

VIRGINIA ACTS OF ASSEMBLY -- 2020 SESSION

CHAPTER 682

An Act to amend and reenact §§ 2.2-4321, 2.2-4343, 58.1-1821, and 58.1-1825 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 58.1-3.4 and by adding in Title 58.1 a chapter numbered 19, consisting of sections numbered 58.1-1900 through 58.1-1905, relating to misclassification of employees as independent contractors; Department of Taxation to investigate and enforce; civil penalties.

[S 744]

Approved April 6, 2020

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4321, 2.2-4343, 58.1-1821, and 58.1-1825 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 58.1-3.4 and by adding in Title 58.1 a chapter numbered 19, consisting of sections numbered 58.1-1900 through 58.1-1905, as follows:

§ 2.2-4321. Debarment.

A. Prospective contractors may be debarred from contracting for particular types of supplies, services, insurance or construction, for specified periods of time. Any debarment procedure shall be established in writing for state agencies and institutions by the agency designated by the Governor and for political subdivisions by their governing bodies. Any debarment procedure may provide for debarment on the basis of a contractor's unsatisfactory performance for a public body.

B. *In addition, a prospective contractor shall be debarred from contracting with all public bodies and covered institutions whenever the Tax Commissioner so determines pursuant to § 58.1-1902.*

As used in this section, "covered institution" means a public institution of higher education operating (i) subject to a management agreement set forth in Article 4 (§ 23.1-1004 et seq.) of Chapter 10 of Title 23.1, (ii) under a memorandum of understanding pursuant to § 23.1-1003, or (iii) under the pilot program authorized in the appropriation act.

§ 2.2-4343. Exemption from operation of chapter for certain transactions.

A. The provisions of this chapter shall not apply to:

1. The Virginia Port Authority in the exercise of any of its powers in accordance with Chapter 10 (§ 62.1-128 et seq.) of Title 62.1, provided the Authority implements, by policy or regulation adopted by the Board of Commissioners, procedures to ensure fairness and competitiveness in the procurement of goods and services and in the administration of its capital outlay program. This exemption shall be applicable only so long as such policies and procedures meeting the requirements remain in effect.

2. The Virginia Retirement System for selection of services related to the management, purchase or sale of authorized investments, actuarial services, and disability determination services. Selection of these services shall be governed by the standard set forth in § 51.1-124.30.

3. The State Treasurer in the selection of investment management services related to the external management of funds shall be governed by the standard set forth in § 2.2-4514, and shall be subject to competitive guidelines and policies that are set by the Commonwealth Treasury Board and approved by the Department of General Services.

4. The Department of Social Services or local departments of social services for the acquisition of motor vehicles for sale or transfer to Temporary Assistance to Needy Families (TANF) recipients.

5. The College of William and Mary in Virginia, Virginia Commonwealth University, the University of Virginia, and Virginia Polytechnic Institute and State University in the selection of services related to the management and investment of their endowment funds, endowment income, gifts, all other nongeneral fund reserves and balances, or local funds of or held by the respective public institution of higher education pursuant to § 23.1-2210, 23.1-2306, 23.1-2604, or 23.1-2803. However, selection of these services shall be governed by the Uniform Prudent Management of Institutional Funds Act (§ 64.2-1100 et seq.) as required by §§ 23.1-2210, 23.1-2306, 23.1-2604, and 23.1-2803.

6. The Board of the Virginia College Savings Plan for the selection of services related to the operation and administration of the Plan, including, but not limited to, contracts or agreements for the management, purchase, or sale of authorized investments or actuarial, record keeping, or consulting services. However, such selection shall be governed by the standard set forth in § 23.1-706.

7. Public institutions of higher education for the purchase of items for resale at retail bookstores and similar retail outlets operated by such institutions. However, such purchase procedures shall provide for competition where practicable.

8. The purchase of goods and services by agencies of the legislative branch that may be specifically exempted therefrom by the Chairman of the Committee on Rules of either the House of Delegates or the Senate. Nor shall the contract review provisions of § 2.2-2012 apply to such procurements. The

exemption shall be in writing and kept on file with the agency's disbursement records.

9. Any town with a population of less than 3,500, except as stipulated in the provisions of §§ 2.2-4305, 2.2-4311, 2.2-4315, 2.2-4330, 2.2-4333 through 2.2-4338, 2.2-4343.1, and 2.2-4367 through 2.2-4377 and Chapter 43.1 (§ 2.2-4378 et seq.).

10. Any county, city or town whose governing body has adopted, by ordinance or resolution, alternative policies and procedures which are (i) based on competitive principles and (ii) generally applicable to procurement of goods and services by such governing body and its agencies, except as stipulated in subdivision 12.

