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DEFINITION OF "EMPLOYEE" WITHIN THE NEBRASKA WORKMEN'S COMPENSATION ACT

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Any attempt to explain what is meant by the word "employee" must be prefaced by a statement that there is a difference between the workmen's compensation definition and the common-law definition. The definition for workmen's compensation purposes is generally broader in keeping with the philosophy of compensating workmen for injuries arising out of and in the course of his employment regardless of fault. Exactly how broadly the word "employee" should be construed within the Nebraska Workmen's Compensation Act has created much litigation.

The intent of this article is to synthesize the problems that have arisen in construing the Nebraska act. An attempt has been made to include all the "definition of employee" cases that have been decided by the Nebraska Supreme Court.

I. CASUAL EMPLOYMENT AND THE REGULAR TRADE, BUSINESS OR OCCUPATION OF THE EMPLOYER

The Nebraska act, in defining employee, excludes "any person whose employment is casual, and which is not in the usual course of the trade, business, profession or occupation of his employer. . . ."[1]

Casual is defined as "occasional; coming at certain times without regularity, in distinction from stated or regular . . . ."[2] Thus, a person's employment is casual where he renders a particular service which is not continuous or regular, but only occasional to the business,[3] as for instance a man who unloads coal cars at irregular intervals and only on occasion.[4] However, the

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1 NEB. REV. STAT. § 48-115 (Reissue 1960).

2 Hiestand v. Ristau, 135 Neb. 881, 887, 284 N.W. 756, 760 (1939).

3 Petrow & Giannou v. Shewan, 108 Neb. 466, 187 N.W. 940 (1922); Guse v. Wessels, 132 Neb. 41, 270 N.W. 665 (1937).

4 Bridger v. Lincoln Feed & Fuel Co., 105 Neb. 222, 179 N.W. 1020 (1920). See also McConnell v. Johnston, 139 Neb. 619, 298 N.W. 346 (1941) (owner of saw hired claimant to help cut wood for farmer's cook stove—casual employee).

shortness of time spent on the job is not controlling,[5] especially where the employment is for an indefinite period of time or the employee is to report regularly for work.[6]

It should be carefully noted that to escape liability under this section[7] the employer must show both conditions;[8] that is, that the employment is both casual *and* not in the usual course of the trade, business, profession or occupation of the employer.[9] Where the employment is more than casual, there is still no liability if the injury did not arise from the regular trade, business, profession or vocation of the employer.[10] For example, where a person is hired to work on the employer's residence, any injury received on such a job would not be compensable because, although the employment is more than casual, the employer's regular trade is not repairing his personal residence.[11] A carpenter, however, hired to repair farm buildings owned by a life insurance company who was renovating the farm for investment purposes, was engaged in the regular business of the company.[12]

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5 Nebraska Nat'l Guard v. Morgan, 112 Neb. 432, 199 N.W. 557 (1924) (carpenter hired to erect shed kitchens for Nebraska National Guard, job to last for approximately ten days—entitled to compensation since term of service indefinite and job in usual course of trade of National Guard).

6 Dietz Club v. Niehaus, 110 Neb. 154, 193 N.W. 344 (1923); Nosky v. Farmer's Union Co-op Ass'n, 109 Neb. 489, 191 N.W. 846 (1922); Nedela v. Mares Auto Co., 106 Neb. 883, 184 N.W. 885 (1921). Compare Gruber v. Stickelman, 149 Neb. 627, 31 N.W.2d 753 (1948) (claimant hired from time to time at livestock auction house to work at sales conducted six or seven times a month—not casual employee).

7 NEB. REV. STAT. § 48-115 (Reissue 1960).

8 The requirement of regular trade, business, profession, or vocation is further emphasized in NEB. REV. STAT. §§ 48-106(1), -115(2) (Reissue 1960).

9 Sentor v. City of Lincoln, 124 Neb. 403, 246 N.W. 924 (1933); Sherlock v. Sherlock, 112 Neb. 797, 201 N.W. 645 (1924).

10 Coyne v. City of O'Neill, 139 Neb. 686, 298 N.W. 547 (1941) (lady given ride to train station by chief of police—not regular business of city).

11 Retzlaff v. Dickinson, 141 Neb. 136, 2 N.W.2d 922 (1942) (moving a farmer's barn); Burkholder v. Clark, 140 Neb. 590, 300 N.W. 839 (1941) (painting a farmer's barn). *Compare* Kaplan v. Gaskill, 108 Neb. 455, 187 N.W. 943 (1922) (employee hired by junk dealer to remodel homes for junk dealer to rent—not junk dealer's regular business) *with* Bauer v. Anderson, 114 Neb. 326, 207 N.W. 508 (1926) (hod carrier employed by retired farmer to remodel house to be used as rental apartment—engaged in employer's regular business).

