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SENATE BILL NO. 365

Offered January 12, 2022

Prefiled January 11, 2022

A *BILL to amend and reenact § 40.1-29.2 of the Code of Virginia, relating to the Virginia Overtime Wage Act.*

Patron—Stuart

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:**1. That § 40.1-29.2 of the Code of Virginia is amended and reenacted as follows:****§ 40.1-29.2. Virginia Overtime Wage Act.**

A. As used in this section:

"Employ" includes to permit or suffer to work.

"Employee" means any individual employed by an employer, including employees of derivative carriers within the meaning of the federal Railway Labor Act, 45 U.S.C. § 151 et seq. "Employee" does not include ~~the following~~: (i) any individual who volunteers solely for humanitarian, religious, or community service purposes for a public body, church, or nonprofit organization that does not otherwise employ such individual; ~~or~~ (ii) any person who is exempt from the federal overtime wage pursuant to 29 U.S.C. § 213(a); and (iii) ~~any person who meets the exemptions set forth in 29 U.S.C. § 213(b)(1) or 213(b)(11) described in 29 U.S.C. § 203(e)(3), (e)(4), or (e)(5).~~

"Employer" means any person acting directly or indirectly in the interest of an employer in relation to an employee. "Employer" does not include any labor organization, other than when acting as an employer; anyone acting in the capacity of officer or agent of such labor organization; or any carrier subject to the federal Railway Labor Act, 45 U.S.C. §§ 151 through 188, except derivative carriers within the meaning of the federal Railway Labor Act.

"Person" means an individual, partnership, association, corporation, business trust, legal representative, any organized group of persons, or the Commonwealth, any of its constitutional officers, agencies, institutions, or political subdivisions, or any public body. This definition constitutes a waiver of sovereign immunity by the Commonwealth.

"Wages" means the same as that term is defined in § 40.1-28.9.

"Workweek" means a fixed and regularly occurring period of 168 hours or seven consecutive 24-hour periods. It need not coincide with the calendar week and may begin on any day and at any hour. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of this section.

B. For any hours worked by an employee in excess of 40 hours in any one workweek, an employer shall pay such employee an overtime premium at a rate not less than one and one-half times the employee's regular rate, pursuant to 29 U.S.C. § 207. An employee's regular rate shall be calculated as follows:

1. For employees paid on an hourly basis, the regular rate is the hourly rate of pay plus any other non-overtime wages paid or allocated for that workweek, excluding any amounts that are excluded from the regular rate by the federal Fair Labor Standards Act, 29 U.S.C. § 201 et seq., and its implementing regulations, divided by the total number of hours worked in that workweek.

2. For employees paid on a salary or other regular basis, the regular rate is one-fortieth of all wages paid for that workweek.

C. For fire protection or law-enforcement employees of any public sector employer for whom 29 U.S.C. § 207(k) applies, such employer shall pay an overtime premium as set forth in this section for (i) all hours worked in excess of the threshold set forth in 20 U.S.C. § 207(k) and (ii) any additional hours such employee worked or received as paid leave as set forth in subsection A of § 9.1-701.

D. An employer may assert an exemption to the overtime requirement of this section for employees who meet ~~the exemptions~~ any exemption set forth in 29 U.S.C. § 213(a)(1) ~~or for employees who meet the exemptions set forth in 29 U.S.C. §§ 213(b)(1) or 213(b)(11) 213.~~

E. No agency, institution, political subdivision, or public body that complies with the requirements of 29 U.S.C. § 207(k) and § 9.1-701 shall be deemed to have violated subsection B with respect to fire suppression or law-enforcement employees covered by such statutes.

F. *Notwithstanding any other provision of this section, a public agency, as defined in 29 U.S.C. § 203, may provide an employee compensatory time off in lieu of overtime compensation, in accordance with 29 U.S.C. § 207(o).*

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59 G. Any employer that violates the overtime wage requirements of this section shall be liable to the
60 employee for all remedies, damages, or other relief available in an action brought under subsection J of
61 § 40.1-29.
62 ~~G.~~ H. Any action pursuant to this section shall be commenced within three years after the cause of
63 action accrues.