

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Introduced

House Bill 2786

BY DELEGATE KESSINGER

[Introduced January 31, 2019; Referred
to the Committee on Industry and Labor then the
Judiciary.]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
 2 designated §21-5I-1, §21-5I-2, §21-5I-3, §21-5I-4, §21-5I-5, and §21-5I-6, all relating to
 3 the Uniform Worker Classification Act; clarifying definition of independent contractor.

Be it enacted by the Legislature of West Virginia:

ARTICLE 5I. UNIFORM WORKER CLASSIFICATION ACT.

§21-5I-1. Short Title.

1 This Act shall be known as the Uniform Worker Classification Act.

§21-5I-2. Findings.

1 The Legislature finds as follows:

2 (1) Recent developments in the workforce marketplace, and in particular with the advent
 3 of the so-called “gig,” “entrepreneurial,” or “sharing” economy, have highlighted the uncertainty
 4 that currently exists with determining the correct classification of workers as independent
 5 contractors or employees. The proper classification of workers as employees or independent
 6 contractors is a complex legal issue that vexes workers and businesses as well as lawyers and
 7 the courts.

8 (2) Not only are the legal standards used to differentiate employees from independent
 9 contractors generally subjective in nature, but those standards differ based on the particular law
 10 at issue. As a result, some workers may be found to be employees under one law but independent
 11 contractors under another law, leaving the same person classified as an employee for some
 12 purposes but as an independent contractor for other purposes.

13 (3) It is in the best interests of this state, workers, and businesses for there to be certainty
 14 regarding the legal status of workers and their applicable rights and obligations. Clarity in a
 15 worker’s classification allows businesses to comply with applicable laws, provides workers with
 16 certainty as to their benefits and obligations, and minimizes unnecessary mistakes, litigation, risk,
 17 and legal exposure.

18 (4) It is in the best interests of workers, business, and government to have clear, objective,

19 and uniform standards for determining who is an employee and who is an independent contractor.

20 (5) The purpose of this bill is to bring uniformity in the laws and clarity to the marketplace
21 regarding the distinction between employees and independent contractors. By doing so, the state
22 will ensure that workers who are indeed “employees” are properly classified as such and will be
23 afforded with the legal protections and obligations that apply to such status, and that workers who
24 desire to be, and meet the standards of being independent contractors will be entitled to the
25 freedoms that such a relationship provides; all of which will reduce unnecessary and costly
26 litigation and confusion in the workforce marketplace and in the courts.

§21-5I-3. Certain laws may be superseded.

1 The purpose of this Uniform Worker Classification Act is to bring clarity, certainty, and
2 uniformity under the laws of this state with regard to differentiating employees from independent
3 contractors, and by imposing objective and uniform standards for making that distinction.
4 Consequently, all laws where the application thereof is contingent upon the classification of a
5 worker as being an employee are superseded to the extent necessary, by this Act, including but
6 not limited to laws concerning Workers Compensation in Chapter 23 of this code, unemployment
7 compensation in chapter 21A of this code, human rights in §5-11-1 et seq. of this code, and wage
8 payment and collection in §21-5-1 et seq. of this code.

§21-5I-4. Classification of Independent Contractors and Employees.

1 (a) Subject only to the provisions of subsection (4)(B) of this section, a person shall be
2 classified as an independent contractor under the laws of this state, including, but not limited to,
3 those laws identified in section 3, if:

4 (1) The person signs a written contract with the principal, in substantial compliance with
5 the terms of this subsection, that states the principal’s intent to retain the services of the person
6 as an independent contractor and contains acknowledgements that the person understands that
7 he/she is:

8 (A) Providing services for the principal as an independent contractor;

9 (B) Not going to be treated as an employee of the principal;

10 (C) Not going to be provided by the principal with either worker's compensation or
11 unemployment compensation benefits;

12 (D) Obligated to pay all applicable federal and state income taxes, if any, on any moneys
13 earned pursuant to the contractual relationship, and that the principal will not make any
14 employment-related tax withholdings from any payments from the principal;

15 (E) Responsible for the majority of supplies and other variable expenses that he/she incurs
16 in connection with performing the contracted for services unless: the expenses are for travel that
17 is not local; the expenses are reimbursed under an express provision of the contract; or the
18 supplies or/and expenses reimbursed are commonly reimbursed under industry practice; and

