

1 SENATE BILL NO. 644

2 AMENDMENT IN THE NATURE OF A SUBSTITUTE

3 (Proposed by the Senate Committee on Commerce and Labor

4 on _____)

5 (Patron Prior to Substitute—Senator Surovell)

6 *A BILL to amend and reenact §§ 2.2-4321.3, 11-4.6, 40.1-28.7:7, 40.1-28.12, 40.1-29, 40.1-29.2, and*
7 *40.1-29.3 of the Code of Virginia, relating to labor and employment; payment of wages; minimum wage*
8 *and overtime wages; misclassification of workers; civil actions.*9 **Be it enacted by the General Assembly of Virginia:**10 **1. That §§ 2.2-4321.3, 11-4.6, 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**
11 **Virginia are amended and reenacted as follows:**12 **§ 2.2-4321.3. Payment of prevailing wage for work performed on public works contracts; penalty.**

13 A. As used in this section:

14 *"Employer" includes any person or group of persons acting directly or indirectly in the interest of an*
15 *employer in relation to an employee and includes a state agency.*

16 "Locality" means any county, city, or town, school division, or other political subdivision.

17 "Prevailing wage rate" means the rate, amount, or level of wages, salaries, benefits, and other
18 remuneration prevailing for the corresponding classes of mechanics, laborers, or workers employed for the
19 same work in the same trade or occupation in the locality in which the public facility or immovable property
20 that is the subject of public works is located, as determined by the Commissioner of Labor and Industry on
21 the basis of applicable prevailing wage rate determinations made by the U.S. Secretary of Labor under the
22 provisions of the Davis-Bacon Act, 40 U.S.C. § 276 et seq., as amended.23 "Public works" means the operation, erection, construction, alteration, improvement, maintenance, or
24 repair of any public facility or immovable property owned, used, or leased by a state agency or locality,
25 including transportation infrastructure projects.26 "State agency" means any authority, board, department, instrumentality, institution, agency, or other unit
27 of state government. "State agency" does not include any county, city, or town.28 B. Notwithstanding any other provision of this chapter, each state agency, when procuring services or
29 letting contracts for public works paid for in whole or in part by state funds, or when overseeing or
30 administering such contracts for public works, shall ensure that its bid specifications or other public contracts

31 applicable to the public works require bidders, offerors, contractors, and subcontractors to pay wages,
32 salaries, benefits, and other remuneration to any mechanic, laborer, or worker employed, retained, or
33 otherwise hired to perform services in connection with the public contract for public works at the prevailing
34 wage rate. Each public contract for public works by a state agency shall contain a provision requiring that the
35 remuneration to any individual performing the work of any mechanic, laborer, or worker on the work
36 contracted to be done under the public contract shall be at a rate equal to the prevailing wage rate.

37 C. Notwithstanding any other provision of this chapter, any locality may adopt an ordinance requiring
38 that, when letting contracts for public works paid for in whole or in part by funds of the locality, or when
39 overseeing or administering a public contract, its bid specifications, project agreements, or other public
40 contracts applicable to the public works shall require bidders, offerors, contractors, and subcontractors to pay
41 wages, salaries, benefits, and other remuneration to any mechanic, laborer, or worker employed, retained, or
42 otherwise hired to perform services in connection with the public contract at the prevailing wage rate. Each
43 public contract of a locality that has adopted an ordinance described in this section shall contain a provision
44 requiring that the remuneration to any individual performing the work of any mechanic, laborer, or worker on
45 the work contracted to be done under the public contract shall be at a rate equal to the prevailing wage rate.

46 D. Any contractor or subcontractor who employs any mechanic, laborer, or worker to perform work
47 contracted to be done under the public contract for public works for or on behalf of a state agency or for or on
48 behalf of a locality that has adopted an ordinance described in subsection C or at a rate that is less than the
49 prevailing wage rate (i) shall be liable to such individuals for the payment of all wages due, plus interest at an
50 annual rate of eight percent accruing from the date the wages were due; and (ii) shall be disqualified from
51 bidding on public contracts with any public body until the contractor or subcontractor has made full
52 restitution of the amount described in clause (i) owed to such individuals. A contractor or subcontractor who
53 willfully violates this section is guilty of a Class 1 misdemeanor.

