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

FIELD OPERATIONS MANUAL

CHAPTER ONE MINIMUM WAGE ACT

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.

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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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1.00 Virginia Minimum Wage Act

A. Coverage

Virginia's Minimum Wage Act is set forth in §§ 40.1-28.8 through 40.1-28.12 of the Code of Virginia. In general, it applies to all private industry employers employing 4 or more covered employees and who do not fall under the provisions of the federal Fair Labor Standards Act of 1938. Public employees also are not covered (§ 40.1-2.1).

The current Virginia minimum hourly wage (as of July 24, 2009) is $7.25 per hour. Future increases will occur when the federal minimum hourly wage increases (§ 40.1-28.10). The Virginia Minimum Wage Act contains no overtime requirements.

B. Definitions

1. "Employer" includes any individual, partnership, association, corporation, business trust, or any person or groups of persons acting directly or indirectly in the interest of an employer in relation to an employee.

2. "Employee" includes any individual employed by the employer, unless a specific exemption is provided.

3. "Wages" means legal tender of the United States or checks or drafts on banks negotiable into cash on demand or upon acceptance at full value; provided, wages may include the reasonable cost to the employer of furnishing meals and for lodging to an employee, if such board or lodging is customarily furnished by the employer, and used by the employee.

(1) "Reasonable cost" cannot exceed the actual cost to the employer. In deciding whether wage credits for facilities are in amounts permissible under § 40.1-28.9(C), experience and judgment must be used. It should be kept in mind that the "reasonable cost" is only met when it does not include a profit to the employer. The cost of furnishing lodging and/or meals must be established based upon available records. The employer has the burden of establishing such cost and must maintain adequate records to support a determination (§ 40.1-6 (7)).

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An employer may not take a credit where no cost is incurred. For example, when a meal is made available to an employee, but is not consumed, and subsequently retained in the employer's inventory for service to customers, no credit may be taken.

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a. Meals -- Food Service Establishments

The "reasonable cost" of meals furnished by a food service establishment to its employees includes only the actual cost to the

employer of the food, its preparation, and related supplies. Salary or wage costs, as distinguished from material or supply costs, may be claimed only to the extent that such salary or wage costs are shown to be directly attributable to the cost of providing meals to employees. If food preparation/serving employees of a food service establishment would be paid the same rate of pay even if meals were not provided to the employees of the establishment, the wage costs cannot be included in determining reasonable cost. Conversely, if it were necessary to hire extra personnel or pay higher wages to existing employees in order for them to assist in furnishing meals to employees, such extra expense would be a legitimate cost which could be included in determining the "reasonable cost" of meals.

Costs which a food service employer incurs regardless of whether the employees were furnished meals may not be included in determining the "reasonable cost." In a food service establishment, items such as employee insurance, payroll taxes, menus, decorations, other operating supplies, laundry, telephone, maintenance services, advertising and promotion, building and equipment rental, licenses and taxes, insurance and depreciation, franchise cost, and general administrative costs are a part of the overall cost of the operation of the employer's business establishment which may not be charged to the reasonable cost of employees' meals.

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b. Meals -- Non-food Service Establishments

Determination of the "reasonable cost" of meals furnished to employees of an establishment which is not a food service establishment involve different criteria for expenses for which an employer may take credit. For example, where meals are provided to employees of a non-food-service establishment by a catering service and there are no special facilities wherein meals are consumed, the actual cost of the catering service, assuming no rebate to the employer, would be the "reasonable cost." In more complex situations where dining areas are provided, the factors discussed in a. above must be considered in making a determination of the "reasonable cost" of meals furnished to employees of a nonfood-service establishment.

c. Lodging

Employers taking credit for housing as part of wages must show that the amounts charged are not more than the actual cost to the employer. If the actual cost of providing lodging is more than its

established rental value, the rental value shall be deemed to be the reasonable cost of lodging.

Adequate Depreciation: Depreciation is a concept primarily used in and extensively regulated under the tax laws. Depreciation is applicable to certain capital goods (e.g. buildings, vehicles, machines, etc.). It is never applicable to land. Depreciation is not more than the amount of depreciation actually claimed and allowed under the tax laws for the property in question. It should be noted the amount of depreciation allowable on any property may vary from year to year. If the employer declines to provide tax returns or similar evidence as to the claim and allowance of depreciation under the tax laws, no allowance will be made.

d. Unlike federal law which includes the language "other facilities, " as being credited to the federal hourly minimum rate, Virginia's Minimum Wage only allows meals and lodging to be credited toward the $7.25 minimum. As a result, such items as tuition, child care, transportation, etc. cannot be substituted. Wages can only be paid in the form of cash, check, meals, and lodging.

