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HOUSE BILL NO. 1036

AMENDMENT IN THE NATURE OF A SUBSTITUTE
(Proposed by the House Committee on Labor and Commerce
on February 9, 2000)

(Patron Prior to Substitute—Delegate Bloxom)

A BILL to amend and reenact §§ 65.2-101, 65.2-502, and 65.2-603 of the Code of Virginia, relating to workers' compensation coverage for alien workers.

Be it enacted by the General Assembly of Virginia:

1. That §§ 65.2-101, 65.2-502, and 65.2-603 of the Code of Virginia are amended and reenacted as follows:

§ 65.2-101. Definitions.

As used in this title:

"Award" means the grant or denial of benefits or other relief under this title or any rule adopted pursuant thereto.

"Average weekly wage" means:

1. a. The earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury, divided by fifty-two; but if the injured employee lost more than seven consecutive calendar days during such period, although not in the same week, then the earnings for the remainder of the fifty-two weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. When the employment prior to the injury extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, provided that results fair and just to both parties will be thereby obtained. When, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the fifty-two weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

b. When for exceptional reasons the foregoing would be unfair either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

2. Whenever allowances of any character made to an employee in lieu of wages are a specified part of the wage contract, they shall be deemed a part of his earnings. For the purpose of this title, the average weekly wage of the members of the Virginia National Guard, the Virginia Naval Militia and the Virginia State Defense Force, registered members on duty or in training of the United States Civil Defense Corps of this Commonwealth, volunteer firefighters engaged in firefighting activities under the supervision and control of the Department of Forestry, and forest wardens shall be deemed to be such amount as will entitle them to the maximum compensation payable under this title; however, any award entered under the provisions of this title on behalf of members of the National Guard, the Virginia Naval Militia or their dependents, or registered members on duty or in training of the United States Civil Defense Corps of this Commonwealth or their dependents, shall be subject to credit for benefits paid them under existing or future federal law on account of injury or occupational disease covered by the provisions of this title.

3. Whenever volunteer firefighters, volunteer lifesaving or volunteer rescue squad members, volunteer law-enforcement chaplains, auxiliary or reserve police, auxiliary or reserve deputy sheriffs, volunteer emergency medical technicians and members of volunteer search and rescue organizations are deemed employees under this title, their average weekly wage shall be deemed sufficient to produce the minimum compensation provided by this title for injured workers or their dependents. For the purposes of workers' compensation insurance premium calculations, the monthly payroll for each volunteer firefighter or volunteer lifesaving or volunteer rescue squad member shall be deemed to be \$300.

4. The average weekly wage of persons, other than those covered in subdivision 3 of this definition, who respond to a hazardous materials incident at the request of the Department of Emergency Services shall be based upon the earnings of such persons from their primary employers.

"Change in condition" means a change in physical condition of the employee as well as any change in the conditions under which compensation was awarded, suspended, or terminated which would affect the right to, amount of, or duration of compensation.

"Commission" means the Virginia Workers' Compensation Commission as well as its former designation as the Virginia Industrial Commission.

"Employee" means:

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60 1. a. Every person, including a ~~minor~~ *aliens and minors*, in the service of another under any contract
61 of hire or apprenticeship, written or implied, *whether lawfully or unlawfully employed*, except (i) one
62 whose employment is not in the usual course of the trade, business, occupation or profession of the
63 employer or (ii) as otherwise provided in subdivision 2 of this definition.

64 b. Any apprentice, trainee, or retrainee who is regularly employed while receiving training or
65 instruction outside of regular working hours and off the job, so long as the training or instruction is
66 related to his employment and is authorized by his employer.

67 c. Members of the Virginia National Guard and the Virginia Naval Militia, whether on duty in a paid
68 or unpaid status or when performing voluntary service to their unit in a nonduty status at the request of
69 their commander.

