



State of Wisconsin
2017 - 2018 LEGISLATURE

LRB-1142/1
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2017 SENATE BILL 103

March 9, 2017 - Introduced by Senators HANSEN, RINGHAND, CARPENTER, JOHNSON, C. LARSON, MILLER, RISSER, VINEHOUT, WIRCH and SHILLING, cosponsored by Representatives MASON, ANDERSON, BERCEAU, BROSTOFF, FIELDS, GENRICH, GOYKE, HINTZ, KOLSTE, OHNSTAD, POPE, RIEMER, SARGENT, SINICKI, SPREITZER, SUBECK, C. TAYLOR, VRUWINK, WACHS, ZAMARRIPA and ZEPNICK. Referred to Committee on Labor and Regulatory Reform.

1 **AN ACT** *to renumber and amend* 103.02; *to amend* 103.03, 109.09 (1), 111.322
2 (2m) (a) and 111.322 (2m) (b); and *to create* 103.02 (3) and 103.023 of the
3 statutes; **relating to:** the exemption of bona fide administrative, executive,
4 and professional employees from the overtime pay requirements of the wage
5 and hours laws, extending the time limit for emergency rule procedures,
6 providing an exemption from emergency rule procedures, providing an
7 exemption from rule-making procedures, and requiring the exercise of
8 rule-making authority.

Analysis by the Legislative Reference Bureau

Under current administrative rules promulgated by the Department of Workforce Development, employers are generally required to pay employees 1.5 times their regular rates of pay for all hours worked in excess of 40 hours per week (overtime pay). Those rules, however, exempt from the overtime pay requirement employees whose primary duty consists of administrative, executive, or professional work (exempt employees). Currently, those rules generally define an administrative, executive, or professional employee, in part, as an employee who does not devote more than 20 percent of his or her hours of work to activities that are not administrative, executive, or professional in nature (20 percent rule) and who is

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compensated on a salary basis at a rate of not less than \$700 per month or, in the case of a professional employee, \$750 per month (compensation threshold).

This bill requires DWD, for purposes of defining an exempt employee, to set the compensation threshold at \$970 per week and to replace the 20 percent rule with a requirement that employee's "primary duty" be administrative, executive, or professional work. The bill provides that, by the first day of the 18th month beginning after the bill's effective date, and annually thereafter, DWD must promulgate emergency rules to revise that compensation threshold by calculating the percentage change in the consumer price index for the 12-month period ending on the last day of the last month for which that information is available and adjusting the rate then in effect by that percentage difference.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 103.02 of the statutes is renumbered 103.02 (1) and amended to
2 read:

3 103.02 (1) No person may be employed or be permitted to work in any place of
4 employment or at any employment for such any period of time during any day, night,
5 or week, as that is dangerous or prejudicial to the person's life, health, safety, or
6 welfare.

7 (2) The department shall investigate, ascertain, determine, and fix such
8 reasonable classification, classifications, issue general or special orders, and
9 promulgate rules fixing a period of time, or hours of beginning and ending work
10 during any day, night, or week, ~~which shall~~ that may be necessary to protect the life,
11 health, safety, or welfare of any person, or to carry out the purposes of ss. 103.01 to
12 103.03. The department shall, by rule, classify such periods of time into periods to
13 be paid for at regular rates and periods to be paid for at the rate of at least ~~one and~~
14 ~~one-half~~ 1.5 times the regular rates. Such investigations, classifications, rules, and
15 orders shall be made as provided in s. 103.005 ~~and the penalties under s. 103.005 (12)~~

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1 ~~shall apply to and be imposed for any violation of ss. 103.01 to 103.03. Such orders~~
2 ~~shall be subject to review in the manner provided in ch. 227. Section 111.322 (2m)~~
3 ~~applies to discharge or other discriminatory acts arising in connection with any~~
4 ~~proceeding under this section.~~

5 **SECTION 2.** 103.02 (3) of the statutes is created to read:

6 103.02 (3) The employment of any person in any employment or place of
7 employment at any time other than the permissible hours of labor under this section
8 shall be prima facie evidence of a violation of this section.

