

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Enrolled

Committee Substitute

for

Senate Bill 272

BY SENATORS BLAIR (MR. PRESIDENT) AND BALDWIN

(BY REQUEST OF THE EXECUTIVE)

[Passed March 11, 2021; in effect 90 days from passage (June 9, 2021)]

1 AN ACT to amend and reenact §21-5-1 of the Code of West Virginia, 1931, as amended; to amend
2 said code by adding thereto a new article, designated §21-5I-1, §21-5I-2, §21-5I-3, §21-
3 5I-4, §21-5I-5, and §21-5I-6; to amend and reenact §21A-1A-16 of said code; and to
4 amend and reenact §23-2-1a of said code, all relating generally to creating the West
5 Virginia Employment Law Worker Classification Act; creating a short title; making certain
6 findings; defining terms; superseding certain existing statutory provisions relating to
7 distinguishing independent contractors from employees; applying classification provisions
8 to workers' compensation, unemployment compensation, wage payment and collection,
9 and Human Rights Act matters; establishing classification criteria; setting forth limitations
10 to applicability of the act; and providing for severability.

Be it enacted by the Legislature of West Virginia:

CHAPTER 21. LABOR.

ARTICLE 5. WAGE PAYMENT AND COLLECTION.

§21-5-1. Definitions.

1 As used in this article:

2 (a) The term "firm" includes any partnership, association, joint-stock company, trust,
3 division of a corporation, the administrator or executor of the estate of a deceased individual, or
4 the receiver, trustee, or successor of any of the same, or officer thereof, employing any person.

5 (b) The term "employee" or "employees" includes any person suffered or permitted to work
6 by a person, firm, or corporation, except those classified as an independent contractor pursuant
7 to §21-5I-4 of this code.

8 (c) The term "wages" means compensation for labor or services rendered by an employee,
9 whether the amount is determined on a time, task, piece, commission, or other basis of
10 calculation. As used in §21-5-4, §21-5-5, §21-5-8a, §21-5-10, and §21-5-12 of this code, the term
11 "wages" shall also include then accrued fringe benefits capable of calculation and payable directly

12 to an employee: *Provided*, That nothing herein contained shall require fringe benefits to be
13 calculated contrary to any agreement between an employer and his or her employees which does
14 not contradict the provisions of this article.

15 (d) The term "commissioner" means the Commissioner of Labor or his or her designated
16 representative.

17 (e) The term "railroad company" includes any firm or corporation engaged primarily in the
18 business of transportation by rail.

19 (f) The term "special agreement" means an arrangement filed with and approved by the
20 commissioner whereby a person, firm, or corporation is permitted upon a compelling showing of
21 good cause to establish regular paydays less frequently than once every two weeks: *Provided*,
22 That in no event shall the employee be paid in full less frequently than once each calendar month
23 on a regularly established schedule.

24 (g) The term "deductions" includes amounts required by law to be withheld, and amounts
25 authorized for union or club dues, pension plans, payroll savings plans, credit unions, charities,
26 and hospitalization and medical insurance.

27 (h) The term "officer" shall include officers or agents in the management of a corporation
28 or firm who knowingly permit the corporation or firm to violate the provisions of this article.

29 (i) The term "wages due" shall include at least all wages earned up to and including the
30 12th day immediately preceding the regular payday.

31 (j) The term "construction" means the furnishing of work in the fulfillment of a contract for
32 the construction, alteration, decoration, painting, or improvement of a new or existing building,
33 structure, roadway, or pipeline, or any part thereof, or for the alteration, improvement, or
34 development of real property: *Provided*, That construction performed for the owner or lessee of a
35 single-family dwelling or a family farming enterprise is excluded.

36 (k) The term "minerals" means clay, coal, flagstone, gravel, limestone, manganese, sand,
37 sandstone, shale, iron ore, and any other metallurgical ore.

(l) The term “fringe benefits” means any benefit provided an employee or group of employees by an employer, or which is required by law, and includes regular vacation, graduated vacation, floating vacation, holidays, sick leave, personal leave, production incentive bonuses, sickness and accident benefits, and benefits relating to medical and pension coverage.

(m) The term “employer” means any person, firm, or corporation employing any employee.

(n) The term “doing business in this state” means having employees actively engaged in the intended principal activity of the person, firm, or corporation in West Virginia.

ARTICLE 5I. WEST VIRGINIA EMPLOYMENT LAW WORKER CLASSIFICATION ACT.

§21-5I-1. Short title.

This article shall be known as the West Virginia Employment Law Worker Classification Act.

