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EMPLOYMENT LAW:
WAGE AND BENEFITS ISSUES

I. INTRODUCTION: SOURCES OF LAW

A. FEDERAL STATUTES

1. Fair Labor Standards Act, 29 U.S.C. § 201 et.seq.

This legislation applies to most employers and most employees. The excluded (exempt) workers are generally management and professional workers and independent contractors. The Act sets out requirements for payment of minimum wage and overtime compensation, as well as maintenance of payroll records. The statute also contains an equal pay (gender) requirement.

2. Employee Retirement Income Security Act, 29 U.S.C. § 1001 et.seq.

ERISA generally pre-empts state law on retirement benefits, deferred compensation plans, group health, life and disability insurance and other employer-provided benefits. One of the best known sections of ERISA is the COBRA (Consolidated Omnibus Budget Reconciliation Act) requirement for extending group health benefits (the opportunity for the employee to purchase coverage) after termination of employment.

3. Family and Medical Leave Act, 29 U.S.C. § 2601 et.seq.

The 1993 Act applies to employers with at least 50 employees, and to employees who have worked for the employer for at least twelve months and who have worked at least 1250 hours in the preceding twelve month period. The federal legislation establishes entitlement to unpaid leave for up to twelve weeks for a serious health condition, with the right to continuation of paid health care coverage and the right to return to work.

B. STATE STATUTES

1. Virginia Labor and Employment Law, Title 40.1.

There are several key provisions affecting wages and benefits. Section 40.1-28 makes it unlawful for an employer to require an employee (or applicant)

to pay for the cost of a medical examination or the cost of furnishing medical records required by the employer as a condition of employment. Section 40.1-28.6 contains an equal pay requirement for employers who are exempt from coverage under the FLSA equal pay law.

Section 40.1-29 covers a number of issues, including payment of wages upon termination of employment, the obligation to provide a written statement of gross wages and a prohibition on wage forfeitures and forfeiture agreements. A violation of the statute can be enforced with court award of reasonable attorney's fees for the employee.

2. Contracts; Independent Sales Representatives, Title 59.1-455

The legislation requires written contracts disclosing the method for payment of commissions, and a 30 day limit for payment of commissions earned, after termination of employment.

3. Group Accident and Sickness Insurance Policies, Title 38.2-3541 and 3542.

Virginia provides broader protection than COBRA, covering smaller employers, and requires extension of the opportunity to purchase continuing health care coverage after termination of employment (Section 3541); and, there is also a required notification to employees of termination of their group health insurance coverage (Section 3542).

4. Wage garnishment, Title 34, § 34-29

Section 34-29(f) prohibits discharge of any employee because his/her wages have been subject to garnishment for one debt. Section 34-33 provides that wages paid to a minor are not subject to garnishment. Section 34-34 sets out exemptions from creditors' claims for retirement benefits.

5. Assignment of Salary, Wages, etc., Article 2, § 55-61- § 55-167.

Virginia has a state court process, loosely equivalent to a Chapter 13 bankruptcy proceeding, available to allocate payment of debts, from wages, by a court-appointed trustee.

C. COMMON LAW

There are many issues regarding employee conditions of employment and employee benefits (vacation pay, holidays, severance pay, compensatory leave, sick leave, etc.) that are not addressed in either federal or state statutes. Title 11-2 of the Virginia Code requires employment contracts to be in writing. Terms of

employment, enforceable in court, may come from employee handbooks, offers of employment, etc. that are not themselves employment contracts.

D. LEGAL RESEARCH RESOURCES

The single best source of relevant state and federal law is a two volume, loose leaf notebook set of books: Employment Law in Virginia, published by the Virginia Law Foundation (First Edition, 1997; with 1998 Supplement).

II. FREQUENTLY OCCURRING PROBLEMS, AND QUESTIONS RAISED ABOUT WAGE AND BENEFITS ISSUES

Following are a number of fairly typical wage and benefits issues that are frequently presented to legal services staff and pro bono volunteers at client intake for the Fairfax Bar Association's Pro Bono Employment Law Project:

SITUATION: NON-PAYMENT OF WAGES OR PAYMENT WITH A BAD CHECK

Most common is the problem experienced by someone working in a construction trade who was employed for a short time or for a single job by someone who does not have a fixed business address and the worker has not been paid at all, has only received partial payment for the agreed work or has been paid with a check not honored by the bank (for insufficient funds).

POSSIBLE RESPONSE/ADVICE:

The first step is to identify and hopefully locate the employer. Often, the non-payment problem occurs with someone who is acting as an independent contractor for another contractor. One way to identify the employer, if the trade involved requires licensing, is to check County business records of licensed plumbers, etc. The general contractor or the property owner can often be helpful to locate the sub-contractor (and identify an address, for service of process).

