

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Introduced

House Bill 2889

BY DELEGATE STEELE

[Introduced March 03, 2021; Referred to the
Committee on Workforce Development then the
Judiciary]

1 A BILL to amend and reenact §5-11-3 of the Code of West Virginia, 1931, as amended; to amend
2 and reenact §21-5-1 of said code; to amend said code by adding thereto a new article
3 designated §21-11B-1, §21-11B-2, §21-11B-3, §21-11B-4, §21-11B-5, §21-11B-6, and
4 §21-11B-7; to amend and reenact §21A-1A-17 of said code; to amend and reenact §23-
5 2-1 of said code; all relating to West Virginia Employment Law Worker Classification Act;
6 providing for excluding independent contractors from the definition of employee in the
7 Human Rights Act; providing for excluding independent contractors from the definition of
8 employee or employees relating to the wage payment and collections act; providing for a
9 short title; providing for legislative findings; providing for superseding consideration when
10 hearing or considering conflicting state law; providing for criteria for employers to
11 determine if a person working for the employer is in an employer-independent contractor
12 relationship or an employer-employee relationship; providing for a written contract to
13 establish the employer-independent contractor relationship; providing for certain
14 conditions to be contained in the written contract establishing the employer-independent
15 contractor relationship; providing for certain conditions required of an independent
16 contractor; providing for the independent contractor to have the ability to control and direct
17 the manner of the work regardless of other certain circumstances; providing for other
18 conditions that may be considered to determine independent contractor status; providing
19 for the principal's decision to hire a person as an employee when the person would
20 otherwise meet criteria to be an independent contractor; providing for limitations for an
21 independent contractor to receive certain benefits and legal protections offered to
22 employees; providing for preemption of local laws; providing for a limited scope to certain
23 benefits and legal protections offered to employees and not independent contractors;
24 providing for severability; providing for an exclusion from the definition of employee or
25 employment relating to unemployment compensation benefits; and providing for an

26 exclusion relating to employers that establish an independent contractor relationship with
27 a person relating to worker’s compensation.

Be it enacted by the Legislature of West Virginia:

**CHAPTER 5. GENERAL POWERS AND AUTHORITY OF THE
GOVERNOR, SECRETARY OF STATE AND ATTORNEY GENERAL;
BOARD OF PUBLIC WORKS; MISCELLANEOUS AGENCIES,
COMMISSIONS, OFFICES, PROGRAMS, ETC.**

ARTICLE 11. HUMAN RIGHTS COMMISSION.

§5-11-3. Definitions.

1 When used in this article:

2 (a) The term “person” means one or more individuals, partnerships, associations,
3 organizations, corporations, labor organizations, cooperatives, legal representatives, trustees,
4 trustees in bankruptcy, receivers, and other organized groups of persons;

5 (b) The term “commission” means the West Virginia Human Rights Commission;

6 (c) The term “director” means the executive director of the commission;

7 (d) The term “employer” means the state, or any political subdivision thereof, and any
8 person employing twelve or more persons within the state for 20 or more calendar weeks in the
9 calendar year in which the act of discrimination allegedly took place or the preceding calendar
10 year: *Provided*, That such terms shall not be taken, understood or construed to include a private
11 club;

12 (e) The term “employee” shall not include any individual employed by his or her parents,
13 spouse or child, or an independent contractor as classified in the provisions of §21-11B-1 et seq.
14 of this code;

15 (f) The term “labor organization” includes any organization which exists for the purpose,

16 in whole or in part, of collective bargaining or of dealing with employers concerning grievances,
17 terms or conditions of employment or for other mutual aid or protection in relation to employment;

18 (g) The term “employment agency” includes any person undertaking, with or without
19 compensation, to procure, recruit, refer, or place employees. A newspaper engaged in the activity
20 of advertising in the normal course of its business shall not be deemed to be an employment
21 agency;

22 (h) The term “discriminate” or “discrimination” means to exclude from, or fail or refuse to
23 extend to, a person equal opportunities because of race, religion, color, national origin, ancestry,
24 sex, age, blindness, disability, or familial status and includes to separate or segregate;

25 (i) The term “unlawful discriminatory practices” includes only those practices specified in
26 section nine of this article;

