

CONTRACTUAL RELATIONSHIPS FOR LANGUAGE INTERPRETER SERVICES

(Prepared by David W. Meyer, Bullivant Houser Bailey PC,
for WASCLA Summit V, October 16-17, 2009)

I. PARTIES

- A. Client (e.g., hospital, DSHS, courts)
- B. LEP individual: Persons for whom interpreting is done
- C. Interpreter
- D. Interpreter service agency

II. COMMON TYPES OF RELATIONSHIPS

- A. Employment: Client has in-house interpreter(s)

Client / interpreter

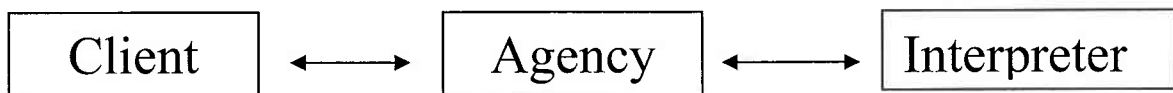
- B. Direct contract by client with interpreter

Client



Interpreter

- C. Indirect hiring of interpreter by client through interpreter services agency



- D. Volunteer interpreters – no payment; certification and ethical restrictions

III. ECONOMIC AND LOGISTICAL LIMITATIONS ON AVAILABILITY

- A. Certified interpreters do not exist for all languages in all locations (i.e., rural areas).
- B. Interpreters most often are sole proprietors with no staff, employees, nor budget for advertising.
- C. “Going rate” for interpreter services necessitates most interpreters to outsource their administrative functions (scheduling and billing).

IV. CONTRACTUAL REQUIREMENTS

- A. Proficient bilingually
- B. Confidentiality – especially medical
- C. Timeliness
- D. Other variables
 - (1) Codes of ethics adherence (i.e., RCW 2.43.080)
 - (2) Client-required certifications (i.e., court certification per RCW 2.43.030; DSHS requirements under WAC 388-030)

CONTRACT LANGUAGE EXAMPLES
(pertaining to referral of freelance interpreters)

Problematic:

“Agency shall require of its interpreters that they be certified, drug tested, (etc.) . . .”

Better:

“Agency assures Client that interpreters located for Client shall verify that they are certified, drug tested, (etc.) . . .”

Best:

“Client shall only be required to accept and pay for services of interpreters who present proof of certification, drug testing, (etc.) at the time of the encounter . . .”

Problematic:

“This is a contract by which Client *hires* interpreters referred by Agency . . .”

or

“This is a contract by which Agency *agrees to provide* interpreters to Client. . .”

Better:

“Whereas Client has the need for interpreters from time to time, and Agency is the scheduling and billing agent for independent interpreters, Client and Agency agree that Client may, but shall not be required to, periodically request scheduling of an interpreter by Agency, and that upon doing so, the invoicing and other terms of this agreement will apply. Nothing herein is intended to create an employment relationship between the parties, nor between either them and any independent interpreter who attends an encounter, nor to require either party’s control over the methods utilized by the interpreter at the encounter, but neither shall this agreement be construed to relieve any interpreter from the duty of performing services according to the standards customarily followed in the language translation and interpretation industry.”

Problematic:

“Agency shall require interpreters to wear photo identification bearing the Agency’s name . . .”

Better:

“Agency will provide interpreter with an identification [badge, password, etc. provided by Client] for security purposes.”

Problematic:

“Agency [or Client] shall be solely responsible for paying the interpreters’ fees. . .”

Better:

“Agency is the billing agent for contract interpreters referred to Client; Agency shall indemnify Client from liability to interpreter for interpreter’s fee upon Client’s remittance of the fee to Agency.”

Note: Nothing hereinabove constitutes legal advice. The examples are for illustrative purposes only and are not intended for literal use in any application or contract. Consult an attorney for specific contract drafting assistance.

656.027. All workers are subject to this chapter except those nonsubject workers described in the following subsections:

(1) A worker employed as a domestic servant in or about a private home. For the purposes of this subsection "domestic servant" means any worker engaged in household domestic service by private employment contract, including, but not limited to, home health workers.

(2) A worker employed to do gardening, maintenance, repair, remodeling or similar work in or about the private home of the person employing the worker.

(3)(a) A worker whose employment is casual and either:

(A) The employment is not in the course of the trade, business or profession of the employer; or

(B) The employment is in the course of the trade, business or profession of a nonsubject employer.

(b) For the purpose of this subsection, "casual" refers only to employments where the work in any 30-day period, without regard to the number of workers employed, involves a total labor cost of less than \$500.

(4) A person for whom a rule of liability for injury or death arising out of and in the course of employment is provided by the laws of the United States.

(5) A worker engaged in the transportation in interstate commerce of goods, persons or property for hire by rail, water, aircraft or motor vehicle, and whose employer has no fixed place of business in this state.

(6) Firefighter and police employees of any city having a population of more than 200,000 that provides a disability and retirement system by ordinance or charter.

(7)(a) Sole proprietors, except those described in paragraph (b) of this subsection. When labor or services are performed under contract, the sole proprietor must qualify as an independent contractor.

(b) Sole proprietors actively licensed under ORS 671.525 or 701.021. When labor or services are performed under contract for remuneration, notwithstanding ORS 656.005 (30), the sole proprietor must qualify as an independent contractor. Any sole proprietor licensed under ORS 671.525 or 701.021 and involved in activities subject thereto is conclusively presumed to be an independent contractor.

(8) Except as provided in subsection (23) of this section, partners who are not engaged in work performed in direct connection with the construction, alteration, repair, improvement, moving or demolition of an improvement on real property or appurtenances thereto. When labor or services are performed under contract, the partnership must qualify as an independent contractor.

* * * * *

(27) A person performing language translator or interpreter services that are provided for others through an agent or broker.

(28) A person who operates, and who has an ownership or leasehold interest in, a passenger motor vehicle that is operated as a taxicab or for nonemergency medical transportation. As used in this subsection:

(a) "Lease" means a contract under which the lessor provides a vehicle to a lessee for consideration.

(b) "Leasehold" includes, but is not limited to, a lease for a shift or a longer period.

(c) "Passenger motor vehicle that is operated as a taxicab" means a vehicle that:

(A) Has a passenger seating capacity that does not exceed seven persons;

(B) Is transporting persons, property or both on a route that begins or ends in Oregon; and

(C)(i) Carries passengers for hire when the destination and route traveled may be controlled by a passenger and the fare is calculated on the basis of any combination of an initial fee, distance traveled or waiting time; or

(ii) Is in use under a contract to provide specific service to a third party to transport designated passengers or to provide errand services to locations selected by the third party.

* * * * *

657.048 Employment; language translators or interpreters excluded; exceptions. (1)

“Employment” does not include services performed by language translators or interpreters that are provided for others through an agent or broker.

(2) The provisions of this section do not apply to services performed for:

- (a) A nonprofit employing unit;
- (b) This state;
- (c) A political subdivision of this state; or
- (d) An Indian tribe. [1997 c.294 §2; 2001 c.572 §5; 2005 c.218 §11]

RCWs > Title 2 > Chapter 2.43 > Section 2.43.030

2.43.020 << 2.43.030 >> 2.43.040

RCW 2.43.030

[COURT INTERPRETERS]

Appointment of interpreter.

(1) Whenever an interpreter is appointed to assist a non-English-speaking person in a legal proceeding, the appointing authority shall, in the absence of a written waiver by the person, appoint a certified or a qualified interpreter to assist the person throughout the proceedings.

(a) Except as otherwise provided for in (b) of this subsection, the interpreter appointed shall be a qualified interpreter.

(b) Beginning on July 1, 1990, when a non-English-speaking person is a party to a legal proceeding, or is subpoenaed or summoned by an appointing authority or is otherwise compelled by an appointing authority to appear at a legal proceeding, the appointing authority shall use the services of only those language interpreters who have been certified by the administrative office of the courts, unless good cause is found and noted on the record by the appointing authority. For purposes of chapter 358, Laws of 1989, "good cause" includes but is not limited to a determination that:

(i) Given the totality of the circumstances, including the nature of the proceeding and the potential penalty or consequences involved, the services of a certified interpreter are not reasonably available to the appointing authority; or

(ii) The current list of certified interpreters maintained by the administrative office of the courts does not include an interpreter certified in the language spoken by the non-English-speaking person.