12 Hiestand v. Ristau, 135 Neb. 881, 284 N.W. 756 (1939). *Cf.* Sherlock v. Sherlock, 112 Neb. 797, 201 N.W. 645 (1924) (hired to paint building used by wholesale drug company—employee since building used for company's business purposes).

II. CONTRACT OF HIRE NECESSARY

The Nebraska act requires that there be a contract of hire between the employer and employee which may be express or implied, oral or written.[13] In this respect, the compensation concept of employee is narrower than the common-law concept of servant, as under the compensation law there must be mutual consent and some payment.[14]

The criterion of control has been used in determining whether or not the claimant was an employee. Thus if an employer has no control or supervision over a claimant nor any right to direct the manner in which work is done, it has been held that a claimant is not an employee.[15] If, however, an employer has full control and dictates the details of the work and can accept the workman's services or discharge him, an employer-employee relationship has been found.[16]

In any case of a loaned employee, the relationship of employer and employee must be established before the special employer is liable.[17] The test as established by *Shamburg v. Shamburg*[18] is as follows:

> [T]he general test in determining whether an employee is a servant of his original master, or of the party to whom he has been furnished, is whether in the particular service which he is engaged to perform he continues to be liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired.[19]

In cases where the contention is made that the claimant is an independent contractor and thus is not an employee under a "contract of hire" as contemplated by the act, the court has held that "the contract under which service is performed, and the

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[13] NEB. REV. STAT. §§ 48-114, -115 (Reissue 1960). See Vandenburg v. Center Township, 123 Neb. 544, 243 N.W. 636 (1932), *aff'd on rehearing*, 124 Neb. 790, 248 N.W. 310 (1933); Holt County v. Mullen, 126 Neb. 102, 252 N.W. 799 (1934).

[14] RESTATEMENT (SECOND), AGENCY §§ 221, 224, 225 (1958); Lind v. Nebraska Nat'l Guard, 144 Neb. 122, 12 N.W.2d 652 (1944) (member of National Guard not an employee because of lack of freedom in contracting—member simply performing duty owed to the sovereign state).

[15] Williams v. City of Wymore, 138 Neb. 257, 292 N.W. 726 (1940).

[16] Hendershot v. City of Lincoln, 136 Neb. 606, 286 N.W. 909 (1939).

[17] Shamburg v. Shamburg, 153 Neb. 495, 45 N.W.2d 446 (1950). See Shada v. Whitney, 172 Neb. 220, 109 N.W.2d 167 (1961).

[18] 153 Neb. 495, 45 N.W.2d 446 (1950).

[19] *Id.* at 502, 45 N.W.2d at 450-51.

performance thereunder, determine the relationship between the contracting parties."[20]

III. EMPLOYEE V. INDEPENDENT CONTRACTOR

An independent contractor is not an employee under the compensation law and therefore is not entitled to compensation.[21] In attempting to determine, in a particular case, if a claimant is an employee or an independent contractor, there are a number of accepted tests. The difficulty arises in the application of the tests and the weight to be given to each.

> It is quite often difficult to distinguish between the relation of employee and independent contractor. There is no one criterion, but several elements may enter into the determination . . . . No one fact can be relied upon as a test or criterion, but the nature of the relation must be determined from all the evidence.[22]

The Nebraska court has continuously reiterated, however, that control is the important test,[23] and have quoted with approval the following statement:[24]

> The true test of a 'contractor' would seem to be that he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. . . . In actual affairs an independent contractor generally pursues the business of contracting, enters into a contract with his employer

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20 Schneider v. Village of Shickley, 156 Neb. 683, 685, 57 N.W.2d 527, 529 (1953); Snodgrass v. City of Holdrege, 166 Neb. 329, 89 N.W.2d 66 (1958).

21 NEB. REV. STAT. § 48-115 (Reissue 1960); Petrow & Giannou v. Shewan, 108 Neb. 466, 187 N.W. 940 (1922).

22 Barrett v. Selden-Breck Constr. Co., 103 Neb. 850, 855, 174 N.W. 866, 868 (1919) (other factors held sufficient to outweigh control employer had over work). See also Potter v. Scotts Bluff County, 112 Neb. 318, 199 N.W. 507 (1924) (employer giving instructions to insure compliance with contract—not inconsistent with independent contractor relationship).

