

September 17, 2024

COWANPERRY_{PC}

Business Resources Symposium

EMPLOYMENT LAW UPDATE



Presented by:
James K. Cowan, Jr.
jcowan@cowanperry.com



What Recent Changes in Federal
and Virginia Law Should you be
Aware of?

The New FLSA Salary Threshold

- The Backdrop: The Fair Labor Standards Act ("FLSA") requires employers to pay workers overtime at a rate of 1.5 times the employee's regular rate of pay for all hours worked in excess of 40 per week.
- In April of 2024, the Department of Labor ("DOL") released regulations making significant changes to the rules governing overtime exemptions under the Fair Labor Standards Act ("FLSA") and specifically to the application of the FLSA's "White-Collar" exemption rules.

Overtime Generally Required, Unless an Exemption Applies

- Section 13(a)(1) of the FLSA carves out an exemption to overtime pay for employees who are “in a bona fide executive, administrative, or professional capacity” (EAP), which generally applies to “white-collar” employees. However, in order to qualify for the EAP exemption:
 - the employee must be paid a predetermined and fixed salary not subject to reduction (the salary basis test);
 - the amount of salary paid must meet a minimum specified amount (the salary level test); and
 - the employee's job duties must primarily involve executive, administrative, or professional duties defined by the regulations (the duties test).

So What are the New Thresholds?

- The rule sets up two initial increases to the salary threshold for “white collar” exempt workers (previously \$35,568):
 - **On July 1, 2024, the threshold will increase to \$844/week (\$43,888 per year).**
 - **On January 1, 2025, that number will bump up to \$1,128/week (\$58,656 per year).**
- The final rule also increases the annual earnings threshold for the highly compensated employee (HCE) exemption (previously \$107,432) to \$151,164 for full-time salaried workers. The HCE exemption does not require a duties test analysis because the high compensation serves as a strong indicator of exempt status.
- However, the pay level for one of the federal regulation’s exemptions remains unchanged under the new rule. Computer professionals are exempt from overtime pay requirements if they make at least **\$27.63 per hour**.

Pending Litigation

- There are several cases pending that could still impact whether the first increase under the Tule stays in place, or the January 1, 2025 increase goes into effect as planned.
- Two of those cases (one filed by the Plano, TX Chamber of Commerce and several business groups, the other filed by the TX Attorney General) are now pending in the Eastern District of Texas – the same court that blocked a similar DOL rule in 2016.

