

Senate Bill No. 2005

(By Senators Kessler (Mr. President) and M. Hall,

By Request of the Executive)

[Introduced May 19, 2014; referred to the Committee on Finance.]

9 A BILL to amend and reenact §21-5C-1, §21-5C-2 and §21-5C-4 of the Code of West Virginia,
10 1931, as amended, as contained in chapter one hundred twenty-four, Acts of the Legislature,
11 regular session, 2014; and to amend and reenact §21-5C-6 of said code, all relating to the
12 application of minimum wage and maximum hour standards; modifying definition of
13 “employer”; clarifying definition of “hours worked”; clarifying operative dates; requiring
14 legislative rules; and authorizing promulgation of emergency rules.

15 *Be it enacted by the Legislature of West Virginia:*

16 That §21-5C-1, §21-5C-2 and §21-5C-4 of the Code of West Virginia, 1931, as amended,
17 as contained in chapter one hundred twenty-four, Acts of the Legislature, regular session, 2014, be
18 amended and reenacted; and that §21-5C-6 of said code be amended and reenacted, all to read as
19 follows:

20 **ARTICLE 5C. MINIMUM WAGE AND MAXIMUM HOURS STANDARDS FOR**

1 **EMPLOYEES.**

2 **§21-5C-1. Definitions.**

3 As used in this article:

4 (a) “Commissioner” means the Commissioner of Labor or his or her duly authorized
5 representatives.

6 (b) “Wage and hour director” means the wage and hour director appointed by the
7 Commissioner of Labor as chief of the Wage and Hour Division.

8 (c) “Wage” means compensation due an employee by reason of his or her employment.

9 (d) “Employ” means to hire or permit to work.

10 (e) “Employer” includes the State of West Virginia, its agencies, departments and all its
11 political subdivisions, any individual, partnership, association, public or private corporation, or any
12 person or group of persons acting directly or indirectly in the interest of any employer in relation to
13 an employee; and who employs during any calendar week six or more employees as herein defined
14 in any one separate, distinct and permanent location or business establishment: Provided, That prior
15 to January 1, 2015, the term “employer” does not include any individual, partnership, association,
16 corporation, person or group of persons or similar unit if eighty percent of the persons employed by
17 him or her are subject to any federal act relating to minimum wage, maximum hours and overtime
18 compensation: *Provided, however, That after December 31, 2014, for the purposes of section three*
19 of this article, the term “employer” does not include any individual, partnership, association,
20 corporation, person or group of persons or similar unit if eighty percent of the persons employed by

1 him or her are subject to any federal act relating to maximum hours and overtime compensation.

2 (f) "Employee" includes any individual employed by an employer but shall not include: (1)
3 Any individual employed by the United States; (2) any individual engaged in the activities of an
4 educational, charitable, religious, fraternal or nonprofit organization where the employer-employee
5 relationship does not in fact exist, or where the services rendered to such organizations are on a
6 voluntary basis; (3) newsboys, shoeshine boys, golf caddies, pinboys and pin chasers in bowling
7 lanes; (4) traveling salesmen and outside salesmen; (5) services performed by an individual in the
8 employ of his or her parent, son, daughter or spouse; (6) any individual employed in a bona fide
9 professional, executive or administrative capacity; (7) any person whose employment is for the
10 purpose of on-the-job training; (8) any person having a physical or mental handicap so severe as to
11 prevent his or her employment or employment training in any training or employment facility other
12 than a nonprofit sheltered workshop; (9) any individual employed in a boys or girls summer camp;
13 (10) any person sixty-two years of age or over who receives old-age or survivors benefits from the
14 Social Security Administration; (11) any individual employed in agriculture as the word agriculture
15 is defined in the Fair Labor Standards Act of 1938, as amended; (12) any individual employed as a
16 firefighter by the state or agency thereof; (13) ushers in theaters; (14) any individual employed on
17 a part-time basis who is a student in any recognized school or college; (15) any individual employed
18 by a local or interurban motorbus carrier; (16) so far as the maximum hours and overtime
19 compensation provisions of this article are concerned, any salesman, parts man or mechanic
20 primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, aircraft if

1 employed by a nonmanufacturing establishment primarily engaged in the business of selling such
2 vehicles to ultimate purchasers; (17) any employee with respect to whom the United States
3 Department of Transportation has statutory authority to establish qualifications and maximum hours
4 of service; (18) any person employed on a per diem basis by the Senate, the House of Delegates, or
5 the Joint Committee on Government and Finance of the Legislature of West Virginia, other
6 employees of the Senate or House of Delegates designated by the presiding officer thereof, and
7 additional employees of the Joint Committee on Government and Finance designated by such joint
8 committee; or (19) any person employed as a seasonal employee of a commercial whitewater
9 outfitter where the seasonal employee works less than seven months in any one calendar year and,
10 in such case, only for the limited purpose of exempting the seasonal employee from the maximum
11 wage provisions of section three of this article.