54 E. Any interested party, which shall include a bidder, offeror, contractor, or subcontractor, shall have
55 standing to challenge any bid specification, project agreement, or other public contract for public works that
56 violates the provisions of this section. Such interested party shall be entitled to injunctive relief to prevent any
57 violation of this section. Any interested party bringing a successful action under this section shall be entitled
58 to recover reasonable attorney fees and costs from the responsible party.

59 F. A representative of a state agency or a representative of a locality that has adopted an ordinance

60 described in subsection C may contact the Commissioner of Labor and Industry, at least 10 but not more than
61 20 days prior to the date bids for such a public contract for public works will be advertised or solicited, to
62 ascertain the proper prevailing wage rate for work to be performed under the public contract.

63 G. Upon the award of any public contract subject to the provisions of this section, the contractor to whom
64 such contract is awarded shall certify, under oath, to the Commissioner of Labor and Industry the pay scale
65 for each craft or trade employed on the project to be used by such contractor and any of the contractor's
66 subcontractors for work to be performed under such public contract. This certification shall, for each craft or
67 trade employed on the project, specify the total hourly amount to be paid to employees, including wages and
68 applicable fringe benefits, provide an itemization of the amount paid in wages and each applicable benefit,
69 and list the names and addresses of any third party fund, plan or program to which benefit payments will be
70 made on behalf of employees.

71 H. Each employer subject to the provisions of this section shall keep, maintain, and preserve (i) records
72 relating to the wages paid to and hours worked by each individual performing the work of any mechanic,
73 laborer, or worker and (ii) a schedule of the occupation or work classification at which each individual
74 performing the work of any mechanic, laborer, or worker on the public works project is employed during
75 each work day and week. The employer shall preserve these records for a minimum of six years and make
76 such records available to the Department of Labor and Industry within 10 days of a request and shall certify
77 that records reflect the actual hours worked and the amount paid to its workers for whatever time period they
78 request.

79 I. Contractors and subcontractors performing public works for a state agency or for a locality that has
80 adopted an ordinance described in subsection C shall post the general prevailing wage rate for each craft and
81 classification involved, as determined by the Commissioner of Labor and Industry, including the effective
82 date of any changes thereof, in prominent and easily accessible places at the site of the work or at any such
83 places as are used by the contractor or subcontractors to pay workers their wages. Within 10 days of such
84 posting, a contractor or subcontractor shall certify to the Commissioner of Labor and Industry its compliance
85 with this subsection.

86 J. The provisions of this section shall not apply to any public contract for public works of \$250,000 or
87 less.

88 K. *The Attorney General or the Commissioner of Labor and Industry may investigate and bring a civil*

89 *action in a court of competent jurisdiction against an employer or other person for a violation of this section*
90 *under subsection M of § 40.1-29. An affected employee may bring a civil action in a court of competent*
91 *jurisdiction against his employer for a violation of this section under subsection J of § 40.1-29.*

92 **§ 11-4.6. Required contract provisions in construction contracts.**

93 A. As used in this section, unless the context requires a different meaning:

94 "Construction contract" means a contract for the construction, alteration, repair, or maintenance of a
95 building, structure, or appurtenance thereto, including moving, demolition, and excavation connected
96 therewith, or any provision contained in any contract relating to the construction of projects other than
97 buildings, except for contracts awarded solely for professional services as that term is defined in § 2.2-4301.

98 "Contractor" or "general contractor" means the same as that term is defined in § 54.1-1100, except that
99 such term shall not include persons solely furnishing materials.

100 "Owner" means a person or entity, other than a public body as defined in § 2.2-4301, responsible for
101 contracting with a general contractor for the procurement of a construction contract.

102 "Subcontractor" means the same as that term is defined in § 2.2-4347.

103 B. 1. In any construction contract between an owner and a general contractor, the parties shall include a
104 provision that requires the owner to pay such general contractor within 60 days of the receipt of an invoice
105 following satisfactory completion of the portion of the work for which the general contractor has invoiced.

