WEST VIRGINIA CODE CHAPTER 21 ARTICLE 5C

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§21-5C-1. Definitions.

As used in this article:

(a) "Commissioner" means the Commissioner of Labor or his or her duly authorized representatives.

(b) "Wage and hour director" means the wage and hour director appointed by the Commissioner of Labor as Chief of the Wage and Hour Division.

(c) "Wage" means compensation due an employee by reason of his or her employment.

(d) "Employ" means to hire or permit to work.

(e) "Employer" includes the State of West Virginia, its agencies, departments, and all its political subdivisions, any individual, partnership, association, public or private corporation, or any person or group of persons acting directly or indirectly in the interest of any employer in relation to an employee; and who employs during any calendar week six or more employees as herein defined in any one separate, distinct, and permanent location or business establishment: Provided, That prior to January 1, 2015, the term "employer" does not include any individual, partnership, association, corporation, person or group of persons, or similar unit if 80 percent of the persons employed by him or her are subject to any federal act relating to minimum wage, maximum hours, and overtime compensation: Provided, however, That after December 31, 2014, for the purposes of §21-5C-3 of this code, the term "employer" does not include any individual, partnership, association, corporation, person or group of persons, or similar unit if 80 percent of the persons employed by him or her are subject to any federal act relating to maximum hours and overtime compensation.

(f) "Employee" includes any individual employed by an employer but shall not include: (1) Any individual employed by the United States; (2) any individual engaged in the activities of an educational, charitable, religious, fraternal, or nonprofit organization where the employer-employee relationship does not in fact exist, or where the services rendered to such organizations are on a voluntary basis; (3) newsboys, shoeshine boys, golf caddies, pinboys, and pin chasers in bowling lanes; (4) traveling salesmen and outside salesmen; (5) services performed by an individual in the employ of his or her parent, son, daughter, or spouse; (6) any individual employed in a bona fide professional, executive, or administrative capacity; (7) any person whose employment is for the purpose of on-the-job training; (8) any person having a physical or mental handicap so severe as to prevent his or her employment or employment training in any training or employment facility other than a nonprofit sheltered workshop; (9) any individual employed in a boys or girls summer camp; (10) any person 62 years of age or over who receives old-age or survivors benefits from the Social Security Administration; (11) any individual employed in agriculture as the word "agriculture" is defined in the Fair Labor Standards Act of 1938, as amended; (12) any individual employed as a firefighter by the state or agency thereof; (13) ushers in theaters; (14) any individual employed on a part-time basis who is a student in any recognized school

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or college; (15) any individual employed by a local or interurban motorbus carrier; (16) so far as the maximum hours and overtime compensation provisions of this article are concerned, any salesman, parts man, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers; (17) any employee with respect to whom the United States Department of Transportation has statutory authority to establish qualifications and maximum hours of service; (18) any person employed on a per diem basis by the Senate, the House of Delegates, or the Joint Committee on Government and Finance of the Legislature of West Virginia, other employees of the Senate or House of Delegates designated by the presiding officer thereof, and additional employees of the Joint Committee on Government and Finance designated by such joint committee; (19) any person employed as a seasonal employee of a commercial whitewater outfitter where the seasonal employee works less than seven months in any one calendar year and, in such case, only for the limited purpose of exempting the seasonal employee from the maximum hours provisions of §21-5C-3 of this code; or (20) any person employed as a seasonal employee of an amusement park where the seasonal employee works less than seven months in any one calendar year and, in such case, only for the limited purpose of exempting the seasonal employee from the maximum hours provisions of §21-5C-3 of this code.

(g) "Work week" means a regularly recurring period of 168 hours in the form of seven consecutive 24-hour periods, need not coincide with the calendar week, and may begin any day of the calendar week and any hour of the day.

(h) "Hours worked" means the hours for which an employee is employed: Provided, That in determining hours worked for the purposes of §21-5C-2 and §21-5C-3 of this code, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday, time spent in walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which the employee is employed to perform and activities which are preliminary to or postliminary to the principal activity or activities, subject to such exceptions as the commissioner may by rules define.

(i) "Amusement park" means any person or organization which holds a permit for the operation of an amusement ride or amusement attraction under §21-10-1 et seq. of this code.

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§21-5C-2. Minimum wages.

(a) Minimum wage:

(1) After June 30, 2006, every employer shall pay to each of his or her employees wages at a rate not less than $5.85 per hour.

(2) After June 30, 2007, every employer shall pay to each of his or her employees wages at a rate not less than $6.55 per hour.

(3) After June 30, 2008, every employer shall pay to each of his or her employees wages at a rate not less than $7.25 per hour.

(4) After December 31, 2014, every employer shall pay to each of his or her employees wages at a rate not less than $8.00 per hour.

(5) After December 31, 2015, every employer shall pay to each of his or her employees wages at a rate not less than $8.75 per hour.

