

SUBCOMMITTEE: SUBCOMMITTEE #1

1 HOUSE BILL NO. 123
 2 AMENDMENT IN THE NATURE OF A SUBSTITUTE
 3 (Proposed by the House Committee on Labor and Commerce
 4 on _____)
 5 (Patron Prior to Substitute--Delegate Carroll Foy)

6 A BILL to amend and reenact § 40.1-29 of the Code of Virginia and to amend the Code of Virginia by
 7 adding a section numbered 11-4.6, relating to nonpayment of wages; construction contracts; joint
 8 and several liability of general contractor and subcontractor for payment of wages to
 9 subcontractor's employees; cause of action; penalties.

10 **Be it enacted by the General Assembly of Virginia:**

11 **1. That § 40.1-29 of the Code of Virginia is amended and reenacted and that the Code of Virginia is**
 12 **amended by adding a section numbered 11-4.6 as follows:**

13 **§ 11-4.6. Liability of contractor for wages of subcontractor's employees.**

14 A. As used in this section, unless the context requires a different meaning:

15 "Construction contract" means a contract between a general contractor and a subcontractor relating
 16 to the construction, alteration, repair, or maintenance of a building, structure, or appurtenance thereto,
 17 including moving, demolition, and excavation connected therewith, or any provision contained in any
 18 contract relating to the construction of projects other than buildings.

19 "General contractor" and "subcontractor" have the meanings ascribed thereto in § 43-1.

20 B. Any construction contract entered into on or after July 1, 2018, shall be deemed to include a
 21 provision under which the general contractor and the subcontractor at any tier are jointly and severally
 22 liable to pay any subcontractor's employees at any tier the greater of (i) all wages due to a subcontractor's
 23 employees at such rate and upon such terms as shall be provided in the employment agreement between
 24 the subcontractor and its employees or (ii) the amount of wages that the subcontractor is required to pay
 25 to its employees under the provisions of applicable law, including the provisions of the Virginia Minimum
 26 Wage Act (§ 40.1-28.8 et seq.) and the Fair Labor Standards Act (29 U.S.C. § 201 et seq.).

27 C. A general contractor shall be deemed to be the employer of a subcontractor's employees at any
28 tier for purposes of § 40.1-29. If the wages due to the subcontractor's employees under the terms of the
29 employment agreement between a subcontractor and its employees are not paid, the general contractor
30 shall be subject to all penalties, criminal and civil, to which an employer that fails or refuses to pay wages
31 is subject under § 40.1-29. Any liability of a general contractor pursuant to § 40.1-29 shall be joint and
32 several with the subcontractor that failed or refused to pay the wages to its employees.

33 D. Except as otherwise provided in a contract between the general contractor and the subcontractor,
34 the subcontractor shall indemnify the general contractor for any wages, damages, interest, penalties, or
35 attorney fees owed as a result of the subcontractor's failure to pay wages to the subcontractor's employees
36 as provided in subsection B, unless the subcontractor's failure to pay the wages was due to the general
37 contractor's failure to pay moneys due to the subcontractor in accordance with the terms of their
38 construction contract.

39 E. Lack of privity between the general contractor and the employees of the subcontractor shall be
40 no defense in an action against the general contractor arising from nonpayment of wages to the
41 subcontractor's employees.

42 **§ 40.1-29. Time and medium of payment; withholding wages; written statement of earnings;**
43 **agreement for forfeiture of wages; proceedings to enforce compliance; penalties.**

44 A.-1. All employers operating a business shall establish regular pay periods and rates of pay for
45 employees except executive personnel. All such employers shall pay salaried employees at least once each
46 month and employees paid on an hourly rate at least once every two weeks or twice in each month, except
47 that (i) a student who is currently enrolled in a work-study program or its equivalent administered by any
48 secondary school, institution of higher education, or trade school, and (ii) employees whose weekly wages
49 total more than 150 percent of the average weekly wage of the Commonwealth as defined in § 65.2-500,
50 upon agreement by each affected employee, may be paid once each month if the institution or employer
51 so chooses. Upon termination of employment an employee shall be paid all wages or salaries due him for
52 work performed prior thereto; such payment shall be made on or before the date on which he would have
53 been paid for such work had his employment not been terminated.

