

2021 SPECIAL SESSION II

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SENATE BILL NO. 7002

Offered August 2, 2021

Prefiled August 2, 2021

A BILL to amend and reenact §§ 40.1-29 and 40.1-29.1 of the Code of Virginia and to repeal § 40.1-29.2 of the Code of Virginia, relating to the Virginia Overtime Wage Act; repealed.

Patron—DeSteph

Referred to Committee on Finance and Appropriations

Be it enacted by the General Assembly of Virginia:

1. That §§ 40.1-29 and 40.1-29.1 of the Code of Virginia are amended and reenacted as follows:

§ 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. All employers operating a business or engaging an individual to perform domestic service 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.

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. On each regular pay date, each employer, other than an employer engaged in agricultural employment including agribusiness and forestry, shall provide to each employee a written statement, by a paystub or online accounting, that shows the name and address of the employer; the number of hours worked during the pay period if the employee is paid on the basis of (i) the number of hours worked or (ii) a salary that is less than the standard salary level adopted by regulation of the U.S. Department of Labor pursuant to § 13(a)(1) of the federal Fair Labor Standards Act, 29 U.S.C. § 213(a)(1), as amended, establishing an exemption from the Act's overtime premium pay requirements; the rate of pay; the gross wages earned by the employee during the pay period; and the amount and purpose of any deductions therefrom. The paystub or online accounting shall include sufficient information to enable the employee to determine how the gross and net pay were calculated. An employer engaged in agricultural employment including agribusiness and forestry, upon request of its employee, shall furnish the employee 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. 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 or § 40.1-29.2, unless the failure to pay was because of a bona fide dispute between

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59 the employer and its employee:

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

62 2. To an employee or employees is guilty of a Class 6 felony (i) if the value of the wages earned
63 and not paid is \$10,000 or more or (ii) regardless of the value of the wages earned and not paid, if the
64 conviction is a second or subsequent conviction under this section ~~or § 40.1-29.2.~~

65 For purposes of this section, the determination as to the "value of the wages earned" shall be made
66 by combining all wages the employer failed or refused to pay pursuant to this section ~~and § 40.1-29.2.~~

67 F. The Commissioner may require a written complaint of the violation of this section ~~or § 40.1-29.2~~
68 and, with the written and signed consent of an employee, may institute proceedings on behalf of an
69 employee to enforce compliance with this section ~~or § 40.1-29.2~~, and to collect any moneys unlawfully
70 withheld from such employee that shall be paid to the employee entitled thereto. In addition, following
71 the issuance of a final order by the Commissioner or a court, the Commissioner may engage private
72 counsel, approved by the Attorney General, to collect any moneys owed to the employee or the
73 Commonwealth. Upon entry of a final order of the Commissioner, or upon entry of a judgment, against
74 the employer, the Commissioner or the court shall assess attorney fees of one-third of the amount set
75 forth in the final order or judgment.

76 G. In addition to being subject to any other penalty provided by the provisions of this section, any
77 employer who fails to make payment of wages in accordance with subsection A ~~or § 40.1-29.2~~ shall be
78 liable for the payment of all wages due, and an additional equal amount as liquidated damages, plus
79 interest at an annual rate of eight percent accruing from the date the wages were due.

80 H. Any employer who knowingly fails to make payment of wages in accordance with subsection A
81 ~~or § 40.1-29.2~~ shall be subject to a civil penalty not to exceed \$1,000 for each violation. The
82 Commissioner shall notify any employer that the Commissioner alleges has violated any provision of
83 this section ~~or § 40.1-29.2~~ by certified mail. Such notice shall contain a description of the alleged
84 violation. Within 15 days of receipt of notice of the alleged violation, the employer may request an
85 informal conference regarding such violation with the Commissioner. In determining the amount of any
86 penalty to be imposed, the Commissioner shall consider the size of the business of the employer charged
87 and the gravity of the violation. The decision of the Commissioner shall be final. Civil penalties owed
88 under this section shall be paid to the Commissioner for deposit into the general fund of the State
89 Treasurer. The Commissioner shall prescribe procedures for the payment of proposed assessments of
90 penalties that are not contested by employers. Such procedures shall include provisions for an employer
91 to consent to abatement of the alleged violation and pay a proposed penalty or a negotiated sum in lieu
92 of such penalty without admission of any civil liability arising from such alleged violation.

93 I. Final orders of the Commissioner, the general district courts, or the circuit courts may be recorded,
94 enforced, and satisfied as orders or decrees of a circuit court upon certification of such orders by the
95 Commissioner or the court as appropriate.

96 J. In addition to any civil or criminal penalty provided by this section, and without regard to any
97 exhaustion of alternative administrative remedies provided for in this section, if an employer fails to pay
98 wages to an employee in accordance with this section ~~or § 40.1-29.2~~, the employee may bring an action,
99 individually, jointly, with other aggrieved employees, or on behalf of similarly situated employees as a
100 collective action consistent with the collective action procedures of the Fair Labor Standards Act, 29
101 U.S.C. § 216(b), against the employer in a court of competent jurisdiction to recover payment of the
102 wages, and the court shall award the wages owed, an additional equal amount as liquidated damages,
103 plus prejudgment interest thereon as provided in subsection G, and reasonable attorney fees and costs. If
104 the court finds that the employer knowingly failed to pay wages to an employee in accordance with this
105 section ~~or § 40.1-29.2~~, the court shall award the employee an amount equal to triple the amount of
106 wages due and reasonable attorney fees and costs.

107 K. As used in this section, a person acts "knowingly" if the person, with respect to information, (i)
108 has actual knowledge of the information, (ii) acts in deliberate ignorance of the truth or falsity of the
109 information, or (iii) acts in reckless disregard of the truth or falsity of the information. Establishing that
110 a person acted knowingly shall not require proof of specific intent to defraud.

111 L. An action under this section ~~or § 40.1-29.2~~ shall be commenced within three years after the cause
112 of action accrued. The period for filing is tolled upon the filing of an administrative action under
113 subsection F until the employee has been informed that the action has been resolved or until the
114 employee has withdrawn the complaint, whichever is sooner.

115 **§ 40.1-29.1. Investigations of employers for nonpayment of wages.**

116 If in the course of an investigation of a complaint of an employer's failure or refusal to pay wages in
117 accordance with the requirements of § 40.1-29 ~~or 40.1-29.2~~, the Commissioner acquires information
118 creating a reasonable belief that other employees of the same employer may not have been paid wages
119 in accordance with such requirements, the Commissioner shall have the authority to investigate whether
120 the employer has failed or refused to make any required payment of wages to other employees of the

121 employer as required by § 40.1-29 ~~or 40.1-29.2~~. If the Commissioner finds in the course of such
122 investigation that the employer has violated a provision of § 40.1-29 ~~or 40.1-29.2~~, the Commissioner
123 may institute proceedings on behalf of any employee against his employer. Such proceedings shall be
124 undertaken in accordance with the provisions of § 40.1-29, except that the Commissioner shall not
125 require a written complaint of the violation or the written and signed consent of any employee as a
126 condition of instituting such proceedings.

127 **2. That § 40.1-29.2 of the Code of Virginia is repealed.**

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