§21-5I-2. Findings.

The Legislature finds as follows:

(a) Recent developments in the workforce marketplace, and in particular with the advent of the so-called “gig”, “entrepreneurial”, or “sharing” economy, have highlighted the uncertainty that currently exists with determining the correct classification of workers as independent contractors or employees. The proper classification of workers as employees or independent contractors is a complex legal issue that vexes workers and businesses as well as lawyers and the courts.

(b) Not only are the legal standards used to differentiate employees from independent contractors generally subjective in nature, but those standards differ based on the particular law at issue. As a result, some workers may be found to be employees under one law but independent contractors under another law, leaving the same person classified as an employee for some purposes but as an independent contractor for other purposes.

(c) It is in the best interests of this state, workers, and businesses for there to be certainty regarding the legal status of workers concerning workers' compensation as defined in chapter 23 of this code, unemployment compensation in chapter 21A of this code, Human Rights Act rights in §5-11-1 *et seq.* of this code, and wage payment and collection in §21-5-1 *et seq.* of this code, and their applicable rights and obligations. Clarity in a worker's classification allows businesses to comply with applicable laws, provides workers with certainty as to their benefits and obligations, and minimizes unnecessary mistakes, litigation, risk, and legal exposure laws concerning workers' compensation in chapter 23 of this code, unemployment compensation in chapter 21A of this code, Human Rights Act rights in §5-11-1 *et seq.* of this code, and wage payment and collection in §21-5-1 *et seq.* of this code.

(d) It is in the best interests of workers, business, and government to have clear, objective, and certain standards for determining who is an employee and who is an independent contractor concerning workers' compensation as defined in chapter 23 of this code, unemployment compensation in chapter 21A of this code, Human Rights Act rights in §5-11-1 *et seq.* of this code, and wage payment and collection in §21-5-1 *et seq.* of this code.

(e) The purpose of this article is to bring certainty and consistency in the laws and clarity regarding the distinction between employees and independent contractors in laws concerning workers' compensation as defined in chapter 23 of this code, unemployment compensation as defined in chapter 21A of this code, Human Rights Act rights as defined in §5-11-1 *et seq.* of this code, and wage payment and collection as defined in §21-5-1 *et seq.* of this code. By doing so, the state will ensure that workers who are indeed "employees" are properly classified as such and will be afforded the legal protections and obligations that apply to such status, and that workers who desire to be, and meet the standards of being, independent contractors will be entitled to the freedoms that such a relationship provides, which will reduce unnecessary and costly litigation and confusion in the workforce marketplace and in the courts.

§21-5I-3. Certain laws may be superseded.

1 The purpose of this article is to bring clarity and certainty under the laws of this state with
2 regard to differentiating employees from independent contractors in employment laws as defined
3 in workers' compensation in chapter 23 of this code, unemployment compensation in chapter 21A
4 of this code, Human Rights Act rights in §5-11-1 *et seq.* of this code, and wage payment and
5 collection in §21-5-1 *et seq.* of this code, and by imposing objective standards for making that
6 distinction. Consequently, all laws concerning workers' compensation in chapter 23 of this code,
7 unemployment compensation in chapter 21A of this code, Human Rights Act rights in §5-11-1 *et*
8 *seq.* of this code, and wage payment and collection in §21-5-1 *et seq.* of this code where the
9 application thereof is contingent upon the classification of a worker as being an employee are
10 superseded, to the extent necessary, by this article.

§21-5I-4. Classification of independent contractors and employees.

1 (a) Subject only to the provisions of subsection (b) of this section, a person shall be
2 classified as an independent contractor under the laws of this state as defined in workers'
3 compensation in chapter 23 of this code, unemployment compensation in chapter 21A of this
4 code, Human Rights Act rights in §5-11-1 *et seq.* of this code, and wage payment and collection
5 as defined in §21-5-1 *et seq.* of this code, if:

6 (1) The person signs a written contract with the principal, in substantial compliance with
7 the terms of this subsection, that states the principal's intent to engage the services of the person
8 as an independent contractor and contains acknowledgements that the person understands that
9 he or she is:

10 (A) Providing services for the principal as an independent contractor;

11 (B) Not going to be treated as an employee of the principal;

12 (C) Not going to be provided by the principal with either workers' compensation or
13 unemployment compensation benefits;

(D) Obligated to pay all applicable federal and state income taxes, if any, on any moneys earned pursuant to the contractual relationship, and that the principal will not make any tax withholdings from any payments from the principal; and

