

WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1987

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ENROLLED

HOUSE BILL No. 2727

(By ~~Delegate~~ MR. Speaker, MR. Chambers
+ Delegate Swann
[BY Request of the Executive])

— ● —

Passed MARCH 14, 1987

In Effect July 1, 1987 ~~Passage~~

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H. B. 2727

(By MR. SPEAKER, MR. CHAMBERS and DELEGATE SWANN)
[By request of the Executive]

[Passed March 14, 1987; in effect July 1, 1987.]

AN ACT to amend and reenact section three, article one, chapter twenty-one-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact sections ten-b and seventeen, article five; sections one and fifteen, article six; and section eleven, article seven of said chapter, all relating to unemployment compensation.

Be it enacted by the Legislature of West Virginia:

That section three, article one, chapter twenty-one-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; that sections ten-b and seventeen, article five of said chapter be amended and reenacted; that sections one and fifteen, article six; and section eleven, article seven of said chapter be amended and reenacted, all to read as follows:

ARTICLE 1. DEPARTMENT OF EMPLOYMENT SECURITY.

§21A-1-3. Definitions.

- 1 As used in this chapter, unless the context clearly
- 2 requires otherwise:
- 3 “Administration fund” means the employment secur-
- 4 ity administration fund, from which the administrative
- 5 expenses under this chapter shall be paid.
- 6 “Annual payroll” means the total amount of wages for

7 employment paid by an employer during a twelve-
8 month period ending with June thirty of any calendar
9 year.

10 “Average annual payroll” means the average of the
11 last three annual payrolls of an employer.

12 “Base period” means the first four out of the last five
13 completed calendar quarters immediately preceding the
14 first day of the individual benefit year.

15 “Base period employer” means any employer who in
16 the base period for any benefit year paid wages to an
17 individual who filed claim for unemployment compen-
18 sation within such benefit year.

19 “Base period wages” means wages paid to an individ-
20 ual during the base period by all his base period
21 employers.

22 “Benefit year” with respect to an individual means the
23 fifty-two-week period beginning with the first day of the
24 calendar week in which a valid claim is effective, and
25 thereafter the fifty-two-week period beginning with the
26 first day of the calendar week in which such individual
27 next files a valid claim for benefits after the termination
28 of his last preceding benefit year; however, if a claim
29 is effective on the first day of a quarter, the benefit year
30 will be fifty-three weeks, in order to prevent an
31 overlapping of the base period wages. An initial claim
32 for benefits filed in accordance with the provisions of
33 this chapter shall be deemed to be a valid claim within
34 the purposes of this definition if the individual has been
35 paid wages in his base period sufficient to make him
36 eligible for benefits under the provisions of this chapter.

37 “Benefits” means the money payable to an individual
38 with respect to his unemployment.

39 “Board” means board of review.

40 “Calendar quarter” means the period of three consec-
41 utive calendar months ending on March thirty-one, June
42 thirty, September thirty or December thirty-one, or the
43 equivalent thereof as the commissioner may by regula-
44 tion prescribe.

45 "Commissioner" means the employment security
46 commissioner.

47 "Computation date" means June thirty of the year
48 immediately preceding the January one on which an
49 employer's contribution rate becomes effective.

50 "Employing unit" means an individual, or type of
51 organization, including any partnership, association,
52 trust estate, joint-stock company, insurance company,
53 corporation (domestic or foreign), state or political
54 subdivision thereof, or their instrumentalities, as
55 provided in paragraph (b), subdivision (9) of the
56 definition of "employment" in this section, institution of
57 higher education, or the receiver, trustee in bankruptcy,
58 trustee or successor thereof, or the legal representative
59 of a deceased person, which has on January first, one
60 thousand nine hundred thirty-five, or subsequent
61 thereto, had in its employ one or more individuals
62 performing service within this state.

63 "Employer" means:

64 (1) Until January one, one thousand nine hundred
65 seventy-two, any employing unit which for some portion
66 of a day, not necessarily simultaneously, in each of
67 twenty different calendar weeks, which weeks need not
68 be consecutive, within either the current calendar year,
69 or the preceding calendar year, has had in employment
70 four or more individuals irrespective of whether the
71 same individuals were or were not employed on each of
72 such days;

73 (2) Any employing unit which is or becomes a liable
74 employer under any federal unemployment tax act;

75 (3) Any employing unit which has acquired or ac-
76 quires the organization, trade or business, or substan-
77 tially all the assets thereof, of an employing unit which
78 at the time of such acquisition was an employer subject
79 to this chapter;

80 (4) Any employing unit which, after December thirty-
81 one, one thousand nine hundred sixty-three, and until
82 January one, one thousand nine hundred seventy-two, in
83 any one calendar quarter, in any calendar year, has in

84 employment four or more individuals and has paid
85 wages for employment in the total sum of five thousand
86 dollars or more, or which, after such date, has paid
87 wages for employment in any calendar year in the sum
88 total of twenty thousand dollars or more;

89 (5) Any employing unit which, after December thirty-
90 one, one thousand nine hundred sixty-three, and until
91 January one, one thousand nine hundred seventy-two, in
92 any three-week period, in any calendar year, has in
93 employment ten or more individuals;

94 (6) For the effective period of its election pursuant to
95 section three, article five of this chapter, any employing
96 unit which has elected to become subject to this chapter;

97 (7) Any employing unit which, after December thirty-
98 one, one thousand nine hundred seventy-one, (i) in any
99 calendar quarter in either the current or preceding
100 calendar year paid for service in employment wages of
101 one thousand five hundred dollars or more, or (ii) for
102 some portion of a day in each of twenty different
103 calendar weeks, whether or not such weeks were
104 consecutive, in either the current or the preceding
105 calendar year had in employment at least one individual
106 (irrespective of whether the same individual was in
107 employment in each such day) except as provided in
108 subdivisions eleven and twelve hereof;

109 (8) Any employing unit for which service in employ-
110 ment, as defined in subdivision (9) of the definition of
111 "employment" in this section, is performed after
112 December thirty-one, one thousand nine hundred
113 seventy-one;

114 (9) Any employing unit for which service in employ-
115 ment, as defined in subdivision (10) of the definition of
116 "employment" in this section, is performed after
117 December thirty-one, one thousand nine hundred
118 seventy-one;

119 (10) Any employing unit for which service in employ-
120 ment, as defined in paragraphs (b) and (c) of subdivision
121 (9) of the definition of "employment" in this section, is
122 performed after December thirty-one, one thousand nine

123 hundred seventy-seven;

124 (11) Any employing unit for which agricultural labor,
125 as defined in subdivision (12) of the definition of
126 "employment" in this section, is performed after
127 December thirty-one, one thousand nine hundred
128 seventy-seven;

129 (12) Any employing unit for which domestic service
130 in employment, as defined in subdivision (13) of the
131 definition of "employment" in this section, is performed
132 after December thirty-one, one thousand nine hundred
133 seventy-seven.

