

Department of Planning and Budget 2018 Fiscal Impact Statement

1. **Bill Number:** HB133

House of Origin	<input checked="" type="checkbox"/>	Introduced	<input type="checkbox"/>	Substitute	<input type="checkbox"/>	Engrossed
Second House	<input type="checkbox"/>	In Committee	<input type="checkbox"/>	Substitute	<input type="checkbox"/>	Enrolled

2. **Patron:** Cole

3. **Committee:** Commerce and Labor

4. **Title:** Employees; exclusions for home healthcare workers and home adult day care service providers.

5. **Summary:** Provides that home healthcare workers and home adult day care service providers are not employees for purposes of labor and employment laws, unemployment compensation, workers' compensation, and state income tax withholding.

6. **Budget Amendment Necessary:** No. See Item 8, below.

7. **Fiscal Impact Estimates:** Preliminary. See Item 8, below.

7a. Expenditure Impact, Virginia Employment Commission:

<i>Fiscal Year</i>	<i>Dollars</i>	<i>Positions</i>	<i>Fund</i>
2018	0	0	n/a
2019	(\$2,070,000)	0	NGF
2020	(\$2,190,000)	0	NGF
2021	(\$2,250,000)	0	NGF
2022	(\$2,300,000)	0	NGF
2023	(\$2,370,000)	0	NGF
2024	(\$2,430,000)	0	NGF

7b. Revenue Impact, Virginia Employment Commission:

<i>Fiscal Year</i>	<i>Dollars</i>	<i>Fund</i>
2018	0	n/a
2019	(\$1,440,000)	NGF
2020	(\$1,460,000)	NGF
2021	(\$1,540,000)	NGF
2022	(\$1,680,000)	NGF
2023	(\$1,760,000)	NGF
2024	(\$1,810,000)	NGF

8. **Fiscal Implications:** It is anticipated that this bill will have a nongeneral fund revenue and expenditure impact on the Virginia Employment Commission. Additionally, it is anticipated that this bill will have an indeterminate general fund revenue impact. It is anticipated that any impact to the Departments of Labor and Industry and Taxation can be absorbed with existing resources. Any impact the bill may have on the Workers Compensation Commission is unknown.

Virginia Employment Commission:

The Virginia Employment Commission (VEC) anticipates that this bill will result in a reduction in the payment of unemployment benefits and a reduction in unemployment taxes that would be collected.

In calendar year 2016, the number of people that were employed in private home health care services was 28,407. These individuals were in covered employment as defined in § 60.2-215, Code of Virginia. If individuals who provide private home health care services are excluded from covered employment, these individuals would no longer be eligible for unemployment benefits related to that employment. Therefore, based on benefits paid in 2016 for that industry, VEC anticipates a reduction in unemployment benefit payments as reflected in the first table.

In calendar year 2016, there were 942 private home health care establishments in the Commonwealth. Based on the average tax rate, those establishments paid \$2.2 million dollars in state unemployment taxes for that year. If their employees are excluded from covered employment, those establishments would no longer pay state unemployment taxes resulting in a reduction in revenue for the Unemployment Trust Fund as reflected in the second table.

Department of Labor and Industry:

The Department of Labor and Industry (DOLI) anticipates that this bill will have little impact on DOLI's occupational safety and health inspections. The bill will impact wage claimants affected by the legislation; however, DOLI anticipates that any potential impact can be absorbed within existing resources.

Department of Taxation:

The Department of Taxation (TAX) anticipates that the changes required by this bill can be implemented as part of the annual changes to TAX's systems and forms.

This bill would have an indeterminate general fund revenue impact. An individual who performs home healthcare services or home adult day care services in a private residence is likely considered either a household employee or an independent contractor under current law. An independent contractor is generally required to make quarterly estimated payments. A household employer who withholds taxes from the wages of a household employer under federal law is generally required to withhold taxes at the state level, although Virginia allows the payment of such withholding on an annual basis. This bill would provide that an individual who performs home healthcare services or home adult day care services in a private residence would be an independent contractor and not a household employee. This would generally require such individuals to make estimated payments of their state income taxes, unless the person receiving the services enters into an agreement with the worker to voluntarily withhold taxes.

Virginia Workers' Compensation Commission:

The Virginia Workers' Compensation Commission (VWC) cannot identify the scope of which the National Association of Insurance Commissioners (NAIC) class codes would be included under the provisions of this bill. In order to determine VWC's fiscal impact on tax revenue, VWC would need to have these class codes identified. Additionally, VWC would also need to know whether those persons who contract with entities who have more than three employees providing the care are excluded under the bill and therefore not subject to tax.

