

Virginia Enacts Three Bills on Employee Misclassification

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Employee misclassification is the focus of three new laws that passed in the Virginia General Assembly during its 2020 Session and signed by the Governor. One creates a private cause of action. Another prohibits retaliation against employees. The third gives investigative authority to the Department of Taxation and prohibits certain misclassification agreements.

Background

In November 2019, the [Virginia Inter-Agency Taskforce on Misclassification and Payroll Fraud released a report](#) on misclassification of independent contractors. It cited a 2012 report from Joint Legislative Audit and Review Commission (JLARC) that found that up to one-third of audited employers misclassified employees. The JLARC estimated that Virginia had up to 40,000 misclassifying employers and up to 214,000 misclassified workers.

The Taskforce's report noted that employers who misclassified employees as independent contractors reduced their labor overhead as much as 40 percent. The report concluded that misclassification can lower Virginia's state income tax collections as much as \$28 million a year.

Creating Private Cause of Action ([HB 984](#))

Effective July 1, 2020, new § 40.1-28.7:7 of the Code of Virginia allows any individual not properly classified as an employee to bring a civil action for damages against their employer for failing to properly classify them as an employee if the employer had knowledge of the individual's misclassification. The new law will open the door for class actions.

HB 984 creates a presumption that any individual performing services for a person for remuneration is an employee of the person that paid such remuneration. The person paying the remuneration is presumed to be the employer of the individual who was paid for performing the services, unless it is shown that the individual is an independent contractor as determined under the Internal Revenue Service guidelines.

If the plaintiff is successful, a court may award damages in the amount of any wages, salary, employment benefits (including expenses incurred by the employee that would otherwise have been covered by insurance), or other compensation lost to the individual, reasonable attorneys' fees, and costs incurred by the individual in bringing the action.

Prohibiting Retaliation Against Employees ([HB 1199](#))

Effective July 1, 2020, new § 40.1-33.1 the Code makes it unlawful for any employer to discharge, discipline, threaten, discriminate against, or penalize an employee or independent contractor, or take other retaliatory action regarding an employee or independent contractor's compensation, terms, conditions, location, or privileges of

employment, because the employee or independent contractor either reported or plans to report to an appropriate authority that an employer failed to properly classify an individual as an employee and failed to pay required benefits or other contributions or is requested or subpoenaed by an appropriate authority to participate in an investigation, hearing, or inquiry by an appropriate authority or in a court action.

Any employee retaliated against for engaging in this protected activity may file a complaint with the Commissioner of Labor and Industry, who can institute proceedings against the employer for appropriate remedies, including reinstatement and lost wages.

Section 40.1-33.1 also provides that an employer found in violation will be subject to a civil penalty not to exceed the amount of the employee's wages that are lost as a result of the violation and that civil penalties will be assessed by the Commissioner and paid to the Literary Fund.

Employees and independent contractors are only protected by § 40.1-33.1 if they disclose information about suspected worker misclassification in good faith and upon a reasonable belief that the information is accurate. Reckless disclosures or those the employee knows or should have known were false, confidential by law, or malicious will not be deemed good faith reports and not protected activity.

Before the passage of HB 1199, the Virginia Department of Labor and Industry (DOLI) provided input to the Virginia General Assembly's Fiscal Impact Statement and noted that the Labor Law Division would require two investigators to ensure enforcement of HB 1199. DOLI pointed out that the Labor Law Division "does not conduct the activities provided in the bill, however, the division receives 50 to 75 inquiries annually regarding worker misclassification, which are forwarded to the Virginia Employment Commission (VEC) and an additional 180-200 claims that deal with independent contractor issues. DOLI indicates that last year, VEC closed 807 cases of worker misclassification. DOLI anticipates that it will receive a minimum of 350 complaints about the actions taken by employers that are prohibited in this bill."

Creating Investigative Authority for Department of Taxation, Prohibit Improper Misclassification Agreements ([HB 1407](#))

Effective January 1, 2021, HB 1407 amends Title 58.1, Taxation, adding Chapter 19, Worker Misclassification. Under § 58.1-1900, an individual performing services for an employer for remuneration will be considered an employee of the party that pays that remuneration, unless the individual or the employer demonstrates that the individual is an independent contractor.

The effects of § 58.1-1900 are far reaching. It not only extends the presumption of an employer-employee relationship to all of Title 58.1, but also includes Title 40.1, Labor and Employment, Title 60.2, Unemployment Compensation, and Title 65.2, Workers' Compensation. Under the new law, the Department of Taxation is responsible for determine whether an individual is an independent contractor by applying Internal Revenue Service guidelines.

All occurrences of misclassification of employees made by the same employer at the same time, or within 72 hours, will be deemed a single offense. If an employer fails to properly classify an individual as an employee in accordance with § 58.1-1900, Title 40.1, Title 60.2, or Title 65.2 and fails to pay taxes, benefits, or other contributions required to

be paid with respect to an employee, the employer will be subject to a civil penalty as follows:

- First offense: up to \$1,000 per misclassified individual
- Second offense: up to \$2,500 per misclassified individual
- Third or subsequent offense: up to \$5,000 per misclassified individual

Each civil penalty assessed under Chapter 19 will be paid into the general fund.

In addition to monetary penalties, HB 1407 also affects contractors competing for public contracts. The soon-to-be-codified § 58.1-1902 provides that if the Department of Taxation determines, after notice to the employer, that an employer failed to properly classify an individual as an employee under the provisions of § 58.1-1900, the Department will notify all public bodies and covered institutions of the name of the employer. For any subsequent violation, all public bodies and covered institutions are prohibited from awarding a contract to violating employers as follows:

- For a period of up to one year from the date of the notice for a second offense
- For a period of up to two years from the date of the notice for a third or subsequent offense

The Department of Taxation is tasked with determining how long each period will run.

Before the passage of HB 1199, the Virginia Department of Taxation provided input to the Virginia General Assembly's Fiscal Impact Statement and noted that "[t]his bill would have a positive General Fund revenue impact of \$1.7 million in Fiscal Year 2021 and \$2.6 million in Fiscal Year 2022."

In addition to misclassifying employees, employers are also prohibited from requiring or requesting that a person enter into an agreement or otherwise sign a document that would misclassify them as an independent contractor, or otherwise not accurately reflect the relationship between the two as employer and employee.

Employers also are prohibited from discriminating or taking adverse action against any person in retaliation for exercising rights protected under Chapter 19.

Implications for Employers

All Virginia companies that use independent contractors should consider conducting thorough, internal audits to identify any employees that may be misclassified as individual contractors. Employers also should review existing employment agreements and service contracts to ensure compliance with the new employee misclassification legislation. The stakes have been raised for employers in Virginia that improperly classify employees as independent contractors.

Jackson Lewis attorneys are available to assist employers in conducting such audits and answering any questions regarding employee misclassification.

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