23 Wilds v. Morehouse, 152 Neb. 749, 42 N.W.2d 649 (1950); Westcoatt v. Lilley, 134 Neb. 376, 278 N.W. 854 (1938); Presher v. Baker Ice Mach. Co., 132 Neb. 648, 273 N.W. 48 (1937); Reeder v. Kimball Laundry, 129 Neb. 306, 261 N.W. 562 (1935); Aeschleman v. Haschenburger Co., 127 Neb. 207, 254 N.W. 899 (1934); Standish v. Larson-Merryweather Co., 124 Neb. 197, 245 N.W. 606 (1932); State Auto. Ins. Ass'n v. Pickett, 124 Neb. 481, 247 N.W. 27 (1932); Showers v. Lund, 123 Neb. 56, 242 N.W. 258 (1932); Johnson v. Smith, 123 Neb. 716, 243 N.W. 894 (1932); Priest v. Business Men's Protective Ass'n, 117 Neb. 198, 220 N.W. 255 (1928); Christensen v. Protector Sales Co., 105 Neb. 389, 181 N.W. 146 (1920).

24 1 SHEARMAN & REDFIELD, LAW OF NEGLIGENCE § 164, at 395 (6th ed. 1913).

> to do a specified piece of work for a specific price, makes his own subcontracts, employs, controls, pays and discharges his own employees, furnishes his own material and directs and controls the execution of his work. Where these conditions concur there is, of course, no difficulty in determining his character as such. It is only where one or more of them is lacking that a question arises. The one indispensable element to his character as an independent contractor is that he must have contracted to do a specified work and have the right to control the mode and manner of doing it.

The right of control is the essential consideration rather than the exercise thereof.[25] In order to have the relation of independent contractor, the right of control must be limited to that necessary to insure compliance with the contract.[26] It is always necessary that the final results meet the approval of those who pay for it.[27] If the right of control over the workman extends no further than this, then he *probably* is an independent contractor,[28] but in any case where the employer does have the right to control the method and manner of doing the work, the workman is an employee.[29] The extent to which the workman is, in fact, independent in the performance of his work is the ultimate test of control. The right to terminate the relationship without liability is a strong indication of the employee status.[30] If the workman can be fired without liability, he is certainly under the control of his employer and if he can quit without liability, it cannot be said that his relation is consistent with that of an independent contractor.

The court has also considered the following factors as an aid in determining whether or not there is an employee or a contractor relationship.

(1) *Mode of Payment.* Payment on a completed job basis is indicative of an independent contractor relationship,[31] while payment on an hourly or weekly basis is indicative of an employee

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[25] Schou v. Village of Hildreth, 127 Neb. 784, 257 N.W. 70 (1934); Claus v. DeVere, 120 Neb. 812, 235 N.W. 450 (1931).

[26] Knuffke v. Bartholomew, 106 Neb. 763, 184 N.W. 889 (1921).

[27] Nollett v. Holland Lumber Co., 141 Neb. 538, 4 N.W.2d 554 (1942).

[28] *But see* Schneider v. Village of Shickley, 156 Neb. 682, 57 N.W.2d 527 (1953).

[29] Petrow & Giannou v. Shewan, 108 Neb. 466, 187 N.W. 940 (1922); Barrett v. Selden-Breck Constr. Co., 103 Neb. 850, 174 N.W. 866 (1919).

[30] Knuffke v. Bartholomew, 106 Neb. 763, 184 N.W. 889 (1921).

[31] Nollett v. Holland Lumber Co., 141 Neb. 538, 4 N.W.2d 554 (1942). *But see* Gardner v. Kothe, 172 Neb. 364, 109 N.W.2d 405 (1961).

status.[32] Payment on commission or piece work can be consistent with either an independent contractor or employee relation.[33]

(2) *Tools.* Who furnishes the equipment, materials and tools may be indicative of the type of relationship, but it is never the controlling factor.[34]

(3) *Work for Others.* The fact that the workman may also work for others as he pleases or has an independent business is indicative of an independent contractor relation.[35] If the workman may hire others to help him do the work, it is an indication of an independent contractor status,[36] but if he must do the work personally it indicates an employment status.[37]

(4) *Supervision.* If the claimant supervises, pays the wages and exercises the right to hire and fire other workers, this would indicate an independent contractor relationship,[38] but if these duties are performed by the employer, an employee relationship is indicated.[39]

(5) *Social Security and Workmen's Compensation.* Whether the employer deducts social security taxes from the claimant's wages and whether the claimant pays workmen's compensation on his helpers is relevant but not conclusive of the employee relation.[40]

(6) *Time.* The time for which the claimant is employed, whether indefinite or for a particular job, whether at certain specified hours or at the pleasure of the workman, is an important consideration.[41]

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[32] Peterson v. Christenson, 141 Neb. 151, 3 N.W.2d 404 (1942). *But see* Snodgrass v. City of Holdrege, 166 Neb. 329, 89 N.W.2d 66 (1958); Petrow & Giannou v. Shewan, 108 Neb. 466, 187 N.W. 940 (1922).

