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HOUSE BILL NO. 133

Offered January 10, 2018

Prefiled December 19, 2017

A BILL to amend and reenact §§ 58.1-460, 60.2-215, and 65.2-101 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 40.1-2.2, relating to home healthcare workers and home adult day care service providers.

Patron—Cole (By Request)

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That §§ 58.1-460, 60.2-215, and 65.2-101 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 40.1-2.2 as follows:

§ 40.1-2.2. Application of title to home healthcare workers and home adult day care service providers.

The provisions of this title and any rules and regulations promulgated pursuant thereto shall not apply to any individual who contracts to provide home healthcare services or home adult day care services in the private residence of the person receiving such services. For purposes of this title, the individuals providing such services shall be deemed to be independent contractors of the person for whom such services are provided.

§ 58.1-460. Definitions.

For the purposes of this article:

"Employee" includes an individual, whether a resident or a nonresident of the Commonwealth, who performs or performed any service in the Commonwealth for wages, or a resident of the Commonwealth who performs or performed any service in the service outside the Commonwealth for wages. The word "employee" also includes an officer, employee, or elected official of the United States, the Commonwealth, or any other state or any territory, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing or an officer of a corporation. The term shall not include the beneficial owner of an individual retirement account (IRA) or simplified employee pension plan (SEPP). *The term shall not include an individual who performs or performed home healthcare services or home adult day care services in the Commonwealth in the private residence of the person receiving such services pursuant to a contract between such individual and the person receiving such services or his personal representative.*

"Employer" means the Commonwealth, or any political subdivision thereof, the United States, or any agency or instrumentality of any one or more of the foregoing, or the person, whether a resident or a nonresident of the Commonwealth, for whom an individual performs or performed any service as an employee or from whom a person receives a prize in excess of \$5,001 pursuant to the Virginia Lottery Law (§ 58.1-4000 et seq.), except that:

1. If the person, governmental unit, or agency thereof, for whom the individual performs or performed the service does not have control of the payment of the wages for such services, the term "employer" (except as used in the definition of "wages" herein) means the person having control of the payment of such wages, and

2. In the case of a person paying wages on behalf of a nonresident person not engaged in trade or business within the Commonwealth or on behalf of any governmental unit or agency thereof not located within the Commonwealth, the term, "employer" (except as used in the definition of "wages" herein) means such person. The term shall not include a financial institution, corporation, partnership or other person or entity with respect to benefits paid as custodian, trustee or depository for an individual retirement account (IRA) or simplified employee pension plan (SEPP).

"Miscellaneous payroll period" means a payroll period other than a daily, weekly, biweekly, semimonthly, monthly, quarterly, semiannual, or annual payroll period.

"Payroll period" means a period for which a payment of wages is ordinarily made to the employee by his employer.

"Wages" means wages as defined under § 3401 (a) of the Internal Revenue Code, as well as any other amounts from which federal income tax is withheld under the provisions of §§ 3402 and 3405 of the Internal Revenue Code and also includes all prizes in excess of \$5,001 paid by the Virginia Lottery; however, such term shall not include amounts paid pursuant to individual retirement plans and simplified employee pension plans as defined in §§ 7701 (a)(37) and 408 (c) of the Internal Revenue Code and shall not include remuneration paid for acting in or service as a member of the crew of a (i) motion

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59 picture feature film, (ii) television series or commercial, or (iii) promotional film filmed totally or
60 partially in the Commonwealth by an individual or corporation which conducts business in the
61 Commonwealth for less than 90 days of the tax year and when such film, series or commercial is
62 processed, edited and marketed outside the Commonwealth. Every such individual or corporation shall,
63 immediately subsequent to the filming of such portion of the film, series or commercial filmed in the
64 Commonwealth, file with the Commissioner on forms furnished the Department, a list of the names and
65 social security account numbers of each actor or crew member who is a resident of the Commonwealth
66 and is compensated by such individual or corporation.