(E) Responsible for the majority of supplies and other variable expenses that he or she incurs in connection with performing the contracted services unless: The expenses are for travel that is not local; the expenses are reimbursed under an express provision of the contract; or the supplies or expenses reimbursed are commonly reimbursed under industry practice; and

(2) The person:

(A) Has either filed, or is contractually required to file, in regard to the fees earned from the work, an income tax return with the appropriate federal, state, and local agencies for a business or for earnings from self-employment; or

(B) Provides his or her services through a business entity, including, but not limited to, a partnership, limited liability company or corporation, or through a sole proprietorship registered with a "doing business as" as required under state or local law; and

(3) With the exception of the exercise of control necessary to ensure compliance with statutory, regulatory, licensing, permitting, or other similar obligations required by a governmental or regulatory entity, or to protect persons or property, or to protect a franchise brand, the person actually and directly controls the manner and means by which the work is to be accomplished, even though he or she may not have control over the final result of the work: *Provided*, That the required deployment, implementation, or use of any safety improvement by an independent contractor as required by contract or otherwise shall not be considered when evaluating status as an employee or independent contractor under any state law. For purposes of this section, "safety improvement" shall mean any device, equipment, software, technology, procedure, training, policy, program, or operational practice intended and primarily used to improve or facilitate compliance with state, federal, or local safety laws or regulations or general safety concerns. This provision is satisfied even though the principal may provide orientation, information, guidance, or

suggestions about the principal's products, business, services, customers and operating systems,
and training otherwise required by law; and

(4) The person satisfies three or more of the following criteria:

(A) Except for an agreement with the principal relating to final completion or final delivery time or schedule, range of work hours, or the time entertainment is to be presented if the work contracted for is entertainment, the person has control over the amount of time personally spent providing services;

(B) Except for services that can only be performed at specific locations, the person has control over where the services are performed;

(C) The person is not required to work exclusively for one principal unless:

(i) A law, regulation, or ordinance prohibits the person from providing services to more than one principal; or

(ii) A license or permit that the person is required to maintain in order to perform the work limits the person to working for only one principal at a time or requires identification of the principal;

(D) The person is free to exercise independent initiative in soliciting others to purchase his or her services;

(E) The person is free to hire employees or to contract with assistants, helpers, or substitutes to perform all or some of the work;

(F) The person cannot be required to perform additional services without a new or modified contract;

(G) The person obtains a license or other permission from the principal to utilize any workspace of the principal in order to perform the work for which the person was engaged;

(H) The principal has been subject to an employment audit by the Internal Revenue Service (IRS) and the IRS has not reclassified the person to be an employee or has not reclassified the category of workers to be employees;

(l) The person is responsible for maintaining and bearing the costs of any required business licenses, insurance, certifications, or permits required to perform the services; or

(5) The person satisfies the definition of a direct seller under Section 3508(b)(2) of the Internal Revenue Code of 1986.

(b) The classification of all workers who do not satisfy the criteria set forth in subsection (a) of this section shall be determined by the test set forth in Internal Revenue Service Rev. Ruling 87-41, for purposes of classifying workers under the laws concerning workers' compensation as defined in chapter 23 of this code, unemployment compensation in chapter 21A of this code, Human Rights Act rights in §5-11-1 *et seq.* of this code, and wage payment and collection in §21-5-1 *et seq.* of this code. In addition, nothing contained in said subsection requires a principal to classify a worker who meets the criteria contained therein as an independent contractor, the principal always being free to hire the worker as an employee.

§21-5I-5. Limitations as to scope of article.

The test for determining whether a person is an independent contractor or employee set forth in this article applies only for purposes of workers' compensation as defined in chapter 23 of this code, unemployment compensation in chapter 21A of this code, Human Rights Act rights in §5-11-1 *et seq.* of this code, and wage payment and collection in §21-5-1 *et seq.* of this code. This test has no application to other areas of law, such as whether a person is an independent contractor or an agent of principal for determining whether the law of principal and agent applies with respect to such questions as the issue of vicarious liability to a third party in tort. Further, this article does not apply with respect to organizations or persons subject to the provisions of §17-29-11 of this code.

§21-5I-6. Severability.

If any provision of this article or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this article, and to this end the provisions of this article are declared to be severable.

CHAPTER 21A. UNEMPLOYMENT COMPENSATION.

ARTICLE 1A. DEFINITIONS.

§21A-1A-16. Employment.

