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**HOUSE BILL NO. 198**

Offered January 9, 2008

Prefiled December 27, 2007

*A BILL to amend and reenact §§ 2.2-3705.3, 2.2-3902, and 15.2-1604 of the Code of Virginia; to amend the Code of Virginia by adding in Chapter 5 of Title 2.2 an article numbered 4, consisting of sections numbered 2.2-519 through 2.2-525; and to repeal Article 12 (§§ 2.2-2632 through 2.2-2639) of Chapter 26 of Title 2.2 of the Code of Virginia, relating to the Department of Law; establishing the Division of Human Rights; elimination of the Human Rights Council; penalties.*

Patron—Marshall, R.G.

Referred to Committee on Rules

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

**1. That §§ 2.2-3705.3, 2.2-3902, and 15.2-1604 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Chapter 5 of Title 2.2 an article numbered 4, consisting of sections numbered 2.2-519 through 2.2-525, as follows:**

*Article 4.**Division of Human Rights.**§ 2.2-519. Human Rights Division.*

*A. There is created in the Department of Law a Division of Human Rights that shall provide all legal services and advice as may be necessary to carry out the provisions of this article.*

*The Attorney General may appoint and fix the salaries of such attorneys and employees as may be necessary to carry out the functions of the Division, within the amounts appropriated to the Division, and may supplement such funds from appropriations made to his office for the provision of legal services to the Commonwealth.*

*B. The Division shall:*

*1. Accept and investigate complaints of alleged unlawful discriminatory practices or alleged unfounded charges of unlawful discrimination filed in writing within 180 days of the alleged discriminatory events;*

*2. Attempt to conciliate any complaint of unlawful discrimination under this article;*

*3. In the event conciliation fails, conduct a hearing or other appropriate action, including the appointment of qualified hearing officers from the list of hearing officers maintained by the Executive Secretary of the Supreme Court of Virginia; and*

*4. Carry out any other duty assigned by this article.*

*§ 2.2-520. Powers and duties of Division.*

*In addition to the other powers and duties prescribed in this article, the Division shall have the following powers to:*

*1. Select and fix the compensation of such technical advisors as it deems necessary;*

*2. Promote creation of local commissions to aid in effectuating the policies of this article and to enter into cooperative work-sharing or other agreements with federal agencies or local commissions, including the deferral of complaints of discrimination to federal agencies or local commissions;*

*3. Receive, investigate, seek to conciliate, refer to another agency, hold hearings pursuant to the Virginia Administrative Process Act (§ 2.2-4000 et seq.), and make findings and recommendations upon complaints alleging unlawful discriminatory practices;*

*4. Make studies and appoint advisory councils to effectuate the purposes and policies of this article and to make the results thereof available to the public;*

*5. Accept public grants or private gifts, bequests, or other payments, as appropriate;*

*6. Furnish technical assistance upon request of persons subject to this article to further comply with the article or an order issued thereunder;*

*7. Inquire into incidents that may constitute unlawful acts of discrimination or unfounded charges of unlawful discrimination under state or federal law, and to take action designed to prevent such acts; and*

*8. Seek prevention of or relief from an alleged unlawful discriminatory practice, including the power to issue subpoenas, award damages, and grant injunctive relief.*

*§ 2.2-521. Procedure for issuance of subpoena duces tecum.*

*Whenever the Division has reasonable cause to believe that any person has engaged in or is engaging in any unlawful discriminatory practice, after a good faith effort to obtain the data and information necessary to determine whether a violation has occurred, and has been unable to obtain*

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59 such information, it may apply to the judge of the circuit court of the jurisdiction in which the  
60 respondent resides or is doing business for a subpoena duces tecum against any person refusing to  
61 produce such data and information. The judge of the court, upon good cause shown, may cause the  
62 subpoena to be issued. Any person failing to comply with such subpoena shall be subject to punishment  
63 for contempt by the court issuing the subpoena. For purposes of this section "person" includes any  
64 individual, partnership, corporation, association, legal representative, mutual company, joint stock  
65 company, trust, unincorporated organization, employee, employer, employment agency, labor  
66 organization, joint labor-management committee, or an agent thereof.

67 § 2.2-522. Filing with Division deemed filing with other state agencies.

68 Filing of a written complaint with the Division shall be deemed filing with any state agency for the  
69 purpose of complying with any time limitation on the filing of a complaint, provided the time limit for  
70 filing with the other agency has not expired. The time limit for filing with other agencies shall be tolled  
71 while the Division is either investigating the complaint or making a decision to refer it. Complaints  
72 under this article shall be filed with the Division within 180 days of the alleged discriminatory event.