(c) Except as otherwise provided in this section, when a non-English-speaking person is involved in a legal proceeding, the appointing authority shall appoint a qualified interpreter.

(2) If good cause is found for using an interpreter who is not certified or if a qualified interpreter is appointed, the appointing authority shall make a preliminary determination, on the basis of testimony or stated needs of the non-English-speaking person, that the proposed interpreter is able to interpret accurately all communications to and from such person in that particular proceeding. The appointing authority shall satisfy itself on the record that the proposed interpreter:

(a) Is capable of communicating effectively with the court or agency and the person for whom the interpreter would interpret; and

(b) Has read, understands, and will abide by the code of ethics for language interpreters established by court rules.

[2005 c 282 § 3; 1990 c 183 § 1; 1989 c 358 § 3. Formerly RCW 2.42.220.]

Notes:

Severability -- 1989 c 358: See note following RCW 2.43.010.

RCWs > Title 2 > Chapter 2.43 > Section 2.43.080

2.43.070 << 2.43.080 >> 2.43.090

RCW 2.43.080

Code of ethics.

All language interpreters serving in a legal proceeding, whether or not certified or qualified, shall abide by a code of ethics established by supreme court rule.

[1989 c 358 § 8. Formerly RCW 2.42.270.]

Notes:

Severability -- 1989 c 358: See note following RCW 2.43.010.

Chapter 388-03 WAC
RULES AND REGULATIONS FOR THE CERTIFICATION OF DSHS
SPOKEN LANGUAGE INTERPRETERS AND TRANSLATORS
Last Update: 2/22/00

WAC SECTIONS

PURPOSE AND SCOPE

388-03-010 What is the purpose of these rules?

388-03-020 What is the scope of these rules?

DEFINITIONS

388-03-030 What definitions are important to understanding these rules?

CODE OF PROFESSIONAL CONDUCT

388-03-050 What is the department's "code of professional conduct for language **interpreters** and translators"?

LIST RESPONSIBILITIES FOR CERTIFYING SPOKEN LANGUAGE
INTERPRETERS AND TRANSLATORS

388-03-060 What is the responsibility of the language interpreter services and translations (LIST) section in certifying spoken language **interpreters** and translators?

CERTIFICATION/QUALIFICATION OF **INTERPRETERS AND**
TRANSLATORS

388-03-110 What certification/qualification requirements apply to **interpreters** and translators?

388-03-112 When do I become a certified or qualified interpreter or translator?

388-03-114 Can I become a department certified interpreter or translator without taking a department examination?

388-03-115 Who determines if my request is "sufficiently documented"?

388-03-116 What if the certification documents requested by the language interpreter services and translations section are in a foreign language?

388-03-117 What happens to my request for department recognition as an

interpreter or translator?

388-03-118 Does the department maintain lists of certified/qualified interpreters and translators?

EXAMINATIONS -- ELIGIBILITY AND REGISTRATION

388-03-120 Who can take the department's interpreter/translator certification and screening examinations?

388-03-122 What type of test is given by the department to certify and qualify interpreters and translators?

388-03-123 What is a screening test?

388-03-124 How do I register for a certification or screening examination if I am a department employee or an applicant for a bilingual position with the department?

388-03-125 How do I register for a certification or screening examination if I am not a department employee or an applicant for a bilingual position with the department?

388-03-126 What does my pretest package contain?

EXAMINATION -- FEES

388-03-130 What examination fees must I pay?

388-03-132 How do I pay my examination fees?

388-03-133 Are my examination fees refundable?

EXAMINATIONS -- SCHEDULING

388-03-135 What requirements apply to the scheduling of interpreter and translator certification and screening examinations?

EXAMINATIONS -- ADMINISTRATION AND SCORING

388-03-138 What procedural requirements apply to administering certification and screening examinations?

388-03-140 What if a test candidate is suspected of cheating?

388-03-150 How does the department score my bilingual examinations?

388-03-152 When does the department mail my test scores?

388-03-154 Can I appeal my test scores?

388-03-156 How many times can I retake a failed test?

DECERTIFICATION/DISQUALIFICATION OF INTERPRETERS AND TRANSLATORS

- 388-03-170** Can the department deny or revoke my certification or qualification status?
- 388-03-172** What procedures must the department follow if it denies or revokes my certification or qualification?
- 388-03-174** Can I appeal the department's decision to deny or revoke my certification or qualification?
- 388-03-176** How do I request an adjudicative hearing?

WACs > Title 388 > Chapter 388-03 > Section 388-03-050

388-03-030 << 388-03-050 >> 388-03-060

WAC 388-03-050

No agency filings affecting this section since 2003

What is the department's "code of professional conduct for language interpreters and translators"?

The "code of conduct" is the professional standard established by the department for all interpreters/translators providing language services to department programs and clients. Any violation of this code may disqualify an interpreter or translator from providing those services. Specifically, the code addresses:

(1) **Accuracy.** Interpreters/translators must always express the source language message in a thorough and faithful manner. They must:

- (a) Omit or add nothing;
- (b) Give consideration to linguistic variations in both the source and target languages; and
- (c) Conserve the tone and spirit of the source language.

(2) **Cultural sensitivity-courtesy.** Interpreters/translators must be culturally knowledgeable, sensitive, and respectful of the individual(s) they serve.

(3) **Confidentiality.** Interpreters/translators must not divulge any information obtained through their assignments, including, but not limited to, information from documents or other written materials.

(4) **Disclosure.** Interpreters/translators must not publicly discuss, report, or offer an opinion on current or past assignments, even when the information related to the assignment is not legally considered confidential.

(5) **Proficiency.** Interpreters/translators must pass the department's required bilingual fluency certification examinations or screening tests in order to meet the department's minimum proficiency standard.

(6) **Compensation.** Interpreters/translators must:

- (a) Not accept additional money, consideration, or favors for services reimbursed by the department through language services providers;
- (b) Not use the department's time, facilities, equipment or supplies for private gain or other advantage; and
- (c) Not use or attempt to use their position to secure privileges or exemptions.

(7) **Nondiscrimination.** Interpreters/translators must:

- (a) Always be neutral, impartial and unbiased;
- (b) Not discriminate on the basis of gender, disability, race, color, national origin, age, creed, religion, marital status, or sexual orientation; and
- (c) Refuse or withdraw from an assignment, without threat or retaliation, if they are unable to perform the required service in an ethical manner.

(8) **Self-evaluation.** Interpreters/translators must accurately and completely represent their certification, training, and experience.

(9) **Impartiality-conflict of interest.** Interpreters/translators must disclose to the department any real or perceived conflicts of interest that would affect their professional objectivity. Note: Providing interpreting or translating services to family members or friends may violate the family member or friend's right to confidentiality and/or may be a real or perceived conflict of interest.

(10) **Professional Demeanor.** Interpreters/translators must be punctual, prepared, and dressed appropriately.

(11) **Scope of practice.** Interpreters/translators must not:

- (a) Counsel, refer, give advice, or express personal opinions to their interpreting/translating clients;

- (b) Engage in activities with clients that are not directly related to providing interpreting and/or translating services;
- (c) Have unsupervised contact with clients; and
- (d) Have direct telephone contact with clients unless requested by DSHS staff.

(12) **Reporting obstacles to practice.** Interpreters/translators must always assess their ability to perform a specific interpreting/translating assignment. If they have any reservations about their ability to competently perform an assignment, they must immediately notify their clients and/or employer and offer to withdraw without threat or retaliation. They may remain on the assignment until more appropriate interpreters/translators can be retained.

(13) **Ethical violations.** Interpreters/translators must immediately withdraw from assignments that they perceive are a violation of this code. Any violation of this code may disqualify them from providing services to the department.

- (14) **Professional development.** Interpreters/translators must continually develop their skills and knowledge through:
- (a) Formal professional training;
 - (b) On-going continuing education; and
 - (c) Regular and frequent interaction with colleagues and specialists in related fields.

[Statutory Authority: RCW 2.43.010, 74.04.025, and 74.08.090. 00-06-014, § 388-03-050, filed 2/22/00, effective 3/24/00.]

F U T A

deleted "after December 31, 1971," "by section 3301 for any taxable year" in subsec. (j), effective for wages paid after 12/31/76.

—P.L. 94-455, Sec. 1906(b)(13)(C), substituted "to the Secretary of the Treasury" for "to the Secretary" following "the Secretary of Labor certifies" in subsec. (j), effective 2/1/77.

