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HOUSE BILL NO. 2114

Offered January 14, 2009

Prefiled January 13, 2009

A BILL to amend and reenact § 59.1-200 of the Code of Virginia and to amend the Code of Virginia by adding in Title 59.1 a chapter numbered 50, consisting of sections numbered 59.1-550 through 59.1-559, relating to the regulation of persons providing payroll processing services; penalty.

Patron—Nichols

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That § 59.1-200 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding in Title 59.1 a chapter numbered 50, consisting of sections numbered 59.1-550 through 59.1-559 as follows:

§ 59.1-200. Prohibited practices.

A. The following fraudulent acts or practices committed by a supplier in connection with a consumer transaction are hereby declared unlawful:

1. Misrepresenting goods or services as those of another;

2. Misrepresenting the source, sponsorship, approval, or certification of goods or services;

3. Misrepresenting the affiliation, connection, or association of the supplier, or of the goods or services, with another;

4. Misrepresenting geographic origin in connection with goods or services;

5. Misrepresenting that goods or services have certain quantities, characteristics, ingredients, uses, or benefits;

6. Misrepresenting that goods or services are of a particular standard, quality, grade, style, or model;

7. Advertising or offering for sale goods that are used, secondhand, repossessed, defective, blemished, deteriorated, or reconditioned, or that are "seconds," irregulars, imperfects, or "not first class," without clearly and unequivocally indicating in the advertisement or offer for sale that the goods are used, secondhand, repossessed, defective, blemished, deteriorated, reconditioned, or are "seconds," irregulars, imperfects or "not first class";

8. Advertising goods or services with intent not to sell them as advertised, or with intent not to sell at the price or upon the terms advertised.

In any action brought under this subdivision, the refusal by any person, or any employee, agent, or servant thereof, to sell any goods or services advertised or offered for sale at the price or upon the terms advertised or offered, shall be prima facie evidence of a violation of this subdivision. This paragraph shall not apply when it is clearly and conspicuously stated in the advertisement or offer by which such goods or services are advertised or offered for sale, that the supplier or offeror has a limited quantity or amount of such goods or services for sale, and the supplier or offeror at the time of such advertisement or offer did in fact have or reasonably expected to have at least such quantity or amount for sale;

9. Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;

10. Misrepresenting that repairs, alterations, modifications, or services have been performed or parts installed;

11. Misrepresenting by the use of any written or documentary material that appears to be an invoice or bill for merchandise or services previously ordered;

12. Notwithstanding any other provision of law, using in any manner the words "wholesale," "wholesaler," "factory," or "manufacturer" in the supplier's name, or to describe the nature of the supplier's business, unless the supplier is actually engaged primarily in selling at wholesale or in manufacturing the goods or services advertised or offered for sale;

13. Using in any contract or lease any liquidated damage clause, penalty clause, or waiver of defense, or attempting to collect any liquidated damages or penalties under any clause, waiver, damages, or penalties that are void or unenforceable under any otherwise applicable laws of the Commonwealth, or under federal statutes or regulations;

14. Using any other deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction;

15. Violating any provision of § 3.1-796.78, 3.1-796.79, or 3.1-796.82, relating to the sale of certain animals by pet dealers which is described in such sections, is a violation of this chapter;

16. Failing to disclose all conditions, charges, or fees relating to:

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59 a. The return of goods for refund, exchange, or credit. Such disclosure shall be by means of a sign  
60 attached to the goods, or placed in a conspicuous public area of the premises of the supplier, so as to be  
61 readily noticeable and readable by the person obtaining the goods from the supplier. If the supplier does  
62 not permit a refund, exchange, or credit for return, he shall so state on a similar sign. The provisions of  
63 this subdivision shall not apply to any retail merchant who has a policy of providing, for a period of not  
64 less than 20 days after date of purchase, a cash refund or credit to the purchaser's credit card account  
65 for the return of defective, unused, or undamaged merchandise upon presentation of proof of purchase.  
66 In the case of merchandise paid for by check, the purchase shall be treated as a cash purchase and any  
67 refund may be delayed for a period of 10 banking days to allow for the check to clear. This subdivision  
68 does not apply to sale merchandise that is obviously distressed, out of date, post season, or otherwise  
69 reduced for clearance; nor does this subdivision apply to special order purchases where the purchaser  
70 has requested the supplier to order merchandise of a specific or unusual size, color, or brand not  
71 ordinarily carried in the store or the store's catalog; nor shall this subdivision apply in connection with a  
72 transaction for the sale or lease of motor vehicles, farm tractors, or motorcycles as defined in  
73 § 46.2-100;

