

1 VIRGINIA ACTS OF ASSEMBLY — CHAPTER

2 *An Act to amend and reenact § 40.1-28.9 of the Code of Virginia, relating to minimum wage; certain*  
3 *employees with disabilities; report.*

4 [H 1924]  
5 Approved

6 **Be it enacted by the General Assembly of Virginia:**

7 **1. That § 40.1-28.9 of the Code of Virginia is amended and reenacted as follows:**

8 **§ 40.1-28.9. Definitions; determining wage of tipped employee.**

9 A. As used in this article:

10 "Adjusted state hourly minimum wage" means the amount established by the Commissioner pursuant  
11 to subsection H of § 40.1-28.10.

12 "Domestic service" means services related to the care of an individual in a private home or the  
13 maintenance of a private home or its premises, on a permanent or temporary basis, including services  
14 performed by individuals such as companions, cooks, waiters, butlers, maids, valets, and chauffeurs.

15 "Employee" includes any individual employed by an employer. "Employee" includes a home care  
16 provider. "Employee" does not include the following:

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

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

21 3. Caddies on golf courses;

22 4. Traveling salesmen or outside salesmen working on a commission basis; taxicab drivers and  
23 operators;

24 5. Any person under the age of 18 in the employ of his parent or legal guardian;

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

28 7. Any person employed by a summer camp for boys, girls, or both boys and girls;

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

30 9. Any ~~person who is paid~~ *individual with disabilities employed by an employer that was authorized,*  
31 *prior to July 1, 2023, to employ individuals with disabilities at a subminimum wage pursuant to a*  
32 *special certificate issued under 29 U.S.C. § 214(c) of the Fair Labor Standards Act of 1938, as*  
33 *amended, provided that such individual was employed by and paid a subminimum wage by such*  
34 *employer pursuant to 29 U.S.C. § 214(c) of the Fair Labor Standards Act of 1938, as amended, prior to*  
35 *July 1, 2023;*

36 10. Students participating in a bona fide educational program;

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

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

43 13. Any person who works as a babysitter for fewer than 10 hours per week;

44 14. Any person participating as an au pair in the U.S. Department of State's Exchange Visitor  
45 Program governed by 22 C.F.R. § 62.31;

46 15. Any individual employed as a temporary foreign worker as governed by 20 C.F.R. Part 655; and

47 16. Any person who is exempt from the federal minimum wage pursuant to 29 U.S.C. § 213(a)(3).

48 "Employer" includes any individual, partnership, association, corporation, or business trust or any  
49 person or group of persons acting directly or indirectly in the interest of an employer in relation to an  
50 employee. "Employer" includes the Commonwealth, any of its agencies, institutions, or political  
51 subdivisions, and any public body.

52 "Federal minimum wage" means the minimum wage or, if applicable, the federal training wage  
53 prescribed by the U.S. Fair Labor Standards Act, 29 U.S.C. § 201 et seq.

54 "Home care provider" means an individual who provides (i) home health services, including services  
55 provided by or under the direct supervision of any health care professional under a medical plan of care  
56 in a patient's residence on a visit or hourly basis to patients who have or are at risk of injury, illness, or

57 a disabling condition and require short-term or long-term interventions, or (ii) personal care services,  
58 including assistance in personal care to include activities of a daily living provided in an individual's  
59 residence on a visit or hourly basis to individuals who have or are at risk of an illness, injury, or  
60 disabling condition.

61 "Tipped employee" means an employee who in the course of employment customarily and regularly  
62 receives tips totaling more than \$30 each month from persons other than the employee's employer.

63 "Wages" means legal tender of the United States or checks or drafts on banks negotiable into cash on  
64 demand or upon acceptance at full value. "Wages" includes the reasonable cost to the employer of  
65 furnishing meals and lodging to an employee if such board or lodging is customarily furnished by the  
66 employer and used by the employee.

67 B. In determining the wage of a tipped employee, the amount paid such employee by his employer  
68 shall be deemed to be increased on account of tips by an amount determined by the employer, except in  
69 the case of an employee who establishes by clear and convincing evidence that the actual amount of tips  
70 received by him was less than the amount determined by the employer. In such case, the amount paid  
71 such employee by his employer shall be deemed to have been increased by such lesser amount. An  
72 employer shall not classify an individual as a tipped employee if the individual is prohibited by  
73 applicable federal or state law or regulation from soliciting tips.

74 **2. That § 40.1-28.9 of the Code of Virginia is amended and reenacted as follows:**

75 **§ 40.1-28.9. Definitions; determining wage of tipped employee.**

76 A. As used in this article:

77 "Adjusted state hourly minimum wage" means the amount established by the Commissioner pursuant  
78 to subsection H of § 40.1-28.10.

