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SENATE BILL DRS35188-LR-64

Short Title: Wage Theft Act.

(Public)

Sponsors: Senators Mohammed, Robinson, and Foushee (Primary Sponsors).

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT AMENDING THE LABOR LAWS OF NORTH CAROLINA TO END WAGE
3 THEFT.

4 The General Assembly of North Carolina enacts:

5 SECTION 1.(a) G.S. 95-25.2 reads as rewritten:

6 "§ 95-25.2. Definitions.

7 ~~In this Article, unless the context otherwise requires:~~The following definitions apply in this
8 Article:

- 9 (1) ~~"Agriculture" includes farming~~Agriculture. – Farming in all its branches
10 performed by a farmer or on a farm as an incident to or in conjunction with
11 farming operations.
- 12 (2) ~~"Commissioner" means the Commissioner.~~ – The Commissioner of Labor.
- 13 (3) ~~"Employ" means to Employ.~~ – To suffer or permit to work.
- 14 (4) ~~"Employee" includes any Employee.~~ – Any individual employed by an
15 employer.
- 16 (5) ~~"Employer" includes any Employer.~~ – Any person acting directly or indirectly
17 in the interest of an employer in relation to an employee.
- 18 (5a) Employment status. – The status of an individual, under the usual common
19 law rules applicable in determining the employee-employer relationship, as an
20 employee or as an independent contractor (or other individual who is not an
21 employee).
- 22 (5b) Enterprise. – The related activities performed either through unified
23 operations or common control by any person or persons for a common
24 business purpose and includes all such activities whether performed in one or
25 more establishments or by one or more corporate units but shall not include
26 the related activities performed for such enterprise by an independent
27 contractor or franchisee.
- 28 (6) ~~"Establishment" means a~~Establishment. – A physical location where business
29 is conducted.
- 30 (7) ~~"The Fair Labor Standards Act" means the Fair Labor Standards Act.~~ – The
31 Fair Labor Standards Act of 1938, as amended and as the same may be
32 amended from time to time by the United States Congress.
- 33 (8) ~~"Hours worked" includes all~~Hours worked. – All time an employee is
34 employed.
- 35 (8a) Intentional. – The employer consciously committed the act which violated the
36 statute.



- 1 (9) ~~"Payday" means that~~ Payday. – That day designated for payment of wages due
2 by virtue of the employment relationship.
- 3 (10) ~~"Pay periods" may~~ Pay periods. – May be daily, weekly, biweekly,
4 semimonthly, or monthly.
- 5 (11) ~~"Person" means an~~ Person. – An individual, partnership, association,
6 corporation, business trust, legal representative, or any organized group of
7 persons. For the purposes of G.S. 95-25.2, G.S. 95-25.3, G.S. 95-25.14, and
8 G.S. 95-25.20, it also means the State of North Carolina, any city, town,
9 county, or municipality, or any State or local agency or instrumentality of
10 government. The Government of the United States and any agency of the
11 United States (including the United States Postal Service and Postal Rate
12 Commission) are not included as persons for any purpose under this Article.
- 13 (12) ~~"Seasonal food service establishment" means a~~ Seasonal food service
14 establishment. – A restaurant, food and drink stand or other establishment
15 generally recognized as a commercial food service establishment, preparing
16 and serving food to the public but operating 180 days or less per year.
- 17 (13) ~~"Seasonal religious or nonprofit educational conference center or a seasonal~~
18 ~~amusement or recreational establishment" means an~~ Seasonal religious or
19 nonprofit educational conference center or a seasonal amusement or
20 recreational establishment. – An establishment which does not operate for
21 more than seven months in any calendar year, or during the preceding calendar
22 year had average receipts for any six months of such year of not more than
23 thirty-three and one-third percent (33 1/3%) of its average receipts for the
24 other six months of that year.
- 25 (14) ~~"Tipped employee" means any~~ Tipped employee. – Any employee who
26 customarily receives more than twenty dollars (\$20.00) a month in tips.
- 27 (15) ~~"Tip" shall mean any~~ Tip. – Any money or part thereof over and above the
28 actual amount due a business for goods, food, drink, services or articles sold
29 which is paid in cash or by credit card, or is given to or left for an employee
30 by a patron or patrons of the business where the employee is employed.
- 31 (16) ~~"Wage" Wage.~~ Wage. – Wage paid to an employee means compensation for labor or
32 services rendered by an employee whether determined on a time, task, piece,
33 job, day, commission, or other basis of calculation, and the reasonable cost as
34 determined by the Commissioner of furnishing employees with board,
35 lodging, or other facilities. For the purposes of G.S. 95-25.6 through
36 G.S. 95-25.13 "wage" includes sick pay, vacation pay, severance pay,
37 commissions, bonuses, and other amounts promised when the employer has a
38 policy or a practice of making such payments.
- 39 (16a) Willful. – The employer knew or showed reckless disregard for the issue of
40 whether the employer's conduct was prohibited by the act.
- 41 (17) ~~"Workweek" means any~~ Workweek. – Any period of 168 consecutive hours.
- 42 (18) ~~"Enterprise" means the related activities performed either through unified~~
43 ~~operations or common control by any person or persons for a common~~
44 ~~business purpose and includes all such activities whether performed in one or~~
45 ~~more establishments or by one or more corporate units but shall not include~~
46 ~~the related activities performed for such enterprise by an independent~~
47 ~~contractor or franchisee."~~

