



# VIRGINIA

## QUICK AND EASY GUIDE TO LABOR & EMPLOYMENT LAW

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*Disclaimer: These materials do not constitute legal advice and should not be substituted for the advice of legal counsel.*

## At-Will Employment

In Virginia, the employer/employee relationship is governed by the at-will employment doctrine. This means that either party may terminate the relationship at any time, with or without cause, and with or without notice. “Reasonable notice” for termination of at-will employment does not require advance notice. *Johnston v. William E. Wood & Assocs., Inc.*, 787 S.E.2d 103, 105 (Va. 2016). Only effective notice that the employment has ended is required. *Id.*

There is a narrow public policy exception limited to discharges that violate public policy. *Bowman v. St. Bank of Keysville*, 229 Va. 534 (1985). The Supreme Court of Virginia has recognized three situations in which a litigant may show that the discharge violated public policy: (1) where an employer fired an employee for exercising a [Virginia] statutorily created right; (2) when the public policy is “explicitly expressed in the [Virginia] statute, and the employee was clearly a member of that class of persons directly entitled to the protection enunciated by the public policy”; and (3) “where the discharge was based on the employee’s refusal to engage in a criminal act.” *Weidman v. Exxon Mobil Corp.*, 776 F.3d 214, 221 (4th Cir.), cert. denied, 135 S. Ct. 2868 (2015) (citing *Rowan v. Tractor Supply Co.*, 263 Va. 209, 559 S.E.2d 709, 711 (2002)). Further, in *VanBuren v. Grubb*, the Virginia Supreme Court held that an individual supervisor may be personally liable for wrongful termination when the termination was in violation of public policy and the supervisor personally violated the relevant public policy. 733 S.E.2d 919, 923 (Va. 2012). The court suggests that the supervisor must be in a position of power such as a business owner. *Id.*

Further, without a disclaimer to the contrary, the terms and conditions of an employer’s employment manual or handbook may narrow and restrict the employment-at-will doctrine. *Miller v. SEVAMP, Inc.*, 234 Va. 462 (1987).

## Immigration Verification

Virginia Code § 40.1-11.2, requires all state agencies to use E-Verify for new hires. Under Section 2.2-4308.2, all employers with more than an average of 50 employees for the past 12 months who enter into a contract in excess of \$50,000 with a state agency must use E-Verify to authorize all newly-hired employees who will work on that agency contract. Any employer who does not comply with this mandate will be barred from receiving a contract with the state for up to 12 months. The debarment ends “upon the employer’s registration and participation in the E-Verify program.” Local governments may have separate requirements.

## Drug Testing

The State of Virginia does not prohibit the drug testing of employees, and employers are not expressly prohibited from discharging at-will employees who test positive on random drug tests. Therefore, employers are free to implement a drug-free workplace. State contractors who contract more than \$10,000 must include provisions outlining drug-free requirements and adhere to certain requirements under Va. Code § 2.2-4312.

A licensed home health organization under § 32.1-162.7 or any home care organization exempt from licensure under §32.1-162.8 is required to establish a drug-free workplace – which includes testing employees – and report positive results to applicable health regulatory boards responsible for licensing, certifying, or registering the person to practice. Va. Code § 32.1-162.9:1(B).

Job applicants cannot be asked to pay for their own medical examinations, must expressly consent before being tested, and current employees cannot be required to pay for their own examinations. Va. Code § 40.1-28. Moreover, under Virginia’s Workers’ Compensation laws, every employer instituting and maintaining a drug-free workplace program is entitled up to a five percent premium discount on workers’ compensation insurance, and an employee whose injury is caused by intoxication or use of nonprescribed controlled substances is ineligible for workers’ compensation benefits. Va. Code § 65.2-813.2, § 65.2-306(A)(3) & (6).

