

1 COMMITTEE SUBSTITUTE

2 FOR

3 **H. B. 4409**

4 (By Delegates Manchin, Skinner, Sponaugle, Fleischauer, Poore,  
5 Ferro, Longstreth, Marcum, Wells, Moore, Caputo)  
6

7 (Originating in the Committee on the Judiciary)

8 [February 13, 2014]  
9

10 A BILL to amend the Code of West Virginia, 1931, as amended, by  
11 adding thereto a new article, designated §21A-12-1, §21A-12-2,  
12 §21A-12-3, §21A-12-4, §21A-12-5, §21A-12-6, §21A-12-7, §21A-  
13 12-8, §21A-12-9, §21A-12-10, §21A-12-11, §21A-12-12 and §21A-  
14 12-13, all relating to the creation of Valued Employee  
15 Retention Program; authorizing the Commissioner to enforce the  
16 requirements of the program; specifying the contents of an  
17 application for participation; limitations on employer  
18 participation; providing criteria for approval or denial of  
19 work share plan; effective date and duration of program plan;  
20 revocation of an approved plan; modification of an approved  
21 program plan; eligibility for benefits; employee benefits;  
22 charging of program benefits to employer; eligibility for  
23 extended benefits; and requiring report to Legislature.

24 *Be it enacted by the Legislature of West Virginia:*

25 That the Code of West Virginia, 1931, as amended, be amended  
26 by adding thereto a new article, designated §21A-12-1, §21A-12-2,

1 §21A-12-3, §21A-12-4, §21A-12-5, §21A-12-6, §21A-12-7, §21A-12-8,  
2 §21A-12-9, §21A-12-10, §21A-12-11, §21A-12-12 and §21A-12-13, all  
3 to read as follows:

4 **ARTICLE 12. VALUED EMPLOYEE RETENTION PROGRAM.**

5 **§21A-12-1. Definitions.**

6 As used in this article:

7 (1) "Affected unit" means a specified plant, department,  
8 shift, or other definable unit which includes two or more workers  
9 to which an approved program plan applies.

10 (2) "Commissioner" means the Commissioner of the Bureau of  
11 Employment Programs.

12 (3) "Health and retirement benefits" means employer-provided  
13 health benefits, and retirement benefits under a defined benefit  
14 pension plan (as defined in section 414(j) of the Internal Revenue  
15 Code) or contributions under a defined contribution plan (defined  
16 in section 414(i) of such code), which are incidents of employment  
17 in addition to the cash remuneration earned.

18 (4) "Participating employee" means an employee who works a  
19 reduced number of hours under an approved program plan.

20 (5) "Participating employer" means an employer who has a  
21 program plan.

22 (6) "Program" means the "Valued Employee Retention" program  
23 created in section two;

24 (7) "Program benefits" means unemployment benefits payable to  
25 employees in an affected unit under an approved program plan, as

1 distinguished from the unemployment benefits otherwise payable  
2 under the unemployment compensation law.

3 (8) "Program plan" means a plan submitted by an employer, for  
4 approval by the commissioner, under which the employer requests the  
5 payment of program benefits to workers in an affected unit of the  
6 employer to avert layoffs.

7 (8) "Usual weekly hours of work" means the usual hours of work  
8 for full-time or part-time employees in the affected unit when that  
9 unit is operating on its regular basis, not to exceed forty hours  
10 and not including hours of overtime work.

11 (9) "Unemployment insurance" means the unemployment benefits  
12 payable under the state unemployment compensation law other than  
13 the Valued Employee Retention program and includes any amounts  
14 payable pursuant to an agreement under any federal law providing  
15 for compensation, assistance, or allowances with respect to  
16 unemployment.

17 **§21A-12-2. Creation of the Valued Employee Retention Program.**

18 (a) The "Valued Employee Retention" program is created. The  
19 Valued Employee Retention program is a short-time compensation  
20 program in which an employer who participates in the program  
21 reduces the number of hours worked by the employees of the employer  
22 in lieu of layoffs. The Valued Employee Retention program is a  
23 completely voluntary program and an employer is under no obligation  
24 to participate.

25 (b) The commissioner shall enforce the requirements of the

1 Valued Employee Retention program in the same manner as the  
2 commissioner enforces the requirements of this chapter, including  
3 the applicable provisions of article ten.

4 **§21A-12-3. Application to participate in the Valued Employee**  
5 **Retention program.**

6 (a) An employer wishing to participate in the program shall  
7 submit a signed written program plan to the commissioner for  
8 approval.