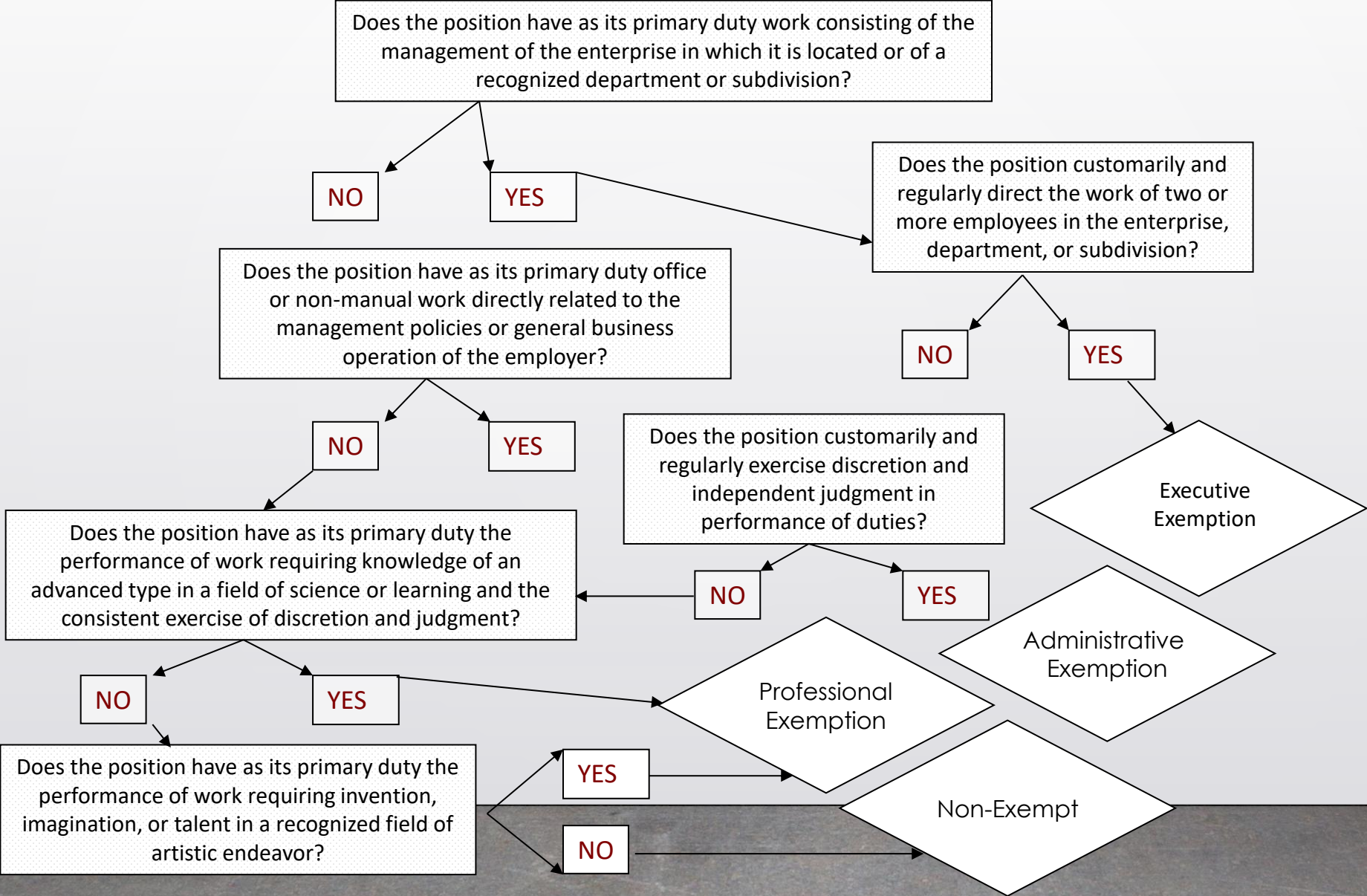
Pending Litigation (cont'd)

- Another case is on appeal before the Fifth Circuit Court of Appeals, regarding a 2022 lawsuit challenging the DOL's ability to set a salary threshold in the first place. Several Supreme Court Justices have suggested that they might agree with that position.
- If the salary threshold were to be abolished, overtime eligibility would depend entirely on more fact-specific duties tests, without employees and employers being able to rely on more bright-line salary rules.