134 "Employment," subject to the other provisions of this
135 section, means:

136 (1) Service, including service in interstate commerce,
137 performed for wages or under any contract of hire,
138 written or oral, express or implied;

139 (2) Any service performed prior to January one, one
140 thousand nine hundred seventy-two, which was employ-
141 ment as defined in this section prior to such date and,
142 subject to the other provisions of this section, service
143 performed after December thirty-one, one thousand nine
144 hundred seventy-one, by an employee, as defined in
145 section 3306(i) of the Federal Unemployment Tax Act,
146 including service in interstate commerce;

147 (3) Any service performed prior to January one, one
148 thousand nine hundred seventy-two, which was employ-
149 ment as defined in this section prior to such date and,
150 subject to the other provisions of this section, service
151 performed after December thirty-one, one thousand nine
152 hundred seventy-one, including service in interstate
153 commerce, by any officer of a corporation;

154 (4) An individual's entire service, performed within or
155 both within and without this state if: (a) The service is
156 localized in this state or (b) the service is not localized
157 in any state but some of the service is performed in this
158 state and (i) the base of operations, or, if there is no base
159 of operations, then the place from which such service is
160 directed or controlled, is in this state; or (ii) the base of
161 operations or place from which such service is directed

162 or controlled is not in any state in which some part of
163 the service is performed but the individual's residence
164 is in this state;

165 (5) Service not covered under paragraph four of this
166 subdivision and performed entirely without this state
167 with respect to no part of which contributions are
168 required and paid under an unemployment compensa-
169 tion law of any other state or of the federal government,
170 shall be deemed to be employment subject to this
171 chapter if the individual performing such services is a
172 resident of this state and the commissioner approves the
173 election of the employing unit for whom such services
174 are performed that the entire service of such individual
175 shall be deemed to be employment subject to this
176 chapter;

177 (6) Service shall be deemed to be localized within a
178 state, if: (a) The service is performed entirely within
179 such state; or (b) the service is performed both within
180 and without such state, but the service performed
181 without such state is incidental to the individual's
182 service within this state, as, for example, is temporary
183 or transitory in nature or consists of isolated
184 transactions;

185 (7) Services performed by an individual for wages
186 shall be deemed to be employment subject to this
187 chapter unless and until it is shown to the satisfaction
188 of the commissioner that: (a) Such individual has been
189 and will continue to be free from control or direction
190 over the performance of such services, both under his
191 contract of service and in fact; and (b) such service is
192 either outside the usual course of the business for which
193 such service is performed or that such service is
194 performed outside of all the places of business of the
195 enterprise for which such service is performed; and (c)
196 such individual is customarily engaged in an independ-
197 ently established trade, occupation, profession or
198 business;

199 (8) All service performed by an officer or member of
200 the crew of an American vessel (as defined in section
201 three hundred five of an act of Congress entitled Social

202 Security Act Amendment of 1946, approved August
203 tenth, one thousand nine hundred forty-six), on or in
204 connection with such vessel, provided that the operating
205 office, from which the operations of such vessel operat-
206 ing on navigable waters within and without the United
207 States is ordinarily and regularly supervised, managed,
208 directed and controlled, is within this state;

209 (9) (a) Service performed after December thirty-one,
210 one thousand nine hundred seventy-one, by an individual
211 in the employ of this state or any of its instrumentalities
212 (or in the employ of this state and one or more other
213 states or their instrumentalities) for a hospital or
214 institution of higher education located in this state:
215 *Provided*, That such service is excluded from "employ-
216 ment" as defined in the Federal Unemployment Tax Act
217 solely by reason of section 3306 (c) (7) of that act and
218 is not excluded from "employment" under subdivision
219 (11) of the exclusion from employment.

220 (b) Service performed after December thirty-one, one
221 thousand nine hundred seventy-seven, in the employ of
222 this state or any of its instrumentalities or political
223 subdivisions thereof or any of its instrumentalities or
224 any instrumentality of more than one of the foregoing
225 or any instrumentality of any foregoing and one or more
226 other states or political subdivisions: *Provided*, That
227 such service is excluded from "employment" as defined
228 in the Federal Unemployment Tax Act by section 3306
229 (c) (7) of that act and is not excluded from "employment"
230 under subdivision (15) of the exclusion from employment
231 in this section; and

232 (c) Service performed after December thirty-one, one
233 thousand nine hundred seventy-seven, in the employ of
234 a nonprofit educational institution which is not an
235 institution of higher education;

236 (10) Service performed after December thirty-one,
237 one thousand nine hundred seventy-one, by an individual
238 in the employ of a religious, charitable, educational or
239 other organization but only if the following conditions
240 are met:

241 (a) The service is excluded from "employment" as

242 defined in the Federal Unemployment Tax Act solely by
243 reason of section 3306(c) (8) of that act; and

244 (b) The organization had four or more individuals in
245 employment for some portion of a day in each of twenty
246 different weeks, whether or not such weeks were
247 consecutive, within either the current or preceding
248 calendar year, regardless of whether they were em-
249 ployed at the same moment of time;

