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SENATE BILL NO. 1201

Offered January 12, 2005

Prefiled January 12, 2005

A BILL to amend and reenact §§ 60.2-500 and 60.2-622 of the Code of Virginia, and to amend the Code of Virginia by adding sections numbered 18.2-204.3 and 60.2-536.1 through 60.2-536.5, relating to unemployment compensation; state unemployment tax dumping; penalties.

Patrons—Miller, Wagner and Watkins; Delegates: Nixon, Purkey, Spruill and Ware, R.L.

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 60.2-500 and 60.2-622 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding sections numbered 18.2-204.3 and 60.2-536.1 through 60.2-536.5, as follows:

§ 18.2-204.3. Transfers for the sole or primary purpose of obtaining a lower unemployment tax rate; penalty.

A. Any person who transfers or attempts to transfer any trade or business to another person, where the sole or primary purpose of the transfer is to obtain a lower unemployment tax rate, is guilty of a Class 1 misdemeanor.

B. Any person who knowingly advises another person to transfer any trade or business to another person where the sole or primary purpose of the transfer is to obtain a lower unemployment tax rate, is guilty of a Class 1 misdemeanor.

C. Any person who is found guilty of more than two such actions under subsections A or B is guilty of a Class 6 felony.

D. It shall be the duty of the attorney for the Commonwealth to whom the Commission shall report, pursuant to subsection B of § 60.2-500, any violation of this section to determine whether to proceed with prosecution.

§ 60.2-500. Determination with respect to whether employing unit is employer; whether services constitute employment; or whether business transfer is illegal.

A. The Commission may, upon its own motion or upon application of an employing unit, and after not less than ~~ten~~ 30 days' notice in writing mailed to the last known address of such employing unit and an opportunity for hearing, make findings of fact, and on that basis, determine (i) whether ~~an~~:

1. An employing unit constitutes an employer and (ii) whether services;

2. Services performed for or in connection with the business of an employing unit constitute employment for such employing unit; or

3. There has been a transfer as defined in § 60.2-536.1.

B. All testimony at any hearing pursuant to this section shall be recorded but need not be transcribed unless a petition for judicial review from such determination is filed in the manner herein prescribed. At such hearing the interests of the Commonwealth shall be represented by the Office of the Attorney General. The Commissioner shall have the power to designate a special examiner to hold such hearings, and may authorize and empower such special examiner to decide any matter so heard, in which event the decision of such special examiner shall be the final decision of the Commission under this section, subject to judicial review under subsection B of this section. C. The Commissioner or his designee shall promptly inform the appropriate attorney for the Commonwealth of any final decision that an employer transferred or attempted to transfer a trade or business for the primary or sole purpose of obtaining a lower unemployment tax rate, or was advised to do so.

B. ~~1.~~ C. Judicial review of any such determination made in subsection A of this section B may be initiated within ~~thirty~~ 30 days after mailing notice of such findings and determination to the employing unit or, in the absence of mailing, within ~~thirty~~ 30 days after delivering such notice and determination, in the Circuit Court of the City of Richmond. Such judicial review shall be commenced by the filing of a petition, which need not be verified but which shall state the grounds upon which a review is sought. Service of two copies of such petition upon the Commissioner shall be deemed completed service and such petition shall be filed with the clerk of the court within five days after service thereof. With its answer the Commission shall certify and file with the court all documents and papers and a transcript of all testimony taken in the matter, together with its findings of fact and decision therein. In any judicial proceedings under this article, the Commission's findings of facts, if supported by the evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law. Such actions shall be given preference on the docket over all other cases except cases to which

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59 the Commonwealth is a party.