(6) When the federal minimum hourly wage as prescribed by 29 U.S.C. §206 (a) (1) is equal to or greater than the wage rate prescribed in the applicable provision of this subsection, every employer shall pay to each of his or her employees wages at a rate of not less than the federal minimum hourly wage as prescribed by 29 U.S.C. §206 (a) (1). The minimum wage rates required under this subsection shall be thereafter adjusted in accordance with adjustments made in the federal minimum hourly rate. The adoption of the federal minimum wage provided by this subsection includes only the federal minimum hourly rate prescribed in 29 U.S.C. §206 (a) (1) and does not include other wage rates, or conditions, exclusions, or exceptions to the federal minimum hourly wage rate. In addition, adoption of the federal minimum hourly wage rate does not extend or modify the scope or coverage of the minimum wage rate required under this subsection.

(b) Training wage:

(1) Notwithstanding the provisions set forth in subsection (a) of this section to the contrary, an employer may pay an employee first hired after June 30, 2006, a subminimum training wage not less than $5.15 per hour: Provided, That an employer may pay an employee first hired after December 31, 2014, a subminimum training wage not less than $6.40 per hour.

(2) An employer may not pay the subminimum training wage set forth in subdivision (1) of this subsection to any individual:

(A) Who has attained or attains while an employee of the employer, the age of twenty years; or

(B) For a cumulative period of not more than ninety days per employee: Provided, That if any business has not been in operation for more than ninety days at the time the employer hired

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the employee, the employer may pay the employee the subminimum training wage set forth in subdivision (1) of this subsection for an additional period not to exceed ninety days.

(3) When the federal subminimum training wage as prescribed by 29 U.S.C. §206 (g) (1) is equal to or greater than the wage rate prescribed in subdivision (1) of this subsection, every employer shall pay to each of his or her employees wages at a rate of not less than the federal subminimum training wage as prescribed by 29 U.S.C. §206 (g) (1). The subminimum training wage rates required under this subsection shall be thereafter adjusted in accordance with adjustments made in the federal subminimum training wage rate. The adoption of the federal subminimum training wage provided by this subsection includes only the federal subminimum training wage rate prescribed in 29 U.S.C. §206 (g) (1) and does not include other wage rates, or conditions, exclusions, or exceptions to the federal subminimum training wage rate. In addition, adoption of the federal subminimum training wage rate does not extend or modify the scope or coverage of the subminimum training wage rate required under this subsection.

(c) Notwithstanding any provision or definition to the contrary, the wages established pursuant to this section are applicable to all individuals employed by the State of West Virginia, its agencies and departments, regardless if the employee or employer are subject to any federal act relating to minimum wage: Provided, That at no time may the minimum wage established pursuant to this section fall below the federal minimum hourly wage as prescribed by 29 U.S.C. §206(a)(1), and at no time may the subminimum training wage established pursuant to this section fall below the federal subminimum training wage rate as prescribed by 29 U.S.C. §206 (g) (1).

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

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

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

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

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

(3) Sums paid in recognition of services performed during a given period if either: (a) Both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the commissioner set forth in appropriate regulation which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the commissioner) paid to performers, including announcers, on radio and television programs;

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

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

(6) Extra compensation provided by a premium rate paid for work by the employee on

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Saturdays, Sundays, holidays or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

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

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

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

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

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

(3) Is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: Provided, That the rate so established shall be authorized by regulation by the commissioner as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time; and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in subdivisions (1) through (7) of subsection (b) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime

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compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

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

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

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

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

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

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

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

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

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

(B) Who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable time after making the request if the use of the compensatory time does not unduly disrupt the operation of the public agency.

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Compensatory time must be used within one year from the time it was acquired.

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

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§21-5C-4. Credits.

Prior to January 1, 2015, in determining whether an employer is paying an employee wages and overtime compensation as provided in sections two and three of this article, there shall be provided in accordance with the regulations which shall be promulgated by the commissioner a credit to the employer of twenty percent of the hourly rate of the amount paid an employee customarily receiving gratuities, and a reasonable credit for board and lodging furnished to an employee: Provided, That after December 31, 2014, in determining whether an employer is paying an employee wages and overtime compensation as provided in sections two and three of this article, there shall be provided in accordance with the legislative rules proposed for promulgation by the commissioner a credit to the employer of seventy percent of the hourly rate of the amount paid an employee customarily receiving gratuities, and a reasonable credit for board and lodging furnished to an employee. The commissioner shall propose legislative rules for promulgation relating to maximum allowances to employers for room and board furnished to employees: Provided, however, That the employer shall be required to furnish to the commissioner upon request, documentary evidence that the employee is receiving at least seventy percent of the minimum wage in gratuities or is receiving room and lodging in accordance with the rules and regulations promulgated by the commissioner.

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§21-5C-5. Keeping of records.

Every employer subject to the provisions of this article shall make or cause to be made, and shall keep and preserve at his place of business for a period of two years, a written record or records of the name and address of each of his employees as herein defined, his rate of pay, hours of employment, payroll deductions, and amount paid him for each pay period.

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§21-5C-6. Duties and powers of commissioner of labor.

