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OFFICE WEST VIRGINIA  
SECRETARY OF STATE

# WEST VIRGINIA LEGISLATURE

FOURTH EXTRAORDINARY SESSION, 2005



# ENROLLED

## House Bill No. 405

(By Mr. Speaker, Mr. Kiss, and Delegate Trump)  
[By Request of the Executive]



Passed September 11, 2005

In Effect Ninety Days from Passage

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**E N R O L L E D**

**H. B. 405**

(BY MR. SPEAKER, MR. KISS, AND DELEGATE TRUMP)  
[BY REQUEST OF THE EXECUTIVE]

[Passed September 11, 2005; in effect ninety days from passage]

AN ACT to amend and reenact §21A-1A-17 of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto a new section, designated §21A-5-10c, all relating to unemployment compensation generally; placing a limit on the amount of wages an election official can receive in a calendar year that is not considered employment wages for unemployment compensation purposes; preventing State Unemployment Tax Act (SUTA) dumping, a method to circumvent the paying of proper unemployment compensation taxes; and imposing criminal and civil penalties, including penalty rates, for dumping violations.

*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; and that said code be amended by adding thereto a new section, designated §21A-5-10c, all to read as follows:

**ARTICLE 1A. DEFINITIONS.**

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

1       The term “employment” does not include:

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

20       (2) Service performed with respect to which unemployment  
21 compensation is payable under the Railroad Unemployment  
22 Insurance Act and service with respect to which unemployment  
23 benefits are payable under an unemployment compensation  
24 system for maritime employees established by an act of  
25 Congress. The Commissioner may enter into agreements with  
26 the proper agency established under an act of Congress to  
27 provide reciprocal treatment to individuals who, after acquiring  
28 potential rights to unemployment compensation under an Act  
29 of Congress or who have, after acquiring potential rights to  
30 unemployment compensation under an act of Congress,

31 acquired rights to benefit under this chapter. Such agreement  
32 shall become effective ten days after the publications which  
33 shall comply with the general rules of the Department;

34 (3) Service performed by an individual in agricultural labor,  
35 except as provided in subdivision (12), section sixteen of this  
36 article, the definition of "employment." For purposes of this  
37 subdivision, the term "agricultural labor" includes all services  
38 performed:

39 (A) On a farm, in the employ of any person, in connection  
40 with cultivating the soil, or in connection with raising or  
41 harvesting any agricultural or horticultural commodity, includ-  
42 ing the raising, shearing, feeding, caring for, training and  
43 management of livestock, bees, poultry and fur-bearing animals  
44 and wildlife;

45 (B) In the employ of the owner or tenant or other operator  
46 of a farm, in connection with the operation, management,  
47 conservation, improvement or maintenance of the farm and its  
48 tools and equipment, or in salvaging timber or clearing land of  
49 brush and other debris left by a hurricane, if the major part of  
50 the service is performed on a farm;

51 (C) In connection with the production or harvesting of any  
52 commodity defined as an agricultural commodity in section  
53 fifteen (g) of the Agricultural Marketing Act, as amended, as  
54 codified in 12 U.S.C. §1141j, subsection (g), or in connection  
55 with the ginning of cotton, or in connection with the operation  
56 or maintenance of ditches, canals, reservoirs or waterways, not  
57 owned or operated for profit, used exclusively for supplying  
58 and storing water for farming purposes;

59 (D) (i) In the employ of the operator of a farm in handling,  
60 planting, drying, packing, packaging, processing, freezing,  
61 grading, storing or delivering to storage or to market or to a

62 carrier for transportation to market, in its unmanufactured state,  
63 any agricultural or horticultural commodity; but only if the  
64 operator produced more than one half of the commodity with  
65 respect to which the service is performed; or (ii) in the employ  
66 of a group of operators of farms (or a cooperative organization  
67 of which the operators are members) in the performance of  
68 service described in subparagraph (i) of this paragraph, but only  
69 if the operators produced more than one half of the commodity  
70 with respect to which the service is performed; but the provi-  
71 sions of subparagraphs (i) and (ii) of this paragraph are not  
72 applicable with respect to service performed in connection with  
73 commercial canning or commercial freezing or in connection  
74 with any agricultural or horticultural commodity after its  
75 delivery to a terminal market for distribution for consumption;

76 (E) On a farm operated for profit if the service is not in the  
77 course of the employer's trade or business or is domestic  
78 service in a private home of the employer. As used in this  
79 subdivision, the term "farm" includes stock, dairy, poultry,  
80 fruit, fur-bearing animals, truck farms, plantations, ranches,  
81 greenhouses, ranges and nurseries, or other similar land areas  
82 or structures used primarily for the raising of any agricultural  
83 or horticultural commodities;

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

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

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

91 (7) Service as an officer or member of a crew of an Ameri-  
92 can vessel, performed on or in connection with the vessel, if the