250 (11) Service of an individual who is a citizen of the
251 United States, performed outside the United States
252 after December thirty-one, one thousand nine hundred
253 seventy-one (except in Canada and in the case of Virgin
254 Islands after December thirty-one, one thousand nine
255 hundred seventy-one, and before January one of the year
256 following the year in which the secretary of labor
257 approves for the first time an unemployment insurance
258 law submitted to him by the Virgin Islands for appro-
259 val) in the employ of an American employer (other than
260 service which is deemed "employment" under the
261 provisions of subdivision (4), (5) or (6) of this definition
262 of "employment" or the parallel provisions of another
263 state's law) if:

264 (a) The employer's principal place of business in the
265 United States is located in this state; or

266 (b) The employer has no place of business in the
267 United States, but (i) the employer is an individual who
268 is a resident of this state; or (ii) the employer is a
269 corporation which is organized under the laws of this
270 state; or (iii) the employer is a partnership or a trust
271 and the number of the partners or trustees who are
272 residents of this state is greater than the number who
273 are residents of any one other state; or

274 (c) None of the criteria of subparagraphs (a) and (b)
275 of this subdivision (11) is met but the employer has
276 elected coverage in this state or, the employer having
277 failed to elect coverage in any state, the individual has
278 filed a claim for benefits, based on such service, under
279 the law of this state.

280 An "American employer," for purposes of this subdi-

281 vision (11), means a person who is (i) an individual who
282 is a resident of the United States; or (ii) a partnership
283 if two thirds or more of the partners are residents of
284 the United States; or (iii) a trust, if all of the trustees
285 are residents of the United States; or (iv) a corporation
286 organized under the laws of the United States or of any
287 state;

288 (12) Service performed after December thirty-one,
289 one thousand nine hundred seventy-seven, by an individ-
290 ual in agricultural labor as defined in subdivision (5) of
291 the exclusions from employment in this section when:

292 (a) Such service is performed for a person who (i)
293 during any calendar quarter in either the current or the
294 preceding calendar year paid remuneration in cash of
295 twenty thousand dollars or more to individuals em-
296 ployed in agricultural labor, including labor performed
297 by an alien referred to in paragraph (b) of this
298 subdivision (12); or (ii) for some portion of a day in each
299 of twenty different calendar weeks, whether or not such
300 weeks were consecutive, in either the current or the
301 preceding calendar year, employed in agricultural
302 labor, including labor performed by an alien referred
303 to in paragraph (b) of this subdivision (12), ten or more
304 individuals, regardless of whether they were employed
305 at the same moment of time;

306 (b) Such service is not performed in agricultural
307 labor if performed before January one, one thousand
308 nine hundred eighty-eight by an individual who is an
309 alien admitted to the United States to perform service
310 in agricultural labor pursuant to sections 214 (c) and 101
311 (a) (15) (H) of the Immigration and Nationality Act;

312 (c) For the purposes of the definition of employment,
313 any individual who is a member of a crew furnished by
314 a crew leader to perform service in agricultural labor
315 for any other person shall be treated as an employee of
316 such crew leader (i) if such crew leader holds a valid
317 certificate of registration under the Farm Labor
318 Contractor Registration Act of 1963; or substantially all
319 the members of such crew operate or maintain tractors,
320 mechanized harvesting or crop-dusting equipment, or

321 any other mechanized equipment, which is provided by
322 such crew leader; and (ii) if such individual is not an
323 employee of such other person within the meaning of
324 subdivision (7) of the definition of employer;

325 (d) For the purposes of this subdivision (12), in the
326 case of any individual who is furnished by a crew leader
327 to perform service in agricultural labor for any other
328 person and who is not treated as an employee of such
329 crew leader under subparagraph (c) of this subdivision
330 (12), (i) such other person and not the crew leader shall
331 be treated as the employer of such individual; and (ii)
332 such other person shall be treated as having paid cash
333 remuneration to such individual in an amount equal to
334 the amount of cash remuneration paid to such individual
335 by the crew leader (either on his own behalf or on behalf
336 of such other person) for the service in agricultural
337 labor performed for such other person;

338 (e) For the purposes of this subdivision (12), the term
339 "crew leader" means an individual who (i) furnishes
340 individuals to perform service in agricultural labor for
341 any other person, (ii) pays (either on his own behalf or
342 on behalf of such other person) the individuals so
343 furnished by him for the service in agricultural labor
344 performed by them, and (iii) has not entered into a
345 written agreement with such other person under which
346 such individual is designated as an employee of such
347 other person;

348 (13) The term "employment" shall include domestic
349 service after December thirty-one, one thousand nine
350 hundred seventy-seven, in a private home, local college
351 club or local chapter of a college fraternity or sorority
352 performed for a person who paid cash remuneration of
353 one thousand dollars or more after December thirty-one,
354 one thousand nine hundred seventy-seven, in any
355 calendar quarter in the current calendar year or the
356 preceding calendar year to individuals employed in such
357 domestic service.

358 Notwithstanding the foregoing definition of "employ-
359 ment," if the services performed during one half or more
360 of any pay period by an employee for the person

361 employing him constitute employment, all the services
362 of such employee for such period shall be deemed to be
363 employment; but if the services performed during more
364 than one half of any such pay period by an employee for
365 the person employing him do not constitute employment,
366 then none of the services of such employee for such
367 period shall be deemed to be employment.

368 The term "employment" shall not include:

369 (1) Service performed in the employ of this state or
370 any political subdivision thereof, or any instrumentality
371 of this state or its subdivisions, except as otherwise
372 provided herein until December thirty-one, one thou-
373 sand nine hundred seventy-seven;

374 (2) Service performed directly in the employ of
375 another state, or its political subdivisions, except as
376 otherwise provided in paragraph (a), subdivision (9) of
377 the definition of "employment," until December thirty-
378 one, one thousand nine hundred seventy-seven;

379 (3) Service performed in the employ of the United
380 States or any instrumentality of the United States
381 exempt under the constitution of the United States from
382 the payments imposed by this law, except that to the
383 extent that the Congress of the United States shall
384 permit states to require any instrumentalities of the
385 United States to make payments into an unemployment
386 fund under a state unemployment compensation law, all
387 of the provisions of this law shall be applicable to such
388 instrumentalities and to service performed for such
389 instrumentalities in the same manner, to the same
390 extent and on the same terms as to all other employers,
391 employing units, individuals and services: *Provided,*
392 That if this state shall not be certified for any year by
393 the secretary of labor under section 1603(c) of the
394 federal Internal Revenue Code, the payments required
395 of such instrumentalities with respect to such year shall
396 be refunded by the commissioner from the fund in the
397 same manner and within the same period as is provided
398 in section nineteen, article five of this chapter, with
399 respect to payments erroneously collected;

