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SENATE BILL NO. 319

Offered January 11, 2012

Prefiled January 10, 2012

A BILL to amend and reenact §§ 60.2-612 and 60.2-618, as it is currently effective and as it may become effective, of the Code of Virginia relating to eligibility for unemployment benefits of individuals testing positive for the use of nonprescribed controlled substances; disqualification for unemployment compensation benefits.

Patrons—Carrico, Black and Ruff

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That §§ 60.2-612 and 60.2-618, as it is currently effective and as it may become effective, of the Code of Virginia are amended and reenacted as follows:

§ 60.2-612. Benefit eligibility conditions.

An unemployed individual shall be eligible to receive benefits for any week only if the Commission finds that:

1. He has, in the highest two quarters of earnings within his base period, been paid wages in employment for employers that are equal to not less than the lowest amount appearing in Column A of the "Benefit Table" appearing in § 60.2-602 on the line which extends through Division C and on which in Column B of the "Benefit Table" appears his weekly benefit amount. Such wages shall be earned in not less than two quarters.

2. a. His total or partial unemployment is not due to a labor dispute in active progress or to shutdown or start-up operations caused by such dispute which exists (i) at the factory, establishment, or other premises, including a vessel, at which he is or was last employed, or (ii) at a factory, establishment or other premises, including a vessel, either within or without this Commonwealth, which (a) is owned or operated by the same employing unit which owns or operates the premises at which he is or was last employed and (b) supplies materials or services necessary to the continued and usual operation of the premises at which he is or was last employed. This subdivision shall not apply if it is shown to the satisfaction of the Commission that:

(1) He is not participating in or financing or directly interested in the labor dispute; and

(2) He does not belong to a grade or class of workers of which, immediately before the commencement of the labor dispute, there were members employed at the premises, including a vessel, at which the labor dispute occurs, any of whom are participating in or financing or directly interested in the dispute.

b. If separate branches of work which are commonly conducted as separate businesses at separate premises are conducted in separate departments of the same premises, each such department shall, for the purposes of this subdivision, be deemed to be a separate factory, establishment or other premises. Membership in a union, or the payment of regular dues to a bona fide labor organization, however, shall not alone constitute financing a labor dispute.

3. He is not receiving, has not received or is not seeking unemployment benefits under an unemployment compensation law of any other state or of the United States; however, if the appropriate agency of such other state or of the United States finally determines that he is not entitled to such unemployment benefits, this subdivision shall not apply.

4. He is not on a bona fide paid vacation. If an individual is paid vacation pay for any week in an amount less than the individual's weekly benefit amount his eligibility for benefits shall be computed under the provisions of § 60.2-603.

5. He has registered for work and thereafter has continued to report at an employment office in accordance with such regulations as the Commission may prescribe. The Commission may, by regulation, waive or alter either or both of the requirements of this subdivision for certain types of cases when it finds that compliance with such requirements would be oppressive, or would be inconsistent with the purposes of this title.

6. He has made a claim for benefits in accordance with regulations the Commission may prescribe.

7. a. He is able to work, is available for work, and is actively seeking and unable to obtain suitable work. Every claimant who is totally unemployed shall report to the Commission the names of employers contacted each week in his effort to obtain work. This information may be subject to employer verification by the Commission through a program designed for that purpose. The Commission may determine that registration by a claimant with the Virginia State Job Service may constitute a valid

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59 employer contact and satisfy the search for work requirement of this subsection in labor market areas
60 where job opportunities are limited. The Commission may determine that an individual, whose usual and
61 customary means of soliciting work in his occupation is through contact with a single hiring hall which
62 makes contacts with multiple employers on behalf of the claimant, meets the requirement that he be
63 actively seeking and unable to obtain suitable work by contacting that hiring hall alone. In areas of high
64 unemployment, as determined by the Commission, the Commission has the authority to adjust the
65 requirement that he be actively seeking and unable to obtain suitable work.

66 *In determining whether an individual is available or unavailable for work:*

67 *b a.* An individual who leaves the normal labor market area of the individual for the major portion
68 of any week is presumed to be unavailable for work within the meaning of this section. This
69 presumption may be overcome if the individual establishes to the satisfaction of the Commission that the
70 individual has conducted a bona fide search for work and has been reasonably accessible to suitable
71 work in the labor market area in which the individual spent the major portion of the week to which the
72 presumption applies.

73 *e b.* An individual whose type of work is such that it is performed by individuals working two or
74 more shifts in a 24-hour period shall not be deemed unavailable for work if the individual is currently
75 enrolled in one or more classes of education related to employment or is continuing in a certificate or
76 degree program at an institution of higher education, provided that the enrollment would only limit the
77 individual's availability for one shift and the individual is otherwise available to work any of the other
78 shifts.