19 (F) Responsible to maintain and substantially bear the principal costs of any required
20 business licenses, insurance, certifications or permits required to perform the services; and

21 (2) The person has filed, intends to file, or is contractually required to file, in regard to the
22 income earned from the work, an income tax return with the Internal Revenue Service for a
23 business or for earnings from self-employment, or

24 (3) The person provides his or her services through a business entity, including, but not
25 limited to, a partnership, limited liability company, or corporation, or through a sole proprietorship
26 registered with a DBA as required under state or local law; and,

27 (4) The person satisfies four or more of the following criteria:

28 (A) With the exception of the exercise of control necessary to ensure compliance with
29 statutory, regulatory, licensing, permitting, contractual or other similar obligations, or to protect
30 persons and/or property, or to protect a brand, the person has the right to control the manner and
31 means by which the work is to be accomplished, even though he or she may not have control
32 over the final result of the work. This provision is satisfied even though the principal may provide
33 orientation, information, guidance, or suggestions about the principal's products, business,
34 services, customers and operating systems, and training otherwise required by law.

35 (B) Except for an agreement with the principal relating to final completion or final delivery
36 time or schedule, range of work hours, or the time entertainment is to be presented, if the work
37 contracted for is entertainment, the person has control over the amount of time personally spent
38 providing services. Limitations on time worked to ensure compliance with regulatory or statutory
39 mandates and any contractual agreement to provide service on regular, specified days or hours
40 shall not be a violation of this factor.

41 (C) Except for services that can only be performed at specific locations, the person has
42 control over where the services are performed.

43 (D)The person is not required to work exclusively for one principal unless:

44 (i) A law, regulation or ordinance prohibits or restricts the person from providing services
45 to more than one principal; or

46 (ii) A license or permit that the person is required to maintain in order to perform the work
47 limits the person to working for only one principal at a time or requires identification of the principal.

48 (E) The person is free to exercise independent initiative in soliciting others to purchase his
49 or her services.

50 (F) The person is free to hire employees or to contract with assistants, helpers, and/or
51 substitutes to perform all or some of the work, subject only to legal or third-party insurance
52 requirements as to qualifications for such employees.

53 (G) The person cannot be required to perform additional services without a new or
54 modified contract.

55 (H) The person obtains a license or other permission from the principal to utilize any
56 workspace of the principal in order to perform the work for which the person was engaged.

57 (I) The principal has been subject to an employment audit by the Internal Revenue Service
58 and the IRS has not reclassified the person to be an employee or has not reclassified the category
59 of workers to be employees.

60 (b) All workers who do not satisfy the criteria set forth in subsection (a) shall be classified
 61 as employees. In addition, nothing contain in subsection (A) shall require a principal to classify a
 62 worker who meets the criteria contained therein as an independent contractor; the principal
 63 always being free to hire the worker as an employee.

64 (c) For purposes of unemployment compensation pursuant to Chapter 21A of this code,
 65 “employment” shall include service performed by a worker when the services are being performed
 66 by an individual who is in the employ of a state or local government entity or federally-recognized
 67 Indian tribe as defined in Section 3306(c)(7) of the Federal Unemployment Tax Act (26 U.S.C.
 68 3306(c)(7) or a nonprofit organization as defined in Section 3306(c)(8) of the Federal
 69 Unemployment Tax Act (26 U.S.C. 3306(c)(8).

§21-5I-5. Unemployment compensation.

1 It is the intent of the state Legislature to provide for the uniformity of laws governing the
 2 determination of independent contractor status. No city, county, municipality, unincorporated
 3 community, township, parish, special district, airport authority, port authority or other local
 4 government entity or subdivision may pass any law, ordinance, regulation, code, charter, rule, or
 5 other guidance in conflict with this Act.

§21-5I-6. Severability.

1 If any provision of this article or the application thereof to any person or circumstance is
 2 held invalid, the invalidity shall not affect other provisions or applications of this article, and to this
 3 end the provisions of this article are declared to be severable.

NOTE: The purpose of this bill is to simplify criteria used to define independent contractors and to impose objective standards on the differentiation of independent contractors from employees.

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