

Stricken language would be deleted from and underlined language would be added to present law.

State of Arkansas  
91st General Assembly  
Regular Session, 2017

As Engrossed: H3/22/17

# A Bill

HOUSE BILL 1846

By: Representative Collins

By: Senator Hester

## For An Act To Be Entitled

AN ACT TO AMEND AND CLARIFY THE MINIMUM WAGE ACT OF THE STATE OF ARKANSAS; TO OVERRULE GERBER PRODUCTS COMPANY V. HEWITT, 2016 ARK. 222, 492 S.W.3D 856; TO DECLARE AN EMERGENCY; AND FOR OTHER PURPOSES.

## Subtitle

TO AMEND AND CLARIFY THE MINIMUM WAGE ACT OF THE STATE OF ARKANSAS; AND TO DECLARE AN EMERGENCY.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. DO NOT CODIFY. Purpose.

The purpose of this act is to resolve questions that have arisen regarding:

(1) The proper interpretation of § 11-4-205 and § 11-4-218(b);

and

(2) What activities constitute "work" under the Minimum Wage Act of the State of Arkansas, § 11-4-201 et seq., as interpreted by the Supreme Court in Gerber Products Company v. Hewitt, 2016 Ark. 222, 492 S.W.3d 856.

SECTION 2. Arkansas Code § 11-4-205 is amended to read as follows:

11-4-205. Right of collective bargaining not affected.

Nothing in this subchapter, including the provisions of § 11-4-218(b), shall be deemed to interfere with, impede, or in any way diminish the right



of employers and employees to bargain collectively through representatives of *their own choosing in order to establish wages or other conditions of work.*

SECTION 3. Arkansas Code § 11-4-218, concerning employees' remedies for underpayment of wages, is amended to add an additional subsection to read as follows:

(f) When construing this subchapter, a court may look for guidance to state and federal decisions interpreting the Fair Labor Standards Act of 1938, as amended and codified in 29 U.S.C. § 201 et seq., as it existed on January 1, 2017, which decisions and act shall have persuasive authority only.

SECTION 4. Arkansas Code Title 11, Chapter 4, Subchapter 2, is amended to add an additional section to read as follows:

11-4-221. Relief from liability under this subchapter for failure to pay minimum wage or overtime compensation.

(a) Except as provided in subsection (b) of this section, an employer is not subject to liability under this subchapter, on account of the failure of the employer to pay an employee minimum wages or to pay an employee overtime compensation, for or on account of any of the following activities of the employee:

(1) 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

(2)(A) An activity that is preliminary to or postliminary to the principal activity or activities, that occurs either before the time on any particular workday at which the employee commences or subsequent to the time on any particular workday at which he or she ceases the principal activity or activities.

(B) For purposes of subdivision (a)(2)(A) of this section, the use of an employer's vehicle for travel by an employee and activities performed by an employee that are incidental to the use of the vehicle for commuting shall not be considered part of the employee's principal activities if the use of the vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the

employee or representative of the employee.

(b) Notwithstanding the provisions of subsection (a) of this section that relieve an employer from liability and punishment with respect to any activity, the employer is not be relieved from liability if the activity is compensable by either:

(1) An express provision of a written or oral contract in effect at the time of the activity between the employee, his or her agent, or collective-bargaining representative and his or her employer; or

(2) A custom or practice in effect at the time of the activity at the establishment or other place where the employee is employed covering the activity, not inconsistent with a written or oral contract in effect at the time of the activity, between the employee, his or her agent, or collective-bargaining representative and his or her employer.

(c) For the purposes of subsection (b) of this section, an activity shall be considered as compensable under a contract provision or a custom or practice only when the activity is engaged in during the portion of the day with respect to which it is compensable.

(d) In the application of the minimum wage and overtime compensation provisions of this subchapter, in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, the time, but only that time, during which the employee engages in any activity which is compensable within the meaning of subsections (b) and (c) of this section shall be counted.

(e) *This act applies only to conduct occurring on or after the effective date of this act.*

SECTION 5. EMERGENCY CLAUSE. It is found and determined by the General Assembly of the State of Arkansas that a recent 4 to 3 decision by the Supreme Court in Gerber Products Company v. Hewitt, 2016 Ark. 222, 492 S.W.3d 856, is at odds with the intent of the General Assembly because it misinterpreted state law, as evidenced by the legislative history surrounding the Minimum Wage Act of the State of Arkansas, § 11-4-201 et seq., to require compensation for certain activities otherwise made noncompensable through the collective bargaining process; that the dissenting opinion in Gerber Products Company v. Hewitt better reflects the legislative intent of the General

Assembly and identifies some of the dangers presented by the majority opinion, specifically that “the floodgates will open to litigation at the enormous cost to businesses in Arkansas” and that the opinion “undermines the collective-bargaining process and destroys any confidence employers and employees have in the enforceability of their agreements”; that certain activities have not been considered to be “work” under state or federal law by employers and employees in the State of Arkansas who have conducted business in reliance upon that accepted understanding; that federal law embodied in the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., along with regulations and case law interpreting the same, has for many decades established that these certain activities are not compensable “work”; that the Minimum Wage Act of the State of Arkansas, § 11-4-201 et seq., existed for nearly fifty years without any interpretation that such activities should be compensable “work” under any state law; and that this act is immediately necessary to legislatively overrule Gerber Products Company v. Hewitt, to clarify that the Minimum Wage Act of the State of Arkansas, § 11-4-201 et seq., incorporates and has always relied upon 29 U.S.C. § 254, which is now embodied in § 11-4-221, to define whether certain activities constitute compensable “work” under state law, and to clarify the Minimum Wage Act of the State of Arkansas’s deference to collective bargaining as embodied in § 11-4-205, so as to (1) protect the sanctity of collective bargaining agreements that have been negotiated and honored so as not to require compensation for activities like those described in 29 U.S.C. § 203(o) of the Fair Labor Standards Act of 1938, and (2) protect Arkansas employers from increased business costs that would place them in a competitive disadvantage by comparison to employers in other states and that would result in irreparable economic harm to such Arkansas employers and their employees. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on:

(1) The date of its approval by the Governor;

(2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or

(3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.

*/s/Collins*