

20105005D

**SENATE BILL NO. 804**

Offered January 8, 2020

Prefiled January 8, 2020

A *BILL to amend and reenact §§ 2.2-3903, 40.1-2, 40.1-28.9, 40.1-29, 40.1-49.3, 40.1-49.8, 60.2-201, 60.2-215, 60.2-219, 65.2-101, and 65.2-305 of the Code of Virginia, relating to employees providing domestic service; application of laws applicable to employment, unemployment benefits, and workers' compensation.*

Patrons—McClellan, Edwards, Hashmi and Spruill

Referred to Committee on Commerce and Labor

**Be it enacted by the General Assembly of Virginia:**

1. That §§ 2.2-3903, 40.1-2, 40.1-28.9, 40.1-29, 40.1-49.3, 40.1-49.8, 60.2-201, 60.2-215, 60.2-219, 65.2-101, and 65.2-305 of the Code of Virginia are amended and reenacted as follows:

**§ 2.2-3903. Causes of action not created.**

A. Nothing in this chapter or in Article 4 (§ 2.2-520 et seq.) of Chapter 5 creates, nor shall it be construed to create, an independent or private cause of action to enforce its provisions, except as specifically provided in subsections B and C.

B. No employer ~~employing more than five but less than 15 persons~~ shall discharge any such employee on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, including lactation. No employer ~~employing more than five but less than 20 persons~~ shall discharge any such employee on the basis of age if the employee is 40 years of age or older. For the purposes of this section, "lactation" means a condition that may result in the feeding of a child directly from the breast or the expressing of milk from the breast.

C. The employee may bring an action in a general district or circuit court having jurisdiction over the employer who allegedly discharged the employee in violation of this section. Any such action shall be brought within 300 days from the date of the discharge or, if the employee has filed a complaint with the Division of Human Rights of the Department of Law or a local human rights or human relations agency or commission within 300 days of the discharge, such action shall be brought within 90 days from the date that the Division or a local human rights or human relations agency or commission has rendered a final disposition on the complaint. The court may award up to 12 months' back pay with interest at the judgment rate as provided in § 6.2-302. However, if the court finds that either party engaged in tactics to delay resolution of the complaint, it may (i) diminish the award or (ii) award back pay to the date of judgment without regard to the 12-month limitation.

In any case where the employee prevails, the court shall award attorney fees from the amount recovered, not to exceed 25 percent of the back pay awarded. The court shall not award other damages, compensatory or punitive, nor shall it order reinstatement of the employee.

D. Causes of action based upon the public policies reflected in this chapter shall be exclusively limited to those actions, procedures, and remedies, if any, afforded by applicable federal or state civil rights statutes or local ordinances. Nothing in this section or § 2.2-3900 shall be deemed to alter, supersede, or otherwise modify the authority of the Division or of any local human rights or human relations commissions established pursuant to § 15.2-853 or 15.2-965.

**§ 40.1-2. Definitions.**

As used in this title, unless the context clearly requires otherwise, the following terms have the following meanings:

"Board" means the Safety and Health Codes Board.

"Business establishment" means any proprietorship, firm or corporation where people are employed, permitted or suffered to work, including agricultural employment on a farm.

"Commission" means the Safety and Health Codes Board.

"Commissioner" means the Commissioner of Labor and Industry. Except where the context clearly indicates the contrary, any reference to "Commissioner" shall include his authorized representatives.

"Department" means the Department of Labor and Industry.

"Domestic service" means services related to the care of an individual in a private home or the maintenance of a private home or its premises, on a permanent or temporary basis, including services performed by individuals such as companions, cooks, waiters, butlers, maids, valets, and chauffeurs.

"Employ" shall include to permit or suffer to work.

"Employee" means any person who, in consideration of wages, salaries or commissions, may be permitted, required or directed by any employer to engage in any employment directly or indirectly.

INTRODUCED

SB804

59 "Employer" means an individual, partnership, association, corporation, legal representative, receiver,  
60 trustee, or trustee in bankruptcy doing business *or engaging an individual to perform domestic service*,  
61 in or operating within this Commonwealth who employs another to work for wages, salaries, or on  
62 commission and shall include any similar entity acting directly or indirectly in the interest of an  
63 employer in relation to an employee.