C. Exemptions

The following individuals are not covered by the provisions of the Act:

1. Any person employed as a farm laborer or farm employee.

2. Any person employed in domestic service or in or about a private home or in an eleemosynary (charitable) institution primarily supported by public funds.

(1) The term "domestic service" employment refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, and chauffeurs of automobiles for family use. An individual could be working for an employer in two different capacities be covered by the Virginia minimum in one instance and not the other. For example, "John Doe" works for "X" employer as a dishwasher in his restaurant where he has to receive the current $7.25 hourly minimum. "John Doe" also cuts "X" employer's grass at his home where he does not have to receive the minimum. Persons performing work in connection with the home of an employer but not related to his business, trade, or profession would be exempted.

(2) Persons employed by charitable institutions supported by public funds are

exempted from receiving the Virginia minimum. Just being recognized as a charitable institution would not qualify; public funds have to be the primary source of funding for the charitable institution. Public funds are identified as moneys received from the federal government, the state, or any of the local governing bodies of the state.

3. Any person engaged in the activities of an educational, charitable, religious, or nonprofit organization where the relationship of an employer-employee does not in fact exist, or where the services rendered to such organizations are on a voluntary basis.

   (1) This exemption has caused confusion especially where churches are involved. If the governing body of a church hires such persons as bookkeepers, janitors, groundsmen, etc. and an employment relationship exists, this exemption does not apply. There is no definition that solves all problems as to the limitations of the employer-employee relationship. The determination of an employment relationship cannot be based on isolated factors or upon a single characteristic or technical concepts, but depends upon the circumstances of the whole activity, including the underlying economic reality. In general, an employment relationship exists where an individual follows the usual path of an employee and is dependent on the business which he serves.

   (2) Individuals who volunteer their services to educational, charitable, religious, or nonprofit organizations are exempt from Virginia's minimum. Individuals who volunteer or donate, usually on a part-time basis, without contemplation of pay are not considered employees of these educational, charitable, religious, or nonprofit organizations. For example, members of civic organizations may help out in a sheltered workshop; women's organizations may send members or students into hospitals or nursing homes to provide certain services for the sick or the elderly; mothers may assist in a school library or cafeteria as a public duty to maintain effective services for their children; or fathers may drive a school bus to carry a football team or band on a trip. Similarly, individuals may volunteer to perform such tasks as driving vehicles or folding bandages for the Red Cross, working with retarded or handicapped children or disadvantaged youth, helping youth programs as camp counselors, scoutmasters, den mothers, providing child care assistance for needy working mothers, soliciting contributions or participating in benefit programs for such organizations and volunteering other services needed to carry out their charitable, educational, or religious programs. The fact that services are performed under such circumstances is not sufficient to create an employer-employee relationship.

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4. Newsboys, shoe-shine boys, caddies on golf courses, baby-sitters, ushers,

doormen, concession attendants, and cashier in theaters.

Note: Babysitters employed by the family or household using the babysitting services are exempt. This exemption however does not extend to third party employment where an individual is hired by an employer, agency, etc. to perform babysitting services in a private home. Neither does the exemption extend to day care centers or similar child-caring facilities where child caring services are performed.

5. Traveling salesmen or outside salesmen working on a commission basis; taxicab drivers and operators

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Traveling or outside salesmen are employees who are customarily and regularly engaged away from the employer's place or places of business to obtain orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer. The employer in return must compensate the salesman on a commission basis for the exemption to apply.

6. A person under the age of 18 in the employ of his father, mother, or legal guardian.

Note: The father, mother, or legal guardian must be the owner or part-owner (50% or more) of the business for his/her children to qualify for this exemption.

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7. Any person confined in any penal, corrective, or mental institution of the state, or any of its political subdivisions.

8. Any person employed by a boys' and or girls' summer camp.

Note: Includes all types of summer camps regardless of the method of funding: private, public, educational, charitable, religious, or nonprofit. The exemption, however, only extends to summer camp activities. Many organizations such as the YMCA, YWCA, Boy Scouts of America, Girl Scouts of America, perform activities throughout the year. Only the activities performed for these and similar organizations by their summer camp employees are exempt.

9. Any person under the age of 16, regardless of by whom employed.

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10. Any person who normally works and is paid based on the amount of work done.

