Committee Substitute

for

House Bill 2365

BY DELEGATE FOSTER, HIGGINbotham, FAST, LINVILLE,
PACK, STEELE, PHILLIPS, SHOTT, SUMMERS, KESSINGER

AND CADLE

[Introduced January 14, 2019; Referred to the
Committee on Industry and Labor, then to the
Judiciary.]
A BILL to amend and reenact §21A-1A-16 of the Code of West Virginia, 1931, as amended; and
to amend and reenact §23-2-1a of said code, relating to the definition of employee for the
purposes of the unemployment compensation and workers compensation laws.

Be it enacted by the Legislature of West Virginia:

CHAPTER 21A. UNEMPLOYMENT COMPENSATION.

ARTICLE 1A. DEFINITIONS.


"Employment", subject to the other provisions of this article, means:

(1) Service, including service in interstate commerce, performed for wages or under any
contract of hire, written or oral, express or implied;

(2) Any service performed by an employee, as defined in Section 3306(i) of the federal
Unemployment Tax Act, including service in interstate commerce;

(3) Any service performed, including service in interstate commerce, by any officer of a
organization;

(4) An individual’s entire service, performed within or both within and without this state if:
(A) The service is localized in this state; or (B) the service is not localized in any state but some
of the service is performed in this state and: (i) The base of operations, or, if there is no base of
operations, then the place from which the service is directed or controlled, is in this state; or (ii)
the base of operations or place from which the service is directed or controlled is not in any state
in which some part of the service is performed but the individual’s residence is in this state;

(5) Service not covered under subdivision (4) of this section and performed entirely without
this state with respect to no part of which contributions are required and paid under an
unemployment compensation law of any other state or of the federal government, is employment
subject to this chapter if the individual performing the services is a resident of this state and the
commissioner approves the election of the employing unit for whom the services are performed that the entire service of the individual is employment subject to this chapter;

(6) Service is localized within a state, if: (A) The service is performed entirely within the state; or (B) the service is performed both within and without the state, but the service performed without the state is incidental to the individual’s service within this state, as, for example, is temporary or transitory in nature or consists of isolated transactions;

(7) Services performed by an individual for wages are employment subject to this chapter unless and until it is shown to the satisfaction of the commissioner that: (A) The individual has been and will continue to be free from control or direction over the performance of the services, both under his or her contract of service and in fact; and (B) the service is either outside the usual course of the business for which the service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (C) the individual is customarily engaged in an independently established trade, occupation, profession or business when, through the commissioner’s evaluation of the following factors, sufficient control is present to establish an employer-employee relationship:

(A) Instructions. A worker who is required to comply with other persons’ instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions.

(B) Training. Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner.

(C) Integration. Integration of the worker’s services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the
workers who perform those services must necessarily be subject to a certain amount of control
by the owner of the business.

(D) Services Rendered Personally. If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results.

(E) Hiring, Supervising, and Paying Assistants. If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status.

(F) Continuing Relationship. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals.

(G) Set Hours of Work. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.

(H) Full Time Required. If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses.

(I) Doing Work on Employer's Premises. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom
from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required.

(J) Order or Sequence Set. If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker’s own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so.

(K) Oral or Written Reports. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.

(L) Payment by Hour, Week, Month. Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor.

(M) Payment of Business and/or Traveling Expenses. If the person or persons for whom the services are performed ordinarily pay the worker’s business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker’s business activities.

(N) Furnishing of Tools and Materials. The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.
(O) Significant Investment. If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship. Special scrutiny is required with respect to certain types of facilities, such as home offices.

(P) Realization of Profit or Loss. A worker who can realize a profit or suffer a loss as a result of the worker’s services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee. For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and thus does not constitute a sufficient economic risk to support treatment as an independent contractor.

(Q) Working for More Than One Firm at a Time. If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.

(R) Making Service Available to General Public. The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.

(S) Right to Discharge. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer’s instructions. An
independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications.

(T) **Right to Terminate.** If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship.

(8) All service performed by an officer or member of the crew of an American vessel (as defined in Section 305 of an act of Congress entitled Social Security Act Amendment of 1946, approved August 10, 1946), on or in connection with the vessel, provided that the operating office, from which the operations of the vessel operating on navigable waters within and without the United States is ordinarily and regularly supervised, managed, directed and controlled, is within this state;

(9) (A) Service performed by an individual in the employ of this state or any of its instrumentalities (or in the employ of this state and one or more other states or their instrumentalities) for a hospital or institution of higher education located in this state: *Provided,* That the service is excluded from “employment” as defined in the federal Unemployment Tax Act solely by reason of Section 3306(c)(7) of that act and is not excluded from “employment” under subdivision (9), section seventeen of this article;

(B) Service performed in the employ of this state or any of its instrumentalities or political subdivisions thereof or any of its instrumentalities or any instrumentality of more than one of the foregoing or any instrumentality of any foregoing and one or more other states or political subdivisions: *Provided,* That the service is excluded from “employment” as defined in the federal Unemployment Tax Act by Section 3306(c)(7) of that act and is not excluded from “employment” under subdivision (13), section seventeen of this article; and

