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SENATE BILL NO. 1120

AMENDMENT IN THE NATURE OF A SUBSTITUTE
(Proposed by the Senate Committee on Commerce and Labor
on January 30, 2017)

(Patron Prior to Substitute—Senator McPike)

A BILL to amend and reenact §§ 65.2-101 and 65.2-102 of the Code of Virginia, relating to workers' compensation; coverage for volunteer firefighters and emergency medical services agency personnel.

Be it enacted by the General Assembly of Virginia:

1. That §§ 65.2-101 and 65.2-102 of the Code of Virginia are amended and reenacted as follows:

§ 65.2-101. Definitions.

As used in this title:

"Average weekly wage" means:

1. a. The earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, divided by 52; but if the injured employee lost more than seven consecutive calendar days during such period, although not in the same week, then the earnings for the remainder of the 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. When the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, provided that results fair and just to both parties will be thereby obtained. When, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

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

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

3. Whenever volunteer firefighters, volunteer emergency medical services personnel, volunteer law-enforcement chaplains, auxiliary or reserve police, auxiliary or reserve deputy sheriffs, members of volunteer search and rescue organizations, volunteer members of community emergency response teams, and volunteer members of medical reserve corps are deemed employees under this title, their average weekly wage shall be deemed sufficient to produce the minimum compensation provided by this title for injured workers or their dependents. For the purposes of workers' compensation insurance premium calculations, the monthly payroll for each volunteer firefighter or volunteer who is an individual who meets the definition of "emergency medical services personnel" in § 32.1-111.1 shall be deemed to be \$300.

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

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

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

"Client company" means any person that enters into an agreement for professional employer services with a professional employer organization.

"Coemployee" means an employee performing services pursuant to an agreement for professional

60 employer services between a client company and a professional employer organization.

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

63 "Employee" means:

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

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

71 c. Members of the Virginia National Guard, whether on duty in a paid or unpaid status or when
72 performing voluntary service to their unit in a nonduty status at the request of their commander.

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

80 d. Members of the Virginia Defense Force.

81 e. Registered members of the United States Civil Defense Corps of the Commonwealth, whether on
82 duty or in training.

83 f. Except as provided in subdivision 2 of this definition, all officers and employees of the
84 Commonwealth, including (i) forest wardens; (ii) judges, clerks, deputy clerks and employees of juvenile
85 and domestic relations district courts and general district courts; and (iii) secretaries and administrative
86 assistants for officers and members of the General Assembly employed pursuant to § 30-19.4 and
87 compensated as provided in the general appropriation act, who shall be deemed employees of the
88 Commonwealth.

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

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

96 i. Policemen and firefighters, sheriffs and their deputies, town sergeants and their deputies, county
97 and city commissioners of the revenue, county and city treasurers, attorneys for the Commonwealth,
98 clerks of circuit courts and their deputies, officers and employees, and electoral board members
99 appointed in accordance with § 24.2-106, who shall be deemed employees of the respective cities,
100 counties and towns in which their services are employed and by whom their salaries are paid or in
101 which their compensation is earnable. However, notwithstanding the foregoing provision of this
102 subdivision, such individuals who would otherwise be deemed to be employees of the city, county, or
103 town in which their services are employed and by whom their salaries are paid or in which their
104 compensation is earnable shall be deemed to be employees of the Commonwealth while rendering aid
105 outside of the Commonwealth pursuant to a request, approved by the Commonwealth, under the
106 Emergency Management Assistance Compact enacted pursuant to § 44-146.28:1.

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

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

114 l. Except as provided in subdivision 2 of this definition, ~~volunteer firefighters, volunteer emergency~~
115 ~~medical services agency personnel, volunteer~~ *Volunteer* law-enforcement chaplains, auxiliary or reserve
116 police, auxiliary or reserve deputy sheriffs, members of volunteer search and rescue organizations,
117 volunteer members of regional hazardous materials emergency response teams, volunteer members of
118 community emergency response teams, and volunteer members of medical reserve corps, who shall be
119 deemed employees of ~~(i) the political subdivision or state public~~ institution of higher education in which
120 the principal office of such ~~volunteer fire company, volunteer emergency medical services agency~~
121 ~~personnel~~, volunteer law-enforcement chaplains, auxiliary or reserve police force, auxiliary or reserve

deputy sheriff force, volunteer search and rescue organization, regional hazardous materials emergency response team, community emergency response team, or medical reserve corps is located if the governing body of such political subdivision or state public institution of higher education has adopted a resolution acknowledging those persons as employees for the purposes of this title or (ii) in the case of volunteer firefighters or volunteer emergency medical services personnel, the fire companies or emergency medical services agencies for which volunteer services are provided whenever such companies or squads elect to be included as an employer under this title.

m. (1) Volunteer firefighters, volunteer emergency medical services agency personnel, volunteer law-enforcement chaplains, auxiliary or reserve police, auxiliary or reserve deputy sheriffs, members of volunteer search and rescue organizations and any other persons who respond to an incident upon request of the Department of Emergency Management, who shall be deemed employees of the Department of Emergency Management for the purposes of this title.