64 "Female" or "woman" means a female 18 years of age or over.

65 "Machinery" means machines, belts, pulleys, motors, engines, gears, vats, pits, elevators, conveyors,  
66 shafts, tunnels, including machinery being operated on farms in connection with the production or  
67 harvesting of agricultural products.

68 **§ 40.1-28.9. Definitions; determining wage of tipped employee.**

69 A. As used in this article:

70 "Employee" includes any individual employed by an employer, except the following:

71 1. Any person employed as a farm laborer or farm employee;

72 2. Any person employed ~~in domestic service or in or about a private home or~~ in an eleemosynary  
73 institution primarily supported by public funds;

74 3. Any person engaged in the activities of an educational, charitable, religious, or nonprofit  
75 organization where the relationship of employer-employee does not, in fact, exist, or where the services  
76 rendered to such ~~organizations are~~ *organization is* on a voluntary basis;

77 4. Caddies on golf courses;

78 5. Traveling salesmen or outside salesmen working on a commission basis; taxicab drivers and  
79 operators;

80 6. Any person under the age of 18 in the employ of his ~~father, mother~~ *parent* or legal guardian;

81 7. Any person confined in any penal or corrective institution of the ~~State Commonwealth~~ any of its  
82 political subdivisions or admitted to a state hospital or training center operated by the Department of  
83 Behavioral Health and Developmental Services;

84 8. Any person employed by a summer camp for boys, girls, or both boys and girls;

85 9. Any person under the age of 16, regardless of by whom employed;

86 10. Any person who normally works and is paid based on the amount of work done;

87 11. Any person whose employment is covered by the Fair Labor Standards Act of 1938, as amended;

88 12. Any person whose earning capacity is impaired by physical deficiency, mental illness, or  
89 intellectual disability;

90 13. Students participating in a bona fide educational program;

91 14. Any person employed by an employer who does not have four or more persons employed at any  
92 one time; provided that ~~husbands, wives, sons, daughters~~ *(i) the spouse, children* and parents of the  
93 employer shall not be counted in determining the number of persons employed *and (ii) this exception*  
94 *shall not apply to persons employed as domestic service employees*;

95 15. Any person who is less than 18 years of age and who is currently enrolled on a full-time basis in  
96 any secondary school, institution of higher education, or trade school, provided *that* the person is not  
97 employed more than 20 hours per week;

98 16. Any person of any age who is currently enrolled on a full-time basis in any secondary school,  
99 institution of higher education, or trade school and is in a work-study program or its equivalent at the  
100 institution at which he ~~or she~~ is enrolled as a student;

101 17. Any person who is less than 18 years of age and who is under the jurisdiction and direction of a  
102 juvenile and domestic relations district court; or

103 18. Any person who works as a babysitter for fewer than 10 hours per week.

104 "Employer" includes any individual, partnership, association, corporation, *or* business trust; or any  
105 person or ~~groups~~ *group* of persons acting directly or indirectly in the interest of an employer in relation  
106 to an employee.

107 "Wages" means legal tender of the United States or checks or drafts on banks negotiable into cash on  
108 demand or upon acceptance at full value; ~~provided, wages may include.~~ *"Wages" includes* the reasonable  
109 cost to the employer of furnishing meals and ~~for~~ lodging to an employee; if such board or lodging is  
110 customarily furnished by the employer; and used by the employee.

111 B. In determining the wage of a tipped employee, the amount paid such employee by his employer  
112 shall be deemed to be increased on account of tips by an amount determined by the employer, except in  
113 the case of an employee who establishes by clear and convincing evidence that the actual amount of tips  
114 received by him was less than the amount determined by the employer. In such case, the amount paid  
115 such employee by his employer shall be deemed to have been increased by such lesser amount.