(C) Service performed in the employ of a nonprofit educational institution which is not an institution of higher education;
(10) Service performed by an individual in the employ of a religious, charitable, educational
or other organization but only if the following conditions are met:

(A) The service is excluded from “employment” as defined in the federal Unemployment
Tax Act solely by reason of Section 3306(c)(8) of that act; and

(B) The organization had four or more individuals in employment for some portion of a day
in each of twenty different weeks, whether or not the weeks were consecutive, within either the
current or preceding calendar year, regardless of whether they were employed at the same
moment of time;

(11) Service of an individual who is a citizen of the United States, performed outside the
United States after December 31, 1971 (except in Canada and in the case of the Virgin Islands
after December 31, 1971, and before January 1, the year following the year in which the secretary
of labor approves for the first time an unemployment insurance law submitted to him or her by the
Virgin Islands for approval), in the employ of an American employer (other than service which is
considered “employment” under the provisions of subdivision (4), (5) or (6) of this section or the
parallel provisions of another state’s law) if:

(A) The employer’s principal place of business in the United States is located in this state;

or

(B) The employer has no place of business in the United States, but: (i) The employer is
an individual who is a resident of this state; or (ii) the employer is a corporation which is organized
under the laws of this state; or (iii) the employer is a partnership or a trust and the number of the
partners or trustees who are residents of this state is greater than the number who are residents
of any one other state; or

(C) None of the criteria of paragraphs (A) and (B) of this subdivision is met but the
employer has elected coverage in this state or, the employer having failed to elect coverage in
any state, the individual has filed a claim for benefits, based on the service, under the law of this
state.
(D) An “American employer”, for purposes of this subdivision, means a person who is: (i) An individual who is a resident of the United States; or (ii) a partnership if two thirds or more of the partners are residents of the United States; or (iii) a trust, if all of the trustees are residents of the United States; or (iv) a corporation organized under the laws of the United States or of any state;

(12) Service performed by an individual in agricultural labor as defined in subdivision (3), section seventeen of this article when:

(A) The service is performed for a person who: (i) During any calendar quarter in either the current or the preceding calendar year paid remuneration in cash of $20,000 or more to individuals employed in agricultural labor including labor performed by an alien referred to in paragraph (B) of this subdivision; or (ii) for some portion of a day in each of twenty different calendar weeks, whether or not the weeks were consecutive, in either the current or the preceding calendar year, employed in agricultural labor, including labor performed by an alien referred to in paragraph (B) of this subdivision, ten or more individuals, regardless of whether they were employed at the same moment of time;

(B) The service is not performed in agricultural labor if performed by an individual who is an alien admitted to the United States to perform service in agricultural labor pursuant to Sections 214(c) and 101(a)(15)(H) of the Immigration and Nationality Act;

(C) For the purposes of the definition of employment, any individual who is a member of a crew furnished by a crew leader to perform service in agricultural labor for any other person shall be treated as an employee of the crew leader: (i) If the crew leader holds a valid certificate of registration under the Migrant and Seasonal Agricultural Worker Protection Act; or substantially all the members of the crew operate or maintain tractors, mechanized harvesting or crop-dusting equipment, or any other mechanized equipment, which is provided by the crew leader; and (ii) if the other person is not otherwise an employer of the individual;
(D) For the purposes of this subdivision, in the case of any individual who is furnished by a crew leader to perform service in agricultural labor for any other person and who is not treated as an employee of the crew leader under paragraph (C) of this subdivision: (i) The other person and not the crew leader shall be treated as the employer of the individual; and (ii) the other person shall be treated as having paid cash remuneration to the individual in an amount equal to the amount of cash remuneration paid to the individual by the crew leader (either on his or her own behalf or on behalf of the other person) for the service in agricultural labor performed for the other person; and

(E) For the purposes of this subdivision, the term “crew leader” means an individual who:

(i) Furnishes individuals to perform service in agricultural labor for any other person; (ii) pays (either on his or her own behalf or on behalf of the other person) the individuals so furnished by him or her for the service in agricultural labor performed by them; and (iii) has not entered into a written agreement with the other person under which the individual is designated as an employee of the other person;

(13) (A) The term “employment” includes domestic service in a private home, local college club or local chapter of a college fraternity or sorority performed for a person who paid cash remuneration of $1,000 or more in any calendar quarter in the current calendar year or the preceding calendar year to individuals employed in domestic service; and

(B) Notwithstanding the foregoing definition of “employment”, if the services performed during one half or more of any pay period by an employee for the person employing him or her constitute employment, all the services of the employee for the period are employment; but if the services performed during more than one half of any such pay period by an employee for the person employing him or her do not constitute employment, then none of the services of the employee for the period are employment.
CHAPTER 23. WORKERS’ COMPENSATION.

ARTICLE 2. EMPLOYERS AND EMPLOYEES SUBJECT TO CHAPTER; EXTRATERRITORIAL COVERAGE.

