COMMONWEALTH of VIRGINIA

Office of the Governor

G. Bryan Slater
Secretary of Labor

November 1, 2022

Governor Glenn Youngkin

The Honorable Janet Howell
Chair, Senate Finance and Appropriations Committee
Virginia General Assembly
900 East Main Street
Richmond, Virginia 23219

The Honorable Richard L. Saslaw
Chair, Senate Commerce and Labor Committee
Virginia General Assembly
900 East Main Street
Richmond, Virginia 23219

The Honorable Barry D. Knight
Chair, House Appropriations Committee
Virginia General Assembly
900 East Main Street
Richmond, Virginia 23219

The Honorable Kathy J. Byron
Chair, House Commerce and Energy Committee
Virginia General Assembly
900 East Main Street
Richmond, Virginia 23219

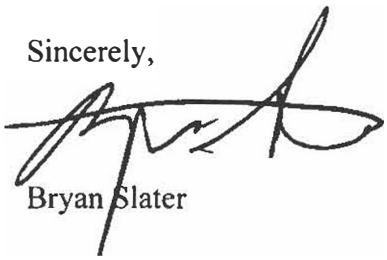
Dear Governor Youngkin, Senator Howell, Senator Saslaw, Delegate Knight, and Delegate Byron:

Senate Bill 31 (Barker) and House Bill 1173 (Ware) directed the Secretary of Labor to convene a work group of representatives from the business, labor, legal, and state and local government sectors along with two members each of the Senate and House to review overtime issues in the Code of Virginia and report its findings by November 1, 2022. The work group was also

charged with reviewing and reporting on specific issues raised by stakeholders and interested parties regarding concerns or clarification on issues that may or may not have been addressed in the two enrolled bills.

Attached is the report on the work group's findings and recommendations to the Governor and the Chairs of the House Committees on Appropriations and Commerce and Energy and the Senate Committees on Finance and Appropriations and Commerce and Labor.

Sincerely,



Bryan Slater

REPORT OF THE SECRETARY OF LABOR

2022 OVERTIME WORK GROUP (HOUSE BILL 1173, SENATE BILL 631)

TO THE GOVERNOR AND CHAIRMEN OF THE HOUSE COMMITTEES ON APPROPRIATIONS AND COMMERCE AND ENERGY AND THE SENATE COMMITTEES ON FINANCE AND APPROPRIATIONS AND COMMERCE AND LABOR

COMMONWEALTH OF VIRGINIA
RICHMOND
NOVEMBER 1, 2022

Preface

Senate Bill 631 (Barker) and House Bill 1173 (Ware) direct the Secretary of Labor to convene a work group to review overtime issues in the Code.

The legislation states the work group shall include "representatives from the business, labor, and legal sectors and state and local governments." The work group shall also include two members of the Senate and House each.

The work group shall submit a report on its findings and recommendations to the Governor and the Chairmen of the House Committees on Appropriations and Commerce and Energy and the Senate Committees on Finance and Appropriations and Commerce and Labor by November 1, 2022.

Senate Bill 631 and House Bill 1173 were introduced to amend the 2021 General Assembly's Overtime Wage Act. The goal of the 2021 Overtime Wage Act was to codify the federal overtime provisions under the Fair Labor Standards Act (FLSA) and provide a private cause of action for an employee to file a lawsuit in state court related to employer violations.

However, after it went into effect in July 2021, it was determined the Overtime Wage Act did not fully align with federal overtime provisions including the omission of a number of exemptions for specific industries, how overtime was calculated, etc.

Senate Bill 631 and House Bill 1173 replaced provisions of the 2021 Virginia Overtime Wage Act to align Virginia's overtime law with the federal Fair Labor Standards Act, including all applicable exemptions, overtime calculation methods, methods of overtime payment, and other overtime provisions within the federal FLSA.

It retains the private cause of action for an employee to file a case in state court.

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Executive Summary

The Overtime Work Group identified six issues arising out of Senate Bill 631 and House Bill 1173 that amended the 2021 Overtime Wage Act. The Work Group was looking at issues that might require legislative action to address. The six issues and the Work Group recommendations were:

Issue 1. *Should DOLI's Labor and Employment Law Division be allowed to collect the overtime premium on behalf of claimants that come to it for collection of wages owed?*

Recommendation: DOLI should be authorized to collect overtime on behalf of complainants. This allows the complainant to make the best choice for them to address their complaint.

Issue 2. *Should definitions of "good faith exception" and "reasonable grounds" be included in Code to guide state decisions on liquidated damages?*

Recommendation: Good faith determination and definition is currently laid out in court decisions, and codifying a definition might make the Virginia statute out of step with future federal or legal determinations and unnecessarily create a conflict.

Issue 3. *Should the penalty regimes in the payment of wage statute and the overtime wage statute be harmonized to avoid confusion?*

Recommendation: Our system allows and encourages Virginia and its courts to resolve employment pay dispute without mirroring the federal system. Plaintiffs are masters of their complaint and can choose Virginia's system or the federal courts. This question confronts many litigants and does not require General Assembly intervention to resolve – in fact, harmonizing the language would likely remove the plaintiffs' choice altogether. Keeping the current legislation intact preserves that choice and gives the most flexibility to future litigants. Any possible legal confusion over penalties should be resolved by the courts and if it proves to be an ongoing problem can be resolved by future legislation. DOLI shall produce a guidance document on the penalty provisions of the two statutes with the input of stakeholders.

NOTE: DOLI has produced the guidance document and it is attached as Appendix E.

Issue 4. *Should the statute of limitation in the payment of wage statute and the overtime wage statute be harmonized to avoid confusion?*

Recommendation: Our system allows and encourages Virginia and its courts to resolve employment pay dispute without mirroring the federal system. Plaintiffs are masters of their complaint and can choose Virginia's system or the federal courts. This question confronts many litigants and does not require General Assembly intervention. All feedback received from stakeholders and the public supports this position. Keeping the current legislation intact preserves that choice and gives the most flexibility to future litigants. Any possible legal

confusion over the statutes of limitation should be resolved by the courts and if it proves to be an ongoing problem can be resolved by future legislation. DOLI shall produce a guidance document on the statute of limitation provisions of the two statutes with the input of stakeholders.

NOTE: DOLI has produced the guidance document and it is attached as Appendix E

Issue 5. *Certain employees are exempt from overtime when doing agricultural work under provisions of* 29 U.S. Code § 213(a)(6), *Should this exemption be continued or eliminated from Virginia law?*

Recommendation: Agriculture is a traditional, long-standing industry in Virginia and that kind of substantial alteration deserves the full attention of the General Assembly. If the law needs to be changed, the people's representatives need to determine that for the people.

Issue 6. *Certain domestic service employees providing companion care services are exempt from overtime under* 29 U.S. Code § 213(a)(15), *made applicable in Virginia by* § 40.1-29.2. *Should this exemption be continued or eliminated from Virginia law?*

Recommendation: Domestic service employees providing companion care services is a newer issue and somewhat unique employment relationship. If the law needs to be changed, the people's representatives need to determine that for the people.

Overtime Work Group Meeting, August 5, 2022

The Overtime Work Group held its first meeting on August 5, 2022. Secretary of Labor G. Bryan Slater convened the work group to review overtime issues under § 40.1-29.2 of the Code with representatives of business, labor, and state and local government — both in person and virtually. Members of the Senate and the House of Delegates also participated in the initial meeting. Members of the work group each presented their issues and concerns during the meeting with some brief discussion of the items raised. The issues discussed at the meeting are detailed below. Secretary Slater would like to gather input for the public on these items. Additional meetings are set for September 12 or 13th and October 7 to discuss these issues and produce the report due by November 1, 2022.