This exemption shall be applicable only so long as such policies and procedures, or other policies and procedures meeting the requirements of § 2.2-4300, remain in effect in such county, city or town. Such policies and standards may provide for incentive contracting that offers a contractor whose bid is accepted the opportunity to share in any cost savings realized by the locality when project costs are reduced by such contractor, without affecting project quality, during construction of the project. The fee, if any, charged by the project engineer or architect for determining such cost savings shall be paid as a separate cost and shall not be calculated as part of any cost savings.

11. Any school division whose school board has adopted, by policy or regulation, alternative policies and procedures that are (i) based on competitive principles and (ii) generally applicable to procurement of goods and services by the school board, except as stipulated in subdivision 12.

This exemption shall be applicable only so long as such policies and procedures, or other policies or procedures meeting the requirements of § 2.2-4300, remain in effect in such school division. This provision shall not exempt any school division from any centralized purchasing ordinance duly adopted by a local governing body.

12. Notwithstanding the exemptions set forth in subdivisions 9 through 11, the provisions of subsections B, C, and D of § 2.2-4303, §§ 2.2-4305, 2.2-4311, 2.2-4315, 2.2-4317, 2.2-4330, 2.2-4333 through 2.2-4338, 2.2-4342, 2.2-4343.1, and 2.2-4367 through 2.2-4377, and Chapter 43.1 (§ 2.2-4378 et seq.), and § 58.1-1902 shall apply to all counties, cities, and school divisions; and to all towns having a population greater than 3,500 in the Commonwealth.

The method for procurement of professional services through competitive negotiation set forth in §§ 2.2-4302.2, 2.2-4303.1, and 2.2-4303.2 shall also apply to all counties, cities, and school divisions, and to all towns having a population greater than 3,500, where the cost of the professional service is expected to exceed \$80,000 in the aggregate or for the sum of all phases of a contract or project. A school board that makes purchases through its public school foundation or purchases educational technology through its educational technology foundation, either as may be established pursuant to § 22.1-212.2:2 shall be exempt from the provisions of this chapter, except, relative to such purchases, the school board shall comply with the provisions of §§ 2.2-4311 and 2.2-4367 through 2.2-4377.

13. A public body that is also a utility operator may purchase services through or participate in contracts awarded by one or more utility operators that are not public bodies for utility marking services as required by the Underground Utility Damage Prevention Act (§ 56-265.14 et seq.). A purchase of services under this subdivision may deviate from the procurement procedures set forth in this chapter upon a determination made in advance by the public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, and the contract is awarded based on competitive principles.

14. Procurement of any construction or planning and design services for construction by a Virginia nonprofit corporation or organization not otherwise specifically exempted when (i) the planning, design or construction is funded by state appropriations of \$10,000 or less or (ii) the Virginia nonprofit corporation or organization is obligated to conform to procurement procedures that are established by federal statutes or regulations, whether those federal procedures are in conformance with the provisions of this chapter.

15. Purchases, exchanges, gifts or sales by the Citizens' Advisory Council on Furnishing and Interpreting the Executive Mansion.

16. The Eastern Virginia Medical School in the selection of services related to the management and investment of its endowment and other institutional funds. The selection of these services shall, however, be governed by the Uniform Prudent Management of Institutional Funds Act (§ 64.2-1100 et seq.).

17. The Department of Corrections in the selection of pre-release and post-incarceration services and the Department of Juvenile Justice in the selection of pre-release and post-commitment services.

18. The University of Virginia Medical Center to the extent provided by subdivision A 3 of § 23.1-2213.

19. The purchase of goods and services by a local governing body or any authority, board, department, instrumentality, institution, agency or other unit of state government when such purchases are made under a remedial plan established by the Governor pursuant to subsection C of § 2.2-4310 or by a chief administrative officer of a county, city or town pursuant to § 15.2-965.1.

20. The contract by community services boards or behavioral health authorities with an administrator or management body pursuant to a joint agreement authorized by § 37.2-512 or 37.2-615.

21. [Expired].

22. The purchase of Virginia-grown food products for use by a public body where the annual cost of the product is not expected to exceed \$100,000, provided that the procurement is accomplished by (i) obtaining written informal solicitation of a minimum of three bidders or offerors if practicable and (ii) including a written statement regarding the basis for awarding the contract.

23. The Virginia Industries for the Blind when procuring components, materials, supplies, or services for use in commodities and services furnished to the federal government in connection with its operation as an AbilityOne Program-qualified nonprofit agency for the blind under the Javits-Wagner-O'Day Act, 41 U.S.C. §§ 8501-8506, provided that the procurement is accomplished using procedures that ensure that funds are used as efficiently as practicable. Such procedures shall require documentation of the basis for awarding contracts. Notwithstanding the provisions of § 2.2-1117, no public body shall be required to purchase such components, materials, supplies, services, or commodities.