[33] Riggins v. Lincoln Tent & Awning Co., 143 Neb. 893, 11 N.W.2d 810 (1943).

[34] Knuffke v. Bartholomew, 106 Neb. 763, 184 N.W. 889 (1921); Barrett v. Selden-Breck Constr. Co., 103 Neb. 850, 174 N.W. 866 (1919).

[35] Reeder v. Kimball Laundry, 129 Neb. 306, 261 N.W. 562 (1935). *But see* Riggins v. Lincoln Tent & Awning Co., 143 Neb. 893, 11 N.W.2d 810 (1943); Cole v. Minnick, 123 Neb. 871, 244 N.W. 785 (1932).

[36] Petrow & Giannou v. Shewan, 108 Neb. 466, 187 N.W. 940 (1922).

[37] Cole v. Minnick, 123 Neb. 871, 244 N.W. 785 (1932).

[38] Snodgrass v. City of Holdrege, 166 Neb. 329, 89 N.W.2d 66 (1958).

[39] Knuffke v. Bartholomew, 106 Neb. 763, 184 N.W. 889 (1921).

[40] Riggins v. Lincoln Tent & Awning Co., 143 Neb. 893, 11 N.W.2d 810 (1943).

[41] Riggins v. Lincoln Tent & Awning Co., 143 Neb. 893, 11 N.W.2d 810 (1943). See also Nollett v. Holland Lumber Co., 141 Neb. 538, 4 N.W.2d 554 (1942).

(7) *Contract.* The actual existence of a contract for performance of a specified piece of work at a fixed price is a very strong indication of an independent contractor status.[42]

(8) *Where Work is Performed.* Where the work done is an integral part of the employer's regular business, and when the worker does not furnish an independent business or professional service, it should indicate an employee status.[43]

But again, it must be stated that in Nebraska, it appears that the most important test to establish an employee status is control over the details of the work, not only as to the final result, but in the mode and manner of the performance of the task itself.[44] However, this is not the only test because all the facts in the case are pertinent.[45]

IV. EMPLOYEES OF RAILROADS ENGAGED IN INTERSTATE OR FOREIGN COMMERCE, HOUSEHOLD DOMESTIC SERVANTS, FARM AND RANCH LABORERS AND HOME WORKERS

Railroad companies engaged in interstate or foreign commerce are excluded from the Nebraska Workmen's Compensation Law,[46] and employers of household domestic servants[47] and farm and ranch laborers,[48] are also excluded. Employers of household domestic servants or farm or ranch laborers, however, may elect to come under the act by carrying compensation insurance.[49] If an exempt employer does carry insurance it is considered to be conclusive proof that the employer and his employee will be bound by the terms of the act,[50] except that any such employee may elect not to accept the act.[51]

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42 Lowe v. Chicago Lumber Co., 135 Neb. 735, 283 N.W. 841 (1939).

43 This may be the real basis for the decisions in Cole v. Minnick, 123 Neb. 871, 244 N.W. 785 (1932), and Schneider v. Village of Shickley, 156 Neb. 683, 57 N.W.2d 527 (1953).

44 1 SHEARMAN & REDFIELD, LAW OF NEGLIGENCE § 164 (6th ed. 1913).

45 Knuffke v. Bartholomew, 106 Neb. 763, 184 N.W. 889 (1921).

46 NEB. REV. STAT. § 48-106(1) (Reissue 1960); Chicago, B. & Q. R.R. v. Amack, 112 Neb. 437, 199 N.W. 724 (1924). See also Summers v. Railway Express Agency, 134 Neb. 237, 278 N.W. 476 (1938).

47 NEB. REV. STAT. § 48-106(2) (Reissue 1960).

48 *Ibid.*

49 *Ibid.*

50 NEB. REV. STAT. § 48-106(3) (Reissue 1960).

51 *Ibid.*

In the case of household domestic servants, it appears that they would not come under the act in any event because they are not employed in the regular trade, business, profession or vocation of the employer.[52] It should be noted, however, that the exemption applies only to *household* domestic servants and not to domestic servants generally.[53] It must also be noted that the statute does not exclude the domestic servant or farm or ranch laborer, but rather excludes their *employer*. It is the class of employers which is excluded rather than the employee. This means that the character of the business of the employer is insignificant if he is an employer of farm laborers.[54] Once the character of the labor is determined, no inquiry as to the occupation or commercial status of the employer is pertinent.[55] Thus, if a person is hired to engage in nonfarm work on a farm, he is not a farm laborer within the meaning of the act even though his employer is a farmer.[56] The Nebraska court has also held that a workman is not a farm laborer simply because at the moment, he is doing work on a farm, or because the task on which he is engaged happens to be what is ordinarily considered farm labor. The whole character of his employment must be examined to determine whether he is a farm laborer.[57]