74 b. A layaway agreement. Such disclosure shall be furnished to the consumer (i) in writing at the time  
75 of the layaway agreement, or (ii) by means of a sign placed in a conspicuous public area of the  
76 premises of the supplier, so as to be readily noticeable and readable by the consumer, or (iii) on the bill  
77 of sale. Disclosure shall include the conditions, charges, or fees in the event that a consumer breaches  
78 the agreement;

79 16a. Failing to provide written notice to a consumer of an existing open-end credit balance in excess  
80 of \$5 (i) on an account maintained by the supplier and (ii) resulting from such consumer's overpayment  
81 on such account. Suppliers shall give consumers written notice of such credit balances within 60 days of  
82 receiving overpayments. If the credit balance information is incorporated into statements of account  
83 furnished consumers by suppliers within such 60-day period, no separate or additional notice is required;

84 17. If a supplier enters into a written agreement with a consumer to resolve a dispute that arises in  
85 connection with a consumer transaction, failing to adhere to the terms and conditions of such an  
86 agreement;

87 18. Violating any provision of the Virginia Health Spa Act, Chapter 24 (§ 59.1-294 et seq.) of this  
88 title;

89 19. Violating any provision of the Virginia Home Solicitation Sales Act, Chapter 2.1 (§ 59.1-21.1 et  
90 seq.) of this title;

91 20. Violating any provision of the Automobile Repair Facilities Act, Chapter 17.1 (§ 59.1-207.1 et  
92 seq.) of this title;

93 21. Violating any provision of the Virginia Lease-Purchase Agreement Act, Chapter 17.4  
94 (§ 59.1-207.17 et seq.) of this title;

95 22. Violating any provision of the Prizes and Gifts Act, Chapter 31 (§ 59.1-415 et seq.) of this title;

96 23. Violating any provision of the Virginia Public Telephone Information Act, Chapter 32  
97 (§ 59.1-424 et seq.) of this title;

98 24. Violating any provision of § 54.1-1505;

99 25. Violating any provision of the Motor Vehicle Manufacturers' Warranty Adjustment Act, Chapter  
100 17.6 (§ 59.1-207.34 et seq.) of this title;

101 26. Violating any provision of § 3.1-949.1, relating to the pricing of merchandise;

102 27. Violating any provision of the Pay-Per-Call Services Act, Chapter 33 (§ 59.1-429 et seq.) of this  
103 title;

104 28. Violating any provision of the Extended Service Contract Act, Chapter 34 (§ 59.1-435 et seq.) of  
105 this title;

106 29. Violating any provision of the Virginia Membership Camping Act, Chapter 25 (§ 59.1-311 et  
107 seq.) of this title;

108 30. Violating any provision of the Comparison Price Advertising Act, Chapter 17.7 (§ 59.1-207.40 et  
109 seq.) of this title;

110 31. Violating any provision of the Virginia Travel Club Act, Chapter 36 (§ 59.1-445 et seq.) of this  
111 title;

112 32. Violating any provision of §§ 46.2-1231 and 46.2-1233.1;

113 33. Violating any provision of Chapter 40 (§ 54.1-4000 et seq.) of Title 54.1;

114 34. Violating any provision of Chapter 10.1 (§ 58.1-1031 et seq.) of Title 58.1;

115 35. Using the consumer's social security number as the consumer's account number with the supplier,  
116 if the consumer has requested in writing that the supplier use an alternate number not associated with  
117 the consumer's social security number;