106 An owner shall not be liable for amounts otherwise reducible due to the general contractor's noncompliance
107 with the terms of the contract. However, in the event that an owner withholds all or a part of the amount
108 invoiced by the general contractor under the terms of the contract, the owner shall notify the general
109 contractor within 45 days of the receipt of such invoice, in writing, of his intention to withhold all or part of
110 the general contractor's payment with the reason for nonpayment, specifically identifying the contractual
111 noncompliance and the dollar amount being withheld. Failure of an owner to make timely payment as
112 provided in this subdivision shall result in interest penalties consistent with § 2.2-4355. Nothing in this
113 subdivision shall be construed to apply to or prohibit the inclusion of any retainage provisions in a
114 construction contract.

115 2. Any construction contract in which there is at least one general contractor and one subcontractor shall
116 be deemed to include a provision under which any general contractor is liable to any subcontractor with
117 whom the general contractor contracts for satisfactory performance of the subcontractor's duties under the
118 contract. Such contract shall require such general contractor to pay such subcontractor within the earlier of (i)
119 60 days of the receipt of an invoice following satisfactory completion of the portion of the work for which the

120 subcontractor has invoiced or (ii) seven days after receipt of amounts paid by the owner to the general
121 contractor or by the contractor to the subcontractor for work performed by a subcontractor pursuant to the
122 terms of the contract. Such contractors shall not be liable for amounts otherwise reducible due to the
123 subcontractor's noncompliance with the terms of the contract. However, in the event that a contractor
124 withholds all or a part of the amount invoiced by any subcontractor under the contract, the contractor shall
125 notify the subcontractor within 50 days of the receipt of such invoice, in writing, of his intention to withhold
126 all or a part of the subcontractor's payment with the reason for nonpayment, specifically identifying the
127 contractual noncompliance, the dollar amount being withheld, and the subcontractor responsible for the
128 contractual noncompliance. Payment by the party contracting with the contractor shall not be a condition
129 precedent to payment to any subcontractor, regardless of that contractor's receiving payment for amounts
130 owed to that contractor, unless the party contracting with the contractor is insolvent or a debtor in bankruptcy
131 as defined in § 50-73.79. Any provision in a contract contrary to this section shall be unenforceable. Failure
132 of a contractor to make timely payment as provided in this subdivision shall result in interest penalties
133 consistent with § 2.2-4355. Nothing in this subdivision shall be construed to apply to or prohibit the inclusion
134 of any retainage provisions in a construction contract. Every subcontract between a subcontractor and a
135 lower-tier subcontractor or supplier, of any tier, shall contain the identical payment, notice, and interest
136 requirements as those provided in this subdivision if (i) such construction contract is related to a project other
137 than a single-family residential project and (ii) the value of the project, or an aggregate of projects under such
138 construction contract, is greater than \$500,000.

139 C. 1. Any construction contract between a general contractor and its subcontractor and any lower tier
140 additional subcontract entered into on or after July 1, 2020 2026, shall be deemed to include a provision
141 under which the general contractor, its subcontractor, and the additional subcontractor at any lower tier are
142 jointly and severally liable to pay the employees of any ~~additional~~ subcontractor at any lower tier the greater
143 of (i) all wages due to a subcontractor's employees or to the lower tier subcontractor's employees at such rate
144 and upon such terms as shall be provided in the employment agreement between the subcontractor and its
145 employees or (ii) the amount of wages that the subcontractor or any lower tier subcontractor is required to
146 pay to its employees under the provisions of applicable law, including the provisions of §§ 40.1-28.7:7 and
147 40.1-29, the Virginia Minimum Wage Act (§ 40.1-28.8 et seq.), and the federal Fair Labor Standards Act (29
148 U.S.C. § 201 et seq.).

149 2. A general contractor shall be deemed to be the employer of any subcontractor's employees for purposes
150 of § 40.1-29. If the wages due to the subcontractor's employees under the terms of the employment agreement

151 between a subcontractor and its employees are not paid, the general contractor shall be subject to all
152 penalties, criminal and civil, to which an employer that fails or refuses to pay wages is subject under
153 § 40.1-29. Any liability of a general contractor pursuant to § 40.1-29 shall be joint and several with the
154 subcontractor that failed or refused to pay the wages to its employees.

155 3. Except as otherwise provided in a contract between the general contractor and the subcontractor, the
156 subcontractor shall indemnify the general contractor for any wages, damages, interest, penalties, or attorney
157 fees owed as a result of the subcontractor's failure to pay wages to the subcontractor's employees as provided
158 in subdivision 1, unless the subcontractor's failure to pay the wages was due to the general contractor's failure
159 to pay moneys due to the subcontractor in accordance with the terms of their construction contract.