Section 48-115(2)(2) excludes from the definition of employee "any person to whom articles and materials are given to be made up, cleaned, washed, finished, repaired or adapted for sale in the worker's own home or in other premises not under the control or management of the employer, unless the employee is required to perform the work at a place designated by the employer."[58] There appear to be no Nebraska cases on this subject.[59]

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[52] NEB. REV. STAT. § 48-106(1) (Reissue 1960).

[53] 1 LARSON, WORKMEN'S COMPENSATION LAW § 50.30 (1952).

[54] Keefover v. Vasey, 112 Neb. 424, 199 N.W. 799 (1924). See also Keith v. Wilson, 165 Neb. 58, 84 N.W.2d 192 (1957).

[55] *Id.* at 424, 199 N.W. 799.

[56] Guse v. Wessels, 132 Neb. 41, 270 N.W. 665 (1937); Hiestand v. Ristau 135 Neb. 881, 284 N.W. 756 (1939).

[57] Gruber v. Stickelman, 149 Neb. 627, 31 N.W.2d 753 (1948) (workman for livestock commission house who sorted cattle and wrote tickets—not excluded by farm laborer provision); Oliver v. Ernst, 148 Neb. 465, 27 N.W.2d 622 (1947) (employee of employer who contracted to move dirt for farmer by bulldozer—not excluded by farm laborer provision).

[58] NEB. REV. STAT. § 48-115(2)(2) (Reissue 1960).

[59] See dissent in Cole v. Minnick, 123 Neb. 871, 875, 244 N.W. 785, 787 (1932).

V. MINORS

Prior to 1959, minors who were legally permitted to work under the laws of Nebraska, were included within the definition of employee.[60] Thus, a minor not legally prohibited from working, could bring an action under the Nebraska Workmen's Compensation Act,[61] and in fact was limited to an action under the act.[62] A minor who was legally prohibited from working was not required to rely on the compensation act for damages and could bring a common-law action.[63]

Since 1959, however, it appears clear that all minors are limited to an action under the compensation act for damages.[64]

VI. EMPLOYEES OF STATE AND GOVERNMENTAL AGENCIES CREATED BY THE STATE

The Nebraska act includes as employees every person in the service of the state or of any governmental agency created by it, except officials who are either elected or appointed for a regular term of office or to complete the unexpired portion of any regular term.[65] Thus, a carpenter employed by the Nebraska National Guard to build shed kitchens for the Guard's summer camp was held to be an employee because in the preparation for and holding of the annual encampment, the Nebraska National Guard was a governmental agency of the state.[66]

The phrase "regular term of office"[67] has been defined to mean a term with a "fixed and definite duration and a date of termination known and fixed by law or other general regulation."[68] Within this definition a captain in a city fire department was not an official appointed for a regular term[69] but a

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60 Neb. Laws c. 93, p. 370 (1941).

61 Krajeski v. Beem, 157 Neb. 586, 60 N.W.2d 651 (1953).

62 Navracel v. Cudahy Packing Co., 109 Neb. 506, 191 N.W. 659 (1922).

63 Benner v. Evans Laundry Co., 117 Neb. 701, 222 N.W. 630 (1929).

64 NEB. REV. STAT. § 48-115(2) (Reissue 1960).

65 NEB. REV. STAT. § 48-115(1) (Reissue 1960). This includes water, street and light commissioners if they are not elected.

66 Nebraska Nat'l Guard v. Morgan, 112 Neb. 432, 199 N.W. 557 (1924). *But see* Lind v. Nebraska Nat'l Guard, 144 Neb. 122, 12 N.W.2d 652 (1944).

