

**VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY
DIVISION OF LABOR AND EMPLOYMENT LAW**

FIELD OPERATIONS MANUAL

CHAPTER TEN PAYMENT OF WAGE

This document is part of the latest version of the Virginia Department of Labor and Industry Division of Labor and Employment Law's Field Operations Manual. This document supersedes any and all previous editions.

Updated January 2009

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DISCLAIMER

The Field Operations Manual (FOM) is an operations manual that provides the Division of Labor and Employment Law investigators and staff with interpretations of statutory provisions, procedures for conducting investigations, and general administrative guidance. The FOM was developed by the Labor and Employment Law Division under the general authority to administer laws that the agency is charged with enforcing. The FOM reflects policies established through changes in legislation, regulations, court decisions, and the decisions and opinions of the Virginia Department of Labor and Industry. Further, the FOM is not used as a device for establishing interpretative policy.

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March 2010

Section 1.00 Coverage

Virginia's Payment of Wage Law is contained in § 40.1-29 of the Code of Virginia. It applies to all private industry employers operating a business in the Commonwealth. Public sector employees are not covered (§ 40.1-2.1).

A. Pay Periods:

1. Hourly employees must be paid every other week or at least twice a month.
2. Salaried employees must be paid at least once a month.
3. Executive employees are exempt from the requirements in Numbers 1 and 2 above; however, they must be paid on whatever date the employer establishes as the pay day.

B. Time of Payment:

As a general rule, all hours worked in a pay period must be paid on the established pay date. Payment may not be delayed for a period longer than is reasonably necessary and in no event may payment be delayed beyond the next payday after such computation can be made. For example, an employer cannot allow an employee a day off with pay and then later recoup the moneys from wages due and payable beyond the next established payday. In those cases where an employer allows an employee to take a paid vacation before he or she has accrued the vacation under company policy, settlement must be made by the date the employee has accrued the vacation leave or the termination date, whichever occurs first. This rule does not apply to advances on wages.

C. Pay Stubs:

1. Employers do not have to on a regular basis include pay stubs or use any similar method to reflect an employee's gross wages and types and amounts of deductions therefrom.
2. However, upon request of an employee, an employer would have to furnish an employee a statement of the gross wages earned by the employee during any specified pay period and the amount and purpose of any deductions made. This is only on a one-time-basis --- not an ongoing requirement.

D. Moneys Collectible:

An employee has to be paid his or her established rate of pay for every hour actually worked. This includes but is not limited to the following:

1. Wages
2. Salaries

3. Commissions
4. Piece-work rates
5. Mileage rates
6. Moneys withheld and not remitted to proper entity. This occurs many times with respect to health premiums being deducted from an employee's wages and the employer fails to distribute such deducted amounts to the insurance carrier.

E. Moneys Uncollectible:

1. Fringe benefits. Fringe benefits includes such items as the following:
 - (1) Vacation pay
 - (2) Severance pay
 - (3) Sick pay
 - (4) Holiday pay
 - (5) Discretionary bonuses
 - (6) Any other benefit provided for by company policy.

Note: An employer, however, cannot provide such benefits and then later deduct the moneys from an employee's actually-worked-for moneys. Department policy is that if an employer gave an employee moneys for a benefit that had actually been earned under company policy for such benefit, he cannot later deduct such amounts from moneys identified as being owed for time actually worked.

On the other hand, if the employer advances an employee moneys for benefits not yet earned under company policy, he may deduct the amount from moneys identified as being owed for time actually worked.

2. Work performed in or around a private home. The employer has to be operating a business establishment (§ 40.1-2). We cannot collect moneys owed for performing such occupations as babysitters, maids, groundsmen, etc. which are performed in or around a private home but not in connection with the employer's business, trade, or profession.
3. Work performed in the capacity of independent agent or subcontractor.
4. No employer-employee relationship.

5. Moneys owed by bankrupt employers or employers operating under reorganization.
6. Claims exceeding \$15,000.00.
7. Cases in litigation.
8. Claims arising out of written employment contracts.
9. Claims of some officers and executives.

Section 2.00 Accepting Wage Complaints for Work Performed in Virginia

- A. Wage complaints will be accepted and investigated in situations where the following has occurred:
 - 1. Out-of-state employer hired Virginia resident to perform work in Virginia.
 - 2. In-state employer hired out-of-state resident to perform work in Virginia.
 - 3. Out-of-state employer hired out-of-state employee to perform work in Virginia.
 - 4. In-state employer hired in-state employee to perform work in Virginia.

- B. Wage complaints will generally not be investigated in situations where the following has occurred:
 - 1. In-state employer hired Virginia resident to perform work out of state.
 - 2. Out-of-state employer hired Virginia resident to perform work out of state.

Note: An exception to this general rule would exist in situations where an employee performed work for a single employer in more than one state. (For example, an accounting firm may hire an auditor whose job requires him to travel and perform tasks in multiple states.) If an employment contract was entered into in the state of Virginia for all work performed, the total employment situation would be covered by Virginia law.

Section 3.00 Wage Procedure (Civil)

Labor Law Representatives shall investigate complaints alleging a violation of § 40.1-29 according to procedures established in this manual.

In obtaining initial information from the employer, the Representative shall attempt to ascertain the legal entity responsible, and the number of employees at the time of the investigation. This information is necessary in order to calculate the reduction-for-size portion of the Civil Monetary Penalty ("CMP") Calculation Report.

Representatives and Supervisors shall, to the extent possible, conduct investigations by telephone and mail. Travel shall be limited to those situations in which an investigation cannot otherwise be pursued effectively or reasonably.

A. Employer Notification of Wage Claim Received

Upon receipt of a wage claim, the employer shall be notified with a form letter sent by regular first-class mail.

B. Notification of Representative's Determination

1. If the Representative is uncertain as to the validity of the claim, he shall request guidance from the Supervisor/Program Manager.
2. If the Representative determines that the claim is clearly not valid, he shall so notify all parties using form letter LLA(91-1)-2.
3. If the Representative determines that the claim is valid and that the Code of Virginia has been violated, he shall notify the employer with form letter LLA (91-1)-3, or, if a repeat offender, LLA(91-1)-3(A). This letter shall be mailed by both first-class mail and by certified mail, return receipt requested. Where appropriate, the Representative may attempt to personally deliver this letter to the employer in lieu of service by mail. If personal service is made, delivery by mail is not required.
4. Before preparing this letter, the Representative shall complete the CMP Calculation Report.
5. In accordance with the terms of LLA(91-1)-3 and LLA(91-1)-18 (Consent Agreement Form), the Civil Monetary Penalty will be waived if the wages are paid within 15 calendar days of the employer's receipt of LLA(91-1)-3, and the employer signs the Consent Agreement Form.
6. Whenever under this section an act is required to be done within 15 days of receipt of a notice which has been sent by both certified mail and first-class mail, and the certified letter is not signed for, the deadline shall be calculated by adding 3 days to allow for mail delivery time. In such a case, therefore, the deadline will

be the 18th day following the date the notice was mailed.

7. Employers shall be instructed to whom checks are payable, and where they are to be sent. Generally, checks for both wages and CMPs should be sent to the Regional Office before Final Orders are issued, and both are to be sent to the Central Office after they are issued. Please note that if an attorney is involved and his fees are to be collected, the attorney may request that checks be made jointly to the attorney and the employee or the Commonwealth, as appropriate.