160 4. The provisions of this subsection shall only apply if ~~(i) it can be demonstrated that the general~~
161 ~~contractor knew or should have known that the subcontractor was not paying his employees all wages due,~~
162 ~~(ii) the construction contract is related to a project other than a single family residential project; and (iii) the~~
163 ~~value of the project, or an aggregate of projects under one construction contract, is greater than \$500,000. As~~
164 ~~evidence a general contractor or any subcontractor may offer a written certification, under oath, from the~~
165 ~~subcontractor in direct privity of contract with the general contractor or subcontractor stating that (a) the~~
166 ~~subcontractor and each of his sub-subcontractors has paid all employees all wages due for the period during~~
167 ~~which the wages are claimed for the work performed on the project and (b) to the subcontractor's knowledge~~
168 ~~all sub-subcontractors below the subcontractor have similarly paid their employees all such wages. Any~~
169 ~~person who falsely signs such certification shall be personally liable to the general contractor or subcontractor~~
170 ~~for fraud and any damages the general contractor or subcontractor may incur.~~

171 **§ 40.1-27.3. Retaliatory action against employee prohibited.**

172 A. *As used in this section:*

173 *"Employee" includes a current or former employee.*

174 *"Federal or state law or regulation" means any federal law, any law of the Commonwealth, and any*
175 *regulation published as a final rule in the Federal Register or the Virginia Administrative Code.*

176 *"In good faith" means having a reasonable belief that a violation of law is occurring or has occurred.*

177 B. An employer shall not discharge, discipline, threaten, discriminate against, or penalize an employee, or
178 take other retaliatory action regarding an employee's compensation, terms, conditions, location, or privileges
179 of employment *or blacklist or otherwise retaliate against an employee*, because the employee:

180 1. Or a person acting on behalf of the employee *reports any information or allegation in good faith*
181 *reports that, if true, amounts to a violation of any federal or state law or regulation to a supervisor, manager,*

182 *officer, or other employee, or to any governmental body or law-enforcement official, including a report made*
183 *in the ordinary course of the employee's employment. Such a report is protected pursuant to this subdivision*
184 *regardless of whether such report refers to a particular law or regulation;*

185 2. Is requested by a governmental body or law-enforcement official to participate in an investigation,
186 hearing, or inquiry;

187 3. Refuses to engage in a criminal act that would subject the employee to criminal liability;

188 4. Refuses an employer's order to perform an action that violates any federal or state law or regulation and
189 the employee informs the employer that the order is being refused for that reason; or

190 5. Provides information to or testifies before any governmental body or law-enforcement official
191 conducting an investigation, hearing, or inquiry into any alleged violation by the employer of federal or state
192 law or regulation.

193 **B.** C. This section does not:

194 1. Authorize an employee to make a disclosure *to a party other than the employer* of data otherwise
195 protected by law or any legal privilege;

196 2. Permit an employee to make statements or disclosures knowing that they are false or that they are in
197 reckless disregard of the truth; or

198 3. Permit disclosures that would violate federal or state law or diminish or impair the rights of any person
199 to the continued protection of confidentiality of communications provided by common law.

200 **C.** D. *No employer shall (i) take any action or include any policy in an employee handbook, employment*
201 *contract, or separation agreement that impedes an employee from disclosing possible or actual illegal*
202 *activity to the public, a governmental body, or his employer, including disclosures regarding violations of*
203 *civil rights or antidiscrimination laws, or (ii) take any disciplinary action in retaliation against an employee*
204 *for reporting to the public, a governmental body, or his employer any possible or actual violation of any*
205 *federal or state law or regulation.*

206 E. A person who ~~alleges~~ *suffers loss as the result of* a violation of this section may bring a civil action in a
207 court of competent jurisdiction within one year of the employer's prohibited retaliatory action. The court may
208 order as a remedy to the employee (i) *actual damages*; (ii) an injunction to restrain continued violation of this
209 section; (iii) the reinstatement of the employee to the same position held before the retaliatory action or
210 to an equivalent position; and (iv) *any other damages, including lost wages, benefits,*
211 *and other remuneration; together with interest thereon, as well as; and (v) if such violation was willful,*

