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SENATE BILL NO. 775

Offered January 9, 2013

Prefiled December 18, 2012

A *BILL to amend and reenact §§ 60.2-618, as it is currently effective and as it may become effective, and 60.2-619 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 60.2-528.1 and by adding in Article 6 of Chapter 6 of Title 60.2 a section numbered 60.2-636, relating to unemployment compensation; responsibility of employers for benefit charges; penalty for pattern of failure to respond to requests for information; penalties for fraudulent claims for unemployment compensation benefits.*

Patron—Watkins

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That §§ 60.2-618, as it is currently effective and as it may become effective, and 60.2-619 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 60.2-528.1 and by adding in Article 6 of Chapter 6 of Title 60.2 a section numbered 60.2-636 as follows:

§ 60.2-528.1. Charging of benefits relating to certain overpayments; penalty for pattern of failure to respond to requests for information.

A. As used in this section, unless the context requires a different meaning:

"Employer," with regard to the timeliness and adequacy of responses, includes an agent of the employer used by the employer to respond to the Commission on the employer's behalf; however, an employer's agent's failure to respond timely or adequately to requests for information with regard to claims involving the agent's other clients shall not be used in determining whether the employer has established a pattern of failing to respond timely or adequately to written requests for information.

"Erroneous payment" means a payment of benefits under this title made prior to a determination by the Commission that the claimant is not eligible or qualified for the benefits paid.

"Information relating to a claim" means information material to a determination or decision by the Commission relating to the payment of benefits under this title, including separation information and information required by the Commission for the establishment of a claim for compensation and information about wages, days, and hours worked.

"Review period" means the 48 consecutive calendar month period ending on the June 30 that precedes the Commission's next annual calculation of the employer's benefit ratio pursuant to subdivision A 1 a of § 60.2-530.

"Written request" includes a request sent electronically.

B. An employer's account shall not be relieved of charges relating to an erroneous payment if the Commission determines that:

1. The erroneous payment was made because the employer failed to respond timely or adequately to a written request by the Commission for information relating to the claim; and

2. The employer has established a pattern of failing to respond timely or adequately to written requests by the Commission for information relating to claims.

C. For purposes of this section, an employer's response to a written request by the Commission for information relating to a claim shall be deemed not to be:

1. "Adequate" if it fails to provide sufficient material facts to enable the Commission to make a correct determination regarding a claim for benefits; however, (i) a response shall not be deemed inadequate if the Commission failed to request the necessary information or if information is provided in a format other than as requested, provided that the information is capable of being read by the recipient, and (ii) there shall be a rebuttable presumption that an employer that participates in a fact-finding interview or responds fully to the questions set out on the written request for information has provided an adequate response; or

2. "Timely" if it is not made within 10 calendar days after the delivery or mailing of the Commission's request for information.

D. An employer shall be deemed to have established a pattern of failing to respond timely or adequately to written requests for information relating to claims if the Commission determines that (i) the employer has failed to respond timely or adequately to a written request for information relating to a claim on four or more occasions within the applicable review period and (ii) each of the failures to respond resulted in an erroneous payment. The Commission shall not find that an employer has

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59 established a pattern of failing to respond timely or adequately to written requests for information
60 relating to claims unless the Commission has provided the employer with the notices required pursuant
61 to subsection E.

62 E. The Commission shall provide the employer with a written notice following the employer's first,
63 second, and third determinations that the employer failed to respond timely or adequately to a written
64 request for information relating to a claim within the applicable review period when such failure
65 resulted in an erroneous payment. Each such notice shall be delivered or mailed to the employer's last
66 known address of agency record and shall advise the employer of the potential implications of the
67 employer's failure to respond timely or adequately to written requests for such information.

68 F. Upon the Commission's third determination within the applicable review period that an employer
69 failed to respond timely or adequately to a written request for information relating to a claim and that
70 such failures resulted in an erroneous payment, the Commission shall assess upon the employer a civil
71 penalty of \$75. A copy of the notice of assessment of a civil penalty shall be delivered or mailed to the
72 employer with the notice of the employer's third such failure as required pursuant to subsection E. Civil
73 penalties collected pursuant to this subsection shall be paid into the Special Unemployment
74 Compensation Administration Fund established pursuant to § 60.2-314. The Commission may
75 compromise, settle, and adjust any such penalty as authorized by § 60.2-521.

76 G. An employer shall not be found to have failed to respond timely or adequately to a written
77 request by the Commission for information relating to a claim if the Commission finds good cause for
78 such failure. The Commission may not find good cause for an employer's failure to respond timely or
79 adequately to such a written request unless the failure is due to compelling and necessitous
80 circumstances beyond the employer's control.

