

SENATE BILL NO. 631

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on Commerce and Energy

on _____)

(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 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.

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

27 fund transfer in lawful money of the United States into an account in the name of the employee at a
28 financial institution designated by the employee, or (iv) by credit to a prepaid debit card or card account
29 from which the employee is able to withdraw or transfer funds with full written disclosure by the employer
30 of any applicable fees and affirmative consent thereto by the employee. However, an employer that elects
31 not to pay wages or salaries in accordance with clause (i) or (ii) to an employee who is hired after January
32 1, 2010, shall be permitted to pay wages or salaries by credit to a prepaid debit card or card account in
33 accordance with clause (iv), even though such employee has not affirmatively consented thereto, if the
34 employee fails to designate an account at a financial institution in accordance with clause (iii) and the
35 employer arranges for such card or card account to be issued through a network system through which the
36 employee shall have the ability to make at least one free withdrawal or transfer per pay period, which
37 withdrawal may be for any sum in such card or card account as the employee may elect, using such card
38 or card account at financial institutions participating in such network system.

39 C. No employer shall withhold any part of the wages or salaries of any employee except for payroll,
40 wage or withholding taxes or in accordance with law, without the written and signed authorization of the
41 employee. On each regular pay date, each employer, other than an employer engaged in agricultural
42 employment including agribusiness and forestry, shall provide to each employee a written statement, by
43 a paystub or online accounting, that shows the name and address of the employer; the number of hours
44 worked during the pay period if the employee is paid on the basis of (i) the number of hours worked or
45 (ii) a salary that is less than the standard salary level adopted by regulation of the U.S. Department of
46 Labor pursuant to § 13(a)(1) of the federal Fair Labor Standards Act, 29 U.S.C. § 213(a)(1), as amended,
47 establishing an exemption from the Act's overtime premium pay requirements; the rate of pay; the gross
48 wages earned by the employee during the pay period; and the amount and purpose of any deductions
49 therefrom. The paystub or online accounting shall include sufficient information to enable the employee
50 to determine how the gross and net pay were calculated. An employer engaged in agricultural employment
51 including agribusiness and forestry, upon request of its employee, shall furnish the employee a written
52 statement of the gross wages earned by the employee during any pay period and the amount and purpose
53 of any deductions therefrom.

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

57 E. An employer who willfully and with intent to defraud fails or refuses to pay wages in accordance
58 with this section or ~~§ 40.1-29.2~~ 40.1-29.3, unless the failure to pay was because of a bona fide dispute
59 between the employer and its employee:

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

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

65 For purposes of this section, the determination as to the "value of the wages earned" shall be made
66 by combining all wages the employer failed or refused to pay pursuant to this section and ~~§ 40.1-29.2~~
67 40.1-29.3.

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

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

81 H. Any employer who knowingly fails to make payment of wages in accordance with subsection
82 A 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
83 Commissioner shall notify any employer that the Commissioner alleges has violated any provision of this
84 section or ~~§ 40.1-29.2~~ 40.1-29.3 by certified mail. Such notice shall contain a description of the alleged
85 violation. Within 15 days of receipt of notice of the alleged violation, the employer may request an
86 informal conference regarding such violation with the Commissioner. In determining the amount of any
87 penalty to be imposed, the Commissioner shall consider the size of the business of the employer charged
88 and the gravity of the violation. The decision of the Commissioner shall be final. Civil penalties owed
89 under this section shall be paid to the Commissioner for deposit into the general fund of the State
90 Treasurer. The Commissioner shall prescribe procedures for the payment of proposed assessments of
91 penalties that are not contested by employers. Such procedures shall include provisions for an employer
92 to consent to abatement of the alleged violation and pay a proposed penalty or a negotiated sum in lieu of
93 such penalty without admission of any civil liability arising from such alleged violation.

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

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

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

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

116 **§ 40.1-29.1. Investigations of employers for nonpayment of wages.**

117 If in the course of an investigation of a complaint of an employer's failure or refusal to pay wages
118 in accordance with the requirements of § 40.1-29 ~~or 40.1-29.2~~, the Commissioner acquires information
119 creating a reasonable belief that other employees of the same employer may not have been paid wages in
120 accordance with such requirements, the Commissioner shall have the authority to investigate whether the
121 employer has failed or refused to make any required payment of wages to other employees of the employer
122 as required by § 40.1-29 ~~or 40.1-29.2~~. If the Commissioner finds in the course of such investigation that
123 the employer has violated a provision of § 40.1-29 ~~or 40.1-29.2~~, the Commissioner may institute
124 proceedings on behalf of any employee against his employer. Such proceedings shall be undertaken in
125 accordance with the provisions of § 40.1-29, except that the Commissioner shall not require a written
126 complaint of the violation or the written and signed consent of any employee as a condition of instituting
127 such proceedings.

128 **§ 40.1-29.2. Employer liability.**

129 ~~A. As used in this section:~~

130 ~~"Employ" includes to permit or suffer to work.~~

131 ~~"Employee" means any individual employed by an employer, including employees of derivative~~
132 ~~carriers within the meaning of the federal Railway Labor Act, 45 U.S.C. § 151 et seq. "Employee" does~~
133 ~~not include the following: (i) any individual who volunteers solely for humanitarian, religious, or~~
134 ~~community service purposes for a public body, church, or nonprofit organization that does not otherwise~~

135 employ such individual, (ii) any person who is exempt from the federal overtime wage pursuant to 29
136 U.S.C. § 213(a), and (iii) any person who meets the exemptions set forth in 29 U.S.C. § 213(b)(1) or
137 213(b)(11).

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

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

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

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

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

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

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

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

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

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

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

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

184 **§ 40.1-29.3. Overtime for certain employees.**

185 A. As used in this section:

186 "Carrier" means an air carrier that is subject to the provisions of the federal Railway Labor Act,
187 45 U.S.C. § 181 et seq.

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

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

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

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

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

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

215 Governor and the Chairmen of the House Committees on Appropriations and Commerce and
216 Energy and the Senate Committees on Finance and Appropriations and Commerce and Labor by
217 November 1, 2022.

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