“Employment”, subject to the other provisions of this article, means:

(1) Service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied;

(2) Any service performed by an employee, as defined in Section 3306(i) of the federal Unemployment Tax Act, including service in interstate commerce;

(3) Any service performed, including service in interstate commerce, by any officer of a corporation;

(4) An individual's entire service, performed within or both within and without this state if:

(A) The service is localized in this state; or (B) the service is not localized in any state but some of the service is performed in this state and: (i) The base of operations, or, if there is no base of operations, then the place from which the service is directed or controlled, is in this state; or (ii) the base of operations or place from which the service is directed or controlled is not in any state in which some part of the service is performed but the individual's residence is in this state;

(5) Service not covered under subdivision (4) of this section and performed entirely without this state with respect to no part of which contributions are required and paid under an unemployment compensation law of any other state or of the federal government, is employment subject to this chapter if the individual performing the services is a resident of this state and the commissioner approves the election of the employing unit for whom the services are performed that the entire service of the individual is employment subject to this chapter;

(6) Service is localized within a state, if: (A) The service is performed entirely within the state; or (B) the service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within this state, as, for example, is temporary or transitory in nature or consists of isolated transactions;

(7) Services performed by an individual for wages are employment subject to this chapter unless and until it is shown to the satisfaction of the commissioner that the individual is classified as an independent contractor pursuant to §21-51-4 of this code;

(8) All service performed by an officer or member of the crew of an American vessel (as defined in Section 305 of an act of Congress entitled Social Security Act Amendment of 1946, approved August 10, 1946), on or in connection with the vessel, provided that the operating office, from which the operations of the vessel operating on navigable waters within and without the United States is ordinarily and regularly supervised, managed, directed, and controlled, is within this state;

(9)(A) Service performed by an individual in the employ of this state or any of its instrumentalities (or in the employ of this state and one or more other states or their instrumentalities) for a hospital or institution of higher education located in this state: *Provided*, That the service is excluded from “employment” as defined in the federal Unemployment Tax Act solely by reason of Section 3306(c)(7) of that act and is not excluded from “employment” under §21A-1A-17(9) of this code;

(B) Service performed in the employ of this state or any of its instrumentalities or political subdivisions thereof or any of its instrumentalities or any instrumentality of more than one of the foregoing or any instrumentality of any foregoing and one or more other states or political subdivisions: *Provided*, That the service is excluded from “employment” as defined in the federal Unemployment Tax Act by Section 3306(c)(7) of that act and is not excluded from “employment” under §21A-1A-17(13) of this code; and

(C) Service performed in the employ of a nonprofit educational institution which is not an institution of higher education;

(10) Service performed by an individual in the employ of a religious, charitable, educational, or other organization but only if the following conditions are met:

49 (A) The service is excluded from "employment" as defined in the federal Unemployment
50 Tax Act solely by reason of Section 3306(c)(8) of that act; and

51 (B) The organization had four or more individuals in employment for some portion of a day
52 in each of 20 different weeks, whether or not the weeks were consecutive, within either the current
53 or preceding calendar year, regardless of whether they were employed at the same moment of
54 time;

55 (11) Service of an individual who is a citizen of the United States, performed outside the
56 United States after December 31, 1971 (except in Canada and in the case of the Virgin Islands
57 after December 31, 1971, and before January 1 the year following the year in which the Secretary
58 of Labor approves for the first time an unemployment insurance law submitted to him or her by
59 the Virgin Islands for approval), in the employ of an American employer (other than service which
60 is considered "employment" under the provisions of subdivision (4), (5), or (6) of this section or
61 the parallel provisions of another state's law) if:

62 (A) The employer's principal place of business in the United States is located in this state;
63 or

64 (B) The employer has no place of business in the United States, but: (i) The employer is
65 an individual who is a resident of this state; or (ii) the employer is a corporation which is organized
66 under the laws of this state; or (iii) the employer is a partnership or a trust and the number of the
67 partners or trustees who are residents of this state is greater than the number who are residents
68 of any one other state; or

69 (C) None of the criteria of paragraphs (A) and (B) of this subdivision is met but the
70 employer has elected coverage in this state or, the employer having failed to elect coverage in
71 any state, the individual has filed a claim for benefits, based on the service, under the law of this
72 state.