27 (j) The term “place of public accommodations” means any establishment or person, as
28 defined herein, including the state, or any political or civil subdivision thereof, which offers its
29 services, goods, facilities or accommodations to the general public, but shall not include any
30 accommodations which are in their nature private. To the extent that any penitentiary, correctional
31 facility, detention center, regional jail or county jail is a place of public accommodation, the rights,
32 remedies, and requirements provided by this article for any violation of subdivision (6), section
33 nine of this article shall not apply to any person other than: (1) Any person employed at a
34 penitentiary, correctional facility, detention center, regional jail or county jail; (2) any person
35 employed by a law-enforcement agency; or (3) any person visiting any such employee or visiting
36 any person detained in custody at such facility;

37 (k) The term “age” means the age of 40 or above;

38 (l) For the purpose of this article, a person shall be considered to be blind only if his central
39 visual acuity does not exceed 20/200 in the better eye with correcting lenses, or if his visual acuity
40 is greater than 20/200 but is occasioned by a limitation in the fields of vision such that the widest
41 diameter of the visual field subtends an angle no greater than 20 degrees; and

42 (m) The term “disability” means:

43 (1) A mental or physical impairment which substantially limits one or more of such person’s
 44 major life activities. The term “major life activities” includes functions such as caring for one’s self,
 45 performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working;

46 (2) A record of such impairment; or

47 (3) Being regarded as having such an impairment.

48 For the purposes of this article, this term does not include persons whose current use of
 49 or addiction to alcohol or drugs prevents such persons from performing the duties of the job in
 50 question or whose employment, by reason of such current alcohol or drug abuse, would constitute
 51 a direct threat to property or the safety of others.

CHAPTER 21. LABOR

ARTICLE 5. WAGE PAYMENT AND COLLECTION.

§21-5-1. Definitions.

1 As used in this article:

2 (a) The term “firm” includes any partnership, association, joint-stock company, trust,
 3 division of a corporation, the administrator or executor of the estate of a deceased individual, or
 4 the receiver, trustee or successor of any of the same, or officer thereof, employing any person.

5 (b) The term “employee” or “employees” includes any person suffered or permitted to work
 6 by a person, firm, or corporation, but does not include any person who would be classified as an
 7 independent contractor pursuant to §21-11B-1 et seq. of this code.

8 (c) The term “wages” means compensation for labor or services rendered by an employee,
 9 whether the amount is determined on a time, task, piece, commission or other basis of calculation.
 10 As used in sections four, five, eight-a, ten and twelve of this article, the term “wages” shall also
 11 include then accrued fringe benefits capable of calculation and payable directly to an employee:
 12 *Provided*, That nothing herein contained shall require fringe benefits to be calculated contrary to

13 any agreement between an employer and his or her employees which does not contradict the
14 provisions of this article.

15 (d) The term “commissioner” means Commissioner of Labor or his or her designated
16 representative.

17 (e) The term “railroad company” includes any firm or corporation engaged primarily in the
18 business of transportation by rail.

19 (f) The term “special agreement” means an arrangement filed with and approved by the
20 commissioner whereby a person, firm or corporation is permitted upon a compelling showing of
21 good cause to establish regular paydays less frequently than once in every two weeks: *Provided,*
22 That in no event shall the employee be paid in full less frequently than once each calendar month
23 on a regularly established schedule.

24 (g) The term “deductions” includes amounts required by law to be withheld, and amounts
25 authorized for union or club dues, pension plans, payroll savings plans, credit unions, charities,
26 and hospitalization and medical insurance.

27 (h) The term “officer” shall include officers or agents in the management of a corporation
28 or firm who knowingly permit the corporation or firm to violate the provisions of this article.

29 (i) The term “wages due” shall include at least all wages earned up to and including the
30 twelfth day immediately preceding the regular payday.

31 (j) The term “construction” means the furnishing of work in the fulfillment of a contract for
32 the construction, alteration, decoration, painting or improvement of a new or existing building,
33 structure, roadway or pipeline, or any part thereof, or for the alteration, improvement or
34 development of real property: *Provided,* That construction performed for the owner or lessee of a
35 single family dwelling or a family farming enterprise is excluded.

36 (k) The term “minerals” means clay, coal, flagstone, gravel, limestone, manganese, sand,
37 sandstone, shale, iron ore, and any other metallurgical ore.

38 (l) The term “fringe benefits” means any benefit provided an employee or group of

39 employees by an employer, or which is required by law, and includes regular vacation, graduated
40 vacation, floating vacation, holidays, sick leave, personal leave, production incentive bonuses,
41 sickness and accident benefits and benefits relating to medical and pension coverage.

