WEST VIRGINIA LEGISLATURE
FOURTH EXTRAORDINARY SESSION, 2005

ENROLLED

House Bill No. 405
(By Mr. Speaker, Mr. Kiss, and Delegate Trump)
[By Request of the Executive]

Passed September 11, 2005
In Effect Ninety Days from Passage
AN ACT to amend and reenact §21A-1A-17 of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto a new section, designated §21A-5-10c, all relating to unemployment compensation generally; placing a limit on the amount of wages an election official can receive in a calendar year that is not considered employment wages for unemployment compensation purposes; preventing State Unemployment Tax Act (SUTA) dumping, a method to circumvent the paying of proper unemployment compensation taxes; and imposing criminal and civil penalties, including penalty rates, for dumping violations.

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; and that said code be amended by adding thereto a new section, designated §21A-5-10c, all to read as follows:
ARTICLE 1A. DEFINITIONS.

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

1 The term “employment” does not include:

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

20 (2) Service performed with respect to which unemployment
21 compensation is payable under the Railroad Unemployment
22 Insurance Act and service with respect to which unemployment
23 benefits are payable under an unemployment compensation
24 system for maritime employees established by an act of
25 Congress. The Commissioner may enter into agreements with
26 the proper agency established under an act of Congress to
27 provide reciprocal treatment to individuals who, after acquiring
28 potential rights to unemployment compensation under an Act
29 of Congress or who have, after acquiring potential rights to
30 unemployment compensation under an act of Congress,
acquired rights to benefit under this chapter. Such agreement shall become effective ten days after the publications which shall comply with the general rules of the Department;

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

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

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

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

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

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

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

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

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

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

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

(9) Service performed: (A) In the employ of a church or convention or association of churches, or an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches; or (B) by a duly ordained, commissioned or licensed minister of a church in the exercise of his or her ministry or by a member of a religious order in the exercise of duties required by the order; or (C) by an individual receiving rehabilitation or remunerative work in a facility conducted for the purpose of carrying out a program of either: (i) Rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury; or (ii) providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market: Provided, That this exemption does not apply to services performed by individuals if they are not receiving rehabilitation or remunerative work on account of their impaired capacity; or (D) as part of an unemployment work-relief or work-training program assisted or financed, in whole or in part, by any federal agency or an agency of a state or political subdivision thereof, by an individual receiving the work relief or work training; or (E) by an inmate of a custodial or penal institution;
(10) Service performed in the employ of a school, college or university, if the service is performed: (A) By a student who is enrolled and is regularly attending classes at the school, college or university; or (B) by the spouse of a student, if the spouse is advised, at the time the spouse commences to perform the service, that: (i) The employment of the spouse to perform the service is provided under a program to provide financial assistance to the student by the school, college or university; and (ii) the employment will not be covered by any program of unemployment insurance;

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

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

(13) Service in the employ of a governmental entity referred to in subdivision (9), section sixteen of this article, the definition of "employment," if the service is performed by an individual in the exercise of duties: (A) As an elected official; (B) as a member of a legislative body, or a member of the judiciary, of a state or political subdivision; (C) as a member of the state national guard or air national guard, except as provided in section twenty-eight of this article; (D) as an employee serving on a temporary basis in case of fire, storm, snow,
earthquake, flood or similar emergency; (E) in a position which, under or pursuant to the laws of this state, is designated as: (i) A major nontenured policymaking or advisory position; or (ii) a policymaking or advisory position the performance of the duties of which ordinarily does not require more than eight hours per week; or (F) as any election official appointed to serve during any municipal, county or state election, if the amount of remuneration received by the individual during the calendar year for services as an election official is less than one thousand dollars;

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

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

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

ARTICLE 5. EMPLOYER COVERAGE AND RESPONSIBILITY.

§21A-5-10c. Special rules regarding transfers of experience and assignment of rates.

Notwithstanding any other provision of law to the contrary, the following shall apply regarding assignment of rates and transfers of experience:
(a) (1) If an employer transfers its trade or business, or a portion thereof, to another employer and, at the time of the transfer, there is substantially common ownership, management or control of the two employers, then the unemployment experience attributable to the transferred trade or business shall be transferred to the employer to whom such business is so transferred. The rates of both employers shall be recalculated and made effective immediately upon the date of the transfer of trade or business. The transfer of some or all of an employer's workforce to another employer shall be considered a transfer of trade or business when, as a result of such transfer, the transferring employer no longer performs the trade or business with respect to the transferred workforce, and such trade or business is performed by the employer to whom the workforce is transferred.

(2) If, following a transfer of experience under paragraph (1) of this section, the Commissioner determines that a substantial purpose of the transfer of trade or business was to obtain a reduced liability for contributions, then the experience rating accounts of the employers involved shall be combined into a single account and a single rate assigned to such account.

(b) Whenever a person who is not an employer, as defined in section fifteen, article one-a of this chapter, at the time it acquires the trade or business of an employer, the unemployment experience of the acquired business shall not be transferred to such person if the Commissioner or his or her representative finds that such person acquired the business solely or primarily for the purpose of obtaining a lower rate of contributions. Instead, such person shall be assigned the applicable new employer rate under section five of this article. In determining whether the business was acquired solely or primarily for the purpose of obtaining a lower rate of contributions, the Commissioner or his or her representative shall use objective factors which may include the cost of acquiring the business, whether
the person continued the business enterprise of the acquired
business, how long such business enterprise was continued, or
whether a substantial number of new employees were hired for
performance of duties unrelated to the business activity
conducted prior to acquisition.

(c) (1) If a person knowingly violates or attempts to violate
subsection (a) or (b) of this section or any other provision of
this chapter related to determining the assignment of a contribu-
tion rate, or if a person knowingly advises another person in a
way that results in a violation of such provision, the person
shall be subject to the following penalties:

(A) If the person is an employer, then such employer shall
be assigned the highest rate assignable under this chapter for the
rate year during which such violation or attempted violation
occurred and the three rate years immediately following this
rate year. However, if the person’s business is already at the
highest rate for any year, or if the amount of increase in the
person’s rate would be less than two percent for that year, then
a penalty rate of contributions of two percent of taxable wages
shall be imposed for that year.

(B) If the person is not an employer, that person shall be
subject to a civil money penalty of not more than five thousand
dollars. Any fine collected pursuant to this paragraph shall be
deposited in the Special Administrative Fund Account estab-
lished under section five-a, article nine of this chapter.

(2) For purposes of this section, the term “knowingly”
means having actual knowledge of or acting with deliberate
ignorance or reckless disregard for the prohibition involved.

(3) For purposes of this section, the term “violates or
attempts to violate” includes, but is not limited to, intent to
evade, misrepresentation or willful nondisclosure.
(d) The Commissioner shall establish procedures to identify the transfer or acquisition of a business for purposes of this section.

(e) For purposes of this section:

(1) "Person" has the meaning given such term by section 7701(a)(1) of the Internal Revenue Code of 1986; and

(2) "Trade or business" shall include the employer’s workforce.

(f) This section shall be interpreted and applied in such a manner as to meet the minimum requirements contained in any guidance or regulations issued by the United States Department of Labor in effect at the time this section becomes law.
That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Originating in the House.

In effect ninety days from passage.

The within is approved this the 28th day of September, 2005.

Governor