In 1970, P.L. 91-373, Sec. 123, added subsec. (j), effective 8/10/70.

In 1960, substituted "(other than an instrumentality to which section 3306(c)(6) applies)" for "except such as are (1) wholly owned by the United States, or (2) exempt from the tax imposed by section 3301 by virtue of any other provision of law," in subsec. (b) and added cl. (C), substituted "neither wholly nor partially" for "not wholly" in subsec. (g) for remuneration paid after '61 for services after '61.

In 1954, repealed subsec. (e), which related to the Bonneville Power Administrator, effective for services performed after 12/31/54.

Sec. 3306. Definitions.

(a) Employer.

For purposes of this chapter—

(1) **In general.** The term "employer" means, with respect to any calendar year, any person who—

(A) during any calendar quarter in the calendar year or the preceding calendar year paid wages of \$1,500 or more, or

(B) on each of some 20 days during the calendar year or during the preceding calendar year, each day being in a different calendar week, employed at least one individual in employment for some portion of the day.

For purposes of this paragraph, there shall not be taken into account any wages paid to, or employment of, an employee performing domestic services referred to in paragraph (3).

(2) **Agricultural labor.** In the case of agricultural labor, the term "employer" means, with respect to any calendar year, any person who—

(A) during any calendar quarter in the calendar year or the preceding calendar year paid wages of \$20,000 or more for agricultural labor, or

(B) on each of some 20 days during the calendar year or during the preceding calendar year, each day being in a different calendar week, employed at least 10 individuals in employment in agricultural labor for some portion of the day.

(3) **Domestic service.** In the case of domestic service in a private home, local college club, or local chapter of a college fraternity or sorority, the term "employer" means, with respect to any calendar year, any person who during any calendar quarter in the calendar year or the preceding calendar year paid wages in cash of \$1,000 or more for such service.

(4) **Special rule.** A person treated as an employer under paragraph (3) shall not be treated as an employer with respect to wages paid for any service other than domestic service referred to in paragraph (3) unless such person is treated as an employer under paragraph (1) or (2) with respect to such other service.

(b) Wages.

For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except that such term shall not include—

(1) that part of the remuneration which, after remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) equal to \$7,000 with respect to employment has been paid to an individual by an employer during any calendar year, is paid to such individual by such employer during such calendar year. If an employer (hereinafter referred to as successor employer) during any calendar year acquires substantially all the property used in a trade or business of another employer

(hereinafter referred to as a predecessor), or used in a separate unit of a trade or business of a predecessor, and immediately after the acquisition employs in his trade or business an individual who immediately prior to the acquisition was employed in the trade or business of such predecessor, then, for the purpose of determining whether the successor employer has paid remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment equal to \$7,000 to such individual during such calendar year, any remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment paid (or considered under this paragraph as having been paid) to such individual by such predecessor during such calendar year and prior to such acquisition shall be considered as having been paid by such successor employer;

(2) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of—

(A) sickness or accident disability (but, in the case of payments made to an employee or any of his dependents, this subparagraph shall exclude from the term "wages" only payments which are received under a workmen's compensation law), or

(B) medical or hospitalization expenses in connection with sickness or accident disability, or

(C) death;

(3) Repealed.

(4) any payment on account of sickness or accident disability, or medical or hospitalization expenses in connection with sickness or accident disability, made by an employer to, or on behalf of, an employee after the expiration of 6 calendar months following the last calendar month in which the employee worked for such employer;

(5) any payment made to, or on behalf of, an employee or his beneficiary—

(A) from or to a trust described in section 401(a) which is exempt from tax under section 501(a) at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust, or

(B) under or to an annuity plan which, at the time of such payment, is a plan described in section 403(a),

(C) under a simplified employee pension (as defined in section 408(k)(1)), other than any contributions described in section 408(k)(6),

(D) under or to an annuity contract described in section 403(b), other than a payment for the purchase of such contract which is made by reason of a salary reduction agreement (whether evidenced by a written instrument or otherwise),

(E) under or to an exempt governmental deferred compensation plan (as defined in section 3121(v)(3)),

(F) to supplement pension benefits under a plan or trust described in any of the foregoing provisions of this paragraph to take into account some portion or all of the increase in the cost of living (as determined by the Secretary of Labor) since retirement but only if such sup-

- plemental payments are under a plan which is treated as a welfare plan under section 3(2)(B)(ii) of the Employee Retirement Income Security Act of 1974;
- (G) under a cafeteria plan (within the meaning of section 125) if such payment would not be treated as wages without regard to such plan and it is reasonable to believe that (if section 125 applied for purposes of this section) section 125 would not treat any wages as constructively received, or
- (H) under an arrangement to which section 408(p) applies, other than any elective contributions under paragraph (2)(A)(i) thereof,
- (6) the payment by an employer (without deduction from the remuneration of the employee)—
 - (A) of the tax imposed upon an employee under section 3101, or
 - (B) of any payment required from an employee under a State unemployment compensation law,
 with respect to remuneration paid to an employee for domestic service in a private home of the employer or for agricultural labor;
- (7) remuneration paid in any medium other than cash to an employee for service not in the course of the employer's trade or business;
- (8) Repealed.
- (9) remuneration paid to or on behalf of an employee if (and to the extent that) at the time of the payment of such remuneration it is reasonable to believe that a corresponding deduction is allowable under section 217 (determined without regard to section 274(n));
- (10) any payment or series of payments by an employer to an employee or any of his dependents which is paid—
 - (A) upon or after the termination of an employee's employment relationship because of (i) death, or (ii) retirement for disability, and
 - (B) under a plan established by the employer which makes provision for his employees generally or a class or classes of his employees (or for such employees or class or classes of employees and their dependents),
 other than any such payment or series of payments which would have been paid if the employee's employment relationship had not been so terminated;
- (11) remuneration for agricultural labor paid in any medium other than cash;
- (12) any contribution, payment, or service, provided by an employer which may be excluded from the gross income of an employee, his spouse, or his dependents, under the provisions of section 120 (relating to amounts received under qualified group legal services plans);
- (13) any payment made, or benefit furnished, to or for the benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127, 129, 134(b)(4); or 134(b)(5);
- (14) the value of any meals or lodging furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119;
- (15) any payment made by an employer to a survivor or the estate of a former employee after the calendar year in which such employee died;
- (16) any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such

benefit from income under section 74(c), 108(f)(4), 117, or 132;

(17) any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(b);

(18) any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(d);

(19) remuneration on account of—

(A) a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option (as defined in section 422(b)) or under an employee stock purchase plan (as defined in section 423(b)), or

(B) any disposition by the individual of such stock; or

(20) any benefit or payment which is excludable from the gross income of the employee under section 139B(b).

Except as otherwise provided in regulations prescribed by the Secretary, any third party which makes a payment included in wages solely by reason of the parenthetical matter contained in subparagraph (A) of paragraph (2) shall be treated for purposes of this chapter and chapter 22 as the employer with respect to such wages. Nothing in the regulations prescribed for purposes of chapter 24 (relating to income tax withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "wages" in the regulations prescribed for purposes of this chapter.

(c) Employment.

For purposes of this chapter, the term "employment" means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and (A) any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, and (B) any service, of whatever nature, performed after 1971 outside the United States (except in a contiguous country with which the United States has an agreement relating to unemployment compensation) by a citizen of the United States as an employee of an American employer (as defined in subsection (j)(3)), except

(1) agricultural labor (as defined in subsection (k)) unless—

(A) such labor is performed for a person who—

(i) during any calendar quarter in the calendar year or the preceding calendar year paid remuneration in cash of \$20,000 or more to individuals employed in agricultural labor (including labor performed by an alien referred to in subparagraph (B)), or

(ii) on each of some 20 days during the calendar year or the preceding calendar year, each day being in a different calendar week, employed in agricultural labor (including labor performed by an alien referred to in subparagraph (B)) for some portion of the day (whether or not at the same moment of time) 10 or more individuals; and

(B) such labor is not agricultural labor performed by an individual who is an alien admitted to the United States to perform agricultural labor pursuant to sections 214(c) and 101(a)(15)(H) of the Immigration and Nationality Act;

(2) domestic service in a private home, local college club, or local chapter of a college fraternity or sorority unless performed for a person who paid cash remuneration of \$1,000 or more to individuals employed in such domestic service in any calendar quarter in the calendar year or the preceding calendar year;

