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H. B. 2120

(By Delegate Rodighiero)
[Introduced January 12, 2011; referred to the
Committee on Energy, Industry and Labor, Economic
Development and Small Business then Finance.]

A BILL to amend and reenact §21-5C-3 of the Code of West Virginia,
1931, as amended, relating to minimum wage and maximum hours
standards for employers.

Be it enacted by the Legislature of West Virginia:

That §21-5C-3 of the Code of West Virginia, 1931, as amended,
be amended and reenacted to read as follows:

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

§21-5C-3. Maximum hours; overtime compensation.

(a) On and after July 1, 1980, no employer shall employ any of
his or her employees for a workweek longer than forty hours, unless
such employee receives compensation for his or her employment in
excess of the hours above specified at a rate of not less than one
and one-half times the regular rate at which he or she is employed.

1 When an employee is required to work on a state recognized holiday,
2 that employee shall be paid at a rate of not less than one and one-
3 half times the regular rate at which he or she is employed
4 irregardless if that shift is in excess of a forty-hour workweek.

5 (b) As used in this section the "regular rate" at which an
6 employee is employed shall be deemed to include all remuneration
7 for employment paid to, or on behalf of, the employee, but shall
8 not be deemed to include:

9 (1) Sums paid as gifts; payments in the nature of gifts made
10 at Christmas time or on other special occasions, as a reward for
11 service, the amounts of which are not measured by or dependent on
12 hours worked, production, or efficiency;

13 (2) Payments made for occasional periods when no work is
14 performed due to vacation, holiday, illness, failure of the
15 employer to provide sufficient work, or other similar cause;
16 reasonable payments for traveling expenses, or other expenses,
17 incurred by an employee in the furtherance of his or her employer's
18 interests and properly reimbursable by the employer, and other
19 similar payments to an employee which are not made as compensation
20 for his or her hours of employment;

21 (3) Sums paid in recognition of services performed during a
22 given period if either: (a) Both the fact that payment is to be
23 made and the amount of the payment are determined at the sole
24 discretion of the employer at or near the end of the period and not

1 pursuant to any prior contract, agreement or promise causing the
2 employee to expect such payments regularly; or (b) the payments are
3 made pursuant to a bona fide profit-sharing plan or trust or bona
4 fide thrift or savings plan, meeting the requirements of the
5 commissioner set forth in appropriate regulation which he or she
6 shall issue, having due regard among other relevant factors, to the
7 extent to which the amounts paid to the employee are determined
8 without regard to hours of work, production or efficiency; or (c)
9 the payments are talent fees (as such talent fees are defined and
10 delimited by regulations of the commissioner) paid to performers,
11 including announcers, on radio and television programs;

12 (4) Contributions irrevocably made by an employer to a trustee
13 or third person pursuant to a bona fide plan for providing old-age,
14 retirement, life, accident, or health insurance or similar benefits
15 for employees;

16 (5) Extra compensation provided by a premium rate paid for
17 certain hours worked by the employee in any day or workweek because
18 such hours are hours worked in excess of eight in a day or in
19 excess of the maximum workweek applicable to such employee under
20 subsection (a) or in excess of the employee's normal working hours
21 or regular working hours, as the case may be;

22 (6) Extra compensation provided by a premium rate paid for
23 work by the employee on Saturdays, Sundays, holidays or regular
24 days of rest, or on the sixth or seventh day of the workweek, where

1 such premium rate is not less than one and one-half times the rate
2 established in good faith for like work performed in nonovertime
3 hours on other days; or

4 (7) Extra compensation provided by a premium rate paid to the
5 employee, in pursuance of an applicable employment contract or
6 collective bargaining agreement, for work outside of the hours
7 established in good faith by the contract or agreement as the
8 basic, normal or regular workweek where such premium rate is not
9 less than one and one-half times the rate established in good faith
10 by the contract or agreement for like work performed during such
11 workweek.

12 (c) No employer shall be deemed to have violated subsection
13 (a) by employing any employee for a workweek in excess of the
14 maximum workweek applicable to such employee under subsection (a)
15 if such employee is employed pursuant to a bona fide individual
16 contract, or pursuant to an agreement made as a result of
17 collective bargaining by representatives of employees, if the
18 duties of such employee necessitate irregular hours of work, and
19 the contract or agreement: (1) Specifies a regular rate of pay of
20 not less than the minimum hourly rate provided in section two and
21 compensation at not less than one and one-half times such rate for
22 all hours worked in excess of such maximum workweek; and (2)
23 provides a weekly guaranty of pay for not more than sixty hours
24 based on the rates so specified.

