



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

MEMORANDUM

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

FROM: Labor and Employment Law Staff
C. Ray Davenport
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Commissioner

DATE: April 6, 2015

SUBJECT: INDIVIDUAL LIABILITY FOR WAGE CLAIMS POLICY

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.

POLICY

Determining whether an owner of a corporation (i.e., shareholder) or a corporate officer is an "employer" for purposes of collecting wages due employees is important, especially when the traditional employer (e.g., corporation, partnership) appears to have little or no assets that could be used to make employees whole (e.g., the company is closed, in bankruptcy or preparing for bankruptcy, or in severe financial difficulties).

During the course of the wage claim investigation, Investigators will gather information to determine whether there is reasonable cause to believe that the owner or one or more corporate officers were acting in such a manner as to support a finding that they should be held individually liable for unpaid wages.

When such a finding of individual liability is made, the Division of Labor and Employment Law will issue the appropriate findings and orders to both the "traditional employer" and the corporate officer(s) for the wages owed. Proposed civil penalties for failure to pay wages will only be issued to the "traditional employer".

The following language will be added, as appropriate, to Department correspondence with corporate employers informing them of the potential for individual liability of corporate officers for unpaid wages:

"For purposes of collecting unpaid wages from an employer on behalf of an employee, an individual business owner or corporate officer may be considered an "employer" under Virginia law and may be held personally liable for the unpaid wages in certain circumstances. In these instances, if the wages are not paid, DOLI will enter Final Orders against both the business and the appropriate individual."

NOTE: It is well-established in case law that, in addition to corporate officers, managers, supervisors and other individuals may also be subject to individual liability for wage claims under certain circumstances. While this policy does not currently include "managers, supervisors and other individuals" within its scope, the Commissioner reserves the right to revise this policy in future to expand its scope to include those classes of individuals.

NOTE: This policy may be applied retroactively to current open investigations and previously closed investigations that are reopened at the discretion of the Commissioner or his designated representatives.

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

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. Substantial legal authority holds that the definition of "employer" under the FLSA is not limited to the common law concept of employer, but is given an expansive interpretation in order to effectuate the FLSA's broad remedial purposes. See *Boucher v. Shaw*, 572 F. 3d 1087 (9th Circuit 2009); *Donovan v. Agnew*, 712 F. 2d 1509 (1st Circuit 1981):

The overwhelming weight of authority is that a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages. See, e.g., *Donovan v. Sabine Irrigation Co., Inc.*, 695 F.2d 190, 194-95 (5th Cir.1983), cert. denied, --- U.S. ---, 103 S.Ct. 3537, 76 L.Ed.2d ---- (1983); *Marchak v. Observer Publications, Inc.*, 493 F.Supp. 278, 282 (D.R.I.1980); *Brennan v. Whatley*, 432 F.Supp. 465, 469 (E.D.Tex.1977); *Hodgson v. Royal Crown Bottling Co.*, 324 F.Supp. 342, 347 (D.Miss.1970), aff'd, 465 F.2d 473 (5th Cir.1972); *Schultz v. Chalk-Fitzgerald Construction Co.*, 309 F.Supp. 1255 (D.Mass.1970); cf. *Chambers Construction Co. v. Mitchell*, 233 F.2d 717, 724-25 (8th Cir.1956) (corporate officer within definition of "employer"; therefore trial judge did not abuse discretion in making injunction run against him personally). Personal liability has been found even against a corporate officer who lacks an ownership interest in the corporation, *Sabine Irrigation Co., Inc.*, supra, 695 F.2d at 194-95; or who has minimal ownership interest, *Usery v. Weiner Bros., Inc.*, 70 F.R.D. 615, 617 (D.Conn.1976).

In *Chao v. Hotel Oasis, Inc.*, 493 F. 3d 26 (1st Circuit 2007), the court noted that not every manager or supervisor is potentially liable for unpaid wages and identified certain factors that are important for individual liability analysis:

Under the FLSA, an "employer" is "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). The First Circuit has followed the Supreme Court's lead in interpreting this definition pursuant to an "economic reality" analysis. *Donovan v. Agnew*, 712 F.2d 1509, 1510 (1st Cir. 1983) (citing *Goldberg v. Whitaker*, 366 U.S. 28, 33 (1961)). Accordingly, there may be multiple "employers" who are simultaneously liable for compliance with the FLSA. *Id.*; *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998).