(3) service not in the course of the employer's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for such service is \$50 or more and such service is performed by an individual who is regularly employed by such employer to perform such service. For purposes of this paragraph, an individual shall be deemed to be regularly employed by an employer during a calendar quarter only if—

(A) on each of some 24 days during such quarter such individual performs for such employer for some portion of the day service not in the course of the employer's trade or business, or

(B) such individual was regularly employed (as determined under subparagraph (A)) by such employer in the performance of such service during the preceding calendar quarter;

(4) service performed on or in connection with a vessel or aircraft not an American vessel or American aircraft, if the employee is employed on and in connection with such vessel or aircraft when outside the United States;

(5) service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of 21 in the employ of his father or mother;

(6) service performed in the employ of the United States Government or of an instrumentality of the United States which is—

(A) wholly or partially owned by the United States, or

(B) exempt from the tax imposed by section 3301 by virtue of any provision of law which specifically refers to such section (or the corresponding section of prior law) in granting such exemption;

(7) service performed in the employ of a State, or any political subdivision thereof, or in the employ of an Indian tribe, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more States or political subdivisions or Indian tribes; and any service performed in the employ of any instrumentality of one or more States or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under the Constitution of the United States from the tax imposed by section 3301;

(8) service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a);

(9) service performed by an individual as an employee or employee representative as defined in section 1 of the Railroad Unemployment Insurance Act (45 U.S.C. 351);

(10)(A) service performed in any calendar quarter in the employ of any organization exempt from income tax under section 501(a) (other than an organization described in section 401(a)) or under section 521, if the remuneration for such service is less than \$50, or

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

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

(D) service performed in the employ of a hospital, if such service is performed by a patient of such hospital;

(11) service performed in the employ of a foreign government (including service as a consular or other officer or employee or a nondiplomatic representative);

(12) service performed in the employ of an instrumentality wholly owned by a foreign government—

(A) if the service is of a character similar to that performed in foreign countries by employees of the United States Government or of an instrumentality thereof; and

(B) if the Secretary of State shall certify to the Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States Government and of instrumentalities thereof;

(13) service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to State law; and service performed as an intern in the employ of a hospital by an individual who has completed a 4 years' course in a medical school chartered or approved pursuant to State law;

(14) service performed by an individual for a person as an insurance agent or as an insurance solicitor, if all such service performed by such individual for such person is performed for remuneration solely by way of commission;

(15)(A) service performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

(B) service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of

compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back;

(16) service performed in the employ of an international organization;

(17) service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life (including service performed by any such individual as an ordinary incident to any such activity), except—

(A) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and

(B) service performed on or in connection with a vessel of more than 10 net tons (determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States);

(18) service described in section 3121(b)(20);

(19) service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101(a)(15) of the Immigration and Nationality Act, as amended (8 U.S.C. 1101(a)(15)(F), (J), (M), or (Q)); and which is performed to carry out the purpose specified in subparagraph (F), (J), (M), or (Q) as the case may be;

(20) service performed by a full time student (as defined in subsection (q)) in the employ of an organized camp

(A) if such camp—

(i) did not operate for more than 7 months in the calendar year and did not operate for more than 7 months in the preceding calendar year, or

(ii) had average gross receipts for any 6 months in the preceding calendar year which were not more than 33½ percent of its average gross receipts for the other 6 months in the preceding calendar year; and

(B) if such full time student performed services in the employ of such camp for less than 13 calendar weeks in such calendar year; or

(21) service performed by a person committed to a penal institution.

(d) Included and excluded service.

For purposes of this chapter, if the services performed during one-half or more of any pay period by an employee for the person employing him constitute employment, all the services of such employee for such period shall be deemed to be employment; but if the services performed during more than one-half of any such pay period by an employee for the person employing him do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment. As used in this subsection, the term “pay period” means a period (of not more than 31 consecutive days) for which a payment of remuneration is ordinarily made to the employee by the person employing him. This subsection shall not be applicable with respect to services performed in a pay period by an employee for the person employing him, where any of such service is excepted by subsection (c)(9).

(e) State agency.

For purposes of this chapter, the term “State agency” means any State officer, board, or other authority, designated under a State law to administer the unemployment fund in such State.

(f) Unemployment fund.

For purposes of this chapter, the term “unemployment fund” means a special fund, established under a State law and administered by a State agency, for the payment of compensation. Any sums standing to the account of the State agency in the Unemployment Trust Fund established by section 904 of the Social Security Act, as amended (42 U.S.C. 1104), shall be deemed to be a part of the unemployment fund of the State, and no sums paid out of the Unemployment Trust Fund to such State agency shall cease to be a part of the unemployment fund of the State until expended by such State agency. An unemployment fund shall be deemed to be maintained during a taxable year only if throughout such year, or such portion of the year as the unemployment fund was in existence, no part of the moneys of such fund was expended for any purpose other than the payment of compensation (exclusive of expenses of administration) and for refunds of sums erroneously paid into such fund and refunds paid in accordance with the provisions of section 3305(b); except that—

(1) an amount equal to the amount of employee payments into the unemployment fund of a State may be used in the payments of cash benefits to individuals with respect to their disability, exclusive of expenses of administration;

(2) the amounts specified by section 903(c)(2) or 903(d)(4) of the Social Security Act may, subject to the conditions prescribed in such section, be used for expenses incurred by the State for administration of its unemployment compensation law and public employment offices,

(3) nothing in this subsection shall be construed to prohibit deducting any amount from unemployment compensation otherwise payable to an individual and using the amount so deducted to pay for health insurance, or the withholding of Federal, State, or local individual income tax, if the individual elected to have such deduction made and such deduction was made under a program approved by the Secretary of Labor;

(4) amounts may be deducted from unemployment benefits and used to repay overpayments as provided in section 303(g) of the Social Security Act; and

(5) amounts may be withdrawn for the payment of short-time compensation under a plan approved by the Secretary of Labor.

(g) Contributions.

For purposes of this chapter, the term “contributions” means payments required by a State law to be made into an unemployment fund by any person on account of having individuals in his employ, to the extent that such payments are made by him without being deducted or deductible from the remuneration of individuals in his employ.

(h) Compensation.

For purposes of this chapter, the term “compensation” means cash benefits payable to individuals with respect to their unemployment.

(i) Employee.

For purposes of this chapter, the term “employee” has the meaning assigned to such term by section 3121(d), except that paragraph (4) and subparagraphs (B) and (C) of paragraph (3) shall not apply.

(j) State, United States, and American employer.

For purposes of this chapter—

(1) **State.** The term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

(2) **United States.** The term "United States:" when used in a geographical sense includes the States, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

(3) **American employer.** The term "American employer" means a person who is—

- (A) an individual who is a resident of the United States,
- (B) a partnership, if two-thirds or more of the partners are residents of the United States,
- (C) a trust, if all of the trustees are residents of the United States, or
- (D) a corporation organized under the laws of the United States or of any State.

An individual who is a citizen of the Commonwealth of Puerto Rico or the Virgin Islands (but not otherwise a citizen of the United States) shall be considered, for purposes of this section, as a citizen of the United States.

(k) Agricultural labor.

For purposes of this chapter, the term "agricultural labor" has the meaning assigned to such term by subsection (g) of section 3121, except that for purposes of this chapter subparagraph (B) of paragraph (4) of such subsection (g) shall be treated as reading:

"(B) in the employ of a group of operators of farms (or a cooperative organization of which such operators are members) in the performance of service described in subparagraph (A), but only if such operators produced more than one-half of the commodity with respect to which such service is performed;"

(l) Repealed.

(m) American vessel and aircraft.

For purposes of this chapter, the term "American vessel" means any vessel documented or numbered under the laws of the United States; and includes any vessel which is neither documented or numbered under the laws of the United States nor documented under the laws of any foreign country, if its crew is employed solely by one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any State; and the term "American aircraft" means an aircraft registered under the laws of the United States.

(n) Vessels operated by general agents of United States.

Notwithstanding the provisions of subsection (c)(6), service performed by officers and members of the crew of a vessel which would otherwise be included as employment under subsection (c) shall not be excluded by reason of the fact that it is performed on or in connection with an American vessel—

- (1) owned by or bareboat chartered to the United States and
- (2) whose business is conducted by a general agent of the Secretary of Commerce.

