

**VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY  
DIVISION OF LABOR AND EMPLOYMENT LAW  
FIELD OPERATIONS MANUAL  
CHAPTER ELEVEN ANTI-RETALIATION**

Effective 7/20

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.

**Section 1.00 Coverage**

Virginia's Anti-Retaliation Laws for misclassification and payment of wage claims are located in §§ 40.1-33.1 and 33.2 of the Code of Virginia respectively. The laws apply to all private industry employers operating a business in the Commonwealth. Public sector employees are not covered by the Anti-Retaliation Laws (see § 40.1-2.1 of the Code of Virginia), nor do they apply to work performed on Federal properties or enclaves.

**A. Retaliation for Payment of Wage Claims**

1. A complaint with the Virginia Department of Labor and Industry Division of Labor and Employment Law (the "Division") or lawsuit must have been filed against the employer by the claimant.
2. The claimant must have been terminated or otherwise discriminated against as a result of that complaint.
3. Claims where no official action against the employer has been commenced, either through the courts or through the Division, are not covered by the statute.

**B. Retaliation for Misclassification Claims**

1. The claimant must have:
  - a. reported (or planned to report to an apparent authority) that an employer had failed to classify them as an employee, or
  - b. been requested or subpoenaed to participate in an investigation or hearing on such an issue.
2. In contrast to payment of wage retaliation, claims where no official action or complaint has been commenced are covered by the statute, and therefore will be investigated.

## **Section 2.00 Accepting Retaliation Complaints for Work Performed in Virginia**

### **A. Retaliation complaints will be accepted and investigated in situations where the following has occurred:**

1. An out-of-state employer hired a Virginia resident to perform work in Virginia.
2. An in-state employer hired an out-of-state resident to perform work in Virginia.
3. An out-of-state employer hired an out-of-state employee to perform work in Virginia.
4. An in-state employer hired an in-state employee to perform work in Virginia.

### **B. Retaliation complaints will generally not be investigated in situations where the following has occurred:**

1. An in-state employer hired a Virginia resident to perform work out of state.
2. An out-of-state employer hired a 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. If employment agreement was entered into in the state of Virginia for all work performed, the total employment situation would be covered by Virginia law. For example, if an accounting firm hired an auditor whose job requires the employee to travel and perform tasks in multiple states including Virginia and the agreement was entered into in Virginia, the Division would investigate the claim.

### **C. Claims Intake Processing**

The Labor and Employment Law Anti-Retaliation Unit receives all claims filed with the Division. Claims will be reviewed for completeness and jurisdiction. Claims whose conduct occurred before the anti-retaliation statutes went into effect (July 1, 2020) or more than two years prior to the date of the complaint shall not be investigated. Complex claims requiring additional review will be reviewed by Senior Staff for acceptance or denial of the claim. If for any reason a claim cannot be pursued by the Division, claimants will be notified of the reason. Claims accepted for investigation will be entered and assigned to Compliance Officers in the Labor Law Claim Tracking System.

## **Section 3.00 Retaliation Procedure**

Labor Law Compliance Officer shall investigate complaints alleging violations of §§ 40.1-33.1 40.1-33.2 in accordance with the procedures established in this manual. In obtaining initial information from the employer, the Compliance Officer shall attempt to ascertain the legal entity involved and the number of employees working at the time of the investigation. This information is necessary in order to calculate the reductions for size of the business for the Civil Monetary Penalty (“CMP”) Report.

Compliance Officers, Leads, and Supervisors shall conduct investigations in the manner that will most effectively result in relevant information, including by telephone, e-mail, fax, and in-person investigations. Any travel must be approved by a supervisor before being undertaken.

#### **A. Employer Notification of Retaliation Claim Received**

Upon assignment of a retaliation claim for investigation, the Compliance Officer shall attempt to interview the claimant. The interview will clarify, verify, and expand any statement of facts provided on the anti-retaliation claim form. If the claimant's complaint and statement contain all the requisite elements of an anti-retaliation claim, the Compliance officer shall notify by employer of the formal retaliation investigation by letter sent by US mail. The letter shall include all available details as well as the statutory authority for the investigation (Sections 40.1-33.1 and/or 33.2 of the Code of Virginia). The Compliance Officer will request information concerning the facts of the claim as presented by the claimant.

#### **B. Investigation Procedure**

1. After reviewing the information received from the Employer, the Supervisor will determine if further investigation is needed. This may require in-person interviews.
2. If the Supervisor authorizes interviews with witnesses, the Compliance Officer shall notify the employer of the date in which the Compliance Officer shall appear to conduct field interviews.
3. The Compliance Officer shall identify all witnesses to be interviewed, and attempt to interview them on that date.
4. All interviews shall occur in a private, neutral location, such as a conference room. If that is not possible, interviews may be conducted at the nearest Department field office.
5. The identities of all witnesses shall be confirmed with a photo ID. Any statements taken shall be presented to the witness to have them confirm the accuracy of those statements.

#### **C. Notification of the Determination**

1. Before making a determination as to whether the anti-retaliation laws in Va Code §§ 33.1 or 33.2 were violated, the Compliance Officer shall request guidance from a Supervisor.
2. If the Compliance Officer, after being advised by a Supervisor, determines that the claim is clearly not valid, he or she shall notify all parties in writing by certified mail with appropriate documentation to the case tracking log.
3. If the Compliance Officer determines the claim is valid and that the Code of Virginia has been violated, the Compliance Officer will present the case file to the Labor Law Attorney.

The Labor Law Attorney will inform the employer in writing that their investigation has found a violation of the Code of Virginia.

4. Before preparing this letter, the Officer shall complete the CMP Calculation Report if necessary.

#### **D. Settlement Negotiations**

1. The Labor Law Attorney will endeavor, on behalf of the claimant, to settle valid claims.
2. The Department may negotiate a settlement with the employer to avoid litigation if desired by the claimant.
3. Employers shall be instructed to whom checks are payable, and where they are to be sent.
4. Should no settlement that is acceptable to the claimant and in compliance with the damages and penalties prescribed by the Code of Virginia be possible, the Labor Law Attorney will file suit in a court of competent jurisdiction, seeking to recover all damages and penalties under the appropriate statute, including reinstatement.

#### **E. Closure of Case**

After the case comes to a conclusion, either by determining that the claim is not valid, settlement, or a verdict from a court of competent jurisdiction, the Compliance Officer will close the case file.

#### **F. Interest Calculation**

1. Interest may be calculated using the following method:
  - (1) Multiply the Wages Due by .06 (6%). The figure that results is the Yearly Payment 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 wages need to be collected 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 six (6) percent from the date the wages were legally owed to the complainant.

**K. Attendance by Compliance Officers at Court Hearings: Subpoenas**

1. In cases prosecuted by a Commonwealth's Attorney, the Attorney General, or other attorney engaged by the Commonwealth, a Compliance Officer shall appear at trial on request of the attorney whether or not a subpoena has been issued.
2. No Compliance Officer shall appear at any other court hearing or trial unless he or she has received a subpoena from the court compelling attendance. For example, if a Compliance Officer is requested to appear at a private civil proceeding related to conduct investigated by the Compliance Officer, the Department will require a subpoena for the Compliance Officer to attend.