

SECOND REGULAR SESSION

# HOUSE BILL NO. 2188

95TH GENERAL ASSEMBLY

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INTRODUCED BY REPRESENTATIVE DIEHL.

5134L.011

D. ADAM CRUMBLISS, Chief Clerk

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## AN ACT

To repeal section 288.034, RSMo, and to enact in lieu thereof one new section relating to unemployment compensation.

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*Be it enacted by the General Assembly of the state of Missouri, as follows:*

Section A. Section 288.034, RSMo, is repealed and one new section enacted in lieu thereof, to be known as section 288.034, to read as follows:

288.034. 1. "Employment" means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied, and notwithstanding any other provisions of this section, service with respect to which a tax is required to be paid under any federal unemployment tax 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 law.

2. The term "employment" shall include an individual's entire service, performed within or both within and without this state if:

(1) The service is localized in this state; or

(2) The service is not localized in any state but some of the service is performed in this state and the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this state; or the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed but the individual's residence is in this state.

3. Service performed by an individual for wages shall be deemed to be employment subject to this law:

EXPLANATION — Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted from the law. Matter in **bold-face** type in the above bill is proposed language.

18 (1) If covered by an election filed and approved pursuant to subdivision (2) of subsection  
19 3 of section 288.080;

20 (2) If covered by an arrangement pursuant to section 288.340 between the division and  
21 the agency charged with the administration of any other state or federal unemployment insurance  
22 law, pursuant to which all services performed by an individual for an employing unit are deemed  
23 to be performed entirely within this state.

24 4. Service shall be deemed to be localized within a state if the service is performed  
25 entirely within such state; or the service is performed both within and without such state, but the  
26 service performed without such state is incidental to the individual's service within the state; for  
27 example, is temporary or transitory in nature or consists of isolated transactions.

28 5. Service performed by an individual for remuneration shall be deemed to be  
29 employment subject to this law unless it is shown to the satisfaction of the division that such  
30 services were performed by an independent contractor. In determining the existence of the  
31 independent contractor relationship, the common law of agency right to control shall be applied.  
32 The common law of agency right to control test shall include but not be limited to: if the alleged  
33 employer retains the right to control the manner and means by which the results are to be  
34 accomplished, the individual who performs the service is an employee. If only the results are  
35 controlled, the individual performing the service is an independent contractor.

36 6. The term "employment" shall include service performed for wages as an agent-driver  
37 or commission-driver engaged in distributing meat products, vegetable products, fruit products,  
38 bakery products, beverages (other than milk), or laundry or dry-cleaning services, for his or her  
39 principal; or as a traveling or city salesman, other than as an agent-driver or commission-driver,  
40 engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his or her  
41 principal (except for sideline sales activities on behalf of some other person) of orders from  
42 wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar  
43 establishments for merchandise for resale or supplies for use in their business operations,  
44 provided:

45 (1) The contract of service contemplates that substantially all of the services are to be  
46 performed personally by such individual; and

47 (2) The individual does not have a substantial investment in facilities used in connection  
48 with the performance of the services (other than in facilities for transportation); and

49 (3) The services are not in the nature of a single transaction that is not part of a  
50 continuing relationship with the person for whom the services are performed.

51 7. Service performed by an individual in the employ of this state or any political  
52 subdivision thereof or any instrumentality of any one or more of the foregoing which is wholly  
53 owned by this state and one or more other states or political subdivisions, or any service

54 performed in the employ of any instrumentality of this state or of any political subdivision  
55 thereof, and one or more other states or political subdivisions, provided that such service is  
56 excluded from "employment" as defined in the Federal Unemployment Tax Act by Section  
57 3306(c)(7) of that act and is not excluded from "employment" pursuant to subsection 9 of this  
58 section, shall be "employment" subject to this law.