70 Income benefits for members of the National Guard or Naval Militia shall be terminated when they
71 are able to return to their customary civilian employment or self-employment. If they are neither
72 employed nor self-employed, those benefits shall terminate when they are able to return to their military
73 duties. If a member of the National Guard or Naval Militia who is fit to return to his customary civilian
74 employment or self-employment remains unable to perform his military duties and thereby suffers loss
75 of military pay which he would otherwise have earned, he shall be entitled to one day of income
76 benefits for each unit training assembly or day of paid training which he is unable to attend.

77 d. Members of the Virginia State Defense Force.

78 e. Registered members of the United States Civil Defense Corps of this Commonwealth, whether on
79 duty or in training.

80 f. Except as provided in subdivision 2 of this definition, all officers and employees of the
81 Commonwealth, including forest wardens, judges, clerks, deputy clerks and employees of juvenile and
82 domestic relations district courts and general district courts, who shall be deemed employees of the
83 Commonwealth.

84 g. Except as provided in subdivision 2 of this definition, all officers and employees of a municipal
85 corporation or political subdivision of the Commonwealth.

86 h. Except as provided in subdivision 2 of this definition, (i) every executive officer, including
87 president, vice president, secretary, treasurer or other officer, elected or appointed in accordance with the
88 charter and bylaws of a corporation, municipal or otherwise and (ii) every manager of a limited liability
89 company elected or appointed in accordance with the articles of organization or operating agreement of
90 the limited liability company.

91 i. Policemen and firefighters, sheriffs and their deputies, town sergeants and their deputies, county
92 and city commissioners of the revenue, county and city treasurers, attorneys for the Commonwealth, and
93 clerks of circuit courts and their deputies, officers and employees, who shall be deemed employees of
94 the respective cities, counties and towns in which their services are employed and by whom their
95 salaries are paid or in which their compensation is earnable.

96 j. Members of the governing body of any county, city or town in the Commonwealth, whenever
97 coverage under this title is extended to such members by resolution or ordinance duly adopted.

98 k. Volunteers, officers and employees of any commission or board of any authority created or
99 controlled by a local governing body, or any local agency or public service corporation owned, operated
100 or controlled by such local governing body, whenever coverage under this title is authorized by
101 resolution or ordinance duly adopted by the governing board of any county, city, town, or any political
102 subdivision thereof.

103 l. Except as provided in subdivision 2 of this definition, volunteer firefighters, volunteer lifesaving or
104 rescue squad members, volunteer law-enforcement chaplains, auxiliary or reserve police, auxiliary or
105 reserve deputy sheriffs, volunteer emergency medical technicians and members of volunteer search and
106 rescue organizations, who shall be deemed employees of (i) the political subdivision or state institution
107 of higher education in which the principal office of such volunteer fire company, volunteer lifesaving or
108 rescue squad, volunteer law-enforcement chaplains, auxiliary or reserve police force, auxiliary or reserve
109 deputy sheriff force, volunteer emergency medical technicians or members of volunteer search and
110 rescue organizations is located if the governing body of such political subdivision or state institution of
111 higher education has adopted a resolution acknowledging such volunteer firefighters, volunteer lifesaving
112 or rescue squad members, volunteer law-enforcement chaplains, auxiliary or reserve police, auxiliary or
113 reserve deputy sheriffs, volunteer emergency medical technicians, members of volunteer search and
114 rescue organizations as employees for the purposes of this title or (ii) in the case of volunteer
115 firefighters or volunteer lifesaving or rescue squad members, the companies or squads for which
116 volunteer services are provided whenever such companies or squads elect to be included as an employer
117 under this title.

118 m. (1) Volunteer firefighters, volunteer lifesaving or rescue squad members, volunteer
119 law-enforcement chaplains, auxiliary or reserve police, auxiliary or reserve deputy sheriffs, volunteer
120 emergency medical technicians, members of volunteer search and rescue organizations and any other
121 persons who respond to an incident upon request of the Department of Emergency Services, who shall

be deemed employees of the Department of Emergency Services for the purposes of this title.