73 (D) An "American employer", for purposes of this subdivision, means a person who is: (i)
74 An individual who is a resident of the United States; or (ii) a partnership if two thirds or more of

the partners are residents of the United States; or (iii) a trust, if all of the trustees are residents of the United States; or (iv) a corporation organized under the laws of the United States or of any state;

(12) Service performed by an individual in agricultural labor as defined in §21A-1A-17(3) of this code when:

(A) The service is performed for a person who: (i) During any calendar quarter in either the current 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 paragraph (B) of this subdivision; or (ii) for some portion of a day in each of 20 different calendar weeks, whether or not the weeks were consecutive, in either the current or the preceding calendar year, employed in agricultural labor, including labor performed by an alien referred to in paragraph (B) of this subdivision, 10 or more individuals, regardless of whether they were employed at the same moment of time;

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

(C) For the purposes of the definition of employment, any individual who is a member of a crew furnished by a crew leader to perform service in agricultural labor for any other person shall be treated as an employee of the crew leader: (i) If the crew leader holds a valid certificate of registration under the Migrant and Seasonal Agricultural Worker Protection Act; or substantially all the members of the crew operate or maintain tractors, mechanized harvesting or crop-dusting equipment, or any other mechanized equipment, which is provided by the crew leader; and (ii) if the other person is not otherwise an employer of the individual;

(D) For the purposes of this subdivision, in the case of any individual who is furnished by a crew leader to perform service in agricultural labor for any other person and who is not treated as an employee of the crew leader under paragraph (C) of this subdivision: (i) The other person and not the crew leader shall be treated as the employer of the individual; and (ii) the other person

shall be treated as having paid cash remuneration to the individual in an amount equal to the amount of cash remuneration paid to the individual by the crew leader (either on his or her own behalf or on behalf of the other person) for the service in agricultural labor performed for the other person; and

(E) For the purposes of this subdivision, the term "crew leader" means an individual who: (i) Furnishes individuals to perform service in agricultural labor for any other person; (ii) pays (either on his or her own behalf or on behalf of the other person) the individuals so furnished by him or her for the service in agricultural labor performed by them; and (iii) has not entered into a written agreement with the other person under which the individual is designated as an employee of the other person;

(13) (A) The term "employment" includes domestic service in a private home, local college club, or local chapter of a college fraternity or sorority performed for a person who paid cash remuneration of \$1,000 or more in any calendar quarter in the current calendar year or the preceding calendar year to individuals employed in domestic service; and

(B) Notwithstanding the foregoing definition of "employment", if the services performed during one half or more of any pay period by an employee for the person employing him or her constitute employment, all the services of the employee for the period are employment; but if the services performed during more than one half of any such pay period by an employee for the person employing him or her do not constitute employment, then none of the services of the employee for the period are employment.

CHAPTER 23. WORKERS' COMPENSATION.

ARTICLE 2. EMPLOYERS AND EMPLOYEES SUBJECT TO CHAPTER; EXTRATERRITORIAL COVERAGE.

§23-2-1a. Employees subject to chapter.

(a) Employees subject to this chapter are all persons in the service of employers, except those classified as an independent contractor pursuant to §21-51-4 of this code, and employed by

3 them for the purpose of carrying on the industry, business, service, or work in which they are
4 engaged, including, but not limited to:

5 (1) Persons regularly employed in the state whose duties necessitate employment of a
6 temporary or transitory nature by the same employer without the state;

7 (2) Every person in the service of the state or of any political subdivision or agency thereof,
8 under any contract of hire, express or implied, and every appointed official or officer thereof while
9 performing his or her official duties;

10 (3) Checkweighmen employed according to law;

11 (4) All members of rescue teams assisting in mine accidents with the consent of the owner
12 who, in such case, shall be deemed the employer, or at the direction of the director of the
13 department of mines;

14 (5) All forest firefighters who, under the supervision of the Director of the Division of Natural
15 Resources or his or her designated representative, assist in the prevention, confinement, and
16 suppression of any forest fire; and

17 (6) Students while participating in a work-based learning experience with an employer
18 approved as a part of the curriculum by the county board. The county board shall be the employer
19 of record of students while participating in unpaid work-based experiences off school premises
20 with employers other than the county board. Students in unpaid work-based learning experiences
21 shall be considered to be paid the amount of wages so as to provide the minimum workers'
22 compensation weekly benefits required by §23-4-6 of this code.

23 (b) The right to receive compensation under this chapter shall not be affected by the fact
24 that a minor is employed or is permitted to be employed in violation of the laws of this state relating
25 to the employment of minors, or that he or she obtained his or her employment by misrepresenting
26 his or her age.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

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Chairman, Senate Committee

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Chairman, House Committee

Originated in the Senate.

In effect 90 days from passage.

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Clerk of the Senate

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Clerk of the House of Delegates

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President of the Senate

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Speaker of the House of Delegates

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Day of, 2021.

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Governor