93 operating office, from which the operations of the vessel  
94 operating on navigable waters within or without the United  
95 States are ordinarily and regularly supervised, managed,  
96 directed and controlled, is without this state;

97 (8) Service performed by agents of mutual fund broker-  
98 dealers or insurance companies, exclusive of industrial insur-  
99 ance agents, or by agents of investment companies, who are  
100 compensated wholly on a commission basis;

101 (9) Service performed: (A) In the employ of a church or  
102 convention or association of churches, or an organization which  
103 is operated primarily for religious purposes and which is  
104 operated, supervised, controlled or principally supported by a  
105 church or convention or association of churches; or (B) by a  
106 duly ordained, commissioned or licensed minister of a church  
107 in the exercise of his or her ministry or by a member of a  
108 religious order in the exercise of duties required by the order;  
109 or (C) by an individual receiving rehabilitation or remunerative  
110 work in a facility conducted for the purpose of carrying out a  
111 program of either: (i) Rehabilitation for individuals whose  
112 earning capacity is impaired by age or physical or mental  
113 deficiency or injury; or (ii) providing remunerative work for  
114 individuals who because of their impaired physical or mental  
115 capacity cannot be readily absorbed in the competitive labor  
116 market: *Provided*, That this exemption does not apply to  
117 services performed by individuals if they are not receiving  
118 rehabilitation or remunerative work on account of their im-  
119 paired capacity; or (D) as part of an unemployment work-relief  
120 or work-training program assisted or financed, in whole or in  
121 part, by any federal agency or an agency of a state or political  
122 subdivision thereof, by an individual receiving the work relief  
123 or work training; or (E) by an inmate of a custodial or penal  
124 institution;

125       (10) Service performed in the employ of a school, college  
126 or university, if the service is performed: (A) By a student who  
127 is enrolled and is regularly attending classes at the school,  
128 college or university; or (B) by the spouse of a student, if the  
129 spouse is advised, at the time the spouse commences to perform  
130 the service, that: (i) The employment of the spouse to perform  
131 the service is provided under a program to provide financial  
132 assistance to the student by the school, college or university;  
133 and (ii) the employment will not be covered by any program of  
134 unemployment insurance;

135       (11) Service performed by an individual who is enrolled at  
136 a nonprofit or public educational institution which normally  
137 maintains a regular faculty and curriculum and normally has a  
138 regularly organized body of students in attendance at the place  
139 where its educational activities are carried on as a student in a  
140 full-time program, taken for credit at the institution, which  
141 combines academic instruction with work experience, if the  
142 service is an integral part of the program and the institution has  
143 so certified to the employer, except that this subdivision does  
144 not apply to service performed in a program established for or  
145 on behalf of an employer or group of employers;

146       (12) Service performed in the employ of a hospital, if the  
147 service is performed by a patient of the hospital, as defined in  
148 this article;

149       (13) Service in the employ of a governmental entity  
150 referred to in subdivision (9), section sixteen of this article, the  
151 definition of "employment," if the service is performed by an  
152 individual in the exercise of duties: (A) As an elected official;  
153 (B) as a member of a legislative body, or a member of the  
154 judiciary, of a state or political subdivision; (C) as a member of  
155 the state national guard or air national guard, except as provided  
156 in section twenty-eight of this article; (D) as an employee  
157 serving on a temporary basis in case of fire, storm, snow,

158 earthquake, flood or similar emergency; (E) in a position which,  
159 under or pursuant to the laws of this state, is designated as: (i)  
160 A major nontenured policymaking or advisory position; or (ii)  
161 a policymaking or advisory position the performance of the  
162 duties of which ordinarily does not require more than eight  
163 hours per week; or (F) as any election official appointed to  
164 serve during any municipal, county or state election, if the  
165 amount of remuneration received by the individual during the  
166 calendar year for services as an election official is less than one  
167 thousand dollars;

168 (14) Service performed by a bona fide partner of a partner-  
169 ship for the partnership; and

170 (15) Service performed by a person for his or her own sole  
171 proprietorship.

172 Notwithstanding the foregoing exclusions from the defini-  
173 tion of "employment," services, except agricultural labor and  
174 domestic service in a private home, are in employment if with  
175 respect to the services a tax is required to be paid under any  
176 federal law imposing a tax against which credit may be taken  
177 for contributions required to be paid into a State Unemployment  
178 Compensation Fund, or which as a condition for full tax credit  
179 against the tax imposed by the federal Unemployment Tax Act  
180 are required to be covered under this chapter.

