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## SENATE BILL NO. 1310

Offered January 13, 2021

Prefiled January 12, 2021

A *BILL to amend and reenact §§ 2.2-3905, 40.1-2, 40.1-29, 40.1-49.3, 40.1-49.8, 65.2-101, and 65.2-305 of the Code of Virginia, relating to the employees providing domestic service; the Virginia Human Rights Act; application of laws applicable to employee safety and workers' compensation.*

Patrons—McClellan, Boysko, Hashmi, Locke and Lucas; Delegates: Bourne and Carr

Referred to Committee on Commerce and Labor

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

**1. That §§ 2.2-3905, 40.1-2, 40.1-29, 40.1-49.3, 40.1-49.8, 65.2-101, and 65.2-305 of the Code of Virginia are amended and reenacted as follows:**

**§ 2.2-3905. Nondiscrimination in employment; definitions; exceptions.**

A. As used in this section:

"Age" means being an individual who is at least 40 years of age.

"Domestic worker" means an individual who is compensated directly or indirectly for the performance of services of a household nature performed in or about a private home, including services performed by individuals such as companions, babysitters, cooks, waiters, butlers, valets, maids, housekeepers, nannies, nurses, janitors, laundresses, caretakers, handymen, gardeners, home health aides, personal care aides, and chauffeurs of automobiles for family use. "Domestic worker" does not include (i) a family member, friend, or neighbor of a child, or a parent of a child, who provides child care in the child's home; (ii) any child day program as defined in § 22.1-289.02 or an individual who is an employee of a child day program; or (iii) any employee employed on a casual basis in domestic service employment to provide companionship services for individuals who, because of age or infirmity, are unable to care for themselves.

"Employee" means an individual employed by an employer.

"Employer" means a person employing (i) 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person or (ii) one or more domestic workers. However, (i) (a) for purposes of unlawful discharge under subdivision B 1 on the basis of race, color, religion, national origin, status as a veteran, sex, sexual orientation, gender identity, marital status, pregnancy, or childbirth or related medical conditions including lactation, "employer" means any employer person employing more than five persons or one or more domestic workers and (ii) (b) for purposes of unlawful discharge under subdivision B 1 on the basis of age, "employer" means any employer employing more than five but fewer than 20 persons.

"Employment agency" means any person, or an agent of such person, regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer.

"Joint apprenticeship committee" means the same as that term is defined in § 40.1-120.

"Labor organization" means an organization engaged in an industry, or an agent of such organization, that exists for the purpose, in whole or in part, of dealing with employers on behalf of employees concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment. "Labor organization" includes employee representation committees, groups, or associations in which employees participate.

"Lactation" means a condition that may result in the feeding of a child directly from the breast or the expressing of milk from the breast.

B. It is an unlawful employment practice for:

1. An employer to:

a. Fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to such individual's compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions including lactation, age, status as a veteran, or national origin; or

b. Limit, segregate, or classify employees or applicants for employment in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect an individual's status as an employee, because of such individual's race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions including lactation, age, status as a veteran, or national origin.

2. An employment agency to:

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59 a. Fail or refuse to refer for employment, or otherwise discriminate against, any individual because of  
60 such individual's race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy,  
61 childbirth or related medical conditions, age, status as a veteran, or national origin; or

62 b. Classify or refer for employment any individual on the basis of such individual's race, color,  
63 religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical  
64 conditions, age, status as a veteran, or national origin.

65 3. A labor organization to:

66 a. Exclude or expel from its membership, or otherwise discriminate against, any individual because  
67 of such individual's race, color, religion, sex, sexual orientation, gender identity, marital status,  
68 pregnancy, childbirth or related medical conditions, age, status as a veteran, or national origin;

69 b. Limit, segregate, or classify its membership or applicants for membership, or classify or fail to or  
70 refuse to refer for employment any individual, in any way that would deprive or tend to deprive such  
71 individual of employment opportunities, or would limit such employment opportunities or otherwise  
72 adversely affect an individual's status as an employee or as an applicant for employment, because of  
73 such individual's race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy,  
74 childbirth or related medical conditions, age, status as a veteran, or national origin; or

75 c. Cause or attempt to cause an employer to discriminate against an individual in violation of  
76 subdivisions a or b.

