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SENATE BILL NO. 548

Offered January 8, 2020

Prefiled January 7, 2020

A BILL to amend and reenact §§ 60.2-212, 60.2-229, 60.2-508, 60.2-512, 60.2-513, and 60.2-627 of the Code of Virginia, relating to unemployment compensation.

Patron—Edwards

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That §§ 60.2-212, 60.2-229, 60.2-508, 60.2-512, 60.2-513, and 60.2-627 of the Code of Virginia are amended and reenacted as follows:

§ 60.2-212. Employment.

A. "Employment" means:

1. Any service including service in interstate commerce, performed for remuneration or under any contract of hire, written or oral, express or implied; and

2. Any service, of whatever nature, performed by an individual for any employing unit, for remuneration or under any contract of hire, written or oral, and irrespective of citizenship or residence of either,

a. Within the United States, or

b. On or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the individual is employed on the vessel or aircraft it touches at a port in the United States, if such individual performs such services on or in connection with such vessel or aircraft when outside the United States, provided that the operating office, from which the operations of the vessel or aircraft are ordinarily and regularly supervised, managed, directed or controlled, is within the Commonwealth.

B. Notwithstanding subdivision 2 b of subsection A of this section, "employment" means all service performed by an officer or member of the crew of an American vessel on or in connection with such vessel, if the operating office from which the operations of such vessel operating on navigable waters within, or within and without, the United States are ordinarily and regularly supervised, managed, directed and controlled is within the Commonwealth.

C. Services performed by an individual for remuneration shall be deemed to be employment subject to this title unless the Commission determines that such individual is not an employee for purposes of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act, based upon an application of the 20 factors set forth in standard used by the Internal Revenue Service Revenue Ruling 87-41, issued pursuant to 26 C.F.R. 31.3306(i)-1 and 26 C.F.R. 31.3121(d)-1 for such determinations.

D. Notwithstanding the provisions of subsection C, an individual who performs services as a real estate salesperson, under direction of a real estate broker under Chapter 21 (§ 54.1-2100 et seq.) of Title 54.1, or as a real estate appraiser under Chapter 20.1 (§ 54.1-2009 et seq.) of Title 54.1 pursuant to an executed independent contractor agreement and for remuneration solely by way of commission or fee, shall not be an employee for purposes of this chapter.

§ 60.2-229. Wages.

A. "Wages" means all remuneration paid, or which should have been paid, for personal services, including commissions, bonuses, tips, back pay, dismissal pay, severance pay and any other payments made by an employer to an employee during his employment and thereafter and the cash value of all remuneration payable in any medium other than cash. Notwithstanding the other provisions of this subsection, wages paid in back pay awards shall be allocated to, and reported as being paid during, the calendar quarter or quarters in which such back pay would have been earned. Severance pay paid at the time of, or subsequent to, separation from employment shall be allocated to the last day of work unless otherwise allocated by the employer. If otherwise allocated, severance pay shall be allocated at a rate not less than the average weekly wage of such employee during the last calendar quarter, and reported as such. Severance pay shall be deducted from any benefits payable after the Commission's receipt of notification of severance pay by the employer pursuant to § 60.2-603. The reasonable cash value of remuneration payable in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the Commission.

B. The term "wages" shall not include:

1. Subsequent to December 31, 1990, for purposes of taxes only, that part of the remuneration, other than remuneration referred to in the succeeding subdivisions of this subsection, that is greater than

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59 \$8,000 and is payable during any calendar year to an individual by any employer with respect to
60 employment in this Commonwealth or any other state. If an employer, hereinafter referred to as
61 "successor employer," during any calendar year acquires substantially all of the property used in a trade
62 or business of another employer, hereinafter referred to as a "predecessor," or used in a separate unit of
63 a trade or business of a predecessor, and immediately after the acquisition employs in his trade or
64 business an individual who immediately prior to the acquisition was employed in the trade or business
65 of such predecessor, then, for the purpose of determining whether remuneration, other than remuneration
66 referred to in the succeeding subdivisions of this subsection, with respect to employment equal to \$8,000
67 is payable by the successor to such individual during such calendar year, any remuneration, other than
68 remuneration referred to in the succeeding subdivisions of this subsection, with respect to employment
69 payable, or considered under this subdivision as payable, to such individual by such predecessor during
70 such calendar year and prior to such acquisition shall be considered as payable by such successor
71 employer;