Mechanics' and materialmen's liens are covered in Title 43 of the Virginia Code. The value of labor or materials greater than \$50.00 is covered by the provision for property liens. Section 43-3A. Section 43-9 applies to workers performing labor for subcontractors. If a lien is filed, it must be recorded within 60 days after the job is completed, and a suit to enforce a lien must be brought within six months after the memorandum of lien is recorded. Virginia Code § 43-17.

The Code also provides recourse for issuance of a check not honored, due to insufficient funds. Civil recovery for a check not honored is addressed in Section 8.01-27.1. Under § 8.01-27.2, an employee given a bad check can, in

addition to the amount of the wages due in the check, recover the lesser of three times the check or \$250.00.

The Code provision in Section 40.1-29, requiring payment of wages, is significant because the statute authorizes recovery of reasonable attorney's fees for an employee who has not received his/her pay. The two methods of pursuing wage claims are by making a complaint to the Virginia Department of Labor, and by filing an action in the General District Court or Small Claims Court. The Virginia Department of Labor has limited resources and fairly limited enforcement powers. Usually, the best and quickest remedy for non-payment of wages is to file a warrant in debt.

Despite these provisions to assist workers to recover wages, there are many circumstances when recovery is impractical because a mechanic's lien is not available, the employer cannot be identified or located, or the business or the owner are bankrupt.

**SITUATION: WORK PERFORMED WITHOUT COMPENSATION;
WORKER PAID LESS THAN MINIMUM WAGE;
OVERTIME WORK PERFORMED WITHOUT HIGHER
RATE COMPENSATION; AND, NO WITHHOLDING
OF PAYROLL TAXES**

Generally at issue in these circumstances is the contention of the employer that the worker is an independent contractor rather than an employee. There are also issues that may come up regarding wages paid to employees claimed by the employer to be exempt from coverage under the Fair Labor Standards Act. Treating an exempt employee who is paid on a salaried basis as a non-exempt employee (i.e., reducing pay for part of a day absent from work) may compromise and forfeit the exemption from the F.L.S.A.

POSSIBLE RESPONSE/ADVICE:

Under the Fair Labor Standards Act, the test for independent contractor status is an assessment of the degree of control the employer exercises over the worker and the work to be performed. Paying a salary rather than a hourly rate or requiring the worker to sign an independent contractor agreement do not affect the determination of employee status.

There is a similar, nearly identical, test under the Virginia Unemployment Compensation Act, § 60.2-212(c), to exclude from taxation of employers, workers who are free from direction or control over their performance by the employer, and workers whose services are performed outside the place of business or the usual course of business. The Virginia Code puts the burden of proof on the employer to demonstrate exclusion from coverage. One way to address

independent contractor versus employee status is through the Virginia Employment Commission on an unemployment compensation claim. When a claimant files for benefits, the Commission's first written response is to issue a monetary determination, showing the wages reported by employer(s) for a prior twelve month period. If an employer has not paid unemployment tax, the wage record will be incomplete, and the employee/claimant has a right to a due process hearing to establish coverage under the Act.

The issue of coverage under the Fair Labor Standards Act (employee status) can be determined by filing a complaint with the Virginia Department of Labor, or with the U.S. Department of Labor. Non-payment or underpayment of wages due to minimum wage or overtime pay violations, can be litigated in either federal or state court. Non-willful violations of the law have a two year limitation; the statute of limitations for willful violations is three years. 29 U.S.C. § 255. Minimum wage violations are also enforceable by employees under the Virginia Code, which provides for award of reasonable attorney's fees. § 40.1-28.12.

Although there is not an explicit state statutory protection from retaliatory discharge for employees who have made wage complaints to the Virginia Department of Labor, an argument should be available under Virginia common law that such a discharge would violate public policy. Retaliation for making Fair Labor Standards Act complaints is prohibited by federal statute.

Another way this underpayment or improper payment of wages comes up is after the end of the year when an employee is given a 1099 rather than a W-2, or is given no withholding statement at all (and seeks guidance how to file an income tax return). Both the Virginia Department of Taxation and the federal Internal Revenue Service offer guidance for workers in these situations. If the issue of non-withholding of payroll taxes comes up during the calendar year, Virginia Code § 40.1-29(c) is useful:

An employer, upon request of his employee, shall furnish the latter a written statement of the gross wages earned by the employee during any pay period and the amount and purpose of any deductions therefrom.

If an employee has been working for cash payments, frequently referred to as "off the books," use of this Section of the Code to request an accounting can set up a demand for payment of payroll taxes for a former employee.

