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HOUSE BILL NO. 798

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Joint Conference Committee
on March 7, 2020)

(Patron Prior to Substitute—Delegate Delaney)

A BILL to amend and reenact §§ 8.01-267.1 and 8.01-420 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 40.1-27.3, relating to protection of employees from retaliatory actions by their employer; class actions.

Be it enacted by the General Assembly of Virginia:

1. That §§ 8.01-267.1 and 8.01-420 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 40.1-27.3 as follows:

§ 8.01-267.1. Standards governing consolidation, etc., and transfer.

On motion of any party, a circuit court may enter an order joining, coordinating, consolidating, or transferring civil actions as provided in this chapter upon finding that:

1. Separate civil actions brought by (i) six or more plaintiffs or (ii) a plaintiff on behalf of multiple similarly situated persons involve common questions of law or fact and arise out of the same transaction, occurrence, or series of transactions or occurrences;

2. The common questions of law or fact predominate and are significant to the actions; and

3. The order (i) will promote the ends of justice and the just and efficient conduct and disposition of the actions, and (ii) is consistent with each party's right to due process of law, and (iii) does not prejudice each individual party's right to a fair and impartial resolution of each action.

Factors to be considered by the court include, but are not limited to, ~~(i)~~ (a) the nature of the common questions of law or fact; ~~(ii)~~ (b) the convenience of the parties, witnesses, and counsel; ~~(iii)~~ (c) the relative stages of the actions and the work of counsel; ~~(iv)~~ (d) the efficient utilization of judicial facilities and personnel; ~~(v)~~ (e) the calendar of the courts; ~~(vi)~~ (f) the likelihood and disadvantages of duplicative and inconsistent rulings, orders, or judgments; ~~(vii)~~ (g) the likelihood of prompt settlement of the actions without the entry of the order; and ~~(viii)~~ (h) as to joint trials by jury, the likelihood of prejudice or confusion.

The court may organize and manage the combined litigation and enter further orders consistent with the right of each party to a fair trial as may be appropriate to avoid unnecessary costs, duplicative litigation, or delay and to assure fair and efficient conduct and resolution of the litigation, including but not limited to orders which organize the parties into groups with like interest; appoint counsel to have lead responsibility for certain matters; allocate costs and fees to separate issues into common questions that require treatment on a consolidated basis and individual cases that do not; and ~~to~~ stay discovery on the issues that are not consolidated.

§ 8.01-420. Depositions as basis for motion for summary judgment or to strike evidence.

A. Except as provided in subsections B and C, no motion for summary judgment or to strike the evidence shall be sustained when based in whole or in part upon any discovery depositions under Rule 4:5, unless all parties to the suit or action shall agree that such deposition may be so used. Notwithstanding the foregoing, requests for admissions for which the responses are submitted in support of a motion for summary judgment may be based in whole or in part upon any discovery depositions under Rule 4:5 and may include admitted facts learned or referenced in such a deposition, provided that any such request for admission shall not reference the deposition or require the party to admit that the deponent gave specific testimony.

B. Notwithstanding the provisions of subsection A, a motion for summary judgment seeking dismissal of any claim or demand for punitive damages may be sustained, as to the punitive damages claim or demand only, when based in whole or in part upon any discovery depositions under Rule 4:5. However, such a motion may not be based upon discovery depositions under Rule 4:5 with respect to any claim or demand for punitive damages based on the operation of a motor vehicle by a person while under the influence of alcohol, any narcotic drug, or any other self-administered intoxicant or drug.

C. Notwithstanding the provisions of subsection A, discovery depositions under Rule 4:5 and affidavits may be used in support of or in opposition to a motion for summary judgment in any action (i) when the only parties to the action are business entities and the amount at issue is \$50,000 or more or (ii) where a class has been certified pursuant to § 8.01-267.1.

§ 40.1-27.3. Retaliatory action against employee prohibited.

A. An employer shall not discharge, discipline, threaten, discriminate against, or penalize an employee, or take other retaliatory action regarding an employee's compensation, terms, conditions, location, or privileges of employment, because the employee:

1. Or a person acting on behalf of the employee in good faith reports a violation of any federal or

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60 *state law or regulation to a supervisor or to any governmental body or law-enforcement official;*
61 *2. Is requested by a governmental body or law-enforcement official to participate in an investigation,*
62 *hearing, or inquiry;*
63 *3. Refuses to engage in a criminal act that would subject the employee to criminal liability;*
64 *4. Refuses an employer's order to perform an action that violates any federal or state law or*
65 *regulation and the employee informs the employer that the order is being refused for that reason; or*
66 *5. Provides information to or testifies before any governmental body or law-enforcement official*
67 *conducting an investigation, hearing, or inquiry into any alleged violation by the employer of federal or*
68 *state law or regulation.*
69 *B. This section does not:*
70 *1. Authorize an employee to make a disclosure of data otherwise protected by law or any legal*
71 *privilege;*
72 *2. Permit an employee to make statements or disclosures knowing that they are false or that they are*
73 *in reckless disregard of the truth; or*
74 *3. Permit disclosures that would violate federal or state law or diminish or impair the rights of any*
75 *person to the continued protection of confidentiality of communications provided by common law.*
76 *C. A person who alleges a violation of this section may bring a civil action in a court of competent*
77 *jurisdiction within one year of the employer's prohibited retaliatory action. The court may order as a*
78 *remedy to the employee (i) an injunction to restrain continued violation of this section, (ii) the*
79 *reinstatement of the employee to the same position held before the retaliatory action or to an equivalent*
80 *position, and (iii) compensation for lost wages, benefits, and other remuneration, together with interest*
81 *thereon, as well as reasonable attorney fees and costs.*
82 **2. That the Supreme Court of Virginia shall promulgate rules no later than November 1, 2020,**
83 **governing the joining, coordinating, consolidating, or transferring of actions pursuant to this act.**
84 **Such rules shall be no more restrictive than those contained in Rule 23 of the Federal Rules of**
85 **Civil Procedure.**
86 **3. That the provisions of §§ 8.01-267.1 and 8.01-420 of the Code of Virginia, as amended by this**
87 **act, shall become effective on July 1, 2021.**