72 2. The amount of any payment, including any amount paid by an employer for insurance or
73 annuities, or into a fund, to provide for any such payment, made to, or on behalf of, an employee or
74 any of his dependents under a plan or system established by an employer which makes provisions for (i)
75 his employees generally, (ii) for his employees generally and their dependents, (iii) for a class or classes
76 of his employees, or (iv) for a class or classes of his employees and their dependents, on account of:

- 77 a. Retirement;
- 78 b. Sickness or accident disability payments which are received under a workers' compensation law;
- 79 c. Medical or hospitalization expenses in connection with sickness or accident disability;
- 80 d. Death; or
- 81 e. Unemployment benefits under any private plan financed in whole or in part by an employer;

82 3. The payment by an employer, without deduction from the remuneration of the employee, of the
83 tax imposed upon an employer under § 3101 of the Federal Internal Revenue Code;

84 4. Any payment on account of sickness or accident disability, or medical or hospitalization expenses
85 in connection with the sickness or accident disability, made by an employer to, or on behalf of, an
86 employee after the expiration of six calendar months following the last calendar month in which the
87 employee worked for such employer;

88 5. Remuneration paid in any medium other than cash to an employee for service not in the course of
89 the employer's trade or business; or

90 6. Any payment, other than vacation or sick pay, made to an employee after the month in which he
91 attains the age of ~~sixty-five~~ 65, if he did not work for the employer in the period for which such
92 payment is made; or

93 7. *Any payment made to, or on behalf of, an employee or his beneficiary under a cafeteria plan, as*
94 *defined in § 125 of the Internal Revenue Code, if such payment would not be treated as wages under the*
95 *Internal Revenue Code.*

96 **§ 60.2-508. Period of coverage generally; account required.**

97 Any employing unit which is or becomes an employer subject to this title within any calendar year
98 shall be subject to this title during the whole of such calendar year. *Any such employing unit shall*
99 *establish an account with the Commission by the end of the calendar quarter in which it becomes*
100 *subject to this title.*

101 **§ 60.2-512. Requiring payroll and tax reports and payment of taxes.**

102 A. The Commission is hereby expressly authorized to require the filing of payroll and tax reports,
103 and the payment of the taxes required by § 60.2-511 in monthly, quarterly, semiannual or annual
104 payments as shall be determined by the Commission; however, if the due date for filing of reports or
105 payment of taxes falls on a Saturday, Sunday or legal holiday, the due date shall be extended to the
106 next business day that is not a Saturday, Sunday or legal holiday. Beginning January 1, 2013, employers
107 may file payroll and tax reports, and pay the taxes required by § 60.2-511, annually, in the time, form
108 and manner prescribed by the Commission, if the employment that is the subject of the report of taxes
109 due under this chapter consists exclusively of domestic service in a private home of the employer, as
110 defined in §§ 31.3121 (a)(7)-1, 31.3306 (c)(2)-1, and 31.3401 (a)(3)-1 of the Employment Tax
111 Regulations promulgated pursuant to §§ 3121, 3306, and 3401 of the Internal Revenue Code, as
112 amended. The aggregate amount of taxes shall be fully paid to the Commission on or before January 31
113 of each year next succeeding the year with respect to employment during which year such taxes are
114 imposed, or in the event the time is extended for filing the return of the taxes imposed by Title IX of
115 the Social Security Act for the year for which such taxes are imposed, then before the expiration of such
116 extension. Taxes due and payable in an amount less than five dollars shall be deemed to be fully paid;
117 however, this does not relieve an employer from filing payroll and tax reports as herein required.