400 (4) Service performed after June thirty, one thousand

401 nine hundred thirty-nine, with respect to which unem-
402 ployment compensation is payable under the Railroad
403 Unemployment Insurance Act and service with respect
404 to which unemployment benefits are payable under an
405 unemployment compensation system for maritime
406 employees established by an act of Congress. The
407 commissioner may enter into agreements with the
408 proper agency established under such an act of Congress
409 to provide reciprocal treatment to individuals who, after
410 acquiring potential rights to unemployment compensa-
411 tion under an act of Congress, or who have, after
412 acquiring potential rights to unemployment compensa-
413 tion under an act of Congress, acquired rights to benefit
414 under this chapter. Such agreement shall become
415 effective ten days after such publications which shall
416 comply with the general rules of the department;

417 (5) Service performed by an individual in agricultural
418 labor, except as provided in subdivision (12) of the
419 definition of "employment" in this section. For purposes
420 of this subdivision (5), the term "agricultural labor"
421 includes all services performed:

422 (a) On a farm, in the employ of any person, in
423 connection with cultivating the soil, or in connection
424 with raising or harvesting any agricultural or horticul-
425 tural commodity, including the raising, shearing,
426 feeding, caring for, training and management of
427 livestock, bees, poultry, and fur-bearing animals and
428 wildlife;

429 (b) In the employ of the owner or tenant or other
430 operator of a farm, in connection with the operation,
431 management, conservation, improvement or mainte-
432 nance of such farm and its tools and equipment, or in
433 salvaging timber or clearing land of brush and other
434 debris left by a hurricane, if the major part of such
435 service is performed on a farm;

436 (c) In connection with the production or harvesting of
437 any commodity defined as an agricultural commodity in
438 section fifteen (g) of the Agricultural Marketing Act, as
439 amended, or in connection with the ginning of cotton,
440 or in connection with the operation or maintenance of

441 ditches, canals, reservoirs or waterways, not owned or
442 operated for profit, used exclusively for supplying and
443 storing water for farming purposes;

444 (d) (i) In the employ of the operator of a farm in
445 handling, planting, drying, packing, packaging, process-
446 ing, freezing, grading, storing or delivering to storage
447 or to market or to a carrier for transportation to market,
448 in its unmanufactured state, any agricultural or
449 horticultural commodity; but only if such operator
450 produced more than one half of the commodity with
451 respect to which such service is performed; or (ii) in the
452 employ of a group of operators of farms (or a cooperative
453 organization of which such operators are members) in
454 the performance of service described in clause (i), but
455 only if such operators produced more than one half of
456 the commodity with respect to which such service is
457 performed; but the provisions of clauses (i) and (ii) shall
458 not be deemed to be applicable with respect to service
459 performed in connection with commercial canning or
460 commercial freezing or in connection with any agricul-
461 tural or horticultural commodity after its delivery to a
462 terminal market for distribution for consumption;

463 (e) On a farm operated for profit if such service is not
464 in the course of the employer's trade or business or is
465 domestic service in a private home of the employer. As
466 used in this subdivision (5), the term "farm" includes
467 stock, dairy, poultry, fruit, fur-bearing animals, truck
468 farms, plantations, ranches, greenhouses, ranges and
469 nurseries, or other similar land areas or structures used
470 primarily for the raising of any agricultural or horti-
471 cultural commodities;

472 (6) Domestic service in a private home except as
473 provided in subdivision (13) of the definition of "employ-
474 ment" in this section;

475 (7) Service performed by an individual in the employ
476 of his son, daughter or spouse;

477 (8) Service performed by a child under the age of
478 eighteen years in the employ of his father or mother;

479 (9) Service as an officer or member of a crew of an

480 American vessel, performed on or in connection with
481 such vessel, if the operating office, from which the
482 operations of the vessel operating on navigable waters
483 within or without the United States are ordinarily and
484 regularly supervised, managed, directed and controlled,
485 is without this state;

486 (10) Service performed by agents of mutual fund
487 broker-dealers or insurance companies, exclusive of
488 industrial insurance agents, or by agents of investment
489 companies, who are compensated wholly on a commis-
490 sion basis;

491 (11) Service performed (i) in the employ of a church
492 or convention or association of churches, or an organi-
493 zation which is operated primarily for religious pur-
494 poses and which is operated, supervised, controlled or
495 principally supported by a church or convention or
496 association of churches; or (ii) by a duly ordained,
497 commissioned or licensed minister of a church in the
498 exercise of his ministry or by a member of a religious
499 order in the exercise of duties required by such order;
500 or (iii) prior to January one, one thousand nine hundred
501 seventy-eight, in the employ of a school which is not an
502 institution of higher education; or (iv) in a facility
503 conducted for the purpose of carrying out a program of
504 rehabilitation for individuals whose earning capacity is
505 impaired by age or physical or mental deficiency or
506 injury or providing remunerative work for individuals
507 who because of their impaired physical or mental
508 capacity cannot be readily absorbed in the competitive
509 labor market by an individual receiving such rehabil-
510 itation or remunerative work; or (v) as part of an
511 unemployment work-relief or work-training program
512 assisted or financed in whole or in part by any federal
513 agency or an agency of a state or political subdivision
514 thereof, by an individual receiving such work relief or
515 work training; or (vi) prior to January one, one thousand
516 nine hundred seventy-eight, for a hospital in a state
517 prison or other state correctional institution by an
518 inmate of the prison or correctional institution, and after
519 December thirty-one, one thousand nine hundred
520 seventy-seven, by an inmate of a custodial or penal

521 institution;