Note: This exemption applies to businesses recognized in the industry for paying individuals by a piece rate rather than an hourly rate.

11. Any person whose employment is covered by the Fair Labor Standards Act of 1938 as amended.

The Fair Labor Standards Act (FLSA) covers the following:

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(1) Enterprises engaged in commerce or in the production of goods for commerce that has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person whose annual gross volume of sales made or business done is not less that $500,000 (exclusive of excise taxes at the retail level that are separately stated).

(2) Enterprises engaged in the operation of a hospital, or institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit)

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(3) Public agencies.

NOTE: An employer who meets either of the above listed coverage requirements of the FLSA would be exempt from the provisions of the Virginia Minimum Wage Act. The fact that FLSA may exempt an employer from one or more of its minimum wage, overtime, child labor or record keeping provisions does not abolish the coverage status. For example, employers operating seasonal recreational establishments, such as King's Dominion and Busch Gardens, are provided an exemption from the minimum wage and overtime standards of FLSA but are still under the jurisdiction of FLSA and have to abide by its child labor and record keeping requirements. Thus, establishments which meet the coverage requirements of the FLSA, whether bound by all of its provisions or not, would be exempted from coverage under the Virginia Minimum Wage Act.

Do not attempt to determine for an employer or for an employee if they are under the jurisdiction of FLSA. You should advise them to contact the closest office of the Wage and Hour Division of the U. S. Department of Labor.

12. Any person whose earning capacity is impaired by physical or mental deficiency

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Note: If an employer states to you he is not paying the Virginia minimum because of this exemption, unless such deficiency is evident beyond all reasonable doubt, this would be a determination made only by a physician, not by you or the employer. The burden of proof is the employer's responsibility. Unless the employer can document that the employee has a mental or physical deficiency that substantially limits the employee from performing the same amount of work in the same amount of time as other employees in the same job capacity, the exemption cannot be claimed.

13. Students and apprentices participating in a bona-fide educational or apprenticeship program.

    Note: To claim this exemption, the student or apprentice would have to be enrolled in a work-training program and have on file with DOLI a Work-Training Student Learner Agreement, or be an apprentice registered by the Virginia Apprenticeship Council and be employed under a written apprenticeship agreement on file in the Apprenticeship Division of DOLI respectively.

14. Any person employed by an employer who does not have four or more persons employed at any one time; provided that husbands, wives, sons, daughters, and parents of the employer shall not be counted in determining the number of persons employed.

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    Note:

    (1) Only the relatives described would be deducted to determine whether the employer has four or more persons employed. For example, if an employer who does not come under the FLSA has four persons in his employ and two of them were under 16 and the remaining two qualified as employees under the Virginia Minimum Wage Act, the employer would have to pay the two qualifying employees the Virginia hourly minimum although the two under 16 would be exempted.

    (2) Husbands, wives, sons, daughters, and parents of the employer are not counted in determining the number of employees; however, they would have to receive the Virginia minimum unless exempted elsewhere under the Act, i.e., son is under 16 years of age or parent is 65 or older.

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    (3) A Virginia employer who has employees working in Virginia and employees working in another state under the same corporate status and the employees total four or more, these employees would have to receive the hourly minimum, unless exempted elsewhere under the Act. There is no requirement that the "four or more persons employed at any one time" must also be employed in Virginia.

15. Any person who is less than 18 years of age and who is currently enrolled on a full-time basis in any secondary school, institution of higher education or trade school and is in a work-study program or its equivalent at the institution at which he or she is enrolled as a student.

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16. Any person of any age who is currently enrolled on a full-time basis in any secondary school, institution of higher education or trade school and is in a work-study program or its equivalent at the institution at which he or she is enrolled as a student.

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17. Any person who is less than 18 years of age and who is under the jurisdiction and discretion of a juvenile and domestic relations court.

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D. Tips

1. Definition: A "tipped employee" is any employee engaged in an occupation in which the individual customarily and regularly receives tips.

