

## EMPLOYMENT LAW UPDATE

### Virginia Enacts Substantial Changes to State Wage and Hour Laws

#### Virginia Raises the Minimum Wage

In April, the Virginia General Assembly voted to approve Governor Ralph Northam's proposed amendment to a bill that will more than double Virginia's minimum wage, which is currently \$7.25 per hour, to \$15.00 per hour by January 1, 2026. Under the new law, Virginia's minimum wage will increase according to the following phased schedule:

- May 1, 2021: \$9.25/hour
- January 1, 2022: \$11.00/hour
- January 1, 2023: \$12.00/hour
- January 1, 2025: \$13.50/hour
- January 1, 2026: \$15.00/hour

The last two increases (in 2025 and 2026) must be reenacted by the General Assembly to go into effect. Virginia is the first southern state to raise its minimum wage to \$15.00 per hour. Over the last few years, Maryland and the District of Columbia have also passed laws raising their minimum wages to \$15.00 (in phased schedules like Virginia).

#### Virginia Strengthens Wage Payment Protections for Employees

Earlier this year, Governor Northam signed into law several significant changes to the Virginia Wage Payment Act ("VWPA"), which regulates the payment of, as well as deductions from, the wages of Virginia employees. These changes, which will become effective on July 1, 2020, are intended to strengthen employees' ability to challenge possible wage violations – including in the courts.

Below is a summary of these changes followed by a series of Questions and Answers.

- **Private Right of Action.** Prior to the new legislation, the VPWA did not contain a private right of action (*i.e.*, employees could not bring a legal action to enforce the

VPWA's provisions, but could only complain to the Virginia Department of Labor and Industry ("DOLI"). Effective July 1, 2020, however, employees may now sue individually for an employer's failure to pay wages under the VWPA. Such a lawsuit must be brought within 3 years. In addition, employees can bring an action on behalf of not only themselves but also their coworkers consistent with the collective action procedures under the Fair Labor Standards Act ("FLSA").

- ***Enhanced Remedies and Damages.*** Prior to the new legislation, the VPWA provided only limited recourse against employers who violated the VWPA, including a civil penalty of up to \$1,000 per violation and criminal penalties, with only the Commissioner of DOLI having the ability to institute proceedings for compliance. In addition to now providing a private cause of action, however, the new VWPA will permit a court to award damages in the amount owed, liquidated damages (additional damages equal to the amount owed), prejudgment interest, and attorneys' fees and costs.

Furthermore, if the court finds the employer "knowingly failed to pay wages" in accordance with the VWPA, the court is *required* to award "triple the amount of wages due and reasonable attorney fees and costs." Under the new statute, an employer acts knowingly if it has actual knowledge, deliberately ignores the truth, or recklessly disregards the truth. An employee does not have to prove that an employer specifically intended to have wrongly withheld wages to show a knowing violation.

- ***Anti-Retaliation Protections.*** The amendments to the VWPA also prohibit retaliation against employees who have filed a complaint or instituted proceedings for non-payment of wages. However, the anti-retaliation amendment does not create a private right of action. Instead, an employee may file a claim with the Commissioner of DOLI, who, with the employee's consent, may file a lawsuit. Damages that can be awarded for retaliation include reinstatement, lost wages, and liquidated damages equal to the lost wages.
- ***Broadened Investigatory Authority.*** The amended VWPA will grant DOLI broad authority to investigate wage claims for all employees of an employer if the Commissioner believes there has been a violation and to initiate proceedings against any employee believed to have been wronged without that employee's consent.

### Virginia's New Pay Transparency Law

Operating under the theory that occluding employees from discussing their wages with one another was somehow allowing discrimination against certain protected classes, the Virginia General Assembly also enacted a new wage transparency law. In summary, the law prohibits employers from enacting or enforcing policies that limit the ability of employees to discuss compensation issues with other employees.

Specifically, effective July 1, 2020, employers in the Commonwealth may not discharge or retaliate against an employee because the employee engaged in any of the following acts:

- Inquired about, discussed with, or disclosed information about the employee's own wages or compensation or another employee's wages or compensation; or
- Filed a complaint with the Virginia Department of Labor and Industry for violation of the law.