12 (g) "Workweek" means a regularly recurring period of one hundred sixty-eight hours in the
13 form of seven consecutive twenty-four hour periods, need not coincide with the calendar week, and
14 may begin any day of the calendar week and any hour of the day.

15 (h) "Hours worked" means the hours for which an employee is employed: *Provided, That*
16 in determining hours worked for the purposes of sections two and three of this article, ~~the hours for~~
17 ~~which an employee is employed~~, there shall be excluded any time spent in changing clothes or
18 washing at the beginning or end of each workday, time spent in walking, riding or traveling to and
19 from the actual place of performance of the principal activity or activities which such employee is
20 employed to perform and activities which are preliminary to or postliminary to said principal activity

1 or activities, subject to such exceptions as the commissioner may by rules and regulations define.

2 **§21-5C-2. Minimum wages.**

3 (a) *Minimum wage:*

4 (1) After June 30, 2006, every employer shall pay to each of his or her employees wages at a
5 rate not less than \$5.85 per hour.

6 (2) After June 30, 2007, every employer shall pay to each of his or her employees wages at a
7 rate not less than \$6.55 per hour.

8 (3) After June 30, 2008, every employer shall pay to each of his or her employees wages at a
9 rate not less than \$7.25 per hour.

10 (4) After ~~January 1, 2015~~ December 31, 2014, every employer shall pay to each of his or her
11 employees wages at a rate not less than \$8.00 per hour.

12 (5) After ~~January 1, 2016~~ December 31, 2015, every employer shall pay to each of his or her
13 employees wages at a rate not less than \$8.75 per hour.

14 (6) When the federal minimum hourly wage as prescribed by 29 U.S.C. §206 (a) (1) is equal
15 to or greater than the wage rate prescribed in the applicable provision of this subsection, every
16 employer shall pay to each of his or her employees wages at a rate of not less than the federal
17 minimum hourly wage as prescribed by 29 U.S.C. §206 (a) (1). The minimum wage rates required
18 under this ~~subparagraph~~ subsection shall be thereafter adjusted in accordance with adjustments made
19 in the federal minimum hourly rate. The adoption of the federal minimum wage provided by this
20 ~~subdivision~~ subsection includes only the federal minimum hourly rate prescribed in 29 U.S.C. §206

1 (a) (1) and does not include other wage rates, or conditions, exclusions, or exceptions to the federal
2 minimum hourly wage rate. In addition, adoption of the federal minimum hourly wage rate does not
3 extend or modify the scope or coverage of the minimum wage rate required under this ~~subdivision~~
4 subsection.

5 (b) *Training wage:*

6 (1) Notwithstanding the provisions set forth in subsection (a) of this section to the contrary,
7 an employer may pay an employee first hired after ~~January 1, 2015~~ June 30, 2006, a subminimum
8 training wage not less than ~~\$6.40~~ \$5.15 per hour: Provided, That an employer may pay an employee
9 first hired after December 31, 2014, a subminimum training wage not less than \$6.40 per hour.

10 (2) An employer may not pay the subminimum training wage set forth in subdivision (1) of this
11 subsection to any individual:

12 (i) (A) Who has attained or attains while an employee of the employer, the age of twenty years;

13 or

14 (ii) (B) For a cumulative period of not more than ninety days per employee: *Provided, That*
15 *if any business has not been in operation for more than ninety days at the time the employer hired*
16 *the employee, the employer may pay the employee the subminimum training wage set forth in*
17 *subdivision (1) of this subsection for an additional period not to exceed ninety days.*

18 (3) When the federal subminimum training wage as prescribed by 29 U.S.C. §206 (g) (1) is
19 equal to or greater than the wage rate prescribed in subdivision (1) of this subsection, every
20 employer shall pay to each of his or her employees wages at a rate of not less than the federal

1 ~~minimum hourly~~ subminimum training wage as prescribed by 29 U.S.C. §206 (g) (1). The
2 ~~minimum~~ subminimum training wage rates required under this ~~subparagraph~~ subsection shall be
3 thereafter adjusted in accordance with adjustments made in the federal ~~minimum hourly~~
4 subminimum training wage rate. The adoption of the federal ~~minimum~~ subminimum training wage
5 provided by this ~~subdivision~~ subsection includes only the federal ~~minimum hourly~~ subminimum
6 training wage rate prescribed in 29 U.S.C. §206 (g) (1) and does not include other wage rates, or
7 conditions, exclusions, or exceptions to the federal ~~minimum hourly~~ subminimum training wage rate.
8 In addition, adoption of the federal ~~minimum hourly~~ subminimum training wage rate does not extend
9 or modify the scope or coverage of the ~~minimum~~ subminimum training wage rate required under this
10 ~~subdivision~~ subsection.