C. Informal Conference

1. On written request of the employer, an informal conference shall be held. The conference shall be scheduled as soon as possible after the employer's request is received. If the employer fails to agree to a conference date within 5 working days from the time he is asked to agree to a date, a date for the conference shall be unilaterally selected by the Department and the employer shall be notified in writing of the scheduled time for the conference, and the Department's efforts to schedule the conference shall be thoroughly documented in the Case Diary Log. A reasonable effort shall be made to schedule informal conferences within 15 calendar days of the date the employer requests the conference. Both employer and employee shall be advised that no evidence presented after the informal conference shall be considered.
2. The conference will normally be held by the Supervisor. In the conference the parties shall be granted the following rights:
 - (1) to have reasonable notice thereof;
 - (2) to appear in person, or by counsel or other qualified Representative, for the informal presentation of factual data, argument, or proof;
 - (3) to have notice of any contrary fact basis or information in the possession of the agency which can be relied upon in making an adverse decision;
 - (4) to be informed briefly and generally in writing, of the factual or procedural basis for an adverse decision in any case.
3. The complainant shall be invited to this conference, and a reasonable effort shall be made in scheduling the meeting to permit the complainant to attend. He shall be advised, however, that no evidence will be accepted after the conference. The Representative should normally attend the conference, but need not at the discretion of the Supervisor.
4. The Supervisor may request security for an informal conference if he deems it necessary.
5. The Supervisor shall receive any information which either party may wish to

submit. The Supervisor shall prepare a memorandum to the case file, which may be handwritten, listing participants at the meeting, and summarizing the employer's defenses and any other matters discussed. This will be a part of the record forwarded to the Circuit Court if a Final Order is appealed, and shall be type written at that time if necessary.

D. Notification of Supervisor's Determination

1. Following the informal conference the Supervisor shall, if he finds the complaint to be invalid, inform the complainant in writing of his determination in the format illustrated in form LLA(91-1)-4. If he finds the complaint to be valid, he shall inform the employer in writing in the format LLA(91-1)-5, or, if a repeat offense, LLA(91-1)-5(A). This letter shall be sent by both first-class mail and certified mail, return receipt requested. The Supervisor's letter need not be a formal or lengthy document. It shall, however, concisely explain the reason for his determination, and the reason why the employer's argument, if any, was not accepted.
2. In accordance with the terms of LLA(91-1)-5 and LLA(91-1)-18 (Consent Agreement Form), the Civil Monetary Penalty will be waived if the wages are paid within 15 calendar days of the employer's receipt of LLA(91-1)-5, and the employer signs the Consent Agreement Form.
3. When an employer fails to appear for a scheduled informal conference, and the Supervisor is of the opinion that the claim is valid, he is not required to notify the employer of his determination with Forms LLA(91-1)-5 or LLA(91-1)-5(A), and may instruct the Representative to prepare Final Orders for wages and a civil monetary penalty.

E. Employer's Right to Trial in Court

In every case, the employer shall be afforded the right to a de novo trial in the appropriate court. When the Department has determined that the claim against him is valid, and he is so notified with Form LLA(91-1)-3 or LLA(91-1)-3(A), he shall be granted 15 calendar days from the date he receives the notification to file a written request of contest requesting the court hearing. In the alternative, at that time, he may request an informal conference. If such a conference is held, and it is determined that the case is valid, he shall be notified with Form letter LLA(91-1)-5 or LLA(91-1)5(A), that he has 15 calendar days to file a notice of contest requesting a court hearing.

F. Filing Suit When Notice of Contest is Filed

The Division has the authority to represent claimants whose claims do not exceed \$5,000.00. All claims in excess of that amount are sent to the Office of the Attorney General for a decision as to whether that Office will represent the claimant. All cases in which the employer requests a court determination should be sent to the Central Office for handling.

G. Entry of Final Order

1. In appropriate cases under this section, the Representative shall prepare Final Orders. Separate orders shall be prepared for the payment of wages and interest and attorneys' fee and for assessing a civil monetary penalty and attorneys' fees. A wage order shall be prepared using form LLA(91-1)-10; a penalty order shall be prepared using form LLA(91-1)-11. A Final Order Case Summary, form LLA(91-1)-14, shall also be prepared by the Representative.
2. The Final Order Case Summary, the Wage Claim CMP Calculation Sheet, and Final Orders shall be sent to the Central Office for review, approval and signature.
3. Original copies of all Final Orders issued by the Commissioner shall be entered into a Wage Claim Order Book maintained in chronological order by the Central Office. Appeals from Department Orders shall be to the Circuit Court for errors of law or sufficiency of evidence only.

H. Assessment of Penalties after Court Judgment for Wages, or Where Wages are Paid Without Legal Action

1. In any case in which a court renders judgment in favor of the Department in a wage case, but does not decide the CMP issue, the Representative shall notify the employer of the Department's right to assess a Civil Monetary Penalty, and of his right to a hearing with Form LLA(91-1)-12, in the same matter described in subsection G. above. Such an order shall not be sent to the Central Office until the appeal period has expired, with no appeal having been taken.
2. In every case, after the investigation has been completed and Form LLA(91-1)-3 has been sent, the wages are paid without legal adjudication by a court or the Department, the Representative shall obtain either payment of the civil monetary penalty or a Consent Agreement. In the event the employer fails to do either, an informal conference shall be held.

I. Certification of Final Orders

1. After 33 calendar days have expired following the employer's receipt of a Final Order, the Central Office shall prepare the certification of the Final Order, which is printed on the reverse sides of the Final Wage and Final Penalty Orders, Forms LLA(91-1)-10 and LLA(91-1)-11.
2. The certifications with the signed Final Orders shall be sent by the Central Office to the Representative for docketing with the Circuit Court(s).

J. Recording Final Orders and Closure of Case

After the Certification(s) and Final Order(s) are returned to the Representative, the Representative shall record the Orders with the Circuit Court in the jurisdiction(s) in

which the employer conducted business, and in all other jurisdictions in which the employer may have real property. After recording the Orders, the Representative shall close the case file and send closure information to the Central Office. Closure information includes the following: Final Order Case Summary, Final Wage and Penalty Orders, Circuit Court recordation information, Civil Money Penalty Calculation Report, a copy of the Statement of Claim for Unpaid Wages, and a short statement from the Representative advising the case is to be sent to collection.

K. Collection of Civil Monetary Penalties, Wages, Interest and Attorneys' Fees

1. After docketing the Final Orders, collection activity shall be initiated, and shall be the responsibility of the Central Office. The cases will be sent to collection attorneys approved by the Attorney General's Office. If no attorney is available and the total dollar amount of the case (wage and penalty order together) is under \$3,000, the case is sent to a collection agency.
2. If a tax ID number has been made available by the Representative, the case is sent to the state tax set-off program in addition to the collection attorney or collection agency.
3. If collection efforts of the collection attorney or collection agency fail because of bankruptcy, employer has no assets, employer's whereabouts cannot be determined, or other verifiable documentation supplied the Department by the collection attorney or collection agency, the penalty amount will be written off in accordance with State and Department procedures. The Central Office will notify the Representative to contact the complainant to advise that the Department cannot collect his wages and the reason why as supplied to the Department by the collection attorney or collection agency.

Attorneys' Fees: Each Final Order entered by the Commissioner will include an award of one-third of the wage and the penalty amount for attorneys' fees. It is important to note, however, that in any case in which an attorney is not engaged the attorney's fee will not be collected, and if sent to the Department, will be returned. In such a case, when full payment is received, the Clerk's Office where the Final Order is entered will be notified that the debt is fully satisfied, even though no attorneys' fees were paid.