59         8. Service performed by an individual in the employ of a corporation or any community  
60 chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific,  
61 testing for public safety, literary, or educational purposes, or for the prevention of cruelty to  
62 children or animals, no part of the net earnings of which inures to the benefit of any private  
63 shareholder or individual, or other organization described in Section 501(c)(3) of the Internal  
64 Revenue Code which is exempt from income tax under Section 501(a) of that code if the  
65 organization had four or more individuals in employment for some portion of a day in each of  
66 twenty different weeks whether or not such weeks were consecutive within a calendar year  
67 regardless of whether they were employed at the same moment of time shall be "employment"  
68 subject to this law.

69         9. For the purposes of subsections 7 and 8 of this section, the term "employment" does  
70 not apply to service performed:

71         (1) In the employ of a church or convention or association of churches, or an  
72 organization which is operated primarily for religious purposes and which is operated,  
73 supervised, controlled, or principally supported by a church or convention or association of  
74 churches; or

75         (2) By a duly ordained, commissioned, or licensed minister of a church in the exercise  
76 of such minister's ministry or by a member of a religious order in the exercise of duties required  
77 by such order; or

78         (3) In the employ of a governmental entity referred to in subdivision (3) of subsection  
79 1 of section 288.032 if such service is performed by an individual in the exercise of duties:

80             (a) As an elected official;

81             (b) As a member of a legislative body, or a member of the judiciary, of a state or political  
82 subdivision;

83             (c) As a member of the state national guard or air national guard;

84             (d) As an employee serving on a temporary basis in case of fire, storm, snow, earthquake,  
85 flood or similar emergency;

86             (e) In a position which, under or pursuant to the laws of this state, is designated as (i) a  
87 major nontenured policy-making or advisory position, or (ii) a policy-making or advisory  
88 position the performance of the duties of which ordinarily does not require more than eight hours  
89 per week; or

90 (4) In a facility conducted for the purpose of carrying out a program of rehabilitation for  
91 individuals whose earning capacity is impaired by age or physical or mental deficiency or injury  
92 or providing remunerative work for individuals who because of their impaired physical or mental  
93 capacity cannot be readily absorbed in the competitive labor market, by an individual receiving  
94 such rehabilitation or remunerative work; or

95 (5) As part of an unemployment work-relief or work-training program assisted or  
96 financed in whole or in part by any federal agency or an agency of a state or political subdivision  
97 thereof, by an individual receiving such work relief or work training; or

98 (6) By an inmate of a custodial or penal institution; or

99 (7) In the employ of a school, college, or university, if such service is performed (i) by  
100 a student who is enrolled and is regularly attending classes at such school, college, or university,  
101 or (ii) by the spouse of such a student, if such spouse is advised, at the time such spouse  
102 commences to perform such service, that (I) the employment of such spouse to perform such  
103 service is provided under a program to provide financial assistance to such student by such  
104 school, college, or university, and (II) such employment will not be covered by any program of  
105 unemployment insurance.

106 10. The term "employment" shall include the service of an individual who is a citizen  
107 of the United States, performed outside the United States (except in Canada), if:

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

110 (2) The employer has no place of business in the United States, but:

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

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

113 (c) The employer is a partnership or a trust and the number of the partners or trustees  
114 who are residents of this state is greater than the number who are residents of any one other state;  
115 or

116 (3) None of the criteria of subdivisions (1) and (2) of this subsection is met but the  
117 employer has elected coverage in this state or, the employer having failed to elect coverage in  
118 any state, the individual has filed a claim for benefits, based on such service, under the law of  
119 this state;

120 (4) As used in this subsection and in subsection 11 of this section, the term "United  
121 States" includes the states, the District of Columbia and the Commonwealth of Puerto Rico.

122 11. An "American employer", for the purposes of subsection 10 of this section, means  
123 a person who is:

124 (1) An individual who is a resident of the United States; or

125 (2) A partnership, if two-thirds or more of the partners are residents of the United States;  
126 or

127 (3) A trust, if all of the trustees are residents of the United States; or

128 (4) A corporation organized under the laws of the United States or of any state.