212 *malicious, or wanton, punitive damages. Notwithstanding any other provision of law to the contrary, in*
213 *addition to any damages awarded, such person may be awarded reasonable attorney fees, litigation expenses,*
214 *and court costs.*

215 *F. No right or remedy provided under this section shall be waived by any employment agreement, policy,*
216 *term, or condition.*

217 *G. No provision of this section shall be construed to invalidate, alter, or diminish the rights, privileges, or*
218 *remedies of any employee under any law, regulation, collective bargaining agreement, or employment*
219 *contract.*

220 **§ 40.1-28.7:7. Misclassification of workers.**

221 A. An individual who has not been properly classified as an employee may bring a civil action for
222 damages against his employer for failing to properly classify the employee if the employer had knowledge of
223 the individual's misclassification. An individual's representative may bring the action on behalf of the
224 individual. If the court finds that the employer has not properly classified the individual as an employee, the
225 court may award the individual damages in the amount of any wages, salary, employment benefits, including
226 expenses incurred by the employee that would otherwise have been covered by insurance, or other
227 compensation lost to the individual, a reasonable attorney fee, and the costs incurred by the individual in
228 bringing the action. *In addition, any employer that violates this section shall be liable to the aggrieved*
229 *individual for the applicable remedies, damages, or other relief available in an action brought pursuant to*
230 *subsection J of § 40.1-29. Any action brought pursuant to this subsection shall commence within three years*
231 *after the accrual of the cause of action.*

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

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

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

248 *E. For the purposes of this section, "employer" includes any person or group of persons acting directly or
249 indirectly in the interest of an employer in relation to an employee.*

250 **§ 40.1-28.12. Employee's remedies.**

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

258 **§ 40.1-29. Time and medium of payment; withholding wages; written statement of earnings;
259 agreement for forfeiture of wages; proceedings to enforce compliance; penalties.**

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

270 B. Payment of wages ~~or salaries~~ shall be (i) in lawful money of the United States, (ii) by check payable at
271 face value upon demand in lawful money of the United States, (iii) by electronic automated fund transfer in
272 lawful money of the United States into an account in the name of the employee at a financial institution

273 designated by the employee, or (iv) by credit to a prepaid debit card or card account from which the employee
274 is able to withdraw or transfer funds with full written disclosure by the employer of any applicable fees and
275 affirmative consent thereto by the employee. However, an employer that elects not to pay wages ~~or salaries~~ in
276 accordance with clause (i) or (ii) to an employee who is hired after January 1, 2010, shall be permitted to pay
277 wages ~~or salaries~~ by credit to a prepaid debit card or card account in accordance with clause (iv), even though
278 such employee has not affirmatively consented thereto, if the employee fails to designate an account at a
279 financial institution in accordance with clause (iii) and the employer arranges for such card or card account to
280 be issued through a network system through which the employee shall have the ability to make at least one
281 free withdrawal or transfer per pay period, which withdrawal may be for any sum in such card or card
282 account as the employee may elect, using such card or card account at financial institutions participating in
283 such network system.

284 C. No employer shall withhold any part of the wages ~~or salaries~~ of any employee except for payroll, wage
285 or withholding taxes or in accordance with law, without the written and signed authorization of the employee.
286 On each regular pay date, each employer, other than an employer engaged in agricultural employment
287 including agribusiness and forestry, shall provide to each employee a written statement, by a paystub or
288 online accounting, that shows the name and address of the employer; the number of hours worked during the
289 pay period if the employee is paid on the basis of (i) the number of hours worked or (ii) a salary that is less
290 than the standard salary level adopted by regulation of the U.S. Department of Labor pursuant to § 13(a)(1) of
291 the federal Fair Labor Standards Act, 29 U.S.C. § 213(a)(1), as amended, establishing an exemption from the
292 Act's overtime premium pay requirements; the rate of pay; the gross wages earned by the employee during
293 the pay period; and the amount and purpose of any deductions therefrom. The paystub or online accounting
294 shall include sufficient information to enable the employee to determine how the gross and net pay were
295 calculated. *An employer shall keep such paystubs or online accounting for at least three years following the*
296 *date of the work performed.* An employer engaged in agricultural employment including agribusiness and
297 forestry, upon request of its employee, shall furnish the employee a written statement of the gross wages
298 earned by the employee during any pay period and the amount and purpose of any deductions therefrom.

