

25104499D

HOUSE BILL NO. 2561

Offered January 13, 2025

Prefiled January 12, 2025

A *BILL to amend and reenact §§ 2.2-3907, 40.1-28.7:7, 40.1-28.12, 40.1-29, 40.1-29.2, and 40.1-29.3 of the Code of Virginia, relating to employee protections; minimum wage and overtime wages; civil actions; misclassification of workers.*

Patrons—Lopez, Cousins, McClure and Simonds

Referred to Committee on Labor and Commerce

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-3907, 40.1-28.7:7, 40.1-28.12, 40.1-29, 40.1-29.2, and 40.1-29.3 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-3907. Procedures for a charge of unlawful discrimination; notice; investigation; report; conciliation; notice of the right to file a civil action; temporary relief.

A. Any person claiming to be aggrieved by an unlawful discriminatory practice may file a complaint in writing under oath or affirmation with the Office of Civil Rights of the Department of Law (the Office). Unless otherwise stated in this chapter, a complaint alleging a violation of this chapter or federal statutes governing discrimination in employment that also falls under the jurisdiction of this chapter shall be filed with the Office no later than ~~300 days~~ *two years* from the day upon which the alleged discriminatory practice occurred. The Office itself may in a like manner initiate such a complaint. The complaint shall be in such detail as to substantially apprise any party properly concerned as to the time, place, and facts surrounding the alleged unlawful discrimination.

B. Upon perfection of a complaint filed pursuant to subsection A, the Office shall timely serve a charge on the respondent and provide all parties with a notice informing the parties of the complainant's rights, including the right to commence a civil action, and the dates within which the complainant may exercise such rights. In the notice, the Office shall notify the complainant that the charge of unlawful discrimination will be dismissed with prejudice and with no right to further proceed if a written complaint is not timely filed with the appropriate general district or circuit court.

C. The complainant and respondent may agree to voluntarily submit the charge to mediation without waiving any rights that are otherwise available to either party pursuant to this chapter and without incurring any obligation to accept the result of the mediation process. Nothing occurring in mediation shall be disclosed by the Office or admissible in evidence in any subsequent proceeding unless the complainant and the respondent agree in writing that such disclosure be made.

D. Once a charge has been issued, the Office shall conduct an investigation sufficient to determine whether there is reasonable cause to believe the alleged discrimination occurred. Such charge shall be the subject of a report made by the Office. The report shall be a confidential document subject to review by the Attorney General, authorized Office employees, and the parties. The review shall state whether there is reasonable cause to believe the alleged unlawful discrimination has been committed.

E. If the report on a charge of discrimination concludes that there is no reasonable cause to believe the alleged unlawful discrimination has been committed, the charge shall be dismissed and the complainant shall be given notice of his right to commence a civil action.

F. If the report on a charge of discrimination concludes that there is reasonable cause to believe the alleged unlawful discrimination has been committed, the complainant and respondent shall be notified of such determination and the Office shall immediately endeavor to eliminate any alleged unlawful discriminatory practice by informal methods such as conference, conciliation, and persuasion. When the Office determines that further endeavor to settle a complaint by conference, conciliation, and persuasion is unworkable and should be bypassed, the Office shall issue a notice that the case has been closed and the complainant shall be given notice of his right to commence a civil action.

G. At any time after a notice of charge of discrimination is issued, the Office or complainant may petition the appropriate court for temporary relief, pending final determination of the proceedings under this section, including an order or judgment restraining the respondent from doing or causing any act that would render ineffectual an order that a court may enter with respect to the complainant. Whether it is brought by the Office or by the complainant, the petition shall contain a certification by the Office that the particular matter presents exceptional circumstances in which irreparable injury will result from unlawful discrimination in the absence of temporary relief.

H. Upon receipt of a written request from the complainant, the Office shall promptly issue a notice of the right to file a civil action to the complainant after (i) 180 days have passed from the date the complaint was

2/5/25 10:59

59 filed or (ii) the Office determines that it will be unable to complete its investigation within 180 days from the
 60 date the complaint was filed. If the Office fails to issue such a notice pursuant to the provisions of this
 61 subsection, the complainant may commence a timely civil action as provided in § 2.2-3908.

62 I. For any complaint or charge of discrimination for which the complainant has received a Notice of Right
 63 to Sue from the E.E.O.C., the general district or circuit court having jurisdiction shall accept the E.E.O.C.
 64 Notice of Right to Sue as a notice of the right to file a civil action under subsection H.

