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SENATE BILL NO. 685

Offered January 18, 2024

A BILL to amend and reenact §§ 2.2-2751, 40.1-28.12, 40.1-29, 40.1-29.2, 40.1-29.3, and 53.1-40.02 of the Code of Virginia, relating to minimum wage and overtime pay; warehouse distribution center employees and employers; civil action; civil penalty.

 Patron—Carroll Foy

 Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-2751, 40.1-28.12, 40.1-29, 40.1-29.2, 40.1-29.3, and 53.1-40.02 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-2751. Program enrollment; participating employer liability and status under the Program.

A. 1. Any employer that is not an eligible employer may facilitate the participation of its eligible employees in the Program. However, such employer shall take all steps necessary to ensure that such facilitation does not constitute an employee benefit plan regulated under Title I of the Employee Retirement Income Security Act (ERISA).

2. Any eligible employee whose employer does not facilitate his participation in the Program pursuant to subdivision 1 or any self-employed individual may participate in the Program under terms and conditions prescribed by the Board.

3. No eligible employee or self-employed individual shall be permitted to participate in the Program unless such individual has Virginia taxable income, as defined in Article 2 (§ 58.1-320 et seq.) of Chapter 3 of Title 58.1.

B. The Program shall be established and enrollment of eligible employers shall begin on July 1, 2023, or as soon thereafter as practicable. The Board shall establish an implementation timeline under which eligible employers shall enroll their eligible employees in the Program.

C. The Board shall develop a Program rollout timeline, including deadlines for the enrollment of eligible employers. The Board may alter the rollout timeline in its discretion, though in all instances any alterations of established rollout dates shall include reasonable notice to affected eligible employers.

D. Participation in the Program shall be mandatory for eligible employers. Eligible employers shall enroll in the Program in accordance with the timeline established by the Plan. Eligible employers shall facilitate a payroll deposit retirement savings agreement pursuant to this chapter for their eligible employees.

E. Each eligible employee of an eligible employer shall be enrolled in the Program unless the employee elects not to participate in the Program in a manner prescribed by the Board.

F. A participating employee may also terminate his participation in the Program at any time in a manner prescribed by the Board.

G. Participating employers shall not have any liability for a participating employee's decision to participate in or opt out of the Program or for the investment decisions of participating employees whose assets are deposited in the Program.

H. Participating employers shall not be a fiduciary, or considered to be a fiduciary, over the Program. The Program is a state-administered program, not an employer-sponsored program. If the Program is subsequently found to be preempted by any federal law or regulation, participating employers shall not be liable as Program sponsors. A participating employer shall not bear responsibility for the administration, investment, or investment performance of the Program. A participating employer shall not be liable with regard to investment returns, Program design, and benefits paid to Program participants.

I. A participating employer shall not have civil liability, and no cause of action shall arise against a participating employer, for acting pursuant to this chapter.

J. The Board shall develop and provide to participating employees and participating individuals Program summaries and other information concerning participation in the Program, including information on Program investments and fees, and the consequences of contributing to an IRA, and a statement that the Program is not an employer-sponsored retirement plan, as required by applicable law and as otherwise determined by the Board.

K. Participating employers shall retain the option at all times to set up any type of employer retirement plan, including plans qualified under § 401(a), 403(a), 403(b), 408(k), or 408(p), of the Internal Revenue Code, in which event such employer shall no longer be considered an eligible employer and shall cease facilitating contributions to the Program in accordance with such procedures as

59 shall be established by the Board.

60 L. No employer shall be permitted to contribute to the Program or to endorse or otherwise promote
61 the Program.

62 M. The Program shall be exempt from the provisions of subsection C D of § 40.1-29.

63 **§ 40.1-28.12. Employee's remedies.**

64 Any employer ~~who that~~ violates the minimum wage requirements of this law article shall be liable to
65 ~~the an impacted employee or employees affected in the amount of the unpaid minimum wages, plus~~
66 ~~interest at eight per centum per annum upon such unpaid wages as may be due the plaintiff; said interest~~
67 ~~to be awarded from the date or dates said wages were due the employee or employees. The court may,~~
68 ~~in addition to any judgment awarded to the employee or employees, require defendant to pay reasonable~~
69 ~~attorney's fees incurred by the employee or employees for the applicable remedies, damages, or other~~
70 ~~relief available in an action brought pursuant to the provisions of subsection L of § 40.1-29.~~

71 **§ 40.1-29. Time and medium of payment; withholding wages; written statement of earnings;**
72 **agreement for forfeiture of wages; warehouse employer requirements; proceedings to enforce**
73 **compliance; penalties.**

