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HOUSE BILL NO. 1196

Offered January 17, 2022

A BILL to amend and reenact §§ 65.2-101 and 65.2-305 of the Code of Virginia, relating to workers' compensation; domestic service employees.

Patrons—Gooditis, Rasoul, Bennett-Parker, Clark, Hope, Kory, Maldonado, Mullin, Plum, Roem, Shin, Simon, Simonds and Torian

Referred to Committee on Commerce and Energy

Be it enacted by the General Assembly of Virginia:

1. That §§ 65.2-101 and 65.2-305 of the Code of Virginia are amended and reenacted as follows:

§ 65.2-101. Definitions.

As used in this title:

"Average weekly wage" means:

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

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

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

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

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

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

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

INTRODUCED

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

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

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

64 "*Domestic service*" means services related to the care of an individual in a private home or the  
65 maintenance of a private home or its premises, on a permanent or temporary basis, including services  
66 performed by individuals such as companions, cooks, waiters, butlers, maids, valets, and chauffeurs.  
67 "*Domestic service*" does not include work that is irregular, uncertain, or incidental in nature and  
68 duration.

69 "Employee" means:

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

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

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

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

87 d. Members of the Virginia Defense Force.

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

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

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

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

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

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

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

120 subdivision thereof.

121 1. Except as provided in subdivision 2 of this definition, volunteer firefighters, volunteer emergency  
122 medical services agency personnel, volunteer law-enforcement chaplains, auxiliary or reserve police,  
123 auxiliary or reserve deputy sheriffs, members of volunteer search and rescue organizations, volunteer  
124 members of regional hazardous materials emergency response teams, volunteer members of community  
125 emergency response teams, and volunteer members of medical reserve corps, who shall be deemed  
126 employees of (i) the political subdivision or public institution of higher education in which the principal  
127 office of such volunteer fire company, volunteer emergency medical services agency personnel,  
128 volunteer law-enforcement chaplains, auxiliary or reserve police force, auxiliary or reserve deputy sheriff  
129 force, volunteer search and rescue organization, regional hazardous materials emergency response team,  
130 community emergency response team, or medical reserve corps is located if the governing body of such  
131 political subdivision or public institution of higher education has adopted a resolution acknowledging  
132 those persons as employees for the purposes of this title or (ii) in the case of volunteer firefighters or  
133 volunteer emergency medical services personnel, the fire companies or emergency medical services  
134 agencies for which volunteer services are provided whenever such companies or squads elect to be  
135 included as an employer under this title.

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

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

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

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

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

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

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

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

165 q. Jail officers and jail superintendents employed by regional jails or jail farm boards or authorities,  
166 whether created pursuant to Article 3.1 (§ 53.1-95.2 et seq.) or Article 5 (§ 53.1-105 et seq.) of Chapter  
167 3 of Title 53.1, or an act of assembly.

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

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

174 t. Temporary Assistance for Needy Families recipients not eligible for Medicaid participating in the  
175 work experience component of the Virginia Initiative for Education and Work, who shall be deemed  
176 employees of the Commonwealth for the purposes of this title.

177 2. "Employee" shall does not mean:

178 a. Officers and employees of the Commonwealth who are elected by the General Assembly, or  
179 appointed by the Governor, either with or without the confirmation of the Senate. This exception shall  
180 not apply to any "state employee" as defined in § 51.1-124.3 nor to Supreme Court Justices, judges of

181 the Court of Appeals, judges of the circuit or district courts, members of the Workers' Compensation  
182 Commission and the State Corporation Commission, or the Superintendent of State Police.

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

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

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

194 e. Casual employees.

195 f. ~~Domestic servants.~~

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

198 h. g. Employees of any person, firm or private corporation, including any public service corporation,  
199 that has regularly in service less than three employees in the same business within this Commonwealth,  
200 unless such employees and their employers voluntarily elect to be bound by this title. However, this  
201 exemption shall not apply to the operators of underground coal mines or their employees, *nor to the*  
202 *employers of a domestic worker or domestic workers.* An executive officer who is not paid salary or  
203 wages on a regular basis at an ~~agreed upon~~ *agreed-upon* amount and who rejects coverage under this  
204 title pursuant to § 65.2-300 shall not be included as an employee for purposes of this subdivision.

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

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

217 k. j. Except as provided in subdivision 1 of this definition, a member of a volunteer fire department  
218 or volunteer emergency medical services agency when engaged in activities related principally to  
219 participation as an individual who meets the definition of "emergency medical services personnel" in  
220 § 32.1-111.1 or a member of such fire department whether or not the volunteer continues to receive  
221 compensation from his employer for time away from the job.

