

2018 POCKET GUIDE

# 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, 2017.

## 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 must 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.*

## Criminal Background Checks

Although no state law exists currently, several Virginia localities have adopted “ban the box” ordinances, which prohibit employers from requesting or seeking information concerning criminal arrests and convictions prior to extending a conditional offer of employment. In 2015, Governor McAuliffe signed Executive Order 41 directing the Department of Human Resource Management to amend the state employment application to “ban the box” and to provide guidance to state agencies on the appropriate use of criminal background checks.

## Discharge for Excessive Absenteeism

An employer cannot 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.*

## 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 § 40.1-51.1.*

## 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 three exceptions to employment at will, such as when 1) an employer violates a policy that enables the exercise of an employee's statutorily created rights; or when 2) an employee is discharged for refusing to engage in criminal conduct; or 3) an employee 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. In 2016, the Virginia Supreme Court held that employers and employees need not provide advance notice before terminating an “at will” employment relationship.

## Employment of Children

No child under the age of 16 can be employed except under such hours and conditions as the Virginia Department of Labor and Industry may set. In certain types of occupations, children under the age of 16 may be employed — e.g., domestic work in the child’s home, newspaper delivery, farm labor, page service 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.*

## 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.*

## Health Coverage Continuation (Mini-COBRA Law)

Small employers with fewer than 20 employees who are not subject to the federal Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) and who offer group health insurance coverage must continue such coverage for 12 months following an employee’s ineligibility, whether because of termination or

otherwise. Continuation is available only to employees who have been continuously insured under the employer's group policy for the preceding three months. Employers must provide written notice of the availability of coverage continuation within 14 days of learning the employee is no longer eligible. The employee then has 31 days to elect coverage and begin paying the premium.

*Va. Code § 38.2-3541.*

## Health Record Privacy

The privacy of an employee's 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 redisclose the information it contains without first obtaining the employee's specific authorization for such disclosure. The employer's use of the information shall only be for the purpose(s) for which the employee originally made the disclosure.

*Va. Code § 32.1-127.1:03.*

## 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 anyone else. This law does not prohibit an employer from giving a truthful statement of the reason for termination of the employment relationship or a truthful statement concerning the character, industry, and ability of an employee who has voluntarily left.

*Va. Code § 40.1-27.*

## Medical and Genetic Testing

An employer cannot require genetic testing as a condition of employment or use such information when making an employment decision. If a medical test is required for employment, the employer must pay for the examination, including the costs incurred by the employee to obtain medical records needed by the employer.

*Va. Code §§ 40.1-28.7:1 and 40.1-28.*

## Military Leave

An employee who is called to active duty or military duty as a member of the Virginia National Guard or the Virginia Defense Force, or an employee who resides in Virginia and who is called to active duty by the National Guard of another state is entitled to leave without pay for the period of active service. The employee cannot be forced to use or exhaust any accrued paid leave, although the employee may choose to do so. If honorably released from duty, the employee can request reinstatement in writing to the former employer. This request must be within 14 days after release from duty (or from hospitalization) and only if the absence did not exceed 180 days; if the absence exceeded 180 days, the request must be made no later than 90 days after release from duty (or hospitalization). Upon such a request, an employer must restore the employee to the position held when the employee was ordered to duty. If the original position has been eliminated or abolished, the employee must be restored to a similar position with like seniority, status, and pay, or to a comparable vacant position, unless doing so would be unreasonable. This law does not apply where the cumulative length of the employee's absence for military service exceeds five years.

*Va. Code §§ 44-93.2 through 44-93.5.*

## Minimum Wage

The minimum wage in Virginia is the same as the federal minimum wage, currently \$7.25 per hour. There are 17 classes of workers who are not deemed employees under Virginia law. An employee who has made a successful 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.*

## Negligent Hiring, Supervision, and Retention

An employer can be liable for harm to third parties caused by its employees if the employer was negligent in hiring or retaining the employee. To avoid liability, an employer should reasonably 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 should investigate complaints about an employee that have been brought, or actions observed, that could cause harm to another. Courts remain split over whether a cause of action for negligent supervision exists in the Commonwealth.

## Payment of Wages

An employer must establish regular pay periods (at least monthly for salaried employees and bimonthly or every two weeks for wage employees) and rates of pay, except for executive personnel. Wages must be paid on payday. 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 made without the employee's written consent. Violations 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.*

## **Polygraph Testing**

Except in the case of a convicted sex offender, it is unlawful for an employer to require a prospective employee, as a condition of employment, to answer questions on a polygraph test relating to sexual activities. 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.*

## **Privacy of Employee Information and Use of Image**

Virginia law mandates the protection of an employee's "personal identifying information," which is defined as an employee's home telephone number, mobile telephone number, email address, shift times, or work schedule. By 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 unencrypted or unredacted information is accessed such that it will likely cause or has caused identity theft or fraud, the employer must provide notice of the breach to the public and personal notice to each person whose information was breached. Civil penalties up to



\$150,000 for a single breach may be imposed by the Virginia Attorney General for neglecting to comply with these requirements.