42 (m) The term “employer” means any person, firm, or corporation employing any employee.

43 (n) The term “doing business in this state” means having employees actively engaged in
44 the intended principal activity of the person, firm or corporation in West Virginia.

ARTICLE 11B. WEST VIRGINIA EMPLOYMENT LAW WORKER CLASSIFICATION

ACT.

§21-11B-1. Short Title.

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

§21-11B-2. Legislative findings.

1 The Legislature finds as follows:

2 (1) Recent developments in the workforce marketplace, and with the advent of the so-
3 called “gig,” “entrepreneurial,” or “sharing” economy, have highlighted the uncertainty that
4 currently exists with respect to determining the correct classification of workers as either
5 independent contractors or employees. The proper classification of workers as employees or
6 independent contractors is a complex legal issue that vexes workers and businesses as well as
7 lawyers and 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 with respect to workers' compensation in chapter 23 of this
15 code, unemployment compensation in chapter 21A of this code, Human Rights Act rights in §5-
16 11-1 et seq. of this code, and Wage Payment and Collection in §21-5-1 et seq. of this code, and
17 his or her applicable rights and obligations. Clarity in a worker's classification allows businesses
18 to comply with applicable laws, provides workers with certainty as to their benefits and obligations,
19 and minimizes unnecessary mistakes, litigation, risk, and legal exposure to laws concerning
20 workers' compensation in chapter 23 of this code, unemployment compensation in chapter 21A
21 of this code, Human Rights Act rights in §5-11-1 et seq. of this code, and Wage Payment and
22 Collection in §21-5-1 et seq. of this code.

23 (4) It is in the best interests of workers, business, and government to have clear, objective,
24 and certain standards for determining who is an employee and who is an independent contractor
25 with respect to workers' compensation in chapter 23 of this code, unemployment compensation
26 in chapter 21A of this code, Human Rights Act rights in §5-11-1 et seq. of this code, and Wage
27 Payment and Collection in §21-5-1 et seq. of this code.

28 (5) The purpose of this bill is to bring certainty and consistency in the laws and clarity
29 regarding the distinction between employees and independent contractors in the laws concerning
30 workers' compensation in chapter 23 of the code, unemployment compensation in chapter 21A
31 of this code, Human Rights Act rights in §5-11-1 et seq. of this code, and Wage Payment and
32 Collection in §21-5-1 et seq. of this code. By doing so, the state will ensure that workers who are
33 indeed "employees" are properly classified as such and are entitled to the legal protections and
34 obligations that apply to such status, and that workers who meet the standards of being,
35 independent contractors will be entitled to the freedoms that such a relationship provides which
36 will reduce unnecessary and costly litigation and confusion in the workforce marketplace and in
37 the courts.

§21-11B-3. Certain laws may be superseded.

1 The purpose of the West Virginia Employment Law Worker Classification Act is to bring

2 clarity and certainty under the laws of this state with regard to differentiating employees from
3 independent contractors in employment laws concerning workers' compensation in chapter 23 of
4 this code, unemployment compensation in chapter 21A of this code, Human Rights Act rights in
5 §5-11-1 et seq. of this code, and Wage Payment and Collection in §21-5-1 et seq. of this code,
6 and by imposing objective standards for making that distinction. Consequently, all laws
7 concerning workers' compensation in chapter 23 of this code, unemployment compensation in
8 chapter 21A of this code, Human Rights Act rights in §5-11-1 et seq. of this code, and Wage
9 Payment and Collection in §21-5-1 et seq. of this code where the application thereof is contingent
10 upon the classification of a worker as being an employee are superseded to the extent necessary,
11 by this article.