Issues Discussed and Questions Identified During August 5, 2022 Meeting

1. Currently, the Department of Labor and Industry (DOLI) does not have authority to collect the overtime premium for hours worked over 40 hours in a week. DOLI can collect employees' straight time pay for weekly hours over 40, but DOLI cannot collect the 50% overtime premium.

Should DOLI's Labor and Employment Law Division be allowed to collect the overtime premium on behalf of claimants that come to it for collection of wages owed?

2. Under the FLSA provisions included in Virginia Law by § 40.1-29.2, employees are entitled to liquidated damages if they prevail on a claim for unpaid overtime. Employers who show they acted in "good faith" and had "reasonable grounds" for believing that the act or omission was not a violation of the FLSA have been excused from having to pay the liquidated damages under federal law (Portal to Portal Act of 1947). As quoted from the Congressional Record, a federal court decision and in 29 CFR § 790.15, "'Good faith' requires that the employer have honesty of intention and no knowledge of circumstances which ought to put him upon inquiry."

Should definitions of "good faith exception" and "reasonable grounds" be included in Code to guide state decisions on liquidated damages?

3. Section 40.1-29.2 makes an employer liable to its employee for the remedies, damages, or other relief available under the federal FLSA. Under § 40.1-29.G for payment of wage cases brought by DOLI, employees are entitled to liquidated damages without reduction for the employers good faith. Under § 40.1-29.J employees are entitled to liquidated damages without reduction if they prevail in a payment of wage case they brought, as well an additional amount equal to the wages owed if the court finds willful conduct on the part of the employer. The potential for confusion between these two penalty schemes exists particularly where an employee brings a case for both unpaid regular hours and overtime. The issue of the proper penalty could be raised in litigation of these cases.

Should the penalty regimes in the payment of wage statute and the overtime wage statute be harmonized to avoid confusion?

4. The current statute of limitations for bringing suit for an employer's failure to pay regular wages is three years under § 40.1-29.L. For overtime pay, Virginia's statute follows the FLSA statute of limitations of two years — unless there is willful conduct on the part of the employer, in which case the employee gets an extra year to file their case. The potential for confusion between these two statutes of limitation exists particularly where an employee brings a case for both unpaid regular hours and overtime. The issue of the proper time to file would be a particular issue if a case were filed in federal court after the two-year federal statute has passed. This could be raised in litigation of these cases.

Should the statute of limitation in the payment of wage statute and the overtime wage statute be harmonized to avoid confusion?

5. Certain employees are exempt from overtime when doing agricultural work under provisions of 29 U.S. Code § 213(a)(6) — for example employees traditionally paid piece rate, made applicable in Virginia by § 40.1-29.2.

Should this exemption be continued or eliminated from Virginia law?

6. Certain domestic service employees providing companion care services are exempt from overtime under 29 U.S. Code § 213(a)(15), made applicable in Virginia by § 40.1-29.2.

Should this exemption be continued or eliminated from Virginia law?

NOTE: There was much discussion about how the law as it currently stands should be preserved and that the law should be as easy and clear to understand as possible. Many of the attendees wanted to maintain the language and exemptions contained in the current law, such as the provision of compensatory leave for local and state government employees, the new language on overtime for derivative carriers, and exemptions for employees of auto dealers.

Comments concerning the maintenance or removal of other exemptions are welcomed.

Overtime Work Group Meeting, September 23, 2022

The Overtime Work Group held its second meeting on September 23, 2022. Secretary of Labor G. Bryan Slater convened the work group to discuss the six questions raised at the August 5 meeting of the group. The meeting began with a summary of the public comments received prior to the meeting (*See Appendix A*) and followed with discussions about the draft answers to each question posed at the first meeting. The public comments and work group discussions are combined for each of the questions proposed.

Overtime Work Group Proposed Responses to Questions

1. Currently, the Department of Labor and Industry (DOLI) does not have authority to collect the overtime premium for hours worked over 40 hours in a week. DOLI can collect employees' straight time pay for weekly hours over 40 but DOLI cannot collect the 50% overtime premium.

   Should DOLI's Labor and Employment Law Division be allowed to collect the overtime premium on behalf of claimants that come to it for collection of wages owed?

   a. None of the public comments took a position on this item.
   b. **Proposed response**: DOLI should be authorized to collect overtime on behalf of complainants. This allows the complainant to make the best choice for them to address their complaint. The discussion on this response centered around the current wage collection process of DOLI and how that would be impacted if the ability to collect the overtime premium was added. The concern was that the overtime provisions are more complex than regular pay issues and would be difficult for DOLI to enforce. The group approved the proposed response as drafted with one negative vote.

2. Under the FLSA provisions included in Virginia law by § 40.1-29.2, employees are entitled to liquidated damages if they prevail on a claim for unpaid overtime. Employers who show they acted in "good faith" and had "reasonable grounds" for believing that the act or omission was not a violation of the FLSA have been excused from having to pay the liquidated damages under federal law (Portal to Portal Act of 1947). As quoted from the Congressional Record, a federal court decision and in 29 CFR § 790.15 "Good faith" requires that the employer have honesty of intention and no knowledge of circumstances which ought to put him upon inquiry.

   Should definitions of "good faith exception" and "reasonable grounds" be included in Code to guide state decisions on liquidated damages?

   a. The commenters felt that there was no need to include the definitions in the Code, but, if necessary, DOLI could issue guidance on the application of these issues as appropriate.

b. **Proposed response:** Good faith determination and definition is currently laid out in court decisions, and codifying a definition might make the Virginia statute out of step with future federal or legal determinations and unnecessarily create a conflict.
c. The group was in agreement with the commenters and the group approved the answer as drafted.

3. Section 40.1-29.2 makes an employer liable to its employee for the remedies, damages, or other relief available under the federal FLSA. Under § 40.1-29.G for payment of wage cases brought by DOLI, employees are entitled to liquidated damages without reduction for the employers good faith. Under § 40.1-29.J employees are entitled to liquidated damages without reduction if they prevail in a payment of wage case they brought as well an additional amount equal to the wages owed if the court finds willful conduct on the part of the employer. The potential for confusion between these two penalty schemes exists particularly where an employee brings a case for both unpaid regular hours and overtime. The issue of the proper penalty could be raised in litigation of these cases.

   Should the penalty regimes in the payment of wage statute and the overtime wage statute be harmonized to avoid confusion?
   a. The commenters suggested that there was no need to amend the two statutes but that DOLI could issue guidance if necessary.
   b. **Proposed response:** Our system allows and encourages Virginia and its courts to resolve employment pay disputes without mirroring the federal system. Plaintiffs are masters of their complaint and can choose Virginia's system or the federal courts. This question confronts many litigants and does not require General Assembly intervention to resolve – in fact, harmonizing the language would likely remove the plaintiffs' choice altogether. Keeping the current legislation intact preserves that choice and gives the most flexibility to future litigants. Any possible legal confusion over penalties should be resolved by the courts and if it proves to be an ongoing problem can be resolved by future legislation.

      The discussion on this topic was again in agreement with the commenter's suggestion that the statutes not be amended in this regard, but that DOLI could produce a guidance document on the application of the penalty aspects of the two statutes.

      The group amended the proposed answer to include the following: "DOLI shall produce a guidance document on the penalty provisions of the two statutes with the input of stakeholders." The group approved the answer as amended.

4. The current statute of limitations for bringing a payment of wage case is three years under § 40.1-29.L. The overtime statute follows the FLSA limitation of two years unless there is willful conduct on the part of the employer in which case the employee gets an extra year to

file their case. The potential for confusion between these two statutes of limitation exists particularly where an employee brings a case for both unpaid regular hours and overtime. The issue of the proper time to file would be a particular issue if a case were filed in federal court after the two year federal statute has passed. This could be raised in litigation of these cases.

