

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Introduced

Senate Bill 528

BY SENATOR SWOPE, AZINGER, RUCKER, TRUMP, CLINE,

AND MAYNARD

[Introduced January 17, 2020; referred
to 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 Uniform Worker Classification Act; and 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 article 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 article is to bring uniformity in the laws and clarity to the
21 marketplace regarding the distinction between employees and independent contractors. By doing
22 so, the state will ensure that workers who are indeed “employees” are properly classified as such
23 and will be afforded with the legal protections and obligations that apply to such status, and that
24 workers who desire to be, and meet the standards of being, independent contractors will be
25 entitled to the freedoms that such a relationship provides which will reduce unnecessary and
26 costly litigation and confusion in the workforce marketplace and in the courts.

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 Certain laws may be superseded.

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5 employee are superseded to the extent necessary, by this article, including, but not limited to,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

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

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

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

23 (3) Provides his or her services through a business entity, including, but not limited to, a
24 partnership, limited liability company or corporation, or through a sole proprietorship registered
25 with a "doing business as" as required under state or local law; and

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

34 (5) The person satisfies three or more of the following criteria:

35 (A) 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.

39 (B) Except for services that can only be performed at specific locations, the person has
40 control over where the services are performed.

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

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

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

46 (D) The person is free to exercise independent initiative in soliciting others to purchase his
47 or her services.

48 (E) The person is free to hire employees or to contract with assistants, helpers, and/or
49 substitutes to perform all or some of the work.

50 (F) The person cannot be required to perform additional services without a new or modified
51 contract.

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

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

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

59 (b) All workers who do not satisfy the criteria set forth in subsection (a) of this section shall
60 be classified as employees. In addition, nothing contain in that subsection requires a principal to

61 classify a worker who meets the criteria contained therein as an independent contractor, the
62 principal always being free to hire the worker as an employee.

§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,
5 regulation or other guidance in conflict with this article.

§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.