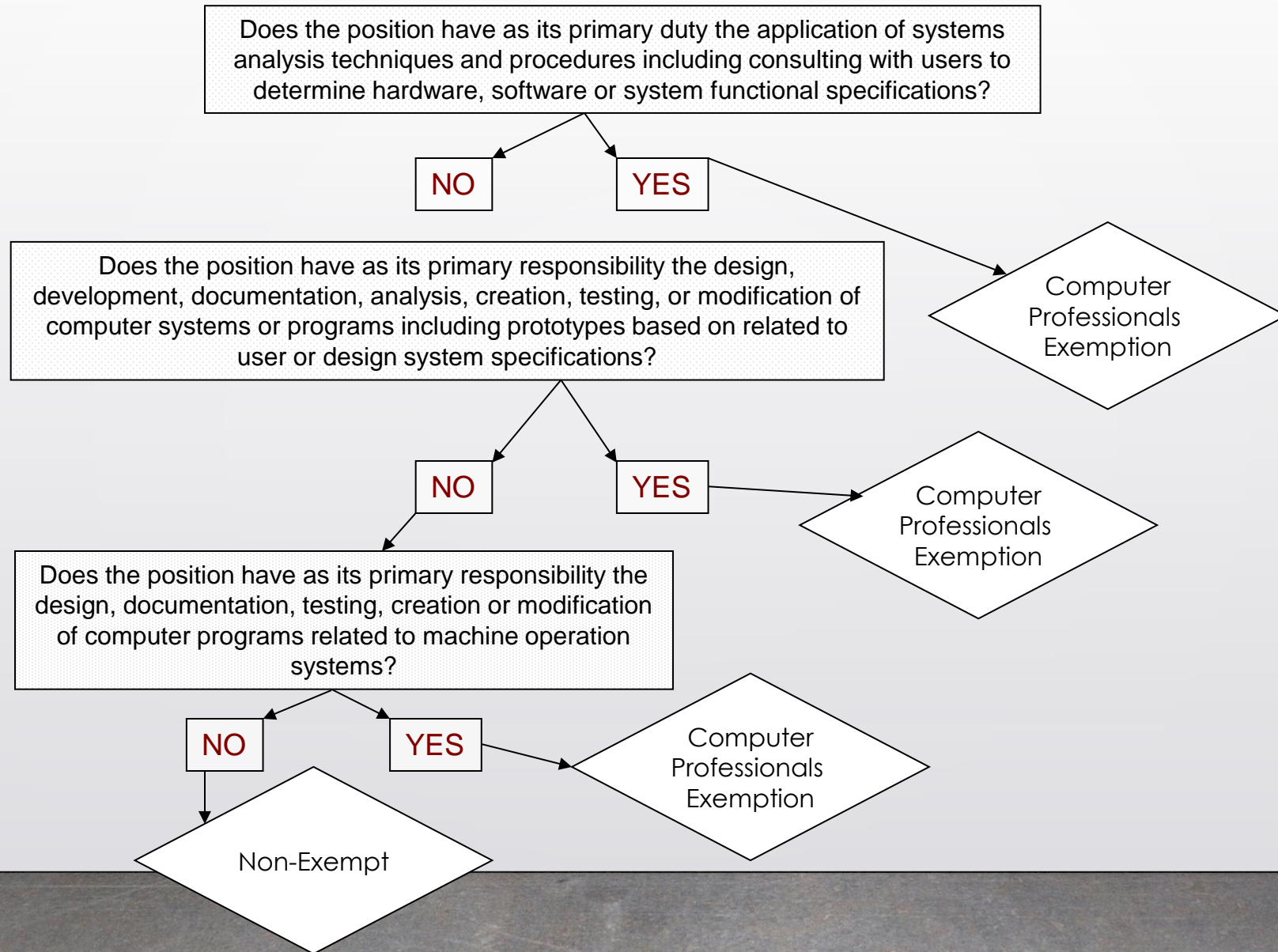
Pending Litigation (cont'd)

- A hearing took place in one of the Texas cases last month, and the Court entered a limited injunction blocking the rule only as applied to the State of Texas. To surprise of many, it did not enter a broader injunction stopping the rule from going into effect nationwide.
- But, there are other challenges that could change this, particularly in light of the Supreme Court overturning “Chevron Deference” for such rulemakings.
- **BOTTOM LINE- Stay tuned!**

White Collar Exemption Tree



Computer Professionals Exemption Decision Tree



DISCUSSION POINT:

HOW DO WE HANDLE
EMPLOYEES WHAT
ARE UNDER THE NEW
THRESHOLDS?

OR IF THEY DON'T
MEET THE DUTIES TEST?

- SALARIED NONEXEMPT?
- MOVE TO HOURLY W/ OVERTIME?
- INCREASE SALARY TO BE ABOVE LIMIT?
- RESTRUCTURE JOB AND ADD RESPONSIBILITIES?
- WHAT ABOUT COMMISSION EARNINGS?