77 4. An employer, labor organization, or joint apprenticeship committee to discriminate against any  
78 individual in any program to provide apprenticeship or other training program on the basis of such  
79 individual's race, color, religion, sex, sexual orientation, gender identity, pregnancy, childbirth or related  
80 medical conditions, age, status as a veteran, or national origin.

81 5. An employer, in connection with the selection or referral of applicants or candidates for  
82 employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the  
83 results of employment-related tests on the basis of race, color, religion, sex, sexual orientation, gender  
84 identity, marital status, pregnancy, childbirth or related medical conditions, age, status as a veteran, or  
85 national origin.

86 6. Except as otherwise provided in this chapter, an employer to use race, color, religion, sex, sexual  
87 orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, status  
88 as a veteran, or national origin as a motivating factor for any employment practice, even though other  
89 factors also motivate the practice.

90 7. (i) An employer to discriminate against any employees or applicants for employment, (ii) an  
91 employment agency or a joint apprenticeship committee controlling an apprenticeship or other training  
92 program to discriminate against any individual, or (iii) a labor organization to discriminate against any  
93 member thereof or applicant for membership because such individual has opposed any practice made an  
94 unlawful employment practice by this chapter or because such individual has made a charge, testified,  
95 assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

96 8. An employer, labor organization, employment agency, or joint apprenticeship committee  
97 controlling an apprenticeship or other training program to print or publish, or cause to be printed or  
98 published, any notice or advertisement relating to (i) employment by such an employer, (ii) membership  
99 in or any classification or referral for employment by such a labor organization, (iii) any classification or  
100 referral for employment by such an employment agency, or (iv) admission to, or employment in, any  
101 program established to provide apprenticeship or other training by such a joint apprenticeship committee  
102 that indicates any preference, limitation, specification, or discrimination based on race, color, religion,  
103 sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical  
104 conditions, age, status as a veteran, or national origin, except that such a notice or advertisement may  
105 indicate a preference, limitation, specification, or discrimination based on religion, sex, age, or national  
106 origin when religion, sex, age, or national origin is a bona fide occupational qualification for  
107 employment.

108 C. Notwithstanding any other provision of this chapter, it is not an unlawful employment practice:

109 1. For (i) an employer to hire and employ employees; (ii) an employment agency to classify, or refer  
110 for employment, any individual; (iii) a labor organization to classify its membership or to classify or  
111 refer for employment any individual; or (iv) an employer, labor organization, or joint apprenticeship  
112 committee to admit or employ any individual in any apprenticeship or other training program on the  
113 basis of such individual's religion, sex, or age in those certain instances where religion, sex, or age is a  
114 bona fide occupational qualification reasonably necessary to the normal operation of that particular  
115 employer, employment agency, labor organization, or joint apprenticeship committee;

116 2. For an elementary or secondary school or institution of higher education to hire and employ  
117 employees of a particular religion if such elementary or secondary school or institution of higher  
118 education is, in whole or in substantial part, owned, supported, controlled, or managed by a particular  
119 religion or by a particular religious corporation, association, or society or if the curriculum of such  
120 elementary or secondary school or institution of higher education is directed toward the propagation of a

particular religion;

3. For an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment, pursuant to a bona fide seniority or merit system, or a system that measures earnings by quantity or quality of production, or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, status as a veteran, or national origin;

4. For an employer to give and to act upon the results of any professionally developed ability test, provided that such test, its administration, or an action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, status as a veteran, or national origin;

5. For an employer to provide reasonable accommodations related to pregnancy, childbirth or related medical conditions, and lactation, when such accommodations are requested by the employee; or

6. For an employer to condition employment or premises access based upon citizenship where the employer is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute or regulation of the federal government or any executive order of the President of the United States.