L. Write-off Request for Civil Monetary Penalty

1. When advised by the collection attorney or collection agency that no assets are available to satisfy the Final Order, the Central Office will use the agency's writeoff form to submit this information to the Accounts Receivable Coordinator to have the civil monetary penalty approved for write-off. Presently, the write-off is being approved by the Program Director.
2. In addition to bankruptcy and establishment of the fact the employer has no assets to levy on, the Central Office shall also prepare a write-off request for the penalty when the employer cannot be located. The documentation should describe all

efforts made by the collection attorney or collection agency to locate the employer.

M. Pre-judgment Attachment

If there is reason to believe the employer is attempting to hide or remove assets from the Commonwealth in an attempt to defraud the claimant(s), the Representative should immediately bring the matter to the attention of the supervisor. If the supervisor believes it is appropriate, he shall advise the Program Director, who shall consult with the Commissioner to determine whether assistance of legal counsel shall be sought for the purpose of filing a pre-judgment attachment.

N. Penalty Calculations; Waiver of Penalties

1. A Civil Monetary Penalty shall be assessed in each case where an employer who knowingly fails to make payment of wages in accordance with § 40.1-29 of the Code of Virginia, unless waived under other provisions of Division policy. Ignorance of the law does not mean an employer "unknowingly" fails to make payment. If the employer is aware of the amount being paid to the employee, and if that amount is insufficient under the law, the employer "knowingly" fails to make payment of wages in accordance with § 40.1-29.
2. Before calculating a civil monetary penalty, the Representative shall check regional and central records and databases to determine whether the defendant has had a previous violation. A final docketed Department Order, a final court judgment, or a previous consent agreement constitutes evidence of a previous violation.
3. All civil monetary penalties, shall be calculated by the Payment of Wage Civil Monetary Penalty Calculation Report, LLA(91-1)-8. A separate sheet shall be used for each claimant.
4. Each separate pay period 1) in which an employee works, and 2) is not paid on or before the established payday for that pay period, is a separate violation of the Payment of Wage Law. CMP's calculated with the calculation sheet where there are multiple pay period violations may result in inappropriately large CMP's, however. The field staff is requested to bring such cases to the Program Director's attention.
5. A "repeat offender" is a defendant for which there is a legally final court judgment or a Department of Labor and Industry Order adjudicating the defendant to be in violation of the Virginia Payment of Wage Law, or one who has previously signed a consent agreement. "Final" means all legal appeals have been exhausted. No such violation which occurred 3 years or earlier from the present violation, nor a violation occurring prior to January 1, 1992, shall be considered.
6. A repeat offender shall be assessed a civil monetary penalty of \$1000 per

violation, and shall not be offered a waiver of the penalty for prompt payment of the wages.

7. The Civil Monetary Penalty as calculated on the Penalty Calculation Report, LLA(91-1)-8, shall be the standard penalty expected to be assessed. No greater amount shall be assessed. In the interest of justice, however, the Program Director may reduce a standard civil monetary penalty by no more than 50%. The Program Director may, subject to review by the Commissioner, reduce a penalty by any amount, or may determine that no penalty shall be assessed.
8. In any case in which the standard civil monetary penalty is reduced, a written statement explaining the reasons for the reduction shall be placed in the file. Reasons for reducing a penalty include but are not limited to obvious or demonstrated financial hardship or inability to pay of the employer; the degree of good faith by the employer in attempting to comply with the law, and in attempting to properly compensate his employees; and whether the assessment of a penalty would serve the purpose of deterring the defendant or others from failing to obey the Payment of Wage Law in the future. One example of the latter would be where the culpable employer is deceased or permanently disabled or, in the case of a corporation, where the corporation has ceased business and is unlikely to resume active status.
9. The Central Office shall track the assessment of collection activities and will provide the Accounts Receivable Coordinator with Accounts Receivable Report each quarter.

O. Interest Calculation

1. Interest may be calculated using the following method:
 - (1) Multiply the Wages Due by .08 (8%). The figure that results is the Yearly Interest.
 - (2) Divide the Yearly Interest by 365 (number of days in a year). This figure equals the Daily Interest amount.
 - (3) Multiply the Daily Interest amount by the number of days the wages are overdue.
 - (4) The result is the Total Interest Due the claimant.
2. If wage violations have occurred over more than one pay period, the correct amount of interest due must be determined by repeating the interest calculation for each affected pay period. Once the Representative has completed a series of individual interest calculations, the separate interest due amounts must be added together to arrive at the total interest due the claimant.

3. All Final Orders must specify that interest shall accrue at eight (8) percent from the date the wages were legally owed to the complainant.

P. Attendance by Representatives at Court Hearings: Subpoenas

1. In cases prosecuted by a Commonwealth's Attorney, the Attorney General, or other attorney engaged by the Commonwealth, a Representative shall appear at trial on request of the attorney whether or not a subpoena has been issued for the Representative's appearance.
2. No Representative shall appear at any other court hearing or trial unless he or she has received a subpoena from the court compelling attendance.

Q. Claimant Authorization for Collection and Deduction of Attorney's Fees

In each case in which a Final Order of the Commissioner or a court judgment has been entered in favor of the claimant, and the case is sent to Richmond for collection, the Representative shall obtain the signature of the claimant on Form LLA(91-1)-19 and send it to the Central Office.

Section 4.00 Wage Procedure (Criminal)

- A. Section 40.1-29(d) states: "an employer who willfully and with intent to defraud violates this section shall be guilty of a misdemeanor."
- B. Definition of "willful and with intent to defraud."
1. The term "willfully" is equivalent to "knowingly." The word "knowingly" imports a knowledge that facts exist which constitute the act or omission of a crime, and does not require knowledge of the unlawfulness of any such act or omission. A mere mistake by an employer is not sufficient to prove willful. It does, however, include employers who knew or showed reckless disregard for the matter of whether its conduct was prohibited. Thus, where employers deliberately, voluntarily, and intentionally refuse to pay wages, criminal violations of the statute may be proven. Where an employer continues to delay payment but claims that he intends to pay, however, a "willful violation with the intent to defraud" may be more difficult to prove.
 2. The following represent examples of situations that may warrant criminal prosecution:
 - (1) Repeat offenders of violations of § 40.1-29.
Example: an employer who repeatedly withholds wages from employees who terminate without notice even after previous instruction by the Representative of the requirement of § 40.1-29 to pay all wages due.
 - (2) Fraudulent disposal of company assets by employer.
Example: the employer claims not to have funds to pay wages, yet, assets are being removed from the company for other purposes.
 - (3) Refusals to pay wages.
Example: the employer states he has no intention of paying the wages even though he is aware of the legal requirement and funds are available.
- C. When the Representative is of the opinion that an employer is willfully with intent to defraud withholding wages from an individual, he should bring the matter to the attention of the Supervisor. If the Supervisor determines that an employer acted willfully with the intent to defraud, the claim should be sent to the Central Office. The Commonwealth's Attorney should prepare and submit the necessary forms and motions. The Representative should be prepared to appear in court and give testimony as requested by the Commonwealth's Attorney.

Section 5.00 Methods of Wage Payment, i. e., Direct Deposit, Etc.