§21-11B-4. Classification of independent contractors; 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 in chapter 23 of this code, unemployment compensation in chapter 21A of this
4 code, Human Rights Act rights in §5-11-1 et seq. of this code, and Wage Payment and Collection
5 in §21-5-1 et seq. of this code, if:

6 (1) The person signs a written contract with the principal, in substantial compliance with
7 the terms of this subsection, that states the principal's intent to engage the services of the person
8 as an independent contractor, and contains acknowledgment that the person understands that he
9 or she is:

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

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

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

14 (D) Obligated to pay all applicable federal and state income taxes, if any, on any moneys
15 earned pursuant to the contractual relationship, and that the principal will not make any tax

16 withholdings from any payments from the principal; and

17 (E) 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; and

23 (2) The person:

24 (A) Has either filed, or is required to file, regarding the fees earned from the work, an
25 income tax return with the appropriate federal, state, and local agencies for a business or for
26 earnings from self-employment; or

27 (B) Provides his or her services through a business entity, including, but not limited to, a
28 partnership, limited liability company or corporation, or through a sole proprietorship; and

29 (3) 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 (4) The person 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 to perform the work limits the
48 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 to perform the work for which the person was engaged; or

57 (H) 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 concerning workers' compensation in chapter 23 of this code,
61 unemployment compensation in chapter 21A of this code, Human Rights Act rights in §5-11-1 *et*
62 *seq.* of this code, and Wage Payment and Collection in §21-5-1 *et seq.* of this code. In addition,
63 nothing contained in subsection (a) of this section requires a principal to classify a worker who
64 meets the criteria contained therein as an independent contractor.

§21-11B-5. Preemption of local laws.

1 It is the intent of the State Legislature to provide for clarity and certainty of laws governing
2 the determination of independent contractor status concerning workers' compensation under

3 chapter 23 of this code, unemployment compensation under chapter 21A of this code, Human
 4 Rights Act rights under §5-11-1 et seq. of this code, and Wage Payment and Collection under
 5 §21-5-1 et seq. of this code. No city, county, municipality, or other local government entity or
 6 subdivision may pass any law, ordinance, regulation, code, charter, or other guidance in conflict
 7 with this article.

§21-11B-6. Limitations as to scope of this article.

1 The test for determining whether a person is an independent contractor or employee as
 2 set forth in this article applies only for purposes of workers' compensation in chapter 23 of this
 3 code, unemployment compensation in chapter 21A of this code, Human Rights Act rights in §5-
 4 11-1 et seq. of this code, and Wage Payment and Collection in §21-5-1 et seq. of this code. This
 5 test has no application to other areas of law, such as whether a person is an independent
 6 contractor or an agent of a principal for determining whether the law of principal and agent applies
 7 with respect to such questions as the issue of vicarious liability to a third party in tort. Further, this
 8 article does not apply with respect to organizations or persons subject to the provisions of §17-
 9 29-11 of this code. Finally, the provisions of this article do not apply to employers as defined under
 10 26 U.S. Code §3309 of the Federal Unemployment Tax Act.

§21-11B-7. 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 the
 3 provisions of this article are declared to be severable.

CHAPTER 21A. UNEMPLOYMENT COMPENSATION.

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 any instrumentality of the

3 United States exempt under the Constitution of the United States from the payments imposed by
4 this law, except that to the extent that the Congress of the United States permits states to require
5 any instrumentalities of the United States to make payments into an unemployment fund under a
6 state unemployment compensation law, all of the provisions of this law are applicable to the
7 instrumentalities and to service performed for the instrumentalities in the same manner, to the
8 same extent, and on the same terms as to all other employers, employing units, individuals, and
9 services: *Provided*, That if this state is not certified for any year by the Secretary of Labor under
10 26 U.S.C. § 3404, subsection (c), the payments required of the instrumentalities with respect to
11 the year shall be refunded by the commissioner from the fund in the same manner and within the
12 same period as is provided in §21A-5-19 of this code with respect to payments erroneously
13 collected;

14 (2) Service performed with respect to which unemployment compensation is payable
15 under the Railroad Unemployment Insurance Act and service with respect to which
16 unemployment benefits are payable under an unemployment compensation system for maritime
17 employees established by an Act of Congress. The commissioner may enter into agreements with
18 the proper agency established under an Act of Congress to provide reciprocal treatment to
19 individuals who, after acquiring potential rights to unemployment compensation under an Act of
20 Congress or who have, after acquiring potential rights to unemployment compensation under an
21 Act of Congress, acquired rights to benefit under this chapter. Such agreement shall become
22 effective 10 days after the publications which shall comply with the general rules of the
23 department;

24 (3) Service performed by an individual in agricultural labor, except as provided in §21A-
25 1A-16(12) of this code, the definition of "employment". For purposes of this subdivision, the term
26 "agricultural labor" includes all services performed:

27 (A) On a farm, in the employ of any person, in connection with cultivating the soil, or in
28 connection with raising or harvesting any agricultural or horticultural commodity, including the