In *Donovan v. Agnew*, we acknowledged that "[t]he overwhelming weight of authority is that a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages." 712 F.2d at 1511 (collecting cases). Although we found it "difficult to accept . . . that Congress intended that any corporate officer or other employee with ultimate operational control over payroll matters be personally liable," *id.* at 1513 (emphasis added), we narrowly determined that the FLSA did not preclude personal liability for "corporate officers with a significant ownership interest who had operational control of significant aspects of the corporation's day to day functions, including compensation of employees, and who personally made decisions to continue operations despite financial adversity during the period of nonpayment," *id.* at 1514. (Emphasis added).

We next visited the issue of an individual's personal liability under the FLSA for corporate employment practices in *Baystate Alternative Staffing*, 163 F.3d 668. There, the Department of Labor's Administrative Review Board had held two corporate officers and managers personally liable for FLSA violations because "they had the authority to manage certain aspects of the business's operations on a day-to-day basis." *Id.* at 678. Noting our concern in *Agnew* that not every corporate employee who exercised supervisory control should be held personally liable, we identified several factors that were important to the personal liability analysis, including the individual's ownership interest, degree of control over the corporation's financial affairs and compensation practices, and role in "caus[ing] the corporation to compensate (or not to compensate) employees in accordance with the FLSA." *Id.* (Emphasis added).

FACTORS TO BE CONSIDERED

Investigators should gather evidence addressing the following factors identified in well-established case law:

1. The identities of the owner and/or corporate officer(s) who exercised operational control over significant aspects of the company's day to day functions.
2. Determine the individual's ownership interest in the company, if any.
3. Determine whether the individual had control over the company's financial affairs and compensation practices.
4. Determine whether the individual maintained employment records.
5. Did the individual have the power to hire and fire employees?
6. Did the individual have the ability to determine the rate and method of payment?
7. Determine whether the individual made decisions to continue operations despite financial adversity during the period of nonpayment of wages.
8. Determine whether the individual had a role in causing the company to compensate or not compensate employees leading to nonpayment of wages.

NOTE: As with any payment of wage violation, there must be a finding that the "employer" knowingly failed to pay wages in accordance with Va. Code §40.1-29.A.2. Accordingly, in order to charge a corporate officer, manager, supervisor or other individual with personal liability, evidence must be gathered to support a finding that the person knew of the failure to pay wages to the employee(s).

DOCUMENTATION SOURCES

During the course of the wage claim investigation, Investigators will gather information from many different sources to determine potential individual liability:

- Personal interviews with employees, supervisors, managers and corporate officers
- Employment contracts
- Letters of offers of employment
- Personnel files
- Copies of paychecks
- Timesheets/hourly records of employment
- Company emails and other company documents
- Information on the structure and corporate responsibilities of individual corporate officers gathered from company websites, social networking sites, etc.
- State Corporation Commission (SCC) records

In those instances where cooperation from the company or corporate officer is not forthcoming, the Investigator shall consult with the Director of the Division of Labor and Employment to determine whether the use of an administrative subpoena and interrogatories under Va. Code §40.1-6(4) is needed to complete the investigation. The Division of Legal Services will be available to provide support in preparing the administrative subpoena/interrogatory.

DETERMINATION OF INDIVIDUAL LIABILITY

In determining whether the owner and/or corporate officer should be held personally liable for unpaid wages, the list of factors above is not all-inclusive and no one factor may be determinative. Following are examples of situations where courts have found liability¹:

- Company president found personally liable where she hired and fired employees, set work hours, directed work activities, had the authority to set wages and had ultimate authority over business decisions that led to FLSA violations
- Company president had "continuous contact" over payroll and other personnel matters
- Company president served as the general manager, chairman of the boards and owned 80% of the company stock; he participated in the overall supervision of the company as well as in many day-to-day functions

¹ *Whose Liability Is It Anyway, ABA Section of Labor and Employment Law, 5th Annual Labor and Employment Law Conference, Seattle, WA, November 4, 2011*