9 (b) The commissioner shall develop an application form to  
10 request approval of a short-time compensation plan and an approval  
11 process.

12 (c) The application shall include:

13 (1) The affected unit (or units) covered by the plan,  
14 including the number of full-time or part-time workers in such  
15 unit, the percentage of workers in the affected unit covered by the  
16 plan, identification of each individual employee in the affected  
17 unit by name, social security number and the employer's  
18 unemployment tax account number and any other information required  
19 by the commissioner to identify plan participants.

20 (2) Certification by the employer that it has obtained the  
21 written approval of any applicable collective bargaining  
22 representative and has notified all affected employees who are not  
23 in a collective bargaining unit of the proposed program plan.

24 (3) A description of how workers in the affected unit will be  
25 notified of the employer's participation in the program plan if the

1 application is approved, including how the employer will notify  
2 those workers in a collective bargaining unit as well as any  
3 workers in the affected unit who are not in a collective bargaining  
4 unit. If the employer will not provide advance notice to workers  
5 in the affected unit, the employer shall explain in a statement in  
6 the application why it is not feasible to provide the notice.

7       (4) A requirement that the employer identify the usual weekly  
8 hours of work for employees in the affected unit and the specific  
9 percentage by which their hours will be reduced during all weeks  
10 covered by the plan. An application shall specify the percentage  
11 of reduction for which a program application may be approved which  
12 shall be not less than ten percent and not more than sixty percent.  
13 If the plan includes any week for which the employer regularly  
14 provides no work (due to a holiday or other plant closing), then  
15 the week shall be identified in the application.

16       (5) Certification by the employer that, if the employer  
17 provides health benefits and retirement benefits under defined  
18 benefit pension plans (as defined in section 414(j) of the Internal  
19 Revenue Code) or contributions under a defined contribution plan  
20 (defined in section 414(i) of that Code) to any employee whose  
21 usual weekly hours of work are reduced under the program, the  
22 benefits will continue to be provided to employees participating in  
23 the program under the same terms and conditions as though the usual  
24 weekly hours of work of the employee had not been reduced or to the  
25 same extent as other employees not participating in the program.

1 For defined benefit retirement plans, the hours that are  
2 reduced under the program plan shall be credited for purposes of  
3 participation, vesting and accrual of benefits as though the usual  
4 weekly hours of work had not been reduced. The dollar amount of  
5 employer contributions to a defined contribution plan that are  
6 based on a percentage of compensation may be less due to the  
7 reduction in the employee's compensation. Notwithstanding the  
8 above, an application may contain the required certification when  
9 a reduction in health and retirement benefits scheduled to occur  
10 during the duration of the plan will be applicable equally to  
11 employees who are not participating in the short-time compensation  
12 program and to those employees who are participating.

13 (6) Certification by the employer that the aggregate reduction  
14 in work hours is in lieu of layoffs (temporary or permanent  
15 layoffs, or both temporary or permanent layoffs) of regularly  
16 employed employees in the affected unit. The application shall  
17 include an estimate of the number of workers who would have been  
18 laid off in the absence of the short-time compensation plan.

19 (7) Agreement by the employer to:

20 (A) Furnish reports to the commissioner relating to the proper  
21 conduct of the plan;

22 (B) Allow the commissioner or his or her authorized  
23 representatives access to all records necessary to approve or  
24 disapprove the plan application and, after approval of a plan, to  
25 monitor and evaluate the plan; and

1       (C) Follow any other directives the commissioner considers  
2 necessary for the agency to implement the plan and which are  
3 consistent with the requirements for plan applications.

4       (8) Certification by the employer that it has filed all  
5 quarterly reports and other reports required under the state  
6 unemployment compensation law and has paid all quarterly  
7 contributions, reimbursements in lieu of contributions, interest  
8 and penalties due through the date of the employer's application.

9       (9) Certification by the employer that it will not hire new  
10 employees in, or transfer employees to, the affected unit during  
11 the effective period of the program plan.

12       (10) Certification by the employer that it will not lay off  
13 participating employees during the effective period of the program  
14 plan, or reduce participating employees' hours of work by more than  
15 the reduction percentage during the effective period of the program  
16 plan, except in cases of holidays, designated vacation periods,  
17 equipment maintenance or similar circumstances.

18       (11) Certification by the employer that participation in the  
19 program plan and its implementation is consistent with the  
20 employer's obligations under applicable federal and state laws.

21       (12) The effective date and duration of the plan that shall  
22 expire not later than the end of the twelfth full calendar month  
23 after the effective date.

24       (13) Any other provision added to the application by the  
25 commissioner that the United States Secretary of Labor determines

1 to be appropriate for purposes of administering the program.