A positive test for a nonprescribed controlled substance is considered misconduct and is grounds for immediate termination. This disqualifies the employee from receiving unemployment benefits provided: (1) the test was conducted pursuant to a “known workplace drug policy”; (2) the testing and sampling were performed “in accordance with scientifically recognized standards”; and (3) the testing lab was “accredited” or the test was a DOT-qualified drug screen. Va. Code § 60.2-618 (2)(b)(1). In *Virginia Employment Commission v.*

*Community Alternatives, Inc. and April L. Collier*, the Virginia Court of Appeals held that the employer does not need a chain of custody affirmation to establish misconduct under the unemployment laws statute when the employee was terminated after violating the employer's drug-free workplace policy by failing the drug test. 705 S.E.2d 530 (2011). Nonetheless, it is a good policy to maintain a chain of custody to avoid other claims.

The Virginians with Disabilities Act prohibits discrimination based on disability but expressly excludes active alcoholism and current drug addiction. Va. Code § 51.5-1, *et seq.* Employers should approach drug testing cautiously because it can present substantial hurdles.

### **Jury Duty Leave**

It is a criminal violation, specifically a Class 3 misdemeanor, for an employer to terminate or take any adverse action against an employee because the employee is on jury duty, subpoenaed to appear in court, responding to a jury summons, or otherwise required in writing to appear in court. Va. Code § 18.2-465.1. The employee shall not be required to take sick leave or vacation time for the time away for jury duty, upon giving reasonable notice of the summons. *Id.* In addition, no person who is summoned and appears for jury duty for four or more hours, including travel time, in one day shall be required to start any work shift that begins on or after 5:00 p.m., on the day of their appearance for jury duty or begins before 3:00 a.m., on the day following the day of their appearance for jury duty. *Id.*

### **Victim/Witness Leave**

Every employer in Virginia must allow an employee who is a victim of a crime to leave work to attend all criminal proceedings relating to a crime against the employee. The term "victim" also includes members of the immediate family of the person who suffered the criminal act unless that family member is the person who committed the crime. Va. Code § 19.2-11.01(B). Employers are not required to compensate employees for such absences but may not discharge an employee for exercising the right to attend a criminal proceeding. Employers may not refuse to hire, or discriminate against an individual because the individual leaves work to attend a criminal proceeding. Employers may only limit the duration of an employee's leave if the employee's leave creates an undue hardship to the employer's business. Va. Code § 40.1-28.7:2.

### **Voting and Election Leave**

The State of Virginia does not require an employer to offer its employees time off to vote. Virginia prohibits employers from taking any adverse action with respect to employees related to their service on a local election board or other service at a polling place. Va. Code § 24.2-119.1. The same law also prohibits forcing such employees to use sick leave or vacation time to serve at a polling place on election day or at electoral board meetings in which the employee is serving to ascertain the result of an election.

### **Parental Leave**

The State of Virginia does not require an employer to offer its employees parental leave. However, the Virginia Human Rights Act (VHRA) defines "because of sex or gender" or "on the basis of sex or gender" to include pregnancy, childbirth, or related medical conditions. Va. Code § 2.2-3901. Consequently, under that VHRA, employers must provide the same leave benefits to women disabled by pregnancy that are provided to other employees with temporary disabilities. Therefore, to the extent an employer provides leave to employees with temporary disabilities, it should include pregnancy.

Virginia Executive Order 2018-12 requires Paid Parental Leave for employees who have been employed for a minimum of 12 months by an executive branch agency in Virginia. An employee can take up to eight weeks of full-pay leave within six months after the birth, adoption, or foster placement of a child under the age of 18.

The Paid Parental Leave cannot be counted against the employee's annual or sick leave or legal holidays but must run concurrently with any eligible FMLA leave.

## Military Leave

All private employers in Virginia must allow an employee who is a member of the Virginia National Guard, Virginia Defense Force, or a National Guard of another state to take unpaid leave when the employee is called to active duty or military duty under Title 32 of the U.S. Code. Va. Code § 44-93.2.

## Paid Sick Leave for Home Health Workers

Under Va. Code § 40.1-33.3, *et seq.*, employers that employ “home health workers” must provide paid sick leave to those employees. The new law contains certain limitations and definitions related to the same, but in general, mandates sick leave at a rate of one hour of leave per 30 hours worked for home health workers. Va. Code § 40.1-33.4.