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

(3) *Except as provided in subdivisions (1) and (2), volunteer firefighters and volunteer emergency medical services agency personnel shall be deemed employees for the purposes of this title of the volunteer fire company or volunteer emergency medical services agency for which volunteer services are provided.*

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

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

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

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

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

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

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

r. AmeriCorps members who receive stipends in return for volunteering in local, state and nonprofit agencies in the Commonwealth, who shall be deemed employees of the Commonwealth for the purposes of this title.

s. Food Stamp recipients participating in the work experience component of the Food Stamp Employment and Training Program, who shall be deemed employees of the Commonwealth for the purposes of this title.

t. Temporary Assistance for Needy Families recipients not eligible for Medicaid participating in the work experience component of the Virginia Initiative for Employment Not Welfare Program, who shall be deemed employees of the Commonwealth for the purposes of this title.

2. "Employee" shall does not mean:

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

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

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

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

191 e. Casual employees.

192 f. Domestic servants.

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

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

202 i. Employees of any common carrier by railroad engaging in commerce between any of the several
203 states or territories or between the District of Columbia and any of the states or territories and any
204 foreign nation or nations, and any person suffering injury or death while he is employed by such carrier
205 in such commerce. This title shall not be construed to lessen the liability of any such common carrier or
206 to diminish or take away in any respect any right that any person so employed, or the personal
207 representative, kindred or relation, or dependent of such person, may have under the act of Congress
208 relating to the liability of common carriers by railroad to their employees in certain cases, approved
209 April 22, 1908, or under §§ 8.01-57 through 8.01-62 or § 56-441.

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

214 k. ~~Except as provided in subdivision l of this definition, a member of a volunteer fire department or~~
215 ~~volunteer emergency medical services agency when engaged in activities related principally to~~
216 ~~participation as an individual who meets the definition of "emergency medical services personnel" in~~
217 ~~§ 32.1-111.1 or a member of such fire department whether or not the volunteer continues to receive~~
218 ~~compensation from his employer for time away from the job.~~

219 l. Except as otherwise provided in this title, noncompensated employees and noncompensated
220 directors of (i) corporations exempt from taxation pursuant to § 501(c)(3) of Title 26 of the United
221 States Code (Internal Revenue Code of 1954) or (ii) property owners' associations as defined in
222 § 55-509.

223 m. l. Any person performing services as a sports official for an entity sponsoring an interscholastic
224 or intercollegiate sports event or any person performing services as a sports official for a public entity or
225 a private, nonprofit organization which sponsors an amateur sports event. For the purposes of this
226 subdivision, "sports official" includes an umpire, referee, judge, scorekeeper, timekeeper or other person
227 who is a neutral participant in a sports event. This shall not include any person, otherwise employed by
228 an organization or entity sponsoring a sports event, who performs services as a sports official as part of
229 his regular employment.

230 n. m. Any person who suffers an injury on or after July 1, 2012, for which there is jurisdiction under
231 either the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., and its
232 extensions, or the Merchant Marine Act of 1920, 46 U.S.C. § 30104 et seq. However, this title shall not
233 be construed to eliminate or diminish any right that any person or, in the case of the person's death, his
234 personal representative, may have under either the Longshore and Harbor Workers' Compensation Act,
235 33 U.S.C. § 901 et seq., and its extensions, or the Merchant Marine Act of 1920, 46 U.S.C. § 30104 et
236 seq.

237 o. n. An owner-operator of a motor vehicle that is leased with or to a common or contract carrier in
238 the trucking industry if (i) the owner-operator performs services for the carrier pursuant to a contract
239 that provides that the owner-operator is an independent contractor and shall not be treated as an
240 employee for purposes of the Federal Insurance Contributions Act, 26 U.S.C. § 3101 et seq., Social
241 Security Act of 1935, P.L. 74-271, federal unemployment tax laws, and federal income tax laws and (ii)
242 each of the following factors is present:

243 (1) The owner-operator is responsible for the maintenance of the vehicle;

244 (2) The owner-operator bears the principal burden of the vehicle's operating costs;

(3) The owner-operator is the driver;
 (4) The owner-operator's compensation is based on factors related to the work performed and not on the basis of hours or time expended; and

(5) The owner-operator determines the method and means of performing the service.

"Employer" includes (i) any person, the Commonwealth or any political subdivision thereof and any individual, firm, association or corporation, or the receiver or trustee of the same, or the legal representative of a deceased employer, using the service of another for pay and (ii) ~~any the~~ volunteer fire company or volunteer emergency medical services agency ~~electing to be included and maintaining coverage as an employer under this title, which shall be deemed to be the employer of such company's or agency's volunteer firefighters and volunteer emergency medical services agency personnel.~~ If the employer is insured, it includes his insurer so far as applicable.