65 **§ 40.1-28.7:7. Misclassification of workers.**

66 A. An individual who has not been properly classified as an employee may bring a civil action for
 67 damages against his employer for failing to properly classify the employee if the employer had knowledge of
 68 the individual's misclassification. An individual's representative may bring the action on behalf of the
 69 individual. If the court finds that the employer has not properly classified the individual as an employee, the
 70 court may award the individual damages in the amount of any wages, salary, employment benefits, including
 71 expenses incurred by the employee that would otherwise have been covered by insurance, or other
 72 compensation lost to the individual, a reasonable attorney fee, and the costs incurred by the individual in
 73 bringing the action.

74 B. In a proceeding under subsection A, an individual who performs services for a person for remuneration
 75 shall be presumed to be an employee of the person that paid such remuneration, and the person that paid such
 76 remuneration shall be presumed to be the employer of the individual who was paid for performing the
 77 services, unless it is shown that the individual is an independent contractor as determined under the Internal
 78 Revenue Service guidelines.

79 C. As used in this section, "Internal Revenue Service guidelines" means the most recent version of the
 80 guidelines published by the Internal Revenue Service for evaluating independent contractor status, including
 81 its interpretation of common law doctrine on independent contractors, and any regulations that the Internal
 82 Revenue Service may promulgate regarding determining whether an employee is an independent contractor,
 83 including 26 C.F.R. § 31.3121(d)-1.

84 D. In a proceeding under subsection A, a hiring party providing an individual with personal protective
 85 equipment in response to a disaster caused by a communicable disease of public health threat for which a
 86 state of emergency has been declared pursuant to § 44-146.17 shall not be considered in any determination
 87 regarding whether such individual is an employee or independent contractor. For the purposes of this
 88 subsection, the terms "communicable disease of public health threat," "disaster," and "state of emergency"
 89 have the same meaning as provided in § 44-146.16.

90 E. *A proceeding under subsection A shall be commenced within three years after the cause of action*
 91 *accrued.*

92 **§ 40.1-28.12. Employee's remedies.**

93 Any employer who violates the minimum wage requirements of this law article shall be liable to the
 94 employee or employees affected in the amount of the unpaid minimum wages, plus interest at eight per
 95 centum per annum upon such unpaid wages as may be due the plaintiff, said interest to be awarded from the
 96 date or dates said wages were due the employee or employees. The court may, in addition to any judgment
 97 awarded to the employee or employees, require defendant to pay reasonable attorney's fees incurred by the
 98 employee or employees for the applicable remedies, damages, or other relief available in an action brought
 99 pursuant to the provisions of subsection J of § 40.1-29.

100 **§ 40.1-29. Time and medium of payment; withholding wages; written statement of earnings;**
 101 **agreement for forfeiture of wages; proceedings to enforce compliance; penalties.**

102 A. All employers operating a business or engaging an individual to perform domestic service shall
 103 establish regular pay periods and rates of pay for employees except executive personnel. All such employers
 104 shall pay salaried employees at least once each month and employees paid on an hourly rate at least once
 105 every two weeks or twice in each month, except that (i) a student who is currently enrolled in a work-study
 106 program or its equivalent administered by any secondary school, institution of higher education, or trade
 107 school, and (ii) employees whose weekly wages total more than 150 percent of the average weekly wage of
 108 the Commonwealth as defined in § 65.2-500, upon agreement by each affected employee, may be paid once
 109 each month if the institution or employer so chooses. Upon termination of employment an employee shall be
 110 paid all wages or salaries due him for work performed prior thereto; such payment shall be made on or before
 111 the date on which he would have been paid for such work had his employment not been terminated.

112 B. Payment of wages or salaries shall be (i) in lawful money of the United States, (ii) by check payable at
 113 face value upon demand in lawful money of the United States, (iii) by electronic automated fund transfer in
 114 lawful money of the United States into an account in the name of the employee at a financial institution
 115 designated by the employee, or (iv) by credit to a prepaid debit card or card account from which the employee
 116 is able to withdraw or transfer funds with full written disclosure by the employer of any applicable fees and
 117 affirmative consent thereto by the employee. However, an employer that elects not to pay wages or salaries in
 118 accordance with clause (i) or (ii) to an employee who is hired after January 1, 2010, shall be permitted to pay
 119 wages or salaries by credit to a prepaid debit card or card account in accordance with clause (iv), even though

120 such employee has not affirmatively consented thereto, if the employee fails to designate an account at a
121 financial institution in accordance with clause (iii) and the employer arranges for such card or card account to
122 be issued through a network system through which the employee shall have the ability to make at least one
123 free withdrawal or transfer per pay period, which withdrawal may be for any sum in such card or card
124 account as the employee may elect, using such card or card account at financial institutions participating in
125 such network system.