- A. Employers may utilize direct deposit for payment of wages to an employee provided the following guidelines are adhered to:
1. Advanced, written consent of employee is secured.
 2. Consent is voluntarily given, not made a condition of employment or continuance therein.
 3. Consent may be revoked by employee in writing.
 4. Right to designate the bank or financial institution and the type of account to which wage is to be deposited is allowed the employee.
 5. Written consent is maintained on file by the employer.
 6. Funds are made available in the designated account on or before the date the employee would have received the wage absent his consent to participate in the direct deposit system.
 7. No service, processing, or administrative charge is incurred by the employee.
- B. Employers cannot force an employee to participate in direct deposit of his wage or any other payment system which does not allow for the employee to receive cash or a check made payable to him.
- C. Another alternative available to the employer other than cash, check, or direct deposit is for the employer to make arrangements for employees to cash their checks only at the bank or financial institution where the employer has established a payroll deposit account for such purpose, provided the employee does not incur any expense or difficulty. Examples of such expense or difficulty are:
- (1) A service, administrative, processing, or other charge to employees for withdrawing their funds.
 - (2) Requirement that the employee establish and maintain an account with the designated bank or financial institution of the employer.
 - (3) Designated bank or financial institution is inconveniently located so that the employees cannot withdraw their wages on or before the established pay day. (This method of payment can be used by the employer without the voluntary and written consent of the employee, because a check is being drawn in the name of the employee).
- D. Employers can now pay wages by using pay cards, provided they comply with the following:

1. The wages are deposited into a trust account on which the employee is a named beneficiary.
2. There are no fees associated with withdrawing the wages from the pay card.
3. The employee is not required to maintain an account at any financial institution.
4. This method of payment can only be offered to the employee, but not required.

Section 6.00 Deceased Wage Claimants

Wage claims for deceased employees will be accepted as follows:

- A. If the deceased employee left a will, the Executor would complete and submit the "Statement of Claim for Unpaid Wages" on deceased's behalf.
- B. If the deceased employee died without leaving a will, the individual qualifying as the Administrator would complete and submit the "Statement of Claim for Unpaid Wages" on deceased's behalf.
- C. In the event the claim cannot be resolved informally, and a Final Order is issued by the Commissioner or a warrant-in-debt is sought by an attorney for the wage and interest amount owed, the order or warrant should be styled as follows:

"Commissioner, Virginia Department of Labor and Industry on behalf of
'(name of Executor or Administrator of the Estate of 'name of deceased person)'"

and

'(name of Executor or Administrator of the Estate of 'name of deceased person)'"

Section 7.00 Uniform Costs

- A. Definition of "Uniforms":
1. If an employer merely prescribes a general type of ordinary basic street clothing to be worn while working and permits variations in details of dress, the garments chosen by the employees would not be considered to be uniforms.
 2. Where an employer does prescribe a specific type and style of clothing to be worn at work (e.g., a restaurant or hotel establishment requires a tuxedo, or a skirt and blouse or jacket of a specific or distinctive style, color, or quality) such clothing would be classified as uniforms.
 3. Clothing that would only be worn by an employee of the particular establishment, such as uniforms designed to be worn by employees of fast-food restaurants meet the definition of uniforms.
 4. Other examples of uniforms would be those required to be worn by guards, cleaning personnel, and hospital and nursing home personnel.
- B. Regardless of whether the wearing of uniforms is required by law, required by the employer, or by the nature of the work, etc., the employer can require employees to pay all costs of the uniforms, provided that the employees' wages do not fall below the applicable federal or state minimum wage or federal overtime rate after the deduction for uniform charges is made.
- C. To be consistent with the requirements of the federal Fair Labor Standards Act, employees must be paid at least the applicable federal or state minimum wage and/or the federal overtime rate for all hours worked. When determining the wage rate, the cost of purchase, rental, or maintenance of uniforms will be factored into the calculation (i.e., total wages paid less the cost of uniforms must equal minimum wage for all hours worked).
- D. The employer may require the employee to pay the up-front costs of uniforms, may charge the employee a monthly rental or maintenance fee, and may ask the employee to pay for the uniforms through a withholding of wages.
- E. If the employee is asked to pay the costs associated with uniforms via a wage deduction, written and signed authorization is required per § 40.1-29(C).
- F. Provided the uniforms required to be worn are made of "wash and wear" materials, may be routinely washed and dried with other personal garments, and do not require ironing or any other special treatment such as dry cleaning, the employee can be required to maintain the uniforms. Costs of in-home maintenance care would not be factored as a wage reduction for the purpose of determining the minimum wage.
- G. If an employer supplies or reimburses the employees for a sufficient number of uniforms

to be worn, and an employee elects to purchase additional uniforms in excess of the required number, the employer can require the employee to pay for the costs of the uniforms and to sign a written agreement for the deductions to be made from his/her wage for the purchase of the additional uniforms. The costs would not be factored as a wage reduction for the purpose of determining minimum wage. The cost, however, must be reasonable or the fair market value and may not include a profit to the employer or any other affiliated person.

Section 8.00 Taken-But-Not Earned Paid Vacation Benefits and Other Fringes

- A. Often employers allow employees to take paid vacation before the vacation has been earned under company policy. Before the employee has worked enough hours to accrue the paid vacation time already taken, he resigns or is terminated. Two questions then arise:
1. Can the employer deduct the value of the taken-but-not-earned paid vacation from the employee's final pay check?
 2. If the employer can make the deduction, does he have to secure the employee's written, signed authorization in accordance with § 40.1-29(C) before such deduction?
- B. Answers:
1. The employer has paid all moneys owed, therefore, he is not deemed to have "withheld wages" when deductions are made from the final wage check for prior vacation payments not earned under company policy. Likewise, if the employee has earned the vacation pay under company policy, the employer is not allowed to make the deduction from the final wage check.
 2. The employer, by deducting the taken-but-not-earned paid vacation, has not "withheld the employee's wages" for purposes of § 40.1-29(C). The employee has received full pay for all time worked, A written and signed authorization therefore is not required.
- C. This interpretation does not imply that the Department will collect earned-but-not-taken vacation pay when an employee leaves his employment. In this situation, the employee will also have received his wage for all time worked. The employee must proceed on his own to collect the vacation pay and other fringe benefits he may be owed.
- D. The guidelines in A. and B. of this section shall also apply to sick pay. Other fringe benefits do not usually involve the payment of wages.

Section 9.00 Discretionary Bonuses Versus Wages

- A. Discretionary bonuses are not considered wages, thus, cannot be collected under § 40.1-29. Non-discretionary bonuses are considered wages and can be collected under § 40.1-29 and no illegal deductions may be made from them.
- B. Characteristics of "Discretionary Bonus":
 - 1. The employer retains discretion with respect to the fact of payment without prior promise or agreement.
 - 2. The employer retains discretion with regard to the sum, if any, to be paid without prior promise or agreement.
- C. Characteristics of "Non-discretionary Bonus":
 - 1. The employer promises to pay a sum in advance, and the sum is related to work to be performed.
 - 2. The employer determines how the sum amount will be derived prior to payment.
 - 3. The sum is promised to employees as a result of a contract, either implied or written.
 - 4. The sum is promised as an incentive to cause the employee to work more steadily, more efficiently, more rapidly, to remain with the employer, etc.
- D. A "discretionary bonus" is hereby defined to be any benefit, whether received in cash, goods and services or otherwise, which is not required to be given under the employment contract, and which may therefore be given or withheld at the employer's discretion. The term "discretionary bonus" does not include any compensation which the employee was reasonably led to believe the employer was obligated to pay him upon completion of work performed.
- E. An employment contract does not have to be in writing, and most employment contracts are in fact oral. Furthermore, a contract may be implied, even though its specific terms are not discussed. If, for example, an employer regularly compensates employees on an incentive basis depending on work performed or sales made, there may well be an implied contract obligating the employer to pay on that basis. The entirety of the employer-employee relationship must be examined to make this judgment.
- F. It is emphasized that an employer's use of the term "bonus" is not controlling and that the underlying employment relationship must be examined in order to determine whether an uncollectible discretionary bonus is involved.

