

# VIRGINIA ACTS OF ASSEMBLY -- 2004 SESSION

## CHAPTER 977

*An Act to amend and reenact §§ 60.2-219, 60.2-528, and 60.2-618 of the Code of Virginia, relating to definition of employment.*

[H 529]

Approved April 15, 2004

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 60.2-219, 60.2-528 and 60.2-618 of the Code of Virginia are amended and reenacted as follows:**

§ 60.2-219. Services not included in term "employment."

The term "employment" shall not include:

1. Service performed in the employ of the United States government or of any instrumentality of the United States which is wholly or partially owned by the United States or which is exempt from the tax imposed by § 3301 of the Federal Internal Revenue Code by virtue of any provision of law which specifically refers to such section (or the corresponding section of prior law) in granting such exemption;

2. Service with respect to which unemployment compensation is payable under an unemployment compensation system established by an act of Congress, including service performed after June 30, 1939, for an employer determined to be subject to the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.) by the agency or agencies empowered to make such determination by an act of Congress, and service as an employer representative determined to be subject to such act by such agency or agencies. The Commission is hereby authorized and directed to enter into agreements with the proper agencies under such act of Congress, which agreements shall become effective 10 days after publication thereof, in the manner provided in § 60.2-111 for general rules, to provide reciprocal treatment to individuals who have, after acquiring potential rights to benefits under this title, acquired rights to unemployment compensation under such act of Congress, or who have, after acquiring potential rights to unemployment compensation under such act of Congress, acquired rights to benefits under this title;

3. Agricultural labor as defined in § 60.2-201 except as provided for in § 60.2-214;

4. Domestic service in a private home, local college club or local chapter of a college fraternity or sorority except as provided for in § 60.2-215;

5. Service performed on or in connection with a vessel or aircraft not an American vessel or American aircraft by an employee, if the employee is employed on and in connection with such vessel or aircraft when outside the United States;

6. Service performed by an individual in, or as an officer or member of the crew of, a vessel while it is engaged in the catching, taking, harvesting, cultivating or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds or other aquatic forms of animal and vegetable life, including service performed by any such individual as an ordinary incident to any such activity, except (i) service performed in connection with the catching or taking of salmon or halibut for commercial purposes and (ii) service performed on or in connection with a vessel of more than 10 net tons, determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States;

6a. Service performed by an individual on a boat engaged in catching fish or other forms of aquatic life under an arrangement with the owner or operator of such boat pursuant to which:

a. Such individual does not receive any cash remuneration, other than as provided in subdivision b of subsection 6a;

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

c. The amount of such individual's share depends on the amount of the boat's, or the boats' in the case of a fishing operation involving more than one boat, catch of fish or other forms of aquatic animal life, but only if the operating crew of such boat, or each boat from which the individual receives a share in the case of a fishing operation involving more than one boat is normally made up of fewer than 10 individuals;

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

8. Service performed in any calendar quarter in the employ of any organization exempt from income tax (i) under § 501 (a) of the Federal Internal Revenue Code (26 U.S.C.), other than an organization described in § 401 (a) of such Code, or (ii) under § 521 of the Federal Internal Revenue Code, if the remuneration for such service is less than \$50;

9. Service performed in the employ of a school, college or university, if such service is performed by

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

10. Service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to state law;

11. Service performed as an intern in the employ of a hospital by an individual who has completed a four-year course in a medical school chartered or approved pursuant to state law;

12. Service performed by an individual for an employing unit as an insurance agent or as an insurance solicitor, if all such service performed by such individual for such employing unit is performed for remuneration solely by way of commission;

13. Service performed by an individual for an employing unit as a real estate salesman, if all such service performed by such individual for such employing unit is performed for remuneration solely by way of commission;

14. Service covered by an arrangement between the Commission and the agency charged with the administration of any other state or federal unemployment compensation law pursuant to which all services performed by an individual for an employing unit during the period covered by such employing unit's duly approved election are deemed to be performed entirely within such agency's state or under such federal law;

