

24103798D

HOUSE BILL NO. 335

Offered January 10, 2024

Prefiled January 5, 2024

A BILL to amend and reenact § 40.1-28.9, as it is currently effective and as it shall become effective, of the Code of Virginia, relating to employment; determining wage of tipped employee.

Patrons—Gardner, Helmer, Anthony, Clark, Cousins, Glass, Henson, Martinez, Reaser and Shin

Referred to Committee on Labor and Commerce

Be it enacted by the General Assembly of Virginia:

1. That § 40.1-28.9, as it is currently effective and as it shall become effective, of the Code of Virginia is amended and reenacted as follows:

§ 40.1-28.9. (Effective until July 1, 2030) Definitions; determining wage of tipped employee.

A. As used in this article:

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

"Domestic service" means services related to the care of an individual in a private home or the maintenance of a private home or its premises, on a permanent or temporary basis, including services performed by individuals such as companions, cooks, waiters, butlers, maids, valets, and chauffeurs.

"Employee" includes any individual employed by an employer. "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 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 organization are on a voluntary basis;

3. Caddies on golf courses;

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

5. Any person under the age of 18 in the employ of his parent or legal guardian;

6. Any person confined in any penal or corrective institution of the 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;

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

8. Any person under the age of 16, regardless of by whom employed;

9. Any individual with disabilities employed by an employer that was authorized, prior to July 1, 2023, to employ individuals with disabilities at a subminimum wage pursuant to a special certificate issued under 29 U.S.C. § 214(c) of the Fair Labor Standards Act of 1938, as amended, provided that such individual was employed by and paid a subminimum wage by such employer pursuant to 29 U.S.C. § 214(c) of the Fair Labor Standards Act of 1938, as amended, prior to July 1, 2023;

10. Students participating in a bona fide educational program;

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;

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 is enrolled as a student;

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 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

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

65 "Tipped employee" means an employee who in the course of employment customarily and regularly
66 receives tips totaling more than \$30 each month from persons other than the employee's employer.

67 "Wages" means legal tender of the United States or checks or drafts on banks negotiable into cash on
68 demand or upon acceptance at full value. "Wages" includes the reasonable cost to the employer of
69 furnishing meals and lodging to an employee if such board or lodging is customarily furnished by the
70 employer and used by the employee.

71 B. In determining the *cash wage* of a tipped employee, the amount paid such employee by his
72 employer shall be deemed to be increased on account of tips by an amount determined by the employer
73 *in accordance with the minimum wage requirements of the federal Fair Labor Standards Act of 1938, as*
74 *amended, except in the case of when (i) an employee who establishes by clear and convincing evidence*
75 *that the actual amount of tips received by him was less than the amount determined by the employer. In*
76 *such case, in which case the amount paid such employee by his employer shall be deemed to have been*
77 *increased by such lesser amount and (ii) notwithstanding any other provision of law, a tipped employee*
78 *regularly performs services in the course of his employment for which there is no reasonable*
79 *expectation that the employee will receive tips, in which case the amount paid to such employee by his*
80 *employer for times that he performs such services shall not be at a rate less than the minimum wage*
81 *specified in § 40.1-28.10.*

82 1. From January 1, 2025, through December 31, 2025, a tipped employee shall receive a cash wage
83 of not less than \$3.50 per hour;

84 2. From January 1, 2026, through December 31, 2026, a tipped employee shall receive a cash wage
85 of not less than \$4.75 per hour;

86 3. From January 1, 2027, through December 31, 2027, a tipped employee shall receive a cash wage
87 of not less than \$6.00 per hour; and

88 4. Commencing January 1, 2028, the amount of tips received by an employer shall be excluded from
89 any determination of the wage paid to the employee by his employer and the amount paid to such
90 employee shall not be at a rate less than the minimum wage specified in § 40.1-28.10.

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

93 **§ 40.1-28.9. (Effective July 1, 2030) Definitions; determining wage of tipped employee.**

94 A. As used in this article:

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

97 "Domestic service" means services related to the care of an individual in a private home or the
98 maintenance of a private home or its premises, on a permanent or temporary basis, including services
99 performed by individuals such as companions, cooks, waiters, butlers, maids, valets, and chauffeurs.

100 "Employee" includes any individual employed by an employer. "Employee" includes a home care
101 provider. "Employee" does not include the following:

102 1. Any person employed as a farm laborer or farm employee;

103 2. Any person engaged in the activities of an educational, charitable, religious, or nonprofit
104 organization where the relationship of employer-employee does not, in fact, exist or where the services
105 rendered to such organization are on a voluntary basis;

106 3. Caddies on golf courses;

107 4. Traveling salesmen or outside salesmen working on a commission basis; taxicab drivers and
108 operators;

109 5. Any person under the age of 18 in the employ of his parent or legal guardian;

110 6. Any person confined in any penal or corrective institution of the Commonwealth or any of its
111 political subdivisions or admitted to a state hospital or training center operated by the Department of
112 Behavioral Health and Developmental Services;

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

114 8. Any person under the age of 16, regardless of by whom employed;

115 9. Students participating in a bona fide educational program;

116 10. Any person who is less than 18 years of age and who is currently enrolled on a full-time basis in
117 any secondary school, institution of higher education, or trade school, provided that the person is not
118 employed more than 20 hours per week;

119 11. Any person of any age who is currently enrolled on a full-time basis in any secondary school,
120 institution of higher education, or trade school and is in a work-study program or its equivalent at the

institution at which he is enrolled as a student;

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

13. 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;

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

15. 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 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 who in the course of employment customarily and regularly receives tips totaling more than \$30 each month from persons other than the employee's employer.

"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. "Wages" includes the reasonable cost to the employer of furnishing meals and lodging to an employee if such board or lodging is customarily furnished by the employer and used by the employee.

B. In determining the cash 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 in accordance with the minimum wage requirements of the federal Fair Labor Standards Act of 1938, as amended, except in the case of when (i) 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~~ *in such case, in which case* the amount paid such employee by his employer shall be deemed to have been increased by such lesser amount and (ii) notwithstanding any other provision of law, a tipped employee regularly performs services in the course of his employment for which there is no reasonable expectation that the employee will receive tips, in which case the amount paid to such employee by his employer for times that he performs such services shall not be at a rate less than the minimum wage specified in § 40.1-28.10.

1. From January 1, 2025, through December 31, 2025, a tipped employee shall receive a cash wage of not less than \$3.50 per hour;

2. From January 1, 2026, through December 31, 2026, a tipped employee shall receive a cash wage of not less than \$4.75 per hour;

3. From January 1, 2027, through December 31, 2027, a tipped employee shall receive a cash wage of not less than \$6.00 per hour; and

4. Commencing January 1, 2028, the amount of tips received by an employer shall be excluded from any determination of the wage paid to the employee by his employer and the amount paid to such employee shall not be at a rate less than the minimum wage specified in § 40.1-28.10.

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.