#### ARTICLE 5. EMPLOYER COVERAGE AND RESPONSIBILITY.

##### **§21A-5-10c. Special rules regarding transfers of experience and assignment of rates.**

1 Notwithstanding any other provision of law to the contrary,  
2 the following shall apply regarding assignment of rates and  
3 transfers of experience:

4       (a) (1) If an employer transfers its trade or business, or a  
5 portion thereof, to another employer and, at the time of the  
6 transfer, there is substantially common ownership, management  
7 or control of the two employers, then the unemployment  
8 experience attributable to the transferred trade or business shall  
9 be transferred to the employer to whom such business is so  
10 transferred. The rates of both employers shall be recalculated  
11 and made effective immediately upon the date of the transfer of  
12 trade or business. The transfer of some or all of an employer's  
13 workforce to another employer shall be considered a transfer of  
14 trade or business when, as a result of such transfer, the transfer-  
15 ring employer no longer performs the trade or business with  
16 respect to the transferred workforce, and such trade or business  
17 is performed by the employer to whom the workforce is  
18 transferred.

19       (2) If, following a transfer of experience under paragraph  
20 (1) of this section, the Commissioner determines that a substan-  
21 tial purpose of the transfer of trade or business was to obtain a  
22 reduced liability for contributions, then the experience rating  
23 accounts of the employers involved shall be combined into a  
24 single account and a single rate assigned to such account.

25       (b) Whenever a person who is not an employer, as defined  
26 in section fifteen, article one-a of this chapter, at the time it  
27 acquires the trade or business of an employer, the unemploy-  
28 ment experience of the acquired business shall not be trans-  
29 ferred to such person if the Commissioner or his or her repre-  
30 sentative finds that such person acquired the business solely or  
31 primarily for the purpose of obtaining a lower rate of contribu-  
32 tions. Instead, such person shall be assigned the applicable new  
33 employer rate under section five of this article. In determining  
34 whether the business was acquired solely or primarily for the  
35 purpose of obtaining a lower rate of contributions, the Commis-  
36 sioner or his or her representative shall use objective factors  
37 which may include the cost of acquiring the business, whether

38 the person continued the business enterprise of the acquired  
39 business, how long such business enterprise was continued, or  
40 whether a substantial number of new employees were hired for  
41 performance of duties unrelated to the business activity  
42 conducted prior to acquisition.

43 (c) (1) If a person knowingly violates or attempts to violate  
44 subsection (a) or (b) of this section or any other provision of  
45 this chapter related to determining the assignment of a contribu-  
46 tion rate, or if a person knowingly advises another person in a  
47 way that results in a violation of such provision, the person  
48 shall be subject to the following penalties:

49 (A) If the person is an employer, then such employer shall  
50 be assigned the highest rate assignable under this chapter for the  
51 rate year during which such violation or attempted violation  
52 occurred and the three rate years immediately following this  
53 rate year. However, if the person's business is already at the  
54 highest rate for any year, or if the amount of increase in the  
55 person's rate would be less than two percent for that year, then  
56 a penalty rate of contributions of two percent of taxable wages  
57 shall be imposed for that year.

58 (B) If the person is not an employer, that person shall be  
59 subject to a civil money penalty of not more than five thousand  
60 dollars. Any fine collected pursuant to this paragraph shall be  
61 deposited in the Special Administrative Fund Account estab-  
62 lished under section five-a, article nine of this chapter.

63 (2) For purposes of this section, the term "knowingly"  
64 means having actual knowledge of or acting with deliberate  
65 ignorance or reckless disregard for the prohibition involved.

66 (3) For purposes of this section, the term "violates or  
67 attempts to violate" includes, but is not limited to, intent to  
68 evade, misrepresentation or willful nondisclosure.

69       (4) In addition to the penalty imposed by paragraph (1) of  
70 this subsection, any violation of this chapter may be prosecuted  
71 as a misdemeanor under section ten, article ten of this chapter.

72       (d) The Commissioner shall establish procedures to identify  
73 the transfer or acquisition of a business for purposes of this  
74 section.

75       (e) For purposes of this section:

76       (1) "Person" has the meaning given such term by section  
77 7701(a)(1) of the Internal Revenue Code of 1986; and

78       (2) "Trade or business" shall include the employer's  
79 workforce.

80       (f) This section shall be interpreted and applied in such a  
81 manner as to meet the minimum requirements contained in any  
82 guidance or regulations issued by the United States Department  
83 of Labor in effect at the time this section becomes law.

That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

*Candy White*  
Chairman Senate Committee

*W. Brown*  
Chairman House Committee

Originating in the House.

In effect ninety days from passage.

*Russell Johnson*  
Clerk of the Senate

*Bugay M. Day*  
Clerk of the House of Delegates

*Carl Ross Tomblin*  
President of the Senate

*[Signature]*  
Speaker of the House of Delegates

The within *is approved* this the *28<sup>th</sup>*  
day of *September*, 2005.

*[Signature]*  
Governor

**PRESENTED TO THE  
GOVERNOR**

Date 9/16/05

Time 4:25 p.m.