74 A. *As used in this section, unless the context requires a different meaning:*

75 *"Warehouse distribution center" means a business establishment that corresponds to any of the*
76 *following North American Industry Classification System (NAICS) codes: general warehousing and*
77 *storage (NAICS 493110); merchant wholesalers, durable goods (NAICS 423000); merchant wholesalers,*
78 *nondurable goods (NAICS 424000); electronic shopping and mail-order houses (NAICS 454110); and*
79 *couriers and express delivery services (NAICS 492100).*

80 *"Warehouse employee" means an employee performing work or based at a warehouse distribution*
81 *center.*

82 *"Warehouse employer" means an employer that operates a warehouse distribution center.*

83 B. All employers operating a business or engaging an individual to perform domestic service shall
84 establish regular pay periods and rates of pay for employees except executive personnel. All such
85 employers shall pay salaried employees at least once each month and employees paid on an hourly rate
86 at least once every two weeks or twice in each month, except that (i) a student who is currently enrolled
87 in a work-study program or its equivalent administered by any secondary school, institution of higher
88 education, or trade school, and (ii) employees whose weekly wages total more than 150 percent of the
89 average weekly wage of the Commonwealth as defined in § 65.2-500, upon agreement by each affected
90 employee, may be paid once each month if the institution or employer so chooses. Upon termination of
91 employment an employee shall be paid all wages or salaries due him for work performed prior thereto;
92 such payment shall be made on or before the date on which he would have been paid for such work had
93 his employment not been terminated.

94 B. C. Payment of wages or salaries shall be (i) in lawful money of the United States, (ii) by check
95 payable at face value upon demand in lawful money of the United States, (iii) by electronic automated
96 fund transfer in lawful money of the United States into an account in the name of the employee at a
97 financial institution designated by the employee, or (iv) by credit to a prepaid debit card or card account
98 from which the employee is able to withdraw or transfer funds with full written disclosure by the
99 employer of any applicable fees and affirmative consent thereto by the employee. However, an employer
100 that elects not to pay wages or salaries in accordance with clause (i) or (ii) to an employee who is hired
101 after January 1, 2010, shall be permitted to pay wages or salaries by credit to a prepaid debit card or
102 card account in accordance with clause (iv), even though such employee has not affirmatively consented
103 thereto, if the employee fails to designate an account at a financial institution in accordance with clause
104 (iii) and the employer arranges for such card or card account to be issued through a network system
105 through which the employee shall have the ability to make at least one free withdrawal or transfer per
106 pay period, which withdrawal may be for any sum in such card or card account as the employee may
107 elect, using such card or card account at financial institutions participating in such network system.

108 C. D. No employer shall withhold any part of the wages or salaries of any employee except for
109 payroll, wage or withholding taxes or in accordance with law, without the written and signed
110 authorization of the employee. On each regular pay date, each employer, other than an employer
111 engaged in agricultural employment including agribusiness and forestry, shall provide to each employee
112 a written statement, by a paystub or online accounting, that shows the name and address of the
113 employer; the number of hours worked during the pay period if the employee is paid on the basis of (i)
114 the number of hours worked or (ii) a salary that is less than the standard salary level adopted by
115 regulation of the U.S. Department of Labor pursuant to § 13(a)(1) of the federal Fair Labor Standards
116 Act, 29 U.S.C. § 213(a)(1), as amended, establishing an exemption from the Act's overtime premium pay
117 requirements; the rate of pay; the gross wages earned by the employee during the pay period; and the
118 amount and purpose of any deductions therefrom. The paystub or online accounting shall include
119 sufficient information to enable the employee to determine how the gross and net pay were calculated.
120 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. E. A warehouse employer shall provide to each warehouse employee, within 30 days after hiring such employee, a written description of (i) each performance standard, including any quota, stacked ranking system, or time-off-task requirement, to which such employee is subject and (ii) any potential adverse employment action that may result from such employee's failure to meet such performance standard. If a warehouse employer changes or adds a performance standard, such employer shall provide an updated written description of such performance standard at least two business days before such change or addition. A warehouse employer that takes adverse action against a warehouse employee for such employee's failure to meet a performance standard shall provide such employee with a written description of such failure. No warehouse employer shall take adverse employment action against a warehouse employee for such employee's use of a bathroom facility, including reasonable travel time to and from such facility. Nothing in this subsection shall be construed to require an employer to use a performance standard or to monitor employee work-speed data, and any employer that does not use performance standards or monitor such data is exempt from the provisions of this subsection.

F. 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. G. An employer who that willfully and with intent to defraud fails or refuses to pay wages in accordance with this section or § 40.1-29.3, 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 and not paid by the employer is less than \$10,000; and

2. To an employee or employees is guilty of a Class 6 felony (i) if the value of the wages earned and not paid is \$10,000 or more or (ii) regardless of the value of the wages earned and not paid, if the conviction is a second or subsequent conviction under this section or § 40.1-29.3.