The Salary Basis Test

- Most of the exemptions require that employees be paid on a “salary basis”
- Payment of a salary has always been required for the “white collar” exemptions
- The new regulations increase the salary threshold, but the DOL has made clear they will also apply scrutiny to whether the exemptions apply

The Salary Test Defined

- Regularly receives a predetermined amount of compensation each pay period (on a weekly or less frequent basis)
- The compensation cannot be reduced because of variations in the quality or quantity of the work performed
- **Must be paid the full salary for any week in which the employee performs any work**
- Need not be paid for any workweek when no work is performed

The Salary Test Defined (cont'd)

- An employee is not paid on a salary basis if deductions from the predetermined salary are made for absences occasioned by the employer or by the operating requirements of the businesses
- If the employee is ready, willing and able to work, deductions may not be made for time when work is not available
- These rules are subject to only a few carve-outs:

Permitted Salary Deductions

Seven exceptions from the “no pay-docking” rule:

1. Absence from work for one or more full days for personal reasons, other than sickness or disability
2. Absence from work for one or more full days due to sickness or disability if deductions are made under a bona fide plan, policy or practice of providing wage replacement benefits for these types of absences
3. To offset any amounts received as payment for jury fees, witness fees, or military pay

Permitted Salary Deductions (cont'd)

Exceptions from the “no pay-docking” rule (cont'd):

4. Penalties imposed in good faith for violating safety rules of “major significance”
5. Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of workplace conduct rules
6. Unpaid leave taken pursuant to the Family and Medical Leave Act
7. Proportionate part of an employee’s full salary may be paid for time actually worked in the first and last weeks of employment

Improper Deductions – Examples

- Deduction for a partial-day absence to attend a parent-teacher conference
- Deduction of a day of pay because the employer was closed due to inclement weather
- Deduction of three days of pay because the employee was absent from work for jury duty, rather than merely offsetting any amount received as payment for the jury duty
- Deduction for a two-day absence due to a minor illness when the employer does not provide wage replacement benefits for such absences

Effects of Improper Deductions

- An “actual practice” of making improper deductions from salary will result in the loss of the exemption only:
 - During the time period in which improper deductions were made
 - For employees in the same job classifications
 - Working for the same managers responsible for the actual improper deductions
- Isolated or inadvertent improper deductions, however, will not result in the loss of exempt status; **if the employer reimburses the employee**

Safe Harbor

- The exemption will not be lost if the employer:
 - Has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism;
 - Reimburses employees for any improper deductions; and
 - Makes a good faith commitment to comply in the future
- *Unless* the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints

Clearly Communicated Policy

- The best evidence of a clearly communicated policy is a written policy distributed to employees prior to the improper pay deductions by, for example:
 - Providing a copy to the policy to employees at the time of hire
 - Publishing the policy in an employee handbook
 - Publishing the policy on the employer's Intranet

Payroll Practices that Do Not Violate the Salary Basis Test

- Taking deductions from exempt employees accrued leave accounts
- Requiring exempt employees to keep track of and record their hours worked
- Requiring exempt employees to work a specified schedule
- Implementing bona fide, across-the-board schedule changes

Additional Compensation

- An employer may provide compensation in addition to the guaranteed weekly salary, such as:
 - Commissions
 - Bonuses
 - Additional pay based on hours worked beyond the normal workweek, so called voluntary overtime payments

So that is the Federal side of things, what about at the state level?

A: mostly continuing fallout from the flurry of new laws over last few years, not all that seem to have gotten publicity.... But that plaintiff's employment lawyers are starting to use more frequently....

Employee Access to Personnel Records

- Va. Code § 8.01-413.1
- Effective July 1, 2019
- Upon employee (or attorney's) written request, employer **MUST** provide documents showing:
 - (1) Dates of employment;
 - (2) Wages or salary;
 - (3) Job description and title; and
 - (4) Injuries sustained in the course of employment.

Employee Access to Personnel Records

- Request must be written.
- Records must be produced within **30 days** of written request.
- **BUT** the law does not create an obligation to keep particular records or to keep personnel files for a particular length of time.
- Limited exception:
 - Employers not required to produce records if doing so would reasonably endanger the employee or another person.

Employee Access to Personnel Records

Key Takeaways for Employers

- Don't ignore requests for information from current or former employees or their attorneys.
- Make sure handbook policies are updated and consistent with this law.
- Review record retention policies and know where records are located.