67 **§ 60.2-215. Domestic employment.**

68 "Employment" includes domestic service performed by an individual in a private home, local college
69 club or local chapter of a college fraternity or sorority for a person who paid wages of \$1,000 or more
70 to individuals employed in such domestic service in any calendar quarter in the current calendar year or
71 the preceding calendar year. The term "domestic service" shall not include any medical services, *home*
72 *healthcare services, or home adult day care services* performed by personnel such as a nurse, nurse's
73 aide, private nurse, practical nurse, student nurse or attendant, *including a home healthcare worker or*
74 *home adult day care service provider*, rendering ~~medical~~ such services in a private residence or a
75 medical institution where such personnel are employed by the person receiving such services.

76 **§ 65.2-101. Definitions.**

77 As used in this title:

78 "Average weekly wage" means:

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

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

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

106 3. Whenever volunteer firefighters, volunteer emergency medical services personnel, volunteer
107 law-enforcement chaplains, auxiliary or reserve police, auxiliary or reserve deputy sheriffs, members of
108 volunteer search and rescue organizations, volunteer members of community emergency response teams,
109 and volunteer members of medical reserve corps are deemed employees under this title, their average
110 weekly wage shall be deemed sufficient to produce the minimum compensation provided by this title for
111 injured workers or their dependents. For the purposes of workers' compensation insurance premium
112 calculations, the monthly payroll for each volunteer firefighter or volunteer who is an individual who
113 meets the definition of "emergency medical services personnel" in § 32.1-111.1 shall be deemed to be
114 \$300.

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

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

120 "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 employer services between a client company and a professional employer organization.

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

"Employee" means:

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

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

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

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

d. Members of the Virginia Defense Force.

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

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

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

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

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

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

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

l. Except as provided in subdivision 2 of this definition, volunteer firefighters, volunteer emergency medical services agency personnel, volunteer law-enforcement chaplains, auxiliary or reserve police,

182 auxiliary or reserve deputy sheriffs, members of volunteer search and rescue organizations, volunteer
183 members of regional hazardous materials emergency response teams, volunteer members of community
184 emergency response teams, and volunteer members of medical reserve corps, who shall be deemed
185 employees of (i) the political subdivision or public institution of higher education in which the principal
186 office of such volunteer fire company, volunteer emergency medical services agency personnel,
187 volunteer law-enforcement chaplains, auxiliary or reserve police force, auxiliary or reserve deputy sheriff
188 force, volunteer search and rescue organization, regional hazardous materials emergency response team,
189 community emergency response team, or medical reserve corps is located if the governing body of such
190 political subdivision or public institution of higher education has adopted a resolution acknowledging
191 those persons as employees for the purposes of this title or (ii) in the case of volunteer firefighters or
192 volunteer emergency medical services personnel, the fire companies or emergency medical services
193 agencies for which volunteer services are provided whenever such companies or squads elect to be
194 included as an employer under this title.

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

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

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

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

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

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

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

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

224 q. Jail officers and jail superintendents employed by regional jails or jail farm boards or authorities,
225 whether created pursuant to Article 3.1 (§ 53.1-95.2 et seq.) or Article 5 (§ 53.1-105 et seq.) of Chapter
226 3 of Title 53.1, or an act of assembly.

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

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

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

236 2. "Employee" shall not mean:

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

242 b. Officers and employees of municipal corporations and political subdivisions of the Commonwealth
243 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.

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

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

e. Casual employees.

f. Domestic servants.

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

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

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

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

k. Except as provided in subdivision 1 of this definition, a member of a volunteer fire department or 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 or a member of such fire department whether or not the volunteer continues to receive compensation from his employer for time away from the job.

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

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

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

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

(1) The owner-operator is responsible for the maintenance of the vehicle;
(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.
p. Home healthcare workers or home adult day care service providers who render such services in the private residence of the person receiving such services.

"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 volunteer fire company or volunteer emergency medical services agency electing to be included and maintaining coverage as an employer under this title. 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.