

**H. B. 2052**

(By Delegate Shott)

[Introduced January 14, 2015; referred to the

Committee on Industry and Labor then the Judiciary.]

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

*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 to read as follows:

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

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

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

(1) Service performed in the employ of the United States or any instrumentality of the United States exempt under the Constitution of the United States from the payments imposed by this law,

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

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

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

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

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

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

14 (D) (i) In the employ of the operator of a farm in handling, planting, drying, packing,  
15 packaging, processing, freezing, grading, storing or delivering to storage or to market or to a carrier  
16 for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity;  
17 but only if the operator produced more than one half of the commodity with respect to which the  
18 service is performed; or (ii) in the employ of a group of operators of farms (or a cooperative  
19 organization of which the operators are members) in the performance of service described in  
20 subparagraph (i) of this paragraph, but only if the operators produced more than one half of the  
21 commodity with respect to which the service is performed; but the provisions of subparagraphs (i)  
22 and (ii) of this paragraph are not applicable with respect to service performed in connection with

1 commercial canning or commercial freezing or in connection with any agricultural or horticultural  
2 commodity after its delivery to a terminal market for distribution for consumption;

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

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

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

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

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

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

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

22 (10) Service performed by an individual in connection with the sale of consumer products

1 (or the solicitation of the sale of consumer products) in a residence or other place that is not a  
2 permanent commercial establishment performed under a written contract between the individual and  
3 the person for whom such individual performs such services, which contract provides:

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

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

7 ~~(9)~~ (11) Service performed:

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

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

14 (C) By an individual receiving rehabilitation or remunerative work in a facility conducted for  
15 the purpose of carrying out a program of either:

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

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

22 (D) As part of an unemployment work-relief or work-training program assisted or financed,

1 in whole or in part, by any federal agency or an agency of a state or political subdivision thereof, by  
2 an individual receiving the work relief or work training; or

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

4 ~~(10)~~ (12) Service performed in the employ of a school, college or university, if the service  
5 is performed:

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

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

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

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

13 ~~(11)~~ (13) Service performed by an individual who is enrolled at a nonprofit or public  
14 educational institution which normally maintains a regular faculty and curriculum and normally has  
15 a regularly organized body of students in attendance at the place where its educational activities are  
16 carried on as a student in a full-time program, taken for credit at the institution, which combines  
17 academic instruction with work experience, if the service is an integral part of the program and the  
18 institution has so certified to the employer, except that this subdivision does not apply to service  
19 performed in a program established for or on behalf of an employer or group of employers;

20 ~~(12)~~ (14) Service performed in the employ of a hospital, if the service is performed by a  
21 patient of the hospital, as defined in this article;

22 ~~(13)~~ (15) Service in the employ of a governmental entity referred to in subdivision (9),

1 section sixteen of this article, the definition of "employment," if the service is performed by an  
2 individual in the exercise of duties:

3 (A) As an elected official;

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

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

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

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

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

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

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

17 ~~(14)~~ (16) Service performed by a bona fide partner of a partnership for the partnership; and

18 ~~(15)~~ (17) Service performed by a person for his or her own sole proprietorship.

19 Notwithstanding the foregoing exclusions from the definition of "employment," services,  
20 except agricultural labor and domestic service in a private home, are in employment if with respect  
21 to the services a tax is required to be paid under any federal law imposing a tax against which credit  
22 may be taken for contributions required to be paid into a State Unemployment Compensation Fund,

- 1 or which as a condition for full tax credit against the tax imposed by the federal Unemployment Tax
- 2 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.