- 9. Specific Agency or Political Subdivisions Affected:** Department of Labor and Industry; Department of Taxation; Virginia Employment Commission; Virginia Workers' Compensation Commission.

- 10. Technical Amendment Necessary:** No.

11. Other Comments:

Department of Taxation:

Current Law: For federal tax purposes, individuals who work in a private home are generally treated as either independent contractors or household employees. The determination of whether a service provider is an independent contractor or household employee depends on a number of factors regarding the relationship between the parties and the degree of behavioral control and financial control exercised over the service provider. If the service provider is considered an independent contractor, then the party receiving the services is not required to pay Social Security, Medicare, or federal unemployment insurance taxes. Such service provider is generally required to make estimated payments of any tax due.

If a service provider is considered a household employee, then the party receiving the services is generally required to pay Social Security, Medicare, and federal unemployment insurance taxes. The party receiving services can voluntarily withhold income tax if the service provider requests that they do so. If the party receiving the services agrees to the request and withholds income tax, that party must pay the withheld income tax over to the Internal Revenue Service on a periodic basis throughout the year.

A household employer who withholds taxes from the wages of a household employer under federal law is generally required to withhold taxes at the state level, although Virginia allows the payment of such withholding on an annual basis. Virginia formerly conformed to federal law and required the party receiving services to pay withheld state income tax to the Department on a periodic basis throughout the year. However, during its 2013 Session, the General Assembly enacted legislation to allow the party receiving services to pay withheld income tax to the Department on an annual basis.

Nine states (Arkansas, California, Georgia, Louisiana, Mississippi, Oklahoma, Oregon, South Carolina, and Wisconsin) exempt remuneration paid for domestic service from the definition of wages, and two others (Arizona and Ohio) specifically exclude remuneration paid for domestic services from withholding.

Proposed Legislation: This bill would provide that an individual who performs home healthcare services or home adult day care services in Virginia is not an employee for income tax withholding purposes if the individual performs the services in the private residence of the person receiving the services pursuant to a contract between such individual and the person receiving such services or his or her personal representative.

This bill would also define healthcare providers and day care providers as independent contractors and exempt them from Virginia's labor laws; unemployment compensation laws; and worker's compensation laws.

Virginia Employment Commission:

This bill would exclude from the definition of employment "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."

While such services are not required to be covered if they are not performed in an employment relationship with a governmental entity, Indian tribe, or 501(c)(3), non-profit organization, there is no exemption for such services under the Federal Unemployment Tax Act (FUTA). Therefore, if such services are considered employment by the IRS, and they are not covered under the state law, the individual who employs the home health care provider or adult day care provider would be responsible for the full FUTA tax of 6.0 percent on the first \$7,000 in wages without benefit of any credit against the tax.

For purposes of Federal coverage, § 3306(i), FUTA, defines "employee" by referring to the common law test found in § 3121(d) of the Internal Revenue Code (IRC). Section 3121(d)(2), IRC, specifies that employee means "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." Regulations implementing § 3306(i), FUTA, are found at 26 C.F.R. 31.3306(i)-1. These regulations specify that an individual is an employee if the relationship between the individual and the person for whom services are performed has the legal relationship of employer and employee:

Generally, such a relationship exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to the results to be accomplished by the work but also as to the details and means by which that result is accomplished.

The regulations explain that "it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if [the employer] has the right to do so." Concerning independent contractors, the regulations are not permissive; if an employer-employee relationship exists, "it is of no consequence that the employee is designated as a partner, co-adventurer, agent, independent contractor, or the like." Thus, the basic determinant of whether or not service is performed by an independent contractor is the right of direction and control, whether or not it is exercised.

If the individual is considered to be an employee under the IRS test, but not an employee under state UC law, and therefore not subject to coverage under the state law, the employer (the individual for whom the services are provided) will be subject to the full FUTA tax.

Therefore, if this bill, as introduced becomes law, affected employers would no longer be eligible to receive the 90 percent credit for Federal Unemployment Tax (FUTA) taxes (\$42) per employee and would pay the full FUTA tax of \$420 per employee. Based on 2016 payments, without the credit, the projected federal taxes for employers would be as follows:

<i>Fiscal Year</i>	<i>Dollars</i>	<i>Fund</i>
2018	0	n/a
2019	\$11,025,000	Federal
2020	\$11,138,000	Federal
2021	\$11,242,000	Federal
2022	\$11,297,000	Federal
2023	\$11,359,000	Federal
2024	\$11,425,000	Federal