

2414.

UNEMPLOYMENT COMPENSATION ACT—SERVICE PERFORMED FOR ONE OR MORE PRINCIPALS BY INDIVIDUAL REQUIRED TO BE LICENSED BY STATE TO PERFORM SUCH SERVICE—MASTER OF OWN TIME AND EFFORTS—COMMISSIONS DEPENDENT ON EFFORT EXPENDED — NOT “EMPLOYMENT” WITHIN MEANING OF ACT.

SYLLABUS:

Service performed for one or more principals by an individual who is required to secure from the State of Ohio a license to perform such service and who in the performance of such service is master of his own time and efforts for which service such individual is compensated by commissions dependent on the amount of effort he chooses to expend, is not “employment”

within the meaning of the Unemployment Compensation Act, unless the provisions of law regulating the business or occupation in which such service is rendered prohibit such service from being rendered in the manner and under the conditions above set forth.

Columbus, Ohio, June 17, 1940.

Hon. H. C. Atkinson, Administrator,
Bureau of Unemployment Compensation,
Columbus, Ohio.

Dear Sir:

This will acknowledge receipt of your recent communication, which reads as follows:

“Since the rendition of your opinion No. 2255, many applications for refunds have been filed with the Bureau by employers whose relationships to their employes are fixed by various Code sections. The Code sections are: Real Estate Brokers and Salesmen, Sec. 6373-25, et seq., Insurance Agents, Solicitors and Brokers, Sec. 644, et seq., Security Brokers and Salesmen, Sec. 8624-1, et seq.; Barbers—Master and Journeymen, Sec. 1081-1, et seq.; Cosmetologists, Managers and Operators, Sec. 1082-1, et seq.

The Bureau, in giving effect to your opinion, is having no difficulty in cases where the relationship of employer-employee is established by private contract, implied or expressed. Bureau officials feel, however, that we should have an interpretation covering the various legal relationships as set out in the Code. Guided by this further interpretation, we feel certain we would have no further occasion to request opinions either in individual or group cases.”

In the opinion to which you refer, it is pointed out that unless the service performed by an individual for his employer constitutes “employment” as such term is defined in section 1345-1, General Code, such employer is not required to pay the contributions provided for in the Unemployment Compensation Act. In this connection, it is stated in said opinion:

“The provisions of law with respect to contributions to the fund by employers is set forth in section 1345-4 of the General Code, which section reads in part as follows:

‘(a) (1) On and after December 21, 1936, contributions shall accrue and become payable by each employer for each calen-

dar year in which he is subject to this act, with respect to wages payable for employment (as defined in section 1345-1) occurring during such calendar year.'

It will be noted from the above that contributions to the fund are due only 'with respect to wages for employment (as defined in section 1345-1).'

The particular statutory language under consideration in the above opinion is contained in section 1345-1 (E) (7), General Code, which reads as follows:

"The term employment shall not include:

* * *

(7) Service performed by an individual for one or more principals who is compensated on a commission basis, and who in the performance of the work is master of his own time and efforts, and whose remuneration is wholly dependent on the amount of effort he chooses to expend."

An examination of the statutes concerning the licensing of real estate brokers and salesmen reveals no language contained therein which would prevent the hiring of a real estate salesman who in the performance of his work is master of his own time and efforts and who is to be compensated by commissions dependent on the amount of effort he chooses to expend.

The same is true with respect to the statutes dealing with insurance agents, solicitors and brokers and the statutes providing for the regulation and licensing of brokers and salesmen of securities.

A thorough search of the statutes discloses no provision of law which prohibits master barbers or managing cosmetologists from hiring help in the manner and under the terms and conditions above set forth.

The fact that certain businesses or occupations may be subjected to license regulation in no wise determines whether or not services rendered for their employers by licensees engaged in such businesses or occupations constitute "employment" within the meaning of the Unemployment Compensation Act. While it is entirely conceivable that barbers or cosmetologists might be hired to perform service on a commission basis and in the performance of such service be masters of their own time and efforts, yet it is difficult to contemplate such a situation in any case where the character of the service performed requires a person rendering such service to do so in the shop or establishment of his principal or employer. I feel that it can

be safely stated that in practically every instance where a barber or operator in a beauty parlor is engaged on a commission basis, such barber or operator is not the master of his or her own time and efforts, for the obvious reason that such arrangement would be inconsistent with the practical conduct of the business of the employer. However, if a case should arise where it is claimed that barbers or cosmetologists are employed on a commission basis and are therefore not engaged in employment within the meaning of the Act, for the reason that the service rendered falls within the terms of section 1345-1 (E) (7), General Code, the only tests which may be applied in order to determine the question are those contained in said paragraph of said section and if by the application of these tests it is ascertained that all the conditions set out in said paragraph exist, the service so rendered would not constitute "employment," on the other hand, if any one of the requirements are not met, such service would be "employment" within the meaning of the Act.

In view of the above it is therefore my opinion, in specific answer to your question, that service performed for one or more principals by an individual who is required to secure from the State of Ohio a license to perform such service and who in the performance of such service is master of his own time and efforts for which service such individual is compensated by commissions dependent on the amount of effort he chooses to expend, is not "employment" within the meaning of the Unemployment Compensation Act, unless the provisions of law regulating the business or occupation in which such service is rendered prohibit such service from being rendered in the manner and under the conditions above set forth.

Respectfully,

THOMAS J. HERBERT,
Attorney General.