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SENATE BILL NO. 1323

Offered January 13, 2021

Prefiled January 12, 2021

A BILL to amend and reenact § 40.1-28.7:7 of the Code of Virginia, relating to worker classification; independent contractors.

Patron—Dunnivant

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That § 40.1-28.7:7 of the Code of Virginia is amended and reenacted as follows:

§ 40.1-28.7:7. Misclassification of workers.

A. An individual who has not been properly classified as an employee may bring a civil action for damages against his employer for failing to properly classify the employee if the employer had knowledge of the individual's misclassification. An individual's representative may bring the action on behalf of the individual. If the court finds that the employer has not properly classified the individual as an employee, the court may award the individual damages in the amount of any wages, salary, employment benefits, including expenses incurred by the employee that would otherwise have been covered by insurance, or other compensation lost to the individual, a reasonable attorney fee, and the costs incurred by the individual in bringing the action.

B. In a proceeding under subsection A, an individual who performs services for a person for remuneration shall be presumed to be an employee of the person that paid such remuneration, and the person that paid such remuneration shall be presumed to be the employer of the individual who was paid for performing the services, unless it is shown that the individual is an independent contractor as determined under the Internal Revenue Service guidelines in accordance with subsection C.

C. As used in this section, "Internal Revenue Service guidelines" means the most recent version of the guidelines published by the Internal Revenue Service for evaluating independent contractor status, including its interpretation of common law doctrine on independent contractors, and any regulations that the Internal Revenue Service may promulgate regarding determining whether an employee is an independent contractor, including 26 C.F.R. § 31.3121(d)-1. An individual or business shall not be considered an employee with respect to a hiring party if the person qualifies as an independent contractor relative to the hiring party under the common law right-of control test as established by the Internal Revenue Service Revenue Ruling 87-41, by an applicable determination of the Internal Revenue Service, or if the following are satisfied:

1. The individual or business signs a written contract with the hiring party, or with a third party under contract with the hiring party, in substantial compliance with the terms of this subsection, stating that the individual or business is self-employed or is being engaged as an independent contractor and containing acknowledgments that the individual or business understands that they are:

- a. Not going to be treated as an employee of the hiring party; and
b. Obligated to pay all applicable federal and state income taxes, if any, on any income earned pursuant to the contractual relationship and making clear that no federal or state income taxes will be withheld.

2. The individual or business has the right to control the manner and means by which the final result of the work is to be accomplished, subject to applicable statutory, regulatory, licensing, permitting, contractual obligations to a common customer or other similar obligations, or franchise or licensed brand obligations. The provisions of this subdivision C 2 may be satisfied even if the hiring party provides orientation or information about the hiring party's products, business, services, customers, and operating systems or training that the hiring party is required by law to provide.

3. Four or more of the following criteria are satisfied:

a. Except for an agreement with the hiring party 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 individual or business has control over the amount of time personally spent providing services, subject to any applicable statutory or regulatory requirements. Any contractual agreement by the individual or business to provide service on specified days or hours shall not be considered for the purposes of satisfying this subdivision C 3 a.

b. Except for the services that can only be performed at specific locations, the individual or business has control over where the services are performed.

c. The individual or business is not required to work exclusively for the hiring party unless (i) a law,

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59 regulation, or ordinance prohibits or restricts the individual or business from providing services to more  
60 than one entity or (ii) a license or permit that the individual or business is required to maintain in  
61 order to perform the work limits the individual or business to working for only one entity at a time or  
62 requires identification of the entity.

63 d. The individual or business is free to exercise independent initiative in soliciting others to purchase  
64 their services.

65 e. The individual or business is free to hire employees or to contract with assistants, helpers, or  
66 substitutes to perform all or some of the work, subject only to legal or third-party insurance  
67 requirements as to qualifications for such individuals.

68 f. The individual or business cannot be required to perform additional services without a new or  
69 modified contract or newly agreed-upon terms and conditions for the additional services.

70 g. The individual or business obtains a license or other permission from the hiring party to utilize  
71 any workspace of the hiring party in order to perform the work for which the individual or business was  
72 engaged.

73 h. The individual or business is responsible for the majority of equipment, supplies, and other  
74 variable expenses that it incurs in connection with performing the contracted for services unless (i) the  
75 expenses are for travel that is not local, (ii) the expenses are reimbursed under an express provision of  
76 the contract that specifically identifies the items of expense to be reimbursed, or (iii) the supplies or  
77 expenses reimbursed are commonly reimbursed under industry practice.

78 D. A hiring party alleging that a claim filed in accordance with this section is frivolous or improper  
79 may file a motion to dismiss such claim. A contract or written agreement expressly stating that a  
80 claimant is not considered an employee as set forth in subsection C shall be considered as prima facie  
81 evidence of a violation of § 8.01-271.1. If such a motion is sustained, the court may impose such  
82 sanctions as are appropriate in accordance with § 8.01-271.1.