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SENATE BILL NO. 631

AMENDMENT IN THE NATURE OF A SUBSTITUTE
(Proposed by the Senate Committee on Commerce and Labor
on February 7, 2022)

(Patrons Prior to Substitute—Senators Barker and Stuart [SB 365])

A BILL to amend and reenact §§ 40.1-29, 40.1-29.1, and 40.1-29.2 of the Code of Virginia, relating to Fair Labor Standards Act; overtime; employer liability.

Be it enacted by the General Assembly of Virginia:

1. That §§ 40.1-29, 40.1-29.1, and 40.1-29.2 of the Code of Virginia are amended and reenacted 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 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 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 with this section ~~or § 40.1-29.2~~, unless the failure to pay was because of a bona fide dispute between the employer and its employee:

1. To an employee or employees is guilty of a Class 1 misdemeanor if the value of the wages earned

60 and not paid by the employer is less than \$10,000; and

61 2. To an employee or employees is guilty of a Class 6 felony (i) if the value of the wages earned
62 and not paid is \$10,000 or more or (ii) regardless of the value of the wages earned and not paid, if the
63 conviction is a second or subsequent conviction under this section ~~or § 40.1-29.2.~~

64 For purposes of this section, the determination as to the "value of the wages earned" shall be made
65 by combining all wages the employer failed or refused to pay pursuant to this section ~~and § 40.1-29.2.~~

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

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

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

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

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

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

110 L. An action under this section ~~or § 40.1-29.2~~ shall be commenced within three years after the cause
111 of action accrued. The period for filing is tolled upon the filing of an administrative action under
112 subsection F until the employee has been informed that the action has been resolved or until the
113 employee has withdrawn the complaint, whichever is sooner.

114 **§ 40.1-29.1. Investigations of employers for nonpayment of wages.**

115 If in the course of an investigation of a complaint of an employer's failure or refusal to pay wages in
116 accordance with the requirements of § 40.1-29 ~~or 40.1-29.2~~, the Commissioner acquires information
117 creating a reasonable belief that other employees of the same employer may not have been paid wages
118 in accordance with such requirements, the Commissioner shall have the authority to investigate whether
119 the employer has failed or refused to make any required payment of wages to other employees of the
120 employer as required by § 40.1-29 ~~or 40.1-29.2~~. If the Commissioner finds in the course of such
121 investigation that the employer has violated a provision of § 40.1-29 ~~or 40.1-29.2~~, the Commissioner

may institute proceedings on behalf of any employee against his employer. Such proceedings shall be undertaken in accordance with the provisions of § 40.1-29, except that the Commissioner shall not require a written complaint of the violation or the written and signed consent of any employee as a condition of instituting such proceedings.

§ 40.1-29.2. Employer liability.

A. As used in this section:

"Employ" includes to permit or suffer to work.

"Employee" means any individual employed by an employer, including employees of derivative carriers within the meaning of the federal Railway Labor Act, 45 U.S.C. § 151 et seq. "Employee" does not include the following: (i) any individual who volunteers solely for humanitarian, religious, or community service purposes for a public body, church, or nonprofit organization that does not otherwise employ such individual; (ii) any person who is exempt from the federal overtime wage pursuant to 29 U.S.C. § 213(a); and (iii) any person who meets the exemptions set forth in 29 U.S.C. § 213(b)(1) or 213(b)(11).

"Employer" means any person acting directly or indirectly in the interest of an employer in relation to an employee. "Employer" does not include any labor organization, other than when acting as an employer; anyone acting in the capacity of officer or agent of such labor organization; or any carrier subject to the federal Railway Labor Act, 45 U.S.C. §§ 151 through 188, except derivative carriers within the meaning of the federal Railway Labor Act.

"Person" means an individual, partnership, association, corporation, business trust, legal representative, any organized group of persons, or the Commonwealth, any of its constitutional officers, agencies, institutions, or political subdivisions; or any public body. This definition constitutes a waiver of sovereign immunity by the Commonwealth.

"Wages" means the same as that term is defined in § 40.1-28.9.

"Workweek" means a fixed and regularly occurring period of 168 hours or seven consecutive 24-hour periods. It need not coincide with the calendar week and may begin on any day and at any hour. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of this section.

B. For any hours worked by an employee in excess of 40 hours in any one workweek, an employer shall pay such employee an overtime premium at a rate not less than one and one-half times the employee's regular rate, pursuant to 29 U.S.C. § 207. An employee's regular rate shall be calculated as follows:

1. For employees paid on an hourly basis, the regular rate is the hourly rate of pay plus any other non-overtime wages paid or allocated for that workweek, excluding any amounts that are excluded from the regular rate by the federal Fair Labor Standards Act, 29 U.S.C. § 201 et seq., and its implementing regulations, divided by the total number of hours worked in that workweek.

2. For employees paid on a salary or other regular basis, the regular rate is one-fortieth of all wages paid for that workweek.

C. For fire protection or law-enforcement employees of any public sector employer for whom 29 U.S.C. § 207(k) applies, such employer shall pay an overtime premium as set forth in this section for (i) all hours worked in excess of the threshold set forth in 20 U.S.C. § 207(k) and (ii) any additional hours such employee worked or received as paid leave as set forth in subsection A of § 9.1-701.

D. An employer may assert an exemption to the overtime requirement of this section for employees who meet the exemptions set forth in 29 U.S.C. § 213(a)(1) or for employees who meet the exemptions set forth in 29 U.S.C. §§ 213(b)(1) or 213(b)(11).

E. No agency, institution, political subdivision, or public body that complies with the requirements of 29 U.S.C. § 207(k) and § 9.1-701 shall be deemed to have violated subsection B with respect to fire suppression or law-enforcement employees covered by such statutes.

F. Any employer that violates the overtime wage requirements of this section *the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq., as amended, and any statutes, regulations, guidelines, or rules adopted pursuant thereto or any related governing case law* shall be liable to the employee for all remedies, damages, or other relief available *under the Fair Labor Standards Act* in an action brought *under pursuant to the process in* subsection J of § 40.1-29. *For the purposes of this section, "employer" and "employee" shall have the meanings ascribed to them under the Fair Labor Standards Act. Any action brought pursuant to this section shall accrue according to the applicable limitations set forth in the Fair Labor Standards Act.*

G. Any action pursuant to this section shall be commenced within three years after the cause of action accrues.