522 (12) Service performed in the employ of a school,
523 college or university, if such service is performed (i) by
524 a student who is enrolled and is regularly attending
525 classes at such school, college or university, or (ii) by the
526 spouse of such a student, if such spouse is advised, at
527 the time such spouse commences to perform such
528 service, that (I) the employment of such spouse to
529 perform such service is provided under a program to
530 provide financial assistance to such student by such
531 school, college or university, and (II) such employment
532 will not be covered by any program of unemployment
533 insurance;

534 (13) Service performed by an individual who is
535 enrolled at a nonprofit or public educational institution
536 which normally maintains a regular faculty and
537 curriculum and normally has a regularly organized
538 body of students in attendance at the place where its
539 educational activities are carried on as a student in a
540 full-time program, taken for credit at such institution,
541 which combines academic instruction with work expe-
542 rience, if such service is an integral part of such
543 program, and such institution has so certified to the
544 employer, except that this subdivision shall not apply to
545 service performed in a program established for or on
546 behalf of an employer or group of employers;

547 (14) Service performed in the employ of a hospital, if
548 such service is performed by a patient of the hospital,
549 as defined in this section;

550 (15) Service in the employ of a governmental entity
551 referred to in subdivision (9) of the definition of
552 "employment" in this section if such service is per-
553 formed by an individual in the exercise of duties (i) as
554 an elected official; (ii) as a member of a legislative body,
555 or a member of the judiciary, of a state or political
556 subdivision; (iii) as a member of the state national guard
557 or air national guard; (iv) as an employee serving on a
558 temporary basis in case of fire, storm, snow, earthquake,
559 flood or similar emergency; (v) in a position which,
560 under or pursuant to the laws of this state, is designated

561 as (I) a major nontenured policy-making or advisory
562 position, or (II) a policy-making or advisory position the
563 performance of the duties of which ordinarily does not
564 require more than eight hours per week.

565 Notwithstanding the foregoing exclusions from the
566 definition of "employment," services, except agricultural
567 labor and domestic service in a private home, shall be
568 deemed to be in employment if with respect to such
569 services a tax is required to be paid under any federal
570 law imposing a tax against which credit may be taken
571 for contributions required to be paid into a state
572 unemployment compensation fund, or which as a
573 condition for full tax credit against the tax imposed by
574 the Federal Unemployment Tax Act are required to be
575 covered under this chapter.

576 "Employment office" means a free employment office
577 or branch thereof, operated by this state, or any free
578 public employment office maintained as a part of a state
579 controlled system of public employment offices in any
580 other state.

581 "Fund" means the unemployment compensation fund
582 established by this chapter.

583 "Hospital" means an institution which has been
584 licensed, certified or approved by the state department
585 of health as a hospital.

586 "Institution of higher education" means an educational
587 institution which:

588 (1) Admits as regular students only individuals
589 having a certificate of graduation from a high school,
590 or the recognized equivalent of such a certificate;

591 (2) Is legally authorized in this state to provide a
592 program of education beyond high school;

593 (3) Provides an educational program for which it
594 awards a bachelor's or higher degree, or provides a
595 program which is acceptable for full credit toward such
596 a degree, or provides a program of post-graduate or
597 post-doctoral studies, or provides a program of training
598 to prepare students for gainful employment in a

599 recognized occupation; and

600 (4) Is a public or other nonprofit institution.

601 Notwithstanding any of the foregoing provisions of
602 this definition all colleges and universities in this state
603 are institutions of higher education for purposes of this
604 section.

605 "Payments" means the money required to be paid or
606 that may be voluntarily paid into the state unemploy-
607 ment compensation fund as provided in article five of
608 this chapter.

609 "Separated from employment" means, for the pur-
610 poses of this chapter, the total severance, whether by
611 quitting, discharge or otherwise, of the employer-
612 employee relationship.

613 "State" includes, in addition to the states of the United
614 States, Puerto Rico, District of Columbia and the Virgin
615 Islands.

616 "Total and partial unemployment" means:

617 (1) An individual shall be deemed totally unemployed
618 in any week in which such individual is separated from
619 employment for an employing unit and during which he
620 performs no services and with respect to which no wages
621 are payable to him.

622 (2) An individual who has not been separated from
623 employment shall be deemed to be partially unemployed
624 in any week in which due to lack of full-time work
625 wages payable to him are less than his weekly benefit
626 amount plus twenty-five dollars: *Provided*, That said
627 individual must have earnings of at least twenty-six
628 dollars.

629 "Wages" means all remuneration for personal service,
630 including commissions, gratuities customarily received
631 by an individual in the course of employment from
632 persons other than the employing unit, as long as such
633 gratuities equal or exceed an amount of not less than
634 twenty dollars each month and which are required to
635 be reported to the employer by the employee, bonuses
636 and the cash value of all remuneration in any medium

637 other than cash except for agricultural labor and
638 domestic service: *Provided*, That the term "wages" shall
639 not include:

640 (1) That part of the remuneration which, after
641 remuneration equal to three thousand dollars has been
642 paid to an individual by an employer with respect to
643 employment during any calendar year, is paid after
644 December thirty-one, one thousand nine hundred thirty-
645 nine, and prior to January one, one thousand nine
646 hundred forty-seven, to such individual by such em-
647 ployer with respect to employment during such calendar
648 year; or that part of the remuneration which, after
649 remuneration equal to three thousand dollars with
650 respect to employment after one thousand nine hundred
651 thirty-eight, has been paid to an individual by an
652 employer during any calendar year after one thousand
653 nine hundred forty-six, is paid to such individual by
654 such employer during such calendar year, except that
655 for the purposes of sections one, ten, eleven and thirteen,
656 article six of this chapter, all remuneration earned by
657 an individual in employment shall be credited to the
658 individual and included in his computation of base
659 period wages: *Provided*, That notwithstanding the
660 foregoing provisions, on and after January one, one
661 thousand nine hundred sixty-two, the term "wages" shall
662 not include:

663 That part of the remuneration which, after remuner-
664 ation equal to three thousand six hundred dollars has
665 been paid to an individual by an employer with respect
666 to employment during any calendar year, is paid during
667 any calendar year after one thousand nine hundred
668 sixty-one; and shall not include that part of remunera-
669 tion which, after remuneration equal to four thousand
670 two hundred dollars is paid during a calendar year after
671 one thousand nine hundred seventy-one; and shall not
672 include that part of remuneration which, after remun-
673 eration equal to six thousand dollars is paid during a
674 calendar year after one thousand nine hundred seventy-
675 seven; and shall not include that part of remuneration
676 which, after remuneration equal to eight thousand
677 dollars is paid during a calendar year after one

