

3036.

UNEMPLOYMENT COMPENSATION ACT OF OHIO — WHERE INDIVIDUAL OR ORGANIZATION HAS TWO REGULAR EMPLOYES, HIRES SUBSTITUTE FOR ONE, ABSENT DUE TO VACATION OR ILLNESS, WITH OR WITHOUT PAY — EMPLOYER DOES NOT HAVE THREE INDIVIDUALS “IN COURSE OF EMPLOYMENT” AT ONE TIME — NOT “EMPLOYER” UNDER SECTION 1345-1-b G. C.

SYLLABUS:

Under the Ohio Unemployment Compensation Act, an individual or an organization which has only two regular employes but hires a substitute for one of such employes during the absence of such employe owing to vacation or illness with or without pay does not have three individuals in the course of employment at one time because of hiring such substitute, and is not an “employer” within the meaning of Section 1345-1 (b), of the General Code of Ohio.

Columbus, Ohio, November 22, 1940.

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

Dear Sir:

Your request for my opinion reads as follows:

“In the light of the definition of ‘employer’ in Section 1345-1-b (1) Ohio General Code:

Does an employer who has two employees only at any one time, hiring a substitute during the illness or vacation (time paid for) of one of his two employees, have three employees at any one time and thus become subject to our Act?"

The pertinent statute involved herein is Section 1345-1, of the General Code, which defines "employer" and "employment" as follows:

(b) 'Employer' means any individual or type of organization including partnership, association * * * who (which) has, or subsequent to December 31, 1936, had in employment three or more individuals at any one time within the current calendar year; * * *

(c) 'Employment' means service including service performed in interstate commerce, performed for remuneration under any contract of hire written or oral, express or implied. The term employment shall include individuals entire service performed within or without the State. * * * ."

Employment having been defined as "service," it becomes necessary to determine the meaning of this word "service" as it is used in this statute. Webster's New International Dictionary, 2nd E., 1940, defines "service" as follows:

"(1) The occupation, condition or status of a servant, especially a domestic servant; as, placed out at service; turned out of service.

(2) Performance of labor for the benefit of another or at another's command; attendance of an inferior, hired help, slave, etc.

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(4) The deed of one who serves; labor performed for another; duty done or required; office."

Funk and Wagnalls' New Standard Dictionary defines "service" as follows:

"(1) The act of serving; labor performed in the interest of or under the direction of others; the work of a slave, hired man, employee or person in any way held to obedience and duty;

(2) Any work done for the benefit of another; the act of helping another or of promoting his interest in any way."

(3) The state of being a servant; the position of a servant; employment in the interest of a person or of a cause; specif., the condition and relations of one as a domestic or menial servant; as, to being in, or out of, service."

In 57 Corpus Juris, page 276, "service" is defined as follows:

"As lexically defined, 'service' means aid rendered; an act of

helping another, or of serving; an advantage or benefit conferred; any work done for the benefit of another; assistance rendered; benefit or good performed, done, or caused; employment in the interest of a person, or a cause; labor performed for another, or in the interest, and under the direction of others; obligation conferred; that which promotes interest or happiness; the deed of one who serves; the performance of labor for the benefit of another, or at another's command; the thing or work being performed for the employer; the work of a slave, hired man, or employee; also avail; duty done or required; the official duty or work required of one; hence, also, any system or organization instituted for the accomplishment of such duty; the position of a servant; the state of being a servant; things required for use; use; useful office. The word implies action whether physical or mental, and compensation; it is generally associated with the idea of selection and compensation; and it is distinguished from 'bonus'."

From an examination of these definitions, it clearly appears that service has at least two different meanings; in one sense it means work or labor performed, and in another sense it means the status, position or relationship existing of one who is performing work and labor.

We find that the word "service" is used very frequently in this section especially in subdivision (E), wherein a number of kinds of work are excluded from the term employment. In part, they read as follows:

"(E) The term 'employment' shall not include:

- (1) Agricultural labor;
- (2) Domestic service in a private home;
- (3) Service performed as an officer or crew on a vessel in the navigable waters of the United States."

Following these are exclusions 4, 5, 6, 7, 8, 9, 10, 11 and 12, each of which starts with the following wording: "Service performed," followed by the phrase: "in the employ" or "by an individual" or "as an extra worker" or "by certain officers and employees." In each of the above instances, the word "service" is referring to work or labor performed, as distinguished from a status, condition or relationship.

The term service also denotes that the worker during the continuance of the relationship is bound to submit his will to the direction and control of the employer in the prosecution of the occupation. *Cameron v. State Theatre Company*, 152 N. E., 880 (Mass.) At page 881, the Court said:

"One is in the service of another when he is so occupied that during the continuance of the relationship he is bound to submit

his will to the direction and control of that other in the prosecution of the occupation.”

When an employee is absent on vacation or sick leave, he is not, except in very unusual instances, bound to submit his will to the direction and control of another. He is also not in the prosecution of the occupation at the time.

It is therefore my opinion that the word “service” as used in this section, means work or labor performed, as distinguished from referring to the relationship or status existing. Thus, “employment,” as defined in this act, means work or labor performed, and does not refer to the status or condition or relationship existing. A regular employee who is absent on vacation or by reason of sickness, is not in actual “employment,” as defined in the act, during such absence, even though he receives compensation during such time.

Specifically answering your question I am of the opinion that when an employer has not more than two regular employees at any one time, and during the absence of one of such employees on vacation, or because of illness, for which he receives compensation, and the employer hires a substitute employee to do his work during such absence only, said employer does not have three persons in his employment at any one time, within the meaning of the act and therefore he is not an employer as defined by the act, and is not subject to pay contributions.

Respectfully,

THOMAS J. HERBERT,
Attorney General.