29 raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and
30 fur-bearing animals and wildlife;

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

35 (C) In connection with the production or harvesting of any commodity defined as an
36 agricultural commodity in § 15(g) of the Agricultural Marketing Act, as amended, as codified in 12
37 U.S.C. § 1141j, subsection (g), or in connection with the ginning of cotton, or in connection with
38 the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated
39 for profit, used exclusively for supplying and storing water for farming purposes;

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

52 (E) On a farm operated for profit if the service is not in the course of the employer's trade
53 or business or is domestic service in a private home of the employer. As used in this subdivision,
54 the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animals, truck farms, plantations,

55 ranches, greenhouses, ranges, and nurseries, or other similar land areas or structures used
56 primarily for the raising of any agricultural or horticultural commodities;

57 (4) Domestic service in a private home except as provided in §21A-1A-16(13) of this code,
58 the definition of “employment”;

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

60 (6) Service performed by a child under the age of 18 years in the employ of his or her
61 father or mother;

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

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

69 (9) Service performed: (A) In the employ of a church or convention or association of
70 churches, or an organization which is operated primarily for religious purposes and which is
71 operated, supervised, controlled, or principally supported by a church or convention or association
72 of churches; or (B) by a duly ordained, commissioned, or licensed minister of a church in the
73 exercise of his or her ministry or by a member of a religious order in the exercise of duties required
74 by the order; or (C) by an individual receiving rehabilitation or remunerative work in a facility
75 conducted for the purpose of carrying out a program of either: (i) Rehabilitation for individuals
76 whose earning capacity is impaired by age or physical or mental deficiency or injury; or (ii)
77 providing remunerative work for individuals who because of their impaired physical or mental
78 capacity cannot be readily absorbed in the competitive labor market: *Provided*, That this
79 exemption does not apply to services performed by individuals if they are not receiving
80 rehabilitation or remunerative work on account of their impaired capacity; or (D) as part of an

81 unemployment work-relief or work-training program assisted or financed, in whole or in part, by
82 any federal agency or an agency of a state or political subdivision thereof, by an individual
83 receiving the work relief or work training; or (E) by an inmate of a custodial or penal institution;

84 (10) Service performed in the employ of a school, college, or university, if the service is
85 performed: (A) By a student who is enrolled and is regularly attending classes at the school,
86 college, or university; or (B) by the spouse of a student, if the spouse is advised, at the time the
87 spouse commences to perform the service, that: (i) The employment of the spouse to perform the
88 service is provided under a program to provide financial assistance to the student by the school,
89 college, or university; and (ii) the employment will not be covered by any program of
90 unemployment insurance;

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

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

100 (13) Service in the employ of a governmental entity referred to in §21A-1A-16(9) of this
101 code, the definition of "employment", if the service is performed by an individual in the exercise of
102 duties: (A) As an elected official; (B) as a member of a legislative body, or a member of the
103 judiciary, of a state or political subdivision; (C) as a member of the state National Guard or air
104 National Guard, except as provided in §21A-1A-28 of this code; (D) as an employee serving on a
105 temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency; (E) in a
106 position which, under or pursuant to the laws of this state, is designated as: (i) A major nontenured

107 policymaking or advisory position; or (ii) a policymaking or advisory position the performance of
 108 the duties of which ordinarily does not require more than eight hours per week; or (F) as any
 109 election official appointed to serve during any municipal, county, or state election, if the amount
 110 of remuneration received by the individual during the calendar year for services as an election
 111 official is less than \$1,000;

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

113 (15) Service performed by a person for his or her own sole proprietorship; or

114 (16) Service that would classify the person as an independent contractor pursuant to the
 115 provisions of §21-11B-1 et seq. of this code.

116 Notwithstanding the foregoing exclusions from the definition of “employment”, services,
 117 except agricultural labor and domestic service in a private home, are in employment if with respect
 118 to the services a tax is required to be paid under any federal law imposing a tax against which
 119 credit may be taken for contributions required to be paid into a State Unemployment
 120 Compensation Fund, or which as a condition for full tax credit against the tax imposed by the
 121 federal Unemployment Tax Act are required to be covered under this chapter.

CHAPTER 23. WORKERS' COMPENSATION.

ARTICLE 2. EMPLOYERS AND EMPLOYEES SUBJECT TO CHAPTER; EXTRATERRITORIAL COVERAGE.