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

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

304 employer and its employee:

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

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

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

312 F. The Commissioner may ~~require a written complaint of the violation of this section and~~, with the written
313 ~~and signed~~ consent of an employee *or an interested third party, or at the Commissioner's discretion based on*
314 *reasonable and good-faith belief of wage violations, may* institute *administrative or court* proceedings ~~on~~
315 ~~behalf of an employee to enforce compliance with this section, and to remedy the failure to pay wages,~~
316 *including violations of this section, § 2.2-4321.3 or 40.1-28.7:7, the Virginia Minimum Wage Act*
317 *(§ 40.1-28.8 et seq.), § 40.1-29.2, or § 40.1-29.3. The Commissioner may seek and collect any moneys wages*
318 *unlawfully withheld from such any employee that shall be paid to the employee entitled thereto and all*
319 *damages and penalties available under subsection J. Such wages and damages shall be paid as restitution to*
320 *any affected employee entitled thereto, and such penalties may be paid to any affected employee or the*
321 *Commonwealth. In the course of an investigation, the Commissioner or the Commissioner's designee may*
322 *enter the employer's premises to review records.* In addition, following the issuance of a final order by the
323 Commissioner or a court, the Commissioner may engage private counsel, approved by the Attorney General,
324 to collect any moneys owed to the employee or the Commonwealth. Upon entry of a final order of the
325 Commissioner, or upon entry of a judgment, against the employer, the Commissioner or the court shall assess
326 *reasonable attorney fees of one third of the amount set forth in the final order or judgment.*

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

331 H. Any employer who knowingly fails to make payment of wages ~~in accordance with subsection A or~~
332 ~~§ 40.1-29.3~~ shall be subject to a civil penalty not to exceed \$1,000 for each violation. The Commissioner
333 shall notify any employer that the Commissioner alleges has violated any provision of this section ~~or~~
334 ~~§ 40.1-29.3~~ by certified mail. Such notice shall contain a description of the alleged violation. Within 15 days

335 of receipt of notice of the alleged violation, the employer may request an informal conference regarding such
336 violation with the Commissioner. In determining the amount of any penalty to be imposed, the Commissioner
337 shall consider the size of the business of the employer charged and the gravity of the violation. The decision
338 of the Commissioner shall be final. Civil penalties owed under this section shall be paid to the Commissioner
339 for deposit into the general fund of the State Treasurer. The Commissioner shall prescribe procedures for the
340 payment of proposed assessments of penalties that are not contested by employers. Such procedures shall
341 include provisions for an employer to consent to abatement of the alleged violation and pay a proposed
342 penalty or a negotiated sum in lieu of such penalty without admission of any civil liability arising from such
343 alleged violation.

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

347 J. In addition to any civil or criminal penalty provided by this section, and without regard to any
348 exhaustion of alternative administrative remedies provided for in this section, if an employer fails to pay
349 wages to an employee in accordance with this section *or violates any provision of § 2.2-4321.3 or*
350 *40.1-28.7:7, the Virginia Minimum Wage Act (§ 40.1-28.8 et seq.), or § 40.1-29.2 or § 40.1-29.3*, the
351 employee may bring an action, individually, jointly, with other aggrieved employees, or on behalf of
352 similarly situated employees as a collective action consistent with the collective action procedures of the Fair
353 Labor Standards Act, 29 U.S.C. § 216(b), against the employer in a court of competent jurisdiction to recover
354 payment of the wages, and the court shall award the wages owed, an additional equal amount as liquidated
355 damages, plus prejudgment interest thereon as provided in subsection G, and reasonable attorney fees and
356 costs. If the court finds that the employer knowingly failed to pay wages to an employee ~~in accordance with~~
357 ~~this section~~, the court shall award the employee an amount equal to triple the amount of wages due and
358 reasonable attorney fees and costs. *No provision of this subsection shall be construed to replace or limit the*
359 *availability of any other class or collective action available in a court of competent jurisdiction or other*
360 *tribunal.*