For purposes of this chapter, each such general agent shall be considered a legal entity in his capacity as such general agent, separate and distinct from his identity as a person employing individuals on his own account, and the officers and members of the crew of such an American vessel whose business is conducted by a general agent of the Secretary of Commerce shall be deemed to be performing services for such general agent rather than the United States. Each such general agent who in his capacity as such is an employer within the meaning of subsection (a) shall be subject to all the requirements imposed upon an employer under this chapter with respect to service which constitutes employment by reason of this subsection.

(o) Special rule in case of certain agricultural workers.

(1) **Crew leaders who are registered or provide specialized agricultural labor.** For purposes of this chapter, any individual who is a member of a crew furnished by a crew leader to perform agricultural labor for any other person shall be treated as an employee of such crew leader—

(A) if—

- (i) such crew leader holds a valid certificate of registration under the Migrant and Seasonal Agricultural Worker Protection Act; or
- (ii) substantially all the members of such crew operate or maintain tractors, mechanized harvesting or crop-dusting equipment, or any other mechanized equipment, which is provided by such crew leader; and

(B) if such individual is not an employee of such other person within the meaning of subsection (i).

(2) **Other crew leaders.** For purposes of this chapter, in the case of any individual who is furnished by a crew leader to perform agricultural labor for any other person and who is not treated as an employee of such crew leader under paragraph (1)—

- (A) such other person and not the crew leader shall be treated as the employer of such individual; and
- (B) such other person shall be treated as having paid cash remuneration to such individual in an amount equal to the amount of cash remuneration paid to such individual by the crew leader (either on his behalf or on behalf of such other person) for the agricultural labor performed for such other person.

(3) **Crew leader.** For purposes of this subsection, the term "crew leader" means an individual who—

- (A) furnishes individuals to perform agricultural labor for any other person,
- (B) pays (either on his behalf or on behalf of such other person) the individuals so furnished by him for the agricultural labor performed by them, and
- (C) has not entered into a written agreement with such other person under which such individual is designated as an employee of such other person.

(p) Concurrent employment by two or more employers.

For purposes of sections 3301, 3302, and 3306(b)(1), if two or more related corporations concurrently employ the same individual and compensate such individual through a common paymaster which is one of such corporations, each such corporation shall be considered to have paid as remuneration to such individual only the amounts actually disbursed by it to such individual and shall not be considered to have paid as remuneration to such individual amounts actually disbursed to such individual by another of such corporations.

(q) Full time student.

For purposes of subsection (c)(20), an individual shall be treated as a full time student for any period

- (1) during which the individual is enrolled as a full time student at an educational institution, or
- (2) which is between academic years or terms if—
 - (A) the individual was enrolled as a full time student at an educational institution for the immediately preceding academic year or term, and
 - (B) there is a reasonable assurance that the individual will be so enrolled for the immediately succeeding academic year or term after the period described in subparagraph (A).

WAGE WITHHOLDING

Subchapter A.—Withholding From Wages

Sec.

- 3401. Definitions.
- 3402. Income tax collected at source.
- 3403. Liability for tax.
- 3404. Return and payment by governmental employer.
- 3405. Special rules for pensions, annuities, and certain other deferred income.
- 3406. Backup withholding.

In 1983, P.L. 98-67, Sec. 104(d)(4), added item 3406.

In 1982, P.L. 97-248, Sec. 307(b)(4), amended the chapter heading. Prior to amendment, the chapter heading read as follows:

"CHAPTER 24.—COLLECTION OF INCOME TAX AT SOURCE ON WAGES"

Sec. 3401. Definitions.**(a) Wages.**

For purposes of this chapter, the term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except that such term shall not include remuneration paid—

- (1) for active service performed in a month for which such employee is entitled to the benefits of section 112 (relating to certain combat zone compensation of members of the Armed Forces of the United States) to the extent remuneration for such service is excludable from gross income under such section; or
- (2) for agricultural labor (as defined in section 3121(g)) unless the remuneration paid for such labor is wages (as defined in section 3121(a)); or
- (3) for domestic service in a private home, local college club, or local chapter of a college fraternity or sorority; or
- (4) for service not in the course of the employer's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for such service is \$50 or more and such service is performed by an individual who is regularly employed by such employer to perform such service. For purposes of this paragraph, an individual shall be deemed to be regularly employed by an employer during a calendar quarter only if—
 - (A) on each of some 24 days during such quarter such individual performs for such employer for some portion of the day service not in the course of the employer's trade or business; or
 - (B) such individual was regularly employed (as determined under subparagraph (A)) by such employer in the performance of such service during the preceding calendar quarter; or
- (5) for services by a citizen or resident of the United States for a foreign government or an international organization; or
- (6) for such services, performed by a nonresident alien individual, as may be designated by regulations prescribed by the Secretary; or
- (7) Repealed.
- (8) (A) for services for an employer (other than the United States or any agency thereof)—
 - (i) performed by a citizen of the United States if, at the time of the payment of such remuneration, it is reasonable to believe that such remuneration will be excluded from gross income under section 911; or
 - (ii) performed in a foreign country or in a possession of the United States by such a citizen if, at the time

of the payment of such remuneration, the employer is required by the law of any foreign country or possession of the United States to withhold income tax upon such remuneration; or

(B) for services for an employer (other than the United States or any agency thereof) performed by a citizen of the United States within a possession of the United States (other than Puerto Rico), if it is reasonable to believe that at least 80 percent of the remuneration to be paid to the employee by such employer during the calendar year will be for such services; or

(C) for services for an employer (other than the United States or any agency thereof) performed by a citizen of the United States within Puerto Rico, if it is reasonable to believe that during the entire calendar year the employee will be a bona fide resident of Puerto Rico; or

(D) for services for the United States (or any agency thereof) performed by a citizen of the United States within a possession of the United States to the extent the United States (or such agency) withholds taxes on such remuneration pursuant to an agreement with such possession; or

(9) for services performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

(10) (A) for services performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution; or

(B) for services performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such services, or is entitled to be credited with the unsold newspapers or magazines turned back; or

(11) for services not in the course of the employer's trade or business, to the extent paid in any medium other than cash; or

(12) to, or on behalf of, an employee or his beneficiary—

(A) from or to a trust described in section 401(a) which is exempt from tax under section 501(a) at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust; or

(B) under or to an annuity plan which, at the time of such payment, is a plan described in section 403(a); or

(C) for a payment described in section 402(h)(1) and

(2) if, at the time of such payment, it is reasonable to believe that the employee will be entitled to an exclusion under such section for payment; or

(D) under an arrangement to which section 408(p) applies; or

(E) under or to an eligible deferred compensation plan which, at the time of such payment, is a plan described in section 457(b) which is maintained by an eligible employer described in section 457(e)(1)(A), or

(13) pursuant to any provision of law other than section 5(c) or 6(1) of the Peace Corps Act, for service performed

as a volunteer or volunteer leader within the meaning of such Act; or

(14) in the form of group-term life insurance on the life of an employee; or

(15) to or on behalf of an employee if (and to the extent that) at the time of the payment of such remuneration it is reasonable to believe that a corresponding deduction is allowable under section 217 (determined without regard to section 274(n)); or

(16)(A) as tips in any medium other than cash;

(B) as cash tips to an employee in any calendar month in the course of his employment by an employer unless the amount of such cash tips is \$20 or more;

(17) for service described in section 3121(b)(20);

(18) for any payment made, or benefit furnished, to or for the benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127, 129, 134(b)(4), or 134(b)(5);

(19) for any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 108(f)(4), 117, or 132;

(20) for any medical care reimbursement made to or for the benefit of an employee under a self-insured medical reimbursement plan (within the meaning of section 105(h)(6));

(21) for any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(b);

(22) any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(d); or

The term "wages" includes any amount includible in gross income of an employee under section 409A and payment of such amount shall be treated as having been made in the taxable year in which the amount is so includible.

(23) for any benefit or payment which is excludable from the gross income of the employee under section 139B(b).

(b) Payroll period.

For purposes of this chapter, the term "payroll period" means a period for which a payment of wages is ordinarily made to the employee by his employer, and the term "miscellaneous payroll period" means a payroll period other than a daily, weekly, biweekly, semimonthly, monthly, quarterly, semiannual, or annual payroll period.

(c) Employee.

For purposes of this chapter, the term "employee" includes an officer, employee, or elected official of the United States; a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term "employee" also includes an officer of a corporation.

(d) Employer.