79 *c.* An individual shall not be deemed available for work unless a representative of the Commission
80 has screened the individual to determine whether probable cause exists to believe such individual is
81 engaged in the use of a nonprescribed controlled substance, identified as such in Chapter 34
82 (§ 54.1-3400 et seq.) of Title 54.1. Such screening shall utilize a standardized screening instrument
83 developed by the Commission together with the Department of Behavioral Health and Developmental
84 Services. Screenings shall be performed by a representative of the Commission at the time of
85 application for benefits and periodically thereafter but not more frequently than every six months. A
86 determination during such screening that an individual within the preceding 10 weeks has been
87 disqualified from benefits upon separation from an employing unit on account of misconduct described
88 in subdivision 2 (b) (1) of § 60.2-618 shall constitute probable cause to believe such individual is
89 engaged in the use of a nonprescribed controlled substance. If a screening indicates that there is
90 probable cause to believe that the individual is engaged in the use of a nonprescribed controlled
91 substance, the Commission shall require a formal substance abuse assessment, which may include drug
92 testing to be performed in accordance with a United States Department of Transportation-qualified drug
93 screen or the equivalent. Any individual who fails or refuses to participate in a screening or assessment
94 without good cause or who tests positive for the use of a nonprescribed controlled substance shall be
95 ineligible to receive benefits. Persons deemed ineligible for benefits due to failure or refusal to
96 participate in a screening or assessment or for testing positive for the use of a nonprescribed controlled
97 substance may reapply for benefits after six months have elapsed from the date of ineligibility.

98 8. He has given notice of resignation to his employer and the employer subsequently made the
99 termination of employment effective prior to the date of termination as given in the notice, but in no
100 case shall unemployment compensation benefits awarded under this subdivision exceed two weeks;
101 provided, that the claimant could not establish good cause for leaving work pursuant to § 60.2-618 and
102 was not discharged for misconduct as provided in § 60.2-618.

103 9. Beginning January 6, 1991, he has served a waiting period of one week during which he was
104 eligible for benefits under this section in all other respects and has not received benefits, except that
105 only one waiting week shall be required of such individual within any benefit year. For claims filed
106 effective November 28, 1999, and after, this requirement shall be waived for any individual whose
107 unemployment was caused by his employer terminating operations, closing its business or declaring
108 bankruptcy without paying the final wages earned as required by § 40.1-29 of the Code of Virginia.
109 Notwithstanding any other provision of this title, if an employer who terminates operations, closes its
110 business or declares bankruptcy pays an individual his final wages after the period of time prescribed by
111 § 40.1-29 of the Code of Virginia, such payment shall not be offset against the benefits the individual
112 was otherwise entitled to receive and shall not, under any circumstances, cause such individual to be
113 declared overpaid benefits.

114 10. He is not imprisoned or confined in jail.

115 11. He participates in reemployment services, such as job search assistance services, if he has been
116 determined to be likely to exhaust regular benefits and need reemployment services pursuant to a
117 profiling system established by the Commission, unless the Commission determines that (i) such
118 claimant has completed such services or (ii) there is good cause for such claimant's failure to participate
119 in such services.

120 § 60.2-618. (Contingent expiration date) Disqualification for benefits.

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

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

131 2. a. For any week benefits are claimed until he has performed services for an employer (i) during
132 30 days, whether or not such days are consecutive, or (ii) for 240 hours, and subsequently becomes
133 totally or partially separated from such employment, if the Commission finds such individual is
134 unemployed because he has been discharged for misconduct connected with his work.

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

136 (1) An employee's confirmed positive test for a nonprescribed controlled substance, identified as such
137 in Chapter 34 (§ 54.1-3400 et seq.) of Title 54.1, where such test was conducted at the direction of his
138 employer in conjunction with the employer's administration and enforcement of a known workplace drug
139 policy. Such test shall have been performed, and a sample collected, in accordance with scientifically
140 recognized standards by a laboratory accredited by the United States Department of Health and Human
141 Services, or the College of American Pathology, or the American Association for Clinical Chemistry, or
142 the equivalent, or shall have been a United States Department of Transportation-qualified drug screen
143 conducted in accordance with the employer's bona fide drug policy. ~~The Commission may consider~~
144 ~~evidence of mitigating circumstances in determining whether misconduct occurred~~ Such misconduct also
145 shall disqualify the employee from receiving benefits under this title during the 10 weeks following the
146 date of the employee's confirmed positive test for a nonprescribed controlled substance with respect to
147 any other employment the employee may have had. If an employee is disqualified for benefits pursuant
148 to such misconduct, (i) no benefit paid to the employee with respect to any week of unemployment after
149 the discharge shall be charged to the account of the employer that discharged the employee if the
150 benefit is based upon wages paid to the employee for employment before the discharge by the employer
151 that discharged the employee, and (ii) the employee shall not be eligible for benefits under this title with
152 respect to any other employment he may have had unless, upon applying for benefits at the end of the
153 10-week disqualification period, he passes a United States Department of Transportation-qualified drug
154 screen by testing negative for nonprescribed controlled substances.