48 **SECTION 1.(b)** G.S. 95-25.13 reads as rewritten:

49 **"§ 95-25.13. Notification, posting, and records.**

50 Every employer shall:

- 1 (1) Notify its ~~employees, orally or~~ employees in writing at the time of hiring, and
 2 upon any material change, of the following information:
 3 a. The promised ~~wages and the day~~ wages and the basis upon which the
 4 promised wages will be calculated (for example, per hour or per piece).
 5 b. The method, day, and place for ~~payment;~~ payment.
 6 c. The full name, mailing address, and telephone number of the employer
 7 and the federal and State tax identification number of each employer
 8 who is not a natural person.
 9 d. The employment status of the employee. Such notification or
 10 classification by the employer shall not be determinative of the
 11 employee's actual employment status.
 12 (2) Make available to its employees, in writing or through a posted notice
 13 maintained in a place accessible to its employees, employment practices and
 14 policies with regard to promised wages;
 15 (3) Notify employees, in writing or through a posted notice maintained in a place
 16 accessible to its employees, at least 24 hours prior to any changes in promised
 17 wages. Wages may be retroactively increased without the prior notice required
 18 by this subsection; and
 19 (4) Furnish each employee with an itemized statement of deductions made from
 20 that employee's wages under G.S. 95-25.8 and with the information required
 21 by 13 NCAC 12 .0801(6) and 13 NCAC 12 .0801(8) through (13) for each
 22 pay period such deductions are made."

23 **SECTION.1.(c)** G.S. 95-25.22 reads as rewritten:

24 "**§ 95-25.22. Recovery of unpaid wages.**

25 (a) Any employer who violates the provisions of G.S. 95-25.3 (Minimum Wage),
 26 G.S. 95-25.4 (Overtime), or G.S. 95-25.6 through 95-25.12 (Wage Payment) shall be liable to
 27 the employee or employees affected in the amount of their unpaid minimum wages, their unpaid
 28 overtime compensation, or their unpaid amounts due under G.S. 95-25.6 through G.S. 95-25.12,
 29 as the case may be, plus interest at the legal rate set forth in G.S. 24-1, from the date each amount
 30 first came due.

31 (a1) In addition to the amounts awarded pursuant to subsection (a) of this section, the court
 32 shall award liquidated damages in an amount equal to twice the amount found to be due as
 33 provided in subsection (a) of this section, provided that if the employer shows to the satisfaction
 34 of the court that the act or omission constituting the violation was in good faith and that the
 35 employer had reasonable grounds for believing that the act or omission was not a violation of
 36 this Article, the court may, in its discretion, award no liquidated damages or may award any
 37 amount of liquidated damages not exceeding twice the amount found due as provided in
 38 subsection (a) of this section.

39 (a2) Any employer who violates the provisions of G.S. 95-25.13 or any rule adopted under
 40 that section shall be liable to the employee or employees affected in the amount of their actual
 41 damages, including, but not limited to, lost wages and benefits plus interest.

