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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 shall be established by the Board.

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

59 Program.

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

61 **§ 40.1-28.12. Employee's remedies.**

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

69 **§ 40.1-29. Time and medium of payment; withholding wages; written statement of earnings;**
70 **agreement for forfeiture of wages; warehouse employer requirements; proceedings to enforce**
71 **compliance; penalties.**

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

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

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

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

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

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

104 ~~C- D.~~ No employer shall withhold any part of the wages or salaries of any employee except for payroll,
105 wage or withholding taxes or in accordance with law, without the written and signed authorization of the
106 employee. On each regular pay date, each employer, other than an employer engaged in agricultural
107 employment including agribusiness and forestry, shall provide to each employee a written statement, by a
108 paystub or online accounting, that shows the name and address of the employer; the number of hours worked
109 during the pay period if the employee is paid on the basis of (i) the number of hours worked or (ii) a salary
110 that is less than the standard salary level adopted by regulation of the U.S. Department of Labor pursuant to §
111 13(a)(1) of the federal Fair Labor Standards Act, 29 U.S.C. § 213(a)(1), as amended, establishing an
112 exemption from the Act's overtime premium pay requirements; the rate of pay; the gross wages earned by the
113 employee during the pay period; and the amount and purpose of any deductions therefrom. The paystub or
114 online accounting shall include sufficient information to enable the employee to determine how the gross and
115 net pay were calculated. An employer engaged in agricultural employment including agribusiness and
116 forestry, upon request of its employee, shall furnish the employee a written statement of the gross wages
117 earned by the employee during any pay period and the amount and purpose of any deductions therefrom.

118 ~~D- E.~~ A warehouse employer shall provide to each warehouse employee, within 30 days after hiring such
119 employee, a written description of (i) each performance standard, including any quota, stacked ranking

120 system, or time-off-task requirement, to which such employee is subject and (ii) any potential adverse
 121 employment action that may result from such employee's failure to meet such performance standard. If a
 122 warehouse employer changes or adds a performance standard, such employer shall provide an updated
 123 written description of such performance standard at least two business days before such change or addition.
 124 A warehouse employer that takes adverse action against a warehouse employee for such employee's failure to
 125 meet a performance standard shall provide such employee with a written description of such failure. No
 126 warehouse employer shall take adverse employment action against a warehouse employee for such
 127 employee's use of a bathroom facility, including reasonable travel time to and from such facility. Nothing in
 128 this subsection shall be construed to require an employer to use a performance standard or to monitor
 129 employee work-speed data, and any employer that does not use performance standards or monitor such data
 130 is exempt from the provisions of this subsection.

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

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

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

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

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

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

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

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

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

175 ~~J.~~ L. In addition to any civil or criminal penalty provided by this section, and without regard to any
 176 exhaustion of alternative administrative remedies provided for in this section, if an employer fails to pay
 177 wages to an employee in accordance with this section, *the Virginia Minimum Wage Act (§ 40.1-28.8 et seq.),*
 178 *or § 40.1-29.2 or 40.1-29.3, or if a warehouse employer fails to comply with the requirements of subsection*
 179 *E, the employee may bring an action, individually, jointly, with other aggrieved employees, or on behalf of*
 180 *similarly situated employees as a collective action consistent with the collective action procedures of the Fair*

181 Labor Standards Act, 29 U.S.C. § 216(b), against the employer in a court of competent jurisdiction to recover
 182 payment of the wages *or, regarding a warehouse employer, to order compliance with the requirements of*
 183 *subsection E*, and the court shall award the wages owed, an additional equal amount as liquidated damages,
 184 plus prejudgment interest thereon as provided in subsection ~~G~~ *I*, and reasonable attorney fees and costs *and,*
 185 *in the case of a warehouse employer, injunctive relief and liquidated damages of \$1,000 for each violation of*
 186 *the requirements of subsection E*. If the court finds that the employer knowingly failed to pay wages to an
 187 employee in accordance with this section, *the Virginia Minimum Wage Act (§ 40.1-28.8 et seq.), or § 40.1-*
 188 *29.2 or 40.1-29.3, or retaliated against a warehouse employee for bathroom facility use in violation of*
 189 *subsection E*, the court shall award the employee an amount equal to triple the amount of wages due and
 190 reasonable attorney fees and costs.