678 thousand nine hundred eighty, to an individual by an
679 employer or his predecessor with respect to employment
680 during any calendar year, is paid to such individual by
681 such employee during such calendar year unless that
682 part of the remuneration is subject to a tax under a
683 federal law imposing a tax against which credit may be
684 taken for contributions required to be paid into a state
685 unemployment fund. For the purposes of this subdivi-
686 sion (1), the term "employment" shall include service
687 constituting employment under any unemployment
688 compensation law of another state; or which as a
689 condition for full tax credit against the tax imposed by
690 the Federal Unemployment Tax Act is required to be
691 covered under this chapter; and, except, that for the
692 purposes of sections one, ten, eleven and thirteen, article
693 six of this chapter, all remuneration earned by an
694 individual in employment shall be credited to the
695 individual and included in his computation of base
696 period wages: *Provided*, That the remuneration paid to
697 an individual by an employer with respect to employ-
698 ment in another state or other states upon which
699 contributions were required of and paid by such
700 employer under an unemployment compensation law of
701 such other state or states shall be included as a part of
702 the remuneration equal to the amounts of three thou-
703 sand six hundred dollars or four thousand two hundred
704 dollars or six thousand dollars or eight thousand dollars
705 herein referred to. In applying such limitation on the
706 amount of remuneration that is taxable, an employer
707 shall be accorded the benefit of all or any portion of such
708 amount which may have been paid by its predecessor
709 or predecessors: *Provided, however*, That if the definition
710 of the term "wages" as contained in section 3306(b) of
711 the Internal Revenue Code of 1954 as amended, is
712 amended: (a) Effective prior to January one, one
713 thousand nine hundred sixty-two, to include remunera-
714 tion in excess of three thousand dollars, or (b) effective
715 on or after January one, one thousand nine hundred
716 sixty-two, to include remuneration in excess of three
717 thousand six hundred dollars, or (c) effective on or after
718 January one, one thousand nine hundred seventy-two, to
719 include remuneration in excess of four thousand two

720 hundred dollars, or (d) effective on or after January one,
721 one thousand nine hundred seventy-eight, to include
722 remuneration in excess of six thousand dollars, or (e)
723 effective on or after January one, one thousand nine
724 hundred eighty, to include remuneration in excess of
725 eight thousand dollars, paid to an individual by an
726 employer under the Federal Unemployment Tax Act
727 during any calendar year, wages for the purposes of this
728 definition shall include remuneration paid in a calendar
729 year to an individual by an employer subject to this
730 article or his predecessor with respect to employment
731 during any calendar year up to an amount equal to the
732 amount of remuneration taxable under the Federal
733 Unemployment Tax Act;

734 (2) The amount of any payment made after December
735 thirty-one, one thousand nine hundred fifty-two (includ-
736 ing any amount paid by an employer for insurance or
737 annuities, or into a fund, to provide for any such
738 payment), to, or on behalf of, an individual in its employ
739 or any of his dependents, under a plan or system
740 established by an employer which makes provision for
741 individuals in its employ generally (or for such individ-
742 uals and their dependents), or for a class or classes of
743 such individuals (or for a class or classes of such
744 individuals and their dependents), on account of (A)
745 retirement, or (B) sickness or accident disability
746 payments made to an employee under an approved state
747 workers' compensation law, or (C) medical or hospital-
748 ization expenses in connection with sickness or accident
749 disability, or (D) death;

750 (3) Any payment made after December thirty-one, one
751 thousand nine hundred fifty-two, by an employer to an
752 individual in its employ (including any amount paid by
753 an employer for insurance or annuities, or into a fund,
754 to provide for any such payment) on account of
755 retirement;

756 (4) Any payment made after December thirty-one, one
757 thousand nine hundred fifty-two, by an employer on
758 account of sickness or accident disability, or medical or
759 hospitalization expenses in connection with sickness or
760 accident disability, to, or on behalf of, an individual in

761 its employ after the expiration of six calendar months
762 following the last calendar month in which such
763 individual worked for such employer;

764 (5) Any payment made after December thirty-one, one
765 thousand nine hundred fifty-two, by an employer to, or
766 on behalf of, an individual in its employ or his benefi-
767 ciary (A) from or to a trust described in section 401(a)
768 which is exempt from tax under section 501(a) of the
769 Federal Internal Revenue Code at the time of such
770 payments unless such payment is made to such individ-
771 ual as an employee of the trust as remuneration for
772 services rendered by such individual and not as a
773 beneficiary of the trust, or (B) under or to an annuity
774 plan which, at the time of such payment, is a plan
775 described in section 403(a) of the Federal Internal
776 Revenue Code;

777 (6) The payment by an employer of the tax imposed
778 upon and employer under section 3101 of the Federal
779 Internal Revenue Code with respect to remuneration
780 paid to an employee for domestic service in a private
781 home of the employer of agricultural labor;

782 (7) Remuneration paid by an employer after De-
783 cember thirty-one, one thousand nine hundred fifty-two,
784 in any medium other than cash to an individual in its
785 employ for service not in the course of the employer's
786 trade or business;

787 (8) Any payment (other than vacation or sick pay)
788 made by an employer after December thirty-one, one
789 thousand nine hundred fifty-two, to an individual in its
790 employ after the month in which he attains the age of
791 sixty-five, if he did not work for the employer in the
792 period for which such payment is made;

793 (9) Payments, not required under any contract of hire,
794 made to an individual with respect to his period of
795 training or service in the armed forces of the United
796 States by an employer by which such individual was
797 formerly employed;

798 (10) Vacation pay, severance pay or savings plans
799 received by an individual before or after becoming

800 totally or partially unemployed but earned prior to
801 becoming totally or partially unemployed: *Provided*,
802 That the term totally or partially unemployed shall not
803 be interpreted to include (1) employees who are on
804 vacation by reason of the request of the employees or
805 their duly authorized agent, for a vacation at a specific
806 time, and which request by the employees or their agent
807 is acceded to by their employer, (2) employees who are
808 on vacation by reason of the employer's request provided
809 they are so informed at least ninety days prior to such
810 vacation, or (3) employees who are on vacation by reason
811 of the employer's request where such vacation is in
812 addition to the regular vacation and the employer
813 compensates such employee at a rate equal to or
814 exceeding their regular daily rate of pay during the
815 vacation period.