73 § 2.2-523. Confidentiality of information; penalty.

74 A. It shall be unlawful for any officer or employee of the Department of Law to make public, prior  
75 to a public hearing pursuant to § 2.2-520, investigative notes and other correspondence and information  
76 furnished to the Division in confidence with respect to an investigation or conciliation process involving  
77 an alleged unlawful discriminatory practice.

78 B. Nothing in this section, however, shall prohibit the distribution of information taken from inactive  
79 reports in a form that does not reveal the identity of the parties involved or other persons supplying  
80 information.

81 C. Any person convicted of a violation of this section shall be guilty of a Class 3 misdemeanor.

82 § 2.2-524. Powers of local commissions.

83 A local human rights or human relations commission established prior to July 1, 2008, in addition to  
84 the powers granted under this article, may exercise any such additional powers as may have been  
85 granted heretofore to that commission pursuant to applicable provisions of §§ 15.2-725, 15.2-853, and  
86 15.2-854 or municipal charter provisions.

87 § 2.2-525. Causes of action not created.

88 A. Nothing in this article creates, nor shall it be construed to create, an independent or private  
89 cause of action to enforce its provisions, except as specifically provided in subsections B and C.

90 B. No employer employing more than five but less than 15 persons shall discharge any such  
91 employee on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related  
92 medical conditions, including lactation, or of age if the employee is 40 years old or older. For the  
93 purposes of this section, "lactation" means a condition that may result in the feeding of a child directly  
94 from the breast or the expressing of milk from the breast.

95 C. The employee may bring an action in a general district or circuit court having jurisdiction over  
96 the employer who allegedly discharged the employee in violation of this section. Any such action shall  
97 be brought within 180 days from the date of the discharge. The court may award up to 12 months' back  
98 pay with interest at the judgment rate as provided in § 6.1-330.54. However, if the court finds that  
99 either party engaged in tactics to delay resolution of the complaint, it may (i) diminish the award or (ii)  
100 award back pay to the date of judgment without regard to the 12-month limitation.

101 In any case where the employee prevails, the court shall award attorney fees from the amount  
102 recovered, not to exceed 25 percent of the back pay awarded. The court shall not award other damages,  
103 compensatory or punitive, nor shall it order reinstatement of the employee.

104 D. Causes of action based upon the public policies reflected in this article shall be exclusively  
105 limited to those actions, procedures, and remedies, if any, afforded by applicable federal or state civil  
106 rights statutes or local ordinances. Nothing in this section or § 2.2-3900 shall be deemed to alter,  
107 supersede, or otherwise modify the authority of the Division or of any local human rights or human  
108 relations commissions established pursuant to § 15.2-965 or 15.2-853 or subject to the provisions of  
109 § 2.2-524.

110 § 2.2-3705.3. Exclusions to application of chapter; records relating to administrative investigations.

111 The following records are excluded from the provisions of this chapter but may be disclosed by the  
112 custodian in his discretion, except where such disclosure is prohibited by law:

113 1. Confidential records of all investigations of applications for licenses and permits, and of all  
114 licensees and permittees, made by or submitted to the Alcoholic Beverage Control Board, the State  
115 Lottery Department, the Virginia Racing Commission, the Department of Charitable Gaming, or the  
116 Private Security Services Unit of the Department of Criminal Justice Services.

117 2. Records of active investigations being conducted by the Department of Health Professions or by  
118 any health regulatory board in the Commonwealth.

119 3. Investigator notes, and other correspondence and information, furnished in confidence with respect  
120 to an active investigation of individual employment discrimination complaints made to the Department

of Human Resource Management or to such personnel of any local public body, including local school boards as are responsible for conducting such investigations in confidence. However, nothing in this section shall prohibit the disclosure of information taken from inactive reports in a form that does not reveal the identity of charging parties, persons supplying the information or other individuals involved in the investigation.

4. Records of active investigations being conducted by the Department of Medical Assistance Services pursuant to Chapter 10 (§ 32.1-323 et seq.) of Title 32.1.