## Other Leave

Pursuant to the Virginia Sickness and Disability program, full-time state employees who are active members of VRS or VaLORs, and state police officers who are active members of State Police Officer’s Retirement System (SPORS) who participate in the sickness and disability program “shall receive an amount of sick leave based on the employee’s number of months of state service as an eligible employee.” Va. Code § 51.1-1104(A). Participating employees shall be eligible to “take sick leave to account for absences due to an incident, illness[,] or injury for periods when disability benefits are not payable” and shall be compensated “by their employers at 100 percent of creditable compensation for each hour of sick leave taken, not to exceed the employee’s sick leave balance.” *Id.* § 51.1-1105.

State employees are also eligible to take paid family and personal leave for absences due to a short-term incident, illness, death of a family member, or other personal need. Va. Code § 51.1-1107. State employees receive family and personal leave based on the number of months of state service: Employees with fewer than 120 months of service receive 32 hours of paid leave per year; employees with 120 or more months of service receive 40 hours of paid leave per year. *Id.* Unused balances of family and personal leave are not carried forward from year to year. *Id.* The leave may be taken for any permitted purpose at the “sole discretion” of the participating employee, provided the employee provides “reasonable prior notice to [their] immediate supervisor” and the supervisor does not inform the employee that taking such leave will “materially impede the ability of the employing agency to perform a critical function due to emergency or exigent circumstances.” Va. Code § 51.1-1108(B).

State employees are allowed up to 30 days of paid leave in any calendar year, in addition to any other paid leave, to serve as bone marrow or organ donors. Va. Code § 2.2-2821.1. In 2023, Virginia passed a new law expanding unpaid organ donation leave to private employers. The law requires that any employer of more than 50 employees must provide up to 60 days of unpaid leave for organ donation and up to 30 days of unpaid leave for bone marrow donation each year to eligible employees. Va. Code § 40.1-33.8. Eligible employees are those who have requested organ donation leave and have worked at least 1,250 hours for the employer during the 12 months preceding the donation. The employee must also provide written physician verification of the donation and its “medical necessity,” and the employee may not take organ donation leave concurrently with leave under the federal Family Medical Leave Act. *Id.*

Employers that offer sick leave, whether paid or unpaid, should ensure that their policy applies equally to all employees.

## Whistleblower Laws

The Virginia Fraud Against Taxpayers Act imposes liability on persons who knowingly present false or fraudulent claims for payment with state funds, misappropriate state property, or deceptively avoid binding obligations to pay the state, among other violations. A person who files a successful claim may receive between 15 and 25 percent of any recovery to the state if the Virginia Attorney General intervenes in the matter. If the private plaintiff successfully prosecutes the case on their own, they may receive between 25 and 30 percent of the award.

The court may reduce the value of the award if the plaintiff planned or initiated the fraud, or if the action is largely based on information disclosed in the media or public hearings. The Act also protects whistleblowers from retaliation by their employers for filing a claim or assisting the state with its own claim. Va. Code § 8.01-216.1, *et seq.*

A Virginia employer cannot discharge or discriminate against an employee who files, testifies, or otherwise acts to exercise rights under Virginia's safety and health statute. An aggrieved employee can file a complaint with the Commissioner of Labor and Industry within 60 days of violation for reinstatement and back pay. If the Commissioner refuses to issue a charge, the employee can file a lawsuit in circuit court for appropriate relief. Va. Code §§ 40.1-51.2:1; §§ 40.1-51.2:2.

### **Smoking Laws**

Under the Virginia Clean Indoor Air Act, Va. Code §§ 15.2-2820, *et seq.*, smoking is prohibited in all enclosed areas not specifically exempted by statute. Also, under the Act, an employer may have the right to limit or ban smoking in the workplace under the following circumstances: (1) if the designated smoking and nonsmoking areas are subject to a written agreement between the parties, the provisions of the agreement control such designation; and (2) a total ban of smoking is enforceable only upon an affirmative vote of a majority of the affected employees voting unless such ban is the subject of a contract of employment between the employer and employee as a prior condition of employment. Va. Code § 15.2-2828.

