VIRGINIA ACTS OF ASSEMBLY — CHAPTER

An Act 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 and to amend the Code of Virginia by adding sections numbered 60.2-711 through 60.2-716, relating to unemployment compensation.

[S 548]

Approved

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 and that the Code of Virginia is amended by adding sections numbered 60.2-711 through 60.2-716 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

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

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

a. Retirement;

b. Sickness or accident disability payments which are received under a workers' compensation law;

c. Medical or hospitalization expenses in connection with sickness or accident disability;

d. Death; or

e. Unemployment benefits under any private plan financed in whole or in part by an employer;

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

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

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

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

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

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

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

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

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

B. ~~Beginning January 1, 1994, through December 31, 2008, employers who report 250 or more employees in any calendar quarter shall file quarterly reports on a magnetic medium using a format~~

~~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.

§ 60.2-711. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Affected unit" means a specific plant, department, shift, or other definable unit of an employing unit that has at least two employees to which an approved short-time compensation plan applies.

"Health and retirement benefits" means employer-provided health benefits and retirement benefits under a defined benefit pension plan as defined in § 414(j) of the Internal Revenue Code or contributions under a defined contribution plan as defined in § 414(i) of the Internal Revenue Code that are incidents of employment in addition to the cash remuneration earned.

"Program" means the short-time compensation program established pursuant to this chapter.

"Short-time compensation" means the unemployment benefits payable to employees in an affected unit under an approved short-time compensation plan, as distinguished from the unemployment benefits otherwise payable under the unemployment compensation provisions of this title.

"Work sharing plan" or "plan" means a plan submitted by an employer to the Commission for approval to participate in the Program.

§ 60.2-712. Application to participate in short-time compensation program.

A. The Commission shall establish and implement a short-time compensation program by January 1, 2021. The Program shall meet the requirements of 22 U.S.C. § 3306(v) and all other applicable federal and state laws.

B. An employer that wishes to participate in the Program shall submit to the Commission a signed, written work sharing plan for approval. The Commission shall develop an application form to request approval of a plan and an approval process. The application shall include:

1. The affected unit covered by the plan, including the number of employees in the unit; the percentage of employees in the affected unit covered by the plan; identification of each individual employee in the affected unit by name, social security number, and the employer's unemployment tax account number; and any other information required by the Commission to identify plan participants.

2. A description of how employees in the affected unit will be notified of the employer's participation in the plan if such application is approved, including how the employer will notify those employees in a collective bargaining unit as well as any employees in the affected unit who are not in a collective bargaining unit. If the employer does not intend to provide advance notice to employees in the affected unit, the employer shall explain in a statement in the application why it is not feasible to provide such notice.

3. A requirement that the employer identify, in the application, the usual weekly hours of work for employees in the affected unit and the specific percentage by which their hours will be reduced during all weeks covered by the plan. The percentage of reduction for which a work sharing plan application may be approved shall be not less than 10 percent and not more than 60 percent. If the plan includes any week for which the employer regularly does not provide work, including incidences due to a holiday or other plant closing, then such week shall be identified in the application.

4. Certification by the employer that, if the employer provides health benefits and retirement benefits to any employee whose usual weekly hours of work are reduced under the Program, such benefits will continue to be provided to employees participating in the Program under the same terms and conditions as though the usual weekly hours of work of such employee had not been reduced or to the same extent as other employees not participating in the Program. For defined benefit retirement plans, the hours that are reduced under the plan shall be credited for purposes of participation, vesting, and accrual of benefits as though the usual weekly hours of work had not been reduced. The dollar amount of employer contributions to a defined contribution plan that are based on a percentage of compensation may be less due to the reduction in the employee's compensation.

5. Certification by the employer that the aggregate reduction in work hours is in lieu of layoffs, whether temporary or permanent layoffs or both. The application shall include an estimate of the number of employees who would have been laid off in the absence of the plan. The employer shall also certify that new employees will not be hired in or transferred to an affected unit for the duration of the plan.

6. Certification by the employer that participation in the plan and its implementation is consistent with the employer's obligations under applicable federal and state laws.

7. Agreement by the employer to (i) furnish reports to the Commission relating to the proper conduct of the plan; (ii) allow the Commission access to all records necessary to approve or disapprove the plan application and, after approval of a plan, monitor and evaluate the plan; and (iii) follow any other directives the Commission deems necessary to implement the plan and that are consistent with the requirements for plan applications.

8. Any other provision added to the application by the Commission that the U.S. Secretary of Labor determines to be appropriate for purposes of a work sharing plan.

§ 60.2-713. Approval and disapproval of plan.

The Commission shall approve or disapprove a work sharing plan in writing within 10 working days of its receipt and promptly communicate the decision to the employer. A decision disapproving the plan shall clearly identify the reasons for the disapproval. If a plan is disapproved, the employer may submit a different work sharing plan for approval.