1 (d) No employer shall be deemed to have violated subsection
2 (a) by employing any employee for a workweek in excess of the
3 maximum workweek applicable to such employee under such subsection
4 if, pursuant to an agreement or understanding arrived at between
5 the employer and the employee before performance of the work, the
6 amount paid to the employee for the number of hours worked by him
7 or her in such workweek in excess of the maximum workweek
8 applicable to such employee under such subsection:

9 (1) In the case of an employee employed at piece rates, is
10 computed at piece rates not less than one and one-half times the
11 bona fide piece rates applicable to the same work when performed
12 during nonovertime hours; or

13 (2) In the case of an employee performing two or more kinds of
14 work for which different hourly or piece rates have been
15 established, is computed at rates not less than one and one-half
16 times such bona fide rates applicable to the same work when
17 performed during nonovertime hours; or

18 (3) Is computed at a rate not less than one and one-half times
19 the rate established by such agreement or understanding as the
20 basic rate to be used in computing overtime compensation
21 thereunder: *Provided*, That the rate so established shall be
22 authorized by regulation by the commissioner as being substantially
23 equivalent to the average hourly earnings of the employee,
24 exclusive of overtime premiums, in the particular work over a

1 representative period of time; and if (i) the employee's average
2 hourly earnings for the workweek exclusive of payments described in
3 subdivisions (1) through (7) of subsection (b) are not less than
4 the minimum hourly rate required by applicable law, and (ii) extra
5 overtime compensation is properly computed and paid on other forms
6 of additional pay required to be included in computing the regular
7 rate.

8 (e) Extra compensation paid as described in subdivisions (5),
9 (6) and (7) of subsection (b) shall be creditable toward overtime
10 compensation payable pursuant to this section.

11 (f) (1) Employees of county and municipal governments may
12 receive, in accordance with this subsection and in lieu of overtime
13 compensation, compensatory time off at a rate not less than one and
14 one-half hours for each hour of employment for which overtime is
15 required pursuant to this section.

16 (2) County and municipal governments may provide compensatory
17 time under subdivision (1) of this subsection, only pursuant to a
18 written agreement arrived at between the employer and employee
19 before the performance of the work, and recorded in the employer's
20 record of hours worked, and if the employee has not accrued
21 compensatory time in excess of the limit prescribed in subdivision
22 (3) of this subsection. Any written agreement may be modified at
23 the request of either the employer or the employee, but under no
24 circumstances shall changes in the agreement deny an employee

1 compensatory time heretofore acquired.

2 (3) An employee may accrue up to four hundred eighty hours of
3 compensatory time if the employee's work is a public safety
4 activity, an emergency response activity or a seasonal activity.
5 An employee engaged in other work for a county or municipal
6 government may accrue up to two hundred forty hours of compensatory
7 time. Any such employee who has accrued four hundred eighty or two
8 hundred forty hours of compensatory time, as the case may be, shall
9 for additional overtime hours of work, be paid overtime
10 compensation. If compensation is paid to an employee for accrued
11 compensatory time off, such compensation shall be paid at the
12 regular rate earned by the employee at the time the employee
13 receives such payment.

14 (4) An employee who has accrued compensatory time off
15 authorized to be provided under subdivision (1) of this subsection
16 shall, upon termination of employment, be paid for the unused
17 compensatory time at a rate of compensation not less than:

18 (A) The average regular rate received by such employee during
19 the last three years of the employee's employment; or

20 (B) The final regular rate received by such employee,
21 whichever is higher.

22 (5) An employee of a county or municipal government:

23 (A) Who has accrued compensatory time off authorized to be
24 provided under subdivision (1) of this subsection; and

1 (B) Who has requested the use of such compensatory time, shall
2 be permitted by the employee's employer to use such time within a
3 reasonable time after making the request if the use of the
4 compensatory time does not unduly disrupt the operation of the
5 public agency. Compensatory time must be used within one year from
6 the time it was acquired.

7 (6) For purposes of this subsection the terms "compensatory
8 time" and "compensatory time off" mean hours during which an
9 employee is not working, which are not counted as hours worked
10 during the applicable workweek or other work period for purposes of
11 overtime compensation, and for which the employee is compensated at
12 the employee's regular rate.

NOTE: The purpose of this bill is to provide overtime pay for all employees who are required to work holidays regardless if the holiday hours are in excess of a forty-hour workweek.

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