Should the statute of limitation in the payment of wage statute and the overtime wage statute be harmonized to avoid confusion?

a. The commenters again suggested that there was no need to amend the two statutes but that DOLI could issue guidance if necessary.
b. **Proposed response:** Our system allows and encourages Virginia and its courts to resolve employment pay dispute without mirroring the federal system. Plaintiffs are masters of their complaint and can choose Virginia's system or the federal courts. This question confronts many litigants and does not require General Assembly intervention. All feedback received from stakeholders and the public supports this position. Keeping the current legislation intact preserves that choice and gives the most flexibility to future litigants. Any possible legal confusion over the statutes of limitation should be resolved by the courts and if it proves to be an ongoing problem can be resolved by future legislation.

   The discussion on this topic was again in agreement with the commenters in suggestion that the statutes not be amended in this regard, but that DOLI could produce a guidance document on the application of the statutes of limitation of the two statutes.

   The group amended the proposed answer to include the following: "DOLI shall produce a guidance document on the statute of limitation provisions of the two statutes with the input of stakeholders." The group approved the answer as amended.

5. *Certain employees are exempt from overtime when doing agricultural work under provisions of 29 U.S. Code §213(a)(6), for example employees traditionally paid piece rate, made applicable in Virginia by § 40.1-29.2.*

   Should this exemption be continued or eliminated from Virginia law?

   a. Comments were received for and against eliminating the agricultural work exemption in Virginia law. The comment in favor of eliminating the exemption noted that other states had extended overtime to agricultural work without harming the industry. It also noted that the exemption arose in an earlier time when discriminatory attitudes existed and that agricultural work is dangerous and difficult work that needs all the

worker protections. The commenters in favor of continuing the exemption felt that its removal would negatively impact the largest private sector industry in Virginia. All agricultural employers would be impacted, but, would be more keenly felt by smaller employers. Further, it would be a disincentive to growth in the agricultural sector and may even lead to a loss of jobs that may also impact other employers that rely on the agricultural production sector. These comments led to a discussion of the overtime provisions for other states. The group requested a review of these states for the next meeting.

b. **Proposed response:** Agriculture is a traditional, long-standing industry in Virginia and that kind of substantial alteration is outside the scope of this Work Group and deserves the full attention of the General Assembly. If the law needs to be changed to require hourly pay instead of the current pay structure in every employment contract of this nature, the people's representatives need to determine that for the people.

   There was much discussion on this answer ranging from acceptable as is; to needing substantial amendment. The general consensus was that the change did not need to be made at this time due to the economic pressures currently on the agriculture industry. A proposed amendment to recommend that the General Assembly take up overtime for agricultural workers when the economic conditions have changed was rejected. The group amended the answer to remove "is outside the scope of this Work Group and" from the proposed answer. An additional discussion that the pay methods in the agricultural sector are varied and it would up to the General Assembly to decide to what pay methods need to have overtime applied to them. Accordingly the group voted to delete "to require hourly pay instead of the current pay structure in every employment contract of this nature."

   The answer approved by the group reads: Agriculture is a traditional, long-standing industry in Virginia and that kind of substantial alteration deserves the full attention of the General Assembly. If the law needs to be changed, the people's representatives need to determine that for the people.

6. *Certain domestic service employees providing companion care services are exempt from overtime under 29 U.S. Code §213(a)(15), made applicable in Virginia by § 40.1-29.2.*

   Should this exemption be continued or eliminated from Virginia law?

   a. The only comment on this item was that the Virginia law continue to mirror the FLSA.
   b. **Proposed response:** Domestic service employees providing companion care services is a newer issue and somewhat unique employment relationship outside the

experience and scope of this Work Group; and based on the General Assembly's recent actions we see no need to make any changes. If the law needs to be changed to require hourly pay instead of the current pay structure in every employment contract of this nature, the people's representatives need to determine that for the people.

Because of the unique nature of this employment the group requested that the pay structures and protections available to domestic service employees be presented to the group. Karen Elliot of Eckert Seamons agreed to present a report at the next meeting. After some discussion of the lack of information in this area, the group amended this answer to align it with the above answer for agricultural employees.

The answer approved by the group reads:

Domestic service employees providing companion care services is a newer issue and somewhat unique employment relationship. If the law needs to be changed, the people's representatives need to determine that for the people.

Overtime Work Group Meeting, October 21, 2022

The Overtime Work Group held its final meeting on October 21, 2022. Secretary of Labor G. Bryan Slater convened the work group to discuss the reports and documents requested at the September 23 meeting of the group and the makeup of the final report. The first report was a comparison of the eight states that have adopted overtime for their agricultural employees. *See Appendix B.* The second report addressed Virginia law dealing with domestic service employees. *See Appendix C.* The final document was the Department of Labor and Industry proposed guidance on the application of the penalty statute. *See Appendix D.* The work group accepted the reports and approved the issuance of the final report with the following final responses to the questions raised at the initial meeting.

Overtime Work Group Final Responses to Questions

1. Currently, the Department of Labor and Industry (DOLI) does not have authority to collect the overtime premium for hours worked over 40 hours in a week. DOLI can collect employees' straight time pay for weekly hours over 40 but DOLI cannot collect the 50% overtime premium.

Should DOLI's Labor and Employment Law Division be allowed to collect the overtime premium on behalf of claimants that come to it for collection of wages owed?

Final response: DOLI should be authorized to collect overtime on behalf of complainants. This allows the complainant to make the best choice for them to address their complaint.

2. Under the FLSA provisions included in Virginia law by § 40.1-29.2 employees are entitled to liquidated damages if they prevail on a claim for unpaid overtime. Employers who show they acted in "good faith" and had "reasonable grounds" for believing that the act or omission was not a violation of the FLSA have been excused from having to pay the liquidated damages under federal law (Portal to Portal Act of 1947). As quoted from the Congressional Record, a federal court decision, and in 29 CFR § 790.15 "Good faith" requires that the employer have honesty of intention and no knowledge of circumstances which ought to put him upon inquiry.

   Should definitions of "good faith exception" and "reasonable grounds" be included in Code to guide state decisions on liquidated damages?

Final response: Good faith determination and definition is currently laid out in court decisions, and codifying a definition might make the Virginia statute out of step with future federal or legal determinations and unnecessarily create a conflict.

3. Section 40.1-29.2 makes an employer liable to its employee for the remedies, damages, or other relief available under the federal FLSA. Under § 40.1-29.G for payment of wage cases brought by DOLI, employees are entitled to liquidated damages without reduction for the employers good faith. Under § 40.1-29.J employees are entitled to liquidated damages without reduction if they prevail in a payment of wage case they brought as well an additional amount equal to the wages owed if the court finds willful conduct on the part of the employer. The potential for confusion between these two penalty schemes exists particularly where an employee brings a case for both unpaid regular hours and overtime. The issue of the proper penalty could be raised in litigation of these cases.

   Should the penalty regimes in the payment of wage statute and the overtime wage statute be harmonized to avoid confusion?

Final response: Our system allows and encourages Virginia and its courts to resolve employment pay dispute without mirroring the federal system. Plaintiffs are masters of their complaint and can choose Virginia's system or the federal courts. This question confronts many litigants and does not require General Assembly intervention to resolve – in fact, harmonizing the language would likely remove the plaintiffs' choice altogether. Keeping the current legislation intact preserves that choice and gives the most flexibility to future litigants. Any possible legal confusion over penalties should be resolved by the courts and if it proves to be an ongoing problem can be resolved by future legislation. DOLI shall produce a guidance document on the penalty provisions of the two statutes with the input of stakeholders.

4. The current statute of limitations for bringing a payment of wage case is three years under § 40.1-29.L. The overtime statute follow the FLSA limitation of two years unless there is willful conduct on the part of the employer in which case the employee gets an extra year to file their case. The potential for confusion between these two statutes of limitation exists

particularly where an employee brings a case for both unpaid regular hours and overtime. The issue of the proper time to file would be a particular issue if a case were filed in federal court after the two year federal statute has passed. This could be raised in litigation of these cases.