118 36. Violating any provision of Chapter 18 (§ 6.1-444 et seq.) of Title 6.1;

119 37. Violating any provision of § 8.01-40.2;

120 38. Violating any provision of Article 7 (§ 32.1-212 et seq.) of Chapter 6 of Title 32.1;

- 121 39. Violating any provision of Chapter 34.1 (§ 59.1-441.1 et seq.) of this title;
- 122 40. Violating any provision of Chapter 10.2 (§ 6.1-363.2 et seq.) of Title 6.1;
- 123 41. Violating any provision of the Virginia Post-Disaster Anti-Price Gouging Act, Chapter 46
- 124 (§ 59.1-525 et seq.) of this title;
- 125 42. Violating any provision of Chapter 47 (§ 59.1-530 et seq.) of this title;
- 126 43. Violating any provision of § 59.1-443.2;
- 127 44. Violating any provision of Chapter 48 (§ 59.1-533 et seq.) of this title;
- 128 45. Violating any provision of Chapter 20 (§ 6.1-474 et seq.) of Title 6.1;
- 129 46. Violating the provisions of clause (i) of subsection B of § 54.1-1115; ~~and~~
- 130 47. Violating any provision of § 18.2-239; *and*
- 131 48. *Violating any provision of Chapter 50 (§ 59.1-550 et seq.) of this title.*
- 132 B. Nothing in this section shall be construed to invalidate or make unenforceable any contract or
- 133 lease solely by reason of the failure of such contract or lease to comply with any other law of the
- 134 Commonwealth or any federal statute or regulation, to the extent such other law, statute, or regulation
- 135 provides that a violation of such law, statute, or regulation shall not invalidate or make unenforceable
- 136 such contract or lease.

CHAPTER 50.  
PAYROLL PROCESSORS.

139 § 59.1-550. *Definitions.*

140 *As used in this chapter, unless the context requires otherwise:*

141 *"Board" means the Board of Agriculture and Consumer Services.*

142 *"Client" means an employer for whom a payroll processor provides payroll processing services.*

143 *"Commissioner" means:*

144 *1. If the payroll processor is a financial institution subject to supervision by the State Corporation*  
 145 *Commission pursuant to Title 6.1 or a wholly owned subsidiary of such a supervised financial*  
 146 *institution, the Commissioner of Financial Institutions within the State Corporation Commission; and*

147 *2. If the payroll processor is not a financial institution subject to supervision by the State*  
 148 *Corporation Commission pursuant to Title 6.1 or a wholly owned subsidiary of such a supervised*  
 149 *financial institution, the Commissioner of Agriculture and Consumer Services.*

150 *"Employer" means a person that maintains an office or otherwise transacts business in the*  
 151 *Commonwealth and makes payment of wages taxable under Chapter 3 (§ 58.1-300 et seq.) of Title 58.1*  
 152 *to an individual.*

153 *"Payroll processing services" means (i) preparing and issuing payroll checks; (ii) preparing and*  
 154 *filing information required to be filed with an agency of the Commonwealth pursuant to Title 58.1 or*  
 155 *Title 60.2; or (iii) collecting, holding, and turning over income withholding taxes or unemployment*  
 156 *insurance taxes.*

157 *"Payroll processor" means a person that provides payroll processing services for one or more*  
 158 *employers.*

159 § 59.1-551. *Registration; fees.*

160 *A. It shall be unlawful for any payroll processor to offer or provide in the Commonwealth any*  
 161 *payroll processing services, on or after the expiration of the phase-in period applicable to the payroll*  
 162 *processor as prescribed in § 59.1-558, unless such payroll processor at the time of such offering or*  
 163 *provision has been properly registered with the Commissioner. Registration shall be renewed annually.*  
 164 *An application for registration, including any renewal thereof, shall (i) disclose the address, ownership,*  
 165 *and nature of business of the payroll processor, (ii) include proof of the surety bond required pursuant*  
 166 *to § 59.1-552, and (iii) include proof of coverage, at the applicant's option, in an amount two times the*  
 167 *highest weekly payroll processed by the applicant in the preceding year or in the amount of \$5 million,*  
 168 *whichever is less, of a fidelity bond, employee dishonesty bond, third-party fidelity coverage, or liability*  
 169 *insurance that includes crime coverage. An application for registration, including any renewal thereof,*  
 170 *shall be accompanied by a fee of \$200 if the payroll processor has fewer than 25 clients, \$500 if the*  
 171 *payroll processor has from 25 to 500 clients, and \$800 if the payroll processor has more than 500*  
 172 *clients. The registration shall be in a form prescribed by the Commissioner. The Commissioner may*  
 173 *refuse to accept a registration form that contains erroneous or incomplete information.*