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

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

199 **§ 40.1-29.2. Employer liability.**

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

210 **§ 40.1-29.3. Overtime for certain employees.**

211 A. As used in this section:

212 "Carrier" means an air carrier that is subject to the provisions of the federal Railway Labor Act, 45 U.S.C.
 213 § 181 et seq.

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

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

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

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

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

236 **§ 53.1-40.02. Conditional release of terminally ill prisoners.**

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

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

241 C. A person who is terminally ill and is serving a sentence imposed upon a conviction for one of the

242 following offenses shall not be eligible to petition the Parole Board for conditional release:
 243 1. A Class 1 felony;
 244 2. Any violation of § 18.2-32, 18.2-32.1, 18.2-32.2, or 18.2-33;
 245 3. Any violation of § 18.2-40 or 18.2-45;
 246 4. Any violation of § 18.2-46.5, subsection A or B of § 18.2-46.6, or § 18.2-46.7;
 247 5. Any kidnapping or abduction felony under Article 3 (§ 18.2-47 et seq.) of Chapter 4 of Title 18.2,
 248 except for a violation of § 18.2-49.1;
 249 6. Any malicious felonious assault or malicious bodily wounding under Article 4 (§ 18.2-51 et seq.) of
 250 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 §
 251 18.2-57.2;
 252 7. Any felony violation of § 18.2-60.3;
 253 8. Any felony violation of § 16.1-253.2 or 18.2-60.4;
 254 9. Robbery under § 18.2-58 or carjacking under § 18.2-58.1;
 255 10. Criminal sexual assault punishable as a felony under Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title
 256 18.2, except, when not committed against a minor, a violation of subdivision A 5 of § 18.2-67.3, § 18.2-
 257 67.4:1, subsection B of § 18.2-67.5, or § 18.2-67.5:1;
 258 11. Any violation of § 18.2-90 or 18.2-93;
 259 12. Any violation of § 18.2-289 or subsection A of § 18.2-300;
 260 13. Any felony offense in Article 3 (§ 18.2-346 et seq.) of Chapter 8 of Title 18.2 involving a minor
 261 victim;
 262 14. Any felony offense in Article 4 (§ 18.2-362 et seq.) of Chapter 8 of Title 18.2 involving a minor
 263 victim, except for a violation of § 18.2-362 or 18.2-370.5 or subsection B of § 18.2-371.1;
 264 15. Any felony offense in Article 5 (§ 18.2-372 et seq.) of Chapter 8 of Title 18.2 involving a minor
 265 victim, except for a violation of subsection A of § 18.2-374.1:1;
 266 16. Any violation of § 18.2-481, 40.1-100.2, or 40.1-103; or
 267 17. A second or subsequent felony violation of the following offenses when such offenses were not part of
 268 a common act, transaction, or scheme and such person has been at liberty as defined in § 53.1-151 between
 269 each conviction:
 270 a. Voluntary or involuntary manslaughter under Article 1 (§ 18.2-30 et seq.) of Chapter 4 of Title 18.2 or
 271 any crime punishable as such;
 272 b. Any violation of § 18.2-41 or 18.2-42.1;
 273 c. Any violation of subsection C of § 18.2-46.6;
 274 d. Any violation when done unlawfully but not maliciously of § 18.2-51 or 18.2-51.1;
 275 e. Arson in violation of § 18.2-77 when the structure burned was occupied or a Class 3 felony violation of
 276 § 18.2-79;
 277 f. Any violation of § 18.2-89 with the intent to commit any larceny or § 18.2-92;
 278 g. Any violation of subsection A of § 18.2-374.1:1;
 279 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
 280 i. Any violation of subdivision E G 2 of § 40.1-29.
 281 D. The Parole Board shall promulgate regulations to implement the provisions of this section.

INTRODUCED

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