11 (c) Notwithstanding any provision or definition to the contrary, the wages established pursuant
12 to this section are applicable to all individuals employed by the State of West Virginia, its agencies
13 and departments, regardless if the employee or employer are subject to any federal act relating to
14 minimum wage: *Provided*, That at no time may the minimum wage established pursuant to this
15 section fall below the federal minimum hourly wage as prescribed by 29 U.S.C. §206(a)(1), and at
16 no time may the subminimum training wage established pursuant to this section fall below the
17 federal subminimum training wage rate as prescribed by 29 U.S.C. §206 (g) (1).

18 **§21-5C-4. Credits.**

19 Prior to January 1, 2015, in determining whether an employer is paying an employee wages
20 and overtime compensation as provided in sections two and three of this article, there shall be

1 provided in accordance with the regulations which shall be promulgated by the commissioner a
 2 credit to the employer of ~~seventy~~ twenty percent of the hourly rate of the amount paid an employee
 3 customarily receiving gratuities, and a reasonable credit for board and lodging furnished to an
 4 employee: Provided, That after December 31, 2014, in determining whether an employer is paying
 5 an employee wages and overtime compensation as provided in sections two and three of this article,
 6 there shall be provided in accordance with the legislative rules proposed for promulgation by the
 7 commissioner a credit to the employer of seventy percent of the hourly rate of the amount paid an
 8 employee customarily receiving gratuities, and a reasonable credit for board and lodging furnished
 9 to an employee. The commissioner shall ~~promulgate regulations~~ propose legislative rules for
 10 promulgation relating to maximum allowances to employers for room and board furnished to
 11 employees: *Provided, however,* That the employer shall be required to furnish to the commissioner
 12 upon request, documentary evidence that the employee is receiving at least seventy percent of the
 13 minimum wage in gratuities or is receiving room and lodging in accordance with the rules and
 14 regulations promulgated by the commissioner.

15 **§21-5C-6. Duties and powers of commissioner of labor.**

16 (a) It shall be the duty of the commissioner to enforce and administer the provisions of this
 17 article and rules promulgated thereunder, and to promulgate such rules and regulations, in
 18 accordance with chapter twenty-nine-a of the Code of West Virginia, 1931, as amended, as shall be
 19 needful to give effect to the provisions of this article. The commissioner is authorized to promulgate
 20 emergency rules prior to January 1, 2015, to implement and administer the amendments made to this

1 article in 2014. If the commissioner makes a finding that a conflict exists between state and federal
2 standards defining employee exemptions, the commissioner is further authorized to promulgate
3 emergency rules prior to January 1, 2015, for the purpose of revising the state standards to conform
4 with federal law.

5 (b) The commissioner is authorized at reasonable times to enter the place of business of an
6 employer subject to the provisions of this article, for purposes of: (1) Inspecting and examining, and
7 copying, photographing or otherwise reproducing all payroll records of the employer directly relating
8 to wages and hours of employment of persons employed by him or her; (2) questioning or otherwise
9 examining persons employed by the employer on the subject of wages and hours of their
10 employment, and gratuities received or earned in such employment.

11 (c) The commissioner is authorized and empowered to make investigations to determine
12 whether there is reasonable cause to believe that any person is an employer as defined in section one
13 of this article, or whether there is reasonable cause to believe that any provision of this article is
14 being or has been violated.

15 (d) The commissioner is authorized and empowered to file criminal complaints against
16 persons whom the commissioner has reasonable cause to believe have committed any offense created
17 or defined by the provisions of this article.

18 (e) The commissioner is authorized and empowered to institute civil actions seeking
19 appropriate injunctive relief to compel an employer subject to this article to comply with the
20 provisions of this article.

1 (f) The commissioner shall enforce and administer the provisions of this article in accordance
2 with chapter twenty-nine-a of this code. The commissioner or his or her authorized representatives
3 are empowered to enter and inspect such places, question such employees and investigate such facts,
4 conditions, or matters as they may deem appropriate, to determine whether any person, firm or
5 corporation has violated any provision of this article, or any rule or regulation issued hereunder or
6 which may aid in the enforcement of the provisions of this article.

NOTE: The purpose of the bill is to clarify the intent of the Legislature in its enactment of Enrolled House Bill No. 4283 to increase the minimum wage, passed March 8, 2014, effective June 6, 2014. The language of the bill inadvertently imposed upon many employers of the state the provisions of state law governing maximum hours and overtime for employees. This bill provides that those employers would continue to be governed by federal law governing maximum hours and overtime as provided under existing law. The bill would also provide a consistent operative date for the substantive provisions of the amendments to the affected sections, all to be effective after December 31, 2014. Finally, the bill would require legislative rules, specify the authority of the commissioner to enforce rules, and authorize emergency rules prior to January 1, 2015, to implement and administer the amendments made to article §21-5C during 2014, and to revise employee exemptions under state law to conform with federal law.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.