**SITUATION: WORKER CHARGED WITH COST OF DAMAGE TO
COMPANY PROPERTY OR SHORTAGE FROM CASH**

REGISTER; COMMISSION RE-CALCULATED TO
REFLECT NON-PAYMENT BY CUSTOMER

Employers make deductions from pay and discharge workers for multiple cash register shortages, missing funds above a designated amount or for damage caused by negligent operation of company equipment. Workers paid in part or wholly by commission sometimes face deduction from or recapture of income (when paid an advance or draw against earnings) for a loss of income claimed by the employer.

RESPONSE/POSSIBLE ADVICE:

The Virginia Code generally prohibits agreements with employees providing for forfeiture of wages. Section 40.1-29(D). The statute also creates an exception for executive personnel and “except as otherwise provided by law.” Subsection(c) of the statute allows deductions, with written and signed authorization by the employee. Any agreement to support a wage offset or recovery would have to be shown to be voluntary in order to avoid the sanctions procedures of Section 40.1-29(E) through (H). An employee who is coerced to sign a forfeiture agreement would have available a complaint to the Virginia Department of Labor and (arguably) protection under common law from a retaliatory discharge.

There are many different arrangements made for compensating sales representatives -- who may be either employees or independent contractors. Virginia law requires for independent contractors a written agreement disclosing the method of calculation and payment of the commission. Section 59.1-456. The most common disputes involve reducing a commission for cancellation of or non-payment for a sale and non-payment or underpayment of commissions earned prior to termination of employment. If the commissioned sales representative is engaged in “inside” sales, the non-payment or underpayment of income would be a wage issue covered by Section 40.1-29. Section 59.1-455 applies to “outside” sales by independent contractors. Forfeitures, if clearly disclosed, are likely to be enforceable in independent contractor contracts. A forfeiture of commission for an employee sales representative, even if disclosed in writing, may be unlawful -- depending upon the policy at issue and the specific factual circumstances.

SITUATION: COMPENSATION FOR VACATION,
 HOLIDAYS, SICK LEAVE AND SEVERANCE
 PAY

The issues most frequently presented regarding paid leave is whether the employee is entitled to payment for accrued leave at termination of employment, whether quitting the job or termination for misconduct affects eligibility for compensation and under what circumstances can an employee seek severance pay.

POSSIBLE RESPONSE/ADVICE:

These paid leave issues are not governed by federal or state statute. One of the few situations covered by state statute is jury service or appearance in court. Virginia Code § 18.2-465.1. Anyone summoned or subpoenaed to appear in court or to serve on a jury cannot be required to use sick leave or vacation time as a result of the absence from work. However, the statute does not require payment of wages or salary for the time not worked. Federal law does limit making reduction in pay for time missed from work by employees exempt from coverage under the Fair Labor Standards Act. 29 C.F.R. § 541.118(a)(4). The exempt employee's salary can be offset by compensation received for jury or witness fees. The federal restriction only applies when the exempt employee performs some work during the week.

Accrual and use of paid leave are matters of contract law, ordinarily determined by written policies in employee handbooks or personnel manuals. Generally, the manner in which leave accrues determines right to use and whether it is compensable. Is unused vacation leave compensable at termination of employment? The answer should be clear from written policies. Typically, if vacation leave accrues by pay period or month, unused leave will be compensable upon termination of employment. If vacation leave accrues, subject to a vesting period, i.e. two weeks after one year of work or for each year worked, and the employee leaves before the right to use the leave vests, there may be no compensation. Typically, employer policies provide no compensation for unused sick leave upon termination of employment. Leave forfeiture provisions may or may not be enforceable -- depending upon how the leave accrued, the reason for the termination, etc.

There is no statutory requirement for paid or unpaid leave for federal or state holidays. An employee can be required to work holidays, as a condition of employment.

Severance pay can be provided for in personnel policies but this is typically discretionary and paid in exchange for a release of liability on termination of employment. While employees cannot generally waive statutory rights, agreements waiving the right to complain about violation of discrimination and civil rights laws, etc. have been upheld when the employee is given compensation (consideration for the contract release of liability) to which he/she would not otherwise be eligible.

SITUATION: EMPLOYEE IS ABSENT FROM WORK DUE TO ILLNESS OR INJURY: WHAT IS PROPERLY REQUIRED FOR MEDICAL

DOCUMENTATION, AND UNDER WHAT
CIRCUMSTANCES IS THE WORKER
ENTITLED TO RETURN TO THE JOB.

There are many different problems and circumstances that arise as a result of injuries, on or off the job, medical problems experienced by the employees or members of their family and application of employer policies governing excused and unexcused absences.