"Executive officer" means (i) the president, vice-president, secretary, treasurer or other officer elected or appointed in accordance with the charter and bylaws of a corporation and (ii) the managers elected or appointed in accordance with the articles of organization or operating agreement of a limited liability company. However, "executive officer" does not include (a) noncompensated officers of corporations exempt from taxation pursuant to § 501(c)(3) of Title 26 of the United States Code (Internal Revenue Code of 1954) or (b) noncompensated officers of a property owners' association as such term is defined in § 55-509.

"Filed" means hand delivered to the Commission's office in Richmond or any regional office maintained by the Commission; sent by means of electronic transmission approved by the Commission; sent by facsimile transmission; or posted at any post office of the United States Postal Service by certified or registered mail. Filing by first-class mail, electronic transmission, or facsimile transmission shall be deemed completed only when the document or other material transmitted reaches the Commission or its designated agent.

"Injury" means only injury by accident arising out of and in the course of the employment or occupational disease as defined in Chapter 4 (§ 65.2-400 et seq.) and does not include a disease in any form, except when it results naturally and unavoidably from either of the foregoing causes. Such term shall not include any injury, disease or condition resulting from an employee's voluntary:

1. Participation in employer-sponsored off-duty recreational activities which are not part of the employee's duties; or

2. Use of a motor vehicle that was provided to the employee by a motor vehicle dealer as defined by § 46.2-1500 and bears a dealer's license plate as defined by § 46.2-1550 for (i) commuting to or from work or (ii) any other nonwork activity.

Such term shall include any injury, disease or condition:

1. Arising out of and in the course of the employment of (a) an employee of a hospital as defined in § 32.1-123; (b) an employee of a health care provider as defined in § 8.01-581.1; (c) an employee of the Department of Health or a local department of health; (d) a member of a search and rescue organization; or (e) any person described in clauses (i) through (iv), (vi), and (ix) of subsection A of § 65.2-402.1 otherwise subject to the provisions of this title; and

2. Resulting from (a) the administration of vaccinia (smallpox) vaccine, Cidofivir and derivatives thereof, or Vaccinia Immune Globulin as part of federally initiated smallpox countermeasures, or (b) transmission of vaccinia in the course of employment from an employee participating in such countermeasures to a coemployee of the same employer.

"Professional employer organization" means any person that enters into a written agreement with a client company to provide professional employer services.

"Professional employer services" means services provided to a client company pursuant to a written agreement with a professional employer organization whereby the professional employer organization initially employs all or a majority of a client company's workforce and assumes responsibilities as an employer for all coemployees that are assigned, allocated, or shared by the agreement between the professional employer organization and the client company.

"Staffing service" means any person, other than a professional employer organization, that hires its own employees and assigns them to a client to support or supplement the client's workforce. It includes temporary staffing services that supply employees to clients in special work situations such as employee absences, temporary skill shortages, seasonal workloads, and special assignments and projects.

"Volunteer emergency medical services agency personnel" means a member of a volunteer emergency medical services agency when engaged in activities related principally to participation as an individual who meets the definition of "emergency medical services personnel" in § 32.1-111.1 whether or not the volunteer continues to receive compensation from his employer for time away from the job.

"Volunteer firefighter" means a member of a volunteer fire department or volunteer fire company when engaged in activities related principally to participation as a member of such fire department or fire company whether or not the volunteer continues to receive compensation from his employer for time

306 away from the job.

307 **§ 65.2-102. Coverage of firefighters and law-enforcement officers in off-duty capacity.**

308 A. Notwithstanding any other provision of law, a claim for workers' compensation benefits shall be
309 deemed to be in the course of employment of any firefighter or law-enforcement officer who, in an
310 off-duty capacity or outside an assigned shift or work location, undertakes any law-enforcement or
311 rescue activity. Nothing in this section shall prohibit an employer from using any defense otherwise
312 available under this title.

313 B. For purposes of this section:

314 "Firefighter" means all (i) salaried firefighters, including special forest wardens designated pursuant
315 to § 10.1-1135, emergency medical services personnel, and arson investigators and (ii) volunteer
316 firefighters and emergency medical services personnel, if the governing body of the political subdivision
317 in which the principal office of such volunteer fire company or volunteer emergency medical services
318 agency is located has adopted a resolution acknowledging such volunteer fire company or volunteer
319 emergency medical services agency as employees for purposes of this title.

320 "Law-enforcement officer" means all (i) members of county, city, town, or authority police
321 departments, (ii) sheriffs and deputy sheriffs, (iii) auxiliary or reserve police and auxiliary or reserve
322 deputy sheriffs, if the governing body of the political subdivision in which the principal office of such
323 auxiliary or reserve police and auxiliary or reserve deputy sheriff force is located has adopted a
324 resolution acknowledging such auxiliary or reserve police and auxiliary or reserve deputy sheriffs as
325 employees for purposes of this title, (iv) members of the State Police Officers' Retirement System, and
326 (v) members of the Capitol Police as described in § 30-34.2:1.