118 B. ~~Beginning January 1, 1994, through December 31, 2008, employers who report 250 or more~~
119 ~~employees in any calendar quarter shall file quarterly reports on a magnetic medium using a format~~
120 ~~prescribed by the Commission. Beginning January 1, 2009, 2021, all employers who report 100 or more~~

employees in any calendar quarter in 2009, or thereafter, shall file quarterly reports on an electronic medium using a format prescribed by the Commission. Waivers will be granted only if the Commission finds this requirement creates an unreasonable burden on the employer. All requests for waiver must be submitted in writing. Beginning January 1, 2009, 2021, if any employer who reports 100 or more employees in any calendar quarter in 2009, or thereafter, and who has not obtained a waiver by the date the employer's quarterly report is due, fails, without good cause shown, to file electronically, the Commission shall assess upon the employer a penalty of \$75, which penalty shall be in addition to the taxes due and payable with respect to such report and to any penalty assessed under subsection B of § 60.2-513. Penalties collected pursuant to this section shall be paid into the Special Unemployment Compensation Administration Fund established pursuant to § 60.2-314.

C. Notwithstanding the provisions of subsection A, no payroll and tax reports shall be filed with respect to an employee of a state or local agency performing intelligence or counterintelligence functions, if the head of such agency has determined that filing such a report could endanger the safety of the employee or compromise an ongoing investigation or intelligence mission.

§ 60.2-513. Failure of employing unit to file reports; assessment and amount of penalty.

A. If any employing unit fails to file with the Commission any report which the Commission deems necessary for the effective administration of this title within 30 days after the Commission requires the same by written notice mailed to the last known address of such employing unit, the Commission may determine on the basis of such information as it may have whether such employing unit is an employer, unless such determination has already been made. Also, on the basis of such information, the Commission may assess the amount of tax due from such employer and shall give written notice of such determination and assessment to such employer. Such determination and assessment shall be final (i) unless such employer, within 30 days after the mailing to the employer at his last known address or other service of the notice of such determination or assessment, applies to the Commission for a review of such determination and assessment or (ii) unless the Commission, on its own motion, sets aside, reduces or increases the same.

B. If any employer had wages payable for a calendar quarter and fails, without good cause shown, to file any report as required of him under this title with respect to wages or taxes, the Commission shall assess upon the employer a penalty of \$100, which shall be in addition to the taxes due and payable with respect to such report.

C. *For the purposes of this subsection, "newly covered" refers to the time at which an employer initially becomes subject to liability under the provisions of this title. A newly covered employer may shall file by the due date of the calendar quarter in which his account number is assigned by the Commission, without penalty such employer becomes subject to liability under the provisions of this title.* If such employer's report is not filed by that date, and in the absence of good cause shown for the failure to so file, a \$100 penalty shall be assessed for each report. Penalties collected pursuant to this section shall be paid into the Special Unemployment Compensation Administration Fund.

§ 60.2-627. Failure to obey subpoenas; orders of court; penalty.

A. In case of contumacy by, or refusal to obey a subpoena issued to any person, any court of this Commonwealth within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which such person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Commission or its duly authorized representative, shall have jurisdiction to issue to such person an order requiring such person to appear before an appeal tribunal, a commissioner, the Commission, or its duly authorized representative, in order to produce evidence or to give testimony concerning the matter under investigation or in question. Any failure to obey such court order may be punished by the court as contempt.

B. Any person subpoenaed by the Commission who, without just cause, fails or refuses to attend and testify or to answer to any lawful inquiry or to produce books, papers, correspondence, memoranda and other records, when it is within his power to do so, shall be guilty of a Class 1 misdemeanor.

C. Each day such any violation of such court-issued subpoena, court order, or Commission-issued subpoena continues shall be deemed to be a separate offense.