

Virginia Employment Law

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Virginia Employment Law

The following sections summarize key Virginia employment statutes and principles of employment law. The summaries are not intended to be a comprehensive analysis of the laws and/or their judicial interpretations. When no reference to a statute is provided, common law applies. The materials in this Pocket Guide reflect the statutes in effect on July 1, 2014.

Employment At-Will

All employment in Virginia is at-will unless there is a contract that establishes a term for the employment relationship. The courts have recognized exceptions to employment at-will, such as when an employee: 1) violates a policy that enables the exercise of an employee's statutorily created rights; 2) is discharged for refusing to engage in criminal conduct; or 3) was clearly a member of that class of persons directly entitled to the protection enunciated in a "public policy" designed "to protect the property rights, personal freedoms, health, safety or welfare of the people in general." The Virginia Human Rights and the Payment of Wage Acts are two such public policy statutes.

Right to Work

The Virginia right-to-work law provides that "the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization." Under the law, a contract or agreement that denies a person who is not a member of the union the right to work for a particular employer or a requirement that a person join the union as a condition of employment is illegal. Picketing activities and other concerted actions that interfere with the right of a person to work are also illegal.

Va. Code §§ 40.1-52, et seq.

Employment of Children

No child under the age of 16 can be employed except under such hours and conditions as the Department of Labor and Industry may set. In certain

types of occupations, children under the age of 16 may be employed – e.g., in domestic work in the child's home, newspaper delivery, farm labor, as a page in the General Assembly, and volunteer work. A certificate of employment issued by the Virginia Department of Labor and Industry is necessary for a child under 16 to work, even in a work-study program. The employer must retain a copy of the certificate for three years or for as long as the child is employed, whichever is longer.

Va. Code §§ 40.1-78 through 40.1-116.

Restrictive Covenants in Employment Contracts

Employment covenants that restrict an employee's right to work are not favored. As the courts have held, such restriction is enforceable if it is narrowly drawn to protect the employer's legitimate business interest, is not unduly burdensome on the employee's ability to earn a living, and is not against public policy.

A restrictive covenant must be reasonable in all respects. It should be limited to 1) the geographic area in which the employer does business, 2) the types of business that are in direct competition, 3) the types of functional activities previously performed by the employee, and 4) the duration of the restraint. Each of these elements is weighed to determine if the restriction is overbroad.

Virginia Human Rights Act

The Virginia Human Rights Act prohibits discrimination on the basis of race, color, religion, national origin, sex, age, marital status, pregnancy and childbirth or related medical condition, including lactation, and any class afforded protection under a federal statute prohibiting discrimination.

The Division of Human Rights within the Office of the Attorney General has the authority to receive, investigate, conciliate, refer to another agency, and make findings and recommendations upon complaints alleging unlawful discriminatory practices. *Va. Code §§ 2.2-520 et seq.* The division can refer claims to local human rights agencies that have the authority to

investigate and resolve issues of discrimination. The division can also refer claims to the EEOC or ask the Attorney General to investigate and seek redress on the employee's behalf. The VHRA also enables an employee to sue an employer with more than five but fewer than 15 employees for discharge based on their protected class. *Va. Code §§ 2.2-3900, et seq.*

Virginians with Disabilities Act

The Virginians with Disabilities Act (VDA) prohibits discrimination in employment against disabled applicants and employees. The claimant must be "otherwise qualified" (a person with a physical or mental impairment who is qualified to perform the duties of the job). If an employer knows that an otherwise-qualified disabled person needs accommodations to perform the job, such accommodations must be provided, if reasonable. *Va. Code §§ 51.5-40, et seq.*

The disAbility Law Center of Virginia, provides guidance and representation to persons with disabilities. The protections afforded under the VDA are similar to those provided under the Americans with Disabilities Act, with two notable exceptions—it applies to all employers no matter their size and an employee must prove that the discrimination was due solely to the disability. Discrimination based on disability is also prohibited under the Virginia Human Rights Act. *Va. Code §§ 51.5-1, et seq.*

Whistleblower Protections

Two statutes provide employees with whistleblower protections. The Fraud Against Taxpayers Act protects employees who have opposed a prohibited practice or who have initiated, assisted, or participated in any manner in any investigation under the Act. An employee who is discharged, threatened, harassed, or in any other manner discriminated against by an employer because of engaging in such protected activity is entitled to all relief necessary to make the employee whole, including reinstatement with seniority status, two times the amount of back pay owed, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, in-

cluding litigation costs and reasonable attorney's fees. *Va. Code §§ 8.01-216.1, et seq.*

An employee who reports conduct or conditions in the workplace that may cause bodily harm or death is protected from discrimination and/or retaliation under the Virginia Occupational Safety and Health Act. The employee is granted immunity from any civil liability that might result from making such a report. *Va. Code §§ 40.1-51.2.1 and 40.1-51.4.5.*