Should the statute of limitation in the payment of wage statute and the overtime wage statute be harmonized to avoid confusion?

Final response: Our system allows and encourages Virginia and its courts to resolve employment pay dispute without mirroring the federal system. Plaintiffs are masters of their complaint and can choose Virginia's system or the federal courts. This question confronts many litigants and does not require General Assembly intervention. All feedback received from stakeholders and the public supports this position. Keeping the current legislation intact preserves that choice and gives the most flexibility to future litigants. Any possible legal confusion over the statutes of limitation should be resolved by the courts and if it proves to be an ongoing problem can be resolved by future legislation. DOLI shall produce a guidance document on the statute of limitation provisions of the two statutes with the input of stakeholders.

5. Certain employees are exempt from overtime when doing agricultural work under provisions of 29 U.S. Code § 213(a)(6), for example employees traditionally paid piece rate, made applicable in Virginia by § 40.1-29.2.

   Should this exemption be continued or eliminated from Virginia law?

Final response: Agriculture is a traditional, long-standing industry in Virginia and that kind of substantial alteration deserves the full attention of the General Assembly. If the law needs to be changed, the people's representatives need to determine that for the people.

6. Certain domestic service employees providing companion care services are exempt from overtime under 29 U.S. Code § 213(a)(15), made applicable in Virginia by § 40.1-29.2.

   Should this exemption be continued or eliminated from Virginia law?

Final response: Domestic service employees providing companion care services is a newer issue and somewhat unique employment relationship. If the law needs to be changed, the people's representatives need to determine that for the people.

Overtime Work Group Member List

The Honorable G. Bryan Slater, Secretary of Labor
The Honorable George L. Barker, Senate of Virginia
The Honorable Adam P. Ebbin, Senate of Virginia
The Honorable Lee Ware, Virginia House of Delegates
The Honorable Michael J. Webert, Virginia House of Delegates
Jeremy Bennett, Virginia Association of Counties
Natalie Brannon, Department of Human Resource Management
Brad Copenhaver, Meadowview Strategies[1]
Doris Crouse-Mays, Virginia AFL-CIO
Brett Daniel, Ogletree Deakins[2]
Karen Elliot, Eckert Seamans
Anne Gambardella, Virginia Auto Dealers Association
Michelle Gowdy, Virginia Municipal League,
Judy Hacker, Virginia Assisted Living Association
Julia Hammond, National Federation of Independent Business Inc.
Keith Hare, Virginia Health Care Association
Kevin Holden, Jackson Lewis
Charlie Jackson, Jackson-West Consulting[3]
Zach Jacobs, Virginia Farm Bureau
Scott Johnson, Hancock Daniel
Josh Laws, Office of the Attorney General[4]
Keith Martin, Virginia Chamber of Commerce
Robert Melvin, Virginia Restaurant, Lodging, Travel Association
Tracy Montross, American Airlines
Brent Rawlings, Virginia Hospital & Healthcare Association
The Honorable Nicole Riley, Deputy Secretary of Commerce and Trade
Jodi Roth, Virginia Retail Federation[5]
Michele Satterlund, McGuire Woods[6]
Kyle Shreeve, Virginia Agribusiness Council[7]
Brett Vassey, Virginia Manufacturers Association

[1] Replaced Kyle Shreeve as Virginia Agribusiness Council Representative
[2] Representative for Virginia Beverage Association
[3] Representative for Service Employees International Union
[4] Work Group Counsel and Parliamentarian
[5] Nancy Thomas attended August 5th,, meeting on behalf of the Virginia Retail Federation
[6] Also counsel for American Airlines
[7] Resigned as of August 19, 2022

The Department of Labor and Industry Provided Staffing to the Work Group

Gary Pan, Commissioner
Harold Pyon, Deputy Commissioner
Willis Morris, Deputy Commissioner
Richard F. White, III, Director, Information Technology
Wendy Inge, Director, Labor and Employment Law
Robert Feild, Legislative Liaison
Princy Doss, Director, Policy, Planning and Public Information
Stephen Clausing, Executive Liaison

Appendix A: Study Mandate

CHAPTER 461

*An Act 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.*

[H 1173]
Approved April 11, 2022

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

C. No employer shall withhold any part of the wages or salaries of any employee except for payroll, wage or withholding taxes or in accordance with law, without the written and signed authorization of the employee. On each regular pay date, each employer, other than an employer engaged in agricultural employment including agribusiness and forestry, shall provide to each employee a written statement, by a paystub or online accounting, that shows the name and address of the employer; the number of hours worked during the pay period if the employee is paid on the basis of (i) the number of hours worked or (ii) a salary that is less than the standard salary level adopted by regulation

of the U.S. Department of Labor pursuant to § 13(a)(1) of the federal Fair Labor Standards Act, 29 U.S.C. § 213(a)(1), as amended, establishing an exemption from the Act's overtime premium pay requirements; the rate of pay; the gross wages earned by the employee during the pay period; and the amount and purpose of any deductions therefrom. The paystub or online accounting shall include sufficient information to enable the employee to determine how the gross and net pay were calculated. An employer engaged in agricultural employment including agribusiness and forestry, upon request of its employee, shall furnish the employee a written statement of the gross wages earned by the employee during any pay period and the amount and purpose of any deductions therefrom.

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

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

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

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

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

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

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

H. Any employer who knowingly fails to make payment of wages in accordance with subsection 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 Commissioner shall notify any employer that the Commissioner alleges has violated any provision of this section or ~~§~~ **40.1-29.2** ***40.1-29.3*** by certified mail. Such notice shall contain a description of the alleged violation. Within 15 days of receipt of notice of the alleged violation, the employer may request an informal conference regarding such violation with the Commissioner. In determining the amount of any penalty to be imposed, the Commissioner shall consider the size of the business of the employer charged and the gravity of the violation. The decision of the Commissioner shall be

final. Civil penalties owed under this section shall be paid to the Commissioner for deposit into the general fund of the State Treasurer. The Commissioner shall prescribe procedures for the payment of proposed assessments of penalties that are not contested by employers. Such procedures shall include provisions for an employer to consent to abatement of the alleged violation and pay a proposed penalty or a negotiated sum in lieu of such penalty without admission of any civil liability arising from such alleged violation.

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

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

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

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

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

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

§ 40.1-29.2. Employer liability.

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

"Employ" includes to permit or suffer to work.

"Employee" means any individual employed by an employer, including employees of derivative carriers within the meaning of the federal Railway Labor Act, 45 U.S.C. § 151 et seq. "Employee" does not include the following: (i) any individual who volunteers solely for humanitarian, religious, or community service purposes for a public body, church, or nonprofit organization that does not otherwise employ such individual, (ii) any person who is exempt from the federal overtime wage pursuant to 29 U.S.C. § 213(a), and (iii) any person who meets the exemptions set forth in 29 U.S.C. § 213(b)(1) or 213(b)(11).

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

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

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

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

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

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

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

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

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

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

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

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

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

A. As used in this section:

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

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

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

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

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

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

2. That the Secretary of Labor shall convene a work group to review overtime issues pursuant to § **40.1-29.2** of the Code of Virginia, as amended by this act. The work group shall include representatives from the business, labor, and legal sectors and state and local governments. The work group shall also include two members of the Senate appointed by the Senate Committee on Rules and two members of the House of Delegates appointed by the Speaker of the House of Delegates. The work group shall submit a report on its findings and recommendations to the Governor and the Chairmen of the House Committees on Appropriations and Commerce and Energy and the Senate Committees on Finance and Appropriations and Commerce and Labor by November 1, 2022.

