WEST VIRGINIA CODE CHAPTER 21 ARTICLE 5I

WV Legislature

§21-5I-1. Short title.

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

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§21-5I-2. Findings.

The Legislature finds as follows:

(a) Recent developments in the workforce marketplace, and in particular with the advent of the so-called "gig", "entrepreneurial", or "sharing" economy, have highlighted the uncertainty that currently exists with determining the correct classification of workers as independent contractors or employees. The proper classification of workers as employees or independent contractors is a complex legal issue that vexes workers and businesses as well as lawyers and the courts.

(b) Not only are the legal standards used to differentiate employees from independent contractors generally subjective in nature, but those standards differ based on the particular law at issue. As a result, some workers may be found to be employees under one law but independent contractors under another law, leaving the same person classified as an employee for some purposes but as an independent contractor for other purposes.

(c) It is in the best interests of this state, workers, and businesses for there to be certainty regarding the legal status of workers concerning workers' compensation as defined in Chapter 23 of this code, unemployment compensation in Chapter 21A of this code, Human Rights Act rights in §5-11-1 *et seq*. of this code, and wage payment and collection in §21-5-1 *et seq*. of this code, and their applicable rights and obligations. Clarity in a worker's classification allows businesses to comply with applicable laws, provides workers with certainty as to their benefits and obligations, and minimizes unnecessary mistakes, litigation, risk, and legal exposure laws concerning workers' compensation in Chapter 23 of this code, unemployment compensation in Chapter 21A of this code, Human Rights Act rights in §5-11-1 *et seq*. of this code, and wage payment and collection in §21-5-1 *et seq*. of this code.

(d) It is in the best interests of workers, business, and government to have clear, objective, and certain standards for determining who is an employee and who is an independent contractor concerning workers' compensation as defined in Chapter 23 of this code, unemployment compensation in Chapter 21A of this code, Human Rights Act rights in §5-11-1 *et seq*. *of* this code, and wage payment and collection in §21-5-1 *et seq*. of this code.

(e) The purpose of this article is to bring certainty and consistency in the laws and clarity regarding the distinction between employees and independent contractors in laws concerning workers' compensation as defined in Chapter 23 of this code, unemployment compensation as defined in Chapter 21A of this code, Human Rights Act rights as defined in §5-11-1 *et seq*. of this code, and wage payment and collection as defined in §21-5-1 *et seq*. of this code. By doing so, the state will ensure that workers who are indeed "employees" are properly classified as such and will be afforded the legal protections and obligations that apply to such status, and that workers who desire to be, and meet the standards of being, independent contractors will be entitled to the freedoms that such a relationship provides, which will reduce unnecessary and costly litigation and confusion in the workforce marketplace and in the courts.

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

The purpose of this article is to bring clarity and certainty under the laws of this state with regard to differentiating employees from independent contractors in employment laws as defined in workers' compensation in Chapter 23 of this code, unemployment compensation in Chapter 21A of this code, Human Rights Act rights in §5-11-1 *et seq*. of this code, and wage payment and collection in §21-5-1 *et seq*. of this code, and by imposing objective standards for making that distinction. Consequently, all laws concerning workers' compensation in Chapter 23 of this code, unemployment compensation in Chapter 21A of this code, Human Rights Act rights in §5-11-1 *et seq*. of this code, and wage payment and collection in §21-5-1 *et seq*. of this code where the application thereof is contingent upon the classification of a worker as being an employee are superseded, to the extent necessary, by this article.

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§21-5I-4. Classification of independent contractors and employees.

(a) Subject only to the provisions of subsection (b) of this section, a person shall be classified as an independent contractor under the laws of this state as defined in workers' compensation in Chapter 23 of this code, unemployment compensation in Chapter 21A of this code, Human Rights Act rights in §5-11-1 *et seq*. of this code, and wage payment and collection as defined in §21-5-1 *et seq*. of this code, if:

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

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

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

(C) Not going to be provided by the principal with either workers' compensation or unemployment compensation benefits;

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

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

(2) The person:

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

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

(3) With the exception of the exercise of control necessary to ensure compliance with statutory, regulatory, licensing, permitting, or other similar obligations required by a governmental or regulatory entity, or to protect persons or property, or to protect a franchise brand, the person actually and directly controls the manner and means by which the work is to be accomplished, even though he or she may not have control over the final result of the work: *Provided*, That the required deployment, implementation, or use of any safety improvement by an independent contractor as required by contract or otherwise shall

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not be considered when evaluating status as an employee or independent contractor under any state law. For purposes of this section, “safety improvement” shall mean any device, equipment, software, technology, procedure, training, policy, program, or operational practice intended and primarily used to improve or facilitate compliance with state, federal, or local safety laws or regulations or general safety concerns. This provision is satisfied even though the principal may provide orientation, information, guidance, or suggestions about the principal’s products, business, services, customers and operating systems, and training otherwise required by law; and

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

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

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

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

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

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

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

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

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

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

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

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

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(5) The person satisfies the definition of a direct seller under Section 3508(b)(2) of the Internal Revenue Code of 1986.

(b) The classification of all workers who do not satisfy the criteria set forth in subsection (a) of this section shall be determined by the test set forth in Internal Revenue Service Rev. Ruling 87-41, for purposes of classifying workers under the laws concerning workers' compensation as defined in Chapter 23 of this code, unemployment compensation in Chapter 21A of this code, Human Rights Act rights in §5-11-1 *et seq*. of this code, and wage payment and collection in §21-5-1 *et seq*. of this code. In addition, nothing contained in said subsection requires a principal to classify a worker who meets the criteria contained therein as an independent contractor, the principal always being free to hire the worker as an employee.

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

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

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§21-5I-6. Severability.

If any provision of this article or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this article, and to this end the provisions of this article are declared to be severable.

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