126 C. No employer shall withhold any part of the wages or salaries of any employee except for payroll, wage
127 or withholding taxes or in accordance with law, without the written and signed authorization of the employee.
128 On each regular pay date, each employer, other than an employer engaged in agricultural employment
129 including agribusiness and forestry, shall provide to each employee a written statement, by a paystub or
130 online accounting, that shows the name and address of the employer; the number of hours worked during the
131 pay period if the employee is paid on the basis of (i) the number of hours worked or (ii) a salary that is less
132 than the standard salary level adopted by regulation of the U.S. Department of Labor pursuant to § 13(a)(1) of
133 the federal Fair Labor Standards Act, 29 U.S.C. § 213(a)(1), as amended, establishing an exemption from the
134 Act's overtime premium pay requirements; the rate of pay; the gross wages earned by the employee during
135 the pay period; and the amount and purpose of any deductions therefrom. The paystub or online accounting
136 shall include sufficient information to enable the employee to determine how the gross and net pay were
137 calculated. An employer engaged in agricultural employment including agribusiness and forestry, upon
138 request of its employee, shall furnish the employee a written statement of the gross wages earned by the
139 employee during any pay period and the amount and purpose of any deductions therefrom.

140 D. No employer shall require any employee, except executive personnel, to sign any contract or
141 agreement which provides for the forfeiture of the employee's wages for time worked as a condition of
142 employment or the continuance therein, except as otherwise provided by law.

143 E. An employer who willfully and with intent to defraud fails or refuses to pay wages in accordance with
144 this section or § 40.1-29.3, unless the failure to pay was because of a bona fide dispute between the employer
145 and its employee:

146 1. To an employee or employees is guilty of a Class 1 misdemeanor if the value of the wages earned and
147 not paid by the employer is less than \$10,000; and

148 2. To an employee or employees is guilty of a Class 6 felony (i) if the value of the wages earned and not
149 paid is \$10,000 or more or (ii) regardless of the value of the wages earned and not paid, if the conviction is a
150 second or subsequent conviction under this section or § 40.1-29.3.

151 For purposes of this section, the determination as to the "value of the wages earned" shall be made by
152 combining all wages the employer failed or refused to pay pursuant to this section and § 40.1-29.3.

153 F. The Commissioner may require a written complaint of the violation of this section and, with the written
154 and signed consent of an employee, may institute proceedings on behalf of an employee to enforce
155 compliance with this section, and to collect any moneys unlawfully withheld from such employee that shall
156 be paid to the employee entitled thereto. In addition, following the issuance of a final order by the
157 Commissioner or a court, the Commissioner may engage private counsel, approved by the Attorney General,
158 to collect any moneys owed to the employee or the Commonwealth. Upon entry of a final order of the
159 Commissioner, or upon entry of a judgment, against the employer, the Commissioner or the court shall assess
160 attorney fees of one-third of the amount set forth in the final order or judgment.

161 G. In addition to being subject to any other penalty provided by the provisions of this section, any
162 employer who fails to make payment of wages in accordance with subsection A shall be liable for the
163 payment of all wages due, and an additional equal amount as liquidated damages, plus interest at an annual
164 rate of eight percent accruing from the date the wages were due.

165 H. Any employer who knowingly fails to make payment of wages in accordance with subsection A or §
166 40.1-29.3 shall be subject to a civil penalty not to exceed \$1,000 for each violation. The Commissioner shall
167 notify any employer that the Commissioner alleges has violated any provision of this section or § 40.1-29.3
168 by certified mail. Such notice shall contain a description of the alleged violation. Within 15 days of receipt of
169 notice of the alleged violation, the employer may request an informal conference regarding such violation
170 with the Commissioner. In determining the amount of any penalty to be imposed, the Commissioner shall
171 consider the size of the business of the employer charged and the gravity of the violation. The decision of the
172 Commissioner shall be final. Civil penalties owed under this section shall be paid to the Commissioner for
173 deposit into the general fund of the State Treasurer. The Commissioner shall prescribe procedures for the
174 payment of proposed assessments of penalties that are not contested by employers. Such procedures shall
175 include provisions for an employer to consent to abatement of the alleged violation and pay a proposed
176 penalty or a negotiated sum in lieu of such penalty without admission of any civil liability arising from such
177 alleged violation.

178 I. Final orders of the Commissioner, the general district courts, or the circuit courts may be recorded,
179 enforced, and satisfied as orders or decrees of a circuit court upon certification of such orders by the
180 Commissioner or the court as appropriate.