Employers who violate the law are subject to a civil penalty of \$100 per violation.

Notably, the law does not apply to employees who have access to other employees' or applicants' compensation information as part of their essential job functions (human resources professionals, payroll administrators, benefits specialists, etc.) who disclose the pay of other employees or applicants to employees who do not otherwise have access to such information, *unless* the disclosure is (1) in response to a formal complaint or charge; (2) in furtherance of an investigation, proceeding, hearing or action, including an investigation conducted by the employer; or (3) consistent with a legal duty to furnish information.

### Anticipated Questions

**Q1. Can employees who believe they are misclassified (as exempt under the FLSA) bring a claim under the new VWPA?**

This is an open question. It would seem that the answer to that question would be no, given that the right to overtime does not arise under Virginia law, but rather rises under the FLSA. It is possible that a plaintiff was successful in arguing entitlement to overtime under the FLSA could also then seek to collect those wages under a 40.1-29 claim in order to get access to the treble damages provision. But at this point, that is far from certain.

**Q2. What do the changes to the VWPA mean for employers who are attempting to recover employee debts?**

The key will be obtaining signed, written authorizations to recover any such amounts that employer believes that employee owes the employer.

If an employer allows an employee to go negative in the employee's leave bank, for example, the employer should have the employee sign an acknowledgment that if the employee departs prior to accruing enough leave to cover the negative balance, the employer may offset the employee's final pay to recoup the leave that has been advanced.

Likewise, if an employer provides an employee with equipment (*e.g.*, a laptop computer or cell phone), the employer should have the employee acknowledge in writing that the employee will return the equipment in good condition, less reasonable wear and tear, and that the failure to return the equipment upon departure will allow the employer to deduct the fair market value of the equipment from the employee's final wages.

**Q4. Why doesn't the minimum wage increase go into effect until May 2021?**

Initially the first wage increase was scheduled to go no effect on January 1, 2021, but Governor Northam proposed an amendment to the original minimum wage bills passed by the General Assembly to delay wage increases while the Commonwealth deals with the economic and other disruptions associated with the COVID-19 pandemic, which the General Assembly accepted.

**Q5. Does the new minimum wage law make any other changes about which employers should be aware?**

Yes. The new law eliminates several minimum wage exemptions, including exemptions for the following workers:

- Individuals employed in domestic service or in a private home;
- Individuals who are paid on a piecework basis;
- Minors who are under the age of 18 and work at the direction of the JDR court;
- Individuals whose earning capacity is impaired by physical deficiency, mental illness, or intellectual disability; and
- Individuals employed by small businesses (*i.e.*, less than four employees).

(Thankfully, the exemption for caddies on golf courses was spared.)

**Action Items for Employers**

While the changes in minimum wage will have a more immediate impact on many employers, longer-term impact will be felt by the number of claims that employees bring under the Virginia Wage Payment Act. Among those claims will be an employer's failure to pay an employee his or her final wages. But these claims also will include alleged failures to pay bonuses and commissions, where there is often dispute between the employer and the employee. Although those claims previously would have simply been subject to basic breach of contract law, they will now encompass the possibility of going double or treble damages.

In light of the new law, employers should immediately take the following steps:

1. Review any and all compensation policies and plans, including bonus plans, incentive compensation plans, tuition reimbursement policies, and paid vacation or PTO policies for clarity. Many incentive compensation/ commission/ bonus plans are vague and ambiguous, allowing the employee to make a claim for a commission that was never intended.
2. Review any agreements that employees are required to sign as a condition of receiving relocation allowance, tuition reimbursement, external training costs, company equipment, or advance leave.
3. Establish and/or revise internal policy and procedures governing the reporting and investigation of wage payment violations. Having such a policy will assist an employer in establishing that the employer did not act willfully if the employee never complained.
4. Draft or modify existing anti-retaliation policies to include protections for employees who raise concerns about potential wage payment violations.
5. Identify employees that will be affected by the increased minimum wage and prepare to increase their wages.
6. Ensure that personnel policies do not contain language prohibiting employees from discussing wages.

***More Questions?  
We are here to help.***

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