*Va. Code §18.2-186.6.*

Virginia law also prohibits a person or business from using someone's name or picture for the purposes of trade or advertising without obtaining prior written consent. This law applies to an employer using employee pictures or images for marketing or advertising purposes. An aggrieved party may sue for injunctive relief and damages, including punitive damages.

*Va. Code § 8.01-40.*

## 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.*

## Restrictive Covenants in Employment Contracts

Employment covenants that restrict an employee's right to work are not favored. As the courts have held, such a 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.

## 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 § 40.1-58 et seq.*

## Social Media Accounts

An employer cannot require a current or prospective employee to provide the username or password to his or her personal social media account, nor can the employee be required to add the employer to his or her contact lists (e.g., supervisors cannot make employees accept their “friend requests”). Login information inadvertently received by the employer cannot be used to access the employee’s social media account. Employers cannot take or threaten adverse action against an employee or refuse to hire a prospective employee attempting to protect this login information. Violations are subject to civil penalties by the Virginia Safety and Health Commission. Employers, however, can obtain an employee’s personal social media login information if there is a reasonable belief that social media activity is relevant to the employer’s formal investigation of the employee’s violation of law or the employer’s written policies.

*Va. Code § 40.1-28.7:5.*

## Unemployment Compensation

To be eligible to receive unemployment benefits, an employee must have worked at least 240 hours or 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 Employment 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); and 4) testing positive for illegal or non-prescribed drugs. Severance payments made to a discharged employee may 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.*

## 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.*

## 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 5 but fewer than 15 employees for discharge based on his or her 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. An accommodation is not reasonable if it imposes an undue burden on the employer.

*Va. Code § 51.5-40 et seq.*

The protections afforded under the VDA are similar to those provided under the federal Americans with Disabilities Act (ADA) with two notable exceptions: 1) the VDA applies to all employers no matter their size, and 2) 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 so-called “whistleblower” protections, the Virginia Fraud Against Taxpayers Act (VFATA) and the Virginia Occupational Safety and Health Act (VOSHA).

VFATA 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 the same 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, including litigation costs and reasonable attorney’s fees.

*Va. Code § 8.01-216.1 et seq.*

Under VOSHA, an employee who files a safety or health complaint is protected from discrimination and/or retaliation. Also, an employee who, in good faith with reasonable cause and without malice, truthfully reports threatening conduct by a person employed at the same workplace is granted immunity from any civil liability that might otherwise result from making such a report.

*Va. Code §§ 40.1-51.2.1 and 40.1-51.4:5.*

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*This guide 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 fields of employment counseling and employment litigation. Our clients include corporations, partnerships, sole proprietors, executives, and tax-exempt organizations from a variety of industries, as well as local governments and agencies. Our attorneys provide common sense strategies and solutions for challenging human resource issues and, when necessary, can be aggressive in litigation while being conscious of your bottom line.

We are prompt in meeting our clients' needs, whether we are engaged in the review and crafting of employment policies and contracts, advising on the administration of personnel policies including immigration and employee benefits issues, or providing legal representation in state and federal courts and administrative agencies such as the Division of Human Rights, Department of Labor, Equal Employment Opportunity Commission, National Labor Relations Board, and 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 conduct staff training and are frequently invited to speak at the meetings of professional associations.

## Before You Fire, Consider:

- Wage and hour (FLSA)
- Labor law and employee concerted activity (NLRA)
- Unlicensed software on your system
- Race
- Color
- National origin
- Religion
- Sex (including pregnancy)
- Citizenship
- Disability (perceived/associated)
- Age
- Marital status
- Equal pay/pay discrimination
- Genetics
- Retaliation/participation
- Safety violations (OSHA)
- Worker's compensation
- Military leave (USERRA)
- Whistleblower protections (VFATA; VOSHA; Sarbanes-Oxley; Dodd-Frank)
- Medical leave (FMLA; ADA)
- COBRA
- ERISA (health/retirement)
- Termination rights (WARN)
- State law claims:
  - Emotional distress
  - Assault and Battery
  - Negligent supervision/hire/retention
  - Contract or at-will
  - Non-compete/Non-solicitation
  - Wrongful termination
  - Defamation
  - Religious intimidation



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