42 (a3) In addition to the amounts awarded pursuant to subsections (a), (a1), and (a2) of this
 43 section, if the court finds that the employer has intentionally violated any provision of this Article
 44 or any regulation issued pursuant to this Article, the court shall award statutory damages of up to
 45 five hundred dollars (\$500.00) per employee per violation. Factors to be considered in setting the
 46 amount of statutory damages include the nature and persistence of the violations and the extent
 47 of the employer's culpability.

48 (b) Action to recover such liability may be maintained in the General Court of Justice by
 49 any one or more employees.

50 (c) Action to recover such liability may also be maintained in the General Court of Justice
 51 by the Commissioner at the request of the employees affected. Any sums thus recovered by the

1 Commissioner on behalf of an employee shall be held in a special deposit account and shall be
2 paid directly to the employee or employees affected.

3 (d) The court, in any action brought under this Article ~~may, shall,~~ in addition to any
4 judgment awarded plaintiff, order costs and fees of the action and reasonable attorneys' fees to
5 be paid by the defendant. In an action brought by the Commissioner in which a default judgment
6 is entered, the clerk shall order attorneys' fees of three hundred dollars (\$300.00) to be paid by
7 the defendant.

8 The court may order costs and fees of the action and reasonable attorneys' fees to be paid by
9 the plaintiff if the court determines that the action was frivolous.

10 (e) The Commissioner is authorized to determine and supervise the payment of the
11 amounts due under this section, including interest at the legal rate set forth in G.S. 24-1, from the
12 date each amount first came due, and the agreement to accept such amounts by the employee
13 shall constitute a waiver of the employee's right to bring an action under subsection (b) of this
14 section.

15 (f) Actions under this section must be brought within two years pursuant to
16 ~~G.S. 1-53~~ G.S. 1-53, except that an action arising out of a willful violation may be brought within
17 three years. Actions may also be brought within one year after notification to the employee of
18 final disposition by the State of a complaint for the same violation.

19 (g) Prior to initiating any action under this section, the Commissioner shall exhaust all
20 administrative remedies, including giving the employer the opportunity to be heard on the matters
21 at issue and giving the employer notice of the pending action."

22 **SECTION 1.(d)** G.S. 95-25.23 reads as rewritten:

23 "**§ 95-25.23. Violation of provisions on minimum wage, overtime, wage payment,**
24 **withholding of wages, notification, and youth employment; civil penalty.**

25 (a) Any employer who violates the provisions of G.S. 95-25.3 (Minimum Wage),
26 G.S. 95-25.4 (Overtime), G.S. 95-25.5 (Youth Employment)-Employment), G.S. 95-25.6 (Wage
27 Payment), or G.S. 95-25.13 (Notification), or any regulation issued thereunder, shall be subject
28 to a civil penalty not to exceed five hundred dollars (\$500.00) for the first violation and not to
29 exceed one thousand dollars (\$1,000) for each subsequent violation. In determining the amount
30 of such penalty, the appropriateness of such penalty to the size of the business of the person
31 charged and the gravity of the violation shall be considered. The determination by the
32 Commissioner shall be final, unless within 15 days after receipt of notice thereof by certified
33 mail with return receipt, by signature confirmation as provided by the U.S. Postal Service, by a
34 designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) with delivery receipt,
35 or via hand delivery, the person charged with the violation takes exception to the determination,
36 in which event final determination of the penalty shall be made in an administrative proceeding
37 pursuant to Article 3 of Chapter 150B and in a judicial proceeding pursuant to Article 4 of
38 Chapter 150B.

39 (b) The amount of such penalty when finally determined may be recovered in the manner
40 set forth in G.S. 95-25.23B.

41 (c) The clear proceeds of civil penalties provided for in this section shall be remitted to
42 the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

43 (d) Assessment of penalties under this section shall be subject to a ~~two-year~~ three-year
44 statute of limitations commencing at the time of the occurrence of the violation."

45 **SECTION 1.(e)** Article 2A of Chapter 95 of the General Statutes is amended by
46 adding a new section to read:

47 "**§ 95-25.23D. Wage claims; liens; collections.**

48 (a) For the purposes of wage claims and collections under this Article, an employee is
49 entitled to a lien upon:

50 (1) All property of the employer, real or personal, located in this State.

