

# **WEST VIRGINIA LEGISLATURE**

**2021 REGULAR SESSION**

**Originating**

**House Bill 2590**

BY DELEGATES QUEEN, WESTFALL, HAYNES, PHILLIPS,  
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[Originating in the Committee on 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 West Virginia Employment Law Worker Classification Act; defining the following terms  
4 in the context of the West Virginia Employment Law Worker Classification Act: "gig  
5 economy", "entrepreneurial economics", "independent worker", "person", "principal",  
6 "sharing economy", "worker compensation", "unemployment compensation", "human  
7 rights", and "wage payment and collection"; providing findings related to recent  
8 developments in the workforce marketplace, noting different standards for classifying  
9 workers as employees or independent contractors; concluding reasonable certainty  
10 concerning the legal status of workers provides guidance and opportunities; establishing  
11 a purpose for the legislation including consistency, clarity, and legal protections for  
12 workers and employers; establishing classification criteria and methodology for  
13 employment of independent contractors; clarifying there is no requirement to classify  
14 workers; establishing that a principal is free to hire any worker; providing for preemption  
15 of local laws related to this article; limiting the independent contractor-employee test to the  
16 laws of workers compensation, unemployment compensation, human rights and wage  
17 payment-collection; and establishing severability for provisions subsequently determined  
18 to be invalid.

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

**ARTICLE 5I. WEST VIRGINIA EMPLOYMENT LAW WORKER CLASSIFICATION ACT.**

**§21-5I-1. Short title.**

1       This article shall be known as the West Virginia Employment Law Worker Classification  
2       Act.

**§21-5I-2. Definitions.**

1       When used in this article:

2       (a) “Gig economy” means a labor market characterized by a prevalence of short-term  
3       contracts or freelance work as opposed to permanent jobs;

4       (b) “Entrepreneurial economics” means the study of entrepreneurs and entrepreneurship  
5       within the economy. Entrepreneurship is a process through which individuals identify  
6       opportunities, allocate resources, and create value. This creation of value is often through the  
7       identification of unmet needs or through the identification of opportunities for change. An  
8       entrepreneur is a person who has already started or is in the process of starting an enterprise, an  
9       individual who identifies and exploits opportunities, usually in the form of some sort of product or  
10      technology.

11      (c) “Independent contractor”. An individual is an independent contractor if the payer has  
12      the right to control or direct only the result of the work and not what will be done and how it will be  
13      done.

14      (d) “Person” includes any natural person or an individual, and an organization.

15      (e) “Principal” is a person who has controlling authority or is in a leading position, such as  
16      the head man or woman.

17      (f) “Sharing economy” means economic activity that involves individuals buying or selling  
18      usually temporary access to goods or services especially as arranged through an online company  
19      or organization.

20      (g) “Workers’ compensation” means the applicable statutes and provisions of Chapter 23  
21      of the West Virginia Code.

22      (h) “Unemployment compensation” means the applicable statutes and provisions of  
23      Chapter 21A of the West Virginia Code.

24      (i) “Human rights” means the applicable statutes and provisions of Chapter 5, Article 11 of  
25      the West Virginia Code.

26      (j) “Wage payment and collection” means the applicable statutes and provisions of  
27      Chapter 21, Article 5 of the West Virginia Code.

**§21-5I-3. Findings and Purpose.**

1       (a) The Legislature finds as follows:

2           (1) The proper classification of workers as employees or independent contractors is a  
3 complex legal issue that vexes workers and businesses as well as lawyers and the courts. Recent  
4 developments in the workforce marketplace, in particular the advent of the “gig economy”, or  
5 “sharing” economy, highlight the need to implement a clear classification of workers as  
6 independent contractors or employees.

7           (2) Current legal standards used to classify employees as independent contractors can be  
8 subjective in nature, at times because those standards differ based on the particular law at issue.  
9 As a result, some workers may be found to be employees under one law but independent  
10 contractors under another law, leaving the same person classified as an employee for some  
11 purposes but as an independent contractor for other purposes.

12          (3) It is in the best interests of West Virginia workers, West Virginia state and local  
13 governments, and West Virginia businesses to have reasonable certainty regarding the legal  
14 status of workers concerning workers’ compensation, unemployment compensation, human  
15 rights and wage payment. Clarity of worker classification provides:

16           (A) Guidance and an opportunity for businesses to comply with applicable laws;

17           (B) Workers with certainty as to their benefits and obligations; and,

18           (C) Minimizes unnecessary mistakes, litigation, risk, and confusion regarding application  
19 of common employment laws including workers’ compensation, unemployment compensation,  
20 human rights, and wage payment and collection.

21          (4) It is in the best interests of workers, business, and government to have clear, objective,  
22 and established standards for determining who is an employee and who is an independent  
23 contractor.