79 "Domestic service" means services related to the care of an individual in a private home or the  
80 maintenance of a private home or its premises, on a permanent or temporary basis, including services  
81 performed by individuals such as companions, cooks, waiters, butlers, maids, valets, and chauffeurs.

82 "Employee" includes any individual employed by an employer. "Employee" includes a home care  
83 provider. "Employee" does not include the following:

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

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

88 3. Caddies on golf courses;

89 4. Traveling salesmen or outside salesmen working on a commission basis; taxicab drivers and  
90 operators;

91 5. Any person under the age of 18 in the employ of his parent or legal guardian;

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

95 7. Any person employed by a summer camp for boys, girls, or both boys and girls;

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

97 9. ~~Any person who is paid pursuant to 29 U.S.C. § 214(e) of the Fair Labor Standards Act of 1938,~~  
98 ~~as amended;~~

99 ~~10. Students participating in a bona fide educational program;~~

100 ~~11. 10. Any person who is less than 18 years of age and who is currently enrolled on a full-time~~  
101 ~~basis in any secondary school, institution of higher education, or trade school, provided that the person~~  
102 ~~is not employed more than 20 hours per week;~~

103 ~~12. 11. Any person of any age who is currently enrolled on a full-time basis in any secondary~~  
104 ~~school, institution of higher education, or trade school and is in a work-study program or its equivalent~~  
105 ~~at the institution at which he is enrolled as a student;~~

106 ~~13. 12. Any person who works as a babysitter for fewer than 10 hours per week;~~

107 ~~14. 13. Any person participating as an au pair in the U.S. Department of State's Exchange Visitor~~  
108 ~~Program governed by 22 C.F.R. § 62.31;~~

109 ~~15. 14. Any individual employed as a temporary foreign worker as governed by 20 C.F.R. Part 655;~~  
110 ~~and~~

111 ~~16. 15. Any person who is exempt from the federal minimum wage pursuant to 29 U.S.C.~~  
112 ~~§ 213(a)(3).~~

113 "Employer" includes any individual, partnership, association, corporation, or business trust or any  
114 person or group of persons acting directly or indirectly in the interest of an employer in relation to an  
115 employee. "Employer" includes the Commonwealth, any of its agencies, institutions, or political  
116 subdivisions, and any public body.

117 "Federal minimum wage" means the minimum wage or, if applicable, the federal training wage

118 prescribed by the U.S. Fair Labor Standards Act, 29 U.S.C. § 201 et seq.

119 "Home care provider" means an individual who provides (i) home health services, including services  
120 provided by or under the direct supervision of any health care professional under a medical plan of care  
121 in a patient's residence on a visit or hourly basis to patients who have or are at risk of injury, illness, or  
122 a disabling condition and require short-term or long-term interventions, or (ii) personal care services,  
123 including assistance in personal care to include activities of a daily living provided in an individual's  
124 residence on a visit or hourly basis to individuals who have or are at risk of an illness, injury, or  
125 disabling condition.

126 "Tipped employee" means an employee who in the course of employment customarily and regularly  
127 receives tips totaling more than \$30 each month from persons other than the employee's employer.

128 "Wages" means legal tender of the United States or checks or drafts on banks negotiable into cash on  
129 demand or upon acceptance at full value. "Wages" includes the reasonable cost to the employer of  
130 furnishing meals and lodging to an employee if such board or lodging is customarily furnished by the  
131 employer and used by the employee.

132 B. In determining the wage of a tipped employee, the amount paid such employee by his employer  
133 shall be deemed to be increased on account of tips by an amount determined by the employer, except in  
134 the case of an employee who establishes by clear and convincing evidence that the actual amount of tips  
135 received by him was less than the amount determined by the employer. In such case, the amount paid  
136 such employee by his employer shall be deemed to have been increased by such lesser amount. An  
137 employer shall not classify an individual as a tipped employee if the individual is prohibited by  
138 applicable federal or state law or regulation from soliciting tips.

139 **3. That the provisions of the first enactment of this act shall expire on July 1, 2030.**

140 **4. That the provisions of the second enactment of this act shall become effective on July 1, 2030.**

141 **5. That the Department for Aging and Rehabilitative Services and the Department of Behavioral**  
142 **Health and Developmental Services shall prioritize efforts to support individuals with disabilities**  
143 **who desire to transition from subminimum wage employment to competitive integrated**  
144 **employment.**

145 **6. That the Department for Aging and Rehabilitative Services and the Department of Behavioral**  
146 **Health and Developmental Services shall submit a report by May 1, 2024, to the Governor and the**  
147 **General Assembly on the number of individuals with disabilities employed in subminimum wage**  
148 **employment and the movement of individuals from subminimum wage employment to competitive**  
149 **integrated employment.**