(2) Volunteer firefighters when engaged in firefighting activities under the supervision and control of the Department of Forestry, who shall be deemed employees of the Department of Forestry for the purposes of this title.

n. Any sole proprietor or all partners of a business electing to be included as an employee under the workers' compensation coverage of such business if the insurer is notified of this election. Any sole proprietor or the partners shall, upon such election, be entitled to employee benefits and be subject to employee responsibilities prescribed in this title.

When any partner or proprietor is entitled to receive coverage under this title, such person shall be subject to all provisions of this title as if he were an employee; however, the notices required under §§ 65.2-405 and 65.2-600 of this title shall be given to the insurance carrier, and the panel of physicians required under § 65.2-603 shall be selected by the insurance carrier.

o. The independent contractor of any employer subject to this title at the election of such employer provided (i) the independent contractor agrees to such inclusion and (ii) unless the employer is self-insured, the employer's insurer agrees in writing to such inclusion. All or part of the cost of the insurance coverage of the independent contractor may be borne by the independent contractor.

When any independent contractor is entitled to receive coverage under this section, such person shall be subject to all provisions of this title as if he were an employee, provided that the notices required under §§ 65.2-405 and 65.2-600 are given either to the employer or its insurance carrier.

However, nothing in this title shall be construed to make the employees of any independent contractor the employees of the person or corporation employing or contracting with such independent contractor.

p. The legal representative, dependents and any other persons to whom compensation may be payable when any person covered as an employee under this title shall be deceased.

q. Jail officers and jail superintendents employed by regional jails or jail farm boards or authorities, whether created pursuant to Article 3.1 (§ 53.1-95.2 et seq.) or Article 5 (§ 53.1-105 et seq.) of Chapter 3 of Title 53.1, or an act of assembly.

2. "Employee" shall not mean:

a. Officers and employees of the Commonwealth who are elected by the General Assembly, or appointed by the Governor, either with or without the confirmation of the Senate. This exception shall not apply to any "state employee" as defined in § 51.1-124.3 nor to Supreme Court Justices, judges of the Court of Appeals, judges of the circuit or district courts, members of the Workers' Compensation Commission and the State Corporation Commission, or the Superintendent of State Police.

b. Officers and employees of municipal corporations and political subdivisions of the Commonwealth who are elected by the people or by the governing bodies, and who act in purely administrative capacities and are to serve for a definite term of office.

c. Any person who is a licensed real estate salesperson, or a licensed real estate broker associated with a real estate broker, if (i) substantially all of the salesperson's or associated broker's remuneration is derived from real estate commissions, (ii) the services of the salesperson or associated broker are performed under a written contract specifying that the salesperson is an independent contractor, and (iii) such contract includes a provision that the salesperson or associated broker will not be treated as an employee for federal income tax purposes.

d. Any taxicab or executive sedan driver, provided the Commission is furnished evidence that such individual is excluded from taxation by the Federal Unemployment Tax Act.

e. Casual employees.

f. Domestic servants.

g. Farm and horticultural laborers, unless the employer regularly has in service more than two full-time employees.

h. Employees of any person, firm or private corporation, including any public service corporation, that has regularly in service less than three employees in the same business within this Commonwealth, unless such employees and their employers voluntarily elect to be bound by this title. However, this exemption shall not apply to the operators of underground coal mines or their employees. An executive officer who is not paid salary or wages on a regular basis at an agreed upon amount and who rejects coverage under this title pursuant to § 65.2-300 shall not be included as an employee for purposes of this subdivision.

i. Employees of any common carrier by railroad engaging in commerce between any of the several states or territories or between the District of Columbia and any of the states or territories and any foreign nation or nations, and any person suffering injury or death while he is employed by such carrier in such commerce. This title shall not be construed to lessen the liability of any such common carrier or to diminish or take away in any respect any right that any person so employed, or the personal representative, kindred or relation, or dependent of such person, may have under the act of Congress

183 relating to the liability of common carriers by railroad to their employees in certain cases, approved
184 April 22, 1908, or under §§ 8.01-57 through 8.01-62 or § 56-441.

