

1 VIRGINIA ACTS OF ASSEMBLY — CHAPTER

2 *An Act 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*
 3 *Code of Virginia, relating to employee protections; minimum wage and overtime wages; civil actions;*
 4 *misclassification of workers.*

5 [H 2561]

6 Approved

7 **Be it enacted by the General Assembly of Virginia:**
 8 **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**
 9 **amended and reenacted as follows:**

10 **§ 2.2-3907. Procedures for a charge of unlawful discrimination; notice; investigation; report;**
 11 **conciliation; notice of the right to file a civil action; temporary relief.**

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

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

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

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

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

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

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

53 H. Upon receipt of a written request from the complainant, the Office shall promptly issue a notice of the
 54 right to file a civil action to the complainant after (i) 180 days have passed from the date the complaint was
 55 filed or (ii) the Office determines that it will be unable to complete its investigation within 180 days from the
 56 date the complaint was filed. If the Office fails to issue such a notice pursuant to the provisions of this

57 subsection, the complainant may commence a timely civil action as provided in § 2.2-3908.

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

61 **§ 40.1-28.7:7. Misclassification of workers.**

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

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

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

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

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

88 **§ 40.1-28.12. Employee's remedies.**

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

96 **§ 40.1-29. Time and medium of payment; withholding wages; written statement of earnings;
97 agreement for forfeiture of wages; proceedings to enforce compliance; penalties.**

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

108 B. Payment of wages or salaries shall be (i) in lawful money of the United States, (ii) by check payable at
109 face value upon demand in lawful money of the United States, (iii) by electronic automated fund transfer in
110 lawful money of the United States into an account in the name of the employee at a financial institution
111 designated by the employee, or (iv) by credit to a prepaid debit card or card account from which the employee
112 is able to withdraw or transfer funds with full written disclosure by the employer of any applicable fees and
113 affirmative consent thereto by the employee. However, an employer that elects not to pay wages or salaries in
114 accordance with clause (i) or (ii) to an employee who is hired after January 1, 2010, shall be permitted to pay
115 wages or salaries by credit to a prepaid debit card or card account in accordance with clause (iv), even though
116 such employee has not affirmatively consented thereto, if the employee fails to designate an account at a
117 financial institution in accordance with clause (iii) and the employer arranges for such card or card account to
118 be issued through a network system through which the employee shall have the ability to make at least one

119 free withdrawal or transfer per pay period, which withdrawal may be for any sum in such card or card
 120 account as the employee may elect, using such card or card account at financial institutions participating in
 121 such network system.

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

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

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

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

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

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

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

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

161 H. Any employer who knowingly fails to make payment of wages in accordance with subsection A or §
 162 40.1-29.3 shall be subject to a civil penalty not to exceed \$1,000 for each violation. The Commissioner shall
 163 notify any employer that the Commissioner alleges has violated any provision of this section or § 40.1-29.3
 164 by certified mail. Such notice shall contain a description of the alleged violation. Within 15 days of receipt of
 165 notice of the alleged violation, the employer may request an informal conference regarding such violation
 166 with the Commissioner. In determining the amount of any penalty to be imposed, the Commissioner shall
 167 consider the size of the business of the employer charged and the gravity of the violation. The decision of the
 168 Commissioner shall be final. Civil penalties owed under this section shall be paid to the Commissioner for
 169 deposit into the general fund of the State Treasurer. The Commissioner shall prescribe procedures for the
 170 payment of proposed assessments of penalties that are not contested by employers. Such procedures shall
 171 include provisions for an employer to consent to abatement of the alleged violation and pay a proposed
 172 penalty or a negotiated sum in lieu of such penalty without admission of any civil liability arising from such
 173 alleged violation.

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

177 J. In addition to any civil or criminal penalty provided by this section, and without regard to any
 178 exhaustion of alternative administrative remedies provided for in this section, if an employer fails to pay
 179 wages to an employee in accordance with this section, *the Virginia Minimum Wage Act* (§ 40.1-28.8 *et seq.*),
 180 or § 40.1-29.2 or 40.1-29.3, the employee may bring an action, individually, jointly, with other aggrieved

181 employees, or on behalf of similarly situated employees as a collective action consistent with the collective
 182 action procedures of the Fair Labor Standards Act, 29 U.S.C. § 216(b), against the employer in a court of
 183 competent jurisdiction to recover payment of the wages, and the court shall award the wages owed, an
 184 additional equal amount as liquidated damages, plus prejudgment interest thereon as provided in subsection
 185 G, and reasonable attorney fees and costs. If the court finds that the employer knowingly failed to pay wages
 186 to an employee in accordance with this section, *the Virginia Minimum Wage Act* (§ 40.1-28.8 et seq.), or §
 187 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
 188 and reasonable attorney fees and costs.

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

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

197 **§ 40.1-29.2. Employer liability.**

198 Any employer that violates the overtime pay requirements of the federal Fair Labor Standards Act of
 199 1938, 29 U.S.C. § 201 et seq., as amended, and any regulations, guidance, or rules adopted pursuant to the
 200 overtime pay provisions of such federal act or any related governing case law shall be liable to the employee
 201 for the applicable remedies, damages, or other relief available ~~under the federal Fair Labor Standards Act~~ in
 202 an action brought pursuant to ~~the process in the provisions of~~ subsection J of § 40.1-29. For the purposes of
 203 this section, "employer" and "employee" shall have the meanings ascribed to them under the federal Fair
 204 Labor Standards Act and all applicable exemptions, overtime calculation methods, methods of overtime
 205 payment, or other overtime provisions within the federal Fair Labor Standards Act and any attendant
 206 regulations, guidance, or rules shall apply. ~~Any action brought pursuant to this section shall accrue according~~
 207 ~~to the applicable limitations set forth in the federal Fair Labor Standards Act.~~

208 **§ 40.1-29.3. Overtime for certain employees.**

209 A. As used in this section:

210 "Carrier" means an air carrier that is subject to the provisions of the federal Railway Labor Act, 45 U.S.C.
 211 § 181 et seq.

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

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

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

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

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