1 (2) All property upon which the employee has performed work at the instance of
2 the owner or of any person acting by the employer's authority or under him or
3 her as contractor or otherwise, for the full amount of the wages and any
4 statutory penalties owed.

5 (b) Both a wage claim and an action to enforce a lien under this section may be brought
6 by the employee individually or by the Commissioner or any representative of the employee on
7 behalf of the employee, including collective bargaining representatives.

8 (c) If no lien has been recorded at the time the employee files his or her complaint with
9 the Commissioner, the Commissioner shall record and provide notice of the lien on behalf of the
10 employee.

11 (d) Any number of wage claims or wage deficiencies against the same employer may be
12 joined in a single proceeding, but the court may order separate trials or hearings. If the proceeds
13 of the sale of the property subject to a lien are insufficient to pay all of the claimants, whether or
14 not such claims have been joined together, the court shall order the claimants to be paid in
15 proportion to the amount due each claimant.

16 (e) An employee's lien upon personal property shall be limited to such property as can be
17 made subject to a security interest under the Commercial Code by the filing of a financing
18 statement.

19 (f) In order to enforce a lien under this section upon real property, a claim of lien must
20 be recorded with the county recorder in the county where the property is located, as follows:

21 (1) The claim shall include all of the applicable information set forth under
22 G.S. 44A-12.

23 (2) The notice of lien shall be served on the property owner in the manner
24 prescribed by G.S. 44A-11.

25 A lien under this section is perfected as soon as notice is provided as required by this
26 subsection.

27 (g) In order to enforce a lien under this section upon personal property, the
28 Commissioner, employee representative, or employee shall file the notice of the lien in the office
29 of the Secretary of State and serve a copy of the notice by personal service to the employer in the
30 same manner as a summons, or by mail. The office of the Secretary of State shall place the notice
31 of the lien in the same file as the financing statements pursuant to G.S. 25-9-310. The notice shall
32 specify the nature and amount of the claim, describe the property on which the lien is made, and
33 state that the person filing the notice claims a lien on that property.

34 (h) The lien may be filed at any time prior to the expiration of the statute of limitations
35 for a wage claim on the same wages pursuant to G.S. 95-25.22(f).

36 (i) Mistakes or errors in the claimed amount owed shall not invalidate the lien unless
37 made with the intent to defraud.

38 (j) If a lien is recorded pursuant to subsection (f) of this section and an action to recover
39 unpaid wages has been filed, then that action shall also be deemed an action to foreclose upon
40 any property subject to the recorded lien. In the judgment resulting from such an action, the court
41 may order the sale at sheriff's auction or the transfer to the plaintiff of title or possession of any
42 property subject to the lien. Whether or not the court makes such an order as part of the judgment,
43 a writ of sale may be issued for any property subject to the lien at any point after a judgment for
44 unpaid wages is issued.

45 (k) If judgment is entered in favor of the employer in an action for unpaid wages or if the
46 case is dismissed with prejudice, the lien shall be extinguished upon expiration of the applicable
47 appeals period if no appeal is filed. If an appeal is filed, the lien shall continue in force until all
48 issues on appeal have been decided.

49 (l) If an action to recover the wages is not brought within one year of the filing of the
50 lien, the lien created by this section shall be extinguished.

1 (m) A lien recorded pursuant to subsection (f) of this section takes precedence over all
2 other debts, judgments, decrees, liens, or mortgages against the employer, regardless as to
3 whether these debts, judgments, decrees, liens, or mortgages originate before or after the wage
4 lien, and regardless of whether these debts, judgments, decrees, liens, or mortgages were
5 perfected prior to the wage lien. An employee's lien is effective against the employer, the estate
6 of the employer, or a subsequent bona fide purchaser of the property subject to the employee's
7 lien.

8 (n) The employee, the Commissioner, or the employee's representative, as assignee of the
9 employee, is entitled to court costs and reasonable attorneys' fees for filing a successful action to
10 foreclose a lien pursuant to this section."

11 **SECTION 2.** This act is effective when it becomes law and applies to employers and
12 employees on or after that date.