

H. B. 3053

(By Delegates Shott, Ellington and Gearheart)
 [Introduced March 22, 2013; referred to the
 Committee on the Judiciary then Finance.]

A BILL to amend and reenact §21A-1A-17 of the Code of West
 Virginia, 1931, as amended, relating to the labor-management
 relations act for the private sector; expanding exclusions
 from the term employment in that article generally.

Be it enacted by the Legislature of West Virginia:

That §21A-1A-17 of the Code of West Virginia, 1931, as
 amended, be amended and reenacted to read as follows:

ARTICLE 1A. LABOR-MANAGEMENT RELATIONS ACT FOR THE PRIVATE SECTOR.

§21A-1A-17. Exclusions from employment.

Notwithstanding any provision of section sixteen of this
 article to the contrary, the term "employment" does not include:

(1) Service performed in the employ of the United States or
 any instrumentality of the United States exempt under the
 Constitution of the United States from the payments imposed by this

1 law, except that to the extent that the Congress of the United
2 States permits states to require any instrumentalities of the
3 United States to make payments into an unemployment fund under a
4 state unemployment compensation law, all of the provisions of this
5 law are applicable to the instrumentalities and to service
6 performed for the instrumentalities in the same manner, to the same
7 extent and on the same terms as to all other employers, employing
8 units, individuals and services: *Provided*, That if this state is
9 not certified for any year by the Secretary of Labor under 26
10 U.S.C. §3404, subsection (c), the payments required of the
11 instrumentalities with respect to the year shall be refunded by the
12 commissioner from the fund in the same manner and within the same
13 period as is provided in section nineteen, article five of this
14 chapter with respect to payments erroneously collected;

15 (2) Service performed with respect to which unemployment
16 compensation is payable under the Railroad Unemployment Insurance
17 Act and service with respect to which unemployment benefits are
18 payable under an unemployment compensation system for maritime
19 employees established by an Act of Congress. The commissioner may
20 enter into agreements with the proper agency established under an
21 Act of Congress to provide reciprocal treatment to individuals who,
22 after acquiring potential rights to unemployment compensation under
23 an Act of Congress or who have, after acquiring potential rights to
24 unemployment compensation under an Act of Congress, acquired rights

1 to benefit under this chapter. Such agreement shall become
2 effective ten days after the publications which shall comply with
3 the general rules of the department;

4 (3) Service performed by an individual in agricultural labor,
5 except as provided in subdivision (12), section sixteen of this
6 article, the definition of "employment." For purposes of this
7 subdivision, the term "agricultural labor" includes all services
8 performed:

9 (A) On a farm, in the employ of any person, in connection with
10 cultivating the soil, or in connection with raising or harvesting
11 any agricultural or horticultural commodity, including the raising,
12 shearing, feeding, caring for, training and management of
13 livestock, bees, poultry and fur-bearing animals and wildlife;

14 (B) In the employ of the owner or tenant or other operator of
15 a farm, in connection with the operation, management, conservation,
16 improvement or maintenance of the farm and its tools and equipment,
17 or in salvaging timber or clearing land of brush and other debris
18 left by a hurricane, if the major part of the service is performed
19 on a farm;

20 (C) In connection with the production or harvesting of any
21 commodity defined as an agricultural commodity in section fifteen
22 (g) of the Agricultural Marketing Act, as amended, as codified in
23 12 U.S.C. §1141j, subsection (g), or in connection with the ginning
24 of cotton, or in connection with the operation or maintenance of

1 ditches, canals, reservoirs or waterways, not owned or operated for
2 profit, used exclusively for supplying and storing water for
3 farming purposes;

4 (D) (i) In the employ of the operator of a farm in handling,
5 planting, drying, packing, packaging, processing, freezing,
6 grading, storing or delivering to storage or to market or to a
7 carrier for transportation to market, in its unmanufactured state,
8 any agricultural or horticultural commodity; but only if the
9 operator produced more than one half of the commodity with respect
10 to which the service is performed; or (ii) in the employ of a group
11 of operators of farms (or a cooperative organization of which the
12 operators are members) in the performance of service described in
13 subparagraph (i) of this paragraph, but only if the operators
14 produced more than one half of the commodity with respect to which
15 the service is performed; but the provisions of subparagraphs (i)
16 and (ii) of this paragraph are not applicable with respect to
17 service performed in connection with commercial canning or
18 commercial freezing or in connection with any agricultural or
19 horticultural commodity after its delivery to a terminal market for
20 distribution for consumption;

21 (E) On a farm operated for profit if the service is not in the
22 course of the employer's trade or business or is domestic service
23 in a private home of the employer. As used in this subdivision,
24 the term "farm" includes stock, dairy, poultry, fruit, fur-bearing

1 animals, truck farms, plantations, ranches, greenhouses, ranges and
2 nurseries, or other similar land areas or structures used primarily
3 for the raising of any agricultural or horticultural commodities;

4 (4) Domestic service in a private home except as provided in
5 subdivision (13), section sixteen of this article, the definition
6 of "employment";

7 (5) Service performed by an individual in the employ of his or
8 her son, daughter or spouse;

9 (6) Service performed by a child under the age of eighteen
10 years in the employ of his or her father or mother;