For purposes of this section, the determination as to the "value of the wages earned" shall be made by combining all wages the employer failed or refused to pay pursuant to this section and § 40.1-29.3.

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

G. I. In addition to being subject to any other penalty provided by the provisions of this section, any employer who that fails to make payment of wages in accordance with subsection A B or a warehouse employer that discharges, retaliates against, or adversely affects the compensation of a warehouse employee in violation of subsection E shall be liable for the payment of all wages due, and an additional equal amount as liquidated damages, plus interest at an annual rate of eight percent accruing from the date the wages were due.

H. J. Any employer who that knowingly fails to make payment of wages in accordance with subsection A B or § 40.1-29.3 shall be subject to a civil penalty not to exceed \$1,000 for each violation. Any warehouse employer that fails to comply with the requirements of subsection E shall be subject to a civil penalty not to exceed \$5,000 for each violation. The Commissioner shall notify any employer that the Commissioner alleges has violated any provision of this section or § 40.1-29.3 by certified mail. Such notice shall contain a description of the alleged violation. Within 15 days of receipt of notice of the alleged violation, the employer may request an informal conference regarding such violation with the Commissioner. In determining the amount of any penalty to be imposed, the Commissioner shall consider the size of the business of the employer charged and the gravity of the violation. The decision of the Commissioner shall be final. Civil penalties owed under this section shall be paid to the Commissioner for deposit into the general fund of the State Treasurer. The Commissioner shall prescribe procedures for the payment of proposed assessments of penalties that are not contested by employers. Such procedures shall include provisions for an employer to consent to abatement of the alleged violation and pay a proposed penalty or a negotiated sum in lieu of such penalty without admission of any civil liability arising from such alleged violation.

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

J. L. In addition to any civil or criminal penalty provided by this section, and without regard to any exhaustion of alternative administrative remedies provided for in this section, if an employer fails to pay wages to an employee in accordance with this section, *the Virginia Minimum Wage Act (§ 40.1-28.8 et seq.), or § 40.1-29.2 or 40.1-29.3, or if a warehouse employer fails to comply with the requirements of subsection E*, the employee may bring an action, individually, jointly, with other aggrieved employees, or on behalf of similarly situated employees as a collective action consistent with the collective action procedures of the Fair Labor Standards Act, 29 U.S.C. § 216(b), against the employer in a court of competent jurisdiction to recover payment of the wages *or, regarding a warehouse employer, to order compliance with the requirements of subsection E*, and the court shall award the wages owed, an additional equal amount as liquidated damages, plus prejudgment interest thereon as provided in subsection G I, and reasonable attorney fees and costs *and, in the case of a warehouse employer, injunctive relief and liquidated damages of \$1,000 for each violation of the requirements of subsection E*. If the court finds that the employer knowingly failed to pay wages to an employee in accordance with this section, *the Virginia Minimum Wage Act (§ 40.1-28.8 et seq.), or § 40.1-29.2 or 40.1-29.3, or retaliated against a warehouse employee for bathroom facility use in violation of subsection E*, the court shall award the employee an amount equal to triple the amount of wages due and reasonable attorney fees and costs.

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

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

§ 40.1-29.2. Employer liability.

Any employer that violates the overtime pay requirements of the federal Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq., as amended, and any regulations, guidance, or rules adopted pursuant to the overtime pay provisions of such federal act or any related governing case law shall be liable to the employee for the applicable remedies, damages, or other relief available under the federal Fair Labor Standards Act in an action brought pursuant to the process in subsection J L of § 40.1-29. For the purposes of this section, "employer" and "employee" shall have the meanings ascribed to them under the federal Fair Labor Standards Act and all applicable exemptions, overtime calculation methods, methods of overtime payment, or other overtime provisions within the federal Fair Labor Standards Act and any attendant regulations, guidance, or rules shall apply. Any action brought pursuant to this section shall accrue according to the applicable limitations set forth in the federal Fair Labor Standards Act.

§ 40.1-29.3. Overtime for certain employees.

A. As used in this section:

"Carrier" means an air carrier that is subject to the provisions of the federal Railway Labor Act, 45 U.S.C. § 181 et seq.

"Derivative carrier" means a carrier that meets the two-part test used by the federal National Mediation Board to determine if a carrier is considered a derivative carrier.

"Employee" means an individual employed by a derivative carrier.