§ 60.2-714. Effective date, duration, and modification of plan.

A. A work sharing plan shall be effective on the date that is mutually agreed upon by the employer and the Commission, which shall be specified in the notice of approval to the employer. The plan shall expire on the date specified in the notice of approval, which shall be either the date at the end of the twelfth full calendar month after its effective date or an earlier date mutually agreed upon by the

employer and the Commission. However, if a work sharing plan is revoked by the Commission under subsection B, the plan shall terminate on the date specified in the Commission's written order of revocation. An employer may terminate a plan at any time upon written notice to the Commission. Upon receipt of such notice from the employer, the Commission shall promptly notify each member of the affected unit of the termination date. An employer may submit a new application to participate in another plan at any time after the expiration or termination date.

B. The Commission may revoke approval of a work sharing plan for good cause at any time, including upon the request of any of the affected unit's employees. The revocation order shall be in writing and shall specify the reasons for the revocation and the date the revocation is effective. The Commission may periodically review the operation of each employer's plan to assure that no good cause exists for revocation of the approval of the plan. Good cause shall include failure to comply with the assurances given in the plan, unreasonable revision of productivity standards for the affected unit, conduct or occurrences tending to defeat the intent and effective operation of the plan, and violation of any criteria on which approval of the plan was based.

C. An employer may request a modification of an approved plan by filing a written request to the Commission. The request shall identify the specific provisions proposed to be modified and provide an explanation of why the proposed modification is appropriate for the plan. The Commission shall approve or disapprove the proposed modification in writing within 10 working days and promptly communicate the decision to the employer. An employer is not required to request approval of a plan modification from the Commission if the change is not substantial, but the employer shall report every change to the plan to the Commission promptly and in writing.

§ 60.2-715. Eligibility for short-time compensation.

A. An employee is eligible to receive short-time compensation under a work sharing plan with respect to any week only if the employee is monetarily eligible for unemployment compensation, not otherwise disqualified for unemployment compensation, and:

1. During the week, the employee is employed as a member of an affected unit under an approved work sharing plan that was approved prior to that week, and the plan is in effect with respect to the week for which short-time compensation is claimed; and

2. Notwithstanding any other provisions of this title relating to availability for work and actively seeking work, the employee is available for the employee's usual hours of work with the short-time compensation employer, which may include, for purposes of this section, participating in training, including employer-sponsored training or training funded under the federal Workforce Innovation and Opportunity Act of 2014, to enhance job skills that is approved by the Commission.

B. Notwithstanding any other provision of law, an employee covered by a work sharing plan is deemed unemployed in any week during the duration of that plan if the employee's remuneration as an employee in an affected unit is reduced based on a reduction of the employee's usual weekly hours of work under an approved work sharing plan.

C. The short-term compensation program shall not serve as a subsidy of seasonal employment during the off-season, nor as a subsidy of temporary part-time or intermittent employment.

§ 60.2-716. Benefits.

A. The short-time compensation weekly benefit amount shall be the product of the regular weekly unemployment compensation amount for a week of total unemployment multiplied by the percentage of reduction in the individual's usual weekly hours of work.

B. An individual may be eligible for short-time compensation or unemployment compensation, as appropriate, except that (i) no individual shall be eligible for combined benefits in any benefit year in an amount more than the maximum entitlement established for regular unemployment compensation and (ii) no individual shall be paid short-time compensation benefits for more than 26 weeks under a plan.

C. Provisions applicable to unemployment compensation claimants shall apply to short-time compensation claimants to the extent that they are not inconsistent with the Program's provisions. An individual who files an initial claim for short-time compensation benefits shall receive a monetary determination.

D. An employee who is not provided any work during a week by the short-time compensation employer, or any other employer, and who is otherwise eligible for unemployment compensation shall be eligible for the amount of regular unemployment compensation to which he would otherwise be eligible.

E. An employee who is not provided any work by the short-time compensation employer during a week, but who works for another employer and is otherwise eligible, may be paid unemployment compensation for that week subject to the disqualifying income and other provisions applicable to claims for regular compensation.

F. An employee who has received all of the short-time compensation or combined unemployment compensation and short-time compensation available in a benefit year shall be considered an exhaustee for purposes of extended benefits and, if otherwise eligible under those provisions, shall be eligible to

receive extended benefits.

2. That the provisions of § 30-19.03:1.2 of the Code of Virginia shall not apply to this act.

3. That the provisions of this act shall expire on January 1, 2021, if the Virginia Employment Commission has not, on or before such date, received adequate funding from the U.S. Department of Labor that covers the costs of information technology upgrades, training, publicity, and marketing that are incurred by the Virginia Employment Commission in connection with establishing the short-time compensation program pursuant to the first enactment of this act.

4. That, if not sooner expired pursuant to the provisions of the third enactment of this act, this act shall expire on July 1, 2022.