Section 10.00 Executive Personnel

- A. The Department of Labor and Industry adopts the federal definition of "executive personnel" as set out in the U. S. Department of Labor, Wage and Hour Division, Regulations, C.F.R., Part 541: Defining the Terms "Executive," "Administrative," "Professional" and "Outside Sales."
- B. An employee is considered an executive employee under FLSA under either the "long test" or "short test."

Long Test:

- 1. Primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof;
- 2. Customarily and regularly directs the work of two or more other employees;
- 3. Has the authority to hire or fire other employees, or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight;
- 4. Customarily and regularly exercises discretionary powers;
- 5. Does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work in 1 - 4 above; and
- 6. Is compensated for his services on a salary basis at a rate of not less than \$155 per week, exclusive of board, lodging, or other facilities.

Short Test:

- 1. Compensated for his services at a guaranteed salary of \$250 or more a workweek, exclusive of board, lodging, or other facilities;
 - 2. Primary duty (50 percent or more) consists of management of the enterprise in which the employee is employed, or of a customarily recognized department or subdivision thereof; and
 - 3. Customarily and regularly directs the work of two or more other employees.
- C. The following guidelines should be observed when making a determination of whether the long or short test applies to an employee:
 - 1. Primary duty (short test):

A determination of whether an employee has management as his primary duty must be based on all the facts in a particular case. The amount of time spent in the performance of the managerial duties is a useful guide in determining whether management is the primary duty of an employee. In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employee's time. Thus, an employee who spends over 50 percent of his time in management would have management as his primary duty. Time alone, however, is not the sole test, and in situations where the employee does not spend over 50 percent of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent facts supports such a conclusion. Some of these pertinent facts are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his relative freedom from supervision, and relationship between his salary and the wages paid other employees for the kind of non-exempt work performed by the supervisor.

Primary duty (long test)

An employee will not qualify for exemption as an executive if he devotes more than 20 percent, or in the case of an employee of a retail or service establishment, if he devotes as much as 40 percent, of his hours worked in the workweek to nonexempt work. The test is applied on a workweek basis and the percentage of time spent on non-exempt work is computed on the time worked by the employee. There are two exemptions to the percentage limitations: (1) The employee is in sole charge of an independent or branch establishment. (2) The employee owns 20 percent interest in the enterprise in which he is employed. These exemptions except the employee only from the percentage limitations. They do not except the employee from any of the other requirements of the long test.

2. Two or more other employees:
 - (1) An executive employee must customarily and regularly supervise at least two full-time employees or the equivalent. For example, if the executive supervises one full-time employee and two part-time employees of whom one works mornings and one, afternoons; or four part-time employees, two of whom work mornings and two afternoons, this requirement would be met.
 - (2) An employee who merely assists the executive of a particular department and supervises two or more employees only in the actual executive employee's absence, however, does not meet this requirement. A shared responsibility for the supervision of the same two or more employees in the same department does not satisfy the requirement that the employee "customarily and regularly directs the work of two or more employees therein."
3. Discretionary powers: An exempt executive employee customarily and regularly

exercises discretionary powers. A person whose work is so completely routinized that he has no discretion does not qualify for exemption. The phrase "customarily and regularly" signifies a frequency which must be greater than occasional but which, of course, may be less than constant. The requirement will be met by the employee who normally and recurringly is called upon to exercise and does exercise discretionary powers in the day-to-day performance of his duties. The requirement is not met by the occasional exercise of discretionary powers.

- D. If an employee meets either the long or short test, he is considered to be an "executive" under § 40.1-29(D). As a result, such an employee may be required to enter into a written agreement providing for a forfeiture of wages as a condition or continuance of employment.
- E. **IMPORTANT:** No deductions which qualify as forfeitures for non-exempt employees could be made from the \$155 per week or \$250 per week. In such event, the employee would no longer be considered an executive employee under the FLSA. Since we adopt the FLSA rule, such an employee whose pay has been reduced below these minimums by deductions would similarly not be considered an executive employee for purposes of § 40.1-29.

Section 11.00 Work Performed

A. The Department of Labor and Industry adopts the federal guidelines of "hours worked" as set out in the U. S. Department of Labor, Wage and Hour Division, Regulations, C.F.R., Part 785: Hours Worked Under the Fair Labor Standards Act of 1938, As Amended, for determining "work performed" under § 40.1-29 of the Code of Virginia, commonly referred to as Virginia's Payment of Wage Law.

B. "Suffered or permitted to work":

Work not requested but "suffered or permitted" is work performed. For example, an employee may voluntarily continue to work without being requested to be the employer. If the employer knows or has reason to believe the employee is continuing to work, this qualifies as "work performed" under § 40.1-29. This may also apply to work performed away from the site of the employer's place of business, i.e., at home, if the employer has knowledge that the work is being performed. In all such cases, it is the duty of management to exercise control to assure that unwanted work is not performed. Management cannot accept the benefits of a employee's labor without compensating that employee. If management adopts a rule that the employee cannot perform work after certain times, management must enforce the rule or compensate the employee for any work after hours.

C. Waiting Time:

1. General

Whether waiting time is work performed depends upon particular circumstances. Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged.

2. On Duty

If an employee is required to remain at the employer's place of business during periods of inactivity, this is considered work performed under § 40.1-29. The employee is being "engaged to wait."

3. Off Duty

Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not periods during which work was performed. The employee is relieved from duty when told he may leave the job and that he will not have to commence work until a definitely specified hour has arrived.

4. On-call time - Employer's Premises

An employee who is required to remain on call on the employer's premises or so

close thereto that he cannot use the time effectively for his own purposes is performing work while on call. An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not performing work while on call.

5. On-call time - Employee's Home

Where an on-call employee performs services for his employer at home and yet has long periods of uninterrupted leisure during which he can engage in the normal activities of living, DOLI will accept any reasonable agreement of the parties for determining the number of hours worked. As an example, this policy will apply to an "on-call" employee who is required by his employer to remain at his home to receive telephone calls from customers when the company office is closed. The agreement should take into account not only the actual time spent in answering the calls but also some allowance for the restriction on the employee's freedom to engage in personal activities resulting from the duty of answering the telephone.

D. Lectures, Meetings, and Training Programs:

1. Attendance at lectures, meetings, training programs, and similar activities is not work performed if the following four criteria are met:

- (1) Attendance is outside of the employee's regular working hours;
- (2) attendance is voluntary;
- (3) the course, lecture, or meeting is not directly related to the employee's job; and
- (4) the employee does not perform any productive work during such attendance.

2. Involuntary Attendance

Attendance is not voluntary, of course, if it is required by the employer. It is not voluntary in fact if the employee is given to understand or led to believe that his present working conditions or the continuance of his employment would be adversely affected by non-attendance.

