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SENATE BILL NO. 816

Senate Amendments in [] — January 25, 2013

A *BILL to amend and reenact § 40.1-29 of the Code of Virginia, relating to the payment of wages to employees; recordkeeping requirements and private right of action.*

Patron Prior to Engrossment—Senator McEachin

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:**1. That § 40.1-29 of the Code of Virginia is amended and reenacted as follows:**

§ 40.1-29. Time and medium of payment; withholding wages; written statement of earnings; recordkeeping; agreement for forfeiture of wages; proceedings to enforce compliance; private right of action; penalties.

A. ~~1.~~ All employers operating a business shall establish regular pay periods and rates of pay for employees except executive personnel. All such employers shall pay salaried employees at least once each month and employees paid on an hourly rate at least once every two weeks or twice in each month, except that (i) a student who is currently enrolled in a work-study program or its equivalent administered by any secondary school, institution of higher education or trade school, and (ii) employees whose weekly wages total more than 150 percent of the average weekly wage of the Commonwealth as defined in § 65.2-500, upon agreement by each affected employee, may be paid once each month if the institution or employer so chooses. Upon termination of employment an employee shall be paid all wages or salaries due him for work performed prior thereto; such payment shall be made on or before the date on which he would have been paid for such work had his employment not been terminated.

~~2.~~ B. Any such employer who knowingly fails to make payment of wages in accordance with this section shall be subject to a civil penalty not to exceed \$1,000 for each violation. The Commissioner shall notify any employer who he alleges has violated any provision of this section by certified mail. Such notice shall contain a description of the alleged violation. Within 15 days of receipt of notice of the alleged violation, the employer may request an informal conference regarding such violation with the Commissioner. In determining the amount of any penalty to be imposed, the Commissioner shall consider the size of the business of the employer charged and the gravity of the violation. The decision of the Commissioner shall be final.

~~B.~~ C. Payment of wages or salaries shall be (i) in lawful money of the United States, (ii) by check payable at face value upon demand in lawful money of the United States, (iii) by electronic automated fund transfer in lawful money of the United States into an account in the name of the employee at a financial institution designated by the employee, or (iv) by credit to a prepaid debit card or card account from which the employee is able to withdraw or transfer funds with full written disclosure by the employer of any applicable fees and affirmative consent thereto by the employee. However, an employer that elects not to pay wages or salaries in accordance with clause (i) or (ii) to an employee who is hired after January 1, 2010, shall be permitted to pay wages or salaries by credit to a prepaid debit card or card account in accordance with clause (iv), even though such employee has not affirmatively consented thereto, if the employee fails to designate an account at a financial institution in accordance with clause (iii) and the employer arranges for such card or card account to be issued through a network system through which the employee shall have the ability to make at least one free withdrawal or transfer per pay period, which withdrawal may be for any sum in such card or card account as the employee may elect, using such card or card account at financial institutions participating in such network system.

~~C.~~ D. No employer shall withhold any part of the wages or salaries of any employee except for payroll, wage or withholding taxes or in accordance with law, without the written and signed authorization of the employee. An employer, upon request of his employee, shall furnish the latter a written statement of the gross wages earned by the employee during any pay period and the amount and purpose of any deductions therefrom.

~~D.~~ E. No employer shall require any employee, except executive personnel, to sign any contract or agreement which provides for the forfeiture of the employee's wages for time worked as a condition of employment or the continuance therein, except as otherwise provided by law.

~~E.~~ F. All employers shall maintain and preserve, for such period as the Commissioner may prescribe by regulation, payroll or other records containing the following information and data with respect to each employee:

1. Name in full;
2. Regular hourly rate of pay;

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60 3. Hours worked each workday and total hours worked each workweek. For purposes of this
61 subsection, "workday" means any fixed period of 24 consecutive hours, and "workweek" means any fixed
62 and regularly recurring period of seven consecutive workdays;

63 4. Total daily or weekly earnings or wages due for hours worked during the workday or workweek;

64 5. Total additions to or deductions from wages paid each pay period, including, in individual
65 employee records, the dates, amounts, and nature of the items that make up the total additions and
66 deductions;

67 6. Total wages paid each pay period; and

68 7. Date of payment and the pay period covered by payment.