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

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

369 *M. The Attorney General or the Commissioner may investigate and bring a civil action in a court of*
370 *competent jurisdiction against an employer or other person for a violation of this section, § 2.2-4321.3 or*
371 *40.1-28.7:7, the Virginia Minimum Wage Act (§ 40.1-28.8 et seq.), § 40.1-29.2, or § 40.1-29.3 for restitution*
372 *or for injunctive, compensatory, or other authorized relief for any affected employees or for the public*
373 *interest. In conducting investigations, the Attorney General or the Commissioner may require an employer or*
374 *employee to submit a statement or report in writing under oath as to all necessary information, examine*
375 *under oath any person alleged to have participated in or have knowledge of the violation, and issue*
376 *subpoenas. Upon prevailing in a civil action under this section, the Attorney General or the Commissioner*
377 *shall be entitled to reasonable attorney fees and costs, statutory penalties equal to any administrative*
378 *penalties provided by law, and, on behalf of affected employees, the payment of wages unlawfully withheld,*
379 *additional damages to the same extent as would be available if the employee brought the civil action, and*
380 *equitable relief as may be appropriate. In no such action shall the Attorney General or the Commissioner be*
381 *awarded an amount already recovered by an employee. In addition, the Attorney General or the*
382 *Commissioner may authorize private counsel to pursue any wages, damages, and penalties owed to*
383 *employees or the Commonwealth in any such action.*

384 N. As used in this section, "wages" includes any remuneration an employer owes to an employee,
385 including hourly wages, minimum wages, piece rate wages, day rates, salaries, overtime wages, legally
386 required prevailing wages, commissions, tips, bonuses, severance, accrued vacation or sick leave pay
387 pursuant to an employment policy or agreement, and damages available due to the misclassification of an
388 employee in violation of § 40.1-28.7:7.

389 O. For the purposes of this section, "employer" includes any person or group of persons acting directly or
390 indirectly in the interest of an employer in relation to an employee.

391 **§ 40.1-29.2. Employer liability.**

392 Any employer that violates the overtime pay requirements of the federal Fair Labor Standards Act of
393 1938, 29 U.S.C. § 201 et seq., as amended, and any regulations, guidance, or rules adopted pursuant to the
394 overtime pay provisions of such federal act or any related governing case law shall be liable to the employee
395 for the applicable remedies, damages, or other relief available under the federal Fair Labor Standards Act in

396 an action brought pursuant to the process in subsection J of § 40.1-29. For the purposes of this section,
397 "employer" and "employee" shall have the meanings ascribed to them under the federal Fair Labor Standards
398 Act and all applicable exemptions, overtime calculation methods, methods of overtime payment, or other
399 overtime provisions within the federal Fair Labor Standards Act and any attendant regulations, guidance, or
400 rules shall apply. Any action brought pursuant to this section shall accrue according to the applicable
401 limitations set forth in the federal Fair Labor Standards Act *and shall be commenced within three years after*
402 *accrual.*

403 **§ 40.1-29.3. Overtime for certain employees.**

404 A. As used in this section:

405 "Carrier" means an air carrier that is subject to the provisions of the federal Railway Labor Act, 45 U.S.C.
406 § 181 et seq.

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

409 "*Direct support services*" means personal care services that assist participants with instrumental
410 activities of daily living, such as grooming, toileting, bathing, eating, dressing, monitoring health status and
411 physical condition, and assisting with housekeeping activities, and other in-home, long-term services and
412 supports provided to an elderly person or person with a disability.

413 "Employee" means an individual employed by a derivative carrier *or an individual who is employed by a*
414 *home care agency or other third-party provider to provide direct support services.*

415 "*Employer*" includes any person or group of persons acting directly or indirectly in the interest of an
416 employer in relation to an employee.

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

424 C. If an employer fails to pay overtime wages to an employee in accordance with this section, the
425 employee may bring an action against the employer in a court of competent jurisdiction to recover payment

426 of the overtime wages; and the court shall award the overtime wages owed, an additional equal amount as
427 liquidated damages, and reasonable attorney fees and costs; however, if the employer shows to the
428 satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had
429 reasonable grounds for believing that his act or omission was not a violation of this section, the court may, in
430 its discretion, award no liquidated damages or award any amount thereof not to exceed the amount of the
431 unpaid overtime wages.

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