15. Service performed by an individual for an employing unit as an agent in the wholesale distribution and sale of gasoline and other petroleum products, if all such service performed by such individual for such employing unit is performed for remuneration solely by way of commission;

16. Service not in the course of the employer's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for such service is \$50 or more and such service is performed by an individual who is regularly employed by such employer to perform such service. For the purposes of this subdivision, an individual shall be deemed to be regularly employed by an employer during a calendar quarter only if (i) on each of some 24 days during such quarter such individual performs for such employer for some portion of the day service not in the course of the employer's trade or business, or (ii) such individual was regularly employed, as determined under clause (i) of this subdivision, by such employer in the performance of such service during the preceding calendar quarter;

17. a. Service performed by an individual who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on. In order for such services to be excluded from "employment":

- (1) The individual shall be enrolled as a student in a full-time program,
- (2) The program shall be taken for credit at such institution,
- (3) The program combines academic instruction with work experience, and
- (4) Such service shall be an integral part of such program.

b. Such institution shall certify to the employer that subdivisions 17 a (1) through 17 a (4) of this section have been met.

c. This subdivision shall not apply to service performed in a program established for or on behalf of an employer or group of employers;

18. Service performed in the employ of a hospital, if such service is performed by a patient of the hospital, as defined in § 60.2-221;

19. Services provided by an individual pursuant to an agreement among the service recipient, a public human services agency as defined in § 15.2-2811, and such individual to an eligible service recipient in his own home or the home of the service provider, unless coverage of such services is required by the provisions of § 3304 (a) (6) (A) of the Federal Unemployment Tax Act;

20. Services performed by an individual as a "direct seller" provided that:

a. Such person:

(1) Is engaged in the trade or business of selling, or soliciting the sale of, consumer products to any buyer on a buy-sell basis, a deposit-commission basis, or any similar basis which the Secretary of the Treasury prescribes by regulations for resale by the buyer or any other person in the home or otherwise than in a permanent retail establishment;

(2) Is engaged in the trade or business of selling, or soliciting the sale of, consumer products to a consumer in the home or otherwise than in a permanent retail establishment; or

(3) Is engaged in the trade or business of the delivery or distribution of newspapers or shopping news (including any delivery services directly related to such trade or business).

b. Substantially all of the remuneration for the services performed as a direct seller, whether or not paid in cash, is directly related to sales or output, including the performances of services, rather than to the number of hours worked;

c. The services performed by the person are performed pursuant to a written contract between such person and the person for whom the services are performed and such contract provides that the person will not be treated as an employee with respect to such services for federal tax purposes;

21. Service performed after July 1, 1984, by an individual as a taxicab driver, or as a driver of an executive sedan as defined in § 46.2-2000, provided the Commission is furnished evidence that such

individual is excluded from taxation by the Federal Unemployment Tax Act;

22. Services performed by an individual as a "contract carrier courier driver" provided the Commission is furnished evidence that such individual is excluded from taxation by the Federal Unemployment Tax Act;

23. Services performed by a full-time student in the employ of an organized camp if:

a. Such camp:

(1) Did not operate for more than seven months in the calendar year and did not operate for more than seven months in the preceding calendar year; or

(2) Had average gross receipts for any six months in the preceding calendar year which were not more than ~~thirty-three and one-third~~  $33 \frac{1}{3}$  percent of its average gross receipts for the other six months in the preceding calendar year; and

b. Such full-time student performed services in the employ of such camp for less than 13 calendar weeks in such calendar year;

24. Services performed by an individual as a court reporter for an employing unit if all such service performed by the individual for the employing unit is performed for remuneration solely by way of commission;

25. Services performed by an individual as a cosmetologist or as a barber provided the Commission is furnished evidence that such individual is excluded from taxation by the Federal Unemployment Tax Act; and

26. Services performed by a licensed clinical social worker as defined in § 54.1-3700, licensed psychologist as defined in § 54.1-3600, licensed professional counselor as defined in § 54.1-3500 or licensed psychiatrist, if such individual:

a. Operates under a contract specifying that the individual is free from control or direction over the performance of such services;

b. Is licensed in the Commonwealth to perform independent clinical services;

c. Is compensated solely by way of fees charged for services rendered by such individual; and

d. Has a valid business license issued by the locality in which such individual performs such services; and

27. *Services performed by an inmate for a penal or custodial institution or while participating in the Diversion Center Incarceration Program pursuant to § 19.2-316.3.*

§ 60.2-528. Individual benefit charges.