116 **§ 40.1-29. Time and medium of payment; withholding wages; written statement of earnings;**  
117 **agreement for forfeiture of wages; proceedings to enforce compliance; penalties.**

118 A. 1. All employers operating a business *or engaging an individual to perform domestic service* shall  
119 establish regular pay periods and rates of pay for employees except executive personnel. All such  
120 employers shall pay salaried employees at least once each month and employees paid on an hourly rate

at least once every two weeks or twice in each month, except that (i) a student who is currently enrolled in a work-study program or its equivalent administered by any secondary school, institution of higher education or trade school, and (ii) employees whose weekly wages total more than 150 percent of the average weekly wage of the Commonwealth as defined in § 65.2-500, upon agreement by each affected employee, may be paid once each month if the institution or employer so chooses. Upon termination of employment an employee shall be paid all wages or salaries due him for work performed prior thereto; such payment shall be made on or before the date on which he would have been paid for such work had his employment not been terminated.

2. Any such employer who knowingly fails to make payment of wages in accordance with this section shall be subject to a civil penalty not to exceed \$1,000 for each violation. The Commissioner shall notify any employer who he alleges has violated any provision of this section by certified mail. Such notice shall contain a description of the alleged violation. Within 15 days of receipt of notice of the alleged violation, the employer may request an informal conference regarding such violation with the Commissioner. In determining the amount of any penalty to be imposed, the Commissioner shall consider the size of the business of the employer charged and the gravity of the violation. The decision of the Commissioner shall be final.

B. Payment of wages or salaries shall be (i) in lawful money of the United States, (ii) by check payable at face value upon demand in lawful money of the United States, (iii) by electronic automated fund transfer in lawful money of the United States into an account in the name of the employee at a financial institution designated by the employee, or (iv) by credit to a prepaid debit card or card account from which the employee is able to withdraw or transfer funds with full written disclosure by the employer of any applicable fees and affirmative consent thereto by the employee. However, an employer that elects not to pay wages or salaries in accordance with clause (i) or (ii) to an employee who is hired after January 1, 2010, shall be permitted to pay wages or salaries by credit to a prepaid debit card or card account in accordance with clause (iv), even though such employee has not affirmatively consented thereto, if the employee fails to designate an account at a financial institution in accordance with clause (iii) and the employer arranges for such card or card account to be issued through a network system through which the employee shall have the ability to make at least one free withdrawal or transfer per pay period, which withdrawal may be for any sum in such card or card account as the employee may elect, using such card or card account at financial institutions participating in such network system.

C. No employer shall withhold any part of the wages or salaries of any employee except for payroll, wage or withholding taxes or in accordance with law, without the written and signed authorization of the employee. On each regular pay date, each employer other than an employer engaged in agricultural employment including agribusiness and forestry shall provide to each employee a written statement, by a paystub or online accounting, that shows the name and address of the employer, the number of hours worked during the pay period, the rate of pay, the gross wages earned by the employee during the pay period, and the amount and purpose of any deductions therefrom. An employer engaged in agricultural employment including agribusiness and forestry, upon request of its employee, shall furnish the employee a written statement of the gross wages earned by the employee during any pay period and the amount and purpose of any deductions therefrom.

D. No employer shall require any employee, except executive personnel, to sign any contract or agreement which provides for the forfeiture of the employee's wages for time worked as a condition of employment or the continuance therein, except as otherwise provided by law.

E. An employer who willfully and with intent to defraud fails or refuses to pay wages in accordance with this section:

1. To an employee or employees is guilty of a Class 1 misdemeanor if the value of the wages earned and not paid by the employer is less than \$10,000; and

2. To an employee or employees is guilty of a Class 6 felony (i) if the value of the wages earned and not paid is \$10,000 or more or (ii) regardless of the value of the wages earned and not paid, if the conviction is a second or subsequent conviction under this section.

For purposes of this section, the determination as to the "value of the wages earned" shall be made by combining all wages the employer failed or refused to pay pursuant to this section.

F. The Commissioner may require a written complaint of the violation of this section and, with the written and signed consent of an employee, may institute proceedings on behalf of an employee to enforce compliance with this section, and to collect any moneys unlawfully withheld from such employee which shall be paid to the employee entitled thereto. In addition, following the issuance of a final order by the Commissioner or a court, the Commissioner may engage private counsel, approved by the Attorney General, to collect any moneys owed to the employee or the Commonwealth. Upon entry of a final order of the Commissioner, or upon entry of a judgment, against the employer, the Commissioner or the court shall assess attorney's fees of one-third of the amount set forth in the final order or judgment.