CHAPTER 462

*An Act 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.*

[S 631]
Approved April 11, 2022

LANGUAGE IDENTICAL TO CHAPTER 461 SO NOT SET OUT SEPARATELY

Appendix B: Public Comments

Full Name: Tracy Montross
Organization Name: American Airlines
Work Group: Overtime Work Group

Public Comment: I am writing on behalf of American Airlines to provide comment on the 2022 Overtime Work Group Report dated November 1, 2022. American Airlines is proud to provide commercial air service access in the Commonwealth of Virginia for the communities of Northern Virginia, Charlottesville, Lynchburg, Newport News, Norfolk, Richmond, and Roanoke with daily air service. National Airport (DCA) also serves as an important hub for American, serving more than 11.5 million passengers per year with 253 daily flights to 65 unique destinations in 4 countries. American Airlines and our nearly 3,000 employees in the Commonwealth contribute more than $4.7 billion to the state's economy from payroll, induced and indirect (passenger non-airline spend) economic output. American Airlines supports the language in SB 631(Barker) and HB 1173 (Ware) as passed by the 2022 Virginia General Assembly Session. These bills were passed after multiple years of discussion, and reflect significant stakeholder input and compromise. If stakeholders outside of the commercial airlines industry need further clarification on any language in the legislation, we would ask the Department of Labor and Industry to consider providing formal guidance rather than a re-write of the carefully crafted compromise that is now reflected in statute.

Keith Martin
Executive Vice President of Public Policy & Government Relations,
and General Counsel, Virginia Chamber of Commerce
Executive Director, Virginia Chamber Foundation

I have submitted the Virginia Chamber's comments online. However, since the spacing seemed off, I have also provided the Virginia Chamber's comments via email below.

On behalf of the Virginia Chamber of Commerce, please see our responses below to the Overtime Work Group draft report questions.

1. Should DOLI be allowed to collect the overtime premium on behalf of claimants that come to it for collection of wages owed?

The Virginia Chamber of Commerce does not have a position on this issue.

2. Should definitions of "good faith exception" and "reasonable grounds" be included in the Virginia Code to guide state decisions on liquidated damages?

Va. Code section 40.1-29.2 creates a state cause of action for violations of the overtime pay requirements of the federal Fair Labor Standards Act ("FLSA"), as amended, and "any regulations, guidance, or rules adopted pursuant to the overtime pay provisions of such federal act or any related governing case law" apply to an action brought in Virginia pursuant to that section. As such, a Virginia court considering a state claim brought pursuant to the Virginia Code section would necessarily look to how terms of art or standards, such as "good faith" and "reasonable grounds," are understood under the FLSA in order to apply those terms under the state act, rendering the addition of these definitions in state law unnecessary. Of course, judicial understanding of various standards and terms of art utilized by the FLSA are also subject to change and, thus, codifying a current definition might then render Virginia's statute out-of-step with any future evolution in the federal standard terms or standards.

As such, the Virginia Chamber of Commerce does not support opening up the Virginia Code to add these definitions. If there is confusion regarding their current meaning, DOLI could consider guidance referencing the applicable federal definitions for clarity.

3. Should the penalty regimes in the payment of wage statute and the overtime wage statute be harmonized to avoid confusion?

As DOLI and others in the work group have pointed out, it is clear that the standards for damages, statute of limitations, etc. for <u>regular</u> wages are not the same as those which apply to a cause of action for <u>overtime</u> in Virginia. Specifically, provisions related to regular wages were not changed by the overtime legislation in 2021 and 2022 and, thus, remain out of step with the FLSA in certain respects, as they were prior to 2021. By contrast, those provisions relevant to a state cause of action for overtime wages now (following the 2022 legislation), align with the

FLSA. As such, Virginia Chamber of Commerce does not support amending the overtime provisions (Va. Code § 40.1-29.2).

The Chamber would support guidance from DOLI to ensure that its investigators, courts, and others were clear as to which standard applies to regular wages and which applies to overtime, to avoid any potential for confusion.

4. Should the statute of limitation in the payment of wage statute and the overtime wage statute be harmonized to avoid confusion?

As DOLI and others in the work group have pointed out, it is clear that the standards for damages, statute of limitations, etc. for regular wages are not the same as those which apply to a cause of action for overtime in Virginia. Specifically, provisions related to regular wages were not changed by the overtime legislation in 2021 and 2022 and, thus, remain out of step with the FLSA in certain respects, as they were prior to 2021. By contrast, those provisions relevant to a state cause of action for overtime wages now (following the 2022 legislation), align with the FLSA. As such, Virginia Chamber of Commerce does not support amending the overtime provisions (Va. Code § 40.1-29.2).

The Chamber would support guidance from DOLI to ensure that its investigators, courts, and others were clear as to which standard applies to regular wages and which applies to overtime, to avoid any potential for confusion.

5. Should this exemption be continued or eliminated from Virginia law?

The Virginia Chamber of Commerce believes that the state cause of action and any other Virginia overtime provisions should align with the FLSA in all substantive respects. As a result, the Chamber would not support any change that would bring Virginia's statute out of alignment with its federal corollary.

6. Should this exemption be continued or eliminated from Virginia law?

The Virginia Chamber of Commerce believes that the state cause of action and any other Virginia overtime provisions should align with the FLSA in all substantive respects. As a result, the Chamber would not support any change that would bring Virginia's statute out of alignment with its federal corollary.

Anne Gambardella, Esq.

Virginia Automobile Dealers Assn

The Virginia Automobile Dealers Association represents the interests of Virginia's franchised motor vehicle dealers in attempts to influence passage or enforcement of laws. As such, we have been closely involved in recent legislative activities related to overtime wages and the work of the 2022 Overtime Work Group.

We supported legislation in 2022, House Bill 1173 and Senate Bill 631, to ensure Virginia's overtime requirements mirrored those of the federal Fair Labor Standards Act (FLSA).

The draft report of the Overtime Work group identifies several issues related to the applicability of certain exemptions as well as differences between statute of limitations and remedies in actions to recover regular wages and overtime.

We take no position on the issue of the consideration of exemptions under the FLSA but feel any exclusion of an FLSA exemption should only be done with serious consideration of all affected parties.

In so far as the differences identified in the report between actions for regular pay and overtime pay, we support the legislation as passed making a state cause of action for overtime wages consistent with the FLSA. Rather than revising a statute reflecting a careful balance of all interest, any confusion would be best addressed by guidance from the Department.

Thank you.

September 19, 2022

The Honorable George "Bryan" Slater
Secretary
Department of Labor
P.O. Box 1475
Richmond, VA 23218

Dear Secretary Slater,

The Virginia Farm Bureau Federation (VFBF) and the Virginia Agribusiness Council appreciate the opportunity to submit comments to the Department of Labor on the 2022 Overtime Workgroup Draft Report.

Virginia Farm Bureau is the Commonwealth's largest general farm organization, representing more than 35,000 farmers of nearly every type of crop and livestock across Virginia. Farm Bureau and its members have worked together to build a sustainable future of safe and abundant food, fiber, and renewable fuel for the United States and the world.

The Virginia Agribusiness Council represents over 40,000 farmers and agribusinesses and the entire agriculture and forestry industry supply chain, which is responsible for a $91 billion total economic impact to the Commonwealth annually, making agriculture Virginia's largest private sector industry.

The impact of eliminating the agricultural overtime exemption would likely be felt differently between smaller and larger producers. Larger farms and agribusinesses are likely to have more employees, greater payroll expenses, and possibly greater impact due to increased wages. They may be able to absorb these increases, and/or take steps to mitigate them, such as spreading hours out among more workers, cutting worker shifts or other practices. However, it is likely that smaller farms, especially those that rely upon a greater percentage of family labor will be more severely impacted. But the impact to the entire agriculture industry would be substantial.

Importantly, a significant increase in labor costs would serve as a disincentive to growing the agricultural sector, and in some cases, if farms cease operations or shift to less labor-intensive crops, jobs could be lost both in production agriculture, as well as related processing and marketing businesses which rely on farm output and generate employment and economic activity.