81 H. If the Commission has determined that an employer has established a pattern of failing to
82 respond timely or adequately to written requests for information relating to claims, such determination
83 shall remain in effect until the end of the applicable review period. Any benefit charges for an
84 erroneous payment that the Commission has determined are not to be relieved from the employer's
85 account pursuant to subsection B shall remain chargeable to the employer's account through the period
86 ending on the fourth June 30 following the Commission's determination.

87 I. The issue of whether an employer's account shall be relieved of charges relating to an erroneous
88 payment, including whether an erroneous payment was made because the employer failed to respond
89 timely or adequately to a written request by the Commission for information relating to the claim, shall
90 be decided in every Commission proceeding arising from an employer's appeal of an award of benefits.
91 Any such decision shall be subject to appeal pursuant to § 60.2-620. Final decisions shall be used in
92 determining whether the employer has established a pattern of failing to respond timely or adequately to
93 written requests for information relating to claims, whether the employer is subject to a civil penalty
94 pursuant to subsection F, and whether the Commission has given the notices required pursuant to
95 subsection E.

96 J. The costs of benefits charged to any governmental entity, Indian tribe, or nonprofit entity that is a
97 reimbursable employing unit under this title shall not include any credits of benefit overpayments
98 actually collected by the Commission if the Commission finds that the overpayment was made because
99 the entity or its agent was at fault for failing to respond timely or adequately to a written request for
100 information relating to a claim and the entity or agent has established a pattern of failing to respond
101 timely or adequately to such requests.

102 K. If the erroneous payment results from a combined-wage claim, the determination of noncharging
103 for the combined-wage claim shall be made by the paying state. If the response from the employer does
104 not meet the criteria established by the paying state for an adequate or timely response, the paying state
105 shall promptly notify the transferring state of its determination, and the employer shall be appropriately
106 charged.

107 L. This section applies to erroneous payments established on or after July 7, 2013.

108 **§ 60.2-618. (Contingent expiration date) Disqualification for benefits.**

109 An individual shall be disqualified for benefits upon separation from the last employing unit for
110 whom he has worked 30 days or 240 hours or from any subsequent employing unit:

111 1. For any week benefits are claimed until he has performed services for an employer (i) during 30
112 days, whether or not such days are consecutive, or (ii) for 240 hours, and subsequently becomes totally
113 or partially separated from such employment, if the Commission finds such individual is unemployed
114 because he left work voluntarily without good cause. As used in this chapter, "good cause" shall not
115 include (i) voluntarily leaving work with an employer to become self-employed or (ii) voluntarily
116 leaving work with an employer to accompany or to join his or her spouse in a new locality. An
117 individual shall not be deemed to have voluntarily left work solely because the separation was in
118 accordance with a seniority-based policy.

119 2. a. For any week benefits are claimed until he has performed services for an employer (i) during
120 30 days, whether or not such days are consecutive, or (ii) for 240 hours, and subsequently becomes

totally or partially separated from such employment, if the Commission finds such individual is unemployed because he has been discharged for misconduct connected with his work.

b. For the purpose of this subdivision, "misconduct" includes, but shall not be limited to:

(1) An employee's confirmed positive test for a nonprescribed controlled substance, identified as such in Chapter 34 (§ 54.1-3400 et seq.) of Title 54.1, where such test was conducted at the direction of his employer in conjunction with the employer's administration and enforcement of a known workplace drug policy. Such test shall have been performed, and a sample collected, in accordance with scientifically recognized standards by a laboratory accredited by the United States Department of Health and Human Services, or the College of American Pathology, or the American Association for Clinical Chemistry, or the equivalent, or shall have been a United States Department of Transportation-qualified drug screen conducted in accordance with the employer's bona fide drug policy. The Commission may consider evidence of mitigating circumstances in determining whether misconduct occurred.

(2) An employee's intentionally false or misleading statement of a material nature concerning past criminal convictions made in a written job application furnished to the employer, where such statement was a basis for the termination and the employer terminated the employee promptly upon the discovery thereof. The Commission may consider evidence of mitigating circumstances in determining whether misconduct occurred.

(3) A willful and deliberate violation of a standard or regulation of the Commonwealth, by an employee of an employer licensed or certified by the Commonwealth, which violation would cause the employer to be sanctioned or have its license or certification suspended by the Commonwealth. The Commission may consider evidence of mitigating circumstances in determining whether misconduct occurred.

(4) Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence. The Commission may consider evidence of mitigating circumstances in determining whether misconduct occurred.