185 j. Employees of common carriers by railroad who are engaged in intrastate trade or commerce.
186 However, this title shall not be construed to lessen the liability of such common carriers or take away or
187 diminish any right that any employee or, in case of his death, the personal representative of such
188 employee of such common carrier may have under §§ 8.01-57 through 8.01-61 or § 56-441.

189 k. Except as provided in subdivision 1 of this definition, a member of a volunteer fire-fighting,
190 lifesaving or rescue squad when engaged in activities related principally to participation as a member of
191 such squad whether or not the volunteer continues to receive compensation from his employer for time
192 away from the job.

193 l. Except as otherwise provided in this title, noncompensated employees and noncompensated
194 directors of corporations exempt from taxation pursuant to § 501 (c) (3) of Title 26 of the United States
195 Code (Internal Revenue Code of 1954).

196 m. Any person performing services as a sports official for an entity sponsoring an interscholastic or
197 intercollegiate sports event or any person performing services as a sports official for a public entity or a
198 private, nonprofit organization which sponsors an amateur sports event. For the purposes of this
199 subdivision, "sports official" includes an umpire, referee, judge, scorekeeper, timekeeper or other person
200 who is a neutral participant in a sports event. This shall not include any person, otherwise employed by
201 an organization or entity sponsoring a sports event, who performs services as a sports official as part of
202 his regular employment.

203 "Employer" includes (i) any person, the Commonwealth or any political subdivision thereof and any
204 individual, firm, association or corporation, or the receiver or trustee of the same, or the legal
205 representative of a deceased employer, using the service of another for pay and (ii) any volunteer fire
206 company or volunteer lifesaving or rescue squad electing to be included and maintaining coverage as an
207 employer under this title. If the employer is insured, it includes his insurer so far as applicable.

208 "Executive officer" means (i) the president, vice president, secretary, treasurer or other officer,
209 elected or appointed in accordance with the charter and bylaws of a corporation and (ii) the managers
210 elected or appointed in accordance with the articles of organization or operating agreement of a limited
211 liability company. However, such term does not include noncompensated officers of corporations exempt
212 from taxation pursuant to § 501 (c) (3) of Title 26 of the United States Code (Internal Revenue Code of
213 1954).

214 "Filed" means hand delivered to the Commission's office in Richmond or any regional office
215 maintained by the Commission; sent by telegraph, electronic mail or facsimile transmission; or posted at
216 any post office of the United States Postal Service by certified or registered mail. Filing by first-class
217 mail, telegraph, electronic mail or facsimile transmission shall be deemed completed only when the
218 application actually reaches a Commission office.

219 "Injury" means only injury by accident arising out of and in the course of the employment or
220 occupational disease as defined in Chapter 4 (§ 65.2-400 et seq.) of this title and does not include a
221 disease in any form, except when it results naturally and unavoidably from either of the foregoing
222 causes. However, such term does not include any injury, disease or condition resulting from an
223 employee's voluntary participation in employer-sponsored off-duty recreational activities which are not
224 part of the employee's duties.

225 § 65.2-502. Compensation for partial incapacity.

226 Except as otherwise provided in § 65.2-503 or § 65.2-510, when the incapacity for work resulting
227 from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the
228 injured employee during such incapacity a weekly compensation equal to 66 2/3 percent of the
229 difference between his average weekly wages before the injury and the average weekly wages which he
230 is able to earn thereafter, but not more than 100 percent of the average weekly wage of the
231 Commonwealth as defined in § 65.2-500. In case the partial incapacity begins after a period of total
232 incapacity, the latter period shall be deducted from the maximum period herein allowed for partial
233 incapacity. *However, the employer shall not be required to pay, or cause to be paid, compensation*
234 *under this section to any injured employee not eligible for lawful employment; nor shall any such*
235 *injured employee not eligible for lawful employment who is partially incapacitated be entitled during*
236 *partial incapacity to receive temporary total benefits under § 65.2-500.*

237 § 65.2-603. Duty to furnish medical attention, etc., and vocational rehabilitation; effect of refusal of
238 employee to accept.