11 (7) Service as an officer or member of a crew of an American
12 vessel, performed on or in connection with the vessel, if the
13 operating office, from which the operations of the vessel operating
14 on navigable waters within or without the United States are
15 ordinarily and regularly supervised, managed, directed and
16 controlled, is without this state;

17 (8) Service performed by agents of mutual fund broker-dealers
18 or insurance companies, exclusive of industrial insurance agents,
19 or by agents of investment companies, who are compensated wholly on
20 a commission basis;

21 (9) Service performed by an agent of a person engaged in the
22 practice of real estate brokerage who is compensated wholly on a
23 commission basis;

24 (10) Service performed by an individual in connection with the

1 sale of consumer products (or the solicitation of the sale of
2 consumer products) in a residence or other place that is not a
3 permanent commercial establishment performed under a written
4 contract between the individual and the person for whom such
5 individual performs such services, which contract provides:

6 (A) That such individual will not be treated as an employee
7 for federal tax purposes; and

8 (B) That substantially all of such individual's compensation
9 is directly related to sales or other output (including the
10 performance of services) rather than to the number of hours worked;

11 ~~(9)~~ (11) Service performed:

12 (A) In the employ of a church or convention or association of
13 churches, or an organization which is operated primarily for
14 religious purposes and which is operated, supervised, controlled or
15 principally supported by a church or convention or association of
16 churches; or

17 (B) By a duly ordained, commissioned or licensed minister of
18 a church in the exercise of his or her ministry or by a member of
19 a religious order in the exercise of duties required by the order;
20 or

21 (C) By an individual receiving rehabilitation or remunerative
22 work in a facility conducted for the purpose of carrying out a
23 program of either:

24 (i) Rehabilitation for individuals whose earning capacity is

1 impaired by age or physical or mental deficiency or injury; or

2 (ii) Providing remunerative work for individuals who because
3 of their impaired physical or mental capacity cannot be readily
4 absorbed in the competitive labor market: *Provided*, That this
5 exemption does not apply to services performed by individuals if
6 they are not receiving rehabilitation or remunerative work on
7 account of their impaired capacity; or

8 (D) As part of an unemployment work-relief or work-training
9 program assisted or financed, in whole or in part, by any federal
10 agency or an agency of a state or political subdivision thereof, by
11 an individual receiving the work relief or work training; or

12 (E) By an inmate of a custodial or penal institution;

13 ~~(10)~~ (12) Service performed in the employ of a school, college
14 or university, if the service is performed:

15 (A) By a student who is enrolled and is regularly attending
16 classes at the school, college or university; or

17 (B) By the spouse of a student, if the spouse is advised, at
18 the time the spouse commences to perform the service, that:

19 (i) The employment of the spouse to perform the service is
20 provided under a program to provide financial assistance to the
21 student by the school, college or university; and

22 (ii) The employment will not be covered by any program of
23 unemployment insurance;

24 ~~(11)~~ (13) Service performed by an individual who is enrolled

1 at a nonprofit or public educational institution which normally
2 maintains a regular faculty and curriculum and normally has a
3 regularly organized body of students in attendance at the place
4 where its educational activities are carried on as a student in a
5 full-time program, taken for credit at the institution, which
6 combines academic instruction with work experience, if the service
7 is an integral part of the program and the institution has so
8 certified to the employer, except that this subdivision does not
9 apply to service performed in a program established for or on
10 behalf of an employer or group of employers;

11 ~~(12)~~ (14) Service performed in the employ of a hospital, if
12 the service is performed by a patient of the hospital, as defined
13 in this article;

14 ~~(13)~~ (15) Service in the employ of a governmental entity
15 referred to in subdivision (9), section sixteen of this article,
16 the definition of "employment," if the service is performed by an
17 individual in the exercise of duties:

18 (A) As an elected official;

19 (B) As a member of a legislative body, or a member of the
20 judiciary, of a state or political subdivision;

21 (C) As a member of the state National Guard or Air National
22 Guard, except as provided in section twenty-eight of this article;

23 (D) As an employee serving on a temporary basis in case of
24 fire, storm, snow, earthquake, flood or similar emergency;

1 (E) In a position which, under or pursuant to the laws of
2 this state, is designated as:

3 (i) A major nontenured policymaking or advisory position; or

4 (ii) A policymaking or advisory position the performance of
5 the duties of which ordinarily does not require more than eight
6 hours per week; or

7 (F) As any election official appointed to serve during any
8 municipal, county or state election, if the amount of remuneration
9 received by the individual during the calendar year for services as
10 an election official is less than \$1,000;

11 ~~(14)~~ (16) Service performed by a bona fide partner of a
12 partnership for the partnership; and

13 ~~(15)~~ (17) Service performed by a person for his or her own
14 sole proprietorship.

15 Notwithstanding the foregoing exclusions from the definition
16 of "employment," services, except agricultural labor and domestic
17 service in a private home, are in employment if with respect to the
18 services a tax is required to be paid under any federal law
19 imposing a tax against which credit may be taken for contributions
20 required to be paid into a State Unemployment Compensation Fund, or
21 which as a condition for full tax credit against the tax imposed by
22 the federal Unemployment Tax Act are required to be covered under
23 this chapter.

NOTE: The purpose of this bill is to make certain clarifications of the definition of the term employment as contained in this article.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.