24       (b) The purpose of this article is:

25        (1) To bring certainty, consistency, and clarity regarding the distinction between  
26    employees and independent contractors in the context of workers' compensation, wage payment  
27    and collection, unemployment compensation, and human rights.

28        (2) To ensure that workers who are "employees" are properly classified as such and will  
29    be afforded the legal protections and obligations that apply to their legal status, and that workers  
30    who desire to be, and meet the standards of being, independent contractors will be entitled to the  
31    freedoms that such a relationship provides which will reduce unnecessary and costly litigation  
32    and confusion in the workforce marketplace and in the courts.

**§21-5I-4. Classification of independent contractors and employees.**

1        (a) Subject only to the provisions of subsection (b) of this section, a person shall be  
2    classified as an independent contractor under the laws of this state concerning workers'  
3    compensation, unemployment compensation, human rights, and wage payment and collection, if:

4        (1) The person executes a written contract with the principal, in substantial compliance  
5    with the terms of this subsection stating it is the principal's intention to engage the services of the  
6    person as an independent contractor. The written contract shall also contain the person's  
7    acknowledgement that the person understands he or she:

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

9        (B) Will not, for the purposes of workers' compensation, unemployment compensation,  
10    human rights, and wage payment and collection of be treated as an employee of the principal;

11        (C) Will not be provided workers' compensation or unemployment compensation benefits  
12    by the principal;

13        (D) Will not be eligible for the benefits and protection of human rights or wage payment  
14    and collection;

15        (E) Is obligated to pay all applicable federal, local and state income taxes, if any, on all  
16    monies earned pursuant to the contractual relationship;

17       (F) Is responsible for the majority of supplies and other variable expenses that he or she  
18 incurs in connection with performing the contracted for services unless:

19           (i) The expenses are for travel that is not local;  
20           (ii) The expenses are reimbursed under an express provision of the contract; or,  
21           (iii) The supplies, or expenses reimbursed are commonly reimbursed under industry  
22 practice;

23       (G) Has either filed, or is contractually required to file, a business or self-employment  
24 income tax return with the appropriate federal, state, and local agencies regarding the fees or  
25 earnings from self-employment; or

26       (H) Provides their services through a business entity, including, but not limited to, a  
27 partnership, limited liability company or corporation, or through a sole proprietorship registered  
28 as required under state or local law; and

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

37           (3) Satisfies three or more of the following criteria:

38           (A) Except for an agreement with the principal relating to final completion or final delivery  
39 time or schedule, range of work hours, or the time entertainment is to be presented if the work

40     contracted for is entertainment, the person has control over the amount of time personally spent  
41     providing services;

42         (B) Except for services that can only be performed at specific locations, the person has  
43     control over where the services are performed;

44         (C) The person is not required to work exclusively for one principal unless:

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

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

49         (D) The person is free to exercise independent initiative in soliciting others to purchase his  
50     or her services;

51         (E) The person is free to hire employees or to contract with assistants, helpers, or  
52     substitutes to perform all or some of the work;

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

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

60         (2) The person is responsible for maintaining and bearing the costs of any required  
61     business licenses, insurance, certifications, or permits required to perform the services.

62       (b) All workers who do not satisfy the criteria set forth in subsection (a) of this section shall  
63       be classified as employees concerning workers' compensation, unemployment compensation,  
64       human rights, and wage payment and collection.

**§21-5I-5. No requirement to classify workers; principal free to hire anyone as employee.**

1       Nothing contained in this subsection requires a principal to classify a worker who meets  
2       the criteria contained herein as an independent contractor. The principal is free to hire any worker  
3       as an employee.

**§21-5I-6. Preemption of local laws.**

1       No city, county, municipality, or other local government entity or subdivision may pass any  
2       law, ordinance, regulation, code, charter, regulation or other guidance in conflict with this article.

**§21-5I-7. Limitations.**

1       (a) The test for determining whether a person is an independent contractor or employee  
2       as set forth in this article is applicable only to the application of workers' compensation,  
3       unemployment compensation, human rights, and the wage payment and collection statute.

4       (1) The test for determining whether a person is an independent contractor or employee  
5       as set forth in this article has no application to the issue of:

6           (A) Vicarious liability regarding a third party in tort or other areas of law; or,

7           (B) Whether a person is an independent contractor or an agent of a principal for  
8       determining whether the law of principal and agent generally applies.

9       (b) This article does not apply to organizations or persons subject to the provisions of W.  
10       Va. Code §17-29-11. Limitation on transportation network companies.

11       (c) Exemptions recognized by W. Va. Code §23-2-1(b) are not affected by the West  
12       Virginia Employment Law Worker Classification Act.

**§21-5I-8. 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.