The Virginia Farm Bureau Federation and Virginia Agribusiness Council respectfully submit these comments. We appreciate the Administration's attention to this issue and look forward to continuing to serve on the Overtime Workgroup.

Sincerely,

R. Zachary Jacobs
Legislative Specialist, Government Relations
Virginia Farm Bureau Federation

Brad Copenhaver
Principal, Meadowview Strategies
on behalf of the Virginia Agribusiness Council

Kristin Donovan
Staff Attorney
Legal Aid Justice Center

Dear Secretary Slater,

In 2021, Virginia passed historic overtime legislation. While VOWA initially covered most agricultural workers, the law was amended in 2022 to mirror the Fair Labor Standards Act (FLSA), which exempts farmworkers from overtime. The FLSA's overtime exemption is a vestige of Jim Crow-era racism that has no place in today's world. Farmworkers are essential workers who perform some of the most difficult and dangerous jobs in the country. They work long hours, which increases their risk of injury and illness. Their continued exclusion from basic labor protections cannot be justified. The values of Virginians today do not align with the values that shaped the FLSA eighty-four years ago. By perpetuating a racist exemption, Virginia is turning its back on some of the most marginalized workers in the state – workers who are overwhelming Black and Latino. VOWA should be amended again to protect farmworkers.

I. The Exclusion of Farmworkers from Overtime Pay Is a Legacy of Jim Crow Era Racism

The FLSA's exclusion of farmworkers from overtime protections is a legacy of New Deal legislation that intentionally excluded southern Black farmworkers. The FLSA became law in 1938, a time when Blacks in the South were subjected to Jim Crow laws, lynchings, and exclusion from the political process. To pass New Deal legislation, Congress excluded Black farmworkers to placate Southern representatives who feared that equal pay for Blacks would undermine the South's racial caste system. *See* Marc Linder, *Migrant Workers and Minimum Wages: Regulating the Exploitation of Agricultural Labor in the United States* 127-132 (1992); M*artinez-Cuevas v. DeRuyter Brothers Dairy, Inc.*, 475 P.3d 164, 176 (Wash, 2020) (Gonzalez, J., concurring). Representative Wilcox of Florida expressed this vile sentiment during congressional debates: "There has always been a difference in the wage scale of white and colored labor. . . . You cannot put the Negro and the white man on the same basis and get away with it." Linder, at 150.

Today, "[f]armworkers remain some of the most impoverished and socially excluded members of our society." 475 P.3d at 177 (Gonzalez, J., concurring). Excluded from the National Labor Relations Act, they do not have the right to bargain collectively and take concerted action to improve working conditions. In Virginia, as in the rest of the U.S., most farmworkers are Black and Latino.

In 2020, the Washington Supreme Court held that exempting farmworkers from the state's overtime law violated the state's constitution, which, like the Virginia constitution, prohibits granting privileges or immunities to certain groups. *Id*. at 164. In his concurrence, one judge explained that "[t]he exclusion of farmworkers from overtime pay deprives them of an

important health and safety protection that is afforded to other workers" and that "the desire to spare employers in one industry from costs cannot, by itself, justify excluding some workers from the health and safety protections afforded to others." *Id.* at 177.

II. Agriculture Is a Dangerous Industry and Overtime Work Makes It More Dangerous

"[A]griculture ranks among the most hazardous industries." *Agricultural Safety*, NIOSH, CDC. In 2020, there were 11,880 work-related injuries that required days away from work and 368 farmworkers died from a work-related injury. *Id.* Farmworkers face a myriad of chronic and acute health risks, including exposure to pesticides, toxic gases, high levels of dust, and mold; risk of heat stroke; and injury from farm equipment and livestock. *Rural Agricultural Health and Safety*, Rural Health Information Hub.

Overtime work exacerbates risks associated with agriculture. The CDC and NIOSH "found that overtime was associated with poorer perceived general health, increased injury rates, increased illnesses, and increased mortality." Krista Brockwood et al., *Mandated, But Not Compensated: Explore the Multifaceted Impacts of Overtime on Farm Workers' Health, Safety, and Well-being* 8 (2021). Working in a job with overtime hours results in a 61 percent higher injury hazard rate. *Id*. at 9. Accordingly, overtime pay is one of our nation's key safeguards against excessive hours and the risk of injuries that comes with it.

III. Agriculture Is Not a Unique Industry

There is no special justification for excluding farmworkers from overtime protections. While many farms have a seasonally intense need for labor, so do other non-exempt industries, including construction, tourism, education, retail, and landscaping. That the hours of work in agriculture can be influenced by the weather does not set it apart. Construction and landscaping workers also have unpredictable schedules influenced by the weather, yet they are not excluded from overtime protections. Agriculture in not the only sector where workers travel between states to work. Many employers, including construction and landscaping companies, send workers to various states and must deal with differing labor laws. The agriculture industry is not unique: it has simply grown accustomed to a staffing model based on overwork and substandard pay.

IV. Other States Have Successfully Implemented Overtime Protections for Farmworkers

California, Colorado, Hawaii, Minnesota, New York, Washington, Oregon, and Maryland have all adopted some form of overtime protection laws for agricultural workers. Since the California legislation took effect in 2019, economic indicators for the state's agricultural economy have remained steady. Daniel Costa, *Testimony before the NY State Department of Labor's Farm Laborers Wage Board, Economic Policy Institute*, Jan. 20, 2022. There is no evidence of increased farm closures in California, as the number of agricultural establishments has remained constant since the overtime provision took effect. *Id.* Farmworker employment has

held strong with a 71% increase of H-2A workers working in the state since the legislation was instituted. *Id.*

In conclusion, by adopting the FLSA's agricultural overtime exemption, Virginia is continuing an arbitrary Jim Crow-era exemption rooted in racism. Virginia's farmworkers perform difficult, dangerous, and vital work and deserve basic labor protections. Other states that have extended overtime protections to farmworkers continue to have thriving agricultural industries. It is time for Virginia to follow suit and bring its overtime law back into the modern era.

Thank you for the opportunity to submit these comments.

Sincerely,

Kristin Donovan

Appendix C: Comparison of State Laws on Overtime for Agricultural Employees

Comparison of State Laws on Overtime for Agricultural Employees

The following pages are a survey of other state laws that require payment of overtime wages to agricultural employees

Prepared by Robert Feild

Comparison of State Laws on Overtime for Agricultural Employees

Unless otherwise noted, overtime is paid at 1.5 times the regular rate of pay.

CALIFORNIA - Legislation passed in 2016 - Overtime for Agricultural Workers (ca.gov)

Agricultural workers working for employers of 26 or more employees receive 1.5 times the regular rate of pay for every hour over 8 in a day and over 40 in a week. Agricultural workers working for employers of 25 or fewer employees receive 1.5 times the regular rate of pay for every hour over 9.5 in a day and over 55 in a week. Beginning January, 2023 the hours for which the smaller employers must pay overtime decreases to 9 in a day and 50 hours a week. The next year the hours will be 8.5 in a day and 45 hours in a week. Beginning in 2025 all employers will pay 1.5 times the regular rate of pay for every hour over 8 in a day and over 40 in a week. Employers must pay double the regular rate of pay for every hour over 12 in a day.

