



COMMONWEALTH of VIRGINIA
DEPARTMENT OF LABOR AND INDUSTRY

C. Ray Davenport
COMMISSIONER

Main Street Centre
600 East Main Street, Suite 207
Richmond, Virginia 23219
PHONE (804) 371-2327
FAX (804) 371-6524

May 2, 2016

POLICY MEMORANDUM

TO: Wendy Inge, Director
Division of Labor and Employment Law

Labor and Employment Law Staff

FROM: C. Ray Davenport
Commissioner

C. Ray Davenport

SUBJECT: REQUESTING EMPLOYMENT RECORDS IN WAGE CLAIM
INVESTIGATIONS

PURPOSE

In furtherance of the Department's mission to make Virginia a better place to work, live and conduct business, the following policy is being adopted to assure to the fullest extent of the law that employees in the Commonwealth receive full compensation for the wages they have earned. Commonly known as "wage theft", employer's failure to promptly pay wages owed places a tremendous economic and social burden on Virginia's workers and their families.

The policy is intended to give guidance and direction to the Department's Labor and Employment Law staff in situations where a covered employer, alleged to have failed to pay wages owed, either refuses to provide required records in its possession, or is unable to provide records because they failed to maintain them as required by either Virginia Employment Commission (VEC) or Fair Labor Standards Act (FLSA) laws and regulations.

POLICY

The Department will undertake an outreach program to employers and employees to explain this labor law employment records request policy and the procedures that will be implemented June 1, 2016. Outreach efforts will include, but not be limited to, posting of this policy on the Department's website, www.doli.virginia.gov, and a public service announcement:

Covered employers are required to keep records on the pay of their FLSA non-exempt employees by VEC regulations and by the federal FLSA. The Department, in trying to resolve payment of wage claims, regularly requests such pay records that employers are otherwise required to keep (see Commissioner's authority to require employers to make available records as are deemed necessary for proper enforcement of Title 40.1 of the Code of Virginia, Va. Code § 40.1-6(7)). Some employers refuse to produce the records or claim they do not have them.

In order to facilitate quicker resolution of wage claims, the following policy is adopted for use by the Division of Labor and Employment Law:

1. Upon request, employers shall provide to the Commissioner all employment records they are otherwise required to keep by provisions of state or federal law that contain all or significantly all of the following requirements:
 - a. Employee's Name in full;
 - b. Regular hourly rate of pay;
 - c. Hours worked each workday and total hours worked each workweek. For purposes of this policy, "workday" means any fixed period of 24 consecutive hours, and "workweek" means any fixed and regularly recurring period of seven consecutive workdays;
 - d. Total daily or weekly earnings or wages due for hours worked during the workday or workweek;
 - e. Total additions to or deductions from wages paid each pay period, including, in individual employee records, the dates, amounts, and nature of the items that make up the total additions and deductions;
 - f. Total wages paid each pay period; and
 - g. Date of payment and the pay period covered by payment.
2. Should the employer, upon request, refuse to provide the requested records to the Commissioner, the Commissioner may compel the employer to provide the records through the issuance of an administrative subpoena and/or interrogatories. See Department of Labor and Industry (DOLI) Policy on "Administrative Subpoenas and Interrogatories Issued in Accordance With Va. Code §40.1-6(4)".
<http://www.doli.virginia.gov/laborlaw/pdfs/Policy%20on%20the%20use%20of%20Administrative%20Subpoenas%20.pdf>
3. An employer's willful failure or refusal to answer any legal and proper question propounded by the Commissioner in response to either an administrative subpoena or list of interrogatories may be referred to the appropriate Commonwealth's Attorney for a misdemeanor prosecution in accordance with Va. Code §40.1-10. Such person, if convicted, shall be fined in an amount not exceeding \$100 nor less than \$25.00, or imprisoned in jail not exceeding 90 days, or both.
4. If it is determined that the employer failed to provide the requested records to the Commissioner because the employer failed to maintain the required records, the Commissioner may refer the case to the VEC and/or the U. S. Department of Labor (USDOL) for further investigation under any applicable statutes and regulations.

5. In the case of FLSA required records, if such records are not provided, there shall be a presumption in favor of the party making an allegation, and the burden of overcoming the presumption shall rest upon the party failing to provide the required records. *Anderson v. Mt. Clemons Pottery Co.*, 328 U.S. 680 (1946) (see Legal Background section below).
6. In the case of VEC required records, if such records are not provided, there shall be a presumption in favor of the party making an allegation, and the burden of overcoming the presumption shall rest upon the party failing to provide the required records. VEC regulation §16VAC5-32-10.C. (see ATTACHMENT A). See also, §10-17, Non-Production of Witnesses or of Evidence; "Missing Witness" Instruction; *The Law of Evidence in Virginia*, Friend, (2003).

NOTE: To the extent that this Policy conflicts with current policies or procedures in the Labor and Employment Law Field Operations Manual, this Policy shall take precedence.

