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SENATE BILL NO. 1228

Offered January 13, 2021

Prefiled January 11, 2021

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.

Patrons—Boysko, Hashmi, Locke and McClellan

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.

"Employee" means any person, paid or unpaid, in the service of an employer.

"Employer" means any person, firm, or corporation, including the Commonwealth and its political subdivisions, and their agents, that has one or more employees or individuals performing services under any contract of hire or service, express or implied, oral or written.

"Protected class" means a group of people distinguished by race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, sexual orientation, gender identity, disability, or status as a veteran.

"Wage range" means the wage range that the employer anticipates relying on in setting wages for the position and may include reference to any applicable pay scale, any previously determined range of wages for the position, the actual range of wages for those currently holding comparable positions, or the budgeted amount for the position, as applicable.

§ 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, including benefits, by paying wages or other compensation to employees who are members of a protected class at a rate less than the rate at which it pays wages or other compensation to employees who are not members of the protected class for substantially similar work, when viewed as a composite of skill, effort, and responsibility and performed under similar working conditions, 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 or 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 membership in a protected class; or

d. A bona fide factor other than on the basis of membership in a protected class, such as education, training, or experience. 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 and that the employer has refused to adopt such alternative practice;

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 the wages of another employee; or

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

a. Inquiring about, discussing, or disclosing the employee's wages or the wages of another employee;

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

c. Aiding or encouraging another employee's exercise of rights under this article.

D. No employer shall:

1. Rely on the wage history of a prospective employee in considering the prospective employee for employment, including requiring that the prospective employee's prior wages satisfy minimum or maximum criteria as a condition of being considered for employment;

2. Rely on the wage history of a prospective employee in determining the wages that the prospective employee is to be paid by the employer upon hire;

3. Seek the wage history of a prospective employee; or

4. Refuse to interview, hire, promote, or employ, or retaliate against a prospective employee for not providing wage history.

Notwithstanding any provision of this subsection to the contrary, after an employer makes an initial offer of employment with an offer of compensation to a prospective employee, the employer may (i) rely on wage history to support a wage higher than the wage offered by the employer, if wage history is voluntarily provided by the prospective employee without prompting from the employer, or (ii) seek to confirm the wage history of the prospective employee to support a wage higher than the wage offered by the employer when relying on wage history as permitted by clause (i). An employer may rely on wage history in any circumstance described in clause (i) or (ii) to the extent that the higher wage does not create an unlawful pay differential based on a protected characteristic prohibited by subsection A.

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

F. An employer that is paying a wage in violation of this article shall not reduce another wage in order to comply with this article.

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

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

§ 40.1-28.15. Requirements for announcements; records.

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

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

§ 40.1-28.16. Rights of action under article.

A. For purposes of administration and enforcement, any amounts owed to any employee that have been withheld in violation of this article shall be deemed to be unpaid wages or unpaid overtime compensation.

B. An employee who is the subject of a violation of this article shall have a right of action therefor to recover:

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

2. An additional equal amount as liquidated damages;

3. Compensatory damages or, for a violation of subsection C or D of § 40.1-28.14 or subsection A of § 40.1-28.15, the greater of compensatory damages or $10,000;

4. Punitive damages, if the violation is found to be intentional or committed with reckless

indifference to the employee's rights under this article;

5. Reasonable attorney fees and costs; and

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

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

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

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

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

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

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

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

1. A discriminatory wage decision or practice is adopted;

2. An individual is subject to a discriminatory wage decision or practice; or

3. An individual is affected by application of a discriminatory wage decision or practice, including each time wages paid result, in whole or in part, from a discriminatory wage decision or practice.

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