54 ~~2. Any such employer who knowingly fails to make payment of wages in accordance with this~~
55 ~~section shall be subject to a civil penalty not to exceed \$1,000 for each violation. The Commissioner shall~~
56 ~~notify any employer who he alleges has violated any provision of this section by certified mail. Such~~
57 ~~notice shall contain a description of the alleged violation. Within 15 days of receipt of notice of the alleged~~
58 ~~violation, the employer may request an informal conference regarding such violation with the~~
59 ~~Commissioner. In determining the amount of any penalty to be imposed, the Commissioner shall consider~~
60 ~~the size of the business of the employer charged and the gravity of the violation. The decision of the~~
61 ~~Commissioner shall be final.~~

62 B. Payment of wages or salaries shall be (i) in lawful money of the United States, (ii) by check
63 payable at face value upon demand in lawful money of the United States, (iii) by electronic automated
64 fund transfer in lawful money of the United States into an account in the name of the employee at a
65 financial institution designated by the employee, or (iv) by credit to a prepaid debit card or card account
66 from which the employee is able to withdraw or transfer funds with full written disclosure by the employer
67 of any applicable fees and affirmative consent thereto by the employee. However, an employer that elects
68 not to pay wages or salaries in accordance with clause (i) or (ii) to an employee who is hired after January
69 1, 2010, shall be permitted to pay wages or salaries by credit to a prepaid debit card or card account in
70 accordance with clause (iv), even though such employee has not affirmatively consented thereto, if the
71 employee fails to designate an account at a financial institution in accordance with clause (iii) and the
72 employer arranges for such card or card account to be issued through a network system through which the
73 employee shall have the ability to make at least one free withdrawal or transfer per pay period, which
74 withdrawal may be for any sum in such card or card account as the employee may elect, using such card
75 or card account at financial institutions participating in such network system.

76 C. No employer shall withhold any part of the wages or salaries of any employee except for payroll,
77 wage₂ or withholding taxes or in accordance with law, without the written and signed authorization of the
78 employee. On each regular pay date, each employer other than an employer engaged in agricultural
79 employment including agribusiness and forestry shall provide to each employee a written statement, by a
80 paystub or online accounting, that shows the name and address of the employer, the number of hours

81 worked during the pay period, the rate of pay, the gross wages earned by the employee during the pay
82 period, and the amount and purpose of any deductions therefrom. An employer engaged in agricultural
83 employment including agribusiness and forestry, upon request of its employee, shall furnish the employee
84 a written statement of the gross wages earned by the employee during any pay period and the amount and
85 purpose of any deductions therefrom.

86 D. No employer shall require any employee, except executive personnel, to sign any contract or
87 agreement which provides for the forfeiture of the employee's wages for time worked as a condition of
88 employment or the continuance therein, except as otherwise provided by law.

89 E. An employer who willfully and with intent to defraud fails or refuses to pay wages in accordance
90 with this section, unless the failure to pay was because of a bona fide dispute between the employer and
91 its employee:

92 1. To an employee or employees is guilty of a Class 1 misdemeanor if the value of the wages
93 earned and not paid by the employer is less than \$10,000; and

94 2. To an employee or employees is guilty of a Class 6 felony (i) if the value of the wages earned
95 and not paid is \$10,000 or more or (ii) regardless of the value of the wages earned and not paid, if the
96 conviction is a second or subsequent conviction under this section.

97 For purposes of this section, the determination as to the "value of the wages earned" shall be made
98 by combining all wages the employer failed or refused to pay pursuant to this section.