3. a. If it is determined by the Commission that such individual has failed, without good cause, either to apply for available, suitable work when so directed by the employment office or the Commission or to accept suitable work when offered him. The disqualification shall commence with the week in which such failure occurred, and shall continue for the period of unemployment next ensuing until he has performed services for an employer (i) during 30 days, whether or not such days are consecutive, or (ii) for 240 hours, and subsequently becomes totally or partially separated from such employment.

b. In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety and morals, his physical fitness and prior training, his experience, his length of unemployment and the accessibility of the available work from his residence.

c. No work shall be deemed suitable and benefits shall not be denied under this title to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(1) If the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(2) If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; or

(3) If as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

d. No individual shall be qualified for benefits during any week that such individual, in connection with an offer of suitable work, has a confirmed positive test for a nonprescribed controlled substance, identified as such in Chapter 34 (§ 54.1-3400 et seq.) of Title 54.1, if the test is required as a condition of employment and (i) performed, and a sample is collected, in accordance with scientifically recognized standards by a laboratory accredited by the United States Department of Health and Human Services, or the College of American Pathology, or the American Association for Clinical Chemistry, or the equivalent, or (ii) a United States Department of Transportation-qualified drug screen conducted in accordance with the employer's bona fide drug policy. The disqualification shall commence with the week in which such a test was conducted, and shall continue for the period of unemployment next ensuing until he has performed services for an employer (i) during 30 days, whether or not such days are consecutive, or (ii) for 240 hours, and subsequently becomes totally or partially separated from such employment.

4. For 52 weeks, beginning with the date of the determination or decision, if the Commission finds that such individual, within 36 calendar months immediately preceding such determination or decision, has made a false statement or representation knowing it to be false, or has knowingly failed to disclose a material fact, to obtain or increase any benefit or payment under this title, the unemployment compensation of any other state, or any other program of the federal government which is administered in any way under this title, either for himself or any other person. ~~Additionally, such individual shall be~~

ineligible for benefits until he has repaid the Commission the sum *Overpayments* that has have been fraudulently obtained and any penalty assessed against the individual pursuant to § 60.2-636 shall be recoverable as provided in § 60.2-633.

5. If such separation arose as a result of an unlawful act which resulted in a conviction and after his release from prison or jail until he has performed services for an employer for (i) 30 days, whether or not such days are consecutive, or (ii) 240 hours, and subsequently becomes totally or partially separated from such employment.

6. If such separation arose as a condition of the individual's parole or release from a custodial or penal institution and such individual was participating in the Diversion Center Incarceration Program pursuant to § 19.2-316.3.

§ 60.2-618. (Contingent effective date) Disqualification for benefits.

An individual shall be disqualified for benefits upon separation from the last employing unit for whom he has worked 30 days or 240 hours or from any subsequent employing unit:

1. For any week benefits are claimed until he has performed services for an employer (i) during 30 days, whether or not such days are consecutive, or (ii) for 240 hours, and subsequently becomes totally or partially separated from such employment, if the Commission finds such individual is unemployed because he left work voluntarily without good cause. As used in this chapter, "good cause" shall not include (i) voluntarily leaving work with an employer to become self-employed or (ii) voluntarily leaving work with an employer to accompany or to join his or her spouse in a new locality, except where an individual leaves employment to accompany his or her spouse to the location of the spouse's new duty assignment if (a) the spouse is on active duty in the military or naval services of the United States; (b) the spouse's relocation to a new military-related assignment is pursuant to a permanent change of station order; (c) the location of the spouse's new duty assignment is not readily accessible from the individual's place of employment; and (d) except for members of the Virginia National Guard relocating to a new assignment within the Commonwealth, the spouse's new duty assignment is located in a state that, pursuant to statute, does not deem a person accompanying a military spouse as a person leaving work voluntarily without good cause. An individual shall not be deemed to have voluntarily left work solely because the separation was in accordance with a seniority-based policy.

2. a. For any week benefits are claimed until he has performed services for an employer (i) during 30 days, whether or not such days are consecutive, or (ii) for 240 hours, and subsequently becomes totally or partially separated from such employment, if the Commission finds such individual is unemployed because he has been discharged for misconduct connected with his work.

b. For the purpose of this subdivision, "misconduct" includes, but shall not be limited to:

(1) An employee's confirmed positive test for a nonprescribed controlled substance, identified as such in Chapter 34 (§ 54.1-3400 et seq.) of Title 54.1, where such test was conducted at the direction of his employer in conjunction with the employer's administration and enforcement of a known workplace drug policy. Such test shall have been performed, and a sample collected, in accordance with scientifically recognized standards by a laboratory accredited by the United States Department of Health and Human Services, or the College of American Pathology, or the American Association for Clinical Chemistry, or the equivalent, or shall have been a United States Department of Transportation-qualified drug screen conducted in accordance with the employer's bona fide drug policy. The Commission may consider evidence of mitigating circumstances in determining whether misconduct occurred.