3. Training Directly Related to Employee's Job

The training is directly related to the employee's job if it designed to make the employee handle his job more effectively as distinguished from training him for another job, or to a new or additional skill. For example, a secretary who is given a course in personal computers is engaged in an activity to make her a better secretary. However, if the secretary takes a course in investigative techniques, it

is not directly related to her job. Thus, the time she spends voluntarily in taking the investigative techniques course, outside of regular working hours, need not be counted as working time. Where a training course is instituted for the bona fide purpose of preparing for advancement through upgrading the employee to a higher skill, and is not intended to make the employee more efficient in his present job, the training is not considered directly related to the employee's job even though the course incidentally improves his skill in doing his regular work.

4. Independent Training

Of course, if an employee on his own initiative attends an independent school, college or independent trade school after hours, the time is not hours worked for his employer even if the courses are related to his job.

5. Apprenticeship Training

As an enforcement policy, time spent in an organized program of related, supplemental instruction by employees working under bona fide apprenticeship programs may be excluded from working time if the following criteria are met:

- (1) The apprentice is employed under a written apprenticeship agreement or program registered with the Apprenticeship Division of the Department of Labor and Industry.
- (2) Such time does not involve productive work or performance of the apprentice's regular duties.

If the above criteria are met, the time spent in such related supplemental training shall not be counted as hours worked unless the written agreement specifically provides that it is hours worked. The mere payment or agreement to pay for time spent in related instruction does not constitute an agreement that such time is hours worked.

E. Travel Time:

1. General

An employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. This is true whether he works at a fixed location or at different job sites. Normal travel from home to work is not work performed.

2. Travel in a Day's Work

Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, is considered work performed. Where an employee is required to report at a meeting place to receive

instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the workplace is part of the day's work. It must be a requirement of the employer, however, that the employee report to a designated site.

If upon arriving at the designated place at the beginning of the workday, the employee is given the option of driving his own vehicle to the job site, the employer is not required to pay him for travel time from the last work site in the workday to his home. Of course, those employees required to drive company vehicles to the job sites would have to be paid for travel time both at the beginning and ending of the workday.

3. Home to Work on Special One-Day Assignment in Another City

When an employee works in one city and is given a special one-day assignment in another city, such travel cannot be regarded as ordinary home-to-work travel occasioned merely by the fact of employment. It was performed for the employer and at his request to meet the needs of the particular and unusual assignment. It is treated like travel that is all in the day's work. However, the time that the employee normally spends in travel on an ordinary workday could be deducted from hours worked.

4. Travel Away from Home Community

Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is considered work performed during the hours which constitute the employee's normal workday. The employee is simply substituting travel for other duties. The time is not only hours worked on regular working days during normal working hours but also during the corresponding hours on non-working days. Thus, if an employee regularly works from 9 a.m. to 5 p.m. from Monday through Friday, the travel time during these hours is work performed on Saturday and Sunday as well as on the other days. Time spent in travel away from home and outside regular working hours is not counted as hours worked.

5. When Private Automobile is Used in Travel Away from Home Community

If an employee is offered public transportation but requests permission to drive his car instead, the employer may count as work performed either the time spent driving the car or the time he would have had to count as hours worked during working hours if the employee had used the public conveyance.

6. Operating Employer's Vehicle for Employee's Convenience

- (1) In certain situations, an employee is responsible for a vehicle and its equipment and for having it at the work site at the proper time. The employer may permit the employee to drive the vehicle to and from home.

In situations of this type where the permission is granted for the employee's own convenience and the travel is within the normal commuting distance of employees in the area, time spent in driving is not hours worked.

- (2) Where the vehicle is also used in connection with emergency calls outside of normal working hours, a determination must be made as to whether the use of the vehicle is in fact for the convenience of the employee or primarily for the benefit of the employer. The frequency of emergency calls may indicate for whose convenience or benefit the vehicle is being used.

7. Driving Employer's Vehicle Transporting Other Employees

- (1) Driving time is not considered hours worked in instances where an employee elects to transport other employees to and from work and such employee is driving the employer's vehicle for his/her own convenience.
- (2) On the other hand, where the driver is directed by the employer to report to the company warehouse, garage, or yard as a pickup point, then time spent driving the employees from such point to the workplace is hours worked.
- (3) Drivers of "vanpools" need not be paid for time spent transporting other employees to and from work under the following conditions:
 - (a) The transportation provided must be primarily for the benefit of participating employees.
 - (b) Participation in the program is entirely voluntary and employees are free to accept or reject the arrangement at any time.
 - (c) The employee-driver is chosen by the participating employees.
 - (d) The pickup times and route are established by the participating employees.
 - (e) The employer has virtually no control over the arrangement.

F. Sleeping Time and Certain Other Activities:

1. Less Than 24-Hour Duty

Under certain conditions an employee is considered to be working even though some of his time is spent in sleeping or in certain other activities.

Any employee who is required to be on duty for less than 24 hours is working

even though he is permitted to sleep or engage in other personal activities when not busy. It makes no difference that the employee is furnished sleeping facilities; the time is given to the employer. The employee is required to be on duty and constitutes work performed.

2. Duty of 24 Hours or More

Where an employee is required to be on duty for 24 hours or more and adequate sleeping facilities are provided, a period of no more than 8 hours can be deducted from hours worked for sleep time.

If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such a extent that the employee cannot get a reasonable night's sleep, the entire period must be counted. For enforcement purposes, the rule is that if an employee cannot get at least 5 hours' sleep time during the scheduled period, the entire time is working time.

3. Employees Residing on Employer's Premises or Working at Home

An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own.

G. Adjusting Grievances, Medical Attention, Civic and Charitable Work and Suggestion Systems

1. Adjusting Grievances

Time spent in adjusting grievances between an employer and employees during the time the employees are required to be on the premises is hours worked, but in the event a bona fide union is involved the counting of such time will, as a matter of enforcement policy, be left to the process of collective bargaining or to the custom or practice under the collective bargaining agreement.

2. Medical Attention

Time spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when he is working constitutes hours worked.

3. Civic and Charitable Work

Time spent in work for public or charitable purposes at the employer's request, or under his direction or control, or while the employee is required to be on the premises, is working time. However, time spent voluntarily in such activities

outside of the employee's normal working hours is not hours worked.

4. Suggestion Systems

Generally, time spent by employees outside of their regular working hours in developing suggestions under a general suggestion system is not working time, but if employees are permitted to work on suggestions during regular working hours the time spent must be counted as hours worked. Where an employee is assigned to work on the development of a suggestion, the time is considered hours worked.

H. Clothes Changing and Wash-up Time

1. If clothes changing and wash-up activities by employees on the premises of the employer are integral parts of the principal activities of the employees because the nature of the work makes the clothes changing and washing indispensable to the performance of productive work by the employees, the time spent is hours worked, except where such clothes changing and wash-up activities are the only preshift and postshift activities performed by the employees on the premises of the employer, the time spent in these activities has never been paid for or counted as hours worked by the employer, and the employees have never opposed or resisted this policy in any manner although they have apparently been fully aware of it, or there is a custom or practice under the collective bargaining agreement to exclude this time from the measured working time.
2. An employer may set up a formula by which employees are allowed given amounts of time to perform clothes changing and wash-up activities provided the time set is reasonable in relation to the actual time required to perform such activities. The time allowed will be considered reasonable if a majority of the employees usually perform the activities within the given time.
3. Employees who dress to go to work in the morning are not working while dressing even though the uniforms they put on at home are required to be used in the plant during working hours. Similarly, any changing which takes place at home at the end of the day would not be an integral part of the employees' employment and is not working time.