D. Nothing in this chapter shall be construed to require any employer, employment agency, labor organization, or joint apprenticeship committee to grant preferential treatment to any individual or to any group because of such individual's or group's race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, status as a veteran, or national origin on account of an imbalance that may exist with respect to the total number or percentage of persons of any race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, status as a veteran, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to or employed in any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, status as a veteran, or national origin in any community.

E. The provisions of this section shall not apply to the employment of individuals of a particular religion by a religious corporation, association, educational institution, or society to perform work associated with its activities.

#### **§ 40.1-2. Definitions.**

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

"Board" means the Safety and Health Codes Board.

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

"Commission" means the Safety and Health Codes Board.

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

"Department" means the Department of Labor and Industry.

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

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

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

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

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

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

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

A. All employers operating a business or engaging an individual to perform domestic service shall

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

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

206 C. No employer shall withhold any part of the wages or salaries of any employee except for payroll,  
207 wage or withholding taxes or in accordance with law, without the written and signed authorization of the  
208 employee. On each regular pay date, each employer other than an employer engaged in agricultural  
209 employment including agribusiness and forestry shall provide to each employee a written statement, by a  
210 paystub or online accounting, that shows the name and address of the employer; the number of hours  
211 worked during the pay period if the employee is paid on the basis of (i) the number of hours worked or  
212 (ii) a salary that is less than the standard salary level adopted by regulation of the U.S. Department of  
213 Labor pursuant to § 13(a)(1) of the federal Fair Labor Standards Act, 29 U.S.C. § 213(a)(1), as  
214 amended, establishing an exemption from the Act's overtime premium pay requirements; the rate of pay;  
215 the gross wages earned by the employee during the pay period; and the amount and purpose of any  
216 deductions therefrom. The paystub or online accounting shall include sufficient information to enable the  
217 employee to determine how the gross and net pay were calculated. An employer engaged in agricultural  
218 employment including agribusiness and forestry, upon request of its employee, shall furnish the  
219 employee a written statement of the gross wages earned by the employee during any pay period and the  
220 amount and purpose of any deductions therefrom.

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

224 E. An employer who willfully and with intent to defraud fails or refuses to pay wages in accordance  
225 with this section, unless the failure to pay was because of a bona fide dispute between the employer and  
226 its employee:

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

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

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

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

243 G. In addition to being subject to any other penalty provided by the provisions of this section, any

employer who fails to make payment of wages in accordance with subsection A shall be liable for the payment of all wages due, and an additional equal amount as liquidated damages, plus interest at an annual rate of eight percent accruing from the date the wages were due.

H. Any employer who knowingly fails to make payment of wages in accordance with subsection A shall be subject to a civil penalty not to exceed \$1,000 for each violation. The Commissioner shall notify any employer that he alleges has violated any provision of this section by certified mail. Such notice shall contain a description of the alleged violation. Within 15 days of receipt of notice of the alleged violation, the employer may request an informal conference regarding such violation with the Commissioner. In determining the amount of any penalty to be imposed, the Commissioner shall consider the size of the business of the employer charged and the gravity of the violation. The decision of the Commissioner shall be final. Civil penalties owed under this section shall be paid to the Commissioner for deposit into the general fund of the State Treasurer. The Commissioner shall prescribe procedures for the payment of proposed assessments of penalties that are not contested by employers. Such procedures shall include provisions for an employer to consent to abatement of the alleged violation and pay a proposed penalty or a negotiated sum in lieu of such penalty without admission of any civil liability arising from such alleged violation.

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

J. In addition to any civil or criminal penalty provided by this section, and without regard to any exhaustion of alternative administrative remedies provided for in this section, if an employer fails to pay wages to an employee in accordance with this section, the employee may bring an action, individually, jointly, with other aggrieved employees, or on behalf of similarly situated employees as a collective action consistent with the collective action procedures of the Fair Labor Standards Act, 29 U.S.C. § 216(b), against the employer in a court of competent jurisdiction to recover payment of the wages, and the court shall award the wages owed, an additional equal amount as liquidated damages, plus prejudgment interest thereon as provided in subsection G, and reasonable attorney fees and costs. If the court finds that the employer knowingly failed to pay wages to an employee in accordance with this section, the court shall award the employee an amount equal to triple the amount of wages due and reasonable attorney fees and costs.

