



## Virginia Wage Theft Law Brings New Duties and Steep Penalties for General Contractors

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On April 12, 2020, Governor Northam signed a series of bills related to the non-payment of wages. New changes to Virginia's wage payment laws significantly increase potential penalties against employers who fail to properly pay employees wages, and the laws also stack additional burdens on general contractors to ensure that their subcontractors are adhering to the law. This alert highlights several critical changes that Virginia employers – particularly those who work with subcontractors – need to know and be prepared for.

**Effective July 1, 2020**, the Virginia Wage Theft Law establishes the following:

### Grants Employees a Private Right of Action Against their Employers

HB 123 and SB 838 – better known as the Wage Theft Law – creates a private right of action, a pathway for employees to sue their employers directly over wage disputes, a first for the Commonwealth. Previously, employees could not sue their employers under state law and instead had to file administrative claims with the Virginia Department of Labor and Industries (DOLI). Now, an employee may file suit individually, jointly with other aggrieved employees or on behalf of similarly situated employees as a “collective action” in Virginia state court. Prior to this law, no process existed for employees to join together in collective actions to bring this type of case in state court.

### Holds General Contractors Liable for Subcontractors' Violations

The Wage Theft Law imposes additional obligations on a general contractor (GC) who either knew or should have known that its subcontractor was not paying employees properly. The Wage Theft Law makes it clear that it holds the GC to be an “employer” of its subcontractors' employees for purposes of ensuring proper pay practices. In turn, employees under the law can sue GCs and hold them jointly and severally liable for the subcontractor's violations. Related legislation also expands the Department of Labor and Industry's right to investigate wage complaints and to hold joint employers jointly and severally liable for suspected wage violations committed by the other entity.

General contractors should note several important exceptions to this new rule:

- Only applies to contracts entered into after July 1, 2020
- Does not apply unless the employee can show that the GC knew or should have known that a

subcontractor was not paying employees properly

- Does not apply to construction contracts related to single-family residential projects (only multi-family residential and commercial construction contracts)
- Does not apply to construction contracts valued at \$500,000 or less
- Only applies to employees of a “subcontractor” which is defined as a party in direct contract with the general contractor; general contractors should not be responsible for employees of anyone they haven’t contracted with<sup>[1]</sup>

### Imposes Harsh Punishments on Employers for Non-Compliance

Given the web of complex federal and state laws that employers must adhere to, it is easy to make mistakes in payments to employees. Previously, Virginia law limited the amount an employee could recover to the sum of all wages due plus pre-judgment interest. The Wage Theft Law expands the remedies available by permitting the recovery of liquidated damages in an amount equal to the wages owed and reasonable attorney fees and costs (i.e. double damages). Other changes to the law prohibit employers from retaliating against those employees who report wage violations internally or who choose to file wage theft claims in state court.

The new Wage Theft Law imposes a civil penalty of up to \$1,000 per violation, based on the employer’s size and the severity of the violation at issue. Under the new law, employers are strictly liable for payment mistakes. As it did before, the Wage Theft Law also provides for criminal penalties for “willful” violations under similar standards to “knowing,” as defined below. The severity of the potential criminal penalty also varies – if the amount of wages owed is less than \$10,000, employers can be found guilty of a misdemeanor. If the amount owed is more than \$10,000 or if the employer is a repeat offender, the law can charge the employer with a felony subject to a term of imprisonment.

Furthermore, if a court finds that an employer *knowingly* failed to pay wages to the employee, the Wage Theft Law grants employees up to three times the amount of wages owed (“treble” damages), plus reasonable attorney fees, at a pre-judgment interest rate of 8%. Under the law, “knowingly” means having actual knowledge of wage theft, as well as showing deliberate indifference or reckless disregard for the law’s requirements, and so employers cannot ignore these changes and hope to escape liability.

### Considerations for Protection of General Contractors

Prior to entering into subcontracts, general contractors should take greater care to vet the financial strength and record keeping of each subcontractor. When entering into subcontracts, general contractors should not rely solely upon the statutory indemnification provision in the new law because financially distressed subcontractors will not have the wherewithal to indemnify general contractors. Moreover, General Contractors should proactively implement measures to protect against claims that they should have known that a subcontractor was not paying employees properly. General contractors should consider adding some or all of the following additional requirements to their subcontracts:

- Requiring the subcontractor to issue a payment and performance bond on the project;
- Adding a more stringent contractual indemnification provision and, in certain cases, should consider getting personal guarantees from the subcontractor’s officers and directors;
- Requiring subcontractors to certify and/or provide documentation or records showing that they’ve paid their employees;
- Requiring subcontractors to retain project and employment records; and/or
- Requiring subcontractors to provide periodic financial records and reporting to demonstrate their financial strength.

However, general contractors should take care not to step into the role of the employer when it comes to dealing with subcontractors' workers (i.e. not attempt to control the terms and conditions of the subcontractors' workers' employment). General contractors may also want to talk to their insurance brokers to make sure that they have policies in place to protect against failing or defaulting subcontractors.

On a related note, general contractors in Virginia should also be aware of legislative changes concerning the misclassification of employees as independent contractors<sup>[2]</sup> Although not expressly provided for in the language of this new Wage Theft legislation, the laws prohibiting misclassification of employees could have an impact on general contractors via the Wage Theft law; therefore, general contractors should also take steps to ensure subcontractors' compliance with regard to the proper classification of workers.

### Conclusion

The new Wage Theft Law signals a major shift in wage and hour litigation in Virginia, and the changes to wage payment laws will almost certainly bring a wave of single-plaintiff and collective actions in state courts. While wage claims have frequently been litigated by individual plaintiffs throughout D.C. and Maryland, such claims are only just now an option for Virginia employees. Like it or not, the availability of triple damages under the law for prevailing employees will incentivize plaintiffs' lawyers to unearth new claims in the Commonwealth, and, as such, employers must take action to avoid costly litigation. As always, the best course of action involves consulting a lawyer who is knowledgeable in construction or employment litigation who can help employers identify potential risks in order to protect them and ensure compliance.

<sup>[1]</sup> The new version of Va. Code § 11-4.6(A) says “General contractor’ and ‘subcontractor’ have the same meanings ascribed thereto in § 43-1.” Va. Code § 43-1 defines “subcontractor” as “all such contractors, laborers, mechanics, and persons furnishing materials, who do not contract with the owner but with the general contractor.” The mechanic’s lien statutes use the term “sub-subcontractor” for lower tiers who contract with a “subcontractor.” See Va. Code §§ 43-9 & 43-10.

<sup>[2]</sup> Also effective July 1, 2020, § 54.1102(B) of the Code of Virginia authorizes the Board of Contractors to (i) require a contractor to appropriately classify all workers as employees or independent contractors, as provided by law and (ii) provide that any contractor who is found to have intentionally misclassified any worker is subject to sanction by the Board.

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