60 ~~2.~~ D. An appeal may be taken from the decision of such court to the Court of Appeals, in
61 conformity with Part Five A of the Rules of Supreme Court and other applicable laws. In any such
62 proceedings for judicial review, the Commission shall be represented by the Office of the Attorney
63 General. A determination by the Commission from which no judicial review has been commenced shall
64 be conclusive in any subsequent judicial proceeding involving liability for taxes against the employing
65 unit or its successor under the provisions of subdivision B 1 of subsection B of § 60.2-210 and of
66 subsection B of § 60.2-523.

67 § 60.2-536.1. *Transfers for the purpose of obtaining a lower unemployment compensation tax rate;*
68 *assignment of rates.*

69 A. *If an employer shall transfer any trade or business to another employer where, at the time of*
70 *transfer, there is substantially common ownership, management, or control of the trade or business, then*
71 *the unemployment experience attributable to the transferred business shall also be transferred to, and*
72 *combined with the unemployment experience attributable to, the employer to whom such business is*
73 *transferred. If the sole or primary purpose of such transfer is to obtain a lower unemployment tax rate,*
74 *that employer shall be subject to the penalties established by § 60.2-536.3.*

75 B. *If an employer shall transfer any trade or business to a person who is not otherwise an employer*
76 *at the time of such transfer, and the sole or primary purpose of such transfer is to obtain a lower*
77 *unemployment tax rate:*

78 1. *The unemployment experience of the acquired business shall not be transferred to such person;*
79 *instead, such person shall be assigned the higher of the transferred business' calculated rate or the new*
80 *employer rate under § 60.2-526; and*

81 2. *Such person shall be subject to the penalties established by § 60.2-536.3.*

82 C. *Any person who shall knowingly advise another person to engage in a transfer of any trade or*
83 *business, where the sole or primary purpose of such transfer is to obtain a lower unemployment tax*
84 *rate, shall be subject to the penalties established by § 60.2-536.3.*

85 D. *The Commission shall establish methods to identify and investigate the transfer or acquisition of a*
86 *business for purposes of this section.*

87 1. *For the purposes of determining whether there is "substantially common ownership, management,*
88 *or control of two or more employers," the Commission shall consider all relevant facts and*
89 *circumstances, including the extent of commonality or similarity of: (i) ownership, (ii) any familial*
90 *relationships, (iii) principals or corporate officers, (iv) organizational structure, (v) day-to-day*
91 *operations, (vi) assets and liabilities, and (vii) stated business purpose.*

92 2. *For the purposes of determining whether a business was transferred solely or primarily to obtain*
93 *a lower unemployment tax rate, the Commission shall consider the facts and circumstances of the*
94 *transfer, including: (i) the cost of acquiring the business, (ii) how long such business was continued,*
95 *and (iii) whether a substantial number of new employees was hired to perform duties unrelated to the*
96 *business activity conducted prior to the transfer.*

97 § 60.2-536.2. *Advisory opinion by the Commission.*

98 Upon application by an employer who is a party to a transfer or potential transfer of any trade or
99 business, the Commission shall issue an advisory opinion as to whether such transfer constitutes a
100 transfer pursuant to § 60.2-536.1, or is solely or primarily for the purpose of obtaining a lower
101 unemployment tax rate. The application shall be under oath or affirmation, in a form prescribed by the
102 Commission, and shall fully set forth all relevant facts regarding the proposed transfer. The Commission
103 may require such additional information and documentary evidence as deemed necessary for a fair and
104 informed opinion. Such opinion shall be issued within 60 days after the Commission has received all of
105 the information and evidence requested. An employer who proceeds with the transfer of a trade or
106 business in reliance upon a favorable advisory opinion issued under this subsection shall not
107 subsequently be found to have violated the provisions of § 18.2-204.3, and shall not be subject to the
108 penalties of § 60.2-536.3, provided such employer has made full disclosure of all relevant facts to the
109 Commission. If an employer disagrees with the Commission's advisory opinion, it shall have the right to
110 a hearing and decision pursuant to § 60.2-500, provided that an application for a hearing is filed with
111 the Commission within 30 days from the date the advisory opinion was mailed.

