION PREMIUMS WITH RESPECT TO A PERSON'S WAGES SHALL NOT BE CONSIDERED IN MAKING A DETERMINATION PURSUANT TO THIS SUBDIVISION.

(C) A PERSON'S EXERCISE OF THE OPTION TO SECURE WORKERS' COMPENSATION INSURANCE WITH A CARRIER AS A SOLE PROPRIETOR OR PARTNERSHIP SHALL NOT BE CONSIDERED IN MAKING A DETERMINATION PURSUANT TO THIS SUBDIVISION.

S 10. Subdivision 5 of section 651 of the labor law is REPEALED and a new subdivision 5 is added to read as follows:

5. "EMPLOYEE" MEANS A PERSON ENGAGED IN ANY EMPLOYMENT AS DETERMINED BY THE DEPARTMENT OF TAXATION AND FINANCE.

(A) SUCH TERM SHALL NOT INCLUDE ANY PERSON PERFORMING A SERVICE IF:

(I) THE PERSON IS FREE FROM CONTROL AND DIRECTION IN CONNECTION WITH THE PERFORMANCE OF THE SERVICE, BOTH UNDER HIS OR HER CONTRACT FOR THE PERFORMANCE OF SERVICE AND IN FACT;

(II) THE SERVICE IS PERFORMED OUTSIDE THE USUAL COURSE OF THE BUSINESS OF AN EMPLOYER; AND

(III) THE PERSON IS CUSTOMARILY ENGAGED IN AN INDEPENDENTLY ESTABLISHED TRADE, OCCUPATION, PROFESSION OR BUSINESS OF THE SAME NATURE AS THAT INVOLVED IN THE SERVICE PERFORMED.

(B) THE FAILURE TO WITHHOLD FEDERAL OR STATE INCOME TAXES OR TO PAY UNEMPLOYMENT COMPENSATION CONTRIBUTIONS OR WORKERS' COMPENSATION PREMIUMS WITH RESPECT TO A PERSON'S WAGES SHALL NOT BE CONSIDERED IN MAKING A DETERMINATION PURSUANT TO THIS SUBDIVISION.

(C) A PERSON'S EXERCISE OF THE OPTION TO SECURE WORKERS' COMPENSATION INSURANCE WITH A CARRIER AS A SOLE PROPRIETOR OR PARTNERSHIP SHALL NOT BE CONSIDERED IN MAKING A DETERMINATION PURSUANT TO THIS SUBDIVISION.

S 11. Subdivision 2 of section 671 of the labor law, as added by chapter 552 of the laws of 1969, is amended to read as follows:

2. (A) "Employee" includes any individual employed or permitted to work by an employer on a farm AS DETERMINED BY THE COMMISSIONER OF TAXATION AND FINANCE but shall not include: [(a)] (I) domestic service in the home of the employer; [(b)] (II) the parent, spouse, child or other member of the employer's immediate family; [(c)] (III) a minor under seventeen years of age employed as a hand harvest worker on the same farm as his parent or guardian and who is paid on a piece-rate basis at the same piece rate as employees seventeen years of age or over; [(d)] (IV) an individual employed or permitted to work for a federal, state, or a municipal government or political subdivision thereof; or [(e)] (V) an individual to whom the provisions of article nineteen of this chapter are applicable.

(B) SUCH TERM SHALL NOT INCLUDE ANY PERSON PERFORMING A SERVICE IF:

(I) THE PERSON IS FREE FROM CONTROL AND DIRECTION IN CONNECTION WITH THE PERFORMANCE OF THE SERVICE, BOTH UNDER HIS OR HER CONTRACT FOR THE PERFORMANCE OF SERVICE AND IN FACT;

(II) THE SERVICE IS PERFORMED OUTSIDE OF THE USUAL COURSE OF THE BUSINESS OF AN EMPLOYER; AND

(III) THE PERSON IS CUSTOMARILY ENGAGED IN AN INDEPENDENTLY ESTABLISHED TRADE, OCCUPATION, PROFESSION OR BUSINESS OF THE SAME NATURE AS THAT INVOLVED IN THE SERVICE PERFORMED.

(C) THE FAILURE TO WITHHOLD FEDERAL OR STATE INCOME TAXES, OR TO PAY UNEMPLOYMENT COMPENSATION CONTRIBUTIONS OR WORKERS' COMPENSATION PREMIUMS WITH RESPECT TO A PERSON'S WAGES SHALL NOT BE CONSIDERED IN MAKING A DETERMINATION PURSUANT TO THIS SUBDIVISION.

(D) A PERSON'S EXERCISE OF THE OPTION TO SECURE WORKERS' COMPENSATION INSURANCE WITH A CARRIER AS A SOLE PROPRIETOR OR PARTNERSHIP SHALL NOT BE CONSIDERED IN MAKING A DETERMINATION PURSUANT TO THIS SUBDIVISION.

S 12. This act shall take effect on the first of January next succeeding the date on which it shall have become a law; provided that, effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be completed on or before such date.