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State of Arkansas  
91st General Assembly  
Regular Session, 2017

# 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:

(1) Resolve questions that have arisen regarding:

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

(B) 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; and

(2) Clarify that the amendments to §§ 11-4-205 and 11-4-218(b) are remedial in nature and should be applied retroactively.

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



1 11-4-205. Right of collective bargaining not affected.

2 Nothing in this subchapter, including the provisions of § 11-4-218(b),  
3 shall be deemed to interfere with, impede, or in any way diminish the right  
4 of employers and employees to bargain collectively through representatives of  
5 their own choosing in order to establish wages or other conditions of work,  
6 even if such wages or other conditions of work would otherwise violate the  
7 terms of this subchapter.

8  
9 SECTION 3. Arkansas Code § 11-4-218, concerning employees' remedies  
10 for underpayment of wages, is amended to add an additional subsection to read  
11 as follows:

12 (f) When construing this subchapter, a court may look for guidance to  
13 state and federal decisions interpreting the Fair Labor Standards Act of  
14 1938, as amended and codified in 29 U.S.C. § 201 et seq., as it existed on  
15 January 1, 2017, which decisions and act shall have persuasive authority  
16 only.

17  
18 SECTION 4. Arkansas Code Title 11, Chapter 4, Subchapter 2, is amended  
19 to add an additional section to read as follows:

20 11-4-221. Relief from liability under this subchapter for failure to  
21 pay minimum wage or overtime compensation.

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

27 (1) Walking, riding, or traveling to and from the actual place  
28 of performance of the principal activity or activities which the employee is  
29 employed to perform; and

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

35 (B) For purposes of subdivision (a)(2)(A) of this section,  
36 the use of an employer's vehicle for travel by an employee and activities

1 performed by an employee that are incidental to the use of the vehicle for  
2 commuting shall not be considered part of the employee's principal activities  
3 if the use of the vehicle for travel is within the normal commuting area for  
4 the employer's business or establishment and the use of the employer's  
5 vehicle is subject to an agreement on the part of the employer and the  
6 employee or representative of the employee.

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

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

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

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

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

30 (e) This section and the provisions of § 11-4-205 are effective  
31 retroactively as of October 1, 2006 because they are remedial in nature and  
32 are enacted to protect the general welfare and public policy by preserving  
33 the accepted understanding of compensable activities that existed in Arkansas  
34 before the Supreme Court's decision in Gerber Products Company v. Hewitt,  
35 2016 Ark. 222, 492 S.W.3d 856.

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1           SECTION 5. EMERGENCY CLAUSE. It is found and determined by the  
2 General Assembly of the State of Arkansas that a recent 4 to 3 decision by  
3 the Supreme Court in Gerber Products Company v. Hewitt, 2016 Ark. 222, 492  
4 S.W.3d 856, is at odds with the intent of the General Assembly because it  
5 misinterpreted state law, as evidenced by the legislative history surrounding  
6 the Minimum Wage Act of the State of Arkansas § 11-4-201 et seq., to require  
7 compensation for certain activities otherwise made noncompensable through the  
8 collective bargaining process; that the dissenting opinion in Gerber Products  
9 Company v. Hewitt better reflects the legislative intent of the General  
10 Assembly and identifies some of the dangers presented by the majority  
11 opinion, specifically that “the floodgates will open to litigation at the  
12 enormous cost to businesses in Arkansas” and that the opinion “undermines the  
13 collective-bargaining process and destroys any confidence employers and  
14 employees have in the enforceability of their agreements”; that certain  
15 activities have not been considered to be “work” under state or federal law  
16 by employers and employees in the State of Arkansas who have conducted  
17 business in reliance upon that accepted understanding; that federal law  
18 embodied in the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., along with  
19 regulations and case law interpreting the same, has for many decades  
20 established that these certain activities are not compensable “work”; that  
21 the Minimum Wage Act of the State of Arkansas, § 11-4-201 et seq., existed  
22 for nearly fifty years without any interpretation that such activities should  
23 be compensable “work” under any state law; and that this act is remedial in  
24 nature and is immediately necessary to legislatively overrule Gerber Products  
25 Company v. Hewitt, to clarify that the Minimum Wage Act of the State of  
26 Arkansas, § 11-4-201 et seq., incorporates and has always relied upon 29  
27 U.S.C. § 254, which is now embodied in § 11-4-221, to define whether certain  
28 activities constitute compensable “work” under state law, and to clarify the  
29 Minimum Wage Act of the State of Arkansas’s deference to collective  
30 bargaining as embodied in § 11-4-205, so as to (1) protect the sanctity of  
31 collective bargaining agreements that have been negotiated and honored so as  
32 not to require compensation for activities like those described in 29 U.S.C.  
33 § 203(o) of the Fair Labor Standards Act of 1938, (2) protect against the  
34 types of “wholly unexpected liabilities, immense in amount and retroactive in  
35 operation” enumerated in 29 U.S.C. § 251(a), explaining the purposes of 29  
36 U.S.C § 254, which purposes apply with equal force to this act, and (3)

1 protect Arkansas employers from increased business costs that would place  
 2 them in a competitive disadvantage by comparison to employers in other states  
 3 and that would result in irreparable economic harm to such Arkansas employers  
 4 and their employees. Therefore, an emergency is declared to exist, and this  
 5 act being immediately necessary for the preservation of the public peace,  
 6 health, and safety shall become effective on:

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

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

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

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