

TITLE 56: LABOR AND EMPLOYMENT
CHAPTER IV: DEPARTMENT OF EMPLOYMENT SECURITY
SUBCHAPTER c: RIGHTS AND DUTIES OF EMPLOYERS
PART 2732 EMPLOYMENT
SECTION 2732.200 SECTION 212 OF THE ACT – SERVICES IN EMPLOYMENT

Section 2732.200 Section 212 of the Act – Services in Employment

- a) In determining whether service performed by an individual for an employing unit is employment, as defined by Section 212 of the Unemployment Insurance Act (the Act) (Ill. Rev. Stat. 1987, ch. 48, par. 322), the Agency shall, when applicable to a particular factual situation:
 - 1) Review written agreements between the individual and the employing unit;
 - 2) Interview the individual or employing unit;
 - 3) Obtain statements of other persons with relevant information;
 - 4) Examine regulatory statutes governing the organization, trade or business;
 - 5) Examine the books and records of the employing unit; and
 - 6) Make any other investigation necessary to make a determination.
- b) The Agency will apply the exceptions specified in the Act to the facts as they exist, and the designation or description which the parties apply to their relationship is not controlling.
- c) The mechanics of compensation are not controlling and the fact that an individual is compensated by commission or any payment other than salary does not preclude a determination that the individual is in employment under the Act.
- d) The exceptions in Section 212 are conjunctive, and all three must be proven by the employer to establish the exemption.
- e) "Engaged in an independently established trade, occupation, or business" within the meaning of Section 212(C) of the Act means that the individual has a proprietary interest in the business which he can sell, give away or operate without hinderance from any other party. While no one factor will determine if an individual is engaged in an independently established

trade, occupation, profession or business as set out in Section 212(C), the business reality or totality of circumstances will determine the presence of this condition. The following types of factors indicate that the individual is engaged in an independently established trade, occupation, profession, or business, as set out in Section 212(C):

- 1) The individual's interest in the business is not subject to cancellation or destruction upon severance of the relationship;
- 2) The individual has an investment of capital and owns the capital goods of the business enterprise;
- 3) The individual gains the profits and bears the losses of the business enterprise;
- 4) The individual makes his services available to the general public or the business community on a continuing basis;
- 5) The individual includes the individual's services on a Federal Income Tax Schedule as an independent business or profession;
- 6) The individual performs services for the employing unit under his own business name;
- 7) The individual has a shop or office of his own;
- 8) The employing unit does not represent the individual as an employee of the firm to its customers;
- 9) The individual hires his own helpers or employees, without the employing unit's approval, pays them without reimbursement from the employing unit, and reports their income to the Internal Revenue Service;
- 10) The individual has an account number with the Agency and reports the wages of his workers quarterly to the Agency;
- 11) The individual has the right to perform similar services for others on whatever basis and whenever he chooses;
- 12) The individual maintains a business listing in the telephone directory or in appropriate trade journals;
- 13) If the services require a license, the individual has obtained and paid for the license in his own name.

f) The two factors in Section 212(B) are in the alternative. Section 212(B) is satisfied if the service is either outside the usual course of business of the employing unit or performed outside of all the places of business of the employing unit:

1) Services which merely render the place of business more pleasant or are not necessary to the employing unit's business are outside the usual course of business.

Example: The services of a window washer engaged by an employing unit whose business is selling woollens are outside the usual course of the business of the employing unit.

2) Because services are performed outside the employing unit's premises does not preclude an individual from being found to be in employment. This decision is based upon the occupation and the factual context in which the services are performed.

A) Example: The homes of typists who are typing manuscripts for an employing unit are places of business of the employing unit.

B) Example: Any territory in which a salesman represents his employing unit's interests is the employing unit's place of business.

g) "Direction or control" within the meaning of Section 212(A) of the Act means that an employing unit has the right to control and direct the worker, not only as to the work to be done but also as to how it should be done, whether or not that control is exercised. The following are illustrative of the types of questions the Department will examine to determine whether "direction or control" exists. The type of business subject to review and the relationship being examined will determine which questions are asked in any given review under this Section. No one question or answer or combination of questions and answers will determine whether direction or control exists but rather the business reality or totality of circumstances will determine if direction or control exists:

1) Does the employing unit issue assignments or schedule work, set quotas or time requirements;

2) Does the employing unit have the right to change the methods used by the worker in performing his services;

- 3) Does the employing unit require the worker to follow a routine or schedule;
- 4) Does the employing unit require the worker to report to a specific location and/or at regular intervals;
- 5) Does the employing unit require the worker to furnish a record of his time to the firm;
- 6) Does the employing unit require the worker to perform services a specific number of hours per day or per week;
- 7) Does the employing unit engage the worker on a permanent basis;
- 8) Does the employing unit reimburse the worker for expenses incurred;
- 9) Is the worker eligible for a pension, a bonus, paid vacation, or sick pay;
- 10) Does the employing unit carry Workers' Compensation insurance on the worker;
- 11) Does the employing unit deduct Social Security tax from the worker's compensation;
- 12) Does the employing unit report the worker's income to the Internal Revenue Service on Form W-2;
- 13) Does the employing unit bond the worker;
- 14) Does the employing unit furnish the worker with materials and supplies, tools or equipment;
- 15) Does the employing unit furnish the worker with transportation, samples, a drawing account, business cards, an expense account, or order blanks;
- 16) Does the employing unit allow the worker to sell noncompetitive lines, or engage in other employment;
- 17) Does the employing unit restrict the worker in terms and conditions of sale, and choice of customers;
- 18) Does the employing unit assign or limit the territory in which the individual performs;

- 19) Does the employing unit set the price and credit terms for the products or service;
- 20) Does the employing unit reserve the right to approve orders or contracts;
- 21) Does the employing unit have a right to discharge;
- 22) Does the employing unit require attendance at meetings or training courses;
- 23) Does the employing unit have the right to appoint the individual's supervisors;
- 24) Does the employing unit have the right to set rules and regulations;
- 25) Does the employing unit purport to guarantee the product or service performed;

(Source: Added at 14 Ill. Reg. 673, effective January 2, 1990)

Enabling Statute:

(820 ILCS 405/212) (from Ch. 48, par. 322)

Sec. 212. Service performed by an individual for an employing unit, whether or not such individual employs others in connection with the performance of such services, shall be deemed to be employment unless and until it is proven in any proceeding where such issue is involved that--

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

B. 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

C. Such individual is engaged in an independently established trade, occupation, profession, or business.

(Source: Laws 1951, p. 32.)