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SENATE BILL NO. 1636

Offered January 9, 2019

Prefiled January 9, 2019

A BILL to amend the Code of Virginia by adding in Chapter 3 of Title 40.1 an article numbered 1.2, consisting of sections numbered 40.1-28.13 through 40.1-28.17, and to repeal § 40.1-28.6 of the Code of Virginia, relating to the Virginia Equal Pay Act; civil penalties.

Patron—Boysko

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Chapter 3 of Title 40.1 an article numbered 1.2, consisting of sections numbered 40.1-28.13 through 40.1-28.17, as follows:

Article 1.2.

Virginia Equal Pay Act.

§ 40.1-28.13. Definitions.

As used in this article, unless the context requires a different meaning:

"Business necessity" means essential to effective job performance.

"Protected class" means a group of persons distinguished by race, color, religion, sex, sexual orientation, gender identity or expression, political affiliation, national origin, marital status, veteran status, disability, or age.

§ 40.1-28.14. Discrimination prohibited; employee right to discuss wages; retaliation prohibited.

A. No employer shall discriminate between employees on the basis of membership in a protected class in the payment of wages or other compensation for substantially similar work, except where the employer demonstrates that:

1 The wage differential is based upon one or more of the following factors:

a. A bona fide seniority system, provided that time spent on leave due to a pregnancy-related condition and protected parental, family, and medical leave shall not reduce seniority;

b. A bona fide merit system;

c. A bona fide system that measures earnings by quantity or quality of production, and the employer demonstrates that the system is fair and is not being used as a pretext for an unlawful wage differential based on sex; or

d. A bona fide factor other than on the basis of membership in a protected class. This factor shall apply only if the employer demonstrates that the factor is not based on or derived from a protected class-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity. This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential;

2. Each factor relied upon is applied reasonably; and

3. The one or more factors relied upon account for the entire wage differential.

B. No employer shall discriminate between employees by providing less favorable employment opportunities on the basis of membership in a protected class by:

1. Assigning or directing the employee into a less favorable career track, if career tracks are offered, or position;

2. Failing to provide information about promotions or advancement in the full range of career tracks offered by the employer; or

3. Limiting or depriving an employee of employment opportunities that would otherwise be available to the employee but for the employee's membership in a protected class.

C. No employer shall limit an employee's right to discuss wages by:

1. Prohibiting an employee from inquiring about, discussing, or disclosing the wages of the employee or another employee;

2. Requiring an employee to sign a waiver or any other document that purports to deny the employee the right to disclose or discuss the employee's wages; or

3. Taking any adverse employment action against an employee for:

a. Inquiring about another employee's wages;

b. Disclosing the employee's own wages;

c. Discussing another employee's wages if those wages have been disclosed voluntarily;

d. Asking the employer to provide a reason for the employee's wages; or

59 e. Aiding or encouraging another employee's exercise of rights under this section.

60 D. No employer shall:

61 1. Rely on the wage or salary history of a prospective employee in determining the compensation for  
62 such individual;

63 2. Seek the wage or salary history of a prospective employee or current or former employee as a  
64 condition to be interviewed, or as a condition of continuing to be considered for an offer of  
65 employment, or as a condition of employment or promotion;

66 3. Seek the wage or salary history of a prospective, current, or former employee from a current or  
67 former employer; or

68 4. Retaliate against in any way, including refusing to interview, hire, promote, or otherwise employ,  
69 a prospective, current, or former employee due to the employee's prior wage or salary history, the  
70 employee's lack of providing prior wage or salary history in accordance with this section, or the  
71 employee's filing of a complaint alleging a violation of this article.

72 E. No employer shall discharge or in any manner retaliate against any employee because the  
73 employee (i) opposed any act or practice made unlawful by this article; (ii) made or indicated an intent  
74 to make a complaint or otherwise caused to be instituted any proceeding under this article; or (iii)  
75 testified or is about to testify, assist, or participate in any manner in an investigation or proceeding  
76 under this article.

77 F. An employer who is paying a wage in violation of this article may not reduce another wage in  
78 order to comply with this article.

79 G. Nothing in this section shall be construed to (i) create an obligation to disclose wages or (ii)  
80 prevent a prospective, current, or former employee from voluntarily disclosing wage or salary history,  
81 including for the purposes of negotiating wages or salary.