A. An individual's "benefit charges" shall be computed in the following manner:

1. For each week benefits are received, a claimant's "benefit charges" shall be equal to his benefits received for such week.

2. For each week extended benefits are received, pursuant to § 60.2-610 or § 60.2-611, a claimant's "benefit charges" shall be equal to one-half his benefits received for such week. However, a claimant's "benefit charges" for extended benefits attributable to service in the employ of a governmental entity referred to in subdivisions 1 through 3 of subsection A of § 60.2-213 shall be equal to the full amount of such extended benefit.

3. For each week partial benefits are received, the claimant's "benefit charges" shall be computed (i) in the case of regular benefits as in subdivision 1 of this subsection, or (ii) in the case of extended benefits as in subdivision 2 of this subsection.

B. 1. The employing unit from whom such individual was separated, resulting in the current period of unemployment, shall be the most recent employing unit for whom such individual has performed services for remuneration (i) during ~~thirty~~ 30 days, whether or not such days are consecutive, or (ii) during 240 hours. If such individual's unemployment is caused by separation from an employer, such individual's "benefit charges" for such period of unemployment shall be deemed the responsibility of the last employer for (i) ~~thirty~~ 30 days or (ii) 240 hours prior to such period of unemployment.

2. Any employer charged with benefits paid shall be notified of the charges quarterly by the Commission. The amount specified shall be conclusive on the employer unless, not later than ~~thirty~~ 30 days after the notice of benefit charges was mailed to its last known address or otherwise delivered to it, the employer files an appeal with the Commission, setting forth the grounds for such an appeal. Proceedings on appeal to the Commission regarding the amount of benefit charges under this subsection or a redetermination of such amount shall be in accordance with the provisions of § 60.2-500. The decision of the Commission shall be subject to the provisions of § 60.2-500. Any appeal perfected pursuant to the provisions of this section shall not address any issue involving the merits or conditions of a claimant's separation from employment.

C. No "benefit charges" shall be deemed the responsibility of an employer of:

1. An individual whose separation from the work of such employer arose as a result of a violation of the law by such individual, which violation led to confinement in any jail or prison;

2. An individual who voluntarily left employment in order to accept other employment, genuinely believing such employment to be permanent;

3. An individual with respect to any weeks in which benefits are claimed and received after such date as that individual refused to accept an offer of rehire by the employer because such individual was

in training with approval of the Commission pursuant to § 60.2-613;

4. An individual who voluntarily left employment to enter training approved under § 236 of the Trade Act of 1974 (19 U.S.C. § 2296 et seq.);

5. An individual hired to replace a member of the Reserve of the United States Armed Forces or the National Guard called into active duty as a result of Operation Desert Shield or Operation Desert Storm and whose employment is terminated concurrent with and because of that member's return from active duty;

6. An individual who left employment voluntarily with good cause due to a personal bona fide medical reason caused by a non-job-related injury or medical condition; or

7. An individual participating as an inmate in (i) ~~the Diversion Center Incarceration Program pursuant to § 19.2-316.3;~~ (ii) state or local work release programs pursuant to § 53.1-60 or § 53.1-131; (iii) (ii) community residential programs pursuant to §§ 53.1-177, 53.1-178, and 53.1-179; or (iv) (iii) any similar work release program, whose separation from work arose from conditions of release or parole from such program.

§ 60.2-618. Disqualification for benefits.

An individual shall be disqualified for benefits upon separation from the last employing unit for whom he has worked ~~thirty~~ 30 days or 240 hours or from any subsequent employing unit:

1. For any week benefits are claimed until he has performed services for an employer (i) during ~~thirty~~ 30 days, whether or not such days are consecutive, or (ii) for 240 hours, and subsequently becomes totally or partially separated from such employment, if the Commission finds such individual is unemployed because he left work voluntarily without good cause. As used in this chapter, "good cause" shall not include (i) voluntarily leaving work with an employer to become self-employed or (ii) voluntarily leaving work with an employer to accompany or to join his or her spouse in a new locality. An individual shall not be deemed to have voluntarily left work solely because the separation was in accordance with a seniority-based policy.