Limitations	Effective Dates	Overtime	Additional Information	
Employees of Employers of 26 or more Employees	Jan. 1, 2022	Due after 40 Hours in a week or 8 hours in a day	Double time after 12 hours in a day	
Employees of Employers of 25 or fewer Employees	Jan. 1, 2022	Due after 55 Hours in a week or 9.5 hours in a day		
Employees of Employers of 25 or fewer Employees	Jan. 1, 2023	Due after 50 Hours in a week or 9 hours in a day		
Employees of Employers of 25 or fewer Employees	Jan. 1, 2024	Due after 45 Hours in a week or 8.5 hours in a day		
Employees of Employers of 25 or fewer Employees	Jan. 1, 2025	Due after 40 Hours in a week or 8 hours in a day	Double time after 12 hours in a day	

WASHINGTON – Legislation passed in 2021 - Overtime & Exemptions (wa.gov)

While dairy workers are entitled to receive overtime pay for all hours worked over 40 in a workweek, the law establishes a gradual phase-in period for full overtime eligibility for all other agricultural workers. The phase-in for non-dairy agricultural workers begins January 1, 2022. During the phase-in period, agricultural workers will be eligible for overtime compensation for hours worked over 55 during a workweek beginning January 1, 2022, for all hours worked over 48 beginning January 1, 2023, and for all hours worked over 40 beginning January 1, 2024.

Limitations	Effective Dates	Overtime	Additional Information	
Non-dairy agricultural workers	Jan. 1, 2022	Due after 55 hours	Dairy workers due overtime after 40 hours	
Same	Jan. 1 2023	Due after 48 Hours	Same	

Same	Jan. 1 2024	Due after 40 Hours	Same	

Note: This law was changed as a result of a Washington Supreme Court decision from November 2020 in the Martinez-Cuevas and Aguilar v. DeRuyter Brothers Dairy case.

OREGON – Legislation passed in 2022 - Bureau of Labor and Industry website not yet updated - https://olis.oregonlegislature.gov/liz/2022R1/Measures/Overview/HB4002

Beginning in 2023, farmers and ranchers will be required to pay agricultural workers overtime pay at one and one-half times their regular rate. To help with the transition, the overtime pay requirements will occur in phases. In 2023 and 2024, employers will be required to pay overtime to workers who work in excess of fifty-five hours in one workweek; in excess of forty-eight hours in 2025 and 2026; and in excess of forty hours beginning in 2027. Employers that are subject to these new requirements may be eligible for refundable tax credits to assist with the increased cost. The tax credit will be a percentage of the additional amount paid in overtime to workers during the year, but will decrease over the course of the transition phase.

Limitations	Effective Dates	Overtime	Additional Information	
Workers engaged in agricultural employment for 100 percent of the workweek	Jan. 1, 2022	Exempt	Employees of agricultural employers who handle or otherwise work on products not grown by their own employer, or do not work within the definition of agriculture are due overtime after 40 hours	
Same	Jan. 1 2023	Due after 55 Hours	Same	
Same	Jan. 1 2025	Due after 48 hours	Same	
Same	Jan. 1 2027	Due after 40 Hours	Same	

COLORADO – Legislation passed in 2020 – https://cdle.colorado.gov/sites/cdle/files/7%20CCR%201103-1%20COMPS%20Order%20%2338.pdf

Colorado agricultural workers are exempt from overtime requirements at this time. Beginning on November 1, 2022, the agricultural employer does not have to pay overtime until the employee has worked sixty hours in a week. This declines in 2024 to 54 hours in a week and in 2025 to 48 hours, except for highly seasonal workers, that must be paid overtime after 56 hours during the 22 peak weeks of the seasonal work.

Limitations	Effective Date	Overtime	Additional Information	

Agricultural Employers	Nov. 1 2022	Due after 60 hours		
Non Highly Seasonal Employers	Jan. 1 2024	Due after 54 hours	Small agricultural employers – those employing 3 or fewer on average over past 3 years – due after 56 hours	
Same	Jan. 1 2025	Due after 48 hours	Small agricultural employers follow this requirement unless they qualify as highly seasonal and follow that rate	
Highly Seasonal Employers	Jan. 1 2024	Due after 56 hours for up to 22 peak weeks; 48 hours otherwise	Defined as an agricultural employer that in any 22 workweek period had at least twice as many employees as the rest of the year.	

HAWAII – Legislation Passed in 1957 - https://www.capitol.hawaii.gov/hrscurrent/Vol07_Ch0346-0398/HRS0387/HRS_0387-0003.htm

Employers of twenty or more employees must pay overtime to their employees after 40 hours except for 20 workweeks a year, selected by the employer, in which week's overtime must be paid after 48 hours in a week. Employers in coffee harvesting and employers of 19 or fewer employees are exempt from overtime.

Limitations	Effective Dates	Overtime	Additional Information	
Employers of twenty employees or more	Jul. 1, 1957	Due after 48 hours for up to 20 weeks selected by the employer: Due after 40 hours for the remaining 32 weeks	Coffee harvesting and employers of 19 or fewer employees exempt from overtime entirely	

NEW YORK – Legislation passed in 2019 - Farm Laborers Fair Labor Practices Act | Department of Labor (ny.gov)

All farm workers must be paid one and a half time their regular rate of pay for hours worked over 60 in a week. Agricultural employers must provide a day of rest to employees. If the farm worker voluntarily works on their designated day of work they must be paid time and a half for all hours worked on that day.

Limitations	Effective Dates	Overtime	Additional Information	
All farm workers qualify	Jan. 1, 2021	Due after 60 Hours	Farm workers get time and a half overtime if they voluntarily work on their day of rest	

MARYLAND – Legislation passed in 2021 - essagexempt.pdf (state.md.us)

Non-exempt Agricultural Workers are required to be paid overtime of time and a half for all hours worked over 60 in a week. Workers in canning, freezing and packing of fruits, vegetables, poultry and seafood are exempt, as are employees of farm employers with less than 500 agricultural workdays in a quarter during the previous year. Non-transitory farm laborers and children of laborers are exempt. Cattle ranching employees are also exempt.

Limitations	Effective Dates	Overtime	Additional Information	
Non-exempt agricultural workers	Jan. 1, 2021	Due after 60 Hours	Exempt employees include those in canning, freezing and packing of fruits, vegetables, poultry and seafood; those employees of farm employers with less than 500 agricultural workdays in a quarter during the previous year; Non-transitory farm laborers and children of laborers; and cattle ranching employees.	

MINNESOTA – Legislation passed in 2015 - Agricultural workers | Minnesota Department of Labor and Industry (mn.gov)

All agricultural workers are required to be paid overtime for any hours over 48 in a week except for salaried employees on small farms (two or fewer salaried employees) making $618.87 a week and on large farms (three or more salaried employees) making $759.26 a week.

Limitations	Effective Dates	Overtime	Additional Information	
Applies to all agricultural workers except certain salaried workers	Jan. 1, 2021	Due after 48 Hours	Exempt employees are salaried employees on small farms making $618.87 a week and those on large farms making $759.26 a week.	

Appendix D: Domestic Service Employees Overtime Exemption

Domestic Service Employees Overtime Exemption

The following pages are a review of Virginia laws concerning domestic service employees

Prepared by the Karen Elliot, Eckert Seamans

TO: Overtime Working Group

Virginia Department of Labor & Industry (DOLI)

FROM: Karen S. Elliott, Esquire

DATE: 10/19/2022

RE: **Domestic Employees Overtime Exemption**

Domestic Employees Overtime Exemption continued or eliminated?

DOLI's Answer: Domestic service employees providing companion care services are a somewhat unique employment relationship and based on the General Assembly's recent actions, we see no need to make any changes. If the law needs to be changed, the people's representatives need to determine that for the people.

Overview:

The Virginia legislature recently made several significant changes to Virginia's payroll and employment laws that provide protection to domestic workers.

In 2020, the Virginia General Assembly enacted the following:

- It amended §40.1-28.9 of the Minimum Wage Act to specifically include home care providers in the category of employees who are entitled to minimum wage:

> "*Home care provider" means an individual who provides (i) home health services, including services provided by or under the direct supervision of any health care professional under a medical plan of care in a patient's residence on a visit or hourly basis to patients who have or are at risk of injury, illness, or a disabling condition and require short-term or long-term interventions, or (ii) personal care services, including assistance in personal care to include activities of a daily living provided in an individual's residence on a visit or hourly basis to individuals who have or are at risk of an illness, injury, or disabling condition."*

In 2021, the Virginia General Assembly enacted the following:

- It added the following definition to §40.1-2 of the statute governing the Virginia Department of Labor and Industry and workplace safety rights for employees:

> "*Domestic service" means services related to the care of an individual in a private home or the maintenance of a private home or its premises, on a permanent or temporary basis, including services performed by individuals such as companions, cooks, waiters, butlers, maids, valets, and chauffeurs. "Domestic service" does not include work that is irregular, uncertain, or incidental in nature and duration.*

- It amended §40.1-49.8 to provide the Virginia Occupational Safety and Health inspectors the right to inspect domestic workplaces.