9 **SECTION 3.** 103.023 of the statutes is created to read:

10 **103.023 Hours of labor; exempt employees. (1) DEFINITIONS.** In this
11 section:

12 (a) "Compensated on a salary basis" means to receive regularly each pay period
13 a predetermined amount constituting all or part of the employee's compensation,
14 which amount is not subject to reduction because of any of the following:

- 15 1. Variations in the quality or quantity of the work performed.
- 16 2. Absences from work occasioned by the employer or by the operating
17 requirements of the employer's business.
- 18 3. The fact that work is not available, so long as the employee is ready, willing,
19 and able to work.

20 (b) "Employee employed in a bona fide administrative capacity" means an
21 employee who is compensated on a salary basis at a rate of not less than the rate
22 determined under sub. (3), exclusive of board, lodging, or other facilities, whose
23 primary duty is the performance of office or nonmanual work directly related to the
24 management or general business operations of the employer or of the employer's

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1 customers, and whose primary duty includes the exercise of discretion and
2 independent judgment with respect to matters of significance.

3 (c) “Employee employed in a bona fide executive capacity” means an employee
4 who is compensated on a salary basis at a rate of not less than the rate determined
5 under sub. (3), exclusive of board, lodging, or other facilities, whose primary duty is
6 management of the enterprise in which he or she is employed or a department or
7 subdivision of that enterprise, who customarily and regularly directs the work of two
8 or more other employees, and who has the authority to hire and fire other employees
9 or whose suggestions and recommendations as to the hiring, firing, advancement,
10 promotion, or any other change in status of other employees are given particular
11 weight. In this paragraph, “customarily and regularly directs” means to direct with
12 a frequency that is greater than occasional, but not necessarily constant, including
13 direction that is normally and recurrently performed every work week, but not
14 including isolated or one-time direction.

15 (d) “Employee employed in a bona fide professional capacity” means an
16 employee who is compensated on a salary or fee basis at a rate of not less than the
17 rate determined under sub. (3), exclusive of board, lodging, or other facilities and
18 whose primary duty is the performance of work requiring knowledge of an advanced
19 type in a field of science or learning customarily acquired by a prolonged course of
20 specialized intellectual instruction or requiring invention, imagination, originality,
21 or talent in a recognized field of artistic or creative endeavor.

22 (e) “Exempt employee” means an employee employed in a bona fide
23 administrative, executive, or professional capacity.

24 (f) “Primary duty” means the principal, main, major, or most important duty
25 that an employee performs as determined on the basis of all the factors in a particular

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1 case, with the major emphasis on the character of the employee's job as a whole,
2 including all of the following factors:

3 1. The relative importance of the employee's duties as an exempt employee as
4 compared to other types of duties.

5 2. The amount of time spent by the employee performing the duties of an
6 exempt employee.

7 3. The employee's relative freedom from direct supervision.

8 4. The relationship between the employee's salary and the wages paid to other
9 employees for the kind of work, other than the work of an exempt employee,
10 performed by the employee.

11 **(2) EXEMPT EMPLOYEES.** In promulgating rules under s. 103.02 (2) classifying
12 periods of time into periods to be paid for at regular rates and periods to be paid for
13 at a rate of at least 1.5 times the regular rates, the department shall exempt from
14 the application of those rules employees employed in a bona fide administrative,
15 executive, or professional capacity.