G. In addition to being subject to any other penalty provided by the provisions of this section, any employer who fails to make payment of wages in accordance with subsection A shall be liable for the payment of all wages due, plus interest at an annual rate of eight percent accruing from the date the wages were due.

H. Civil penalties owed under this section shall be paid to the Commissioner for deposit into the general fund of the State Treasurer. The Commissioner shall prescribe procedures for the payment of proposed assessments of penalties which are not contested by employers. Such procedures shall include provisions for an employer to consent to abatement of the alleged violation and pay a proposed penalty or a negotiated sum in lieu of such penalty without admission of any civil liability arising from such alleged violation.

Final orders of the Commissioner, the general district courts or the circuit courts may be recorded, enforced and satisfied as orders or decrees of a circuit court upon certification of such orders by the Commissioner or the court as appropriate.

#### **§ 40.1-49.3. Definitions.**

For the purposes of §§ 40.1-49.4, 40.1-49.5, 40.1-49.6, 40.1-49.7, and 40.1-51.1 through 40.1-51.3 the following terms shall have the following meanings:

"Commission" means the Virginia Workers' Compensation Commission.

"Commissioner" means the Commissioner of Labor and Industry. Except where the context clearly indicates the contrary, any reference to Commissioner shall include his authorized representatives.

"Employee" means an employee of an employer who is employed in a business of his by an employer.

"Employer" means any person or entity who that (i) is engaged in business or engages an individual to perform domestic service and (ii) has employees; but, "Employer" does not include the United States.

"Occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

"Serious violation" means a violation deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

"Person" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.

"Circuit court" means the circuit court of the city or county wherein the violation of this title or any standard, rule or regulation issued pursuant thereto is alleged to have occurred. Venue shall be determined in accordance with the provisions of §§ 8.01-257 through 8.01-267.

#### **§ 40.1-49.8. Inspections of workplace.**

In order to carry out the purposes of the occupational safety and health laws of the Commonwealth and any such rules, regulations, or standards adopted in pursuance of such laws, the Commissioner, upon representing appropriate credentials to the owner, operator, or agent in charge, is authorized, with the consent of the owner, operator, or agent in charge of such workplace as described in subdivision (1) of this section, or with an appropriate order or warrant:

(1) To enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed, *including any place where an individual is engaged to perform domestic service*, by an employee of an employer; and

(2) To inspect, investigate, and take samples during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

#### **§ 60.2-201. Agricultural labor.**

A. The term "agricultural labor" includes all service performed:

1. On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife.

2. In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm.

3. In connection with the production or harvesting of any commodity defined as an agricultural commodity in 12 U.S.C. § 1141 j of the Federal Agricultural Marketing Act, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or

waterways not owned or operated for profit used exclusively for supplying and storing water for farming purposes.

4. a. In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any such agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

b. In the employ of a group of operators of farms (or a cooperative organization of which such operators are members) in the performance of service described in subdivision 4 a of this subsection, but only if such operators produced more than one-half of the commodity with respect to which such service is performed;

c. The provisions of subdivisions 4 a and 4 b of this section shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

5. On a farm operated for profit if such service is not in the course of the employer's trade or business or is domestic service in a private home of the employer.

B. As used in this section, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities and orchards.

**§ 60.2-215. Employment; domestic service.**

"Employment" includes domestic service performed by an individual in a private home, local college club or local chapter of a college fraternity or sorority for a person who paid wages of \$1,000 or more to individuals employed in such domestic service in any calendar quarter in the current calendar year or the preceding calendar year for consideration. The term "domestic service" shall not include any medical services performed by personnel such as a nurse, nurse's aide, private nurse, practical nurse, student nurse or attendant rendering medical services in a private residence or a medical institution where such personnel are employed by the person receiving such services means services related to the care of an individual in a private home or the maintenance of a private home, local college club, or local chapter of a college fraternity or sorority.

