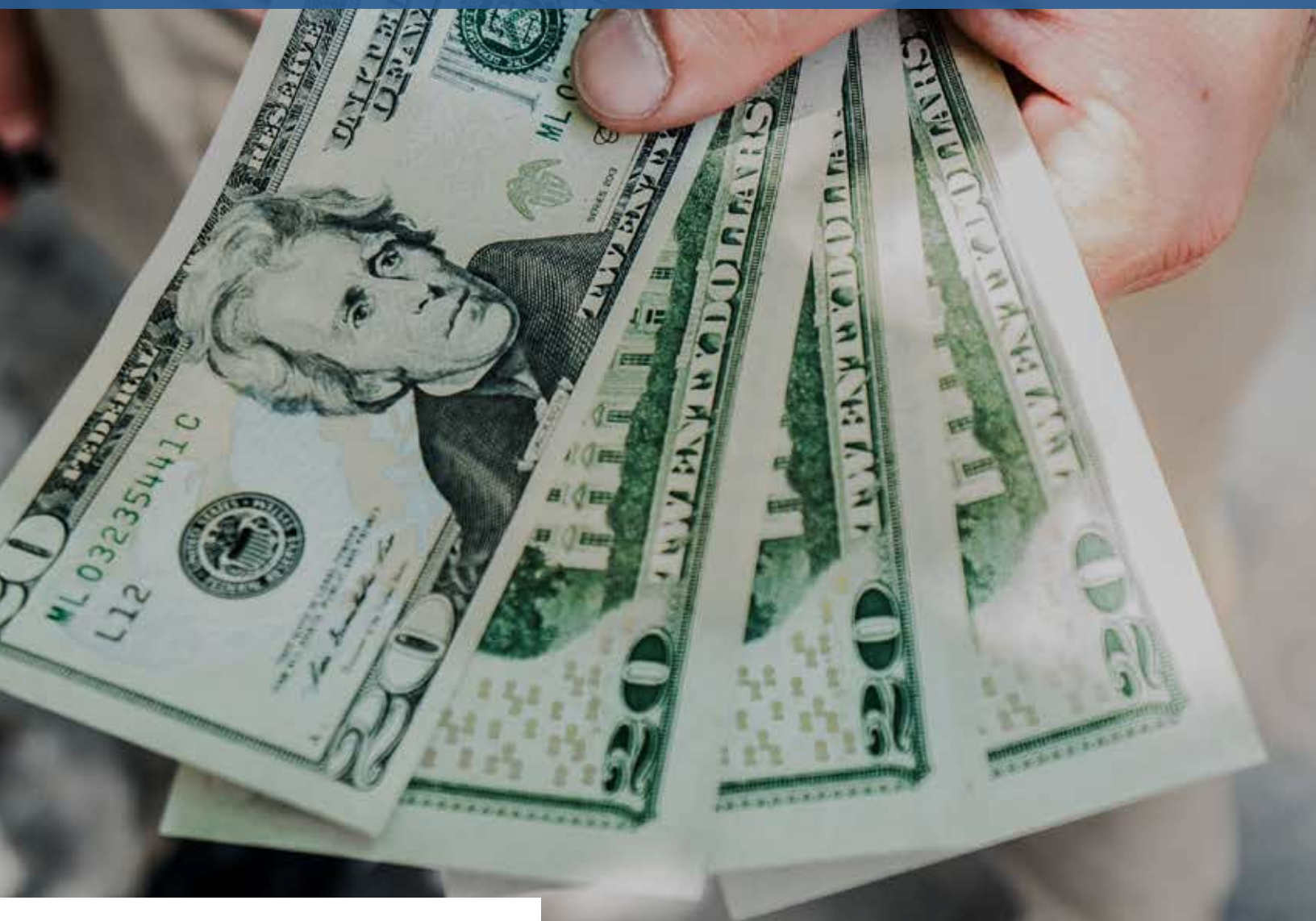


# GETTING WORKERS WHAT THEY'RE OWED

Why Virginia's Department of Labor and Industry  
must reform its wage-claims process.