### **Break Time to Express Milk**

A mother may breastfeed her child in any location, public or private, where the mother is otherwise authorized to be present, including any property owned, leased, or controlled by the State of Virginia. Va. Code §§ 2.2-1147.1; 18.2-387 (exempt from the criminal indecent exposure statute). As for places of employment, Virginia House Joint Resolution 145 "encourages" employers to recognize the benefits of breastfeeding and provide unpaid break time and appropriate space for employees to breastfeed or express milk. However, the federal Fair Labor Standards Act (FLSA) requires employers to provide reasonable break time for an employee to express breast milk for her nursing child for one year after the child's birth each time such employee has need to express milk. Employers are also required to provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, to be used by an employee to express breast milk.

### **Meal Breaks**

In general, the State of Virginia has no law regulating meal breaks or rest periods. However, employees under the age of 16 shall not work more than five hours continuously without an interval of at least 30 minutes for a lunch period. Va. Code § 40.1-80.1(B).

### **Minimum Wage**

Virginia passed an expanded minimum wage program effective May 1, 2021. As of January 1, 2022, the Virginia Minimum Wage Act requires a minimum wage equivalent to the higher of \$11.00 per hour or the federal minimum wage. Va. Code § 40.1-28.10. As of January 1, 2023, the minimum wage is \$12 per hour, and it will increase each year until it reaches \$15 per hour on January 1, 2026. An increase in the federal rate automatically increases the Virginia rate because the statute requires payment of the higher of the state or federal minimum wage. An employer that violates the minimum wage requirement is liable to the employee(s) in the amount of the unpaid wages, plus interest at eight percent per annum upon such unpaid wages as may be due to the plaintiff. *Id.* § 40.1-28.12. The interest is awarded from the date or dates said wages were due; the court may also award reasonable attorney's fees. *Id.*

### **Minimum Wage for Employees with Disabilities**

In 2023, the Virginia General Assembly amended the state's minimum wage law to reclassify workers with disabilities paid pursuant to § 214(c) of the Fair Labor Standards Act as employees. Starting July 1, 2023, employers who employ individuals with disabilities at a subminimum wage pursuant to a special certificate issued under 29 U.S.C. § 214(c) must pay these employees at least the hourly rate required in Va. Code § 40.1-28.10.

## Final Payments

Under the Virginia Payment of Wage Law, upon termination of employment, an employee shall be paid all wages or salaries due them for work performed before termination; such payment shall be made on or before the date on which they would have been paid for such work had their employment not been terminated. Va. Code § 40.1-29(A).

## Unemployment Insurance

Unemployment insurance benefits provide income to individuals who have lost work through no fault of their own. The benefits are intended to partially offset the loss of wages while an unemployed worker searches for suitable work, or until an employer can recall the employee to work. Nothing is deducted from the employee's wages to pay for this coverage. Unemployment benefits are administered by the Virginia Employment Commission.

## Workers' Compensation

The Virginia Workers' Compensation Act, Va. Code § 65.2, *et seq.*, applies to virtually every employer in Virginia with three or more employees. The Act is administered by the Virginia Workers' Compensation Commission.

Employees who suffer injuries and/or occupational diseases arising out of and in the course of their employment may be eligible to receive several types of benefits under the Act. A workplace injury must be reported to the employer immediately; failing to report an injury in a timely manner may result in a denial of benefits. It is unlawful to discriminate against an employee because they have filed a workers' compensation claim, participated in an investigation related to a claim, or testified in a proceeding regarding a claim. Va. Code § 65.2-308. The civil penalty for when an employer fails to insure under the Act is up to a maximum of \$50,000. An employer is required to insure in Virginia when they regularly employ more than two part-time (or full-time) employees. A business that hires subcontractors or other businesses to assist them must count the subcontractor's employees, as well as their own, in determining total employees for coverage requirements.

Effective July 1, 2023, the Virginia Worker's Compensation Act expanded its compensation promises for public servants. First, the General Assembly added anxiety disorder and depressive disorder to post-traumatic stress disorder as the list of mental health conditions for which law enforcement officers and firefighters can receive compensation. Va. Code § 65.2-107. To qualify, the officer or firefighter must be diagnosed with such a condition caused by a "qualifying event" while in the line of duty. *Id.* Qualifying events include experiences like investigating a crime scene, responding to serious threats to themselves or others, and responding to the harm done to children, among others, *id.* Firefighters must also show they were compliant with relevant OSHA regulations at the time of the qualifying event to receive compensation. *Id.* Second, the General Assembly added bladder and thyroid cancer to the list of cancers the state considers occupational diseases suffered in the line of duty for firefighters, law enforcement officers, and several other public servants. Va. Code § 65.2-402.