Nondisclosure Agreements and Sexual Assault

- Va. Code § 40.1-28.01
- Effective July 1, 2020
- Employers **may not** require that job applicants or employees sign a “non-disclosure or confidentiality agreement that has the purpose or effect of concealing the details relating to a claim of sexual assault.”
- Any such agreement would be void and unenforceable as contrary to public policy.
- “Sexual assault” is not defined. However, the statute applies to claims arising under Virginia laws on rape (Va. Code § 18.2-61), forcible sodomy (§ 18.2-67.1), aggravated sexual battery (§ 18.2-67.3), and sexual battery (§ 18.2-67.4).

Nondisclosure Agreements and Sexual Assault...

and some related NLRB activity

- BUT VA law relates only to such agreements being made “as a condition of employment.” **Therefore, the VIRGINIA law does not apply to agreements with former employees.**
- Nondisclosure and confidentiality provisions in severance and settlement agreements are not affected by the new law, as long as the employee signs the agreement after the end of employment.
- **But wait... Late Breaking News-** A recent decision from the NLRB suggests that employee severance agreements in both unionized and non-union workplaces could be deemed unlawful if they contain confidentiality and non-disparagement provisions (common provisions for severance agreements) that restrict an employee's rights to speak about the agreement terms or otherwise talk negatively about their former employer.
- **USE CAUTION UNTIL THERE IS MORE CLARITY ON THIS**



Nondisclosure Agreements and Sexual Assault

Key Takeaways for Employers

- Review template agreements, including employment agreements, confidentiality agreements, and severance templates to ensure that they do not violate this law.
- Carefully review any settlement agreements, severance agreements and releases executed by current employees to ensure agreements do not violate this law.
- Pay attention to non-disparagement provisions, which may implicitly violate this law when signed by current employees.
- WE ADVISE THAT YOU OBTAIN COUNSEL ON CONFIDENTIALITY AND NON-DISPARAGEMENT CLAUSES IF YOU ARE USING AN OLDER “FORM” AGREEMENT

Worker Misclassification Law

Va. Code § 40.1-28.7:7

- Effective July 1, 2020

- Two primary objectives:

- (1) Establishes presumption that an individual providing services for payment is an employee, not an independent contractor.
- (2) Creates a private right of action for workers to challenge classification as an independent contractor.

Worker Misclassification Law (Private Right of Action)

- An individual not properly classified as an employee can bring a civil action for damages.
- Presumption in favor of “employee” status.
- **Unless** the employer shows that the worker is an independent contractor under the IRS guidelines.
- If successful, Court may award:
 - Lost wages
 - Lost benefits (including expenses that would have been covered)
 - Reasonable attorneys’ fees and costs.

Worker Misclassification Laws (Retaliation)



- Va. Code § 40.1-33.1
 - Technically separate from Va. Code § 40.1-28.7:7
- Unlawful for an employer to discharge, discipline, threaten, discriminate against, or penalize an employee or independent contractor, or take other retaliatory action because s/he:
 - Has reported or plans to report that an employer failed to properly classify an individual as an employee and failed to pay required benefits or other contributions; or
 - Is requested or subpoenaed by an appropriate authority to participate in an investigation, hearing, or inquiry by an appropriate authority or in a court action.

Worker Misclassification Laws

- Va. Code § 58.1-1900.
- Department of Taxation is responsible for determining whether an individual is an independent contractor by applying IRS guidelines.
- Monetary penalties:
 - First offense: up to \$1,000 per misclassified individual.
 - Second offense: up to \$2,500 per misclassified individual, possible one-year contract debarment.
 - Third or subsequent offense: up to \$5,000 per misclassified individual, possible three-year contract debarment.