239 A. 1. As long as necessary after an accident, the employer shall furnish or cause to be furnished, free
240 of charge to the injured employee, a physician chosen by the injured employee from a panel of at least
241 three physicians selected by the employer and such other necessary medical attention. Where such
242 accident results in the amputation or loss of use of an arm, hand, leg, or foot or the enucleation of an
243 eye or the loss of any natural teeth or loss of hearing, the employer shall furnish prosthetic or orthotic
244 appliances, as well as wheelchairs, walkers, canes, or crutches, proper fitting and maintenance thereof,

and training in the use thereof, as the nature of the injury may require. In awards entered for incapacity for work, under this title, upon determination by the treating physician and the Commission that the same is medically necessary, the Commission may require that the employer furnish and maintain bedside lifts, adjustable beds, and modification of the employee's principal home consisting of ramps, handrails, or any appliances prescribed by the treating physician and doorway alterations, provided that the aggregate cost of all such items and modifications required to be furnished on account of any one accident shall not exceed \$25,000. The employee shall accept the attending physician, unless otherwise ordered by the Commission, and in addition, such surgical and hospital service and supplies as may be deemed necessary by the attending physician or the Commission.

2. The employer shall repair, if repairable, or replace dentures, artificial limbs, or other prosthetic or orthotic devices damaged in an accident otherwise compensable under workers' compensation, and furnish proper fitting thereof.

3. The employer shall also furnish or cause to be furnished, at the direction of the Commission, reasonable and necessary vocational rehabilitation services; *however, the employer shall not be required to furnish, or cause to be furnished, services under this subdivision to any injured employee not eligible for lawful employment.* Vocational rehabilitation services may include vocational evaluation, counseling, job coaching, job development, job placement, on-the-job training, education, and retraining. Those vocational rehabilitation services that involve the exercise of professional judgment as defined in § 54.1-3510 shall be provided by a certified rehabilitation provider as provided in Article 2 (§ 54.1-3510 et seq.) of Chapter 35 of Title 54.1 or by a person licensed by the Boards of Medicine; Nursing; Optometry; Licensed Professional Counselors, Marriage and Family Therapists and Substance Abuse Treatment Professionals; Psychology; or Social Work. In the event a dispute arises, any party may request a hearing and seek the approval of the Commission for the proposed services. Such services shall take into account the employee's preinjury job and wage classifications; his age, aptitude, and level of education; the likelihood of success in the new vocation; and the relative costs and benefits to be derived from such services.

B. The unjustified refusal of the employee to accept such medical service or vocational rehabilitation services when provided by the employer shall bar the employee from further compensation until such refusal ceases and no compensation shall at any time be paid for the period of suspension unless, in the opinion of the Commission, the circumstances justified the refusal. In any such case the Commission may order a change in the medical or hospital service or vocational rehabilitation services.

C. If in an emergency or on account of the employer's failure to provide the medical care during the period herein specified, or for other good reasons, a physician other than provided by the employer is called to treat the injured employee, during such period, the reasonable cost of such service shall be paid by the employer if ordered so to do by the Commission.

D. As used in this section and in § 65.2-604, the terms "medical attention," "medical service," "medical care," and "medical report" shall be deemed to include chiropractic service or treatment and, where appropriate, a chiropractic treatment report.

E. Whenever an employer furnishes an employee the names of three physicians pursuant to this section, and the employer also assumes all or part of the cost of providing health care coverage for the employee as a self-insured or under a group health insurance policy, health services plan or health care plan, upon the request of an employee, the employer shall also inform the employee whether each physician named is eligible to receive payment under the employee's health care coverage provided by the employer.

F. If the injured employee has an injury which may be treated within the scope of practice for a chiropractor, then the employer or insurer may include chiropractors on the panel provided the injured employee.