

New Virginia Laws Seek to Convert Independent Contractors to Employees

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Starting July 1, 2020, Virginia law will presume that a worker who performs services for pay qualifies as an “employee” unless the employer proves otherwise under IRS “independent contractor” rules.

In addition, the law creates a new cause of action allowing Virginia workers to sue an employer for misclassifying them as an independent contractor, with the potential for the worker to recover her attorneys’ fees. If successful, these legal challenges will convert the worker from an independent contractor classification into an employee with full benefits.

Starting January 1, 2021, the Commonwealth will begin using this new employee presumption when pursuing employers for back taxes for independent contractor misclassification.

Every employer in the Commonwealth must understand and abide by the following new laws to avoid employee lawsuits and damages, financial penalties, sanctions, back tax collection, and even debarment from public contracts.

Independent contractors pay their own taxes and receive no employee benefits. Employers pay payroll taxes on behalf of employees into state coffers, so conversion from independent contractor to employee provides the state a means to recoup lost taxes. These legislative initiatives arise out of a 2012 Joint Legislative Audit and Review Commission (JLARC) report, finding that the state loses about \$28 million a year from misclassification. Governor Ralph Northam set up a task force to develop and implement a comprehensive plan with measurable goals to reduce worker misclassification and payroll fraud in Virginia.

PRIVATE CAUSE OF ACTION AGAINST EMPLOYERS

[New Va. Code § 40.1-28.7:7](#)
(effective July 1, 2020)

Section 40.1-28.7:7 creates a private cause of action for workers to sue employers directly for misclassifying them as an independent contractor instead of an employee. Virginia law will now presume that those who perform services for pay automatically qualify as employees. Therefore, the employer now has the burden to prove that a worker instead qualifies as an independent contractor pursuant to IRS independent contractor guidelines and 26 C.F.R. § 31.3121(d)-1.

Under this new law, an employee must show the employer had “knowledge” of a misclassification. However, the statute text does not explain whether “knowledge” means actual or constructive knowledge of a misclassification. Therefore, any employer who receives any notification from an independent contractor regarding their classification status should be on alert to whether the notification supports the “knowledge” element in a misclassification suit. If a worker prevails on her classification challenge, she may be awarded wages, salary, employment benefits and expenses (including health

insurance), reasonable attorney's fees, and court costs as damages. Employers may also be liable for back taxes due to the change in the worker's status (see below).

NO RETALIATION

[New Va. Code § 40.1-33.1](#)
(effective July 1, 2020)

Section 40.1-33.1 prohibits employers from retaliating against employees or independent contractors who: (1) report or plan to report that their employer misclassified them; or (2) are requested or subpoenaed to participate in an investigation or court action related to a misclassification claim. "Retaliation" means discrimination, discharge, discipline, or denial of any privilege or benefit to which the worker would have otherwise been entitled.

This new law will allow an employee to file a complaint against his/her employer to the Commissioner of Labor and Industry if the complaint of retaliation is supported by "reasonable belief and good faith." A complaint is not supported by "a reasonable belief and good faith" if: (1) the employee knew or should have known the information he/she provided was false; (2) the employee disclosed information maliciously; or (3) if the disclosed information is confidential as a matter of law. Upon receipt of a qualifying complaint and signed consent from the employee, the Commissioner is authorized to institute proceedings against the employer. If the Commission finds that the employer took retaliatory action, the employer is subject to a civil penalty equal to the employee's lost wages.

WORKER MISCLASSIFICATIONS, BACK TAXES, AND CIVIL PENALTIES

[Va. Code § 58.1-1900 through 1905](#)
(effective January 1, 2021)

Sections 58.1-1900 through 1905 provide that the "worker" presumption applies for the purposes of taxation (Title 58), labor and employment (such as payment of wages) (Title 40.1), unemployment (Title 60.2) and worker's compensation (Title 65.2). Starting January 2021, the Commonwealth will begin using this new employee presumption to pursue employers for back taxes for independent contractor misclassification. Employers will be required to pay the designated taxes unless the employer demonstrates to the tax department's satisfaction that their 1099-designated workers qualify under the IRS guidelines as an independent contractor.

Employers who misclassify employees and therefore fail to pay the proper employment taxes, benefits or other contributions will also be subject to a civil penalty of up to:

- \$1,000 per misclassified individual for a first offense;
- \$2,500 per individual for a second offense;
- \$5,000 per misclassified individual for a third or subsequent offense; and
- the Commonwealth may bar an employer from winning public contracts.

This new law makes it unlawful to enter into, sign an agreement, or sign a document that results in the misclassification of a worker or inaccurately depicts the relationship between the employer and the employee and prohibits retaliation against employees exercising their rights under this section.

SHARING OF INFORMATION AMONGST STATE AGENCIES

[New Va. Code § 58.1-3.4](#)
(effective January 1, 2021)

Section 58.1-3.4 will allow the Tax Commissioner to request from, and share information with, selected state agencies such as the Virginia Employment Commission (VEC) in a collective effort to identify employers liable for misclassification. The Tax Commissioner has not said whether the VEC will be seeking a list of the independent contractors who sought unemployment under the relaxed COVID-19 rules as a place to start with this reclassification effort.

BOARD OF CONTRACTORS SANCTIONS

[Amendment to Va. Code § 54.1-1102](#)
(effective July 1, 2020)

This amendment to Section 54.1-1102 authorizes the Board of Contractors to impose sanctions against any contractor who intentionally misclassifies workers as independent contractors. The statute gives contractors an affirmative duty to properly classify its workers as either employees or independent contractors. The Board of Contractors regulates tradesmen and licensed businesses engaged in construction, removal, repair, or improvement of facilities or residential building energy analysis.