- It added employers of domestic workers to the definition of §40.1-49.3 (Worker's Compensation benefits).

- Therefore, the Virginia Code expressly provides domestic service workers workplace safety rights, the right to file claims for Workers' Compensation Benefits against an employer, and a mechanism for the Commonwealth to inspect domestic workplaces for safety violations.

- It also amended §2.2-3905 to allow domestic workers to file an administrative complaint or sue for discrimination in the workplace, as well as request accommodations for a disability from their employer.

> *"Domestic worker" means an individual who is compensated directly or indirectly for the performance of services of a household nature performed in or about a private home, including services performed by individuals such as companions, babysitters, cooks, waiters, butlers, valets, maids, housekeepers, nannies, nurses, janitors, laundresses, caretakers, handymen, gardeners, home health aides, personal care aides, and chauffeurs of automobiles for family use. "Domestic worker" does not include (i) a family member, friend, or neighbor of a child, or a parent of a child, who provides child care in the child's home; (ii) any child day program as defined in § **22.1-289.02** or an individual who is an employee of a child day program; or (iii) any employee employed on a casual basis in domestic service employment to provide companionship services for individuals who, because of age or infirmity, are unable to care for themselves.*

- It amended §40.1-29 of the Wage Payment Act to require 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."

In 2022, the Virginia General Assembly enacted the overtime legislation in §40.1-29.2. The new overtime legislation states that*:*

> *"an employer who violates the* ***overtime*** *pay requirements of the Fair Labor Standards Act of 1938, (29 U.S.C. §201 et seq., as amended) … shall be liable to the employee for the applicable remedies, damages or other relief available under the federal Fair Labor Standards Act in an action brought pursuant to the process in subsection J . . . ."*

Conclusion:

Thus, from an overtime perspective, the Virginia Code appears to default to the application of the FLSA for domestic workers, thereby giving domestic service workers in Virginia certain rights to overtime consistent with the FLSA. The FLSA requires employers to pay certain non-exempt employees an overtime premium of 1.5 times their regular rate of pay for all hours worked over 40 in any 168-hour workweek.

Determining whether a domestic worker is exempt under the FLSA depends on the duties performed. In 1974, the FLSA was amended to require domestic service workers such as cooks, housekeepers, maids, and gardeners to receive overtime. However, it exempts from the overtime requirement several categories of domestic service workers, including casual babysitters and companions (29 U.S.C. §213(a)(15)) and live-in domestic service workers (29 U.S.C. §213(B)(21).

In 2015, however, the DOL revised 29 CFR §552.109 to eliminate the ability of third-party agencies to avail themselves of these exemptions. The 2015 Amendments also limit the scope of the "companionship services" exemption, such that the exemption does not include "the performance of medically related services" and instead, applies only to "the activities of daily living (such as dressing, grooming, feeding, bathing, toileting, and transferring) (29 CFR §552.6). Since then, the type of companionship tasks that can meet the requirements for a worker to be exempt under the FLSA remains narrow.

Applying the FLSA to Virginia Domestic Workers it appears that:

- Domestic service workers who work for a third-party agency in Virginia, have the right to overtime pursuant to the FLSA and therefore apparent rights under §40.1-29.2.

- Domestic service workers who do not work for a third-party agency in Virginia, but who perform medically related services, are entitled to overtime pursuant to the FLSA and therefore they have apparent rights under §40.1-29.2.

- Domestic service workers who do not work for a third-party agency in Virginia, and who perform companionship services to an elderly person or person with illness, injury, or disability, are not entitled to overtime if the employee meets the FLSA "duties test." Similarly, an employee who is a live-in domestic service employee may be exempt from overtime if the employee meets the residency requirements.

Special thanks to Kevin Holden, Esq. of Jackson Lewis and Brendan Horgan, Esq. of Eckert Seamans for their contributions to this summary.

Appendix E: Guidance on Overtime Law

Guidance on Overtime Law

The following pages are the proposed guidance on the penalty provisions and the statutes of limitation for the enforcement of payment of wage and overtime laws

Prepared by the Department of Labor and Industry

GUIDANCE ON OVERTIME LAW

DEFINITIONS

The Department of Labor and Industry will provide no guidance on the "good faith exception" and "reasonable grounds" definitions as they apply to overtime in Virginia. Section 40.1-29.2's text specifically includes any related governing case law as the basis for potential liability in overtime pay. The definitions provided by federal case law, any federal Fair Labor Standards Act (FLSA) provisions and its regulations, rules, and guidance should be looked to for this guidance.

PENALTY CALCULATIONS

Under § 40.1-29.G — for payment of wage cases brought by DOLI — in addition to the wages owed, employees are entitled to liquidated damages without reduction for the employers good faith should they prevail.

Under § 40.1-29.J, in addition to the wages owed, employees are entitled to liquidated damages without reduction if they prevail in a payment of wage case they brought, as well as an additional amount equal to the wages owed if the court finds willful conduct on the part of the employer.

Section 40.1-29.2 makes an employer liable to its employee for the remedies, damages, or other relief available under the federal FLSA in overtime pay cases. Under the FLSA, an employee who prevails in court is entitled to the overtime pay and an equal amount in liquidated damages, unless the employer proves that they acted in "good faith" in which case the employee is only entitled to recover the overtime pay owed. In cases where either straight time hours (first 40 hours in a week) or overtime hours are sued for, but not both, the penalty provisions of § 40.1-29 apply to the case for regular hours and the penalty provision under the FLSA apply to the overtime case.

For cases brought in a Virginia court by an employee where both regular hours and overtime hours are sued for, the penalties applicable under § 40.1-29.J apply to the straight time hours sought. The employee is entitled to the pay sought as well as an equal amount in liquidated damages. No reduction of the liquidated damages is allowed if the employer demonstrates the "good faith" exception allowed under the FLSA. If the court finds that the employer knowingly failed to pay wages to an employee, the employee is entitled to an amount equal to triple the amount of straight time wages due. For the overtime hours sought, the prevailing employee is entitled to payment of the overtime wages due as well as an equal amount in liquidated damages, unless the employer demonstrates the "good faith" exception in, which case only the amount of overtime wages is due.

STATUTE OF LIMITATIONS

The current statute of limitations for bringing a payment of wage case is three years under § 40.1-29.L. The overtime statute follows the FLSA limitation of two years unless the employee can demonstrate willful conduct on the part of the employer, in which case the employee gets an

extra year to file their case. In cases where only straight time hours are sought, the three year statute of limitations of § 40.1-29.L would apply. For the cases where only overtime hours are sought, the FLSA two year statute of limitation applies unless the employee demonstrates willful conduct on the part of the employer, in which case the employee gets an extra year.

For cases brought in a Virginia court by an employee for which both regular hours and overtime hours are sought, the three year statute of limitation applicable under § 40.1-29.L applies to the part of the case for which straight time hours are sought. For the overtime hours sought in such cases, the case must have been filed within two years unless the employee demonstrates willful conduct on the part of the employer, in which case the employee gets an extra year to file the case. For those cases brought after two years but before the three year statute of limitation expires and the employee cannot demonstrate willful conduct, the employee that prevails would be entitled to recover for every hour actually worked but would not be entitled to the additional amount required to be paid for hours worked over forty in a week.