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HOUSE BILL NO. 325

Offered January 10, 2024

Prefiled January 5, 2024

A BILL to amend and reenact §§ 40.1-28.12, 40.1-29, 40.1-29.2, and 40.1-29.3 of the Code of Virginia, relating to minimum wage and overtime wages; civil actions.

Patron—Thomas

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 40.1-28.12, 40.1-29, 40.1-29.2, and 40.1-29.3 of the Code of Virginia are amended and reenacted as follows:

§ 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, in addition to any judgment awarded to the employee or employees, require defendant to pay reasonable attorney's fees incurred by the employee or employees for the applicable remedies, damages, or other relief available in an action brought pursuant to the provisions of subsection J of § 40.1-29.

§ 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

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59 employee to determine how the gross and net pay were calculated. An employer engaged in agricultural
60 employment including agribusiness and forestry, upon request of its employee, shall furnish the
61 employee a written statement of the gross wages earned by the employee during any pay period and the
62 amount and purpose of any deductions therefrom.

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

66 E. An employer who willfully and with intent to defraud fails or refuses to pay wages in accordance
67 with this section or § 40.1-29.3, unless the failure to pay was because of a bona fide dispute between
68 the employer and its employee:

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

71 2. To an employee or employees is guilty of a Class 6 felony (i) if the value of the wages earned
72 and not paid is \$10,000 or more or (ii) regardless of the value of the wages earned and not paid, if the
73 conviction is a second or subsequent conviction under this section or § 40.1-29.3.

74 For purposes of this section, the determination as to the "value of the wages earned" shall be made
75 by combining all wages the employer failed or refused to pay pursuant to this section and § 40.1-29.3.

76 F. The Commissioner may require a written complaint of the violation of this section and, with the
77 written and signed consent of an employee, may institute proceedings on behalf of an employee to
78 enforce compliance with this section, and to collect any moneys unlawfully withheld from such
79 employee that shall be paid to the employee entitled thereto. In addition, following the issuance of a
80 final order by the Commissioner or a court, the Commissioner may engage private counsel, approved by
81 the Attorney General, to collect any moneys owed to the employee or the Commonwealth. Upon entry
82 of a final order of the Commissioner, or upon entry of a judgment, against the employer, the
83 Commissioner or the court shall assess attorney fees of one-third of the amount set forth in the final
84 order or judgment.

85 G. In addition to being subject to any other penalty provided by the provisions of this section, any
86 employer who fails to make payment of wages in accordance with subsection A shall be liable for the
87 payment of all wages due, and an additional equal amount as liquidated damages, plus interest at an
88 annual rate of eight percent accruing from the date the wages were due.

89 H. Any employer who knowingly fails to make payment of wages in accordance with subsection A
90 or § 40.1-29.3 shall be subject to a civil penalty not to exceed \$1,000 for each violation. The
91 Commissioner shall notify any employer that the Commissioner alleges has violated any provision of
92 this section or § 40.1-29.3 by certified mail. Such notice shall contain a description of the alleged
93 violation. Within 15 days of receipt of notice of the alleged violation, the employer may request an
94 informal conference regarding such violation with the Commissioner. In determining the amount of any
95 penalty to be imposed, the Commissioner shall consider the size of the business of the employer charged
96 and the gravity of the violation. The decision of the Commissioner shall be final. Civil penalties owed
97 under this section shall be paid to the Commissioner for deposit into the general fund of the State
98 Treasurer. The Commissioner shall prescribe procedures for the payment of proposed assessments of
99 penalties that are not contested by employers. Such procedures shall include provisions for an employer
100 to consent to abatement of the alleged violation and pay a proposed penalty or a negotiated sum in lieu
101 of such penalty without admission of any civil liability arising from such alleged violation.

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

105 J. In addition to any civil or criminal penalty provided by this section, and without regard to any
106 exhaustion of alternative administrative remedies provided for in this section, if an employer fails to pay
107 wages to an employee in accordance with this section, *the Virginia Minimum Wage Act* (§ 40.1-28.8 *et*
108 *seq.*), or § 40.1-29.2 or 40.1-29.3, the employee may bring an action, individually, jointly, with other
109 aggrieved employees, or on behalf of similarly situated employees as a collective action consistent with
110 the collective action procedures of the Fair Labor Standards Act, 29 U.S.C. § 216(b), against the
111 employer in a court of competent jurisdiction to recover payment of the wages, and the court shall
112 award the wages owed, an additional equal amount as liquidated damages, plus prejudgment interest
113 thereon as provided in subsection G, and reasonable attorney fees and costs. If the court finds that the
114 employer knowingly failed to pay wages to an employee in accordance with this section, *the Virginia*
115 *Minimum Wage Act* (§ 40.1-28.8 *et seq.*), or § 40.1-29.2 or 40.1-29.3, the court shall award the
116 employee an amount equal to triple the amount of wages due and reasonable attorney fees and costs.

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

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

M. *For the purposes of this section, the Virginia Minimum Wage Act (§ 40.1-28.8 et seq.), or § 40.1-29.2 or 40.1-29.3, "employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee.*

§ 40.1-29.2. Employer liability.

Any employer that violates the overtime pay requirements of the federal Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq., as amended, and any regulations, guidance, or rules adopted pursuant to the overtime pay provisions of such federal act or any related governing case law shall be liable to the employee for the applicable remedies, damages, or other relief available under the federal Fair Labor Standards Act in an action brought pursuant to the process in the provisions of subsection J of § 40.1-29. For the purposes of this section, "employer" and "employee" shall have the meanings ascribed to them under the federal Fair Labor Standards Act and all applicable exemptions, overtime calculation methods, methods of overtime payment, or other overtime provisions within the federal Fair Labor Standards Act and any attendant regulations, guidance, or rules shall apply. Any action brought pursuant to this section shall accrue according to the applicable limitations set forth in the federal Fair Labor Standards Act.

§ 40.1-29.3. Overtime for certain employees.

A. As used in this section:

"Carrier" means an air carrier that is subject to the provisions of the federal Railway Labor Act, 45 U.S.C. § 181 et seq.

"Derivative carrier" means a carrier that meets the two-part test used by the federal National Mediation Board to determine if a carrier is considered a derivative carrier.

"Employee" means an individual employed by a derivative carrier.

B. An employer shall pay each employee an overtime premium at a rate not less than one and one-half times the employee's regular rate for any hours worked by an employee in excess of 40 hours in any one workweek. An employee's regular rate shall be calculated as the employee's hourly rate of pay plus any other non-overtime wages paid or allocated for that workweek, excluding any amounts that would be excluded from the regular rate by the federal Fair Labor Standards Act, 29 U.S.C. § 201 et seq., and its implementing regulations for an individual covered by such federal act, divided by the total number of hours worked in that workweek.

C. If an employer fails to pay overtime wages to an employee in accordance with this section, the employee may bring an action against the employer in a court of competent jurisdiction to recover payment of the overtime wages, and the court shall award the overtime wages owed, an additional equal amount as liquidated damages, and reasonable attorney fees and costs; however, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of this section, the court may, in its discretion, award no liquidated damages or award any amount thereof not to exceed the amount of the unpaid overtime wages.

D. An action under this section shall be commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued *employer shall be liable to the employee for the applicable remedies, damages, or other relief available in an action brought pursuant to the provisions of subsection J of § 40.1-29.*