2. a. For any week benefits are claimed until he has performed services for an employer (i) during ~~thirty~~ 30 days, whether or not such days are consecutive, or (ii) for 240 hours, and subsequently becomes totally or partially separated from such employment, if the Commission finds such individual is unemployed because he has been discharged for misconduct connected with his work.

b. For the purpose of this subdivision, "misconduct" includes, but shall not be limited to:

(1) An employee's confirmed positive test for a nonprescribed controlled substance, identified as such in Chapter 34 (§ 54.1-3400 et seq.) of Title 54.1, where such test was conducted at the direction of his employer in conjunction with the employer's administration and enforcement of a known workplace drug policy. Such test shall have been performed, and a sample collected, in accordance with scientifically recognized standards by a laboratory accredited by the United States Department of Health and Human Services, or the College of American Pathology, or the American Association for Clinical Chemistry, or the equivalent. The Commission may consider evidence of mitigating circumstances in determining whether misconduct occurred.

(2) An employee's intentionally false or misleading statement of a material nature concerning past criminal convictions made in a written job application furnished to the employer, where such statement was a basis for the termination and the employer terminated the employee promptly upon the discovery thereof. The Commission may consider evidence of mitigating circumstances in determining whether misconduct occurred.

3. a. If it is determined by the Commission that such individual has failed, without good cause, either to apply for available, suitable work when so directed by the employment office or the Commission or to accept suitable work when offered him. The disqualification shall commence with the week in which such failure occurred, and shall continue for the period of unemployment next ensuing until he has performed services for an employer (i) during ~~thirty~~ 30 days, whether or not such days are consecutive, or (ii) for 240 hours, and subsequently becomes totally or partially separated from such employment.

b. In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety and morals, his physical fitness and prior training, his experience, his length of unemployment and the accessibility of the available work from his residence.

c. No work shall be deemed suitable and benefits shall not be denied under this title to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(1) If the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(2) If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; or

(3) If as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

d. No individual shall be qualified for benefits during any week that such individual, in connection with an offer of suitable work, has a confirmed positive test for a nonprescribed controlled substance, identified as such in Chapter 34 (§ 54.1-3400 et seq.) of Title 54.1, if the test is (i) required as a condition of employment and (ii) performed, and a sample is collected, in accordance with scientifically

recognized standards by a laboratory accredited by the United States Department of Health and Human Services, or the College of American Pathology, or the American Association for Clinical Chemistry, or the equivalent. The disqualification shall commence with the week in which such a test was conducted, and shall continue for the period of unemployment next ensuing until he has performed services for an employer (i) during ~~thirty~~ 30 days, whether or not such days are consecutive, or (ii) for 240 hours, and subsequently becomes totally or partially separated from such employment.

4. For ~~fifty-two~~ 52 weeks, beginning with the date of the determination or decision, if the Commission finds that such individual, within ~~thirty-six~~ 36 calendar months immediately preceding such determination or decision, has made a false statement or representation knowing it to be false, or has knowingly failed to disclose a material fact, to obtain or increase any benefit or payment under this title, the unemployment compensation of any other state, or any other program of the federal government which is administered in any way under this title, either for himself or any other person. Additionally, such individual shall be ineligible for benefits until he has repaid the Commission the sum which has been fraudulently obtained.

5. If such separation arose as a result of an unlawful act which resulted in a conviction and after his release from prison or jail until he has performed services for an employer for (i) ~~thirty~~ 30 days, whether or not such days are consecutive, or (ii) 240 hours, and subsequently becomes totally or partially separated from such employment.

6. *If such separation arose as a condition of the individual's parole or release from a custodial or penal institution and such individual was participating in the Diversion Center Incarceration Program pursuant to § 19.2-316.3.*