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

160 (3) A willful and deliberate violation of a standard or regulation of the Commonwealth, by an
161 employee of an employer licensed or certified by the Commonwealth, which violation would cause the
162 employer to be sanctioned or have its license or certification suspended by the Commonwealth. The
163 Commission may consider evidence of mitigating circumstances in determining whether misconduct
164 occurred.

165 (4) Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or
166 one or more unapproved absences following a written reprimand or warning relating to more than one
167 unapproved absence. The Commission may consider evidence of mitigating circumstances in determining
168 whether misconduct occurred.

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

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

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

181 (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, *(i) fails to appear for a United States Department of Transportation-qualified drug screen after receiving a bona fide offer of suitable employment conditioned upon passage of the drug screen or (ii) 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 required as a condition of employment and (i) that is performed, and for which 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, or (ii) a United States Department of Transportation-qualified drug screen conducted in accordance with the employer's bona fide drug policy. 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 30 days, whether or not such days are consecutive, or (ii) for 240 hours, and subsequently becomes totally or partially separated from such employment until the disqualified individual passes a United States Department of Transportation-qualified drug screen by testing negative for nonprescribed controlled substances.*

4. For 52 weeks, beginning with the date of the determination or decision, if the Commission finds that such individual, within 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 that 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) 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.

§ 60.2-618. (Contingent effective date) Disqualification for benefits.

An individual shall be disqualified for benefits upon separation from the last employing unit for whom he has worked 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 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, except where an individual leaves employment to accompany his or her spouse to the location of the spouse's new duty assignment if (a) the spouse is on active duty in the military or naval services of the United States; (b) the spouse's relocation to a new military-related assignment is pursuant to a permanent change of station order; (c) the location of the spouse's new duty assignment is not readily accessible from the individual's place of employment; and (d) except for members of the Virginia National Guard relocating to a new assignment within the Commonwealth, the spouse's new duty assignment is located in a state that, pursuant to statute, does not deem a person accompanying a military spouse as a person leaving work voluntarily without good cause. 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 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, or shall have been a United States Department of Transportation-qualified drug screen conducted in accordance with the employer's bona fide drug policy. The Commission may consider evidence of mitigating circumstances in determining whether misconduct occurred. Such misconduct also shall disqualify the employee from receiving benefits under this title during the 10 weeks following the date of the employee's confirmed positive test for a nonprescribed controlled substance with respect to any other employment the employee may have had. If an employee is disqualified for benefits pursuant to such misconduct, (i) no benefit paid to the employee with respect to any week of unemployment after the discharge shall be charged to the account of the employer that discharged the employee if the benefit is based upon wages paid to the employee for employment before the discharge by the employer that discharged the employee, and (ii) the employee shall not be eligible for benefits under this title with respect to any other employment he may have had unless, upon applying for benefits at the end of the 10-week disqualification period, he passes a United States Department of Transportation-qualified drug screen by testing negative for nonprescribed controlled substances.

(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 willful and deliberate violation of a standard or regulation of the Commonwealth, by an employee of an employer licensed or certified by the Commonwealth, which violation would cause the employer to be sanctioned or have its license or certification suspended by the Commonwealth. The Commission may consider evidence of mitigating circumstances in determining whether misconduct occurred.

(4) Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence. 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 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, (i) fails to appear for a United States Department of Transportation-qualified drug screen after receiving a bona fide offer of suitable employment conditioned upon passage of the drug screen or (ii) 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 required as a condition of employment and (i) that is performed, and for which 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, or (ii) a United States Department of Transportation-qualified drug screen conducted in accordance with the employer's bona fide drug policy. 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 30 days, whether or not such days are consecutive, or (ii) for 240 hours, and subsequently becomes totally or partially separated from such employment until the disqualified individual passes a United States Department of Transportation-qualified drug screen by testing negative for nonprescribed controlled substances.

305 4. For 52 weeks, beginning with the date of the determination or decision, if the Commission finds
306 that such individual, within 36 calendar months immediately preceding such determination or decision,
307 has made a false statement or representation knowing it to be false, or has knowingly failed to disclose
308 a material fact, to obtain or increase any benefit or payment under this title, the unemployment
309 compensation of any other state, or any other program of the federal government which is administered
310 in any way under this title, either for himself or any other person. Additionally, such individual shall be
311 ineligible for benefits until he has repaid the Commission the sum that has been fraudulently obtained.
312 5. If such separation arose as a result of an unlawful act which resulted in a conviction and after his
313 release from prison or jail until he has performed services for an employer for (i) 30 days, whether or
314 not such days are consecutive, or (ii) 240 hours, and subsequently becomes totally or partially separated
315 from such employment.
316 6. If such separation arose as a condition of the individual's parole or release from a custodial or
317 penal institution and such individual was participating in the Diversion Center Incarceration Program
318 pursuant to § 19.2-316.3.