129 12. The term "employment" shall not include:

130 (1) Service performed by an individual in agricultural labor;

131 (a) For the purposes of this subdivision, the term "agricultural labor" means remunerated  
132 service performed:

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

137 b. In the employ of the owner or tenant or other operator of a farm, in connection with  
138 the operation, management, conservation, improvement, or maintenance of such farm and its  
139 tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a  
140 hurricane, if the major part of such service is performed on a farm;

141 c. In connection with the production or harvesting of any commodity defined as an  
142 agricultural commodity in Section 15(g) of the Federal Agricultural Marketing Act, as amended  
143 (46 Stat. 1550, Sec. 3; 12 U.S.C. 1441j), or in connection with the ginning of cotton, or in  
144 connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not  
145 owned or operated for profit, used exclusively for supplying and storing water for farming  
146 purposes;

147 d. i. In the employ of the operator of a farm in handling, planting, drying, packing,  
148 packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a  
149 carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural  
150 commodity; but only if such operator produced more than one-half of the commodity with  
151 respect to which such service is performed;

152 ii. In the employ of a group of operators of farms (or a cooperative organization of which  
153 such operators are members) in the performance of services described in item i of this  
154 subparagraph, but only if such operators produced more than one-half of the commodity with  
155 respect to which such service is performed;

156 iii. The provisions of items i and ii of this subparagraph shall not be deemed to be  
157 applicable with respect to service performed in connection with commercial canning or  
158 commercial freezing or in connection with any agricultural or horticultural commodity after its  
159 delivery to a terminal market for distribution for consumption; or

160 e. On a farm operated for profit if such service is not in the course of the employer's trade  
161 or business. As used in this paragraph, the term "farm" includes stock, dairy, poultry, fruit,  
162 furbearing animals, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other  
163 similar structures, used primarily for the raising of agricultural or horticultural commodities, and  
164 orchards;

165 (b) The term "employment" shall include service performed after December 31, 1977,  
166 by an individual in agricultural labor as defined in paragraph (a) of this subdivision when such  
167 service is performed for a person who, during any calendar quarter, paid remuneration in cash  
168 of twenty thousand dollars or more to individuals employed in agricultural labor or for some  
169 portion of a day in a calendar year in each of twenty different calendar weeks, whether or not  
170 such weeks were consecutive, employed in agricultural labor ten or more individuals, regardless  
171 of whether they were employed at the same moment of time;

172 (c) For the purposes of this subsection any individual who is a member of a crew  
173 furnished by a crew leader to perform service in agricultural labor for any other person shall be  
174 considered as employed by such crew leader:

175 a. If such crew leader holds a valid certificate of registration under the Farm Labor  
176 Contractor Registration Act of 1963; or substantially all the members of such crew operate or  
177 maintain tractors, mechanized harvesting or crop-dusting equipment, or any other mechanized  
178 equipment, which is provided by such crew leader; and

179 b. If such individual is not in employment by such other person;

180 c. If any individual is furnished by a crew leader to perform service in agricultural labor  
181 for any other person and that individual is not in the employment of the crew leader:

182 i. Such other person and not the crew leader shall be treated as the employer of such  
183 individual; and

184 ii. Such other person shall be treated as having paid cash remuneration to such individual  
185 in an amount equal to the amount of cash remuneration paid to such individual by the crew  
186 leader (either on his or her own behalf or on behalf of such other person) for the service in  
187 agricultural labor performed for such other person;

188 d. For the purposes of this subsection, the term "crew leader" means an individual who:

189 i. Furnishes individuals to perform service in agricultural labor for any other person;

190 ii. Pays (either on his or her own behalf or on behalf of such other person) the individuals  
191 so furnished by him or her for the service in agricultural labor performed by them; and

192 iii. Has not entered into a written agreement with such other person under which such  
193 individual is designated as in employment by such other person;