16 **(3) PAY RATE DETERMINATION.** (a) For the purpose of sub. (1) (b), (c), and (d), the
17 rate of compensation shall be \$970 per week until the first day of the 18th month
18 beginning after the effective date of this paragraph ... [LRB inserts date]. By the
19 first day of the 18th month beginning after the effective date of this paragraph ...
20 [LRB inserts date], and annually thereafter, the department shall, subject to par. (c),
21 promulgate rules to revise that rate. The department shall revise the rate of
22 compensation by calculating the percentage difference between the consumer price
23 index for the 12-month period ending on the last day of the last month for which that
24 information is available and the consumer price index for the 12-month period
25 ending on the last day of the month 12 months prior to that month, adjusting the rate

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1 then in effect by that percentage difference, and rounding that result to the nearest
2 multiple of 5 cents.

3 (b) The department may use the emergency rule procedures under s. 227.24 to
4 promulgate the rules required under par. (a). Notwithstanding s. 227.24 (1) (a) and
5 (3), the department may promulgate those rules as emergency rules without
6 providing evidence that promulgating those rules as emergency rules is necessary
7 to preserve the public peace, health, safety, or welfare and without a finding of
8 emergency. Notwithstanding s. 227.24 (1) (e) 1d. and 1g., the department is not
9 required to prepare a statement of the scope of those rules or to submit those rules
10 in final draft form to the governor for approval.

11 (c) Paragraph (a) does not apply if the consumer price index for the 12-month
12 period ending on the last day of the last month for which that information is available
13 has not increased over the consumer price index for the 12-month period ending on
14 the last day of the month 12 months prior to that month.

15 **SECTION 4.** 103.03 of the statutes is amended to read:

16 **103.03 Violations; penalty.** ~~The employment of any person in any~~
17 ~~employment or place of employment at any time other than the permissible hours of~~
18 ~~labor shall be prima facie evidence of a violation of this section Any employer that~~
19 ~~violates s. 103.02 or 103.023 is subject to the penalties under s. 103.005 (12). Every~~
20 ~~day for each person employed, and every week for each person employed, during~~
21 ~~which any employer fails to observe or to comply with any order of the department,~~
22 ~~or to perform any duty enjoined by ss. 103.01 to 103.03 required by s. 103.02 or~~
23 ~~103.023, shall constitute a separate offense. Section 111.322 (2m) applies to~~
24 ~~discharge or other discriminatory acts arising in connection with any proceeding~~
25 ~~under s. 103.02 or 103.023.~~

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1 **SECTION 5.** 109.09 (1) of the statutes is amended to read:

2 109.09 (1) The department shall investigate and attempt equitably to adjust
3 controversies between employers and employees as to alleged wage claims. The
4 department may receive and investigate any wage claim that is filed with the
5 department, or received by the department under s. 109.10 (4), no later than 2 years
6 after the date the wages are due. The department may, after receiving a wage claim,
7 investigate any wages due from the employer against whom the claim is filed to any
8 employee during the period commencing 2 years before the date the claim is filed.
9 The department shall enforce this chapter and s. 66.0903, 2013 stats., s. 103.49, 2013
10 stats., and s. 229.8275, 2013 stats., and ss. 16.856, 103.02, 103.023, 103.82, and
11 104.12. In pursuance of this duty, the department may sue the employer on behalf
12 of the employee to collect any wage claim or wage deficiency and ss. 109.03 (6) and
13 109.11 (2) and (3) shall apply to such actions. Except for actions under s. 109.10, the
14 department may refer such an action to the district attorney of the county in which
15 the violation occurs for prosecution and collection and the district attorney shall
16 commence an action in the circuit court having appropriate jurisdiction. Any
17 number of wage claims or wage deficiencies against the same employer may be joined
18 in a single proceeding, but the court may order separate trials or hearings. In actions
19 that are referred to a district attorney under this subsection, any taxable costs
20 recovered by the district attorney shall be paid into the general fund of the county
21 in which the violation occurs and used by that county to meet its financial
22 responsibility under s. 978.13 (2) (b) for the operation of the office of the district
23 attorney who prosecuted the action.

24 **SECTION 6.** 111.322 (2m) (a) of the statutes is amended to read:

