

GENERAL ASSEMBLY OF NORTH CAROLINA
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HOUSE DRH70278-LR-92A (03/08)

Short Title: Wage Theft/Misclassification/Remedies. (Public)

Sponsors: Representative Glazier.

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT AMENDING THE LABOR LAWS PERTAINING TO WAGE THEFT,
3 MISCLASSIFICATION OF EMPLOYEES, AND RECOVERY OF UNPAID WAGES.

4 The General Assembly of North Carolina enacts:

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

6 "§ 95-25.2. Definitions.

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

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



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

43 **SECTION 2.** G.S. 95-25.13 reads as rewritten:

44 **"§ 95-25.13. Notification, posting, and records.**

45 Every employer shall:

- 46 (1) Notify its employees, ~~orally or~~ in writing at the time of hiring, and upon any
 47 material change of the following information:
- 48 a. The promised wages and the day wages and the basis upon which the
 49 promised wages will be calculated (for example, per hour or per
 50 piece).
- 51 b. The method, day, and place for payment;payment.

1 c. The full name, mailing address, and telephone number of the
2 employer and the federal and State tax identification number of each
3 employer who is not a natural person.

4 d. The employment status of the employee. Such notification or
5 classification by the employer shall not be determinative of the
6 employee's actual employment status.

7 (2) Make available to its employees, in writing or through a posted notice
8 maintained in a place accessible to its employees, employment practices and
9 policies with regard to promised wages;

10 (3) Notify employees, in writing or through a posted notice maintained in a
11 place accessible to its employees, at least 24 hours prior to any changes in
12 promised wages. Wages may be retroactively increased without the prior
13 notice required by this subsection; and

14 (4) Furnish each employee with an itemized statement of deductions made from
15 that employee's wages under G.S. 95-25.8 and with the information required
16 by 13 NCAC 12 . 0801(6) and 13 NCAC 12 . 0801(8) through (13) for each
17 pay period such deductions are made period."

18 **SECTION 3.** G.S. 95-25.22 reads as rewritten:

19 **"§ 95-25.22. Recovery of unpaid wages.**

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

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

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

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

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

45 (c) Action to recover such liability may also be maintained in the General Court of
46 Justice by the Commissioner at the request of the employees affected. Any sums thus recovered
47 by the Commissioner on behalf of an employee shall be held in a special deposit account and
48 shall be paid directly to the employee or employees affected.

49 (d) The court, in any action brought under this Article ~~may~~, shall, in addition to any
50 judgment awarded plaintiff, order costs and fees of the action and reasonable attorneys' fees to
51 be paid by the defendant. In an action brought by the Commissioner in which a default

1 judgment is entered, the clerk shall order attorneys' fees of three hundred dollars (\$300.00) to
2 be paid by the defendant.

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

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

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

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

17 **SECTION 4.** G.S. 95-25.23 reads as rewritten:

18 "**§ 95-25.23. Violation of provisions on minimum wage, overtime, wage payment,**
19 **withholding of wages, notification, and youth employment; civil penalty.**

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

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

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

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

40 **SECTION 5.** Article 2A of Chapter 95 of the General Statutes is amended by
41 adding a new section to read:

42 "**§ 95-25.23D. Wage claims; liens; collections.**

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

45 (1) All property of the employer, real or personal, located in this State; and

46 (2) All property upon which the employee has performed work at the instance of
47 the owner or of any person acting by the employer's authority or under him
48 or her as contractor or otherwise, for the full amount of the wages and any
49 statutory penalties owed, including, but not limited, to those under
50 G.S. 95-25.2 (Minimum Wage), 95-25.3 (Overtime), 95-25.6 (Wage

1 Payment), 95-25.8 (Withholding of Wages), and 95-25.22 (Recovery of
2 Unpaid Wages).

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

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

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

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

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

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

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

23 A lien under this section is perfected as soon as notice is provided as required by this
24 subsection.

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

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

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

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

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

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

50 (m) A lien recorded pursuant to subsection (f) of this section takes precedence over all
51 other debts, judgments, decrees, liens, or mortgages against the employer, regardless as to

1 whether these debts, judgments, decrees, liens, or mortgages originate before or after the wage
2 lien, and regardless of whether these debts, judgments, decrees, liens, or mortgages were
3 perfected prior to the wage lien. An employee's lien is effective against the employer, the estate
4 of the employer, or a subsequent bona fide purchaser of the property subject to the employee's
5 lien.

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

9 **SECTION 6.** This act is effective when it becomes law and applies to employers
10 and employees on or after that date.