181 J. In addition to any civil or criminal penalty provided by this section, and without regard to any

182 exhaustion of alternative administrative remedies provided for in this section, if an employer fails to pay
183 wages to an employee in accordance with this section, *the Virginia Minimum Wage Act* (§ 40.1-28.8 et seq.),
184 or § 40.1-29.2 or 40.1-29.3, the employee may bring an action, individually, jointly, with other aggrieved
185 employees, or on behalf of similarly situated employees as a collective action consistent with the collective
186 action procedures of the Fair Labor Standards Act, 29 U.S.C. § 216(b), against the employer in a court of
187 competent jurisdiction to recover payment of the wages, and the court shall award the wages owed, an
188 additional equal amount as liquidated damages, plus prejudgment interest thereon as provided in subsection
189 G, and reasonable attorney fees and costs. If the court finds that the employer knowingly failed to pay wages
190 to an employee in accordance with this section, *the Virginia Minimum Wage Act* (§ 40.1-28.8 et seq.), or §
191 40.1-29.2 or 40.1-29.3, the court shall award the employee an amount equal to triple the amount of wages due
192 and reasonable attorney fees and costs.

193 K. As used in this section, a person acts "knowingly" if the person, with respect to information, (i) has
194 actual knowledge of the information, (ii) acts in deliberate ignorance of the truth or falsity of the information,
195 or (iii) acts in reckless disregard of the truth or falsity of the information. Establishing that a person acted
196 knowingly shall not require proof of specific intent to defraud.

197 L. An action under this section shall be commenced within three years after the cause of action accrued.
198 The period for filing is tolled upon the filing of an administrative action under subsection F until the
199 employee has been informed that the action has been resolved or until the employee has withdrawn the
200 complaint, whichever is sooner.

201 **§ 40.1-29.2. Employer liability.**

202 Any employer that violates the overtime pay requirements of the federal Fair Labor Standards Act of
203 1938, 29 U.S.C. § 201 et seq., as amended, and any regulations, guidance, or rules adopted pursuant to the
204 overtime pay provisions of such federal act or any related governing case law shall be liable to the employee
205 for the applicable remedies, damages, or other relief available under the federal Fair Labor Standards Act in
206 an action brought pursuant to the process in the provisions of subsection J of § 40.1-29. For the purposes of
207 this section, "employer" and "employee" shall have the meanings ascribed to them under the federal Fair
208 Labor Standards Act and all applicable exemptions, overtime calculation methods, methods of overtime
209 payment, or other overtime provisions within the federal Fair Labor Standards Act and any attendant
210 regulations, guidance, or rules shall apply. ~~Any action brought pursuant to this section shall accrue according~~
211 ~~to the applicable limitations set forth in the federal Fair Labor Standards Act.~~

212 **§ 40.1-29.3. Overtime for certain employees.**

213 A. As used in this section:

214 "Carrier" means an air carrier that is subject to the provisions of the federal Railway Labor Act, 45 U.S.C.
215 § 181 et seq.

216 "Derivative carrier" means a carrier that meets the two-part test used by the federal National Mediation
217 Board to determine if a carrier is considered a derivative carrier.

218 "Employee" means an individual employed by a derivative carrier.

219 B. An employer shall pay each employee an overtime premium at a rate not less than one and one-half
220 times the employee's regular rate for any hours worked by an employee in excess of 40 hours in any one
221 workweek. An employee's regular rate shall be calculated as the employee's hourly rate of pay plus any other
222 non-overtime wages paid or allocated for that workweek, excluding any amounts that would be excluded
223 from the regular rate by the federal Fair Labor Standards Act, 29 U.S.C. § 201 et seq., and its implementing
224 regulations for an individual covered by such federal act, divided by the total number of hours worked in that
225 workweek.

226 C. If an employer fails to pay overtime wages to an employee in accordance with this section, the
227 employee may bring an action against the employer in a court of competent jurisdiction to recover payment
228 of the overtime wages, and the court shall award the overtime wages owed; an additional equal amount as
229 liquidated damages, and reasonable attorney fees and costs; however, if the employer shows to the
230 satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had
231 reasonable grounds for believing that his act or omission was not a violation of this section, the court may, in
232 its discretion, award no liquidated damages or award any amount thereof not to exceed the amount of the
233 unpaid overtime wages.

234 D. ~~An action under this section shall be commenced within two years after the cause of action accrued,~~
235 ~~except that a cause of action arising out of a willful violation may be commenced within three years after the~~
236 ~~cause of action accrued~~ employer shall be liable to the employee for the applicable remedies, damages, or
237 other relief available in an action brought pursuant to the provisions of subsection J of § 40.1-29.