B. Where a procurement transaction involves the expenditure of federal assistance or contract funds, the receipt of which is conditioned upon compliance with mandatory requirements in federal laws or regulations not in conformance with the provisions of this chapter, a public body may comply with such federal requirements, notwithstanding the provisions of this chapter, only upon the written determination of the Governor, in the case of state agencies, or the governing body, in the case of political subdivisions, that acceptance of the grant or contract funds under the applicable conditions is in the public interest. Such determination shall state the specific provision of this chapter in conflict with the conditions of the grant or contract.

§ 58.1-3.4. Tax Commissioner's authority to request and share information regarding employer worker reclassification.

Notwithstanding the provisions of § 58.1-3, the Tax Commissioner is authorized to work and share information with the following agencies to identify employers who fail to properly classify individuals as employees pursuant to the provisions of Chapter 19 (§ 58.1-1900 et seq.) and to enforce the provisions of Chapters 3 (§ 58.1-300 et seq.) and 19: the Department of Labor and Industry, the Virginia Employment Commission, the Department of Small Business and Supplier Diversity, the Department of General Services, the Workers' Compensation Commission, and the Department of Professional and Occupational Regulation. If any such agency has reason to believe that an employer has failed to properly classify individuals as employees in violation of Chapter 19, it shall notify the Department. Except as otherwise provided by law, such agencies shall share with the Department any information that may assist the Department in enforcing the provisions of Chapters 3 and 19.

§ 58.1-1821. Application to Tax Commissioner for correction.

Any person assessed with any tax administered by the Department of Taxation may, within ninety days from the date of such assessment, apply for relief to the Tax Commissioner. Such application shall be in the form prescribed by the Department, and shall fully set forth the grounds upon which the taxpayer relies and all facts relevant to the taxpayer's contention. The Tax Commissioner may also require such additional information, testimony or documentary evidence as he deems necessary to a fair determination of the application. Any person aggrieved by an action by the Department with respect to a transferred credit or other tax attribute may apply for relief under this section or request to join an application already filed by another person assessed with tax or aggrieved by an action with respect to the same credit or other tax attribute. *Any person aggrieved by an action by the Department with respect to debarment pursuant to § 58.1-1902 may apply for relief under this section.* Notwithstanding the provisions of § 58.1-3, the Tax Commissioner shall have the discretion to permit the joinder of a party or consolidate proceedings on applications filed by different taxpayers if the interest of the party or the applications involve adjustments to credits or other tax attributes arising from the same transaction or occurrence, provided that no interests are prejudiced and the joinder or consolidation advances administrative economy.

On receipt of a notice of intent to file under this section, the Tax Commissioner shall refrain from collecting the tax until the time for filing hereunder has expired, unless he determines that collection is in jeopardy.

Any person whose tax assessment has been improperly collected by the Department may apply hereunder to assert a claim that any amount so collected was exempt from process.

The initial assessment of any tax administered by the Department of Taxation shall include a notice to the taxpayer that specifies all of the taxpayer's rights under this section, including but not limited to the right to have the Tax Commissioner refrain from collecting the tax upon the Commissioner's receipt from the taxpayer of a notice of intent to file for relief under this section.

§ 58.1-1825. Application to court for correction of erroneous or improper assessments of state taxes generally.

A. Any person assessed with any tax administered by the Department of Taxation and aggrieved by any such assessment, or aggrieved by an action by the Department with respect to a transferred credit or other tax attribute, *or aggrieved by an action by the Department with respect to debarment pursuant to § 58.1-1902*, may, unless otherwise specifically provided by law, within (i) three years from the date such assessment is made or (ii) one year from the date of the Tax Commissioner's determination under § 58.1-1822, whichever is later, apply to a circuit court for relief. The venue for such proceeding shall

be as specified in subdivision 13 b of § 8.01-261. The application shall be before the court when it is filed in the clerk's office.

B. Except as provided in subsection C, the court shall require the applicant to pay the assessment before proceeding with its application upon granting a motion by the Tax Commissioner seeking to compel such payment and showing to the satisfaction of the court that the Department is likely to prevail on the merits of the case, that the application is (i) not well grounded in fact; (ii) not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (iii) interposed for an improper purpose, such as to harass, to cause unnecessary delay in the collection of the revenue, or to create needless cost to the Commonwealth from the litigation; or (iv) otherwise frivolous.