LEGAL BACKGROUND

Authority to Request Records

The Commissioner of Labor and Industry is authorized to require employers to develop, maintain and make available records that can be used in DOLI enforcement actions. Va. Code § 40.1-6(7) provides as follows:

The Commissioner shall:

....

(7) Have power to require that accident, injury and occupational illness records and reports be kept at any place of employment and that such records and reports be made available to the Commissioner or his duly authorized representatives upon request. **Further, he may require employers to develop, maintain and make available such other records and information as are deemed necessary for the proper enforcement of this title.** (emphasis added).

Recordkeeping Requirements of Other Agencies

Employers are required to keep records on the pay of their employees by VEC regulation §16VAC5-32-10. Employing unit records:

A. Each employing unit as defined under § [60.2-211](#) of the Code of Virginia, having services performed for it by one or more individuals in its employ, shall maintain records reasonably protected against damage or loss as hereinafter indicated and shall preserve such records. These records shall include for each worker:

[SEE ATTACHMENT A FOR LIST OF REQUIRED RECORDS]

Employers are required to keep records on the pay of their employees under the FLSA - Recordkeeping Requirements, 29 CFR 516, provides as follows:

§516.2 Employees subject to minimum wage or minimum wage and overtime provisions pursuant to section 6 or sections 6 and 7(a) of the Act.

(a) Items required. Every employer shall maintain and preserve payroll or other records containing the following information and data with respect to each employee to whom section 6 or both sections 6 and 7(a) of the Act apply:
[SEE ATTACHMENT B FOR LIST OF REQUIRED RECORDS]

Burden of Proof in FLSA Cases and by Extension, Virginia Wage Cases

Va. Code § 40.1-2. Definitions, defines the term "employer":

"Employer" means an individual, partnership, association, corporation, legal representative, receiver, trustee, or trustee in bankruptcy doing business in or operating within this Commonwealth who employs another to work for wages, salaries, or on commission and shall include any similar entity **acting directly or indirectly in the interest of an employer in relation to an employee.** (Emphasis added).

The above highlighted language tracks wording from the definition of "employer" contained in §203 of the Fair Labor Standards Act (FLSA):

(d) "Employer" includes any person **acting directly or indirectly in the interest of an employer in relation to an employee** and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

Therefore, it is appropriate to look to judicial rulings established under federal law as a guide for interpreting the Virginia statute. *Anderson v. Mt. Clemons Pottery Co.*, 328 U.S. 680 (1946) discusses the burden of proof in instances where records required to be kept by the FLSA are either incomplete or non-existent:

"An employee who brings suit under § 16(b) of the Act for unpaid minimum wages or unpaid overtime compensation, together with liquidated damages, has the burden of proving that he performed work for which he was not properly compensated. The remedial nature of this statute and the great public policy which it embodies, however, militate against making that burden an impossible hurdle for the employee. Due regard must be given to the fact that it is the employer who has the duty under § 11(c) of the Act to keep proper records of wages, hours, and other conditions and practices of employment, and who is in position to know and to produce the most probative facts concerning the nature and amount of work performed. Employees seldom keep such records themselves; even if they do, the records may be, and frequently are, untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof.

When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer

convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation, we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate. See Note, 43 Col.L.Rev. 355.

The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of § 11(c) of the Act. And even where the lack of accurate records grows out of a bona fide mistake as to whether certain activities or nonactivities constitute work, the employer, having received the benefits of such work, cannot object to the payment for the work on the most accurate basis possible under the circumstances. Nor is such a result to be condemned by the rule that precludes the recovery of uncertain and speculative damages. That rule applies only to situations where the fact of damage is itself uncertain. But here, we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute. The damage is therefore certain. The uncertainty lies only in the amount of damages arising from the statutory violation by the employer. In such a case "it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts."

Story Parchment Co. v. Paterson Parchment Co., 282 U. S. 555, 282 U. S. 563. It is enough under these circumstances if there is a basis for a reasonable inference as to the extent of the damages. Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359, 273 U. S. 377-379; Palmer v. Connecticut Railway & Lighting Co., 311 U. S. 544, 311 U. S. 560-561; Bigelow v. RKO Radio Pictures, Inc., 327 U. S. 251, 327 U. S. 263-266."

ATTACHMENT A

Virginia Employment Commissioner Laws and Regulations

Regulations

16VAC5-32-10. Employing unit records.

- A. Each employing unit as defined under § [60.2-211](#) of the Code of Virginia, having services performed for it by one or more individuals in its employ, shall maintain records reasonably protected against damage or loss as hereinafter indicated and shall preserve such records. These records shall include for each worker:
1. A full legal name;
 2. A social security account number;
 3. The state or states in which his services are performed; and if any of such services are performed outside the Commonwealth of Virginia not incidental to the services within the Commonwealth of Virginia, his base of operations with respect to such services (or if there is no base of operations then the place from which such services are directed or controlled) and his residence (by state). Where the services are performed outside the United States, the country in which performed;
 4. The date of hire, rehire, or return to work after temporary layoff;
 5. The date when work ceased and the reason for such cessation;
 6. Scheduled hours (except for workers without a fixed schedule of hours, such as those working outside their employer's establishment in such a manner that the employer has no record or definite knowledge of their working hours);
 7. a. Wages earned in any week by a partially employed individual as such individual is defined in [16VAC5-10-10](#);
b. Whether any week was in fact a week of less than full-time work;
c. Time lost, if any, by each such worker, and the reason therefor;
 8. Total wages in each pay period, and the total wages payable for all pay periods ending in each quarter, showing separately (i) money wages, including tips and dismissal or severance pay, and (ii) the cash value of other remuneration;
 9. Any special payments for service other than those rendered exclusively in a given quarter, such as annual bonuses, gifts, prizes, etc., showing separately (i) money payments, (ii) other remuneration, and (iii) nature of said payments;