(2) An employee's intentionally false or misleading statement of a material nature concerning past criminal convictions made in a written job application furnished to the employer, where such statement was a basis for the termination and the employer terminated the employee promptly upon the discovery thereof. The Commission may consider evidence of mitigating circumstances in determining whether misconduct occurred.

(3) A willful and deliberate violation of a standard or regulation of the Commonwealth, by an employee of an employer licensed or certified by the Commonwealth, which violation would cause the employer to be sanctioned or have its license or certification suspended by the Commonwealth. The Commission may consider evidence of mitigating circumstances in determining whether misconduct occurred.

(4) Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence. The Commission may consider evidence of mitigating circumstances in determining whether misconduct occurred.

3. a. If it is determined by the Commission that such individual has failed, without good cause, either to apply for available, suitable work when so directed by the employment office or the Commission or to accept suitable work when offered him. The disqualification shall commence with the week in which such failure occurred, and shall continue for the period of unemployment next ensuing until he has performed services for an employer (i) during 30 days, whether or not such days are consecutive, or (ii) for 240 hours, and subsequently becomes totally or partially separated from such employment.

b. In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety and morals, his physical fitness and prior training, his experience, his length of unemployment and the accessibility of the available work from his residence.

c. No work shall be deemed suitable and benefits shall not be denied under this title to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(1) If the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(2) If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; or

(3) If as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

d. No individual shall be qualified for benefits during any week that such individual, in connection with an offer of suitable work, has a confirmed positive test for a nonprescribed controlled substance, identified as such in Chapter 34 (§ 54.1-3400 et seq.) of Title 54.1, if the test is required as a condition of employment and (i) performed, and a sample is collected, in accordance with scientifically recognized standards by a laboratory accredited by the United States Department of Health and Human Services, or the College of American Pathology, or the American Association for Clinical Chemistry, or the equivalent, or (ii) a United States Department of Transportation-qualified drug screen conducted in accordance with the employer's bona fide drug policy. The disqualification shall commence with the week in which such a test was conducted, and shall continue for the period of unemployment next ensuing until he has performed services for an employer (i) during 30 days, whether or not such days are consecutive, or (ii) for 240 hours, and subsequently becomes totally or partially separated from such employment.

4. For 52 weeks, beginning with the date of the determination or decision, if the Commission finds that such individual, within 36 calendar months immediately preceding such determination or decision, has made a false statement or representation knowing it to be false, or has knowingly failed to disclose a material fact, to obtain or increase any benefit or payment under this title, the unemployment compensation of any other state, or any other program of the federal government which is administered in any way under this title, either for himself or any other person. ~~Additionally, such individual shall be ineligible for benefits until he has repaid the Commission the sum of~~ *Overpayments of benefits that have been fraudulently obtained and any penalty assessed against the individual pursuant to § 60.2-636 shall be recoverable as provided in § 60.2-633.*

5. If such separation arose as a result of an unlawful act which resulted in a conviction and after his release from prison or jail until he has performed services for an employer for (i) 30 days, whether or not such days are consecutive, or (ii) 240 hours, and subsequently becomes totally or partially separated from such employment.

6. If such separation arose as a condition of the individual's parole or release from a custodial or penal institution and such individual was participating in the Diversion Center Incarceration Program pursuant to § 19.2-316.3.

§ 60.2-619. Determinations and decisions by deputy; appeals therefrom.

A. 1. A representative designated by the Commission as a deputy, shall promptly examine the claim. On the basis of the facts found by him, the deputy shall either:

a. Determine whether or not such claim is valid, and if valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and the maximum duration thereof; or

b. Refer such claim or any question involved therein to any appeal tribunal or to the Commission, which tribunal or Commission shall make its determination in accordance with the procedure described in § 60.2-620.

2. When the payment or denial of benefits will be determined by the provisions of subdivision 2 of § 60.2-612, the deputy shall promptly transmit his full finding of fact with respect to that subdivision to any appeal tribunal, which shall make its determination in accordance with the procedure described in § 60.2-620.

B. Upon the filing of an initial claim for benefits, the Commission shall cause an informatory notice of such filing to be mailed to the most recent ~~thirty-day~~ 30-day or 240-hour employing unit of the claimant and all subsequent employing units, and any reimbursable employing units which may be liable for reimbursement to the Commission for any benefits paid. However, the failure to furnish such notice shall not have any effect upon the claim for benefits.