§23-2-1. Employers subject to chapter; elections not to provide certain coverages; notices; filing of business registration certificates.

1 (a) The State of West Virginia and all governmental agencies or departments created by
 2 it, including county boards of education, political subdivisions of the state, any volunteer fire
 3 department or company and other emergency service organizations as defined by ~~article five,~~
 4 ~~chapter fifteen~~ §15-5-1 et seq. of this code, and all persons, firms, associations and corporations
 5 regularly employing another person or persons for the purpose of carrying on any form of industry,

6 service or business in this state, are employers within the meaning of this chapter and are required
7 to subscribe to and pay premium taxes into the Workers' Compensation Fund for the protection
8 of their employees and are subject to all requirements of this chapter and all rules prescribed by
9 the Workers' Compensation Commission with reference to rate, classification and premium
10 payment: *Provided*, That rates will be adjusted by the commission to reflect the demand on the
11 compensation fund by the covered employer.

12 (b) The following employers are not required to subscribe to the fund, but may elect to do
13 so:

14 (1) Employers of employees in domestic services;

15 (2) Employers of five or fewer full-time employees in agricultural service;

16 (3) Employers of employees while the employees are employed without the state except
17 in cases of temporary employment without the state;

18 (4) Casual employers. An employer is a casual employer when the number of his or her
19 employees does not exceed three and the period of employment is temporary, intermittent and
20 sporadic in nature and does not exceed 10 calendar days in any calendar quarter;

21 (5) Churches;

22 (6) Employers engaged in organized professional sports activities, including employers of
23 trainers and jockeys engaged in thoroughbred horse racing; or

24 (7) Any volunteer rescue squad or volunteer police auxiliary unit organized under the
25 auspices of a county commission, municipality or other government entity or political subdivision;
26 volunteer organizations created or sponsored by government entities, political subdivisions; or
27 area or regional emergency medical services boards of directors in furtherance of the purposes
28 of the Emergency Medical Services Act of ~~article four-c, chapter sixteen~~ §16-4C-1 *et seq.* of this
29 code: *Provided*, That if any of the employers described in this subdivision have paid employees,
30 to the extent of those paid employees, the employer shall subscribe to and pay premium taxes
31 into the Workers' Compensation Fund based upon the gross wages of the paid employees but

32 with regard to the volunteers, the coverage remains optional;

33 (8) Taxicab drivers of taxicab companies operating under ~~article two, chapter twenty-four-~~
34 ~~a~~§24-2-1 *et seq.* of this code, who provide taxicab service pursuant to a written or electronic
35 agreement that identifies the taxicab driver as an independent contractor consistent with the
36 United States Internal Revenue code requirements for persons acting as independent contractors:
37 *Provided*, That any such taxicab driver identified as an independent contractor shall not be eligible
38 for workers' compensation benefits under this chapter as an employee of the taxicab company.

39 ~~(8)~~ (9) Any employer whose employees are eligible to receive benefits under the federal
40 Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq.*, but only for those
41 employees eligible for those benefits.

42 (10) Any employer who engages a person in service as an independent contractor
43 pursuant to §21-11B-1 *et seq.* of this code.

44 (c) Notwithstanding any other provision of this chapter to the contrary, whenever there are
45 churches in a circuit which employ one individual clergyman and the payments to the clergyman
46 from the churches constitute his or her full salary, such circuit or group of churches may elect to
47 be considered a single employer for the purpose of premium payment into the Workers'
48 Compensation Fund.

49 (d) Employers who are not required to subscribe to the Workers' Compensation Fund may
50 voluntarily choose to subscribe to and pay premiums into the fund for the protection of their
51 employees and in that case are subject to all requirements of this chapter and all rules and
52 regulations prescribed by the commission with reference to rates, classifications and premium
53 payments and shall afford to them the protection of this chapter, including section six of this article,
54 but the failure of the employers to choose to subscribe to and to pay premiums into the fund shall
55 not impose any liability upon them other than any liability that would exist notwithstanding the
56 provisions of this chapter.