194 (2) Domestic service in a private home except as provided in subsection 13 of this  
195 section;

196 (3) Service performed by an individual under the age of eighteen years in the delivery  
197 or distribution of newspapers or shopping news but shall not include delivery or distribution to  
198 any point for subsequent delivery or distribution;

199 (4) Service performed by an individual in, and at the time of, the sale of newspapers or  
200 magazines to ultimate consumers under an arrangement under which the newspapers or  
201 magazines are to be sold by him or her at a fixed price, his or her compensation being based on  
202 the retention of the excess of such price over the amount at which the newspapers or magazines  
203 are charged to him or her, whether or not he or she is guaranteed a minimum amount of  
204 compensation for such service, or is entitled to be credited with the unsold newspapers or  
205 magazines turned back;

206 (5) Service performed by an individual in the employ of his or her son, daughter, or  
207 spouse, and service performed by a child under the age of twenty-one in the employ of his or her  
208 father or mother;

209 (6) Except as otherwise provided in this law, service performed in the employ of a  
210 corporation, community chest, fund or foundation, organized and operated exclusively for  
211 religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty  
212 to children or animals, no part of the net earnings of which inures to the benefit of any private  
213 shareholder or individual;

214 (7) Services with respect to which unemployment insurance is payable under an  
215 unemployment insurance system established by an act of Congress;

216 (8) Service performed in the employ of a foreign government;

217 (9) Service performed in the employ of an instrumentality wholly owned by a foreign  
218 government:

219 (a) If the service is of a character similar to that performed in foreign countries by  
220 employees of the United States government or of an instrumentality thereof; and

221 (b) If the division finds that the foreign government, with respect to whose  
222 instrumentality exemption is claimed, grants an equivalent exemption with respect to similar  
223 service performed in the foreign country by employees of the United States government and of  
224 instrumentalities thereof. The certification of the United States Secretary of State to the United  
225 States Secretary of Treasury shall constitute prima facie evidence of such equivalent exemption;

226 (10) Service covered by an arrangement between the division and the agency charged  
227 with the administration of any other state or federal unemployment insurance law pursuant to  
228 which all services performed by an individual for an employing unit during the period covered  
229 by the employing unit's approved election are deemed to be performed entirely within the  
230 jurisdiction of such other state or federal agency;

231 (11) Service performed in any calendar quarter in the employ of a school, college or  
232 university not otherwise excluded, if such service is performed by a student who is enrolled and  
233 regularly attending classes at such school, college, or university, and the remuneration for such  
234 service does not exceed fifty dollars (exclusive of board, room, and tuition);

235 (12) Service performed by an individual for a person as a licensed insurance agent, a  
236 licensed insurance broker, or an insurance solicitor, if all such service performed by such  
237 individual for such person is performed for remuneration solely by way of commissions;

238 (13) Domestic service performed in the employ of a local college club or of a local  
239 chapter of a college fraternity or sorority, except as provided in subsection 13 of this section;

240 (14) Services performed after March 31, 1982, in programs authorized and funded by  
241 the Comprehensive Employment and Training Act by participants of such programs, except those  
242 programs with respect to which unemployment insurance coverage is required by the  
243 Comprehensive Employment and Training Act or regulations issued pursuant thereto;

244 (15) Service performed by an individual who is enrolled at a nonprofit or public  
245 educational institution which normally maintains a regular faculty and curriculum and normally  
246 has a regularly organized body of students in attendance at the place where its educational  
247 activities are carried on, as a student in a full-time program, taken for credit at such institution,  
248 which combines academic instruction with work experience, if such service is an integral part  
249 of such program, and such institution has so certified to the employer; except, that this  
250 subdivision shall not apply to service performed in a program established for or on behalf of an  
251 employer or group of employers;