Virginia Equal Pay Act

The Virginia Equal Pay Act prohibits pay differentials based on sex—it requires equal pay for equal work. An employee has two years to bring an action and may recover twice the amount of the wage differential. *Va. Code § 40.1-28.6.*

Minimum Wage

The minimum wage in Virginia is the same as the federal minimum wage. There are 17 classes of workers who are not deemed employees under the Act. A successful employee who has made a claim for unpaid wages can recover the back wages owed plus interest and attorney's fees. *Va. Code §§ 40.1-28.8 through 40.1-28.12.*

Payment of Wages

An employer must establish regular pay periods (at least monthly for salaried employees and bi-monthly or every two weeks for wage employees) and rates of pay. Wages must be paid on pay day. Wage payments must be made in cash, by check payable at full value, or by direct deposit or as a credit to a prepaid debit card with the written consent of the employee. For employees hired after January 1, 2010, the employer can make wage payments to a prepaid debit card or by direct deposit without the written consent of the employee, provided certain conditions are met.

An employer cannot require an employee to forfeit wages for time worked. Deductions from wages cannot be done without the employee's written con-

sent. Violations of the act can result in a criminal conviction and/or a civil penalty of \$1,000 for each violation, plus attorney's fees. *Va. Code § 40.1-29*

Employee Safety

Every employer must provide safe employment to each employee and a workplace that is free from recognized hazards that are likely to cause serious injury or death. All serious injuries or deaths occurring at work must be reported to the Commissioner of Labor and Industry, who is charged with enforcing the Virginia Safety and Health Code.

Va. Code §§ 40.1-41 through 40.1-51.4:5.

Medical and Genetic Testing

An employer cannot require genetic testing as a condition of employment or use such information in making an employment decision. If a medical test is required for employment, the employer must pay the costs of such examination, including the costs incurred by the employee in obtaining medical records needed by the employer. *Va. Code § 40.1-28.7:1.*

Polygraph Testing

Except in the case of a convicted sex offender, it is unlawful for an employer to require an employee to answer questions on a polygraph test relating to sexual activities as a condition of employment. After it is read, the results of such test must be destroyed or kept in a confidential file and only reviewed with the consent of the employee. *Va. Code §§ 40.1-51.4:3 and 40.1-51.4:4*

Health Record Privacy

The privacy of a health record is protected under Virginia law and Federal law. When a health record is released to an employer, the employer may not reveal the health record or re-disclose the information contained therein without first obtaining the specific authorization for such disclosure. The employer's use of the information shall only be for the purpose(s) for which such disclosure was made. *Va. Code § 32.1-127.1:03.*

Privacy of Employee Information

Virginia law favors the protection of employee's "personal identifying information," which is defined as an employee's home telephone number, mobile telephone number, e-mail address, shift times, or work schedule. Under the statute, employers shall not be required to release, communicate, or distribute any current or former employee's personal identifying information to a third party, unless required by a federal law that overrides this statute, court order, judicial warrant, or a subpoena in a civil or criminal case. *Va. Code § 40.1-28.7:4.*

Personally identifiable information should be encrypted and/or redacted. If such is not done, and the information that has been accessed is such that it caused or will likely cause identity theft or fraud, the employer must provide each person whose information was so breached with personal as well as public notice of the breach. *Va. Code § 18.2-186.6* Personal information includes: the first name or first initial and last name of a person linked to the following numbers: social security, driver's license, state identification card, financial account, or credit card or debit card. Civil penalties of up to \$150,000 may be imposed by the Attorney General for neglecting to comply with these requirements.

Negligent Hiring, Supervision, and Retention

An employer can be liable for the harm to third parties caused by its employees if the employer was negligent in hiring or retaining the employee. To avoid liability, an employer must thoroughly investigate the background of an employee before hiring, including making inquiries into any information that is pertinent to the job and verifying. Likewise, after employment, an employer must investigate complaints about an employee that have been brought, or actions observed, that could cause harm to another. Virginia does not recognize a cause of action against an employer for negligent supervision of an employee.

