VIRGINIA ACTS OF ASSEMBLY -- 2020 RECONVENED SESSION

CHAPTER 1204

An Act to amend and reenact §§ 40.1-28.9 and 40.1-28.10 of the Code of Virginia, relating to the minimum wage.

[H 395]

Approved April 22, 2020

Be it enacted by the General Assembly of Virginia:

1. That §§ 40.1-28.9 and 40.1-28.10 of the Code of Virginia are amended and reenacted as follows:

§ 40.1-28.9. Definitions.

A. As used in this article:

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

"Employee" includes any individual employed by an employer~~, except the following~~. *"Employee" includes a home care provider. "Employee" does not include 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.~~ *2.* 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~~ *organization* are on a voluntary basis;

~~4.~~ *3.* Caddies on golf courses;

~~5.~~ *4.* Traveling salesmen or outside salesmen working on a commission basis; taxicab drivers and operators;

~~6.~~ *5.* Any person under the age of 18 in the employ of his ~~father, mother~~ *parent* or legal guardian;

~~7.~~ *6.* Any person confined in any penal or corrective institution of the ~~State~~ *Commonwealth* 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.~~ *7.* Any person employed by a summer camp for boys, girls, or both boys and girls;

~~9.~~ *8.* 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.~~ *9.* Any person ~~whose employment is covered by~~ *who is paid pursuant to 29 U.S.C. § 214(c) of* the Fair Labor Standards Act of 1938, as amended;

~~12. Any person whose earning capacity is impaired by physical deficiency, mental illness, or intellectual disability;~~

~~13.~~ *10.* Students participating in a bona fide educational program;

~~14. 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 of the employer shall not be counted in determining the number of persons employed;~~

~~15.~~ *11.* 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 *that* the person is not employed more than 20 hours per week;

~~16.~~ *12.* 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;

~~17. 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; or~~

~~18.~~ *13.* Any person who works as a babysitter for fewer than 10 hours per week*;*

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

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

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

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

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

"Home care provider" means an individual who provides (i) home health services, including services provided by or under the direct supervision of any health care professional under a medical plan of

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

"Tipped employee" means an employee engaged in an occupation in which he customarily and regularly receives more than $30 per month in tips.

"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~~. *"Wages" includes* 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.

B. 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 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. *An employer shall not classify an individual as a tipped employee if the individual is prohibited by applicable federal or state law or regulation from soliciting tips.*

§ 40.1-28.10. Minimum wages.

~~Every~~ *A. 1. Prior to May 1, 2021, every* employer shall pay to each of ~~his~~ *its* employees wages at a rate not less than the federal minimum wage ~~and a training wage as prescribed by the U.S. Fair Labor Standards Act (29 U.S.C. § 201 et seq.)~~.

2. Beginning May 1, 2021, every employer shall pay to each of his employees at a rate not less than the federal minimum wage or 75 percent of the Virginia minimum wage provided for in this section, whichever is greater. For the purposes of this subdivision "employee" means any person or individual who is enrolled in an established employer on-the-job or other training program for a period not to exceed 90 days which meets standards set by regulations adopted by the Commissioner.

B. From May 1, 2021, until January 1, 2022, every employer shall pay to each of its employees wages at a rate not less than the greater of (i) $9.50 per hour or (ii) the federal minimum wage.

C. From January 1, 2022, until January 1, 2023, every employer shall pay to each of its employees wages at a rate not less than the greater of (i) $11.00 per hour or (ii) the federal minimum wage.

D. From January 1, 2023, until January 1, 2025, every employer shall pay to each of its employees wages at a rate not less than the greater of (i) $12.00 per hour or (ii) the federal minimum wage.

E. From January 1, 2025, until January 1, 2026, every employer shall pay to each of its employees wages at a rate not less than the greater of (i) $13.50 per hour or (ii) the federal minimum wage.

F. From January 1, 2026, until January 1, 2027, every employer shall pay to each of its employees wages at a rate not less than the greater of (i) $15.00 per hour or (ii) the federal minimum wage.

G. From and after January 1, 2027, every employer shall pay to each of his employees wages at a rate not less than the greater of (i) the adjusted state hourly minimum wage or (ii) the federal minimum wage.

H. By October 1, 2026, and annually thereafter, the Commissioner shall establish the adjusted state hourly minimum wage that shall be in effect during the 12-month period commencing on the following January 1. The Commissioner shall set the adjusted state hourly minimum wage at the sum of (i) the amount of the state hourly minimum wage rate that is in effect on the date such adjustment is made and (ii) a percentage of the amount described in clause (i) that is equal to the percentage by which the United States Average Consumer Price Index for all items, all urban consumers (CPI-U), as published by the Bureau of Labor Statistics of the U.S. Department of Labor, or a successor index as calculated by the U.S. Department of Labor, has increased during the most recent calendar year for which such information is available. The amount of each annual adjustment shall not be less than zero.

2. Beginning January 1, 2022, the Virginia Department of Housing and Community Development, the Virginia Economic Development Partnership Authority, and the Virginia Employment Commission (the agencies) shall conduct a joint review of the feasibility and potential impact of instituting a regional minimum wage in the Commonwealth. In evaluating a regional minimum wage, the agencies shall form a work group to assess various factors, including, but not limited to, the cost of living in the Commonwealth; the potential impact on employers and any fringe benefits offered to employees such as employer-sponsored health insurance; the potential impact on workers, with a focus on income inequality; the potential impact on agricultural workers; the experience of other states with a regional wage; and the equity and fairness of the exemption from the minimum wage for any person employed as a farm laborer or farm employee provided by § 40.1-28.10 of the Code of Virginia. The agencies also shall provide an assessment of options for utilizing a minimum wage in the Commonwealth, the feasibility of a regional minimum wage, and the economic benefits or impacts of utilizing a minimum wage. The agencies shall also assess the effects of the minimum wage increases scheduled in § 40.1-28.10 of the Code of Virginia, as amended by this act. The agencies shall submit to the General Assembly and the Governor an

executive summary and a report of their findings and recommendations. The executive summary and report shall be submitted as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents no later than December 1, 2023, and shall be posted on the General Assembly's website.

3. That the provisions of subsections E and F of § 40.1-28.10 of the Code of Virginia, as amended by this act, shall not become effective unless reenacted by a regular or special session of the General Assembly prior to July 1, 2024. If the General Assembly does not reenact subsections E and F by July 1, 2024, then (i) the Commissioner of Labor and Industry shall establish the adjusted state hourly minimum wage as provided in subsection H by October 1, 2024, and annually thereafter; and (ii) from and after January 1, 2025, every employer shall pay to each of his employees wages as specified in subsections G.