67 NEB. REV. STAT. § 48-115(1) (Reissue 1960).

68 Rooney v. City of Omaha, 105 Neb. 447, 181 N.W. 143 (1920).

69 Shandy v. City of Omaha, 127 Neb. 406, 255 N.W. 477 (1934); City of Fremont v. Lea, 115 Neb. 565, 213 N.W. 820 (1927) (paid member of city fire department—employee of the city).

village marshal appointed by the village board on a year to year basis was held to be an officer of the village appointed for a regular term of office and not an employee.[70] A member of a town board, holding his office by virtue of his election as justice of the peace for a fixed, definite and regular term was held to be an official elected for a regular term of office and the fact that he did some work not required by his office and charged the township for this work did not change his character as an official since there was no contract of employment.[71]

A serious problem has arisen as to the status of certain workmen employed on a city project but paid from federal funds. The authority to control the details of the work or to direct the mode and manner of doing the work appears to be the basis of determining the status. Where the city has entire charge of directing and controlling the work of a brick layer, he was held to be an employee of the city, although his wages were paid from federal funds.[72] But where the city had no authority to control the details of the work or to direct the mode and manner of doing it, a laborer was held not to be an employee of the city even though the city furnished certain equipment, material, supplies and other items, and the superintendent of the project was the city's street commissioner paid by the city.[73]

VII. VOLUNTEER FIREMEN

The act specifically includes as employees volunteer firemen of any fire department of any rural or suburban fire protection district provided certain qualifications are met: (1) the fire department must be regularly organized under the laws of the State of Nebraska; (2) the claimant must be a member of such depart-

[70] Suverkrubbe v. Village of Fort Calhoun, 127 Neb. 472, 256 N.W. 47 (1934). See also Anderson v. Bituminous Cas. Co., 155 Neb. 590, 52 N.W.2d 814 (1952) (private citizen called into service as member of sheriff's posse—employee within meaning of the act); Davis v. Lincoln County, 117 Neb. 148, 219 N.W. 899 (1928) (one employed to repair bridges for county as occasion arose—employee of county).

[71] Vandenburg v. Center Township, 123 Neb. 544, 243 N.W. 636 (1932), *aff'd on rehearing*, 124 Neb. 790, 248 N.W. 310 (1933).

[72] Hendershot v. City of Lincoln, 136 Neb. 606, 286 N.W. 909 (1939).

[73] Glantz v. City of Lincoln, 140 Neb. 515, 300 N.W. 572 (1941); Williams v. City of Wymore, 138 Neb. 256, 292 N.W. 726 (1940). See also Steward v. Deuel County, 137 Neb. 516, 289 N.W. 877 (1940) (county made arrangement with village for latter to employ foreman to handle supervision of highway repair—county still paid for labor and had utlimate control—claimant hired by foreman employee of county).

ment; (3) the members of the fire department must be recommended by the chief of the fire department to the appropriate auhtority and by such authority be confirmed, and (4) the member must not have been removed by such authority at the time of the accident and must be acting in the performance and within the scope of his duties.[74]

VIII. CIVIL DEFENSE WORKERS

Because of the increasing possibility that members of civil defense agencies may be injured while in the performance of their duties without any protection under the workmen's compensation act, the 1961 Legislature amended the act to include, under the definition of employee all members of the State Civil Defense Agency, or of any local organization for civil defense or civil defense mobile support unit, which Agency, organization, or unit is regularly organized under the laws of the State of Nebraska, while in the performance of their duties as members of such Agency, organization or unit.[75]

IX. PARTNERS AND CORPORATE OFFICERS

Section 48-115(2) begins its definition of employee by stating: "Every person in the service of an employer . . . ."[76] This section contemplates that there be two persons, the employee and the employer. It does not contemplate the dual relationship of partnerships even though the partner may be a working partner. Thus, where the partnership contract provided that one of the partners should be the active manager and devote all of his time to the business and to receive $250.00 per month, it was held that he was an employer and not an employee.[77]

A corporation on the other hand is a complete entity, separate and distinguishable from its stockholders and officers. If it sees fit to have one of its officers serve in the capacity of an ordinary employee, there is nothing to prevent it from so doing

[74] NEB. REV. STAT. § 48-115(1) (Reissue 1960); Clark v. Village of Hemingford, 147 Neb. 1044, 26 N.W.2d 15 (1947) (claimant's name carried on roll of active members of fire department—village trustees confirmed roll—claimant was employee); Eagle Indem. Co. v. Village of Creston, 29 Neb. 850, 263 N.W. 220 (1935) (members of volunteer fire department not recommended by chief of department for membership and not confirmed by the village board—not employees of village).

[75] NEB. REV. STAT. § 48-115(1)(f) (Reissue 1960).

[76] NEB. REV. STAT. § 48-115(2) (Reissue 1960).