57 (e) Any foreign corporation employer whose employment in this state is to be for a definite

58 or limited period which could not be considered “regularly employing” within the meaning of this
59 section may choose to pay into the Workers’ Compensation Fund the premiums provided for in
60 this section, and at the time of making application to the Workers’ Compensation Commission,
61 the employer shall furnish a statement under oath showing the probable length of time the
62 employment will continue in this state, the character of the work, an estimate of the monthly payroll
63 and any other information which may be required by the commission. At the time of making
64 application the employer shall deposit with the commission to the credit of the Workers’
65 Compensation Fund the amount required by section five of this article. That amount shall be
66 returned to the employer if the employer’s application is rejected by the commission. Upon notice
67 to the employer of the acceptance of his or her application by the commission, he or she is an
68 employer within the meaning of this chapter and subject to all of its provisions.

69 (f) Any foreign corporation employer choosing to comply with the provisions of this chapter
70 and to receive the benefits under this chapter shall, at the time of making application to the
71 commission in addition to other requirements of this chapter, furnish the commission with a
72 certificate from the Secretary of State, where the certificate is necessary, showing that it has
73 complied with all the requirements necessary to enable it legally to do business in this state and
74 no application of a foreign corporation employer shall be accepted by the commission until the
75 certificate is filed.

76 (g) The following employers may elect not to provide coverage to certain of their
77 employees under the provisions of this chapter:

78 (1) Any political subdivision of the state including county commissions and municipalities,
79 boards of education, or emergency services organizations organized under the auspices of a
80 county commission may elect not to provide coverage to any elected official. The election not to
81 provide coverage does not apply to individuals in appointed positions or to any other employees
82 of the political subdivision;

83 (2) If an employer is a partnership, sole proprietorship, association or corporation, the

84 employer may elect not to include as an “employee” within this chapter, any member of the
85 partnership, the owner of the sole proprietorship, or any corporate officer or member of the board
86 of directors of the association or corporation. The officers of a corporation or an association shall
87 consist of a president, a vice president, a secretary and a treasurer, each of whom is elected by
88 the board of directors at the time and in the manner prescribed by the bylaws. Other officers and
89 assistant officers that are considered necessary may be elected or appointed by the board of
90 directors or chosen in any other manner prescribed by the bylaws and, if elected, appointed or
91 chosen, the employer may elect not to include the officer or assistant officer as an “employee”
92 within the meaning of this chapter: *Provided*, That except for those persons who are members of
93 the board of directors or who are the corporation’s or association’s president, vice president,
94 secretary and treasurer and who may be excluded by reason of their positions from the benefits
95 of this chapter even though their duties, responsibilities, activities or actions may have a dual
96 capacity of work which is ordinarily performed by an officer and also of work which is ordinarily
97 performed by a worker, an administrator or an employee who is not an officer, no other officer or
98 assistant officer who is elected or appointed shall be excluded by election from coverage or be
99 denied the benefits of this chapter merely because he or she is an officer or assistant officer if, as
100 a matter of fact:

101 (A) He or she is engaged in a dual capacity of having the duties and responsibilities for
102 work ordinarily performed by an officer and also having duties and work ordinarily performed by
103 a worker, administrator or employee who is not an officer;

104 (B) He or she is engaged ordinarily in performing the duties of a worker, an administrator,
105 or an employee who is not an officer and receives pay for performing the duties in the capacity of
106 an employee; or

107 (C) He or she is engaged in an employment palpably separate and distinct from his or her
108 official duties as an officer of the association or corporation;

109 (3) If an employer is a limited liability company, the employer may elect not to include as

110 an “employee” within this chapter a total of no more than four persons, each of whom are acting
111 in the capacity of manager, officer or member of the company.

112 (h) In the event of election under subsection (g) of this section, the employer shall serve
113 upon the commission written notice naming the positions not to be covered and shall not include
114 the “employee’s” remuneration for premium purposes in all future payroll reports, and the partner,
115 proprietor or corporate or executive officer is not considered an employee within the meaning of
116 this chapter after the notice has been served. Notwithstanding the provisions of subsection (g),
117 section five of this article, if an employer is delinquent or in default or has not subscribed to the
118 fund even though it is obligated to do so under the provisions of this article, any partner, proprietor
119 or corporate or executive officer shall not be covered and shall not receive the benefits of this
120 chapter.

121 (i) “Regularly employing” or “regular employment” means employment by an employer
122 which is not a casual employer under this section.

123 (j) Upon the termination of the commission, the criteria governing which employer shall or
124 may subscribe to the Workers’ Compensation Commission shall also govern which employers
125 shall or may purchase Workers’ Compensation insurance under ~~article two-e~~ §21A-2C-1 of this
126 ~~chapter~~ code.

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.