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S.B. 47  
134<sup>th</sup> General Assembly

## Bill Analysis

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**Version:** As Reported by the House Commerce and Labor

**Primary Sponsors:** Sens. Brenner and Peterson

Paul Luzzi, Attorney

### SUMMARY

- Prohibits an employee from joining as a party plaintiff in a lawsuit alleging a violation of Ohio's overtime requirement unless that employee first gives written consent to become a party plaintiff and that consent is filed with the court in which the lawsuit is brought.
- Exempts an employer from Ohio's requirement to pay overtime wages when an employee is engaged in traveling to and from a worksite or performing specific tasks.
- Incorporates into Ohio's overtime requirement specified sections of the federal Portal to Portal Act of 1947, which addresses when to pay overtime for travel to and from work and activities that are preliminary and postliminary to an employee's principal activities.

### DETAILED ANALYSIS

Ohio's Overtime Law<sup>1</sup> requires an employer to pay an employee overtime pay of one and a half times the employee's regular hourly wage rate for hours worked in excess of 40 hours in a seven-day workweek, in the manner and methods provided in and subject to the exemptions of the federal Fair Labor Standards Act<sup>2</sup> (FLSA).

The bill prohibits an employee from joining a lawsuit for overtime violations unless the employee consents in writing and the consent is filed with the court. It also exempts certain tasks from the Ohio Overtime Law and incorporates into the law specific sections of the federal

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<sup>1</sup> R.C. 4111.03.

<sup>2</sup> 29 United States Code (U.S.C.) 201 *et seq.*

Portal to Portal Act of 1947,<sup>3</sup> which grant immunity from liability under the FLSA when an employer does not pay overtime under certain circumstances.

## **Collective actions for state overtime violations**

Under the bill, an employee may not be joined as a party plaintiff in a lawsuit alleging a violation of Ohio's overtime requirement unless that employee first gives written consent to become a party plaintiff and the consent is filed with the court in which the lawsuit was filed. The requirement that an employee opt-in to a collective action for overtime violations is similar to provisions in both the FLSA and the law implementing the minimum wage amendment to the Ohio Constitution.<sup>4</sup>

## **Overtime compensation exemption**

The bill exempts, subject to the exceptions below, an employer from Ohio's requirement to pay overtime wages to an employee for any time the employee spends doing any of the following:

- Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities that the employee is employed to perform;
- Activities that are preliminary or postliminary to the principal activity or activities;
- Activities requiring insubstantial or insignificant periods of time beyond the employee's scheduled working hours.

The bill's exemption applies to any activity described above that occurs before the time on any particular workday that the employee commences the principal activity, or after the time on any particular workday that employee stops performing the principal activity.<sup>5</sup>

## **Exceptions to the exemption**

The bill's exemption from the overtime requirement for tasks that are preliminary or postliminary to an employee's principal work activities does not apply if the employee performs the task under either of the following circumstances:

- The employee performs the task during the regular work day or during prescribed hours;
- The employee performs the task at the employer's specific direction.

Additionally, the bill's exemptions from the overtime requirement do not apply to any of the activities listed above under either of the following circumstances:

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<sup>3</sup> 29 U.S.C. 251 *et seq.*

<sup>4</sup> R.C. 4111.10; *see also* R.C. 4111.14 (implementing Ohio Constitution, Article II, Section 34a) and 29 U.S.C. 216(b).

<sup>5</sup> R.C. 4111.03 and 4111.031(A).

- The employee performs the activity pursuant to a contract between the employee, or the employee's agent or collective bargaining representative, and the employee's employer.
- The employee performs the activity pursuant to a custom or practice at the employee's place of employment and the custom or practice is not inconsistent with a contract described above.<sup>6</sup>

## **Incorporation of Portal to Portal Act**

The bill specifies that Ohio's overtime requirement is subject to the exemptions found in Sections 252 and 254 of the federal Portal to Portal Act of 1947.

### **Section 252**

Section 252 of the Portal to Portal Act grants an employer immunity from liability or punishment for failing to pay an employee overtime compensation for any activity the employee engaged in before May 14, 1947 (the date the act was enacted), unless the activity was compensable under certain circumstances specified by the act.<sup>7</sup> Because Section 252 applies only to activities occurring before May 14, 1947, it is unclear how incorporating this immunity into Ohio's overtime requirement affects overtime liability.

### **Section 254**

Section 254 of the Portal to Portal Act grants an employer immunity from liability or punishment for failing to pay an employee overtime compensation for any of the following activities whether an employee engaged in the activity on or after May 14, 1947:

- Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities that the employee is employed to perform;
- Performing activities that are preliminary or postliminary to the principal activity or activities that the employee is employed to perform.

The immunity granted by Section 254 does not apply if either of the activities listed above are compensable under either of the following:

- An express provision of a contract in effect at the time the employee performed the activity, including a collective bargaining agreement;
- A custom or practice in effect at the time of the activity that is not inconsistent with a contract in effect at the time the employee engaged in the activity, including a collective bargaining agreement.<sup>8</sup>

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<sup>6</sup> R.C. 4111.031(B) and (C).

<sup>7</sup> 29 U.S.C. 252.

<sup>8</sup> 29 U.S.C. 254.

The immunity granted by Section 254 of the act overlaps with two of the exemptions to Ohio's overtime requirement created by the bill. The act, however, does not expressly grant immunity to the federal overtime requirement for activities requiring insubstantial or insignificant periods of time beyond the employee's scheduled working hours. Additionally, the bill lists two situations in which the exemption for activities that are preliminary or postliminary to an employee's principal activity do not apply, but the Portal to Portal Act is silent with respect to those situations. It is unclear how incorporating Section 254 of the act into Ohio's Overtime Law and also providing similar exemptions in that law with different exceptions and exemptions from those exceptions will affect overtime liability.

## Interaction between state and federal law

The FLSA and Ohio's Overtime Law both regulate overtime wages that an employer must pay the employer's employees. An employer may be subject to one or both laws. The FLSA specifies that if an employer is subject to both laws, the employer is governed by the law that establishes the lower maximum workweek.<sup>9</sup> Under continuing law, Ohio has the same maximum workweek as specified in the FLSA (40 hours per week).

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## HISTORY

Action	Date
Introduced	02-03-21
Reported, S. Ways and Means	09-15-21
Passed Senate (25-7)	09-22-21
Reported, H. Commerce and Labor	03-09-22

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<sup>9</sup> 29 U.S.C. 218.