

# **WEST VIRGINIA LEGISLATURE**

## **2016 REGULAR SESSION**

**Introduced**

### **House Bill 2052**

**2015 Carryover**

(BY DELEGATE SHOTT)

[Introduced January 13, 2016; referred to the  
Committee on Industry and Labor then the Judiciary.]

1 A BILL to amend and reenact §21A-1A-17 of the Code of West Virginia, 1931, as amended,  
 2 relating to the labor-management relations act for the private sector; expanding exclusions  
 3 from the term employment in that article generally.

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

1 That §21A-1A-17 of the Code of West Virginia, 1931, as amended, be amended and  
 2 reenacted to read as follows:

**ARTICLE 1A. LABOR-MANAGEMENT RELATIONS ACT FOR THE PRIVATE  
 SECTOR.**

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

1 Notwithstanding any provision of section sixteen of this article to the contrary, the term  
 2 "employment" does not include:

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

15 (2) Service performed with respect to which unemployment compensation is payable

16 under the Railroad Unemployment Insurance Act and service with respect to which  
17 unemployment benefits are payable under an unemployment compensation system for maritime  
18 employees established by an Act of Congress. The commissioner may enter into agreements  
19 with the proper agency established under an Act of Congress to provide reciprocal treatment to  
20 individuals who, after acquiring potential rights to unemployment compensation under an Act of  
21 Congress or who have, after acquiring potential rights to unemployment compensation under an  
22 Act of Congress, acquired rights to benefit under this chapter. Such agreement shall become  
23 effective ten days after the publications which shall comply with the general rules of the  
24 department;

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

28 (A) On a farm, in the employ of any person, in connection with cultivating the soil, or in  
29 connection with raising or harvesting any agricultural or horticultural commodity, including the  
30 raising, shearing, feeding, caring for, training and management of livestock, bees, poultry and  
31 fur-bearing animals and wildlife;

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

36 (C) In connection with the production or harvesting of any commodity defined as an  
37 agricultural commodity in section fifteen (g) of the Agricultural Marketing Act, as amended, as  
38 codified in 12 U.S.C. §1141j, subsection (g), or in connection with the ginning of cotton, or in  
39 connection with the operation or maintenance of ditches, canals, reservoirs or waterways, not

40 owned or operated for profit, used exclusively for supplying and storing water for farming  
41 purposes;

42 (D) (i) In the employ of the operator of a farm in handling, planting, drying, packing,  
43 packaging, processing, freezing, grading, storing or delivering to storage or to market or to a  
44 carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural  
45 commodity; but only if the operator produced more than one half of the commodity with respect  
46 to which the service is performed; or (ii) in the employ of a group of operators of farms (or a  
47 cooperative organization of which the operators are members) in the performance of service  
48 described in subparagraph (i) of this paragraph, but only if the operators produced more than one  
49 half of the commodity with respect to which the service is performed; but the provisions of  
50 subparagraphs (i) and (ii) of this paragraph are not applicable with respect to service performed  
51 in connection with commercial canning or commercial freezing or in connection with any  
52 agricultural or horticultural commodity after its delivery to a terminal market for distribution for  
53 consumption;

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

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

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

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

64 (7) Service as an officer or member of a crew of an American vessel, performed on or in  
65 connection with the vessel, if the operating office, from which the operations of the vessel  
66 operating on navigable waters within or without the United States are ordinarily and regularly  
67 supervised, managed, directed and controlled, is without this state;

68 (8) Service performed by agents of mutual fund broker-dealers or insurance companies,  
69 exclusive of industrial insurance agents, or by agents of investment companies, who are  
70 compensated wholly on a commission basis;

71 (9) Service performed by an agent of a person engaged in the practice of real estate  
72 brokerage who is compensated wholly on a commission basis;

73 (10) Service performed by an individual in connection with the sale of consumer products  
74 (or the solicitation of the sale of consumer products) in a residence or other place that is not a  
75 permanent commercial establishment performed under a written contract between the individual  
76 and the person for whom such individual performs such services, which contract provides:

77 (A) That such individual will not be treated as an employee for federal tax purposes; and

78 (B) That substantially all of such individual's compensation is directly related to sales or  
79 other output (including the performance of services) rather than to the number of hours worked;

80 ~~(9)~~ (11) Service performed:

81 (A) In the employ of a church or convention or association of churches, or an organization  
82 which is operated primarily for religious purposes and which is operated, supervised, controlled  
83 or principally supported by a church or convention or association of churches; or

84 (B) By a duly ordained, commissioned or licensed minister of a church in the exercise of  
85 his or her ministry or by a member of a religious order in the exercise of duties required by the  
86 order; or

87 (C) By an individual receiving rehabilitation or remunerative work in a facility conducted

88 for the purpose of carrying out a program of either:

89 (i) Rehabilitation for individuals whose earning capacity is impaired by age or physical or  
90 mental deficiency or injury; or

91 (ii) Providing remunerative work for individuals who because of their impaired physical or  
92 mental capacity cannot be readily absorbed in the competitive labor market: *Provided*, That this  
93 exemption does not apply to services performed by individuals if they are not receiving  
94 rehabilitation or remunerative work on account of their impaired capacity; or

95 (D) As part of an unemployment work-relief or work-training program assisted or financed,  
96 in whole or in part, by any federal agency or an agency of a state or political subdivision thereof,  
97 by an individual receiving the work relief or work training; or

98 (E) By an inmate of a custodial or penal institution;

99 ~~(40)~~ (12) Service performed in the employ of a school, college or university, if the service  
100 is performed:

101 (A) By a student who is enrolled and is regularly attending classes at the school, college  
102 or university; or

103 (B) By the spouse of a student, if the spouse is advised, at the time the spouse  
104 commences to perform the service, that:

105 (i) The employment of the spouse to perform the service is provided under a program to  
106 provide financial assistance to the student by the school, college or university; and

107 (ii) The employment will not be covered by any program of unemployment insurance;

108 ~~(44)~~ (13) Service performed by an individual who is enrolled at a nonprofit or public  
109 educational institution which normally maintains a regular faculty and curriculum and normally has  
110 a regularly organized body of students in attendance at the place where its educational activities  
111 are carried on as a student in a full-time program, taken for credit at the institution, which combines

112 academic instruction with work experience, if the service is an integral part of the program and  
113 the institution has so certified to the employer, except that this subdivision does not apply to  
114 service performed in a program established for or on behalf of an employer or group of employers;

115 ~~(12)~~ (14) Service performed in the employ of a hospital, if the service is performed by a  
116 patient of the hospital, as defined in this article;

117 ~~(13)~~ (15) Service in the employ of a governmental entity referred to in subdivision (9),  
118 section sixteen of this article, the definition of "employment," if the service is performed by an  
119 individual in the exercise of duties:

120 (A) As an elected official;

121 (B) As a member of a legislative body, or a member of the judiciary, of a state or political  
122 subdivision;

123 (C) As a member of the state National Guard or Air National Guard, except as provided  
124 in section twenty-eight of this article;

125 (D) As an employee serving on a temporary basis in case of fire, storm, snow,  
126 earthquake, flood or similar emergency;

127 (E) In a position which, under or pursuant to the laws of this state, is designated as:

128 (i) A major nontenured policymaking or advisory position; or

129 (ii) A policymaking or advisory position the performance of the duties of which ordinarily  
130 does not require more than eight hours per week; or

131 (F) As any election official appointed to serve during any municipal, county or state  
132 election, if the amount of remuneration received by the individual during the calendar year for  
133 services as an election official is less than \$1,000;

134 ~~(14)~~ (16) Service performed by a bona fide partner of a partnership for the partnership;  
135 and

136           ~~(45)~~ (17) Service performed by a person for his or her own sole proprietorship.  
137           Notwithstanding the foregoing exclusions from the definition of "employment," services,  
138 except agricultural labor and domestic service in a private home, are in employment if with respect  
139 to the services a tax is required to be paid under any federal law imposing a tax against which  
140 credit may be taken for contributions required to be paid into a State Unemployment  
141 Compensation Fund, or which as a condition for full tax credit against the tax imposed by the  
142 federal Unemployment Tax Act are required to be covered under this chapter.

NOTE: The purpose of this bill is to make certain clarifications of the definition of the term employment as contained in this article.

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