For purposes of this chapter, the term "employer" means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that—

(1) if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term "employer" (ex-

cept for purposes of subsection (a)) means the person having control of the payment of such wages, and

(2) in the case of a person paying wages on behalf of a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States, the term "employer" (except for purposes of subsection (a)) means such person.

(e) Number of withholding exemptions claimed.

For purposes of this chapter, the term "number of withholding exemptions claimed" means the number of withholding exemptions claimed in a withholding exemption certificate in effect under section 3402(f), or in effect under the corresponding section of prior law, except that if no such certificate is in effect, the number of withholding exemptions claimed shall be considered to be zero.

(f) Tips.

For purposes of subsection (a), the term "wages" includes tips received by an employee in the course of his employment. Such wages shall be deemed to be paid at the time a written statement including such tips is furnished to the employer pursuant to section 6053(a) or (if no statement including such tips is so furnished) at the time received.

(g) Crew leader rules to apply.

Rules similar to the rules of section 3121(o) shall apply for purposes of this chapter.

(h)

Differential Wage Payments to Active Duty Members of the Uniformed Services.

(1) **In general.** For purposes of subsection (a), any differential wage payment shall be treated as a payment of wages by the employer to the employee.

(2) **Differential wage payment.** For purposes of paragraph (1), the term "differential wage payment" means any payment which—

(A) is made by an employer to an individual with respect to any period during which the individual is performing service in the uniformed services (as defined in chapter 43 of title 38, United States Code) while on active duty for a period of more than 30 days, and

(B) represents all or a portion of the wages the individual would have received from the employer if the individual were performing service for the employer.

In 2008, P.L. 110-458, Sec. 108(m), of this Act [relating to Sec. 864(a) of P.L. 109-280], provides:

"(m) Amendment related to section 864. Section 864(a) of the 2006 Act is amended by striking 'Reconciliation'.

—P.L. 110-245, Sec. 105(a)(1), added subsec. (h), effective for remuneration paid after 12/31/2008.

—P.L. 110-245, Sec. 115(c), deleted 'or' at the end of para. (a)(21), substituted '; or' for the period at the end of para. (a)(22), and added para. (a)(23), effective as if included in section 5 of the Mortgage Forgiveness Debt Relief Act of 2007.

In 2006, P.L. 109-280, Sec. 811, of this Act [relating to Sec. 901 of P.L. 107-16, see below], provides:

"SEC. 811. PENSIONS AND INDIVIDUAL RETIREMENT ARRANGEMENT PROVISIONS OF ECONOMIC GROWTH AND TAX RELIEF RECONCILIATION ACT OF 2001 MADE PERMANENT.

"Title IX of the Economic Growth and Tax Relief Reconciliation Act of 2001 shall not apply to the provisions of, and amendments made by, subtitles A through F of title VI of such Act (relating to pension and individual retirement arrangement provisions)."

—P.L. 109-280, Sec. 864(a), added subsec. (f) in Sec. 530 of P.L. 95-600 [see below], effective for remuneration for services performed after 12/31/2006.

In 2005, P.L. 109-135, Sec. 412(tt), redesignated subsec. (h) as subsec. (g), effective 12/21/2005.

In 2004, P.L. 108-375, Sec. 585(b)(2)(D), substituted "134(b)(4), or 134(b)(5)" for "or 134(b)(4)" in para. (a)(18), effective for travel benefits provided after 10/28/2004.

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(18) any payment made, or benefit furnished, to or for the benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127, 129, 134(b)(4), or 134(b)(5);

(19) the value of any meals or lodging furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119;

(20) any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 108(f)(4), 117 or 132;

(21) in the case of a member of an Indian tribe, any remuneration on which no tax is imposed by this chapter by reason of section 7873 (relating to income derived by Indians from exercise of fishing rights);

(22) remuneration on account of—

(A) a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option (as defined in section 422(b)) or under an employee stock purchase plan (as defined in section 423(b)), or

(B) any disposition by the individual of such stock; or

(23) any benefit or payment which is excludable from the gross income of the employee under section 139B(b).

Nothing in the regulations prescribed for purposes of chapter 24 (relating to income tax withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "wages" in the regulations prescribed for purposes of this chapter.

Except as otherwise provided in regulations prescribed by the Secretary, any third party which makes a payment included in wages solely by reason of the parenthetical matter contained in subparagraph (A) of paragraph (2) shall be treated for purposes of this chapter and chapter 22 as the employer with respect to such wages.

(b) Employment.

For purposes of this chapter, the term "employment" means any service, of whatever nature, performed (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, or (B) outside the United States by a citizen or resident of the United States as an employee for an American employer (as defined in subsection (h)), or (C) if it is service, regardless of where or by whom performed, which is designated as employment or recognized as equivalent to employment under an agreement entered into under section 233 of the Social Security Act; except that such term shall not include—

(1) service performed by foreign agricultural workers lawfully admitted to the United States from the Bahamas, Jamaica, and the other British West Indies, or from any other foreign country or possession thereof, on a temporary basis to perform agricultural labor;

(2) domestic service performed in a local college club, or local chapter of a college fraternity or sorority, by a student who is enrolled and is regularly attending classes at a school, college, or university;

(3)(A) service performed by a child under the age of 18 in the employ of his father or mother;

(B) service not in the course of the employer's trade or business, or domestic service in a private home of the employer, performed by an individual under the age of 21 in the employ of his father or mother, or performed by an individual in the employ of his spouse or son or daughter; except that the provisions of this subparagraph shall not be applicable to such domestic service performed by an individual in the employ of his son or daughter if—

(i) the employer is a surviving spouse or a divorced individual and has not remarried, or has a spouse living in the home who has a mental or physical condition which results in such spouse's being incapable of caring for a son, daughter, stepson, or stepdaughter (referred to in clause (ii)) for at least 4 continuous weeks in the calendar quarter in which the service is rendered, and

(ii) a son, daughter, stepson, or stepdaughter of such employer is living in the home, and

(iii) the son, daughter, stepson, or stepdaughter (referred to in clause (ii)) has not attained age 18 or has a mental or physical condition which requires the personal care and supervision of an adult for at least 4 continuous weeks in the calendar quarter in which the service is rendered;

(4) service performed by an individual on or in connection with a vessel not an American vessel, or on or in connection with an aircraft not an American aircraft, if (A) the individual is employed on and in connection with such vessel or aircraft, when outside the United States and (B)(i) such individual is not a citizen of the United States or (ii) the employer is not an American employer;

(5) service performed in the employ of the United States or any instrumentality of the United States, if such service—

(A) would be excluded from the term "employment" for purposes of this title if the provisions of paragraphs (5) and (6) of this subsection as in effect in January 1983 had remained in effect, and

(B) is performed by an individual who—

(i) has been continuously performing service described in subparagraph (A) since December 31, 1983, and for purposes of this clause—

(I) if an individual performing service described in subparagraph (A) returns to the performance of such service after being separated therefrom for a period of less than 366 consecutive days, regardless of whether the period began before, on, or after December 31, 1983, then such service shall be considered continuous,

(II) if an individual performing service described in subparagraph (A) returns to the performance of such service after being detailed or transferred to an international organization as described under section 3343 of subchapter III of chapter 33 of title 5, United States Code, or under section 3581 of chapter 35 of such title, then the service performed for that organization shall be considered service described in subparagraph (A),

(III) if an individual performing service described in subparagraph (A) is reemployed or reinstated after being separated from such service for the purpose of accepting employment with the American Institute in Taiwan as provided under section 3310

of chapter 48 of title 22, United States Code, then the service performed for that Institute shall be considered service described in subparagraph (A), (IV) if an individual performing service described in subparagraph (A) returns to the performance of such service after performing service as a member of a uniformed service (including, for purposes of this clause, service in the National Guard and temporary service in the Coast Guard Reserve) and after exercising restoration or reemployment rights as provided under chapter 43 of title 38, United States Code, then the service so performed as a member of a uniformed service shall be considered service described in subparagraph (A), and

(V) if an individual performing service described in subparagraph (A) returns to the performance of such service after employment (by a tribal organization) to which section 105(e)(2) of the Indian Self-Determination Act applies, then the service performed for that tribal organization shall be considered service described in subparagraph (A); or

(ii) is receiving an annuity from the Civil Service Retirement and Disability Fund, or benefits (for service as an employee) under another retirement system established by a law of the United States for employees of the Federal Government (other than for members of the uniformed service);

except that this paragraph shall not apply with respect to any such service performed on or after any date on which such individual performs—