2 **§21A-12-4. Limitations on participation.**

3 (a) The commissioner may not approve a shared work plan  
4 submitted by an employer who is assigned the maximum contribution  
5 rate calculated in accordance with section five, article five of  
6 this chapter, or employers subject to a "new employer" tax rate.

7 (b) An employer may be approved for only one program plan  
8 during any twelve month period commencing with the effective date  
9 of the original approved plan and ending on the twelfth full  
10 calendar month after said date.

11 (c) An employer who has had two consecutive program plans for  
12 the same affected unit, may not be approved for another program for  
13 the affected unit until two full years have elapsed.

14 **§21A-12-5. Approval or disapproval of program plan.**

15 The commissioner shall approve or disapprove a program plan in  
16 writing within thirty days of its receipt and promptly communicate  
17 the decision to the employer. A decision disapproving the plan  
18 shall clearly identify the reasons for the disapproval. The  
19 disapproval is final, but the employer shall be allowed to submit  
20 another program plan for approval not earlier than fifteen days  
21 from the date of the disapproval.

22 **§21A-12-6. Effective date and duration of the program plan.**

23 (a) A program plan is effective on the date that is mutually  
24 agreed upon by the employer and the commissioner, which shall be  
25 specified in the notice of approval to the employer.



1 (b) The plan shall expire on the date specified in the notice  
2 of approval, which shall be either the date at the end of the  
3 twelfth full calendar month after its effective date or an earlier  
4 date mutually agreed upon by the employer and the commissioner.  
5 However, if a program plan is revoked by the commissioner under  
6 section seven of this article, the plan shall terminate on the date  
7 specified in the commissioner's written order of revocation.

8 (c) An employer may terminate a program plan at any time upon  
9 written notice to the commissioner. Upon receipt of the notice  
10 from the employer, the commissioner shall notify each member of the  
11 affected unit at least ten days prior to the termination date.

12 (d) An employer may submit a new application to participate in  
13 another program plan at any time after the expiration or  
14 termination date.

15 **§21A-12-7. Revocation of approval.**

16 (a) The commissioner may revoke approval of a program plan for  
17 good cause at any time, including upon the request of any of the  
18 affected unit's employees. The revocation order shall be in  
19 writing and shall specify the reasons for the revocation and the  
20 date the revocation is effective.

21 (b) The commissioner may periodically review the operation of  
22 each employer's program plan to assure that no good cause exists  
23 for revocation of the approval of the plan.

24 (c) Good cause includes, but is not limited to, failure to  
25 comply with the assurances given in the plan, unreasonable revision

1 of productivity standards for the affected unit, conduct or  
2 occurrences tending to defeat the intent and effective operation of  
3 the plan and violation of any criteria on which approval of the  
4 plan was based.

5 **§21A-12-8. Modification of an approved program plan.**

6 (a) An employer may request a modification of an approved plan  
7 by filing a written request to the commissioner.

8 (b) The request shall identify the specific provisions  
9 proposed to be modified and provide an explanation of why the  
10 proposed modification is appropriate for the program plan.

11 (c) The commissioner shall approve or disapprove the proposed  
12 modification in writing within ten working days of receipt and  
13 promptly communicate the decision to the employer.

14 (d) The commissioner may approve a request for modification of  
15 the plan based on conditions that have changed since the plan was  
16 approved provided that the modification is consistent with and  
17 supports the purposes for which the plan was initially approved.

18 (e) A modification does not extend the expiration date of the  
19 original plan. The commissioner must promptly notify the employer  
20 whether the plan modification has been approved and, if approved,  
21 the effective date of the modification.

22 (f) An employer is not required to request approval of a plan  
23 modification from the commissioner if the change is not  
24 substantial, but the employer must report every change to the plan  
25 to the commissioner promptly and in writing. The commissioner may

1 terminate an employer's plan if the employer fails to meet this  
2 reporting requirement.

3 (g) If the commissioner determines that the reported change is  
4 substantial, the commissioner shall require the employer to request  
5 a modification to the plan.