## Child Labor Laws

Virginia's Child Labor Laws are codified at Va. Code §§ 40.1-78 through 40.1-116. With few exceptions, the laws prohibit minors under the age of 14 from working and require work permits for all minors under the age of 16. There are also work-hour restrictions for minors under the age of 16, and employers are required to keep records to verify the hours worked and breaks given to them. Further, there are provisions identifying the specific types of employment that are prohibited or limited for minors under the age of 18.

## Gun Laws

Virginia Code Section 18.2-308(C)(8) carves out an exception from its general prohibition for carrying a concealed weapon for "any person who may lawfully possess a firearm and is carrying a handgun while in a personal, private motor vehicle[,] or vessel, and such handgun is secured in a container or compartment in the vehicle or vessel."

A Virginia Attorney General opinion about this exception concludes that: (1) a person may possess a firearm in their vehicle even if they have not been issued a concealed weapons permit; (2) the handgun may be loaded and may remain within reach of a driver or passenger; (3) for the handgun to be “secured in a container or compartment,” the storage need not be locked; and (4) an employer may prevent an individual from keeping a firearm stored in their vehicle at a place of employment if there is a company policy or signage prohibiting firearms on the premises. OAG Opinion 11-111 (May 2012).

Virginia recognizes valid concealed handgun or concealed weapon permits and licenses issued by other states provided:

1. The holder of such a permit or license is at least 21 years of age;
2. The issuing authority provides means to instantaneously verify the validity of the permit or license;
3. The permit or license holder carries a photo identification issued by a government agency of any state or by the U.S. Department of Defense or the U.S. Department of State;
4. The holder displays the permit or license and such identification upon demand by a law enforcement officer; and
5. The permit or license holder has not previously had a Virginia concealed handgun permit revoked.

Va. Code § 18.2-308.014(A).

### **Additional Laws and Regulations**

#### **Marijuana Laws**

Virginia decriminalized possession of up to one ounce of marijuana on July 1, 2021, for people aged 21 years or older and bolstered protections for medical marijuana users. Va. Code § 40.1-27.4 prohibits employers from disciplining or discharging an employee for lawful use of cannabis unless the use of the substance interferes with work performance. Employers may also take adverse action against marijuana users if they possess or use marijuana during the workday.

#### **Anti-Retaliation Provisions**

An employer shall not retaliate against an individual because that individual has, for example: (1) had their earnings garnished for any one indebtedness. Va. Code § 34-29(f); (2) filed a complaint or participated in an investigation under the Virginia Occupational Safety and Health Act. Va. Code § 40.1-51.2:1; (3) a certain genetic characteristic or as a result of a genetic test. Va. Code § 40.1-28.7:1; (4) filed a claim with the Commissioner of Labor and Industry for unpaid or untimely paid wages pursuant to Va. Code § 40.1-29; or (5) served in the Virginia National Guard, Virginia Defense Force, or National Guard of another state. Va. Code § 44-93.4.

#### **Prohibited Nondisclosure or Confidentiality Agreements Regarding Sexual Assault or Harassment**

Effective July 1, 2023, the General Assembly amended the prohibition on employers requiring employees to execute nondisclosure or confidentiality agreements meant to conceal sexual assault claims by adding nondisparagement clauses to the proscription. Va. Code § 40.1-28.01. Also, the statute now prohibits the use of such agreements to conceal claims of sexual harassment in addition to sexual assault.

#### **Virginia Human Rights Act (VHRA)**

The VHRA, which may be found at Va. Code § 2.2-3900, *et seq.*, prohibits discrimination on the basis of race, color, religion, sex, pregnancy (including childbirth or related medical conditions), age (40 and older), national origin, disability, or marital status. All employers are covered by the VHRA; however, civil lawsuits may only be brought against those employers with five or more employees (with respect to unlawful discharge) or 15 or more employees (with respect to other claims).

