



Compensation Management News

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Virginia Cracks Down on Worker Misclassification

A recent study revealed that more than 200,000 Virginia workers have been misclassified as independent contractors, and this alone has cost the Commonwealth approximately \$28 million in tax revenues each year. To curb the practice and to generate revenue for the state, in 2020 the Virginia legislature enacted a beefed-up Wage Payment Act, which took effect last year and has some real teeth.

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Virginia's New Law

Under the new law, employers that improperly classify their employees as independent contractors are subject to criminal prosecution and a fine of up to \$1,000 per misclassified worker for a first offense. Maximum fines increase to \$2,500 for a second offense and up to \$5,000 for a third or subsequent offense.

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Employers violating the law a second time also may be prohibited from being awarded public contracts for up to one year and up to two years for a third offense. The legislation further requires the Virginia Department of Taxation to assist with enforcement by sharing information with Virginia's attorney general.

Criminal Actions to Enforce the Law

To implement the new law, the attorney general's office established a Worker's Protection Unit, which took its first action last fall by bringing a criminal proceeding against building drywall subcontractors working on major construction projects in Virginia, including the building of the new Virginia General Assembly Building. The charges were filed against several drywall companies, including GTO Drywall and Richmond Drywall Installers, for misclassifying workers as independent contractors rather than as employees, allegedly in an effort to avoid paying taxes. Each company was charged with 10 counts of felony embezzlement. In December 2021, Richmond Drywall pleaded guilty to five counts of felony embezzlement with the other five counts being dropped.

Although last November's election resulted in a new Republican governor, lieutenant governor, and attorney general being elected, the change of parties controlling Virginia's executive branch has not lessened the Commonwealth's interest in vigorously enforcing the new misclassification law.

In February 2022, under the new Republican administration, GTO Drywall pleaded guilty to five felony counts, with the other five counts similarly dropped. Both GTO and Richmond Drywall were fined \$2,500 for each guilty plea, plus court costs and restitution to the Virginia Department of Taxation for the unpaid taxes.

Civil Actions by Workers

Importantly, the criminal prosecutions aren't the only means of enforcing Virginia's Wage Payment Act. Workers affected by their misclassification also may file a civil action for lost wages as well as for penalties, including treble damages.

And that's what occurred with the drywall companies that engaged in misclassification. The workers filed a class action in federal court against some of the same drywall subcontractors, claiming they were improperly classified as independent contractors instead of as employees. The lawsuit was filed under the Virginia statute as well as the federal Fair Labor Standards Act (FLSA). The case is still ongoing.

Additionally, a second group of laborers working for another subcontractor filed almost identical claims in Richmond federal court under both Virginia and federal law. The workers claimed, among other things, that the subcontractor violated Virginia law by failing to pay them overtime and seeking up to three times the amount of unpaid overtime wages.

At the beginning of this year, the case settled, with the companies agreeing to pay twice the amount of underpaid wages as calculated by the workers' counsel, plus an additional

\$400 for each worker. In addition, the companies agreed to pay the workers' attorneys \$86,000.

Making the Right Decision

As evidenced by the criminal and civil proceedings, the fallout for misclassifying an employee as an independent contractor can be substantial. Not only must you be concerned about the federal laws, but Virginia law also prohibits such practices and carries hefty penalties for violations. Wage and tax theft statutes are now in place in Virginia, and they are designed to compensate victims and incentivize employers' compliance with lawful wage payment policies.

Determining whether a worker is an employee or an independent contractor isn't always clear cut. Accordingly, Virginia employers are well advised to consult with experienced legal counsel in deciding how to properly classify workers as either employees or independent contractors. A wrong decision can result in criminal and civil liability—something no employer wants.

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