§23-2-1a. Employees subject to chapter.

(a) Employees subject to this chapter are all persons in the service of employers and employed by them for the purpose of carrying on the industry, business, service or work in which they are engaged including, but not limited to:

(1) Persons regularly employed in the state whose duties necessitate employment of a temporary or transitory nature by the same employer without the state;

(2) Every person in the service of the state or of any political subdivision or agency thereof, under any contract of hire, express or implied, and every appointed official or officer thereof while performing his or her official duties;

(3) Checkweighmen employed according to law;

(4) All members of rescue teams assisting in mine accidents with the consent of the owner who, in such case, shall be deemed the employer, or at the direction of the director of the department of mines;

(5) All forest firefighters who, under the supervision of the director of the Department of Natural Resources or his or her designated representative, assist in the prevention, confinement and suppression of any forest fire; and

(6) Students while participating in a work-based learning experience with an employer approved as a part of the curriculum by the county board. The county board shall be the employer of record of students while participating in unpaid work-based experiences off school premises with employers other than the county board. Students in unpaid work-based learning experiences
shall be considered to be paid the amount of wages so as to provide the minimum workers’
compensation weekly benefits required by section six, article four of this chapter.

(b) The right to receive compensation under this chapter shall not be affected by the fact
that a minor is employed or is permitted to be employed in violation of the laws of this state relating
to the employment of minors, or that he or she obtained his or her employment by misrepresenting
his or her age.

(c) When determining whether an employee is subject to this chapter, the commissioner
shall use the following factors to evaluate whether sufficient control is present to establish an
employer-employee relationship:

1. Instructions. A worker who is required to comply with other persons’ instructions about
when, where, and how he or she is to work is ordinarily an employee. This control factor is present
if the person or persons for whom the services are performed have the right to require compliance
with instructions.

2. Training. Training a worker by requiring an experienced employee to work with the
worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using
other methods, indicates that the person or persons for whom the services are performed want
the services performed in a particular method or manner.

3. Integration. Integration of the worker’s services into the business operations generally
shows that the worker is subject to direction and control. When the success or continuation of a
business depends to an appreciable degree upon the performance of certain services, the
workers who perform those services must necessarily be subject to a certain amount of control
by the owner of the business.

4. Services Rendered Personally. If the services must be rendered personally,
presumably the person or persons for whom the services are performed are interested in the
methods used to accomplish the work as well as in the results.
(5) Hiring, Supervising, and Paying Assistants. If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status.

(6) Continuing Relationship. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals.

(7) Set Hours of Work. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.

(8) Full Time Required. If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses.

(9) Doing Work on Employer’s Premises. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer’s premises. Control over the place of work is indicated when the person or persons for whom the
services are performed have the right to compel the worker to travel a designated route, to
canvass a territory within a certain time, or to work at specific places as required.

(10) Order or Sequence Set. If a worker must perform services in the order or sequence
set by the person or persons for whom the services are performed, that factor shows that the
worker is not free to follow the worker’s own pattern of work but must follow the established
routines and schedules of the person or persons for whom the services are performed. Often,
because of the nature of an occupation, the person or persons for whom the services are
performed do not set the order of the services or set the order infrequently. It is sufficient to show
control, however, if such person or persons retain the right to do so.

(11) Oral or Written Reports. A requirement that the worker submit regular or written
reports to the person or persons for whom the services are performed indicates a degree of
control.

(12) Payment by Hour, Week, Month. Payment by the hour, week, or month generally
points to an employer-employee relationship, provided that this method of payment is not just a
convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the
job or on a straight commission generally indicates that the worker is an independent contractor.

(13) Payment of Business and/or Traveling Expenses. If the person or persons for whom
the services are performed ordinarily pay the worker’s business and/or traveling expenses, the
worker is ordinarily an employee. An employer, to be able to control expenses, generally retains
the right to regulate and direct the worker’s business activities.

(14) Furnishing of Tools and Materials. The fact that the person or persons for whom the
services are performed furnish significant tools, materials, and other equipment tends to show the
existence of an employer-employee relationship.

(15) Significant Investment. If the worker invests in facilities that are used by the worker in
performing services and are not typically maintained by employees (such as the maintenance of
an office rented at fair value from an unrelated party), that factor tends to indicate that the worker
is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship. Special scrutiny is required with respect to certain types of facilities, such as home offices.

(16) Realization of Profit or Loss. A worker who can realize a profit or suffer a loss as a result of the worker’s services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee. For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and thus does not constitute a sufficient economic risk to support treatment as an independent contractor.

(17) Working for More Than One Firm at a Time. If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.

(18) Making Service Available to General Public. The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.

(19) Right to Discharge. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer’s instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications.
(20) Right to Terminate. If the worker has the right to end his or her relationship with the
person for whom the services are performed at any time he or she wishes without incurring
liability, that factor indicates an employer-employee relationship.

NOTE: The purpose of this bill is to clarify the definition of an employee for the purposes
of unemployment compensation and workers’ compensation to match conform with
Internal Revenue Code provisions.

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