C. In lieu of the payment required in subsection B, the taxpayer may, within 60 days of the court's ruling, (i) post a bond pursuant to the provisions of § 16.1-107, with a corporate surety licensed to do business in Virginia, or (ii) file an irrevocable letter of credit satisfactory to the Tax Commissioner as to the bank or savings institution, the form and substance, and payable to the Commonwealth in the face amount of the contested assessment increased by twice the interest rate for underpayments published by the Department and in effect at the time the application is filed. The letter of credit shall be from a bank incorporated or authorized to conduct banking business under the laws of this Commonwealth or authorized to do business in this Commonwealth under the banking laws of the United States, or a federally insured savings institution located in this Commonwealth. Such bond or irrevocable letter of credit shall be conditioned upon payment by the applicant of the amount of the taxes, penalty and interest ordered by the court pursuant to § 58.1-1826, if any.

D. Any person whose assessment has been improperly collected from property exempt from process may within three years from the date such assessment is made, or if later, within one year of the Tax Commissioner's decision on a process exemption claim under § 58.1-1821 apply to a circuit court for relief. The venue for such proceeding shall be as specified in subdivision 13 b of § 8.01-261.

The Department shall be named as defendant, and the proceedings shall be conducted as an action at law before the court sitting without a jury. It shall be the burden of the applicant in any such proceeding to show that the assessment or collection or action on a transferred credit or other tax attribute complained of is erroneous or otherwise improper. The court's order shall be entered pursuant to § 58.1-1826.

E. Nothing in this section shall prevent the Tax Commissioner from collecting the assessment if he determines that collection is in jeopardy.

CHAPTER 19.

WORKER MISCLASSIFICATION.

§ 58.1-1900. Classification of employees.

A. For the purposes of this title and Title 40.1, Title 60.2, and Title 65.2, if an individual performs services for an employer for remuneration, that individual shall be considered an employee of the party that pays that remuneration unless such individual or his employer demonstrates that such individual is an independent contractor. The Department shall determine whether an individual is an independent contractor by applying Internal Revenue Service guidelines.

B. Unless otherwise provided in this chapter, the Department shall administer this chapter according to the provisions of Article 16 (§ 58.1-460 et seq.) of Chapter 3, *mutatis mutandis*.

C. For the purposes of this chapter, all occurrences of misclassification of employees as described hereinafter made by the same employer at the same time, or within 72 hours, shall be deemed to be a single offense.

§ 58.1-1901. Civil penalties.

Any employer, or any officer or agent of the employer, that fails to properly classify an individual as an employee in accordance with § 58.1-1900 for purposes of this title, Title 40.1, Title 60.2, or Title 65.2 and fails to pay taxes, benefits, or other contributions required to be paid with respect to an employee shall, upon notice by the Department to the affected party, be subject to a civil penalty of up to \$1,000 per misclassified individual for a first offense, up to \$2,500 per misclassified individual for a second offense, and up to \$5,000 per misclassified individual for a third or subsequent offense. Each civil penalty assessed under this chapter shall be paid into the general fund.

§ 58.1-1902. Debarment; civil penalty.

A. Whenever the Department determines, after notice to the employer, that an employer failed to properly classify an individual as an employee under the provisions of § 58.1-1900, the Department shall notify all public bodies and covered institutions of the name of the employer.

B. Upon an employer's subsequent violations of subsection A, all public bodies and covered institutions shall not award a contract to such employer or to any firm, corporation, or partnership in which the employer has an interest in the following manner:

1. For a period of up to one year, as determined by the Department, from the date of the notice for a second offense.

2. For a period of up to three years, as determined by the Department, from the date of the notice for a third or subsequent offense.

§ 58.1-1903. Certain agreements prohibited.

No person shall require or request that an individual enter into an agreement or sign a document that results in the misclassification of the individual as an independent contractor or otherwise does not accurately reflect the relationship with the employer.

§ 58.1-1904. Unlawful acts.

It shall be unlawful for an employer or any other party to discriminate in any manner or take adverse action against any person in retaliation for exercising rights protected under this chapter.

§ 58.1-1905. Reporting.

The Department shall report annually to the Governor and the General Assembly regarding compliance with and enforcement of this chapter. The Department's report shall include information regarding the number of investigated reports of worker misclassification; the findings of such reports; the amount of combined tax, interest, and fines collected; the number of referrals to the Department of Labor and Industry, Virginia Employment Commission, Department of Small Business and Supplier Diversity, Virginia Workers' Compensation Commission, and Department of Professional and Occupational Regulation; and the number of notifications of failure to properly classify to all public bodies and institutions.

2. That the Department of Taxation shall develop guidelines implementing the provisions of this act. Such guidelines shall be exempt from the provisions of the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia).

3. That the provisions of this act shall become effective on January 1, 2021.