222 l. k. Except as otherwise provided in this title, noncompensated employees and noncompensated  
223 directors of (i) corporations exempt from taxation pursuant to § 501(c)(3) of Title 26 of the United  
224 States Code (Internal Revenue Code of 1954) or (ii) property owners' associations as defined in  
225 § 55.1-1800.

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

233 n. m. Any person who suffers an injury on or after July 1, 2012, for which there is jurisdiction under  
234 either the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., and its  
235 extensions, or the Merchant Marine Act of 1920, 46 U.S.C. § 30104 et seq. However, this title shall not  
236 be construed to eliminate or diminish any right that any person or, in the case of the person's death, his  
237 personal representative, may have under either the Longshore and Harbor Workers' Compensation Act,  
238 33 U.S.C. § 901 et seq., and its extensions, or the Merchant Marine Act of 1920, 46 U.S.C. § 30104 et  
239 seq.

240 o. n. An owner-operator of a motor vehicle that is leased with or to a common or contract carrier in  
241 the trucking industry if (i) the owner-operator performs services for the carrier pursuant to a contract  
242 that provides that the owner-operator is an independent contractor and shall not be treated as an

243 employee for purposes of the Federal Insurance Contributions Act, 26 U.S.C. § 3101 et seq., Social  
 244 Security Act of 1935, P.L. 74-271, federal unemployment tax laws, and federal income tax laws and (ii)  
 245 each of the following factors is present:

- 246 (1) The owner-operator is responsible for the maintenance of the vehicle;  
 247 (2) The owner-operator bears the principal burden of the vehicle's operating costs;  
 248 (3) The owner-operator is the driver;  
 249 (4) The owner-operator's compensation is based on factors related to the work performed and not on  
 250 the basis of hours or time expended; and  
 251 (5) The owner-operator determines the method and means of performing the service.

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

258 "Executive officer" means (i) the president, vice-president, secretary, treasurer or other officer elected  
 259 or appointed in accordance with the charter and bylaws of a corporation and (ii) the managers elected or  
 260 appointed in accordance with the articles of organization or operating agreement of a limited liability  
 261 company. However, "executive officer" does not include (a) noncompensated officers of corporations  
 262 exempt from taxation pursuant to § 501(c)(3) of Title 26 of the United States Code (Internal Revenue  
 263 Code of 1954) or (b) noncompensated officers of a property owners' association as such term is defined  
 264 in § 55.1-1800.

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

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

- 275 1. Participation in employer-sponsored off-duty recreational activities which are not part of the  
 276 employee's duties; or  
 277 2. Use of a motor vehicle that was provided to the employee by a motor vehicle dealer as defined by  
 278 § 46.2-1500 and bears a dealer's license plate as defined by § 46.2-1550 for (i) commuting to or from  
 279 work or (ii) any other nonwork activity.

280 ~~Such term shall include "Injury" includes~~ any injury, disease or condition:

- 281 1. Arising out of and in the course of the employment of (a) an employee of a hospital as defined in  
 282 § 32.1-123; (b) an employee of a health care provider as defined in § 8.01-581.1; (c) an employee of the  
 283 Department of Health or a local department of health; (d) a member of a search and rescue organization;  
 284 or (e) any person described in clauses (i) through (iv), (vi), and (ix) of subsection A of § 65.2-402.1  
 285 otherwise subject to the provisions of this title; and

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

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

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

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

301 **§ 65.2-305. Voluntary subjection to provisions of title; effect of taking out insurance or**  
 302 **qualifying as self-insurer.**

303 A. Those employers not subject to this title may, by complying with the provisions of this title and

304 the applicable rules of the Commission, voluntarily elect to be bound by it as to accidents or  
305 occupational diseases or both.

306 B. Every employer taking out a workers' compensation insurance policy, or qualifying as a  
307 self-insurer, shall be subject to all the provisions of this title, regardless of the number of employees or  
308 whether he is an employer of farm and horticultural laborers and domestic servants. Such employers not  
309 otherwise covered by this title shall be subject to this title only during the period covered by such  
310 insurance. Every employee of an employer who has complied with the foregoing requirements shall be  
311 subject to all the provisions of this title except that executive officers may reject coverage as provided in  
312 § 65.2-300.

313 **2. That the Department of Labor and Industry (the Department) shall promulgate such regulations**  
314 **as necessary to inform domestic workers of their right to workers' compensation as established by**  
315 **this act. The Department shall create an accessible, multilingual resource guide that includes a**  
316 **contact phone number and information regarding workplace rights for domestic workers and**  
317 **employers of domestic workers. This resource guide shall be accessible on the Department's**  
318 **website and shall include templates for contracts between domestic workers and their employers.**