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VIRGINIA ACTS OF ASSEMBLY — CHAPTER

An Act to amend and reenact §§ 40.1-29, 40.1-29.1, and 40.1-29.2 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 40.1-29.3, relating to Fair Labor Standards Act; employer liability; overtime required for certain employees.

[H 1173]

Approved

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 and that the Code of Virginia is amended by adding a section numbered 40.1-29.3 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~~ 40.1-29.3, unless the failure to pay was because of a bona fide dispute

57 between the employer and its employee:

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

60 2. To an employee or employees is guilty of a Class 6 felony (i) if the value of the wages earned
61 and not paid is \$10,000 or more or (ii) regardless of the value of the wages earned and not paid, if the
62 conviction is a second or subsequent conviction under this section or § 40.1-29.2 40.1-29.3.

63 For purposes of this section, the determination as to the "value of the wages earned" shall be made
64 by combining all wages the employer failed or refused to pay pursuant to this section and § 40.1-29.2
65 40.1-29.3.

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 40.1-29.3 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 40.1-29.3 by certified mail. Such notice shall contain a description of the
83 alleged violation. Within 15 days of receipt of notice of the alleged violation, the employer may request
84 an informal conference regarding such violation with the Commissioner. In determining the amount of
85 any penalty to be imposed, the Commissioner shall consider the size of the business of the employer
86 charged and the gravity of the violation. The decision of the Commissioner shall be final. Civil penalties
87 owed 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
 122 may institute proceedings on behalf of any employee against his employer. Such proceedings shall be
 123 undertaken in accordance with the provisions of § 40.1-29, except that the Commissioner shall not
 124 require a written complaint of the violation or the written and signed consent of any employee as a
 125 condition of instituting such proceedings.

126 **§ 40.1-29.2. Employer liability.**

127 A. As used in this section:

128 "Employ" includes to permit or suffer to work.

129 "Employee" means any individual employed by an employer, including employees of derivative
 130 carriers within the meaning of the federal Railway Labor Act, 45 U.S.C. § 151 et seq. "Employee" does
 131 not include the following: (i) any individual who volunteers solely for humanitarian, religious, or
 132 community service purposes for a public body, church, or nonprofit organization that does not otherwise
 133 employ such individual; (ii) any person who is exempt from the federal overtime wage pursuant to 29
 134 U.S.C. § 213(a), and (iii) any person who meets the exemptions set forth in 29 U.S.C. § 213(b)(1) or
 135 213(b)(11).

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

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

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

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

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

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

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

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

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

167 E. No agency, institution, political subdivision, or public body that complies with the requirements of
 168 29 U.S.C. § 207(k) and § 9.1-701 shall be deemed to have violated subsection B with respect to fire
 169 suppression or law enforcement employees covered by such statutes.

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

179 action brought pursuant to this section shall accrue according to the applicable limitations set forth in
180 the federal Fair Labor Standards Act.

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

183 § 40.1-29.3. Overtime for certain employees.

184 A. As used in this section:

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

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

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

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

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

205 D. An action under this section shall be commenced within two years after the cause of action
206 accrued, except that a cause of action arising out of a willful violation may be commenced within three
207 years after the cause of action accrued.

208 2. That the Secretary of Labor shall convene a work group to review overtime issues pursuant to
209 § 40.1-29.2 of the Code of Virginia, as amended by this act. The work group shall include
210 representatives from the business, labor, and legal sectors and state and local governments. The
211 work group shall also include two members of the Senate appointed by the Senate Committee on
212 Rules and two members of the House of Delegates appointed by the Speaker of the House of
213 Delegates. The work group shall submit a report on its findings and recommendations to the
214 Governor and the Chairmen of the House Committees on Appropriations and Commerce and
215 Energy and the Senate Committees on Finance and Appropriations and Commerce and Labor by
216 November 1, 2022.