Military Leave

An employee who is called to active military duty by the Virginia National Guard, Virginia Defense Force, or naval militia is entitled to leave without pay for the period of active service. The employee cannot be forced to use or exhaust accrued paid leave, although the employee may choose to do so. If honorably released from duty, the employee can make a written request for reinstatement with the former employer. Such request must be made within 14 days from release from duty (or from hospitalization) when the absence did not exceed 180 days and no later than 90 days from release from duty (or hospitalization) when military duty exceeded 180 days. Upon such a request, an employer must restore the employee to the position held when the employee was ordered to duty, or to a similar position with like seniority, status, and pay or, if such position does not exist, to a comparable vacant position. *Va. Code §§ 44-93.2 through 44-93.5.*

Court Appearances

An employer cannot take any adverse action against an employee who is required in writing by a court to appear for a court appearance, including jury duty. This does not apply to a criminal defendant. The employee cannot be required to use sick or vacation leave for such absence. The employee is obligated to give reasonable notice to the employer when summoned to court. If required service involves more than four hours, including travel time, there are restrictions on when the employer can require the employee to return to work. A violation of this statute is a misdemeanor. *Va. Code § 18.2-465.1.*

Garnishment of Wages

An employer may not discharge an employee based on the fact that the employee's earnings have been garnished for a single indebtedness. *Va. Code § 34-29.*

Discharge for Excessive Absenteeism

An employer can not discharge an employee for excessive absenteeism if the absenteeism was because of a compensable Workers' Compensation injury. Such

absences, however, could be calculated into an employee's work record for purposes of discharge after all steps of the excessive absenteeism policy have been exhausted.

Further, if the employee's absence exceeds six months or if the employer's circumstances have changed during the employee's absence making it impossible or unreasonable to retain the employee, the discharge could be permissible. *Va. Code § 40.1-27.1.*

Interference with Future Employment

It is a crime for an employer to willfully and maliciously prevent or attempt to prevent a former employee from obtaining employment with any other person. *Va. Code § 40.1-27.*

References

An employer has immunity when responding to inquiries from another employer about a former employee. The employer can provide information on professional conduct, the reasons for separation, and job performance (including any written performance evaluations), provided that, when giving the information, the employer is not acting in bad faith. *Va. Code § 8.01-46.1.*

Under another statute, an employer may give a truthful statement of the reason for termination of the employment relationship or a truthful statement concerning the character, industry, and ability of an employeewho has voluntarily left. *Va. Code § 40.1-27.*

Unemployment Compensation

To be eligible to receive unemployment benefits, an employee must have worked at least 240 hours and have worked at least 30 days for the employer. An employee will be disqualified from benefits if the employee: 1) voluntarily quit without good cause, 2) was discharged for misconduct in connection with work, 3) refused suitable work, 4) made a false statement to the Virginia Employ-

ment Commission while seeking benefits, and/or 5) is incarcerated. Misconduct requires a showing of a known **rule or** policy that was violated and includes: 1) chronic absenteeism, tardiness, unauthorized absences; 2) willful or deliberate violation of a standard or rule; 3) intentional or misleading statements on an application relating to criminal

conviction(s); 4) gross negligence in the performance of duties; and 5) testing positive for illegal or non-prescribed drugs. Severance payments made to a discharged employee will disqualify the employee for benefits on a dollar-for-dollar basis during the week such severance is paid.

Va. Code §§ 60.2–100, et seq.

This information is provided for informational purposes, and includes both legal requirements and generally recommended best practices. It is not intended to be legal advice. An attorney should be consulted when developing policies and procedures for your organization.

Sands Anderson PC Employment Practice

Sands Anderson PC attorneys have extensive experience in the field of employment counseling and litigation. Our clients include corporations, partnerships, sole proprietors, executives, and non-profits from a variety of industries as well as local governments and agencies.

Our attorneys provide common sense strategies and solutions for troubling human resource issues and aggressive litigation while being conscious of your bottom line. We are prompt in meeting our clients' needs whether we are engaged in the review and drafting of employment policies and contracts, advising on the administration of personnel policies including immigration and employee benefits issues, or legal representation in state and Federal courts and before administrative agencies such as the Department of Labor, Equal Employment Opportunity Commission, National Labor Relations Board, or Office of Federal Contract Compliance Programs. We serve as experienced counsel to insurers and insureds providing defense under employment practices liability ("EPL") policies. Our attorneys provide staff training and are frequently invited to present at the meetings of professional associations.

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Before You Fire, Consider:

- Wage & Hour (FLSA) (misclassified employee?)
- NLRA (Non-union concerted activity)
- Unlicensed software on your system
- Race
- Color
- National origin
- Religion
- Sex (including pregnancy)
- Citizenship
- Disability (perceived/associated)
- Age
- Marital status
- Equal pay/day discrimination
- Genetics
- Retaliation/participation
- Safety violations (OSHA)
- Worker's compensation
- Military leave (USERRA)
- Va. Fraud Against Taxpayer Act (whistleblower)
- Sarbanes-Oxley/Dodd-Frank (whistleblower)
- Medical leave (FMLA)
- COBRA
- ERISA (health/retirement)
- Termination rights (WARN)
- State Law Claims:
 - Emotional distress
 - Assault & Battery
 - Negligent supervision/hire/retention
 - Contract or at-will
 - Non-compete
 - Wrongful discharge
 - Defamation
 - Religious intimidation