112 § 60.2-536.3. *Violations; penalties.*

113 A. *If a person knowingly transfers, or attempts to transfer, any trade or business where the sole or*
114 *primary purpose is to obtain a lower unemployment tax rate, or if a person knowingly advises another*
115 *person to engage, or attempt to engage, in such transfer, such person shall be subject, in addition to the*
116 *criminal penalties set forth in § 18.2-204.3, to the following additional rate of contributions and civil*
117 *penalty:*

118 1. *If the person is an employer, he shall be assigned the highest rate assignable under this chapter*
119 *for the calendar year during which such violation or attempted violation occurred, and for the next*
120 *calendar year immediately following such year. However, if the employer is already at such highest rate*

for that year, or if the amount of increase in the employer's rate would be less than two percent for any such year, then an additional rate of contributions of two percent of taxable wages shall be imposed for such year, which shall be paid into the benefit account of the Unemployment Compensation Fund pursuant to § 60.2-301.

2. If the person is not an employer, he shall be subject to a civil penalty of \$5,000, which shall be paid into the Special Unemployment Compensation Administration Fund pursuant to § 60.2-314.

B. Final orders of the Commission with respect to the provisions of § 60.2-536.1 may be recorded, enforced, and satisfied as orders or decrees of a circuit court upon certification of such orders by the Clerk of the Commission. Such orders may be appealed pursuant to § 60.2-500.

§ 60.2-536.4. Interpretation.

The provisions of §§ 60.2-536.1 through 60.2-536.3 shall be interpreted and applied in such a manner as to meet the requirements contained in Public Law 108-295.

§ 60.2-536.5. Definitions.

As used in §§ 60.2-536.1 through 60.2-536.3, unless the context requires a different meaning:

"Knowingly" means having actual knowledge of or acting with deliberate ignorance or reckless disregard for the prohibition involved.

"Person" shall have the meaning given such term by § 7701 (a) (1) of the Internal Revenue Code of 1986.

"Trade" or "business" includes the employer's workforce.

"Violates" or "attempts" to violate includes intent to evade, misrepresentation, or willful nondisclosure.

§ 60.2-622. Commission review.

A. The Commission (i) may on its own motion affirm, modify, or set aside any decision of an appeal tribunal on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence by an appeal tribunal, or receive such evidence itself, or (ii) shall permit any of the parties to such decision to initiate further appeals before it. The Commission may remove to itself or transfer to another appeal tribunal the proceedings on any claim pending before an appeal tribunal. Any proceeding so removed to the Commission shall be heard in accordance with the requirements of § 60.2-620. The Commission shall promptly notify the interested parties of its findings and decision.

B. 1. Any decision of the Commission, upon a hearing on appeal, shall become final ~~ten~~ 10 days after the date of notification or mailing, and judicial review shall be permitted the claimant or any interested party claiming to be aggrieved. The Commission shall be deemed to be a party to any judicial action involving any such decision, and shall be represented in any such judicial action by the Office of the Attorney General.

2. Any such decision by the Commission involving (i) whether an employing unit constitutes an employer or (ii) whether services performed for or in connection with business of an employing unit constitute employment for such employing unit, from which no judicial review is had pursuant to ~~subsection B~~ subsections C and D of § 60.2-500, shall be conclusive in any subsequent judicial proceedings involving liability for taxes by the Commission against any employing unit which was a party to the proceedings held before the Commission.

C. The Commissioner shall have the power to designate a special examiner to hear appeals to the Commission under this section. The Commissioner may authorize and empower such special examiner to decide any appeal so heard, in which event the decision of the special examiner shall be the final decision of the Commission under this section, subject to judicial review under § 60.2-625.

2. That an emergency exists and this act is in force from its passage.

3. That the provisions of this act may result in a net increase in periods of imprisonment or commitment. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities and is \$0 for periods of commitment to the custody of the Department of Juvenile Justice.