B. An employer shall pay each employee an overtime premium at a rate not less than one and one-half times the employee's regular rate for any hours worked by an employee in excess of 40 hours in any one workweek. An employee's regular rate shall be calculated as the employee's hourly rate of pay plus any other non-overtime wages paid or allocated for that workweek, excluding any amounts that would be excluded from the regular rate by the federal Fair Labor Standards Act, 29 U.S.C. § 201 et seq., and its implementing regulations for an individual covered by such federal act, divided by the total number of hours worked in that workweek.

C. If an employer fails to pay overtime wages to an employee in accordance with this section, the employee may bring an action against the employer in a court of competent jurisdiction to recover payment of the overtime wages, and the court shall award the overtime wages owed, an additional equal amount as liquidated damages, and reasonable attorney fees and costs; however, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of this section, the court may, in its discretion, award no liquidated damages or award any amount thereof not to exceed the amount of the unpaid overtime wages.

D. An action under this section shall be commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued *liable to such employee for the applicable remedies, damages, or other relief available in an action brought pursuant to the provisions of subsection L of § 40.1-29.*

§ 53.1-40.02. Conditional release of terminally ill prisoners.

A. As used in this section, "terminally ill" means having a chronic or progressive medical condition caused by injury, disease, or illness where the medical prognosis is the person's death within 12 months.

B. Any person serving a sentence imposed upon a conviction for a felony offense, except as provided in subsection C, who is terminally ill may petition the Parole Board for conditional release.

C. A person who is terminally ill and is serving a sentence imposed upon a conviction for one of the following offenses shall not be eligible to petition the Parole Board for conditional release:

1. A Class 1 felony;
 2. Any violation of § 18.2-32, 18.2-32.1, 18.2-32.2, or 18.2-33;
 3. Any violation of § 18.2-40 or 18.2-45;
 4. Any violation of § 18.2-46.5, subsection A or B of § 18.2-46.6, or § 18.2-46.7;
 5. Any kidnapping or abduction felony under Article 3 (§ 18.2-47 et seq.) of Chapter 4 of Title 18.2, except for a violation of § 18.2-49.1;
 6. Any malicious felonious assault or malicious bodily wounding under Article 4 (§ 18.2-51 et seq.) of Chapter 4 of Title 18.2, any violation of § 18.2-51.7, 18.2-54.1, or 18.2-54.2, or any felony violation of § 18.2-57.2;
 7. Any felony violation of § 18.2-60.3;
 8. Any felony violation of § 16.1-253.2 or 18.2-60.4;
 9. Robbery under § 18.2-58 or carjacking under § 18.2-58.1;
 10. Criminal sexual assault punishable as a felony under Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2, except, when not committed against a minor, a violation of subdivision A 5 of § 18.2-67.3, § 18.2-67.4:1, subsection B of § 18.2-67.5, or § 18.2-67.5:1;
 11. Any violation of § 18.2-90 or 18.2-93;
 12. Any violation of § 18.2-289 or subsection A of § 18.2-300;
 13. Any felony offense in Article 3 (§ 18.2-346 et seq.) of Chapter 8 of Title 18.2 involving a minor victim;
 14. Any felony offense in Article 4 (§ 18.2-362 et seq.) of Chapter 8 of Title 18.2 involving a minor victim, except for a violation of § 18.2-362 or 18.2-370.5 or subsection B of § 18.2-371.1;
 15. Any felony offense in Article 5 (§ 18.2-372 et seq.) of Chapter 8 of Title 18.2 involving a minor victim, except for a violation of subsection A of § 18.2-374.1:1;
 16. Any violation of § 18.2-481, 40.1-100.2, or 40.1-103; or
 17. A second or subsequent felony violation of the following offenses when such offenses were not part of a common act, transaction, or scheme and such person has been at liberty as defined in § 53.1-151 between each conviction:
 - a. Voluntary or involuntary manslaughter under Article 1 (§ 18.2-30 et seq.) of Chapter 4 of Title 18.2 or any crime punishable as such;
 - b. Any violation of § 18.2-41 or 18.2-42.1;
 - c. Any violation of subsection C of § 18.2-46.6;
 - d. Any violation when done unlawfully but not maliciously of § 18.2-51 or 18.2-51.1;
 - e. Arson in violation of § 18.2-77 when the structure burned was occupied or a Class 3 felony violation of § 18.2-79;
 - f. Any violation of § 18.2-89 with the intent to commit any larceny or § 18.2-92;
 - g. Any violation of subsection A of § 18.2-374.1:1;
 - h. Any violation of § 18.2-423, 18.2-423.01, 18.2-423.1, 18.2-423.2, or 18.2-433.2; or
 - i. Any violation of subdivision E G 2 of § 40.1-29.
- D. The Parole Board shall promulgate regulations to implement the provisions of this section.