[77] Rasmussen v. Trico Feed Mills, 148 Neb. 855, 29 N.W.2d 641 (1947).

and such employee-officer would be entitled to workmen's compensation for an injury received while doing such work based on the wages received by him in the capacity of an employee. But an executive officer of a corporation is not, as such, its employee in the ordinary use of the word and does not come within the provisions of the Nebraska Workmen's Compensation Act.[78]

X. EMPLOYEE UNDER SCHEME, ARTIFICE OR DEVICE

Part of the question involving the definition of employee arises from section 48-116 which attempts to reach employers who would avoid the act by subcontracting without requiring the subcontractor to carry compensation insurance. In his treatise on workmen's compensation, Larson states:[79]

> The purpose of this legislation was to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on the presumably responsible principal contractor, who has it within his power, in choosing sub-contractors, to pass upon their responsibility and insist upon appropriate compensation protection for their workers.

In Nebraska, the owner is included among those who may be held responsible if he does not require the contractor to carry workmen's compensation insurance. If anyone creates or carries into operation any scheme, artifice or device attempting to defeat the provisions of the compensation act, they are included in the term "employer."[80] But, where an owner or a contractor lets or sublets a contract or a part thereof and *does* require the contractor or subcontractor to carry compensation insurance, he is not an employer, but is a "third party"[81] under the compensation law,[82] who can be held liable at common law for his negligence for injuring the employee of his subcontractor.[83] Where the owners of a building themselves engage a contractor and do not require him to carry workmen's compensation insurance, they

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78 Solheim v. Hastings Housing Co., 151 Neb. 264, 37 N.W.2d 212 (1949).

79 1 LARSON, WORKMEN'S COMPENSATION LAW § 49.11 (1952).

80 NEB. REV. STAT. § 48-118 (Reissue 1960).

81 Mathews v. Crancer Co., 117 Neb. 805, 223 N.W. 661 (1929). Boyd v. Humphreys, 117 Neb. 799, 223 N.W. 658 (1929).

82 NEB. REV. STAT. § 48-118 (Reissue 1960).

83 Mathews v. Crancer Co., 117 Neb. 805, 223 N.W. 661 (1929); Tralle v. Hartman Furniture & Carpet Co., 116 Neb. 418, 217 N.W. 952 (1928) (owner of building leased for furniture store gave lessee right to remodel but took no part—not employer of workman employed by contractor who was engaged by lessee).

will be considered to be employers[84] even though their intentions were honest. The terms of the statute, "any scheme, artifice or device," do not necessarily imply fraud or evil design,[85] the term "requires" being interpreted to mean compel or exact.[86] If an employee rejects the act, however, the fact that the owner did not require the contractor to carry compensation insurance would not make the owner an employer of this employee.[87]

A true vendor-vendee relationship is not a scheme, artifice or device. Thus, where a vendor sold lumber to an employer who has his employee cut and load the lumber in the vendor's yard, it was held that the vendor was not an employer under the act.[88]

XI. EMPLOYEE OF JOINT EMPLOYERS

Where an employee, entitled to compensation is, at the time of his injury, employed and paid jointly by two or more employers, the employers must contribute to the payment of the compensation in proportion to their several wage liabilities to the employee.[89] Such employers may, however, make arrangements among themselves for a different distribution of the compensation liability.[90] If not all the employers are subject to the act, those employers who do fall within the act must pay that proportion of the compensation which their wage liability bears to the entire wage of the employee.[91]

In order to come within this section, there must be joint employment. This has been defined to mean that there must be some joint arrangement between two or more employers as to salary, wages, hours of employment or terms of service. In the

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84 New Masonic Temple Ass'n v. Glove Indem. Co., 134 Neb. 731, 279 N.W. 745 (1938); Jones v. Rossback Coal Co., 130 Neb. 302, 264 N.W. 877 (1936).

85 Sherlock v. Sherlock, 112 Neb. 797, 201 N.W. 645 (1924).

86 Riggins v. Lincoln Tent & Awning Co., 143 Neb. 893, 11 N.W.2d 810 (1943); Hiestand v. Ristau, 135 Neb. 881, 284 N.W. 756 (1939).

87 White v. National Window Cleaning Co., 132 Neb. 155, 271 N.W. 341 (1937).

88 Heider v. Stoughton, 150 Neb. 741, 35 N.W.2d 814 (1949). See also McConnell v. Johnston, 139 Neb. 619, 298 N.W. 346 (1941).