Worker Misclassification Laws (Board for Contractors)

- Va. Code § 54.1-1102
- Board for Contractors shall:
 - Require a contractor to appropriately classify all workers as employees or independent contractors, as provided by law
 - Provide that any contractor who is found to have intentionally misclassified any worker is subject to sanction by the Board
- Effective July 1, 2020



- Virginia has long adhered to the employment at will doctrine.
- Exception to at-will doctrine first recognized in *Bowman v. State Bank of Keysville*.
- Bowman permitted a cause of action for wrongful termination in violation of public policy.
- Virginia courts, including SCOVA, interpreted *Bowman* narrowly.
- Only permitted wrongful termination claims in these instances:
 - (1) Employer violated an employee's statutory right
 - (2) Employer's actions violated a public policy expressed in a Virginia statute and the employee was within the class of persons that policy was designed to protect
 - (3) Employee refused to engage in a criminal act.

Employment At Will in Virginia....

“Bowman”

(Pre-
Whistleblower
Law)

NOW: A Comprehensive Whistleblower Law (Elements)

Va. Code § 40.1-27.3

Effective July 1, 2020

Prohibits discrimination and retaliation against an employee who:

- Reports a violation of federal or state law or regulation
- Is requested by a law enforcement officer to participate in hearing or inquiry
- Refuses to engage in criminal activity
- Refuses to perform an action that violates federal or state law or regulation, AND the employee informs the employer that he/she is refusing to perform the action for that reason; and
- Participates in an investigation, hearing, or inquiry related to the violation

Comprehensive Whistleblower Law (Remedies)

Available Remedies

Injunctive relief

Reinstatement

Lost wages
(uncapped)

Lost benefits
(uncapped)

Reasonable
attorneys' fees

No requirement
to file an
administrative
charge

BUT 1-year
statute of
limitations

The Restrictive Covenant Law (Noncompete Ban)

- Va. Code § 40.1-28.7:8
- Applies to agreements entered into on or after July 1, 2020

Basic Text:

“No employer shall enter into, enforce, or threaten to enforce a covenant not to compete with any low-wage employee.”

The Restrictive Covenant Law

Key definition: “Covenant Not to Compete:”

"Covenant not to compete" means a covenant or agreement, ... that restrains, prohibits, or otherwise restricts an individual's ability, following the termination of the individual's employment, to compete with his former employer.

“Covenant Not to Compete” appears to allow, but also limits, non-solicits of customers:

A "covenant not to compete" shall not restrict an employee from providing a service to a customer or client of the employer if the employee does not initiate contact with or solicit the customer or client.

The Restrictive Covenant Law

Key definition:

“Low Wage Employee:”

"Low-wage employee" means an employee whose average weekly earnings ... are less than the average weekly wage of the Commonwealth.

(Right now ~\$73,320.00)

"Low-wage employee" includes interns, students, apprentices, or trainees employed, with or without pay...

“Low Wage Employee” INCLUDES independent contractors:

"Low-wage employee" also includes an individual who has independently contracted with another person to perform services independent of an employment relationship and who is compensated for such services by such person at an hourly rate that is less than the median hourly wage for the Commonwealth... (about \$22/hr)

The Restrictive Covenant Law

**“Low Wage Employee” INCLUDES
interns, apprentices, and trainees:**

"Low-wage employee" also includes interns, students, apprentices or trainees employed, with or without pay, at a trade or occupation in order to gain work or educational experience."

**“Low Wage Employee” DOES NOT
INCLUDE employees paid mostly by
commission or bonus:**

"Low-wage employee" shall not include any employee whose earnings are derived, in whole or in predominant part, from sales commissions, incentives, or bonuses paid to the employee by the employer.

The Restrictive Covenant Law

Confidentiality clauses/agreements are still acceptable

“Nothing in this section shall serve to limit the creation or application of nondisclosure agreements intended to prohibit the taking, misappropriating, threatening to misappropriate, or sharing of certain information, including trade secrets, ... and proprietary or confidential information.”

The Restrictive Covenant Law

Two Statutory Enforcement Mechanisms

(1) Private Right of Action

- Employees can sue *“any former employer or other person that attempts to enforce a covenant not to compete.”*
- Damages include lost compensation, attorneys’ fees, litigation costs, and liquidated damages.
- 2 year SOL.