# Getting Workers What They're Owed:

Why Virginia's Department of Labor and Industry must reform its wage-claims process.

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## EXECUTIVE SUMMARY

In 2018, Oxfam America published a report ranking America's best states to work.<sup>1</sup> Virginia was ranked #51: dead last out of all 50 states (and the District of Columbia, which took the top spot). One reason for the state's dismal ranking, Oxfam found, is that Virginia has the weakest wage-and-hour laws in the nation.<sup>2</sup> The state agency charged with enforcing those laws is the Virginia Department of Labor and Industry (DOLI).

Under Virginia law, workers can file administrative complaints with DOLI if their employer fails to pay the wages that the employer promised to pay, or if the employer fails to pay the Virginia minimum wage. And for nearly a decade, the Legal Aid Justice Center has tried to help Virginia's low-wage workers recover their wages through the DOLI administrative process. But far too often, LAJC's clients who turn to DOLI for help are stymied by the agency's internal procedures.

Over the last year-and-a-half alone, LAJC has monitored the cases of 15 low-wage workers who submitted wage complaints to DOLI. Of these, only three have resulted in any wages being returned to the worker. Some workers had their claims rejected because DOLI determined that they were independent contractors—without explanation why, and without giving the worker a chance to respond with additional evidence. Other workers have had their cases rejected for seemingly arbitrary reasons: one had a written work contract with his employer; another had worked over 40 hours in some of her workweeks; another worked at a business that abruptly closed. Their voices appear in this report.

A recent release of DOLI wage-claim data—obtained by LAJC under Virginia's Freedom of Information Act—confirms that these workers are not alone. DOLI's records show that of the nearly 4,000 DOLI wage complaints that DOLI has closed since January 2015, DOLI rejected nearly half of them without conducting any investigation whatsoever. And DOLI dismissed almost one-third of all claims under internal policies that defy common sense and deny victimized workers basic fairness. By contrast, DOLI actually recovers wages for the worker in fewer than 18% of cases.

*DOLI's wage-claim policies and procedures need to change. DOLI can change many of them immediately by itself, without any new laws or regulations*

DOLI's wage-claim policies and procedures need to change. DOLI can change many of them immediately by itself, without the need for any new laws or regulations. This report shows how the agency's current practices fail Virginia's low-wage workers and gives practical recommendations for how they can be improved.

Virginia should do what it takes to shed its ranking as the worst state for workers. And because Virginia workers have so few workplace rights compared to other states, it is essential that those rights be zealously and effectively enforced. Common-sense reforms to the Department of Labor and Industry would be an excellent place to start.

## Newly Uncovered Facts from DOLI's Wage-Claim Data:

Cases Closed Between Jan. 2015 – May 2019

- **Total Wage Claims Closed: 3948**
- **Total Value of Wage Claims: \$11,088,301**
- **Wage theft pervades every region of the Commonwealth:** The DOLI data show that wage theft occurs in every corner of Virginia, urban and rural. Out of all of Virginia's 134 independent cities and counties, all but 5 jurisdictions had at least one resident worker who filed a DOLI complaint or a resident employer who had a complaint filed against it. Of course, most workers who are victims of wage theft do not file complaints with DOLI, meaning that the scale of Virginia's wage-theft problem is likely far greater than the numbers in this report suggest. This table shows how many claims were filed by workers against employers in each of DOLI's four regions:

| DOLI Regional Office          | Worker Residence | Employer Location |
|-------------------------------|------------------|-------------------|
| Northern                      | 1157             | 1317              |
| Central                       | 983              | 907               |
| Southwest                     | 378              | 354               |
| Tidewater                     | 982              | 938               |
| Out of State                  | 415              | 322               |
| Location Not Recorded By DOLI | 33               | 110               |

- **DOLI rarely recovers wages for workers.** In only about 18% of cases did DOLI require culpable employers to pay any back wages at all (736 out of 3948 claims).
- **DOLI did not investigate almost half of the wage claims it received:** DOLI closed almost half of all wage claims it received (47%) without opening any investigation whatsoever (1,887 out of 3,948 claims).
- **DOLI needlessly dismissed nearly a third of all wage claims:** DOLI rejected nearly a third of all claims (31.5%) based on eight internal agency policies that have no basis in any law or regulation. As shown in this report, these policies defy common sense and are difficult to justify (1,246 out of 3,948 claims).