I. Participation in Athletic Events

Time spent by an employee as a participant in, or as an umpire, referee, scorer, or similar official in an athletic event sponsored by the employer, if the participation of the employee in these activities is completely voluntary and if his regular employment is not conditioned upon his participating in these activities is not considered hours worked.

J. Fire and Disaster Drills

Time spent by employees in participating in fire or other disaster drills, whether

voluntary or involuntary or during or after regular working hours, is considered substantially to be benefit of the employer and therefore is compensable hours of work. Of course, such time may be compensated at the applicable minimum wage rate rather than the employees' regular rate.

K. Inspections Under the Occupational Safety and Health Act of 1970

During an inspection under the Act where an authorized representative of the employees shall be given an opportunity to accompany the VOSH compliance officer, the time is not considered hours worked. Since the Act does not require that an employee representative accompany the compliance officer nor does it impose a duty on the employer to require an employee to accompany the compliance officer, such time spent by an employee is considered voluntary and primarily for the benefit of the employees.

Where there is no authorized employee representative and the VOSH compliance officer shall consult with a reasonable number of employees concerning health and safety at their workplace, this time is considered hours worked, provided it is during the normal workday and on the employer's premises.

L. Homeworker's Travel

The time spent by homeworkers in traveling to and from the employer's premises (or other pickup/dropoff point) to obtain work-related materials or equipment and/or to deliver finished products, is primarily for the employer's benefit and must be included in the total hours worked by homeworkers. Where such trips are combined with personal errands, e.g., grocery shopping or visits with friends, the time spent in such personal pursuits is excluded from the total travel time for the trip in calculating hours worked.

Section 12.00 Trainees

- A. Trainees are not employees within the meaning of the federal Fair Labor Standards Act or the Virginia Payment of Wage Law, § 40.1-29 of the Code of Virginia only if all of the following criteria are met.
1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
 2. The training is for the benefit of the trainees or students;
 3. The trainees or students do not displace regular employees, but work under their close supervision.
 4. The employer that provides the training derives no immediate advantage from the activities of the trainees or students, and on occasion the employer's operations may actually be impeded;
 5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
 6. The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.
- B. Employees (those individuals who have been hired) shall be paid wages, at least in the amount of the minimum wage, for all training hours required by the employer.

Section 13.00 Employee vs. Subcontractor/Independent Agent

A. Section 40.1-29 only provides coverage to employees; it does not apply to subcontractors or independent agents. Many employers will classify an employee as an independent agent when in actuality an employer/employee relationship exists. IRS publications clarify that agency's position regarding an individual's employment status. DOLI accepts and hereby adopts IRS's determination as to when an individual is an employee and when an individual is a subcontractor/independent agent. If you cannot make a determination, contact the closest office of the Internal Revenue Service and request a ruling.

B. Discussion

An independent contractor relationship is created when a person employed another to obtain specific results, but had no control or right of control over the details of his movement, or the time or manner of performing the work. The controlling or principal test is whether or not the employer has the right to control the details of the work to be done, or whether the employee represents the employer only as to results to be accomplished.

The relationship of employer and employee does not exist where the former has no right to select the latter, no right of control, no right to discharge or remove, no power or authority to prescribe the duties, and no right to determine the method, the manner, or the time in which the service shall be performed.

An independent contractor is frequently hired to do certain work, without restrictions as to means, and performs the work according to his own ideas or to plans supplied by the principal. He directs the work himself and chooses his own methods to accomplish it, and the only supervision over his work is to determine his compliance with the contract or job specifications. The work of an employee, on the other hand, is controlled, supervised, and directed by the employer who can stop the work or continue it, and determine the method by which the work is to be done rather than merely determining the result to be reached.

How a party is compensated for the work performed can also be useful in determining whether that party is an employee or an independent contractor. Is there a contract for performing work at a certain price? Is the party paid in a lump sum for the work performed? Is so, the person is likely an independent contractor. If, on the other hand, the party is paid by the hour or by the piece, he is likely an employee.

The power to hire and fire are less important factors, but may be considered. An employer who engages a "subcontractor" to do work on a job site, but reserves the right to control and direct the work, and the power to choose, direct, and discharge the subcontractor's employees, is legally the employer of that subcontractor's employees. A principal who does not have the power to select employees of the independent contractor, and no authority to remove them, is not the legal employer of those workers.

C. You have to look at all of the facts and circumstances regarding the relationship---the

type of business, the provisions of any contract between the parties, and the actual conduct of the parties. The following standard questions provided by the Department's legal staff can be asked to establish whether an individual is an employee rather than a subcontractor/independent agent:

1. Name:
2. Address:
3. Phone number:
4. Who hired you for the job?
5. Are you paid by the hour or by the job?
6. Who has the power to fire you?
7. What time do you report to work?
8. Do you keep regular hours?
9. What would happen if you were late to work?
10. What would happen if you did not come into work at all?
11. Do you report to the employer's main office or to the job site?
12. Does the employer supply you transportation to the job site?
13. Does the employer supply you with tools and equipment? Specify:
14. Do you supply any of your own tools and equipment? Specify:
15. Is there a supervisor/foreman on the job site? Name:
16. Do you work under your own direction, or does the supervisor supervise your work?
17. Does the supervisor tell you when to start and stop work?
18. Does the supervisor give you orders and/or instructions?
19. Does he/she tell you where to work? how to work? what to do next?
20. What would happen if you ignored the supervisor's orders?
21. What happens if you do a job wrong?

Section 14.00 Payroll Deductions and Forfeiture of Wages

- A. No employer may withhold any part of an employee's wages for non-payroll deductions without written and signed permission of the employee, except for deductions for payroll advances and wage overpayments. (§ 40.1-29(C))
- B. No employer can require an employee, except an executive employee, to enter into a contract or agreement (written, verbal, or implied) which requires the employee to forfeit his wages, salaries, or commissions as a condition or continuance of employment. (§ 40.1-29(D))
- C. Blanket authorizations signed by an employee at the commencement of employment which allow such forfeitures will be considered per se a condition of employment, and are not allowed. Only a signed agreement that is truly voluntary, and is not a condition of employment, is allowed by § 40.1-29(D).
- D. No deduction is allowed which reduces an employee's pay below the amounts protected by the applicable state or federal minimum wage. The only exception is deductions for moneys already received by the employee for work performed such as pay advances, loans and wage overpayments.
- E. DOLI shall attempt to collect all moneys unlawfully withheld from an employee as a result of unauthorized deductions or wage forfeitures except as described in Item F below.
- F. DOLI shall not pursue collection of moneys on behalf of an employee in instances of proven theft, misappropriation, or other criminal activity related to the alleged wages due; or in cases for which the employee has already received all moneys for time worked (i.e., payroll advances, personal travel advances and personal loans). A technical violation will be cited against the employer in these instances.

If a criminal case is pending against the employee for theft, misappropriation, or other criminal activity, collection will be delayed until case is decided by the court. If the employee is exonerated of the charges and the employer refuses to pay the wage debt, DOLI will pursue collection.