(2) DOLI Commissioner Penalties

- Civil penalty up to \$10,000 per violation.
- Employers also required to post a summary of the law.
 - Penalties range from written warning to \$1,000 for violating posting requirement.

WHAT IS THE STATUS OF THE FEDERAL NONCOMPETE RULE?

BREAKING NEWS: FTC's Non-Compete Ban Struck Down For All Employers Nationwide!

- The FTC rule outlawed most noncompete agreements, other than in sale of business and for “senior executives.” Allowed narrowly drafted non-solicitation agreements and confidentiality protections.
- The judge found that the agency didn't have the power to issue the rule because Congress only authorized it to issue *procedural* rules to address unfair methods of competition, not *substantive* rules. “The role of an administrative agency is to do as told by Congress, not to do what the agency thinks it should do,” she said.
- The Court found the rule itself was “arbitrary and capricious” for the following reasons:
 - Found that the rule is arbitrary and capricious because it is unreasonably overbroad without a reasonable explanation.
 - The rule aimed to impose a one-size-fits-all approach with no end date.
 - No state in the country has enacted a non-compete ban as broad as the FTC's rule.
 - Questioned why the rule didn't target specific, harmful non-competes instead of taking a blanket approach.
 - The agency failed to consider the positive benefits of non-competes, she said.
 - The agency failed to sufficiently address potential alternatives rather than a nationwide ban on just about every non-compete.

Wage Payment Law (Requirements)

- Virginia Code § 40.1-29(A)
 - Refresher: Employers must pay salaried employees at least once per month, and hourly employees at least twice per month.
- Virginia Code § 40.1-29(C)
 - Prohibits employer from making unauthorized deductions from employee's wages.
 - Certain deductions permitted (e.g., insurance premiums, loan repayments, tools and uniform purchases, etc.)
 - 2019 Legislation - Employers must provide written paystubs showing:
 - Number of hours worked
 - Rate of pay
 - Gross wages earned
 - Amount and purpose of any deductions.
 - Should contain sufficient information to show how gross and net pay were calculated.

Wage Payment Laws (Private Right of Action)

- Prior to July 1, 2020, employees who were allegedly denied wages were required to file an administrative claim with DOLI, which the Commissioner could choose to investigate or not.
- Now, employees have a **private right of action**.
 - Applies “without regard to any exhaustion of alternative administrative remedies.”
 - Can be brought individually or as a collective action.
 - 3 year Statute of Limitations
- If successful, may recover:
 - Lost wages
 - Liquidated damages (equal to lost wages)
 - Reasonable attorneys’ fees
 - Prejudgment interest at 8%
 - Treble damages award required if the wage violation was “knowing.”

PRACTICE POINT: WHAT ARE WE SEEING- GENERAL DISTRICT COURT CLAIMS

Wage Payment Laws (Expanded Investigatory Authority for DOLI)

- DOLI has expanded authority to investigate wage theft complaints.
- If, during course of investigation, obtains information that creates “a reasonable belief” that other employees have not been paid wages, DOLI can expand investigation.
- If violation found, DOLI can institute proceedings on behalf of any employee.
- DOLI does not need employee's consent.

Virginia's Pay Transparency Law

- Effective July 1, 2020
- *“No employer shall discharge from employment or take other retaliatory action against an employee because the employee (i) inquired about or discussed with, or disclosed to, another employee any information about either the employee's own wages or other compensation or about any other employee's wages or other compensation or (ii) filed a complaint with the Department [of Labor and Industry] alleging a violation of this section.”*

New Pay Transparency Law (Exclusions)

Note that it Excludes:



- Employees who have access to such information as part of their essential job functions.
- **Unless** that disclosure is:
 - in response to a formal complaint or charge;
 - in furtherance of an investigation, proceeding, hearing, or action, including an investigation by the employer; or
 - consistent with a legal duty to furnish information.

In these scenarios, the prohibition against retaliation applies.



THANK YOU
FOR JOINING
US!

Feel free to Reach out:

COWANPERRY_{PC}

jcowan@cowanperry.com

540.443.2860

//////
QUESTIONS OR IBUPROFEN?