6 **§21A-12-9. Eligibility for program benefits.**

7 An individual is eligible to receive program benefits with  
8 respect to any week only if the individual is monetarily eligible  
9 for unemployment insurance, not otherwise disqualified for  
10 unemployment insurance, and:

11 (1) During the week, the individual is employed as a member of  
12 an affected unit under an approved program plan, which was approved  
13 prior to that week, and the plan is in effect with respect to the  
14 week for which program benefits are claimed;

15 (2) Notwithstanding any other provisions of this chapter  
16 relating to availability for work and actively seeking work, the  
17 individual is available for the individual's usual hours of work  
18 with the program employer, which may include, for purposes of this  
19 section, participating in training to enhance job skills that is  
20 approved by the commissioner such as employer-sponsored training or  
21 training funded under the Workforce Investment Act of 1998; and

22 (3) Notwithstanding any other provision of law, an individual  
23 covered by an approved program plan is considered unemployed in any  
24 week during the duration of the plan if the individual's  
25 remuneration as an employee in an affected unit is reduced based a

1 reduction of the individual's usual weekly hours of work under an  
2 approved program plan.

3 **§21A-12-10. Benefits.**

4 (a) An individual's program benefit amount is the product of  
5 the regular weekly unemployment insurance amount for a week of  
6 total unemployment multiplied by the percentage of reduction in the  
7 individual's usual weekly hours of work.

8 (b) An individual may be eligible for program benefits or  
9 unemployment insurance, as appropriate, except that an individual  
10 may not be eligible for combined benefits in any benefit year in an  
11 amount more than the maximum entitlement established for regular  
12 unemployment insurance, nor may an individual be paid program  
13 benefits for more than twenty-six weeks under an approved program  
14 plan.

15 (c) The program benefits paid to an individual shall be  
16 deducted from the maximum entitlement amount of regular  
17 unemployment insurance established for that individual's benefit  
18 year.

19 (d) Provisions applicable to unemployment insurance claimants  
20 apply to program claimants to the extent that they are not  
21 inconsistent with the program provisions of this article. An  
22 individual who files an initial claim for program benefits shall  
23 receive a monetary determination.

24 (e) An individual who is eligible for program benefits is not  
25 subject to the provisions of the state's unemployment compensation

1 law relating to partial unemployment benefits. Wages earned from an  
2 employer other than the program employer during the week of program  
3 eligibility shall be disregarded in the calculation of the  
4 individual's weekly program benefit.

5 (f) An individual who is not provided any work during a week  
6 by the program employer, or any other employer, and who is  
7 otherwise eligible for unemployment insurance is eligible for the  
8 amount of regular unemployment insurance to which the individual  
9 would otherwise be eligible.

10 (g) An individual who is not provided any work by the program  
11 employer during a week, but who works for another employer and is  
12 otherwise eligible may be paid unemployment insurance for that week  
13 subject to the disqualifying income provisions of article six of  
14 this chapter relating to partial unemployment benefits.

15 **§21A-12-11. Charging program benefits.**

16 (a) Except as provided in subsection (b) of this section,  
17 program benefits shall be charged to an employers' experience  
18 rating account in the same manner as unemployment insurance is  
19 charged under article five of this chapter. Employers liable for  
20 payments in lieu of contributions shall have program benefits  
21 attributed to service in their employ in the same manner as  
22 unemployment insurance is attributed under the provisions of the  
23 state's unemployment compensation law relating to the financing of  
24 benefits by employers using the reimbursing method.

25 (b) If federal funding is available to the state for the

1 purpose of full reimbursement for the cost of funding program  
2 benefits paid by the unemployment insurance agency pursuant to  
3 section 2162 of the Layoff Prevention Act of 2012 and an approved  
4 program plan under this article, those benefits may not be charged  
5 or billed to a participating employer.

6 **§21A-12-12. Extended Benefits.**

7 An individual who has received all of the program benefits or  
8 combined unemployment insurance and program benefits available in  
9 a benefit year is an exhaustee for purposes of extended benefits,  
10 as provided under the provisions of the state's unemployment  
11 compensation law relating to extended benefits contained in article  
12 six-a of this chapter, and, if otherwise eligible under those  
13 provisions, is eligible to receive extended benefits.

14 **§21A-12-13. Report to the Legislature.**

15 (a) Beginning one year after the effective date of this  
16 article, and every year thereafter, the commissioner shall prepare  
17 and submit a report evaluating the use and effectiveness of the  
18 Work Share West Virginia program created by section two of this  
19 article, and the impact of the program on the Unemployment  
20 Compensation Fund created in article eight of this chapter. The  
21 commissioner shall include in that report the number of employers  
22 and employees participating in the program, the amount of shared  
23 work benefits paid under the program during the immediately  
24 preceding year and any other information the commissioner considers  
25 to be relevant.

1        (b) The commissioner shall submit the report to the Governor,  
2 the President of the Senate, and the Minority Leader of the Senate,  
3 the Speaker of the House of Delegates and the Minority Leader of  
4 the House of Delegates.