(C) service performed as the President or Vice President of the United States,

(D) service performed—

(i) in a position placed in the Executive Schedule under sections 5312 through 5317 of title 5, United States Code,

(ii) as a noncareer appointee in the Senior Executive Service or a noncareer member of the Senior Foreign Service, or

(iii) in a position to which the individual is appointed by the President (or his designee) or the Vice President under section 105(a)(1), 106(a)(1), or 107(a)(1) or (b)(1) of title 5, United States Code, if the maximum rate of basic pay for such position is at or above the rate for level V of the Executive Schedule,

(E) service performed as the Chief Justice of the United States, an Associate Justice of the Supreme Court, a judge of a United States court of appeals, a judge of a United States district court (including the district court of a territory), a judge of the United States Claims Court [United States Court of Federal Claims, see § 902(b), P.L. 102-572], a judge of the United States Court of International Trade, a judge of the United States Tax Court, a United States magistrate, or a referee in bankruptcy or United States bankruptcy judge,

(F) service performed as a Member, Delegate, or Resident Commissioner of or to the Congress,

(G) any other service in the legislative branch of the Federal Government if such service—

(i) is performed by an individual who was not subject to subchapter III of chapter 83 of title 5, United States Code, or to another retirement system established by a law of the United States for employees of the Federal Government (other than for members of the uniformed services), on December 31, 1983, or

(ii) is performed by an individual who has, at any time after December 31, 1983, received a lump-sum payment under section 8342(a) of title 5, United States Code, or under the corresponding provision of the law establishing the other retirement system described in clause (i), or

(iii) is performed by an individual after such individual has otherwise ceased to be subject to subchapter III of chapter 83 of title 5, United States Code (without having an application pending for coverage under such subchapter), while performing service in the legislative branch (determined without regard to the provisions of subparagraph (B) relating to continuity of employment), for any period of time after December 31, 1983,

and for purposes of this subparagraph (G) an individual is subject to such subchapter III or to any such other retirement system at any time only if (a) such individual's pay is subject to deductions, contributions, or similar payments (concurrent with the service being performed at that time) under section 8334(a) of such title 5 or the corresponding provision of the law establishing such other system, or (in a case to which section 8332(k)(1) of such title applies) such individual is making payments of amounts equivalent to such deductions, contributions, or similar payments while on leave without pay, or (b) such individual is receiving an annuity from the Civil Service Retirement and Disability Fund, or is receiving benefits (for service as an employee) under another retirement system established by a law of the United States for employees of the Federal Government (other than for members of the uniformed services), or

(H) service performed by an individual

(i) on or after the effective date of an election by such individual, under section 301 of the Federal Employees' Retirement System Act of 1986, section 307 of the Central Intelligence Agency Retirement Act (50 U.S.C. 2157), or the Federal Employees' Retirement System Open Enrollment Act of 1997 to become subject to the Federal Employees' Retirement System provided in chapter 84 of title 5, United States Code, or

(ii) on or after the effective date of an election by such individual, under regulations issued under section 860 of the Foreign Service Act of 1980, to become subject to the Foreign Service Pension System provided in subchapter II of chapter 8 of title I of such Act;

(6) service performed in the employ of the United States or any instrumentality of the United States if such service is performed

(A) in a penal institution of the United States by an inmate thereof;

(B) by any individual as an employee included under section 5351(2) of title 5, United States Code (relating to certain interns, student nurses, and other student employees of hospitals of the Federal Government), other than as a medical or dental intern or a medical or dental resident in training; or

(C) by any individual as an employee serving on a temporary basis in case of fire, storm, earthquake, flood, or other similar emergency;

(7) service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned

thereby, except that this paragraph shall not apply in the case of—

(A) service which, under subsection (j), constitutes covered transportation service;

(B) service in the employ of the Government of Guam or the Government of American Samoa or any political subdivision thereof, or of any instrumentality of any one or more of the foregoing which is wholly owned thereby, performed by an officer or employee thereof (including a member of the legislature of any such Government or political subdivision), and, for purposes of this title with respect to the taxes imposed by this chapter—

(i) any person whose service as such an officer or employee is not covered by a retirement system established by a law of the United States shall not, with respect to such service, be regarded as an employee of the United States or any agency or instrumentality thereof, and

(ii) the remuneration for service described in clause (i) (including fees paid to a public official) shall be deemed to have been paid by the Government of Guam or the Government of American Samoa or by a political subdivision thereof or an instrumentality of any one or more of the foregoing which is wholly owned thereby, whichever is appropriate,

(C) service performed in the employ of the District of Columbia or any instrumentality which is wholly owned thereby, if such service is not covered by a retirement system established by a law of the United States; except that the provisions of this subparagraph shall not be applicable to service performed—

(i) in a hospital or penal institution by a patient or inmate thereof;

(ii) by any individual as an employee included under section 5351(2) of title 5, United States Code (relating to certain interns, student nurses, and other student employees of hospitals of the District of Columbia Government), other than as a medical or dental intern or as a medical or dental resident in training;

(iii) by any individual as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood or other similar emergency; or

(iv) by a member of a board, committee, or council of the District of Columbia, paid on a per diem, meeting, or other fee basis,

(D) service performed in the employ of the Government of Guam (or any instrumentality which is wholly owned by such Government) by an employee properly classified as a temporary or intermittent employee, if such service is not covered by a retirement system established by a law of Guam; except that (i) the provisions of this subparagraph shall not be applicable to services performed by an elected official or a member of the legislature or in a hospital or penal institution by a patient or inmate thereof, and (ii) for purposes of this subparagraph, clauses (i) and (ii) of subparagraph (B) shall apply,

(E) service included under an agreement entered into pursuant to section 218 of the Social Security Act, or

(F) service in the employ of a State (other than the District of Columbia, Guam, or American Samoa), of any political subdivision thereof, or of any instrumentality of any one or more of the foregoing which is wholly owned thereby, by an individual who is not a member of a retirement system of such State, political subdivi-

sion, or instrumentality, except that the provisions of this subparagraph shall not be applicable to service performed—

(i) by an individual who is employed to relieve such individual from unemployment;

(ii) in a hospital, home, or other institution by a patient or inmate thereof;

(iii) by any individual as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or other similar emergency;

(iv) by an election official or election worker if the remuneration paid in a calendar year for such service is less than \$1,000 with respect to service performed during any calendar year commencing on or after January 1, 1995, ending on or before December 31, 1999, and the adjusted amount determined under section 218(c)(8)(B) of the Social Security Act for any calendar year commencing on or after January 1, 2000, with respect to service performed during such calendar year; or

(v) by an employee in a position compensated solely on a fee basis which is treated pursuant to section 1402(c)(2)(E) as a trade or business for purposes of inclusion of such fees in net earnings from self-employment;

for purposes of this subparagraph, except as provided in regulations prescribed by the Secretary, the term "retirement system" has the meaning given such term by section 218(b)(4) of the Social Security Act;

(8)(A) service performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order, except that this subparagraph shall not apply to service performed by a member of such an order in the exercise of such duties, if an election of coverage under subsection (r) is in effect with respect to such order, or with respect to the autonomous subdivision thereof to which such member belongs;

(B) service performed in the employ of a church or qualified church-controlled organization if such church or organization has in effect an election under subsection (w), other than service in an unrelated trade or business (within the meaning of section 513(a));

(9) service performed by an individual as an employee or employee representative as defined in section 3231;

(10) service performed in the employ of—

(A) a school, college, or university; or

(B) an organization described in section 509(a)(3) if the organization is organized, and at all times thereafter is operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of a school, college, or university and is operated, supervised, or controlled by or in connection with such school, college, or university, unless it is a school, college, or university of a State or a political subdivision thereof and the services performed in its employ by a student referred to in section 218(c)(5) of the Social Security Act are covered under the agreement between the Commissioner of Social Security and such State entered into pursuant to section 218 of such Act;

if such service is performed by a student who is enrolled and regularly attending classes at such school, college, or university;

(11) service performed in the employ of a foreign government (including service as a consular or other officer or employee or a nondiplomatic representative);

(12) service performed in the employ of an instrumentality wholly owned by a foreign government—

- (A) if the service is of a character similar to that performed in foreign countries by employees of the United States Government or of an instrumentality thereof; and
- (B) if the Secretary of State shall certify to the Secretary of the Treasury that the foreign government, with respect to whose instrumentality and employees thereof exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States Government and of instrumentalities thereof;