2. Burden of Proof: The burden of proving the amount of tips received by tipped employees rests with the employer.

3. Tipped Duties Versus Non-tipped duties: The tip provision applies on an individual employee basis. Thus, an employer may claim the tip credit for some employees even though the employer cannot meet the requirements for others. In establishments where employees perform a variety of different jobs, an employee's status as a "tipped employee" will depend on the total fact situation and will be determined on the basis of such employee's activities over the entire workweek. When an individual is employed in a tipped occupation and a non-tipped occupation (dual jobs), the tip credit is available only for the hours spent in the tipped occupation. Some allowance is made for the time spent related to the tipped occupation, even though such duties are not be themselves directed toward producing the tips such as maintenance and preparatory or closing activities. For example, a waiter/waitress who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses may continue to be engaged in a tip occupation even though these duties are not tip producing, provided such duties are incidental to the regular duties of the waiter/waitress and are generally assigned to them. However, where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties.

4. Retention of Tips by Employee: All tips received by a "tipped employee" must be retained by the employee except to the extent that there is a valid pooling arrangement. The employer cannot require a tipped employee to turn any portion of his tips over to him.

5. Tip Pooling: The requirement that an employee must retain all tips does not preclude tip splitting or pooling arrangements among employees who customarily and regularly receive tips. The following occupations have been recognized as falling within the eligible category: waiters/waitresses, bellhops, counter personnel who serve customers, busboys/girls (server helpers), service bartenders.

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A valid tip-pooling arrangement cannot require employees who actually receive tips to contribute a greater percentage of their tips than is customary and reasonable. For enforcement purposes, DOLI will not question contributions to a

pool where the net amount of tips contributed does not exceed 15 percent of the employee's tips. However, only those tips in excess of the hourly minimum may be taken for a pool. If such requirements are met, it is not necessary that the pooling be voluntarily consented to by the employees involved.

Tipped employees may not be required to share their tips with employees who have not customarily and regularly participated in tip pooling arrangements. The following employee occupations would therefore not be eligible to participate: janitors, dishwashers, chefs or cooks, laundry room attendants.

It is not the intent of DOLI to prevent tipped employees from deciding, free from any coercion whatever and outside of any formalized arrangement or a condition of employment, to share their tips with whichever coworkers they please. Tips given to such co-workers, however, cannot be used by the employer as a credit toward the hourly minimum.

6. Tips Charged on Credit Cards: Where tips are charged on credit cards, DOLI will not question the reduction of the credit card tips paid over to the employee if the amount deducted is no greater than the percentage charged by the credit card company. For example, where a credit card company charges an employer 5 percent on all sales charged to its credit service, the employer may pay the employee 95 percent of the tips.

In some situations, a credit card transaction is not collected from a credit card company. In such cases, the employer is not required to pay a tipped employee the amount of tips specified on the credit card slip. Of course, this assumes the inability to collect is not a result of the employer's failure to submit the slip for reimbursement, etc.

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The employer may recover from a tipped employee the tip amount stated on the uncollected credit card slip if the tip amount has been paid to the tipped employee. This may be accomplished either by payroll deduction or by out-of-pocket reimbursement by the employee to the employer. Written authorization is not needed. However, the amount of uncollected credit card tips recovered from the employee must not reduce the tipped employee below the hourly minimum. The amount of tips to be recovered which would cut into the claimed tip credit is unrecoverable by the employer.

Where there are tip pools, tip pool recipients are responsible for reimbursing the employer for the share of tips from an uncollected credit card transaction which was allocated into the tip pool. The tipped employee who contributed to the tip pool cannot be held accountable for tips which are not in the individual's possession.

E. Accepting Claims

Claims must be in writing and must provide sufficient information to indicate an alleged violation.

F. Investigation

1. Interviews complainant.

2. Interviews employer

3. Interviews co-workers/witnesses if necessary.

4. Conducts records review/audit.

5. Representative will determine the validity of the claim and amount due if valid; calculate the exact amount of back minimum wages due employee(s).

G. Informal Resolution

Representative will attempt informal resolution:

1. Discuss findings and determination with employer.

2. Inform employer:

(1) Payment is due and must be paid immediately.

(2) Criminal charges can be brought by DOLI.

(3) Employee(s) will be advised to seek restitution of back wages plus applicable interest through the courts.

H. Employer Refuses to Comply

1. Determine and discuss with Supervisor the merits of bringing criminal charges.

2. If criminal action is chosen, contact the Commonwealth's Attorney for assistance. If the Commonwealth's Attorney refuses, seek assistance from Supervisor.

3. Advise the employee(s) that he or she or an attorney acting on their behalf would have to seek restitution of back minimum wages through the appropriate court.

4. Upon approval of Supervisor, may proceed to collect back minimum wages by having the employee(s) complete a "Statement of Claim for Unpaid Wages" form and proceed in accordance with the Payment of Wage segment of this manual.