252 (16) Services performed by a licensed real estate salesperson or licensed real estate  
253 broker if [at least eighty percent] **substantially all** of the remuneration, whether or not paid in  
254 cash, for the services performed, rather than to the number of hours worked, is directly related  
255 to sales **or other output, including the performance of services**, performed pursuant to a  
256 written contract between such individual and the person for whom the services are performed  
257 and such contract provides that the individual will not be treated as an employee with respect to  
258 such services for federal tax purposes;

259 (17) Services performed as a direct seller who is engaged in the trade or business of the  
260 delivering or distribution of newspapers or shopping news, including any services directly related  
261 to such trade or business, or services performed as a direct seller who is engaged in the trade or  
262 business of selling, or soliciting the sale of, consumer products in the home or otherwise than in,  
263 or affiliated with, a permanent, fixed retail establishment, if eighty percent or more of the  
264 remuneration, whether or not paid in cash, for the services performed rather than the number of  
265 hours worked is directly related to sales performed pursuant to a written contract between such  
266 direct seller and the person for whom the services are performed, and such contract provides that

267 the individual will not be treated as an employee with respect to such services for federal tax  
268 purposes;

269 (18) Services performed as a volunteer research subject who is paid on a per study basis  
270 for scientific, medical or drug-related testing for any organization other than one described in  
271 Section 501(c)(3) of the Internal Revenue Code or any governmental entity.

272 13. The term "employment" shall include domestic service as defined in subdivisions  
273 (2) and (13) of subsection 12 of this section performed after December 31, 1977, if the  
274 employing unit for which such service is performed paid cash wages of one thousand dollars or  
275 more for such services in any calendar quarter after December 31, 1977.

276 14. The term "employment" shall include or exclude the entire service of an individual  
277 for an employing unit during a pay period in which such individual's services are not all excluded  
278 under the foregoing provisions, on the following basis: if the services performed during one-half  
279 or more of any pay period constitute employment as otherwise defined in this law, all the  
280 services performed during such period shall be deemed to be employment; but if the services  
281 performed during more than one-half of any such pay period do not constitute employment as  
282 otherwise defined in this law, then none of the services for such period shall be deemed to be  
283 employment. (As used in this subsection, the term "pay period" means a period of not more than  
284 thirty-one consecutive days for which a payment of remuneration is ordinarily made to the  
285 individual by the employing unit employing such individual.) This subsection shall not be  
286 applicable with respect to service performed in a pay period where any such service is excluded  
287 pursuant to subdivision (8) of subsection 12 of this section.

288 15. The term "employment" shall not include the services of a full-time student who  
289 performed such services in the employ of an organized summer camp for less than thirteen  
290 calendar weeks in such calendar year.

291 16. For the purpose of subsection 15 of this section, an individual shall be treated as a  
292 full-time student for any period:

293 (1) During which the individual is enrolled as a full-time student at an educational  
294 institution; or

295 (2) Which is between academic years or terms if:

296 (a) The individual was enrolled as a full-time student at an educational institution for the  
297 immediately preceding academic year or term; and

298 (b) There is a reasonable assurance that the individual will be so enrolled for the  
299 immediately succeeding academic year or term after the period described in paragraph (a) of this  
300 subdivision.

301 17. For the purpose of subsection 15 of this section, an "organized summer camp" shall  
302 mean a summer camp which:

303 (1) Did not operate for more than seven months in the calendar year and did not operate  
304 for more than seven months in the preceding calendar year; or

305 (2) Had average gross receipts for any six months in the preceding calendar year which  
306 were not more than thirty-three and one-third percent of its average gross receipts for the other  
307 six months in the preceding calendar year.

308 18. The term "employment" shall not mean service performed by a remodeling  
309 salesperson acting as an independent contractor; however, if the federal Internal Revenue Service  
310 determines that a contractual relationship between a direct provider and an individual acting as  
311 an independent contractor pursuant to the provisions of this subsection is in fact an  
312 employer-employee relationship for the purposes of federal law, then that relationship shall be  
313 considered as an employer-employee relationship for the purposes of this chapter.

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