**§ 60.2-219. Services not included in term "employment."**

The term "employment" shall not include:

1. Service performed in the employ of the United States government or of any instrumentality of the United States which is wholly or partially owned by the United States or which is exempt from the tax imposed by § 3301 of the Federal Internal Revenue Code by virtue of any provision of law which specifically refers to such section (or the corresponding section of prior law) in granting such exemption;

2. Service with respect to which unemployment compensation is payable under an unemployment compensation system established by an act of Congress, including service performed after June 30, 1939, for an employer determined to be subject to the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.) by the agency or agencies empowered to make such determination by an act of Congress, and service as an employer representative determined to be subject to such act by such agency or agencies. The Commission is hereby authorized and directed to enter into agreements with the proper agencies under such act of Congress, which agreements shall become effective 10 days after publication thereof, in the manner provided in § 60.2-111 for general rules, to provide reciprocal treatment to individuals who have, after acquiring potential rights to benefits under this title, acquired rights to unemployment compensation under such act of Congress, or who have, after acquiring potential rights to unemployment compensation under such act of Congress, acquired rights to benefits under this title;

3. Agricultural labor as defined in § 60.2-201 except as provided for in § 60.2-214;

4. Domestic service in a private home, local college club or local chapter of a college fraternity or sorority except as provided for in § 60.2-215 [Reserved.];

5. Service performed on or in connection with a vessel or aircraft not an American vessel or American aircraft by an employee, if the employee is employed on and in connection with such vessel or aircraft when outside the United States;

6. Service performed by an individual in, or as an officer or member of the crew of, a vessel while it is engaged in the catching, taking, harvesting, cultivating or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds or other aquatic forms of animal and vegetable life, including service performed by any such individual as an ordinary incident to any such activity, except (i) service performed in connection with the catching or taking of salmon or halibut for commercial purposes and (ii) service performed on or in connection with a vessel of more than 10 net tons, determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States;

305 6a. Service performed by an individual on a boat engaged in catching fish or other forms of aquatic  
306 life under an arrangement with the owner or operator of such boat pursuant to which:  
307 a. Such individual does not receive any cash remuneration, other than as provided in subdivision b;  
308 b. Such individual receives a share of the boat's, or the boats' in the case of a fishing operation  
309 involving more than one boat, catch of fish or other forms of aquatic animal life, or a share of the  
310 proceeds from the sale of such catch; and  
311 c. The amount of such individual's share depends on the amount of the boat's, or the boats' in the  
312 case of a fishing operation involving more than one boat, catch of fish or other forms of aquatic animal  
313 life, but only if the operating crew of such boat, or each boat from which the individual receives a share  
314 in the case of a fishing operation involving more than one boat is normally made up of fewer than 10  
315 individuals;  
316 7. Service performed by an individual in the employ of his son, daughter, or spouse and service  
317 performed by a child under the age of 21 in the employ of his father or mother;  
318 8. Service performed in any calendar quarter in the employ of any organization exempt from income  
319 tax (i) under § 501(a) of the Federal Internal Revenue Code (26 U.S.C.), other than an organization  
320 described in § 401(a) of such Code, or (ii) under § 521 of the Federal Internal Revenue Code, if the  
321 remuneration for such service is less than \$50;  
322 9. Service performed in the employ of a school or institution of higher education, if such service is  
323 performed by a student who is enrolled and is regularly attending classes at such school or institution;  
324 10. Service performed as a student nurse in the employ of a hospital or a nurses' training school by  
325 an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or  
326 approved pursuant to state law;  
327 11. Service performed as an intern in the employ of a hospital by an individual who has completed a  
328 four-year course in a medical school chartered or approved pursuant to state law;  
329 12. Service performed by an individual for an employing unit as an insurance agent or as an  
330 insurance solicitor, if all such service performed by such individual for such employing unit is  
331 performed for remuneration solely by way of commission;  
332 13. Service performed by an individual for an employing unit as a real estate salesman, if all such  
333 service performed by such individual for such employing unit is performed for remuneration solely by  
334 way of commission;  
335 14. Service covered by an arrangement between the Commission and the agency charged with the  
336 administration of any other state or federal unemployment compensation law pursuant to which all  
337 services performed by an individual for an employing unit during the period covered by such employing  
338 unit's duly approved election are deemed to be performed entirely within such agency's state or under  
339 such federal law;  
340 15. Service performed by an individual for an employing unit as an agent in the wholesale  
341 distribution and sale of gasoline and other petroleum products, if all such service performed by such  
342 individual for such employing unit is performed for remuneration solely by way of commission;  
343 16. Service not in the course of the employer's trade or business performed in any calendar quarter  
344 by an employee, unless the cash remuneration paid for such service is \$50 or more and such service is  
345 performed by an individual who is regularly employed by such employer to perform such service. For  
346 the purposes of this subdivision, an individual shall be deemed to be regularly employed by an employer  
347 during a calendar quarter only if (i) on each of some 24 days during such quarter such individual  
348 performs for such employer for some portion of the day service not in the course of the employer's trade  
349 or business, or (ii) such individual was regularly employed, as determined under clause (i) of this  
350 subdivision, by such employer in the performance of such service during the preceding calendar quarter;  
351 17. a. Service performed by an individual who is enrolled at a nonprofit or public educational  
352 institution which normally maintains a regular faculty and curriculum and normally has a regularly  
353 organized body of students in attendance at the place where its educational activities are carried on. In  
354 order for such services to be excluded from "employment":  
355 (1) The individual shall be enrolled as a student in a full-time program,  
356 (2) The program shall be taken for credit at such institution,  
357 (3) The program combines academic instruction with work experience, and  
358 (4) Such service shall be an integral part of such program.  
359 b. Such institution shall certify to the employer that subdivisions 17 a (1) through 17 a (4) have been  
360 met.  
361 c. This subdivision shall not apply to service performed in a program established for or on behalf of  
362 an employer or group of employers;  
363 18. Service performed in the employ of a hospital, if such service is performed by a patient of the  
364 hospital, as defined in § 60.2-221;  
365 19. Services provided by an individual pursuant to an agreement among the service recipient, a  
366 public human services agency as defined in § 15.2-2811, and such individual to an eligible service