(13) service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to State law;

(14)(A) service performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

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

(15) service performed in the employ of an international organization, except service which constitutes "employment" under subsection (y);

(16) service performed by an individual under an arrangement with the owner or tenant of land pursuant to which—

(A) such individual undertakes to produce agricultural or horticultural commodities (including livestock, bees, poultry, and fur-bearing animals and wildlife) on such land,

(B) the agricultural or horticultural commodities produced by such individual, or the proceeds therefrom, are to be divided between such individual and such owner or tenant, and

(C) the amount of such individual's share depends on the amount of the agricultural or horticultural commodities produced;

(17) service in the employ of any organization which is performed (A) in any year during any part of which such organization is registered, or there is in effect a final order of the Subversive Activities Control Board requiring such organization to register, under the Internal Security Act of 1950, as amended, as a Communist-action organization, a Communist-front organization, or a Communist-infiltrated organization, and (B) after June 30, 1956;

(18) service performed in Guam by a resident of the Republic of the Philippines while in Guam on a temporary basis as a nonimmigrant alien admitted to Guam pursuant to section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii));

(19) service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101(a)(15) of the Immigration and Nationality Act, as amended, and which is performed to carry out the purpose specified in subparagraph (F), (J), (M), or (Q), as the case may be;

(20) service (other than service described in paragraph (3)(A)) performed by an individual on a boat engaged in catching fish or other forms of aquatic animal life under an arrangement with the owner or operator of such boat pursuant to which—

(A) such individual does not receive any cash remuneration other than as provided in subparagraph (B) and other than cash remuneration—

- (i) which does not exceed \$100 per trip;
- (ii) which is contingent on a minimum catch; and
- (iii) which is paid solely for additional dues (such as mate, engineer, or cook) for which additional cash remuneration is traditional in the industry,

(B) such individual receives a share of the boat's (or the boats' in the case of a fishing operation involving more than one boat) catch of fish or other forms or aquatic animal life or a share of the proceeds from the sale of such catch, and

(C) the amount of such individual's share depends on the amount of the boat's (or the boats' in the case of a fishing operation involving more than one boat) catch of fish or other forms of aquatic animal life,

but only if the operating crew of such boat (or each boat from which the individual receives a share in the case of a fishing operation involving more than one boat) is normally made up of fewer than 10 individuals; or

(21) domestic service in a private home of the employer which—

(A) is performed in any year by an individual under the age of 18 during any portion of such year; and

(B) is not the principal occupation of such employee.

For purposes of paragraph (20), the operating crew of a boat shall be treated as normally made up of fewer than 10 individuals if the average size of the operating crew on trips made during the preceding 4 calendar quarters consisted of fewer than 10 individuals.

(c) Included and excluded service.

For purposes of this chapter, if the services performed during one-half or more of any pay period by an employee for the person employing him constitute employment, all the services of such employee for such period shall be deemed to be employment; but if the services performed during more than one-half of any such pay period by an employee for the person employing him do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment. As used in this subsection, the term "pay period" means a period (of not more than 31 consecutive days) for which a payment of remuneration is ordinarily made to the employee by the person employing him. This subsection shall not be applicable with respect to services performed in a pay period by an employee for the person employing him, where any of such service is excepted by subsection (b)(9).

(d) Employee.

For purposes of this chapter, the term "employee" means—

(1) any officer of a corporation; or

[No. 61703-6-I. Division One. April 13, 2009.]

THE LANGUAGE CONNECTION, LLC, *Appellant*, v. THE
EMPLOYMENT SECURITY DEPARTMENT, *Respondent*.

- [1] **Administrative Law — Judicial Review — Question of Law — De Novo Review — In General.** An administrative agency's interpretation of the law is reviewed by a court de novo.
- [2] **Administrative Law — Judicial Review — Question of Law — De Novo Review — Deference to Agency — Agency Expertise.** While a court will accord substantial weight to an agency's interpretation of the law in an area in which the agency has specialized expertise, the court is not bound by the agency's interpretation.
- [3] **Unemployment Compensation — Employer Contributions — Covered Employment — Necessity.** The threshold test for determining whether a putative employer is liable for contributions to the employment security fund is whether the putative employer has persons engaged in "employment"—as defined by RCW 50.04.100 of the Employment Security Act (Title 50 RCW). Unless this test is

satisfied, there is no need to consider whether a statutory exemption to liability applies.

- [4] **Unemployment Compensation — Employer Contributions — Covered Employment — Test.** Under the RCW 50.04.100 definition of “employment,” a putative employer is not liable for contributions to the employment security fund for a worker unless (1) the worker performs personal services for the putative employer and (2) the putative employer pays wages for those services.
- [5] **Unemployment Compensation — Eligibility — Covered Employment — Personal Service — What Constitutes — Test.** For purposes of RCW 50.04.100 of the Employment Security Act (Title 50 RCW), which defines “employment” as the performance of personal services for wages, “personal service” is work clearly performed for the putative employer or for the benefit of the putative employer.
- [6] **Unemployment Compensation — Eligibility — Covered Employment — Personal Service — Contract With Services Referral Agency — Agency Responsible for Payment of Compensation — Contractual or Legal Obligation — Necessity.** A services referral agency that does not have a contractual or legal responsibility to pay the wages of the persons who perform the services for the agency’s clients is not the employer of such persons under former RCW 50.04.245 (2006) of the Employment Security Act (Title 50 RCW).
- [7] **Contracts — Construction — Unambiguous Language — Review — Standard of Review.** The interpretation of an unambiguous contract is an issue of law that an appellate court reviews de novo.
- [8] **Unemployment Compensation — Eligibility — Covered Employment — Personal Service — Contract With Services Referral Agency — Agency Responsible for Payment of Compensation — Contractual or Legal Obligation — What Constitutes.** A services referral agency’s contractual obligation to forward fees paid by clients to service providers referred by the agency does not, alone, establish an employment relationship between the agency and the service providers under former RCW 50.04.245 (2006) of the Employment Security Act (Title 50 RCW)—which provides that personal services performed for or for the benefit of a third party pursuant to a contract with a services referral agency is deemed to be employment for the services referral agency if the agency is responsible, under contract or in fact, for the payment of wages in remuneration for the services performed—particularly if the agency is under no obligation, contractual or otherwise, to compensate the services provider if payment from the client is not received. Neither the fact that an agency has a sophisticated scheduling and billing system nor the fact that the agency retains the difference between what it charges a client and what a service provider referred by the agency agreed to accept for the services

provided establishes that the agency is “responsible, under contract or in fact, for the payment of wages in remuneration for the services performed.”

[9] **Administrative Law — Judicial Review — Attorney Fees — Unjustified Agency Action — Statutory Provisions — “Substantially Justified” — Burden of Proof.** For purposes of RCW 4.84.350(1), which requires a court to award attorney fees and costs to a qualified party that prevails in an action for judicial review of an agency action unless the court finds that the agency action was substantially justified, the agency has the burden of showing that attorney fees should be denied because its action was substantially justified. To meet this burden, the agency must demonstrate that its position has a reasonable basis in law and fact.

[10] **Unemployment Compensation — Attorney Fees — Reversal or Modification of Commissioner’s Decision — Fund Contribution Litigation.** RCW 50.32.160 does not authorize an award of attorney fees in an action involving the validity of an administrative decision requiring a putative employer to contribute to the employment security fund.

[11] **Unemployment Compensation — Attorney Fees — Unjustified Agency Action — Applicability.** Attorney fees are awardable on the grounds of unjustified agency action under RCW 4.84.350(1) in a dispute under the Employment Security Act (Title 50 RCW) if attorney fees are not awardable in the action under RCW 50.32.160.

Nature of Action: A services referral agency for language interpreters sought judicial review of the Employment Security Department’s assessment of past due unemployment taxes, penalties, and interest for the interpreters the agency referred to clients.

Superior Court: The Superior Court for King County, No. 07-2-18797-9, Kimberley Prochnau, J., on May 15, 2008, entered a judgment upholding the assessment.

Court of Appeals: Holding that the services referral agency is not liable for contributions to the employment security fund for the language interpreters because the responsibility for paying the interpreters falls on the agency’s clients, not the agency, and that the agency is entitled to attorney fees on appeal, the court *reverses* the judgment and the decision of the Employment Security Department.

David W. Meyer (of Bullivant Houser Bailey, PC), for appellant.