



Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

Senate Bill No. 1310 Amendment in the Nature of a Substitute (Patron Prior to Substitute – McClellan)

LD#: 21103755

Date: 2/1/2021

Topic: Domestic service employment practices

Fiscal Impact Summary:

- **State Adult Correctional Facilities:**
\$50,000 *
- **Local Adult Correctional Facilities:**
Cannot be determined
- **Adult Community Corrections Programs:**
Cannot be determined

- **Juvenile Direct Care:**
Cannot be determined (likely negligible)**
- **Juvenile Detention Facilities:**
Cannot be determined (likely negligible)**

**Provided by the Department of Juvenile Justice

* The estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 1289 of the Acts of Assembly of 2020 requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000.

Pursuant to § 30-19.1:4, fiscal impact statements prepared by the Virginia Criminal Sentencing Commission only include the estimated increase in operating costs associated with additional state-responsible prison beds and do not reflect any other costs or savings that may be associated with the proposed legislation.

Summary of Proposed Legislation:

The proposal amends §§ 2.2-3905, 40.1-2, 40.1-29, 40.1-49.3, and 40.1-49.8 of the *Code of Virginia*, relating to failure to pay wages. Under the proposal, domestic services would be included under Virginia employment nondiscrimination protections, wage laws, and workplace inspection standards. For nondiscrimination purposes, proposed § 2.2-3905 defines “domestic worker” as “an individual who is compensated directly or indirectly for the performance of services of a household nature performed in or about a private home.” This *Code* section lists child care by family and friends, child day programs, and casual companionship services for the elderly or infirm as exclusions from the “domestic worker” definition. For wage purposes, the proposed § 40.1-2 defines “domestic services” as “services related to the care of an individual in a private home or the maintenance of a private home or its premises, on a permanent or temporary basis, including services performed by individuals such as companions, cooks, waiters, butlers, maids, valets, and chauffeurs.” This section exempts “work that is irregular, uncertain, or incidental in nature and duration” from the definition. For occupational safety and workplace inspection purposes, proposed § 40.1-49.3 adds “any person that engages an individual to perform domestic service” to the definition of an employer.

Currently, under § 40.1-29, in addition to civil penalties, an employer who willfully and with intent to defraud fails or refuses to pay wages is guilty of a Class 1 misdemeanor if the value of the unpaid wages is less than \$10,000. If the combined value of the unpaid wages is \$10,000 or more, the penalty is increased to a Class 6 felony. A second or subsequent conviction, regardless of the value of the wages, is a Class 6 felony. For purposes of this section, the determination as to the value of the wages is made by combining all wages the

employer failed or refused to pay which, under the proposal, would include the newly-defined § 40.1-29.2 related to overtime pay.

Under current § 40.1-49.4(K), an employer's violation of occupational safety rules that results in the death of an employee is a misdemeanor punishable by incarceration up to six months, and up to one year for second or subsequent violations. Under § 40.1-51.3:1, providing unauthorized advanced notice of an occupational health or safety inspection is a misdemeanor punishable by up to six months' incarceration.

Analysis:

According to fiscal year (FY) 2015 through FY2020 General District Court and Circuit Court Case Management System (CMS) data, a misdemeanor conviction under § 40.1-29 for unlawfully withholding wages was the primary (or most serious offense) in seven sentencing events. Five offenders (71%) did not receive an active term of incarceration to serve after sentencing. Two offenders (29%) received local-responsible (jail) terms of 12 and 24 months¹. Circuit Court CMS data indicate that there was one felony sentencing event under § 40.1-29 (withholding \$10,000 or more) during this six-year period; this offender did not receive an active term of incarceration to serve after sentencing.

According to FY2015 through FY2020 General District Court CMS data, there were zero misdemeanor convictions under § 40.1-49.4(K) or § 40.1-51.3:1.

Impact of Proposed Legislation:

State adult correctional facilities². By expanding wage requirements to include domestic services, more employers may commit subsequent wage withholding offenses or reach the threshold for failing to pay wages valued at a total of \$10,000 or more. If an employer is inclined to defraud an employee of wages, the threshold of \$10,000 for a Class 6 felony conviction is easier to obtain because the definition of employees covered under this clause is expanded. Likewise, the proposal expands the potential for employers to commit second or subsequent violations under § 40.1-29 and receive a felony conviction regardless of the value of wages withheld. Finally, individuals not previously considered employers for wage purposes (who solely procure domestic services) would become newly liable for wage violations under the proposed. In this way, the proposal may increase the state-responsible (prison) bed space needs of the Commonwealth. Data are not available to estimate the number of additional felony convictions that would result from enactment of the proposal. Therefore, the impact on prison bed space needs cannot be determined.

Local adult correctional facilities. By expanding wage requirements and occupational health and safety standards to include domestic services, the proposal expands the application of existing felony and misdemeanor offenses and may increase local-responsible (jail) bed space needs. Because the number of new convictions that may result from enactment of the proposal cannot be determined, the magnitude of the impact on jail bed space needs cannot be estimated.

Adult community corrections programs. Because the proposal could result in more felony convictions and subsequent supervision requirements for additional offenders, the proposal may increase the need for adult community corrections resources. However, the potential impact on state and local community corrections programs cannot be determined.

Virginia's sentencing guidelines. Felony convictions under § 40.1-29 are not covered by the sentencing guidelines when the offense is the primary, or most serious, offense in a case. However, convictions under this

¹ The 24-month sentence involved two counts of the primary offense.

² Pursuant to § 30-19.1:4, fiscal impact statements prepared by the Virginia Criminal Sentencing Commission only address the estimated increase in operating costs associated with additional state-responsible prison beds and do not reflect any other costs or savings that may be associated with, or any revenue that may be generated by, the proposed legislation.

statute could augment the guidelines recommendation if the most serious offense at sentencing is covered by the guidelines. No adjustment to the guidelines would be necessary under the proposal.

Juvenile direct care. According to the Department of Juvenile Justice, the impact of the proposal on direct care (juvenile correctional center or alternative commitment placement) bed space needs cannot be determined, but it is likely negligible.

Juvenile detention facilities. The Department of Juvenile Justice reports that the proposal's impact on the bed space needs of juvenile detention facilities cannot be determined, but it is likely negligible.

Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 1289 of the Acts of Assembly of 2020 requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000.

Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot be determined for periods of commitment to the custody of the Department of Juvenile Justice.

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