C. Notice of determination upon a claim shall be promptly given to the claimant by delivering or by mailing such notice to the claimant's last known address. In addition, notice of any determination which involves the application of the provisions of § 60.2-618, together with the reasons therefor, shall be promptly given in the same manner to the most recent ~~thirty-day~~ 30-day or 240-hour employing unit by whom the claimant was last employed and any subsequent employing unit which is a party. The

Commission may dispense with the giving of notice of any determination to any employing unit, and such employing unit shall not be entitled to such notice if it has failed to ~~indicate prior to the determination, as required by regulation promulgated by the Commission~~ *respond timely or adequately to a written request of the Commission for information, as required by § 60.2-528.1, from which the deputy may have determined* that the claimant may be ineligible or disqualified under any provision of this title. The deputy shall promptly notify the claimant of any decision made by him at any time which in any manner denies benefits to the claimant for one or more weeks.

D. Such determination or decision shall be final unless the claimant or any such employing unit files an appeal from such determination or decision (i) within ~~thirty~~ 30 calendar days after the delivery of such notification, (ii) within ~~thirty~~ 30 calendar days after such notification was mailed to his last known address, or (iii) within ~~thirty~~ 30 days after such notification was mailed to the last known address of an interstate claimant. For good cause shown, the ~~thirty-day~~ 30-day period may be extended.

E. Benefits shall be paid promptly in accordance with a determination or redetermination under this chapter, or decision of an appeal tribunal, the Commission, the Board of Review or a reviewing court under §§ 60.2-625 and 60.2-631 upon the issuance of such determination, redetermination or decision, regardless of the pendency of the period to file an appeal or petition for judicial review that is provided in this chapter, or the pendency of any such appeal or review. Such benefits shall be paid unless or until such determination, redetermination or decision has been modified or reversed by a subsequent redetermination or decision, in which event benefits shall be paid or denied for weeks of unemployment thereafter in accordance with such modifying or reversing redetermination or decision. If a decision of an appeal tribunal allowing benefits is affirmed in any amount by the Commission, benefits shall continue to be paid until such time as a court decision has become final so that no further appeal can be taken. If an appeal is taken from the Commission's decision, benefits paid shall result in a benefit charge to the account of the employer under § 60.2-530 only when, and as of the date on which, as the result of an appeal, the courts finally determine that the Commission should have awarded benefits to the claimant or claimants involved in such appeal.

§ 60.2-636. Penalty for fraudulent claim.

A. Any person who has been disqualified for benefits under subdivision 4 of § 60.2-618 and who, because of those same acts or omissions, has received any sum as benefits under this title to which the person is not entitled shall be assessed a penalty in an amount equal to 15 percent of the amount of the payment to which the person was not entitled. All penalties collected by the Commission shall be paid into the state treasury and credited to the clearing account of the Fund established pursuant to § 60.2-300. The penalty applies to an erroneous payment made under any state program providing for the payment of unemployment compensation as well as an erroneous payment made under any federal program providing for the payment of unemployment compensation. The notice of determination or decision advising the person that benefits have been denied or adjusted pursuant to subdivision 4 of § 60.2-618 shall include the reason for the finding of an erroneous payment, the penalty amount assessed under this section, and the reason the penalty has been applied.

B. The amount of the penalty assessed pursuant to this section may be collected in any manner allowed for the recovery of the erroneous payment. When a recovery with respect to an erroneous payment is made, any recovery shall be applied first to the principal of the erroneous payment, then to the penalty amount imposed under this section, and finally to any other amounts due.

2. That the Virginia Employment Commission shall monitor the implementation of § 60.2-528.1 created by this act and shall submit a report thereon to the Commission on Unemployment Compensation biennially commencing July 1, 2015. Each report of the Virginia Employment Commission shall provide information, aggregated so as not to identify specific employers or claimants, regarding the number of employers that have been deemed to have established a pattern of failing to respond timely or adequately to written requests for information, the amount of benefit charges not relieved from employers' accounts as a result of the implementation of such section, the assessment of civil penalties pursuant to such section, the effectiveness of the section in reducing the number and amount of erroneous payments made to claimants and in increasing the percentage of employers that provide timely and adequate responses to requests for information relating to claims for compensation, and the effect thereof on the solvency level of the Unemployment Trust Fund and the average state unemployment tax per employee. Each report shall include information regarding the burden of complying with and administering the section and recommendations for legislative changes that would ease such burdens and increase the section's effectiveness.