89 NEB. REV. STAT. § 48-129 (Reissue 1960).

90 *Ibid.*

91 *Ibid.* See Summers v. Railway Express Agency, 134 Neb. 237, 278 N.W. 476 (1938).

absence of such arrangement, there can be no joint employment.[92]

XII. ALIENS

Aliens, who otherwise meet the definition of employee, have the same rights under the act as any other employee.[93] Alien dependents, who are not residents of the United States, of an employee who dies as a result of an accident arising out of and in the course of his employment may be required to take all future installments of compensation payable in a lump sum equal to two-thirds of the total amount of such future installments at the option of the employer.[94] Excluded from those dependents who are entitled to compensation are alien widowers, and brothers and sisters not residents of the United States.[95]

XIII. EMPLOYEE OF NON-RESIDENT EMPLOYER

Prior to the 1957 amendment to section 48-106,[96] the major test as to whether or not an employee of a foreign employer could maintain a compensation action in Nebraska was whether the work was in an industry in Nebraska or incident to a Nebraska industry. Thus where an employee worked for more than a year in Nebraska while employed by a foreign corporation, it was held that the situs of the industry for purposes of workmen's compensation was in Nebraska.[97]

Since the 1957 amendment, it appears that if part of the work is performed in Nebraska and the employee is injured in Nebraska while so working, it would make no difference if it

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92 Suverkrubbe v. Village of Fort Calhoun, 127 Neb. 472, 256 N.W. 47 (1934). See also Solheim v. Hastings Housing Co., 151 Neb. 264, 37 N.W.2d 212 (1949).

93 NEB. REV. STAT. § 48-115(2) (Reissue 1960).

94 NEB. REV. STAT. § 48-112(5) (Reissue 1960).

95 *Ibid.*

96 NEB. REV. STAT. § 48-106 (Reissue 1960).

97 Solomon v. A. W. Farney, Inc., 130 Neb. 485, 265 N.W. 724 (1936). See also McRae v. Ulrich, 147 Neb. 214, 22 N.W.2d 697 (1946); Rigg v. Atlantic, Pac. & Gulf Oil Co., 129 Neb. 412, 261 N.W. 900 (1935); Penwell v. Anderson, 125 Neb. 449, 250 N.W. 665 (1933); Esau v. Smith Bros., 124 Neb. 217, 246 N.W. 230 (1932); Stone v. Thomson Co., 124 Neb. 181, 245 N.W. 600 (1932); Freeman v. Higgins, 123 Neb. 73, 242 N.W. 271 (1932); Skelly Oil Co. v. Gaugenbaugh, 119 Neb. 698, 230 N.W. 688 (1930); Watts v. Long, 116 Neb. 656, 218 N.W. 410 (1928); McGuire v. Phelan-Shirley Co., 111 Neb. 609, 197 N.W. 615 (1924).

were in a Nebraska industry or if the work was incident to a Nebraska industry.[98]

XIV. CONCLUSION

The drafters of the Nebraska Workmen's Compensation Law probably little realized the amount of litigation the provisions on "who is an employee" would create. But they might have some solace in knowing that other state acts have created the same difficulties.

Some of the decisions of the Nebraska Supreme Court appear to be contradictory,[99] while others, correct under the terms of the act, seem improper when considering the purposes of workmen's compensation.[100] For the most part, however, the decisions of the court adhere to the holdings of other jurisdictions in applying a liberal rule to cover as many employees as possible.

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[98] Rapp v. Hale, 170 Neb. 620, 103 N.W.2d 851 (1960).

[99] See, *e.g.*, Schneider v. Village of Shickley, 156 Neb. 683, 57 N.W.2d 527 (1953); Snodgrass v. City of Holdrege, 166 Neb. 329, 89 N.W.2d 66 (1958). In the *Schneider* case, an electrician contracted to do all the electrical work for the Village of Shickley as it arose. The work was neither fixed as to amount nor time, and was irregular as to both. Either party could have terminated the arrangement at will. The village expected him to do the work personally although he could employ others to help him. He did not work continuously for the employer and he furnished his own tools. The village was not interested in the details of how and when the work was performed but only in securing a reasonably prompt and satisfactory result. After the electrician was killed, the village apparently hired another electrician. The Nebraska Supreme Court held that Schneider was an employee of the village.

In the *Snodgrass* case, a tree trimmer was hired by the City of Holdrege to do work when needed. He offered his services to the public and hired others to help him. He had no definite hours when he did the work and usually furnished his own tools. The claimant was an expert in his business, and the details, method and means of performing the work were left entirely in his hands with responsibility for completing the job entirely under his control. After the claimant was injured, his employees finished the work. In this case, the Nebraska court held that Snodgrass was an independent contractor. It is difficult to distinguish the two cases.

[100] For example, section 48-106(2) excludes the employers of farm and ranch laborers from coverage of the act. The justification for this exclusion is that farm and ranch labor is "non-hazardous." With the advent of farm and ranch mechanization, agriculture has become one of the most hazardous of all occupations. See 1 LARSON, WORKMEN'S COMPENSATION LAW § 53.20 (1952). The validity of the above classification, therefore, is of some doubt.