

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Committee Substitute

for

Senate Bill 528

SENATOR SWOPE, AZINGER, RUCKER, TRUMP, CLINE,

AND MAYNARD, *original sponsors*

[Originating in the Committee on the Judiciary;

reported on February 19, 2020]

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 West Virginia Employment Law Worker Classification Act; and clarifying definition of
4 “independent contractor”.

Be it enacted by the Legislature of West Virginia:

ARTICLE 5I. WEST VIRGINIA EMPLOYMENT LAW WORKER CLASSIFICATION ACT.

§21-5I-1. Short title.

1 This article shall be known as the West Virginia Employment Law Worker Classification
2 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 concerning 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 their applicable rights and obligations. Clarity in a worker's classification allows businesses to
18 comply with applicable laws, provides workers with certainty as to their benefits and obligations,
19 and minimizes unnecessary mistakes, litigation, risk, and legal exposure 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 concerning workers' compensation in chapter 23 of this code, unemployment compensation in
26 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 article is to bring certainty and consistency in the laws and clarity
29 regarding the distinction between employees and independent contractors laws concerning
30 workers' compensation in chapter 23 of this 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 will be afforded with the legal protections
34 and obligations that apply to such status, and that workers who desire to be, and meet the
35 standards of being, independent contractors will be entitled to the freedoms that such a
36 relationship provides which will reduce unnecessary and costly litigation and confusion in the
37 workforce marketplace and in the courts.

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 Certain laws may be superseded.

1 The purpose of this article is to bring clarity and certainty under the laws of this state with
2 regard to differentiating employees from independent contractors in employment laws concerning
3 workers' compensation in chapter 23 of this code, unemployment compensation in chapter 21A
4 of this code, Human Rights Act rights in §5-11-1 et seq. of this code, and wage payment and

5 collection in §21-5-1 et seq. of this code, and by imposing objective standards for making that
6 distinction. Consequently, all laws concerning workers' compensation in chapter 23 of this code,
7 unemployment compensation in chapter 21A of this code, Human Rights Act rights in §5-11-1 et
8 seq. of this code, and wage payment and collection in §21-5-1 et seq. of this code where the
9 application thereof is contingent upon the classification of a worker as being an employee are
10 superseded, to the extent necessary, by this article.

§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 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 acknowledgements that the person understands that
9 he 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 workers' compensation or
13 unemployment compensation benefits; and

14 (D) Obligated to pay all applicable federal and state income taxes, if any, on any monies
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: The expenses are for
19 travel that is not local; the expenses are reimbursed under an express provision of the contract;

20 or the supplies, or expenses reimbursed are commonly reimbursed under industry practice; and

21 (2) The person:

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

25 (B) Provides his or her services through a business entity, including, but not limited to, a
26 partnership, limited liability company or corporation, or through a sole proprietorship registered
27 with a “doing business as” as required under state or local law; and

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

36 (4) The person satisfies three or more of the following criteria:

37 (A) Except for an agreement with the principal relating to final completion or final delivery
38 time or schedule, range of work hours, or the time entertainment is to be presented if the work
39 contracted for is entertainment, the person has control over the amount of time personally spent
40 providing services;

41 (B) Except for services that can only be performed at specific locations, the person has
42 control over where the services are performed;

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

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

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

48 (D) The person is free to exercise independent initiative in soliciting others to purchase his
49 or her services;

50 (E) The person is free to hire employees or to contract with assistants, helpers, or
51 substitutes to perform all or some of the work;

52 (F) The person cannot be required to perform additional services without a new or modified
53 contract;

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

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

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

61 (b) All workers who do not satisfy the criteria set forth in subsection (a) of this section shall
62 be classified as employees concerning workers' compensation in chapter 23 of this code,
63 unemployment compensation in chapter 21A of this code, Human Rights Act rights in §5-11-1 et
64 seq. of this code, and wage payment and collection in §21-5-1 et seq. of this code. In addition,
65 nothing contained in said subsection requires a principal to classify a worker who meets the
66 criteria contained therein as an independent contractor, the principal always being free to hire the
67 worker as an employee.

§21-5I-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 §21-
5 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, regulation or other guidance
7 in conflict with this article.

§21-5I-6. Limitations as to scope of article.

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

§21-5I-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 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.