

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36

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



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

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

7 (f) When construing this subchapter, a court may look for guidance to
8 state and federal decisions interpreting the Fair Labor Standards Act of
9 1938, as amended and codified in 29 U.S.C. § 201 et seq., as it existed on
10 January 1, 2017, which decisions and act shall have persuasive authority
11 only.

12
13 SECTION 4. Arkansas Code Title 11, Chapter 4, Subchapter 2, is amended
14 to add an additional section to read as follows:

15 11-4-221. Relief from liability under this subchapter for failure to
16 pay minimum wage or overtime compensation.

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

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

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

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

1 employee or representative of the employee.

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

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

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

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

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

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

27
28 SECTION 5. EMERGENCY CLAUSE. It is found and determined by the
29 General Assembly of the State of Arkansas that a recent 4 to 3 decision by
30 the Supreme Court in Gerber Products Company v. Hewitt, 2016 Ark. 222, 492
31 S.W.3d 856, is at odds with the intent of the General Assembly because it
32 misinterpreted state law, as evidenced by the legislative history surrounding
33 the Minimum Wage Act of the State of Arkansas, § 11-4-201 et seq., to require
34 compensation for certain activities otherwise made noncompensable through the
35 collective bargaining process; that the dissenting opinion in Gerber Products
36 Company v. Hewitt better reflects the legislative intent of the General

1 Assembly and identifies some of the dangers presented by the majority
2 opinion, specifically that “the floodgates will open to litigation at the
3 enormous cost to businesses in Arkansas” and that the opinion “undermines the
4 collective-bargaining process and destroys any confidence employers and
5 employees have in the enforceability of their agreements”; that certain
6 activities have not been considered to be “work” under state or federal law
7 by employers and employees in the State of Arkansas who have conducted
8 business in reliance upon that accepted understanding; that federal law
9 embodied in the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., along with
10 regulations and case law interpreting the same, has for many decades
11 established that these certain activities are not compensable “work”; that
12 the Minimum Wage Act of the State of Arkansas, § 11-4-201 et seq., existed
13 for nearly fifty years without any interpretation that such activities should
14 be compensable “work” under any state law; and that this act is immediately
15 necessary to legislatively overrule Gerber Products Company v. Hewitt, to
16 clarify that the Minimum Wage Act of the State of Arkansas, § 11-4-201 et
17 seq., incorporates and has always relied upon 29 U.S.C. § 254, which is now
18 embodied in § 11-4-221, to define whether certain activities constitute
19 compensable “work” under state law, and to clarify the Minimum Wage Act of
20 the State of Arkansas’s deference to collective bargaining as embodied in §
21 11-4-205, so as to (1) protect the sanctity of collective bargaining
22 agreements that have been negotiated and honored so as not to require
23 compensation for activities like those described in 29 U.S.C. § 203(o) of the
24 Fair Labor Standards Act of 1938, and (2) protect Arkansas employers from
25 increased business costs that would place them in a competitive disadvantage
26 by comparison to employers in other states and that would result in
27 irreparable economic harm to such Arkansas employers and their employees.
28 Therefore, an emergency is declared to exist, and this act being immediately
29 necessary for the preservation of the public peace, health, and safety shall
30 become effective on:

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

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

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36

/s/Collins