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BEFORE THE SENATE TRANSPORTATION, COMMERCE & WORKFORCE COMMITTEE

OPPONENT TESTIMONY ON SENATE BILL 243

Chairman McColley, Vice Chair Johnson, Ranking Member Antonio, and members of the Senate Transportation, Commerce and Workforce Committee, thank for the opportunity to provide testimony in opposition the Senate Bill 243 (SB 243). My name is Bob DeRose, I am the former President of the Ohio Association for Justice. More importantly I am a lawyer who focuses his practice to protecting workers in Ohio and around the country from wage theft. I am very familiar with the Fair Labor Standards Act (FLSA) and the Ohio Minimum Wage Fairness Act (the Ohio Wage Act).

The FLSA Savings Clause, 29 U.S.C. §218, expressly allows states to craft wage and hour statutes and regulations apart from the FLSA. Congress intended the FLSA to be the minimum requirement for employee protections and permits the states to adopt the FLSA and/or increase employee wage protections. The Ohio Wage Act incorporates the Sections 207 and 213 of the FLSA at O.R.C. § 4111.03(A).

While the FLSA does not expressly prevent states from adopting its own wage laws that differ from the federal law, the FLSA does not permit Ohio to reduce the wage protections granted by the Congress. 29 U.S.C. §218(a). S.B.243 is in conflict with federal wage law, specifically the Portal-to-Portal Act.

In 1947, Congress enacted the Portal-to Portal Act, 29 U.S.C. §251, *et al.*, which amended the FLSA to clarify the definition of the compensable workday. The federal Portal-to-Poral Act clarifies that commuting time and some preliminary and postliminary work duties are not compensable. However, the federal Portal-to-Poral Act does mandate that employees are entitled to compensation for performing activities that are indispensable to their job duties.

With the increased use of smartphones and mobile technology, the line between work and free time has become blurred. Smartphones, laptops, iPads, and other technology allow employees to receive e-mails, download documents and access the Internet when they choose. As a result, some employees feel obligated to stay connected to work on nights, weekends and during vacation times. Even composing a few quick e-mails on a smartphone can add up to a significant period of time spent working "off the clock." Proponents of SB243 argue that any time spent before or after an employee's scheduled workday is not compensable. This position is incorrect and does not comport to the established body of federal statutory and case law.

The FLSA addresses this issue by looking at what the employer either "suffers or permits" the employee to do before or after their scheduled workday. Federal law mandates that an employer who **requires or assigns** their employees to perform preliminary and postliminary tasks to

compensate the employee for that time. Further, federal law mandates that if an employer "knows or has reason to believe that the work is being performed, [it] must count the time as hours worked." 29 C.F.R. §112. It does not matter if the work was specifically requested, or even authorized. 29 C.F.R. § 785.111. Ohio cannot enact a law that restricts or removes employee protections granted by the Congress.

The federal courts have given employers protections from employees who work "off-the-clock" when specifically told not to do so. If an employer does not want the employee to work "off-the-clock," it can protect themselves from liability by crafting a clear policy regarding the after-hours use of smartphones and other technology. In *White v. Baptist Mem. Health Care Corp*., 699 F. 3d 869 (6th Cir. 2012) "under the FLSA, if an employer established a reasonable process for an employee to report uncompensated work time, the employer is not liable for non-payment if the employee fails to follow the established process."

SB243 incorrectly defines the concept of "de minimus time" at line 137 through 147. The federal "de minimus rule" applies to time that is so "insubstantial or insignificant" that is administratively impractical to record it. 29 C.F.R. § 785.47 The concept de minimus time being described as tasks that are not compensable without considering the length of time it took to perform the task, the number of tasks or whether the employer suffered or permitted the work to be performed is in direct contradiction with federal wage law.

Many employees are required to be ready to work when their scheduled shift starts. The notion of being "ready to work" for many employees means preparing their paperwork, getting their assignments, preparing their workplace, or obtaining the correct tools. In this era of COVID, nurses and hospital staff must put on required Personal Protective Equipment (PPE) prior to the start of their shift and remove it at the end of their shift. Donning and doffing, putting on and taking off of PPE prior to the start of a shift is considered preliminary and postliminary activity to their principle activities. Under SB243, at proposed amended Sec. 4111.031(b), the nurses and hospital staff would not be paid for that time. Further, nor would any Ohioan who works with the public, from fast food restaurant workers, to retail workers to baristas. The Portal-to-Portal Act mandates the donning and doffing of PPE that is integral and indispensable to a workers' primary duties be paid. SB243 would deny coverage. Thus, SB243 is in conflict with the FLSA.

Simply put, SB243 is preempted by federal wage law. However, the Ohio Legislature can achieve SB243's intended result by adopting the Portal-to Portal Act and incorporating 29 U.S.C. §251 within O.R.C. 4111.

In closing, the non-exempt employees of Ohio urge you to not adopt SB243 as written because it restricts the wage protections granted by the Congress.

I welcome any questions from the committee and thank you for the opportunity to testify today.

/s/Bob DeRose
Bob DeRose