174 *B. All registration and annual renewal fees shall be remitted to the State Treasurer and shall be*  
 175 *placed to the credit and special fund of the Department of Agriculture and Consumer Services, or of the*  
 176 *Bureau of Financial Institutions of the State Corporation Commission if the fees are remitted with*  
 177 *respect to a payroll processor that is a financial institution subject to supervision by the State*  
 178 *Corporation Commission pursuant to Title 6.1 or a wholly owned subsidiary of such a supervised*  
 179 *financial institution, which fees shall be used in either instance in the administration of this chapter.*

180 § 59.1-552. *Bond required; exemption.*

181 *A. Commencing upon the expiration of the phase-in period for the payroll processor as prescribed in*

182 § 59.1-558, every payroll processor before providing, or entering into an agreement to provide, payroll  
183 processing services to a client, shall file and maintain with the Commissioner, in a form and substance  
184 approved by the Commissioner, a bond with corporate surety from a company authorized to transact  
185 business in the Commonwealth, in an amount equal to the total of all state and federal income tax and  
186 unemployment insurance tax payments expected to be processed by the payroll processor on behalf of  
187 clients during the 12 months following the initial registration or renewal thereof. In determining the  
188 amount of tax payments expected to be processed during the ensuing 12 months, the Commissioner in  
189 his discretion may rely on the amounts processed during such preceding period as the Commissioner  
190 deems appropriate or such other method as is adopted by regulation pursuant to § 59.1-554.

191 B. The bond required by subsection A shall be in favor of the Commonwealth of Virginia for the  
192 benefit of any client who is damaged by any violation of this chapter by a payroll processor. The  
193 aggregate liability of the bond to all persons for all breaches of the conditions of the bond shall in no  
194 event exceed the amount of the bond. The terms of the bond shall run continuously until cancelled and  
195 the aggregate amount of the bond shall be maintained at all times during the registration period. The  
196 bond shall not be canceled or terminated except with the consent of the Commissioner.

197 C. A payroll processor that does not have the authority to access, control, direct, transfer, or  
198 disburse a client's funds is not subject to this section. A payroll processor that arranges for the transfer  
199 of funds from an employer's account directly to taxing authorities for payment of the employer's taxes is  
200 not subject to this section, if the payroll processor is not authorized to arrange for the transfer of funds  
201 for any other uses or to any other accounts.

202 § 59.1-553. Reports by payroll processors to clients; disclosures; exemption.

203 A. Commencing upon the expiration of the phase-in period for the payroll processor as prescribed in  
204 § 59.1-558, on a regular basis not less frequently than quarterly, a payroll processor shall:

205 1. Provide to each client an accounting of:

206 a. Funds received from that employer; and

207 b. The aggregate amounts disbursed for (i) payroll; (ii) each category of income taxes; and (iii) state  
208 and federal unemployment compensation taxes; and

209 2. Clearly and conspicuously and in easily understood language disclose to each client the specific  
210 method or methods whereby the client can contact state and federal tax and unemployment insurance  
211 authorities, including but not limited to Internet address and toll-free telephone number information, to  
212 verify that payments have been made and properly credited on behalf of the client.

213 B. Commencing upon the expiration of the phase-in period for the payroll processor as prescribed in  
214 § 59.1-558, whenever a payroll processor promotes, markets, or advertises itself or its services and uses  
215 the phrase "bonded with the State" or "fully bonded" or other language that in the opinion of the  
216 Commissioner would lead a client to believe that the bond coverage provides full compensation for  
217 potential losses should the payroll processor fail to make required payments or become insolvent, the  
218 payroll processor shall also include a clear and conspicuous disclaimer stating that use of the language  
219 referencing bonding does not signify or ensure that the bond will cover all potential claims if the  
220 payroll processor fails to comply with its responsibilities under this chapter. A payroll processor also  
221 shall provide this disclaimer to an employer before contracting for payroll processing services to that  
222 employer.

223 C. Commencing upon the expiration of the phase-in period for the payroll processor as prescribed in  
224 § 59.1-558, a payroll processor may not designate itself as the sole recipient of notices from state or  
225 federal authorities for nonpayment of taxes or unemployment insurance payments. A payroll processor  
226 shall ensure that such notices are provided directly to the affected clients.

227 D. A payroll processor that does not have the authority to access, control, direct, transfer, or  
228 disburse a client's funds is not subject to this section.

229 § 59.1-554. Regulations.

230 The Board and State Corporation Commission shall adopt reasonable regulations in order to  
231 implement the provisions of this chapter. These regulations shall be adopted, amended, or repealed in  
232 accordance with the Administrative Process Act (§ 2.2-4000 et seq.) or the Rules of Practice and  
233 Procedure of the State Corporation Commission, as applicable.

234 § 59.1-555. Investigations.

235 A. The Commissioner is authorized to:

236 1. Make necessary public and private investigations within or without the Commonwealth to  
237 determine whether any person has violated, or is about to violate, the provisions of this chapter or any  
238 rule, regulation, or order issued pursuant to this chapter;

239 2. Require or permit any person to file a statement in writing, under oath or otherwise as the  
240 Commissioner determines, as to all facts and circumstances concerning the matter under investigation;  
241 and

242 3. Administer oaths or affirmations and, upon motion or upon request of any party, subpoena  
243 witnesses, compel their attendance, take evidence, and require the production of any matter that is

244 relevant to the investigation, including the existence, description, nature, custody, condition, and location  
 245 of any books, documents, or other tangible things; the identity and location of persons having  
 246 knowledge of relevant facts; or any other matter reasonably calculated to lead to the discovery of  
 247 material evidence.

248 B. Any proceeding or hearing of the Commissioner pursuant to this chapter, in which witnesses are  
 249 subpoenaed and their attendance required for evidence to be taken, or any matter produced to ascertain  
 250 material evidence shall take place within the City of Richmond.

251 C. If any person fails to obey the subpoena or to answer questions propounded by the Commissioner  
 252 and upon reasonable notice to all persons affected thereby, the Commissioner may apply to the Circuit  
 253 Court of the City of Richmond for an order compelling compliance.

254 § 59.1-556. Cessation of business; insolvency and liquidation; appointment of receiver.

255 A. Commencing upon the expiration of the phase-in period for the payroll processor as prescribed in  
 256 § 59.1-558, a payroll processor that voluntarily ceases to do business in the Commonwealth is subject to  
 257 the following provisions:

258 1. Prior to voluntarily ceasing business as a payroll processor, a payroll processor shall:

259 a. Notify the Commissioner of the proposed termination at least 30 days prior to its effective date;

260 b. Notify all clients in writing of the proposed termination at least 30 days prior to its effective date;

261 c. Provide all clients with detailed final accountings of all accounts;

262 d. Remit all money held by the payroll processor to each respective client or the appropriate taxing  
 263 authority; and

264 e. Return its registration to the Commissioner for cancellation; and

265 2. When terminating a business, a payroll processor whose contract with a client does not authorize  
 266 the processor to assign the account to another processor may not transfer the account to another  
 267 processor without first securing the written permission of the client.