K. As used in this section, a person acts "knowingly" if the person, with respect to information, (i) has actual knowledge of the information, (ii) acts in deliberate ignorance of the truth or falsity of the information, or (iii) acts in reckless disregard of the truth or falsity of the information. Establishing that a person acted knowingly shall not require proof of specific intent to defraud.

L. An action under this section shall be commenced within three years after the cause of action accrued. The period for filing is tolled upon the filing of an administrative action under subsection F until the employee has been informed that the action has been resolved or until the employee has withdrawn the complaint, whichever is sooner.

#### **§ 40.1-49.3. Definitions.**

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

"Commission" means the Virginia Workers' Compensation Commission.

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

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

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

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

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

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

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

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

In order to carry out the purposes of the occupational safety and health laws of the Commonwealth and any such rules, regulations, or standards adopted in pursuance of such laws, the Commissioner, upon representing appropriate credentials to the owner, operator, or agent in charge, is authorized, with the consent of the owner, operator, or agent in charge of such workplace as described in subdivision (4) of this section 1, or with an appropriate order or warrant:

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

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

**§ 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.

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

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

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

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

"Employee" means:

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

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

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

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

d. Members of the Virginia Defense Force.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. "Employee" shall does not mean:

a. Officers and employees of the Commonwealth who are elected by the General Assembly, or appointed by the Governor, either with or without the confirmation of the Senate. This exception shall not apply to any "state employee" as defined in § 51.1-124.3 nor to Supreme Court Justices, judges of the Court of Appeals, judges of the circuit or district courts, members of the Workers' Compensation Commission and the State Corporation Commission, or the Superintendent of State Police.



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

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

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

e. Casual employees.

f. ~~Domestic servants.~~

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

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

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

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

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

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

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

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

o. n. An owner-operator of a motor vehicle that is leased with or to a common or contract carrier in the trucking industry if (i) the owner-operator performs services for the carrier pursuant to a contract that provides that the owner-operator is an independent contractor and shall not be treated as an employee for purposes of the Federal Insurance Contributions Act, 26 U.S.C. § 3101 et seq., Social

551 Security Act of 1935, P.L. 74-271, federal unemployment tax laws, and federal income tax laws and (ii)  
552 each of the following factors is present:

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

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

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

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

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

582 1. Participation in employer-sponsored off-duty recreational activities which are not part of the  
583 employee's duties; or

584 2. Use of a motor vehicle that was provided to the employee by a motor vehicle dealer as defined by  
585 § 46.2-1500 and bears a dealer's license plate as defined by § 46.2-1550 for (i) commuting to or from  
586 work or (ii) any other nonwork activity.

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

588 1. Arising out of and in the course of the employment of (a) an employee of a hospital as defined in  
589 § 32.1-123; (b) an employee of a health care provider as defined in § 8.01-581.1; (c) an employee of the  
590 Department of Health or a local department of health; (d) a member of a search and rescue organization;  
591 or (e) any person described in clauses (i) through (iv), (vi), and (ix) of subsection A of § 65.2-402.1  
592 otherwise subject to the provisions of this title; and

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

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

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

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

608 **§ 65.2-305. Voluntary subjection to provisions of title; effect of taking out insurance or**  
609 **qualifying as self-insurer.**

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

613 B. Every employer taking out a workers' compensation insurance policy, or qualifying as a  
614 self-insurer, shall be subject to all the provisions of this title, regardless of the number of employees or  
615 whether he is an employer of farm and horticultural laborers ~~and domestic servants~~. Such employers not  
616 otherwise covered by this title shall be subject to this title only during the period covered by such  
617 insurance. Every employee of an employer who has complied with the foregoing requirements shall be  
618 subject to all the provisions of this title except that executive officers may reject coverage as provided in  
619 § 65.2-300.