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HOUSE BILL NO. 395

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Joint Conference Committee
on March 7, 2020)

(Patrons Prior to Substitute—Delegates Ward, Carroll Foy [HB 433], Guzman [HB 583], and Plum [HB 615])

*A BILL to amend and reenact §§ 40.1-28.9 and 40.1-28.10 of the Code of Virginia, relating to the minimum wage.***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. 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. Caddies on golf courses;

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

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

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

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

19. 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;

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

21. 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.

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

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

69 "Wages" means legal tender of the United States or checks or drafts on banks negotiable into cash on
70 demand or upon acceptance at full value; ~~provided, wages may include.~~ "Wages" includes the reasonable
71 cost to the employer of furnishing meals and for lodging to an employee, if such board or lodging is
72 customarily furnished by the employer, and used by the employee.

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

80 **§ 40.1-28.10. Minimum wages.**

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

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

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

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

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

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

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

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

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

111 2. Beginning January 1, 2022, the Virginia Department of Housing and Community Development,
112 the Virginia Economic Development Partnership Authority, and the Virginia Employment
113 Commission (the agencies) shall conduct a joint review of the feasibility and potential impact of
114 instituting a regional minimum wage in the Commonwealth. In evaluating a regional minimum
115 wage, the agencies shall form a work group to assess various factors, including, but not limited to,
116 the cost of living in the Commonwealth; the potential impact on employers and any fringe benefits
117 offered to employees such as employer-sponsored health insurance; the potential impact on
118 workers, with a focus on income inequality; the potential impact on agricultural workers; the
119 experience of other states with a regional wage; and the equity and fairness of the exemption from
120 the minimum wage for any person employed as a farm laborer or farm employee provided by
121 § 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.