POSSIBLE RESPONSE/ADVICE:

The federal Family and Medical Leave Act provides limited protection for some employees under some circumstances for denial of leave or loss of employment. The federal regulations, 29 C.F.R. § 800 et seq., are drafted in a question and answer format and give guidance for some of the commonly occurring issues. The law does not apply to smaller employers (those with less than 50 workers), also it excludes new and part-time workers (for coverage, an employee must have worked 12 months and 1250 hours in the past 12 months), and it only applies to serious health conditions and a limited number of defined events (i.e., death of immediate family member).

At least in one circumstance, the federal law probably pre-empts application of a state statute protecting Virginia workers. Virginia Code §40.1-28 makes it unlawful for an employer to require employees to pay for the cost of a medical examination or a medical record, required as a condition of employment. However, under the Family and Medical Leave Act, a federal regulation requires the employee to pay for the medical certificate of fitness to return to work from leave (if required by the employer). 29 C.F.R. § 825.310(d). Arguably, the federal regulation pre-empts Virginia law.

It is a fairly common practice for employers to have policies requiring medical documentation of absence from work due to sickness when the employee is ill for at least three days. Some employers require medical documentation, to excuse absence, when an employee reports sick for one day. The policies seldom make clear that the employer is responsible for the cost of a medical exam or of preparation of a doctor's note. This is a more substantial issue if the employee does not have group health insurance. Other than the medical examination and report at the end of FMLA leave, an employee should be able to have the hospital/physician bill the employer for any required examination or report. Few employers make clear in their policies that payment or reimbursement is available for this expense.

The right to return from sick leave (paid or unpaid) depends primarily upon whether an on-the-job injury is involved and/or if the leave is covered by the Family and Medical Leave Act. Virginia Code § 40.1-27.1 provides limited protection from termination for an employee who is absent from work due to a covered injury, under the worker's compensation program defined in Title 65.2 of

the Code. The weaknesses in this protection are that termination of employment for other reasons is not prohibited and the statutory protection does not apply when circumstances of the employee's absence makes it impossible or unreasonable not to discharge such employee. Also, the right to return to work from worker's compensation leave does not apply to absences greater than six months.

Generally, the Family and Medical Leave Act requires a return to work, to the same job or to an equivalent position, for leave taken up to 12 weeks. This right is qualified for "key" employees defined in federal regulations, and employees on FMLA leave do not have superior rights to other workers, to be protected from lay-offs, reductions-in-force, etc.

In some circumstances, either handicap and disability discrimination provisions or sex discrimination (pregnancy) protections may apply to insure reasonable accommodation be made to allow an opportunity to work or to return to work after conclusion of leave. When FMLA does not apply, the discrimination protections of federal, state or local law may be the only possible protections.

SITUATION: EMPLOYEE HAS JUDGMENT
ENTERED AGAINST HIM/HER AND
HAS RECEIVED NOTICE FROM THE
EMPLOYER THAT TWENTY FIVE
PERCENT OF HIS WAGES ARE BEING
WITHHELD

There is a relatively quick process, available to most debtors under Virginia law, to stop a wage garnishment proceeding (substantially similar defense process is available to stop bank account garnishments).

RESPONSE/POSSIBLE ADVICE:

The Virginia Code makes available a householder (homestead) exemption, applicable to creditor claims against personal property (wages). Section 34-4. Each householder is granted a lifetime \$5,000.000 exemption, plus \$500 for each dependent. The Code contains a sample form and a brief explanation of how to claim the personal property exemption. Annexed is a form homestead deed.

By law, the worker who has had his/her wages garnished is served with a copy of the garnishment summons (addressed to the employer) with a return date (end date) for the garnishment, up to 90 days later. Attached to the summons is a form: REQUEST FOR HEARING - GARNISHMENT EXEMPTION CLAIM. The employee (with assistance from the payroll office of the employer, if necessary) can calculate the amount of wages that will be withheld during the garnishment period, fill in that amount in the homestead deed and file the deed

with the Land Records section of the Circuit Court Clerk's office (\$16.00 filing fee).

The employee needs to take a certified copy of the deed that was filed, together with the exemption claim form, and file it with the General District Court Clerk's office (most garnishments are in General District Court). The Clerk will set a hearing within 7 business days. The employee needs to appear. The Court, after it grants the exemption, will send an order to the employer, halting the garnishment and ordering withheld wages released to the employee.

ADVOCACY TIP: While this procedure will block the particular garnishment, there is nothing to stop the creditor from filing a new garnishment after the 90 day period has run. Using the household exemption to offer the creditor a voluntary payment plan of less than 25% of wages is probably a better, long term solution to the debt (unless the employee is going to file for bankruptcy). An employee can effectively set a lower payment amount (for example, 5 to 10% of wages, by only exempting part of the amount subject to garnishment - or by communicating a voluntary payment plan offer. The assignment provisions in Virginia Code § 55-161 may also help provide a long term solution to avoid wage garnishments by multiple creditors.