69 G. If an employer fails to accurately maintain records containing the information and data with
70 respect to an employee as required under subsection F, the employee, in any proceeding to collect any
71 wages earned and not paid to him or other moneys unlawfully withheld from him by his employer, shall
72 satisfy his burden of establishing that he is entitled to such wages or other moneys if the employee (i)
73 proves that he performed work for which he was improperly compensated and (ii) produces sufficient
74 evidence regarding the amount of his rate of pay and the extent of the work he performed to permit the
75 Commissioner or court, as applicable, to reasonably infer the amount of wages or other moneys
76 properly owed to him. Such evidence may be made through the employee's sworn testimony regarding
77 his recollection of hours worked. If the employee produces such evidence, the burden of proof shall then
78 shift to the employer to come forward with evidence of the precise amount of work performed or with
79 evidence to negate the reasonableness of the inference drawn from the employee's evidence. If the
80 employer cannot produce such evidence, the Commissioner or court, as applicable, may then find for the
81 employee even if the amount of such wages or other moneys claimed is inexact or an approximation.

82 H. An employer who willfully and with intent to defraud fails or refuses to pay wages in accordance
83 with this section is guilty of a Class 1 misdemeanor if the value of the wages earned and not paid by
84 the employer is less than \$10,000 and is guilty of a Class 6 felony if the value of the wages earned and
85 not paid is \$10,000 or more or, regardless of the value of the wages earned and not paid, if the
86 conviction is a second or subsequent conviction under this section. For purposes of this section, the
87 determination as to the "value of the wages earned" shall be made by combining all wages the employer
88 failed or refused to pay pursuant to this section.

89 F. I. The Commissioner may require a written complaint of the violation of this section and, with the
90 written and signed consent of an employee, may institute proceedings on behalf of an employee to
91 enforce compliance with this section, and to collect any moneys unlawfully withheld from such
92 employee which shall be paid to the employee entitled thereto. In addition, following the issuance of a
93 final order by the Commissioner or a court, the Commissioner may engage private counsel, approved by
94 the Attorney General, to collect any moneys owed to the employee or the Commonwealth. Upon entry
95 of a final order of the Commissioner, or upon entry of a judgment, against the employer, the
96 Commissioner or the court shall assess ~~attorney's~~ attorney fees of one-third of the amount set forth in
97 the final order or judgment.

98 G. J. In addition to being subject to any other penalty provided by the provisions of this section, ~~any~~
99 ~~and without regard to exhaustion of any alternative administrative remedies provided in this section, if~~
100 ~~an employer who~~ fails to make payment of wages in accordance with ~~subsection A~~ shall be liable for
101 this section, an employee may bring an action against the employer in a court of competent jurisdiction
102 to recover the payment of all unpaid wages ~~due, plus~~. If a court finds that an employer withheld the
103 wages of an employee in violation of this section, the court shall award the employee an amount
104 equivalent to the unpaid wages and prejudgment interest at an annual rate of eight percent accruing
105 from the date the wages were due, ~~plus reasonable attorney fees and other costs~~. Furthermore, in the
106 absence of a showing of good faith on the part of the employer, the court shall award the employee an
107 amount equivalent to three times the amount of unpaid wages. Any such action for unpaid wages shall
108 commence within two years after the action accrued, except that in the case of a willful violation the
109 action shall commence within three years after the action accrued.

110 H. K. Civil penalties owed under this section shall be paid to the Commissioner for deposit into the
111 general fund of the State Treasurer. The Commissioner shall prescribe procedures for the payment of
112 proposed assessments of penalties which are not contested by employers. Such procedures shall include
113 provisions for an employer to consent to abatement of the alleged violation and pay a proposed penalty
114 or a negotiated sum in lieu of such penalty without admission of any civil liability arising from such
115 alleged violation.

116 L. Final orders of the Commissioner, the general district courts or the circuit courts may be recorded,
117 enforced and satisfied as orders or decrees of a circuit court upon certification of such orders by the
118 Commissioner or the court as appropriate.

119 [2. That the provisions of this act shall not become effective if an appropriation of general funds
120 restoring funding for six wage investigator positions at the Department of Labor and Industry is
121 included in a general appropriation act passed by the 2013 Session of the General Assembly,

122 which becomes law.]