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HOUSE BILL NO. 529

Offered January 12, 2022

Prefiled January 11, 2022

A BILL to amend and reenact § 40.1-28.7:7 of the Code of Virginia, relating to labor and employment; misclassification of workers.

Patron—Batten

Referred to Committee on Commerce and Energy

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 or business that 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 or business that was paid for performing the services, unless it is shown that the individual or business is an independent contractor as determined under the Internal Revenue Service guidelines pursuant to 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 20-factor test as established by the Internal Revenue Service Ruling 87-41, by an applicable determination of the Internal Revenue Service, or if the person identifies as an independent contractor and each of the following criteria 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 acknowledgements that the individual or business understands that it (i) is not going to be treated as an employee of the hiring party and (ii) is 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, and contractual obligations to a common customer, or other similar obligations, or franchise or licensed brand obligations. The provisions of this subdivision 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 criterion;

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 *its 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 persons;*

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; and*

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 services contracted for unless the*
75 *supplies or expenses are (i) for travel that is not local, (ii) reimbursed under an express provision of the*
76 *contract that specifically identifies the items of expense to be reimbursed, or (iii) commonly reimbursed*
77 *under industry practice.*

78 *D. In a proceeding under subsection A, a hiring party providing an individual or business with*
79 *personal protective equipment in response to a disaster caused by a communicable disease of public*
80 *health threat for which a state of emergency has been declared pursuant to § 44-146.17 shall not be*
81 *considered in any determination regarding whether such individual person is an employee or*
82 *independent contractor. For the purposes of this subsection, the terms "communicable disease of public*
83 *health threat," "disaster," and "state of emergency" have the same meaning as provided in § 44-146.16.*