- G. Definitions:
 - 1. "Forfeit" is defined in Webster's dictionary to mean "to lose or lose the right to by some error, offense, or crime." As used in § 40.1-29(D), the employee would lose his wage, salary, or commission because of something he did do or something he did not do. In many cases, you can identify forfeiture contracts or agreements based on whether it is voluntary on behalf of the employee. Voluntary is not absolute, however. Often, an employee will voluntarily enter into agreements which are forfeitures. For example, a commissioned salesman will voluntarily sign an employment contract to the effect that he will forfeit (give up) any commissions owed him upon termination of employment. Many employees are

not aware that such agreements are illegal and will sign whatever is necessary in order to gain employment.

2. "Voluntary" is defined as not under compulsion, unconstrained by interference, spontaneous, acting of oneself. Because of the unequal bargaining power of employers and employees, the voluntary nature of many agreement may be questionable. Any agreement which is clearly not in the employee's interest will be considered involuntary. As a test, the Representative should determine who benefits from the agreement. If the employee benefits, the agreement may be considered voluntary. If the employer benefits (or profits) from the agreement and the employee does not benefit, the agreement may be considered involuntary.

H. Forfeiture - To forfeit is to incur a loss through some fault, omission, error, or offense. All deductions are not forfeitures. A forfeiture implies a penalty imposed by an employer as a consequence of the commission of some act or the omission of some act by the employee.

Examples of forfeitures include deductions from employee wages as "punishment" for such things as:

1. Failure to punch the time clock or sign a time card.
2. Bad checks or credit card charges by customers.
3. Gasoline purchases by customers who drive off without paying.
4. Broken dishes, lost silverware, damaged equipment.
5. Mathematical errors.
6. Cash register shortages.
7. Breach of an employment contract or failure to give advanced termination notice.
8. Violation of a company work rule.
9. Loss of commissions because employment terminated.

Forfeitures would not include deductions for items which are not caused by an error, omission, or offense, by the employee such as:

1. Purchase of uniforms or tools.
2. Insurance premiums.
3. Escrow accounts (provided amounts in escrow accounts are not at a later date given up (forfeited) by the employee because of an error, omission, or offense

(commission of an offense) by the employee.

4. Pay advances.
5. Repayment of personal loans received from the employer.
6. Repayment for equipment or other items purchased from the employer.

Note: These would be considered "deductions" within the meaning of § 40.1-29(C), and except for pay advances the written and signed consent of the employee is required.

Such deductions, except for pay advances and personal loans cannot reduce the amount of wage below the applicable state or federal minimum wage.

I. Case Examples.

<u>EXAMPLES</u>	<u>DETERMINATION</u>
<p>1. Employer withholds employee's final paycheck due to the employee's failure to give prior notice of termination.</p>	<p><u>Not allowable</u>, even if the employee had signed a pre-employment agreement stating that wages would be withheld for failure to give termination notice; act would be considered a forfeiture of wages as a condition of employment.</p>
<p>2. Employer withholds a portion of the employee's earned wages due to the employee's tardiness or absenteeism.</p>	<p>An employer would not be required to pay for any time not worked; however, deductions from earned wages are not allowable, even if employee had signed a pre-employment agreement allowing these deductions.</p>
<p>3. Employer withholds a portion of the employee's earned wages to cover the cost of a company vehicle wrecked by the employee while on official duty.</p>	<p><u>Not allowable</u>, if employee gave blanket authorization for deduction as a condition of employment.</p> <p><u>Allowable</u>, if employee voluntarily gave written permission for deduction; the deduction is a one-time-only arrangement and not a condition of employment. Employee's wage may not fall below the applicable state or federal minimum wage.</p>
<p>4. Employee was involved in an accident while driving a company car. The employee was found guilty of driving under the influence of alcohol via the courts. The employee was</p>	<p>The employee was determined guilty of criminal activity by the court. A technical violation would be cited against the employer by DOLI for failure to obtain written authorization to</p>

<p>terminated by the employer, and his final paycheck was withheld to cover a portion of damages incurred by the employer. No payroll deduction authorization was signed by the employee.</p> <p>5. Employer pays the employee a set amount of wages/commissions for work performed. Also, at sometime the employer sets aside a percentage payment in an escrow account to cover any equipment damage, breakages, losses, etc. The employee is paid the balance in the escrow account as a discretionary bonus at termination.</p> <p>6. Employer withholds a portion of the employee's earned wages to cover cash register shortages, unpaid restaurant bills, etc.</p> <p>7. Employer maintains a policy not to pay any commissions after termination. Employee signs pre-employment agreement acknowledging this policy.</p> <p>8. Employer withholds portion of employee's wages as repayment of a loan made to the employee by the employer or for payments for purchases made by the employee from the employer.</p> <p>9. Employer withholds employee's earned wages to recover damages due to theft or misappropriation of funds or property.</p>	<p>withhold wages. DOLI would not pursue collection of the unpaid wages.</p> <p><u>Not allowable</u>, if the amount the employer sets aside is determined to be a non-discretionary bonus. Non-discretionary bonuses are considered a wage and are afforded all the protection given a wage. Therefore, to make deductions from a wage even with written and signed authorization is considered a forfeiture of wages and not allowed. <u>Allowable</u>, provided the amount set aside is determined to be a discretionary bonus.</p> <p><u>Not allowable</u>, if employee gave blanket authorization for deduction as a condition of employment. <u>Allowable</u>, if employee voluntarily gave written permission for deduction; the deduction is a one-time-only arrangement and not a condition of employment. Employee's wage may not fall below applicable state or federal minimum wage.</p> <p><u>Not allowable</u>, if commissions were earned they must be paid. Withholding these commissions would be considered a forfeiture. would</p> <p>Allowable, with written authorization of the employee. However, if amount deducted exceeds the amount authorized by the employee (for example, employer withholds entire final check), the amount withheld in excess of the authorized deduction would not be allowable.</p> <p><u>Allowable</u>, if employee admits to theft and voluntarily agrees to wage deduction per written authorization. <u>Not allowable</u>, if employee did not give voluntary authorization or if the employee's guilt has not been determined. Employer cannot determine guilt. Employer must pay wages and take court action to reclaim loss due to theft through the courts. If the employee's</p>
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10. Employer withholds employee's earned wages to recover damages suffered as a result of the employee's negligence. For example: 1) Employee failed to process warranty claim and cost company \$600; 2) Employee did not properly repair customer's car, employer was not paid for work completed, and employer did not pay employee.

guilt has not been established, but criminal action is pending, collection efforts will be delayed until case is decided. If the employee's guilt was established, but the employee did not give written authorization for the payroll deduction, a technical violation will be cited against the employer; however, DOLI will not pursue collection of the withheld wages as long as the deduction did not exceed the amount of theft.

Not allowable, if employee gave blanket authorization for deduction as a condition of employment.

Allowable, if employee voluntarily gave written permission for deduction; the deduction is a one-time-only arrangement and not a condition of employment. Employee's wage may not fall below the applicable federal or state minimum wage.

Section 15.00 Assisting Wage Complainants in Filing Proof of Claim Forms for Unpaid Wages

The following procedures shall be adhered to when the Representative determines an employer has declared bankruptcy and DOLI can no longer pursue collection of unpaid wages due employees:

- A. Furnish the wage claimant a proof of claim form for filing with the appropriate United States Bankruptcy Court.
- B. Secure the location of the United States Bankruptcy Court and the name of the trustee handling the bankruptcy. This information shall be furnished to the claimant via telephone or letter.
- C. Assist the claimant in completing the proof of claim form when requested. Schedule a time for the claimant to come into the field office and receive this assistance.
- D. The services in Item A, B, and C above shall be provided to all employees seeking to recover wages where bankruptcy has occurred.