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HOUSE BILL NO. 2015

AMENDMENT IN THE NATURE OF A SUBSTITUTE
 (Proposed by the House Committee on Labor and Commerce
 on January 28, 2021)

(Patron Prior to Substitute—Delegate Ayala)

A BILL to amend and reenact § 40.1-29 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 40.1-29.2 and by adding in Article 5 of Chapter 3 of Title 40.1 a section numbered 40.1-51.4:6, relating to essential workers; hazard pay; personal protective equipment; civil penalty.

Be it enacted by the General Assembly of Virginia:

1. That § 40.1-29 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding a section numbered 40.1-29.2 and by adding in Article 5 of Chapter 3 of Title 40.1 a section numbered 40.1-51.4:6 as follows:

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

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

E. An employer who willfully and with intent to defraud fails or refuses to pay wages in accordance

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60 with this section, unless the failure to pay was because of a bona fide dispute between the employer and
61 its employee:

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

64 2. To an employee or employees is guilty of a Class 6 felony (i) if the value of the wages earned
65 and not paid is \$10,000 or more or (ii) regardless of the value of the wages earned and not paid, if the
66 conviction is a second or subsequent conviction under this section.

67 For purposes of this section, the determination as to the "value of the wages earned" shall be made
68 by combining all wages the employer failed or refused to pay pursuant to this section.

69 F. The Commissioner may require a written complaint of the violation of this section *or* § 40.1-29.2
70 and, with the written and signed consent of an employee, may institute proceedings on behalf of an
71 employee to enforce compliance with this section *or* § 40.1-29.2, and to collect any moneys unlawfully
72 withheld from such employee which shall be paid to the employee entitled thereto. In addition,
73 following the issuance of a final order by the Commissioner or a court, the Commissioner may engage
74 private counsel, approved by the Attorney General, to collect any moneys owed to the employee or the
75 Commonwealth. Upon entry of a final order of the Commissioner, or upon entry of a judgment, against
76 the employer, the Commissioner or the court shall assess attorney fees of one-third of the amount set
77 forth in the final order or judgment.

78 G. In addition to being subject to any other penalty provided by the provisions of this section, any
79 employer who fails to make payment of wages in accordance with subsection A *or* § 40.1-29.2 shall be
80 liable for the payment of all wages due, and an additional equal amount as liquidated damages, plus
81 interest at an annual rate of eight percent accruing from the date the wages were due.

82 H. Any employer who knowingly fails to make payment of wages in accordance with subsection A
83 *or* § 40.1-29.2 shall be subject to a civil penalty not to exceed \$1,000 for each violation. The
84 Commissioner shall notify any employer that he alleges has violated any provision of this section by
85 certified mail. Such notice shall contain a description of the alleged violation. Within 15 days of receipt
86 of notice of the alleged violation, the employer may request an informal conference regarding such
87 violation with the Commissioner. In determining the amount of any penalty to be imposed, the
88 Commissioner shall consider the size of the business of the employer charged and the gravity of the
89 violation. The decision of the Commissioner shall be final. Civil penalties owed under this section shall
90 be paid to the Commissioner for deposit into the general fund of the State Treasurer. The Commissioner
91 shall prescribe procedures for the payment of proposed assessments of penalties that are not contested by
92 employers. Such procedures shall include provisions for an employer to consent to abatement of the
93 alleged violation and pay a proposed penalty or a negotiated sum in lieu of such penalty without
94 admission of any civil liability arising from such alleged violation.

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

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

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

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

117 **§ 40.1-29.2. Essential workers; hazard pay.**

118 A. As used in this section:

119 "Airport worker" means workers who support air transportation for cargo and passengers, including
120 operation, distribution, maintenance, and sanitation, including air traffic controllers, flight dispatchers,
121 maintenance personnel, ramp workers, fueling agents, flight crews, airport safety inspectors and

engineers, airport operations personnel, aviation and aerospace safety workers, security, commercial space personnel, operations personnel, accident investigators, flight instructors, and other on- and off-airport facilities workers.

"Essential retail business" includes (i) grocery stores, pharmacies, and other retailers that sell food and beverage products or pharmacy products, including dollar stores, and department stores with grocery or pharmacy operations; (ii) medical, laboratory, and vision supply retailers; (iii) electronic retailers that sell or service cell phones, computers, tablets, and other communications technology; (iv) automotive parts, accessories, and tire retailers as well as automotive repair facilities; (v) home improvement, hardware, building material, and building supply retailers; (vi) lawn and garden equipment retailers; (vii) retail functions of gas stations and convenience stores; (viii) retailers located within health care facilities; (ix) pet and feed stores; (x) printing and office supply stores; and (xi) laundromats and dry cleaners. "Essential retail business" does not include restaurants, banks, and financial institutions subject to Title V of the federal Gramm-Leach-Bliley Act (15 U.S.C. § 6801 et seq.).

"Essential worker" means an individual employed as a health care provider, home care provider, transit driver, or airport worker, or by an essential retail business.

"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 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.

B. Following the declaration by the Governor of a state of emergency pursuant to § 44-146.17 that includes or is followed by any additional executive order in furtherance of such declaration that includes a stay-at-home or shelter-in-place order, any essential retail business that is authorized to remain open shall pay to each of its essential workers at a rate not less than one and one-half times the essential worker's regular rate of pay for any hours worked while the stay-at-home or shelter-in-place order is in effect. This section shall not apply to individuals who are exempt from overtime requirements under 29 U.S.C. § 213(a)(1) of the federal Fair Labor Standards Act, 29 U.S.C. § 201 et seq.

§ 40.1-51.4:6. Personal protective equipment.

Following the declaration by the Governor of a state of emergency pursuant to § 44-146.17 that includes or is followed by any additional executive order in furtherance of such declaration that includes a stay-at-home or shelter-in-place order, any essential retail business that is authorized to remain open shall provide to each of its essential workers, as defined in § 40.1-29.2, required to work while the stay-at-home or shelter-in-place order is in effect personal protective equipment related to the state of emergency and recommended for the relevant work site or job task by the Virginia Department of Labor and Industry, the State Department of Health, the U.S. Centers for Disease Control and Prevention, or the federal Occupational Safety and Health Administration.