recipient in his own home or the home of the service provider, unless coverage of such services is required by the provisions of § 3304(a)(6)(A) of the Federal Unemployment Tax Act;

20. Services performed by an individual as a "direct seller" provided that:

a. Such person:

(1) Is engaged in the trade or business of selling, or soliciting the sale of, consumer products to any buyer on a buy-sell basis, a deposit-commission basis, or any similar basis which the Secretary of the Treasury prescribes by regulations for resale by the buyer or any other person in the home or otherwise than in a permanent retail establishment;

(2) Is engaged in the trade or business of selling, or soliciting the sale of, consumer products to a consumer in the home or otherwise than in a permanent retail establishment; or

(3) Is engaged in the trade or business of the delivery or distribution of newspapers or shopping news (including any delivery services directly related to such trade or business).

b. Substantially all of the remuneration for the services performed as a direct seller, whether or not paid in cash, is directly related to sales or output, including the performances of services, rather than to the number of hours worked;

c. The services performed by the person are performed pursuant to a written contract between such person and the person for whom the services are performed and such contract provides that the person will not be treated as an employee with respect to such services for federal tax purposes;

21. Service performed after July 1, 1984, by an individual as a taxicab driver, or as a driver of an executive sedan as defined in § 46.2-2000, provided the Commission is furnished evidence that such individual is excluded from taxation by the Federal Unemployment Tax Act;

22. Services performed by an individual as a "contract carrier courier driver" provided the Commission is furnished evidence that such individual is excluded from taxation by the Federal Unemployment Tax Act;

23. Services performed by a full-time student in the employ of an organized camp if:

a. Such camp:

(1) Did not operate for more than seven months in the calendar year and did not operate for more than seven months in the preceding calendar year; or

(2) Had average gross receipts for any six months in the preceding calendar year which were not more than 33- 1/3 percent of its average gross receipts for the other six months in the preceding calendar year; and

b. Such full-time student performed services in the employ of such camp for less than 13 calendar weeks in such calendar year;

24. Services performed by an individual as a court reporter for an employing unit if all such service performed by the individual for the employing unit is performed for remuneration solely by way of commission;

25. Services performed by an individual as a cosmetologist or as a barber provided the Commission is furnished evidence that such individual is excluded from taxation by the Federal Unemployment Tax Act;

