

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2013

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HOUSE BILL 826

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

Sponsors: Representatives Glazier, D. Ross, Harrison, and L. Hall (Primary Sponsors).
For a complete list of Sponsors, refer to the North Carolina General Assembly Web Site.

Referred to: Commerce and Job Development, if favorable, Judiciary.

April 11, 2013

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.



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

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

46 "**§ 95-25.13. Notification, posting, and records.**

47 Every employer shall:

- 48 (1) Notify its employees, ~~orally or~~ in writing at the time of hiring, and upon any
49 material change of the following information:

- 1 a. The promised wages and the day wages and the basis upon which the
2 promised wages will be calculated (for example, per hour or per
3 piece).
4 b. The method, day, and place for payment; payment.
5 c. The full name, mailing address, and telephone number of the
6 employer and the federal and State tax identification number of each
7 employer who is not a natural person.
8 d. The employment status of the employee. Such notification or
9 classification by the employer shall not be determinative of the
10 employee's actual employment status.

- 11 (2) Make available to its employees, in writing or through a posted notice
12 maintained in a place accessible to its employees, employment practices and
13 policies with regard to promised wages;
14 (3) Notify employees, in writing or through a posted notice maintained in a
15 place accessible to its employees, at least 24 hours prior to any changes in
16 promised wages. Wages may be retroactively increased without the prior
17 notice required by this subsection; and
18 (4) Furnish each employee with an itemized statement of deductions made from
19 that employee's wages under G.S. 95-25.8 and with the information required
20 by 13 NCAC 12 . 0801(6) and 13 NCAC 12 . 0801(8) through (13) for each
21 pay period such deductions are made period."

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

23 **"§ 95-25.22. Recovery of unpaid wages.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 (2) All property upon which the employee has performed work at the instance of
2 the owner or of any person acting by the employer's authority or under him
3 or her as contractor or otherwise, for the full amount of the wages and any
4 statutory penalties owed, including, but not limited, to those under
5 G.S. 95-25.2 (Minimum Wage), 95-25.3 (Overtime), 95-25.6 (Wage
6 Payment), 95-25.8 (Withholding of Wages), and 95-25.22 (Recovery of
7 Unpaid Wages).

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

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

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

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

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

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

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

28 A lien under this section is perfected as soon as notice is provided as required by this
29 subsection.

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

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

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

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

49 (k) If judgment is entered in favor of the employer in an action for unpaid wages or if
50 the case is dismissed with prejudice, the lien shall be extinguished upon expiration of the

1 applicable appeals period if no appeal is filed. If an appeal is filed, the lien shall continue in
2 force until all issues on appeal have been decided.

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

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

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

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