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SENATE BILL NO. 661

Offered January 10, 2018

Prefiled January 10, 2018

A BILL to amend and reenact §§ 40.1-28.9, 40.1-28.12, and 40.1-29 of the Code of Virginia, relating to the payment of wages; Virginia Minimum Wage Act.

Patrons—Wagner and Ebbin

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That §§ 40.1-28.9, 40.1-28.12, and 40.1-29 of the Code of Virginia are amended and reenacted as follows:

§ 40.1-28.9. Definition of terms.

As used in this article:

A. "Employer" includes any individual, partnership, association, corporation, business trust, or any person or groups of persons acting directly or indirectly in the interest of an employer in relation to an employee;

B. "Employee" includes any individual employed by an employer, except the following:

1. Any person employed as a farm laborer or farm employee;

2. Any person employed in domestic service or in or about a private home or in an eleemosynary institution primarily supported by public funds;

3. Any person engaged in the activities of an educational, charitable, religious or nonprofit organization where the relationship of employer-employee does not, in fact, exist, or where the services rendered to such organizations are on a voluntary basis;

4. ~~Newsboys, shoe-shine boys, caddies~~ *Caddies* on golf courses; ~~babysitters, ushers, doormen, concession attendants and cashiers in theaters;~~

5. Traveling salesmen or outside salesmen working on a commission basis; taxicab drivers and operators;

6. Any person under the age of 18 in the employ of his father, mother or legal guardian;

7. Any person confined in any penal or corrective institution of the State or any of its political subdivisions or admitted to a state hospital or training center operated by the Department of Behavioral Health and Developmental Services;

8. Any person employed by a boys' and/or girls' summer camp;

9. Any person under the age of 16, regardless of by whom employed;

10. Any person who normally works and is paid based on the amount of work done;

11. ~~[Repealed.] Babysitters who are not employed more than 10 hours per week;~~

12. Any person whose employment is covered by the Fair Labor Standards Act of 1938 as amended;

13. Any person whose earning capacity is impaired by physical deficiency, mental illness, or intellectual disability;

14. Students participating in a bona fide educational program;

15. Any person employed by an employer who does not have four or more persons employed at any one time; provided that husbands, wives, sons, daughters and parents who is the spouse, child, or parent of the an individual employer shall not be counted in determining the number of persons employed;

16. Any person who is less than 18 years of age and who is currently enrolled on a full-time basis in any secondary school, institution of higher education or trade school, provided the person is not employed more than 20 hours per week;

~~16A.~~ 17. Any person of any age who is currently enrolled on a full-time basis in any secondary school, institution of higher education or trade school and is in a work-study program or its equivalent at the institution at which he or she is enrolled as a student; or

~~17.~~ 18. Any person who is less than 18 years of age and who is under the jurisdiction and direction of a juvenile and domestic relations district court.

C. "Wages" means legal tender of the United States or checks or drafts on banks negotiable into cash on demand or upon acceptance at full value; provided, wages may include the reasonable cost to the employer of furnishing meals and for lodging to an employee, if such board or lodging is customarily furnished by the employer, and used by the employee.

D. In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, except in the case of an employee who establishes by clear and convincing evidence that the actual amount of tips

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received by him was less than the amount determined by the employer. In such case, the amount paid such employee by his employer shall be deemed to have been increased by such lesser amount.

§ 40.1-28.12. Employee's remedies.

Any employer who violates the minimum wage requirements of this law *article* shall be liable to the employee or employees affected in the amount of the unpaid minimum wages, plus interest at eight per centum per annum upon such unpaid wages as may be due the plaintiff, said interest to be awarded from the date or dates said wages were due the employee or employees. The court ~~may~~ *shall*, in addition to any judgment awarded to the employee or employees, require defendant to pay reasonable ~~attorney's attorney~~ fees incurred by the employee or employees.

§ 40.1-29. Time and medium of payment; withholding wages; written statement of earnings; agreement for forfeiture of wages; proceedings to enforce compliance; 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. 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. 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. 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~~ *On each regular pay date the employer, upon request of his employee, shall furnish the latter provide to each employee a written statement of, by a paystub or online accounting, that shows the name and address of the employer, the number of hours worked during the pay period, the rate of pay, the gross wages earned by the employee during any pay period, and the amount and purpose of any deductions therefrom.*

D. 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. An employer who willfully and with intent to defraud fails or refuses to pay wages in accordance with this section:

1. To an employee or employees is guilty of a Class 1 misdemeanor if the value of the wages earned and not paid by the employer is less than \$10,000; and

2. To an employee or employees is guilty of a Class 6 felony (i) if the value of the wages earned and not paid is \$10,000 or more or (ii) regardless of the value of the wages earned and not paid, if the conviction is a second or subsequent conviction under this section.

For purposes of this section, the determination as to the "value of the wages earned" shall be made by combining all wages the employer failed or refused to pay pursuant to this section.

121 F. The Commissioner may require a written complaint of the violation of this section and, with the
122 written and signed consent of an employee, may institute proceedings on behalf of an employee to
123 enforce compliance with this section, and to collect any moneys unlawfully withheld from such
124 employee which shall be paid to the employee entitled thereto. In addition, following the issuance of a
125 final order by the Commissioner or a court, the Commissioner may engage private counsel, approved by
126 the Attorney General, to collect any moneys owed to the employee or the Commonwealth. Upon entry
127 of a final order of the Commissioner, or upon entry of a judgment, against the employer, the
128 Commissioner or the court shall assess ~~attorney's~~ attorney fees of one-third of the amount set forth in
129 the final order or judgment. *Upon receipt of a complaint pursuant to this subsection, or at any time*
130 *within two years following receipt of such a complaint or completing enforcement proceedings under*
131 *this subsection, if the Commissioner has reason to believe that the employer has engaged in a pattern or*
132 *practice of violating this section, the Commissioner may institute proceedings to take enforcement*
133 *actions pursuant to this subsection on behalf of any of the employer's employees harmed by violations of*
134 *this section.*

135 G. In addition to being subject to any other penalty provided by the provisions of this section, any
136 employer who fails to make payment of wages in accordance with subsection A, B, or C shall be liable
137 for the payment of all wages due, plus interest at an annual rate of eight percent accruing from the date
138 the wages were due.

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

145 Final orders of the Commissioner, the general district courts or the circuit courts may be recorded,
146 enforced and satisfied as orders or decrees of a circuit court upon certification of such orders by the
147 Commissioner or the court as appropriate.