26. Services performed by a licensed clinical social worker as defined in § 54.1-3700, licensed psychologist as defined in § 54.1-3600, licensed professional counselor as defined in § 54.1-3500, licensed psychiatrist, or licensed marriage and family therapist as defined in § 54.1-3500, if such individual:

a. Operates under a contract specifying that the individual is free from control or direction over the performance of such services;

b. Is licensed in the Commonwealth to perform independent clinical services;

c. Is compensated solely by way of fees charged for services rendered by such individual; and

d. Has a valid business license issued by the locality in which such individual performs such services; and

27. Services performed by an inmate for a penal or custodial institution or while participating in the community corrections alternative program pursuant to § 19.2-316.4.

#### **§ 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

428 followed, provided that results fair and just to both parties will be thereby obtained. When, by reason of  
429 a shortness of time during which the employee has been in the employment of his employer or the  
430 casual nature or terms of his employment, it is impractical to compute the average weekly wages as  
431 above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to  
432 the injury was being earned by a person of the same grade and character employed in the same class of  
433 employment in the same locality or community.

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

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

448 3. Whenever volunteer firefighters, volunteer emergency medical services personnel, volunteer  
449 law-enforcement chaplains, auxiliary or reserve police, auxiliary or reserve deputy sheriffs, members of  
450 volunteer search and rescue organizations, volunteer members of community emergency response teams,  
451 and volunteer members of medical reserve corps are deemed employees under this title, their average  
452 weekly wage shall be deemed sufficient to produce the minimum compensation provided by this title for  
453 injured workers or their dependents. For the purposes of workers' compensation insurance premium  
454 calculations, the monthly payroll for each volunteer firefighter or volunteer who is an individual who  
455 meets the definition of "emergency medical services personnel" in § 32.1-111.1 shall be deemed to be  
456 \$300.

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

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

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

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

467 "Coemployee" means an employee performing services pursuant to an agreement for professional  
468 employer services between a client company and a professional employer organization.

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

471 "*Domestic service*" means services related to the care of an individual in a private home or the  
472 maintenance of a private home or its premises, on a permanent or temporary basis, including services  
473 performed by individuals such as companions, cooks, waiters, butlers, maids, valets, and chauffeurs.

474 "Employee" means:

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

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

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

485 Income benefits for members of the National Guard shall be terminated when they are able to return  
486 to their customary civilian employment or self-employment. If they are neither employed nor  
487 self-employed, those benefits shall terminate when they are able to return to their military duties. If a  
488 member of the National Guard who is fit to return to his customary civilian employment or  
489 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, auxiliary or reserve deputy sheriffs, members of volunteer search and rescue organizations, volunteer members of regional hazardous materials emergency response teams, volunteer members of community emergency response teams, and volunteer members of medical reserve corps, who shall be deemed employees of (i) the political subdivision or public institution of higher education in which the principal office of such volunteer fire company, volunteer emergency medical services agency 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 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.

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 Education and Work, who shall be deemed employees of the Commonwealth for the purposes of this title.

2. "Employee" shall 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.

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.~~ g. 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, *nor to the employers of those engaged to provide domestic service 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.~~ h. 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.~~ *i.* 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.~~ *j.* 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.~~ *k.* 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 § 55.1-1800.

~~m.~~ *l.* 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.~~ *m.* 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.~~ *n.* 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.

"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 § 55.1-1800.

"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.

**§ 65.2-305. Voluntary subjection to provisions of title; effect of taking out insurance or qualifying as self-insurer.**

A. Those employers not subject to this title may, by complying with the provisions of this title and the applicable rules of the Commission, voluntarily elect to be bound by it as to accidents or occupational diseases or both.

B. Every employer taking out a workers' compensation insurance policy, or qualifying as a self-insurer, shall be subject to all the provisions of this title, regardless of the number of employees or whether he is an employer of farm and horticultural laborers and domestic servants. Such employers not otherwise covered by this title shall be subject to this title only during the period covered by such insurance. Every employee of an employer who has complied with the foregoing requirements shall be subject to all the provisions of this title except that executive officers may reject coverage as provided in § 65.2-300.