99 F. The Commissioner may require a written complaint of the violation of this section and, with the
100 written and signed consent of an employee, may institute proceedings on behalf of an employee to enforce
101 compliance with this section, and to collect any moneys unlawfully withheld from such employee which
102 shall be paid to the employee entitled thereto. In addition, following the issuance of a final order by the
103 Commissioner or a court, the Commissioner may engage private counsel, approved by the Attorney
104 General, to collect any moneys owed to the employee or the Commonwealth. Upon entry of a final order
105 of the Commissioner, or upon entry of a judgment, against the employer, the Commissioner or the court
106 shall assess ~~attorney's~~ attorney fees of one-third of the amount set forth in the final order or judgment.

107 G. In addition to being subject to any other penalty provided by the provisions of this section, any
108 employer who fails to make payment of wages in accordance with subsection A shall be liable for the
109 payment of all wages due, and an additional equal amount as liquidated damages, plus interest at an annual
110 rate of eight percent accruing from the date the wages were due.

111 H. Any employer who knowingly fails to make payment of wages in accordance with subsection
112 A shall be subject to a civil penalty not to exceed \$1,000 for each violation. The Commissioner shall notify
113 any employer that he alleges has violated any provision of this section by certified mail. Such notice shall
114 contain a description of the alleged violation. Within 15 days of receipt of notice of the alleged violation,
115 the employer may request an informal conference regarding such violation with the Commissioner. In
116 determining the amount of any penalty to be imposed, the Commissioner shall consider the size of the
117 business of the employer charged and the gravity of the violation. The decision of the Commissioner shall
118 be final. Civil penalties owed under this section shall be paid to the Commissioner for deposit into the
119 general fund of the State Treasurer. The Commissioner shall prescribe procedures for the payment of
120 proposed assessments of penalties ~~which that~~ are not contested by employers. Such procedures shall
121 include provisions for an employer to consent to abatement of the alleged violation and pay a proposed
122 penalty or a negotiated sum in lieu of such penalty without admission of any civil liability arising from
123 such alleged violation.

124 I. Final orders of the Commissioner, the general district courts, or the circuit courts may be
125 recorded, enforced, and satisfied as orders or decrees of a circuit court upon certification of such orders
126 by the Commissioner or the court as appropriate.

127 J. In addition to any civil or criminal penalty provided by this section, and without regard to any
128 exhaustion of alternative administrative remedies provided for in this section, if an employer fails to pay
129 wages to an employee in accordance with this section, the employee may bring an action, individually,
130 jointly, with other aggrieved employees, or on behalf of similarly situated employees as a collective action
131 consistent with the collective action procedures of the Fair Labor Standards Act, 29 U.S.C. § 216(b),
132 against the employer in a court of competent jurisdiction to recover payment of the wages, and the court
133 shall award the wages owed, an additional equal amount as liquidated damages, and reasonable attorney

134 fees and costs. If the court finds that the employer knowingly failed to pay wages to an employee in
135 accordance with this section, the court shall award the employee an amount equal to triple the amount of
136 wages due and reasonable attorney fees and costs.

137 K. As used in this section, a person acts "knowingly" if the person, with respect to information, (i)
138 has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the
139 information; or (iii) acts in reckless disregard of the truth or falsity of the information. Establishing that a
140 person acted knowingly shall not require proof of specific intent to defraud.

141 L. An action under this section shall be commenced within three years after the cause of action
142 accrued. The period for filing is tolled upon the filing of an administrative action under subsection F until
143 the employee has been informed that the action has been resolved or until the employee has withdrawn
144 the complaint, whichever is sooner.

145 **2. That the provisions of this act may result in a net increase in periods of imprisonment or**
146 **commitment. Pursuant to § 30-19.1:4 of the Code of Virginia, the estimated amount of the necessary**
147 **appropriation cannot be determined for periods of imprisonment in state adult correctional**
148 **facilities; therefore, Chapter 854 of the Acts of Assembly of 2019 requires the Virginia Criminal**
149 **Sentencing Commission to assign a minimum fiscal impact of \$50,000. Pursuant to § 30-19.1:4 of**
150 **the Code of Virginia, the estimated amount of the necessary appropriation cannot be determined**
151 **for periods of commitment to the custody of the Department of Juvenile Justice.**

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