5. Investigative notes and other correspondence and information furnished in confidence with respect to an investigation or conciliation process involving an alleged unlawful discriminatory practice under the Virginia Human Rights Act (§ 2.2-3900 et seq.) or under any local ordinance adopted in accordance with the authority specified in § 2.2-2638 2.2-524, or adopted pursuant to § 15.2-965, or adopted prior to July 1, 1987, in accordance with applicable law, relating to local human rights or human relations commissions. However, nothing in this section shall prohibit the distribution of information taken from inactive reports in a form that does not reveal the identity of the parties involved or other persons supplying information.

6. Records of studies and investigations by the State Lottery Department of (i) lottery agents, (ii) lottery vendors, (iii) lottery crimes under §§ 58.1-4014 through 58.1-4018, (iv) defects in the law or regulations that cause abuses in the administration and operation of the lottery and any evasions of such provisions, or (v) the use of the lottery as a subterfuge for organized crime and illegal gambling where such official records have not been publicly released, published or copyrighted. All studies and investigations referred to under clauses (iii), (iv) and (v) shall be open to inspection and copying upon completion of the study or investigation.

7. Investigative notes, correspondence and information furnished in confidence, and records otherwise exempted by this chapter or any Virginia statute, provided to or produced by or for the (i) Auditor of Public Accounts; (ii) Joint Legislative Audit and Review Commission; (iii) Department of the State Internal Auditor with respect to an investigation initiated through the State Employee Fraud, Waste and Abuse Hotline; (iv) committee or the auditor with respect to an investigation or audit conducted pursuant to § 15.2-825; or (v) auditors, appointed by the local governing body of any county, city or town or a school board, who by charter, ordinance, or statute have responsibility for conducting an investigation of any officer, department or program of such body. Records of completed investigations shall be disclosed in a form that does not reveal the identity of the complainants or persons supplying information to investigators. Unless disclosure is prohibited by this section, the records disclosed shall include, but not be limited to, the agency involved, the identity of the person who is the subject of the complaint, the nature of the complaint, and the actions taken to resolve the complaint. If an investigation does not lead to corrective action, the identity of the person who is the subject of the complaint may be released only with the consent of the subject person. Local governing bodies shall adopt guidelines to govern the disclosure required by this subdivision.

8. Records of the Virginia Office for Protection and Advocacy consisting of documentary evidence received or maintained by the Office or its agents in connection with specific complaints or investigations, and records of communications between employees and agents of the Office and its clients or prospective clients concerning specific complaints, investigations or cases. Upon the conclusion of an investigation of a complaint, this exclusion shall no longer apply, but the Office may not at any time release the identity of any complainant or person with mental illness, mental retardation, developmental disabilities or other disability, unless (i) such complainant or person or his legal representative consents in writing to such identification or (ii) such identification is required by court order.

9. Information furnished in confidence to the Department of Employment Dispute Resolution with respect to an investigation, consultation, or mediation under Chapter 10 (§ 2.2-1000 et seq.) of this title, and memoranda, correspondence and other records resulting from any such investigation, consultation or mediation. However, nothing in this section shall prohibit the distribution of information taken from inactive reports in a form that does not reveal the identity of the parties involved or other persons supplying information.

10. The names, addresses and telephone numbers of complainants furnished in confidence with respect to an investigation of individual zoning enforcement complaints made to a local governing body.

11. Records of active investigations being conducted by the Department of Criminal Justice Services pursuant to Article 4 (§ 9.1-138 et seq.), Article 4.1 (§ 9.1-150.1 et seq.), Article 11 (§ 9.1-185 et seq.) and Article 12 (§ 9.1-186 et seq.) of Chapter 1 of Title 9.1.

12. Records furnished to or prepared by the Board of Education pursuant to subsection D of § 22.1-253.13:3 in connection with the review or investigation of any alleged breach in security, unauthorized alteration, or improper administration of tests by local school board employees responsible for the distribution or administration of the tests. However, this section shall not prohibit the disclosure

182 of records to (i) a local school board or division superintendent for the purpose of permitting such board  
183 or superintendent to consider or to take personnel action with regard to an employee or (ii) any  
184 requester, after the conclusion of a review or investigation, in a form that (a) does not reveal the identity  
185 of any person making a complaint or supplying information to the Board on a confidential basis and (b)  
186 does not compromise the security of any test mandated by the Board.

187 § 2.2-3902. Construction of chapter; other programs to aid persons with disabilities, minors and the  
188 elderly.

189 The provisions of this chapter shall be construed liberally for the accomplishment of its policies.  
190 Nothing contained in this chapter shall be deemed to repeal, supersede or expand upon any of the  
191 provisions of any other state or federal law relating to discrimination because of race, color, religion,  
192 national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability.