82 H. Nothing in this section is intended to override programs providing hiring preferences to (i)  
83 veterans or spouses of veterans, including veterans with service-related disabilities, or (ii) a person with  
84 a disability as defined in § 51.5-40.1.

85 **§ 40.1-28.15. Requirements for announcements; records.**

86 A. An employer shall provide an applicant for employment with the wage range for the position for  
87 which the applicant is applying upon the applicant's request or prior to inquiring about an applicant's  
88 wage expectations or providing an offer of compensation, whichever comes first. An employer shall  
89 provide an employee with the wage range for the employee's job title and for comparable jobs upon hire  
90 and, thereafter, annually and upon request.

91 B. Every employer shall maintain records of the wages and wage rates, job classifications, and other  
92 terms and conditions of employment of the persons employed by the employer. Such records shall be  
93 kept on file for a period of three years.

94 **§ 40.1-28.16. Rights of action under article.**

95 A. For purposes of administration and enforcement, any amounts owed to any employee that have  
96 been withheld in violation of this article shall be deemed to be unpaid wages or unpaid overtime  
97 compensation, and the employee whose wages have been wrongfully withheld in violation of this article  
98 shall have a right of action therefor to recover:

99 1. The difference between the amount of wages paid and the maximum wage paid any other  
100 employee for substantially similar work;

101 2. Compensatory damages;

102 3. Punitive damages, if the violation is found to be intentional or committed with reckless  
103 indifference to the employee's rights under this article;

104 4. Reasonable attorney fees and costs; and

105 5. Any other legal and equitable relief as may be appropriate, including employment reinstatement  
106 and promotion.

107 B. Action to recover such wages, damages, and legal or equitable relief may be maintained in any  
108 court of competent jurisdiction by any one or more employees for and on behalf of such employees or  
109 themselves and other employees similarly situated.

110 C. Any agreement between the employer and an employee to work for less than the wage to which  
111 such employee is entitled under this article shall not be a defense to an action. An employee's previous  
112 wage or salary history shall not be a defense to an action.

113 D. At the request of any employee paid less than the wage to which the employee is entitled under  
114 this article and due any damages as a result of a violation, the Commissioner may take an assignment  
115 of such wage and damages claim for collection and shall bring any legal action necessary to collect  
116 such claim. The Commissioner shall not be required to pay for the filing fee or other costs in  
117 connection with such action. The Commissioner shall have the power to join various claimants against  
118 the employer in one cause of action.

119 **§ 40.1-28.17. Enforcement of article; civil penalties.**

120 A. Any employer that violates a provision of this article is subject to a civil penalty not to exceed (i)

121 \$2,500 for a first violation, (ii) \$3,000 for a second violation, and (iii) \$5,000 for a third or subsequent  
122 violation. The Commissioner shall have the authority to assess civil penalties for violations of this  
123 article as provided in this section. In determining the amount of a civil penalty to be assessed, the  
124 Commissioner shall consider the severity of the violation. Civil penalties owed under this section shall  
125 be paid to the Commissioner for deposit into the Literary Fund. The Commissioner shall prescribe  
126 procedures for the payment of proposed penalties that are not contested by employers.

127 B. The Commissioner shall notify any employer that he alleges has violated any provision of this  
128 section by certified mail. Such notice shall contain a description of the alleged violation. Within 15 days  
129 of receipt of notice of the alleged violation, the employer may request an informal conference regarding  
130 such violation with the Commissioner. In determining the amount of any penalty to be imposed, the  
131 Commissioner shall consider the size of the business of the employer charged and the gravity of the  
132 violation. The decision of the Commissioner shall be final.

133 C. Every proceeding for a civil penalty as provided in this section shall be brought within two years  
134 after the date the violation occurred, unless the violation is a willful violation, in which case the action  
135 shall be brought within three years from the date the violation occurred. For the purposes of this  
136 article, a violation occurs when:

- 137 1. A discriminatory wage decision or practice is adopted;
- 138 2. An individual is subject to a discriminatory wage decision or practice; or
- 139 3. An individual is affected by application of a discriminatory wage decision or practice, including  
140 each time wages paid result, in whole or in part, from a discriminatory wage decision or practice.

141 **2. That § 40.1-28.6 of the Code of Virginia is repealed.**