816 Gratuities customarily received by an individual in
817 the course of his employment from persons other than
818 his employing unit shall be treated as wages paid by his
819 employing unit, if accounted for and reported to such
820 employing unit.

821 The reasonable cash value of remuneration in any
822 medium other than cash shall be estimated and deter-
823 mined in accordance with rules prescribed by the
824 commissioner, except for remuneration other than cash
825 for services performed in agricultural labor and
826 domestic service.

827 "Week" means a calendar week, ending at midnight
828 Saturday, or the equivalent thereof, as determined in
829 accordance with the regulations prescribed by the
830 commissioner.

831 "Weekly benefit rate" means the maximum amount of
832 benefit an eligible individual will receive for one week
833 of total unemployment.

834 "Year" means a calendar year or the equivalent
835 thereof, as determined by the commissioner.

ARTICLE 5. EMPLOYER COVERAGE AND RESPONSIBILITY.

§21A-5-10b. Transfer of business.

1 If a subject employer shall transfer his entire
2 organization, trade or business, or substantially all the
3 assets thereof, to another employer, the commissioner
4 shall combine the contribution records and the benefit
5 experience records of the transferring and acquiring
6 employers. The acquiring employer's contribution rate
7 for the remainder of the calendar year shall not be
8 affected by the transfer but such rate shall apply to the
9 whole of his business, including the portion acquired by
10 the transfer, through the following December thirty-
11 first. If a subject employer shall make such transfer to
12 an employing unit which is not an employer on the date
13 of the transfer, such subject employer's rate shall
14 continue as the rate of the acquiring employing unit
15 until the next effective rate date. If an employing unit
16 acquires simultaneously the entire organization, trade
17 or business, or substantially all the assets thereof, of two
18 or more covered employers, the successor shall be
19 assigned as a contribution rate the then current rate of
20 the transferring employer which had, in the calendar
21 quarter immediately preceding the date of the transfer,
22 the higher or highest payroll. If a subject employer shall
23 transfer his entire organization, trade or business, or
24 substantially all the assets thereof, to two or more
25 employers or employing units, apportionment of the
26 contribution records and benefit experience records of
27 the transferring employer shall be made between the
28 acquiring units in accordance with the ratio that the
29 total assets acquired by each transferee bears to the
30 total assets transferred by the transferring employer as
31 of the date of the transfers. The current contribution
32 rate of the transferring employer shall in such case
33 continue as the rate of each transferee who or which is
34 an employing unit until the next effective rate date; the
35 current contribution rate of each transferee who or
36 which is an employer shall continue as his or its rate
37 until the next effective rate date. For the succeeding
38 calendar year the rate of each transferee shall be
39 determined as provided in section ten of this article. As
40 to any transfers which occur prior to July thirty-first of
41 the current calendar year such rate shall remain
42 effective for the balance of that calendar year: *Provided,*

43 *however*, That if the transfers occur subsequent to July
44 thirty-first such rate shall remain effective for the
45 balance of that calendar year and the rate for the
46 succeeding calendar year shall, notwithstanding any-
47 thing to the contrary provided in section seven of article
48 five of this chapter, be recomputed on the basis of the
49 combined experience of the transferring employers as of
50 July thirty-first of the year in which the transfers occur.
51 In case the transferring employer is delinquent in the
52 payment of contributions or interest thereon the
53 acquiring employer shall not be entitled to any benefit
54 of the contribution record of the transferring employer
55 unless payment of such delinquent contributions and
56 interest thereon is assumed by the acquiring employer.
57 The commissioner shall upon joint request of the
58 transferor and transferee furnish the transferee a
59 statement of the amount of any contribution and interest
60 due and unpaid by the transferor. A statement so
61 furnished shall be controlling for the purposes of the
62 foregoing proviso.

63 The provisions of this section shall not apply to any
64 employer which is established through the assistance of
65 any state economic development agency irrespective of
66 the contribution rate of any related predecessor.

§21A-5-17. Interest on past-due payments.

1 Payments unpaid on the date on which due and
2 payable, as prescribed by the commissioner, shall bear
3 interest at the rate of one percent per month until
4 payment plus accrued interest is received by the
5 commissioner. The commissioner may waive interest on
6 the payment of delinquent employers if payment is
7 made on all outstanding delinquent contributions which
8 were incurred on or before the first day of January, one
9 thousand nine hundred eighty-seven, during the period
10 beginning the first day of July, one thousand nine
11 hundred eighty-seven and ending on the thirty-first day
12 of December, one thousand nine hundred eighty-seven.

13 Interest collected pursuant to this section shall be paid
14 into the employment security special administration
15 fund.

ARTICLE 6. EMPLOYEE ELIGIBILITY; BENEFITS.**§21A-6-1. Eligibility qualifications.**

1 An unemployed individual shall be eligible to receive
2 benefits only if the commissioner finds that:

3 (1) He has registered for work at and thereafter
4 continues to report at an employment office in accor-
5 dance with the regulations of the commissioner;

6 (2) He has made a claim for benefits in accordance
7 with the provisions of article seven of this chapter and
8 has furnished his social security number, or numbers if
9 he has more than one such number;

10 (3) He is able to work and is available for full-time
11 work for which he is fitted by prior training or
12 experience and is doing that which a reasonably prudent
13 person in his circumstances would do in seeking work;

14 (4) He has been totally or partially unemployed
15 during his benefit year for a waiting period of one week
16 prior to the week for which he claims benefits for total
17 or partial unemployment; and

18 (5) He has within his base period been paid wages for
19 employment equal to not less than two thousand two
20 hundred dollars and must have earned wages in more
21 than one quarter of his base period.