The Virginia Values Act greatly expanded the scope of the VHRA, including prohibiting discrimination on the basis of sexual orientation and gender identity. Although the VHRA previously limited private rights of action to “unlawful discharge,” the amended VHRA contains no such limitation and therefore prohibits all forms of discrimination and retaliation as described in Title VII of the Civil Rights Act.

## Virginians with Disabilities Act

The Act, in part, mimics the Americans with Disabilities Act of 1990, as amended, and prohibits discrimination solely because of an individual's disability. Va. Code § 51.5-41(A). An employer shall make reasonable accommodation to the known physical and mental impairments of an otherwise qualified person with a disability, if necessary, to assist such a person in performing a particular job, unless the employer can demonstrate that the accommodation would impose an undue burden on the employer. *Id.* § 51.5-41(C). Employers subject to the federal Rehabilitation Act of 1973 are exempt from the Virginia with Disabilities Act. Va. Code § 51.5-41(F).

## Safety Provision

No person shall discharge an employee or in any way discriminate against an employee because the employee filed a safety or health complaint or testified or otherwise acted to exercise rights under the safety and health provisions of the commonwealth. Va. Code § 40.1-51.2:1. Moreover, any employee who, in good faith with reasonable cause and without malice, truthfully reports threatening conduct by a person employed at the same workplace shall be immune from all civil liability that might otherwise be incurred or imposed as the result of making such a report. Va. Code § 40.1-51.4:5(A). Further, it is the duty of the employer to furnish safe employment and workplaces that are free from recognized hazards that are causing or likely to cause death or serious physical harm to employees. Va. Code § 40.1-51.1(A).

## Employment Applications

It is a Class 1 misdemeanor for an employer or educational institution to require an applicant, in any application, interview, or otherwise, to disclose any information concerning an arrest or criminal charge against them that has been expunged. Va. Code § 19.2-392.4. An executive "ban the box" order prohibits questions about criminal histories from applications for most state jobs, except for "sensitive" positions or roles in which such history is directly relevant to the job. All applications "shall ask prospective employees if they are legally eligible for employment in the United States"; it is a Class 1 misdemeanor to hire an individual not authorized to work in the United States. Va. Code § 40.1-11.1.

## Reference Immunity

An employer who, upon request, discloses information about a former or current employee to a prospective employer of the former or current employee is immune from civil liability for such disclosure or its consequences unless it is shown by clear and convincing evidence that the information disclosed by the former or current employer was knowingly false, with reckless disregard regarding whether it was false or offered with the intent to deliberately mislead. Va. Code § 8.01-46.1.

## WARN Laws

Virginia does not have its own state WARN law and instead adheres to the federal Worker Adjustment and Retraining Notification (WARN) Act. The Act applies to employers with 100 or more full-time employees and to mass layoffs or plant closings wherein a certain percentage of employees lose their jobs. Generally, the Act requires most employers to provide at least 60 days' notice of any plant closing and mass layoff.

## Employer Use of Employee Social Security Numbers

In 2023, the General Assembly prohibited employers from using their employees' social security numbers or any derivative thereof as the employees' identification numbers or putting the numbers on any identification card, badge, or similar item. Va. Code § 40.1-28.7:10. The new statute sets a civil penalty of not more than \$100 per knowing violation and gives the commissioner power to petition a circuit court for an injunction to stop any violation.

## Social Media Accounts of Current and Prospective Employees

An employer cannot require a current or prospective employee to disclose the username and password to the current or prospective employee's social media accounts. Va. Code § 40.1-28.7:5(B). Nor can an employer require an employee to "add" or "friend" another employee on a social media platform. In the event an employer comes into possession of an employee's social media username and password, the employer will not be held liable unless it uses the information to gain access to the employee's social media account.



## **Prohibition on Covenants Not to Compete for Low-Wage Employees**

Employers are prohibited from entering, enforcing, or threatening to enforce a covenant not to compete with any low-wage employee. Va. Code § 40.1-28.7:8. A low-wage employee does not include, however, an employee who derives a predominant part of their wages from commissions, incentives, or bonuses. Based on the 2023 median hourly wage of employees in Virginia, the Virginia Department of Labor has determined that a low-wage employee is one who earns less than \$73,320 per year.