(a) It shall be the duty of the commissioner to enforce and administer the provisions of this article and rules promulgated thereunder, and to promulgate such rules and regulations, in accordance with chapter twenty-nine-a of the Code of West Virginia, 1931, as amended, as shall be needful to give effect to the provisions of this article. The commissioner is authorized to promulgate emergency rules prior to January 1, 2015, to implement and administer the amendments made to this article in 2014. If the commissioner makes a finding that a conflict exists between state and federal standards defining employee exemptions, the commissioner is further authorized to promulgate emergency rules prior to January 1, 2015, for the purpose of revising the state standards to conform with federal law.

(b) The commissioner is authorized at reasonable times to enter the place of business of an employer subject to the provisions of this article, for purposes of: (1) Inspecting and examining, and copying, photographing or otherwise reproducing all payroll records of the employer directly relating to wages and hours of employment of persons employed by him or her; (2) questioning or otherwise examining persons employed by the employer on the subject of wages and hours of their employment, and gratuities received or earned in such employment.

(c) The commissioner is authorized and empowered to make investigations to determine whether there is reasonable cause to believe that any person is an employer as defined in section one of this article, or whether there is reasonable cause to believe that any provision of this article is being or has been violated.

(d) The commissioner is authorized and empowered to file criminal complaints against persons whom the commissioner has reasonable cause to believe have committed any offense created or defined by the provisions of this article.

(e) The commissioner is authorized and empowered to institute civil actions seeking appropriate injunctive relief to compel an employer subject to this article to comply with the provisions of this article.

(f) The commissioner shall enforce and administer the provisions of this article in accordance with chapter twenty-nine-a of this code. The commissioner or his or her authorized representatives are empowered to enter and inspect such places, question such employees and investigate such facts, conditions, or matters as they may deem appropriate, to determine whether any person, firm or corporation has violated any provision of this article, or any rule or regulation issued hereunder or which may aid in the enforcement of the provisions of this article.

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§21-5C-7. Offenses and penalties.

(a) Any employer who wilfully discharges or in any manner wilfully discriminates against any employee because such employee has made complaint to his employer, or to the commissioner, that he has not been paid wages in accordance with the wage and hour provisions of this article, or because such employee has instituted or is about to institute any civil action, or file any petition or criminal complaint against the employer by reason of the provisions of this article, or because such employee has testified or is about to testify in any administrative proceeding, civil action, or criminal action under this article, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than $100 nor more than $500.

(b) Any employer, labor organization, employee, or other person, alone or in concert, who in any manner wilfully discriminates against any person with respect to wages, hours of work or overtime compensation because of race, religion, color, national origin, ancestry, age or sex, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than two hundred and fifty nor more than $1,000, or imprisoned in the county jail for not more than one year, or both fined and imprisoned.

(c) Any employer who wilfully violates any other provision of this article shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than $100.

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§21-5C-8. Civil remedy of employee; limitation of actions.

(a) Any employer who pays an employee less than the applicable wage rate to which such employee is entitled under or by virtue of this article shall be liable to such employee for the unpaid wages; an agreement by an employee to work for less than the applicable wage rate is hereby declared by the Legislature of West Virginia to be against public policy and unenforceable.

(b) Any person whose wages have not been paid in accord with this article, or the commissioner or his designated representative, upon the request of such person, may bring any legal action necessary to collect a claim under this article. With the consent of the employee, the commissioner shall have the power to settle and adjust any claim to the same extent as might the employee.

(c) The court in any action brought under this article may, in the event that any judgment is awarded to the plaintiff or plaintiffs, assess costs of the action, including reasonable attorney fees against the defendant. Such attorney fees in the case of action brought under this section by the commissioner shall be remitted by the commissioner to the treasurer of the state. The commissioner shall not be required to pay the filing fee or other costs or fees of any nature or to file a bond or other security of any nature in connection with such action or with proceedings supplementary thereto, or as a condition precedent to the availability to the commissioner of any process in aid of such action or proceedings. The commissioner shall have power to join various claimants in one claim or lien, and in case of suit to join them in one cause of action.

(d) In any such action the amount recoverable shall be limited to such unpaid wages as should have been paid by the employer within two years next preceding the commencement of such action. Nothing in this article shall be construed to limit the right of an employee to recover upon a contract of employment.

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§21-5C-9. Wage and hour division; wage and hour director; duties.

The commissioner of labor shall establish within the department of labor a division to be known as the wage and hour division, which shall be a separate administrative division with respect to personnel and duties. The division shall be in charge of a wage and hour director. The wage and hour director, employees, and representatives within the wage and hour division shall, under the direction of the commissioner of labor, carry out such duties and functions as are necessary to effectuate the provisions of this article. The wage and hour director, representatives and employees within the wage and hour division shall be selected by the commissioner of labor in the same manner as other employees of the department of labor.

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§21-5C-10. Relation to other laws.

Any standards relating to minimum wages, maximum hours, overtime compensation or other working conditions in effect under any other law of this state on the effective date of this article, which are more favorable to employees than those applicable to such employees under this article shall not be deemed to be amended, rescinded or otherwise affected by this article but shall continue in full force and effect and may be enforced as provided by law.

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§21-5C-11. Severability.

If any provision of this article or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

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