§21A-6-15. Benefit payments for service with nonprofit organizations, state hospitals, institutions of higher education, educational institutions and governmental entities.

1 (1) Benefits based on service in employment as
2 defined in subdivisions (9) and (10) of the definition of
3 "employment" in section three, article one of this
4 chapter, shall be payable in the same amount, on the
5 same terms and subject to the same conditions as
6 compensation payable on the basis of other service
7 subject to this chapter; except that benefits based on
8 service in an instructional, research or principal
9 administrative capacity in an institution of higher
10 education shall not be paid to an individual for any week
11 of unemployment which begins during the period

12 between two successive academic years, or during a
13 similar period between two regular terms, whether or
14 not successive, or during a period of paid sabbatical
15 leave provided for in the individual's contract, if the
16 individual has a contract or contracts to perform
17 services, in any such capacity for any institution or
18 institutions of higher education for both such academic
19 years or both such terms.

20 (2) Benefits based on service in employment defined
21 in subdivisions (9) and (10) of the definition of "employ-
22 ment" in section three, article one of this chapter, shall
23 be payable in the same amount, on the same terms and
24 subject to the same conditions as benefits payable on the
25 basis of other service subject to this chapter, except that:

26 (a) With respect to services in an instructional,
27 research or principal administrative capacity for an
28 educational institution, benefits shall not be paid based
29 on such services for any week commencing during the
30 period between two successive academic years or terms,
31 or during a similar period between two regular but not
32 successive terms, or during a period of paid sabbatical
33 leave provided for in the individual's contract, to any
34 individual if such individual performs such services in
35 the first of such academic years or terms and if there
36 is a contract or a reasonable assurance that such
37 individual will perform services in any such capacity for
38 any educational institution in the second of such
39 academic years or terms or after such holiday or
40 vacation period.

41 (b) With respect to services in any other capacity for
42 an educational institution, benefits shall not be paid on
43 the basis of such services to any individual for any week
44 which commences during a period between two succes-
45 sive academic years or terms if such individual per-
46 forms such services in the first of such academic years
47 or terms and there is a reasonable assurance that such
48 individual will perform such services in the second of
49 such academic years or terms, except that if compen-
50 sation is denied to any individual under this subsection
51 and such individual was not offered an opportunity to
52 perform such services for the educational institution for

53 the second of such academic years or terms, such
54 individual shall be entitled to a retroactive payment of
55 compensation for each week for which the individual
56 filed a timely claim for compensation and for which
57 compensation was denied solely by reason of this clause.

58 (c) With respect to services described in subdivisions
59 (a) and (b) of this section, benefits shall not be paid to
60 any individual for any week which commences during
61 an established and customary vacation period or holiday
62 recess if such individual performs such services in the
63 period immediately before such vacation period or
64 holiday recess, and there is a reasonable assurance that
65 such individual will perform such services in the period
66 immediately following such vacation period or holiday
67 recess.

68 (d) On and after April one, one thousand nine
69 hundred eighty-four, benefits payable on the basis of
70 services in any such capacities as specified in subdivi-
71 sions (a) and (b) of this section shall be denied as
72 specified in subdivisions (a), (b) and (c) of this section
73 to any individual who performed such services in an
74 educational institution while in the employ of an
75 educational service agency. For purposes of this
76 subdivision the term "educational service agency" means
77 a governmental agency or governmental entity which is
78 established and operated exclusively for the purpose of
79 providing such services to one or more educational
80 institutions.

ARTICLE 7. CLAIM PROCEDURE.

§21A-7-11. Benefits pending appeal.

1 Benefits found payable by decision of a deputy, appeal
2 tribunal, the board or court shall be immediately paid
3 in accordance therewith up to the week in which a
4 subsequent appellate body renders a decision, by order,
5 finding that benefits were not or are not payable. If, at
6 any appeal stage, benefits are found to be payable which
7 were found before such appeal stage to be not payable,
8 the commissioner shall immediately reinstate the
9 payment benefits. If the final decision in any case
10 determines that a claimant was not lawfully entitled to

11 benefits paid to him pursuant to a prior decision, such
12 amount of benefits so paid shall be deemed overpaid.
13 The commissioner shall recover such amount by civil
14 action or in any manner provided in this code for the
15 collection of past-due payment and shall withhold, in
16 whole or in part, as determined by the commissioner,
17 any future benefits payable to the individual and credit
18 such amount against the overpayment until it is repaid
19 in full. If the final decision in any case determines that
20 the claimant was not lawfully entitled to the benefits
21 paid to him pursuant to a prior order, any benefits so
22 paid pursuant to such prior order, shall not be charge-
23 able to the employer's account.

24 (a) Whenever the commissioner finds that a dis-
25 charged employee has received back pay at his custom-
26 ary wage rate from his employer after reinstatement,
27 such employee shall be liable to repay the benefits, if
28 any, paid to such individual during the time he was
29 unemployed. In any case in which, under this section,
30 an employee is liable to repay benefits to the commis-
31 sioner, such sum shall be collectible by civil action in
32 the name of the commissioner.

33 (b) Whenever an employer subject to this chapter is
34 required to make a payment of back pay to an individual
35 who has received unemployment compensation benefits
36 during the same period covered by the back pay award,
37 the employer shall withhold an amount equal to the
38 unemployment compensation benefits and shall repay
39 the amount withheld to the unemployment compensation
40 trust fund. If an employer fails to comply with this
41 section, the commissioner shall have the right to recover
42 from the employer the amount of unemployment
43 compensation benefits which should have been withheld
44 by a civil action.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Bruce O. Williams
.....
Chairman Senate Committee

Lyle Satter
.....
Chairman House Committee

Originating in the House.

Takes effect July 1, 1987.

Todd C. Mills
.....
Clerk of the Senate

Donald J. Kopp
.....
Clerk of the House of Delegates

Sam Turk
.....
President of the Senate

John W. Clendinning
.....
Speaker of the House of Delegates

The within *approved* this the *30th*
March day of, 1987.

Arch A. Brown
.....
Governor

PRESENTED TO THE

GOVERNOR

Date 3/26/87

Time 2:41 p.m.

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