193 Nothing in this chapter shall prohibit or alter any program, service, facility, school, or privilege that  
194 is afforded, oriented or restricted to a person because of disability or age from continuing to habilitate,  
195 rehabilitate, or accommodate that person.

196 In addition, nothing in this chapter shall be construed to affect any governmental program, law or  
197 activity differentiating between persons on the basis of age over the age of eighteen years (i) where the  
198 differentiation is reasonably necessary to normal operation or the activity is based upon reasonable  
199 factors other than age or (ii) where the program, law or activity constitutes a legitimate exercise of  
200 powers of the Commonwealth for the general health, safety and welfare of the population at large.

201 Complaints filed with the ~~Human Rights Council~~ (the "Council") *Division of Human Rights (the*  
202 *Division)* in accordance with ~~§ 2.2-2634~~ 2.2-520 alleging unlawful discriminatory practice under a  
203 Virginia statute that is enforced by a Virginia agency shall be referred to that agency. The ~~Council~~  
204 *Division* may investigate complaints alleging an unlawful discriminatory practice under a federal statute  
205 or regulation and attempt to resolve it through conciliation. Unsolved complaints shall thereafter be  
206 referred to the federal agency with jurisdiction over the complaint. Upon such referral, the ~~Council~~  
207 *Division* shall have no further jurisdiction over the complaint. The ~~Council~~ *Division* shall have no  
208 jurisdiction over any complaint filed under a local ordinance adopted pursuant to § 15.2-965.

209 § 15.2-1604. Appointment of deputies and employment of employees; discriminatory practices by  
210 certain officers; civil penalty.

211 A. It shall be an unlawful employment practice for a constitutional officer to:

212 1. ~~To fail~~ Fail or refuse to appoint or hire or to discharge any individual, or otherwise to  
213 discriminate against any individual with respect to his compensation, terms, conditions or privileges of  
214 appointment or employment, because of such individual's race, color, religion, sex or national origin; or

215 2. ~~To limit~~ Limit, segregate, or classify his appointees, employees or applicants for appointment or  
216 employment in any way which would deprive or tend to deprive any individual of employment  
217 opportunities or otherwise adversely affect his status as an employee, because of the individual's race,  
218 color, religion, sex or national origin.

219 B. Nothing in this section shall be construed to make it an unlawful employment practice for a  
220 constitutional officer to hire or appoint an individual on the basis of his sex or national origin in those  
221 instances where sex or national origin is a bona fide occupational qualification reasonably necessary to  
222 the normal operation of that particular office. The provisions of this section shall not apply to  
223 policy-making positions, confidential or personal staff positions, or undercover positions.

224 C. With regard to notices and advertisements:

225 1. Every constitutional officer shall, prior to hiring any employee, advertise such employment  
226 position in a newspaper having general circulation or a state or local government job placement service  
227 in such constitutional officer's locality except where the vacancy is to be used (i) as a placement  
228 opportunity for appointees or employees affected by layoff; (ii) as a transfer opportunity or demotion  
229 for an incumbent; (iii) to fill positions that have been advertised within the past 120 days; (iv) to fill  
230 positions to be filled by appointees or employees returning from leave with or without pay; (v) to fill  
231 temporary positions, temporary employees being those employees hired to work on special projects that  
232 have durations of three months or less; or (vi) to fill policy-making positions, confidential or personal  
233 staff positions, or special, sensitive law-enforcement positions normally regarded as undercover work.

234 2. No constitutional officer shall print or publish or cause to be printed or published any notice or  
235 advertisement relating to employment by such constitutional officer indicating any preference, limitation,  
236 specification, or discrimination, based on sex or national origin, except that such notice or advertisement  
237 may indicate a preference, limitation, specification, or discrimination based on sex or national origin  
238 when sex or national origin is a bona fide occupational qualification for employment.

239 D. Complaints regarding violations of subsection A of this section may be made to the ~~Virginia~~  
240 ~~Council on Human Rights~~ *Division of Human Rights of the Department of Law*. The ~~Council~~ *Division*  
241 shall have the authority to exercise its powers as outlined in ~~§ 2.2-2634~~ 2.2-520.

242 E. Any constitutional officer who willfully violates the provisions of subsection C shall be subject to  
243 a civil penalty not to exceed \$2,000.

244 2. That Article 12 (§§ 2.2-2632 through 2.2-2639) of Chapter 26 of Title 2.2 of the Code of Virginia  
245 is repealed.

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