10. Amounts paid each worker as advancement, allowance or reimbursement for traveling or other business expenses, dates of payment, and the amounts of expenditures actually incurred and accounted for by such worker;

11. Location in which the worker's services are performed within or outside of the United States and dates such services are performed outside of the United States. For the purposes of this subdivision, "United States" means the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands.

- B. Employers shall provide the commission upon request all payroll records, federal W2 and 1099 forms, federal and state employment and income tax returns, and any other records that would be relevant to ensuring that wages had been accurately reported and taxes or refunds correctly computed and paid. Records required by this chapter to be maintained by employing units under the Act shall be preserved for four years from the date of payment of the tax based thereon and shall be subject to examination and audit by the commission.
- C. If such records are not maintained, there shall be a presumption in favor of the party making an allegation, and the burden of overcoming such presumption shall rest upon the party failing to maintain the required records.

Statutes

Va. Code § 60.2-211. Employing unit.

- A. "Employing unit" means any of the following which has or had in its employ one or more individuals performing services for it within this Commonwealth:
 - 1. Any individual or type of organization, including the state government and its instrumentalities;
 - 2. Any of the political subdivisions of this Commonwealth and their instrumentalities;
 - 3. Any instrumentalities wholly owned (i) by this Commonwealth and one or more political subdivisions, (ii) by a combination of political subdivisions or (iii) by any of the foregoing and one or more other states or their political subdivisions;
 - 4. Any partnership, association, trust, estate, joint-stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof; or
 - 5. The legal representative of a deceased person.
- B. All individuals performing services within this Commonwealth for any employing unit which maintains two or more separate establishments within this Commonwealth shall be deemed to be employed by a single employing unit for all the purposes of this title. Whenever any employing unit contracts with any person for any service which is a part of such employing unit's usual trade, occupation, profession or business, that employing

unit shall be deemed to employ all individuals employed by such person for such service unless such person performs service or is in fact actually available to perform service for anyone who may wish to contract with him and is also found to be engaged in an independently established trade, occupation, profession or business. Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all the purposes of this title, whether such individual was hired or paid directly by such employing unit or by such agent or employee, provided the employing unit had actual or constructive knowledge of such work.

ATTACHMENT B

Federal Laws and Regulations

Regulations

USDOL Fair Labor Standards Act - Recordkeeping Requirements 29 CFR 516.

§516.2 Employees subject to minimum wage or minimum wage and overtime provisions pursuant to section 6 or sections 6 and 7(a) of the Act.

(a) Items required. Every employer shall maintain and preserve payroll or other records containing the following information and data with respect to each employee to whom section 6 or both sections 6 and 7(a) of the Act apply:

(1) Name in full, as used for Social Security recordkeeping purposes, and on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records,

(2) Home address, including zip code,

(3) Date of birth, if under 19,

(4) Sex and occupation in which employed (sex may be indicated by use of the prefixes Mr., Mrs., Miss., or Ms.) (Employee's sex identification is related to the equal pay provisions of the Act which are administered by the Equal Employment Opportunity Commission. Other equal pay recordkeeping requirements are contained in 29 CFR part 1620),

(5) Time of day and day of week on which the employee's workweek begins (or for employees employed under section 7(k) of the Act, the starting time and length of each employee's work period). If the employee is part of a workforce or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole workforce or establishment will suffice,

(6)(i) Regular hourly rate of pay for any workweek in which overtime compensation is due under section 7(a) of the Act, (ii) explain basis of pay by indicating the monetary amount paid on a per hour, per day, per week, per piece, commission on sales, or other basis, and (iii) the amount and nature of each payment which, pursuant to section 7(e) of the Act, is excluded from the "regular rate" (these records may be in the form of vouchers or other payment data),

(7) Hours worked each workday and total hours worked each workweek (for purposes of this section, a "workday" is any fixed period of 24 consecutive hours and a "workweek" is any fixed and regularly recurring period of 7 consecutive workdays),

(8) Total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation,

(9) Total premium pay for overtime hours. This amount excludes the straight-time earnings for overtime hours recorded under paragraph (a)(8) of this section,

(10) Total additions to or deductions from wages paid each pay period including employee purchase orders or wage assignments. Also, in individual employee records, the dates, amounts, and nature of the items which make up the total additions and deductions,

(11) Total wages paid each pay period,

(12) Date of payment and the pay period covered by payment.