268 B. Commencing upon the expiration of the phase-in period for the payroll processor as prescribed in  
 269 § 59.1-558, a payroll processor that is no longer eligible to do business in the Commonwealth shall be  
 270 subject to the following provisions:

271 1. If, upon examination of a payroll processor, the Commissioner is of the opinion that the payroll  
 272 processor is insolvent or can no longer obtain a surety bond or when the license of a payroll processor  
 273 has expired or been terminated for any reason, the Commissioner may appoint a receiver who shall  
 274 proceed to close the payroll processor. The person appointed by the Commissioner as a receiver may be  
 275 the Commissioner, a deputy, or such other person as the Commissioner may choose, and a certified  
 276 copy of the order making such appointment is evidence of the appointment. A receiver has the power  
 277 and authority provided in this chapter and such other powers and authority as may be expressed in the  
 278 order of the Commissioner. If the Commissioner or a deputy is appointed receiver, no additional  
 279 compensation need be paid, but any reasonable and necessary expenses as a receiver must be paid by  
 280 the processor. If another person is appointed, then the compensation of the receiver must be paid from  
 281 the assets of that processor;

282 2. Upon taking possession of the property and business of a payroll processor under this section, the  
 283 receiver:

284 a. May collect money due to the Commissioner and perform all acts necessary to conserve the  
 285 payroll processor's assets and business and shall proceed to liquidate the payroll processor's affairs;

286 b. Shall collect all debts due and claims belonging to the payroll processor and may sell or  
 287 compound all bad or doubtful debts;

288 c. May sell, for cash or other consideration or as provided by law, all or any part of the real and  
 289 personal property of the payroll processor; and

290 d. May borrow money and issue evidence of indebtedness therefor, and to secure the repayment of  
 291 this money, may mortgage, pledge, or transfer in trust any of the property of the payroll processor,  
 292 whether real, personal, or mixed, superior to any charge for expenses of liquidation; and

293 3. The assets of the payroll processor in liquidation, exclusive of any bond proceeds, must be  
 294 disbursed in the following order:

295 a. First, the payment of the costs and expenses of liquidation;

296 b. Second, payment of payroll, tax, and unemployment insurance funds held by the payroll processor;

297 c. Third, payment of all debts, claims, and obligations owed by the payroll processor;

298 d. Fourth, the payment of claims otherwise proper that were not filed within the prescribed time; and

299 e. Fifth, the payment of any obligation expressly subordinated to claims entitled to the priority  
 300 established by subdivisions a through c.

301 C. A payroll processor closed by action of the Commissioner pursuant to this chapter may bring an  
 302 action challenging the Commissioner's appointment of receiver in the Circuit Court of the City of  
 303 Richmond or of the locality in which the processor transacts business within 10 days after the  
 304 Commissioner appoints a receiver. The court shall uphold the Commissioner's finding that a payroll

305 processor is insolvent or that its condition is such as to render its further proceedings hazardous to the  
306 public or to those having funds in its custody and shall uphold the appointment of a receiver unless the  
307 court finds that the Commissioner's action was arbitrary and capricious.

308 § 59.1-557. Production of records.

309 Commencing upon the expiration of the phase-in period for the payroll processor as prescribed in  
310 § 59.1-558, every payroll processor, upon written request of the Commissioner, shall make available to  
311 the Commissioner its payroll processing records for inspection and copying to enable the Commissioner  
312 to reasonably determine compliance with this chapter. Every payroll processor shall maintain a true  
313 copy of each agreement with its clients for the term of the agreement plus two years.

314 § 59.1-558. Phase-in period.

315 A. The requirements imposed under this chapter on any person that is providing payroll processing  
316 services on July 1, 2009, shall become effective with respect to such person on July 1, 2013.

317 B. The requirements imposed under this chapter on any person that commences providing payroll  
318 processing services after July 1, 2009, shall become effective with respect to such person on the fourth  
319 anniversary of the date that the person commenced providing payroll processing services.

320 § 59.1-559. Violations of chapter; penalty.

321 Any violation of the provisions of this chapter or any payroll processing services agreement executed  
322 therewith shall constitute a prohibited practice pursuant to the provisions of § 59.1-200 and shall be  
323 subject to any and all of the enforcement provisions of the Virginia Consumer Protection Act  
324 (§ 59.1-196 et seq.).