- **DOLI determined that hundreds of workers were not “employees” on dubious grounds:** DOLI dismissed the complaints of 415 workers (10.5%) because it found that the workers were not “employees” under Virginia law. As shown in this report, however, DOLI does not have adequate procedures in place for making that determination. As such, DOLI’s decision to dismiss each of these claims is open to question.
- **DOLI almost never required employers who committed wage theft to pay a fine:** DOLI required employers to pay a civil money penalty in just 9 cases (0.22%).
- **DOLI did not use its criminal enforcement powers to hold employers accountable:** Wage theft is a crime, but DOLI does not treat it as one. Although DOLI policy states that the agency should refer wage claims to law enforcement for criminal investigation in appropriate cases, DOLI has not done so even once since January 2015.

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## Key Recommendations for DOLI:

### **DOLI should overhaul its procedures for determining whether a complaining worker is an employee or an independent contractor.**

Virginia wage law protects only employees, not independent contractors. But DOLI does not have an appropriate process for determining which category a worker falls into. As a result, the agency regularly rejects workers’ complaints incorrectly. DOLI should revise its claim form to capture the information necessary to get the determination right. DOLI should also stop telling workers to ask the IRS to resolve the matter. This report includes a proposal for a new wage-claim form that would help DOLI decide the question accurately in-house.

### **DOLI should revise or eliminate internal policies that cause it to dismiss meritorious wage claims unnecessarily.**

DOLI should also eliminate or revise at least eight internal policies that it currently uses to reject wage claims. These policies often defy common sense and are difficult to justify. They are not required by any law or regulation—meaning that DOLI could fix them today without the need for any new laws or regulations.

### **DOLI should always determine if a wage claim presents a “joint employment” scenario.**

Virginia’s wage-and-hour laws include a broad definition of “employment” that gives DOLI the power to hold accountable not only the worker’s direct employer, but also any other people and businesses who can determine the worker’s working conditions. However, DOLI rarely uses this power. Going forward, DOLI should always determine if a wage claim presents this kind of “joint employment” scenario.

### **DOLI should implement improved procedures for processing wage claims.**

- DOLI should always give workers an opportunity to supplement the record before unilaterally dismissing their claims.
- DOLI should communicate with wage claimants primarily in writing, and in a language they understand.
- DOLI should allow workers (instead of just employers) to request an administrative hearing.
- DOLI should provide for administrative review of its decisions.
- DOLI should refer appropriate cases to law enforcement for criminal investigation.

### **DOLI currently rejects a worker's wage claim if...**

| REASON CLAIM WAS REJECTED   | TOTAL CASES REJECTED<br>(2015-2019) | TOTAL WAGES NOT<br>PURSUED |
|---|-------------------------------------|----------------------------|
| The worker had a written work contract.   | 706                                 | \$2,060,364                |
| The worker worked over 40 hours in any workweek—even if the worker does not ask for (or is not entitled to) the federal time-and-a-half overtime premium. | 159                                 | \$302,892                  |
| The business has closed down, even if the corporation has not filed for bankruptcy.   | 126                                 | \$300,279                  |
| The worker worked only outside of Virginia.   | 72                                  | \$1,069,014                |
| The worker did not demand their wages from the employer first.  | 61                                  | \$100,771                  |
| The worker seeks more than \$15,000 in unpaid wages.  | 46                                  | \$2,589,195                |
| The worker receives tips.   | 35                                  | \$38,258                   |
| The worker consulted with an attorney about their case.   | 41                                  | \$427,716                  |

# What is DOLI and What Does It Do?

## History and Structure of DOLI

The Virginia Department of Labor and Industry was created in 1927 by an act of the General Assembly.<sup>3</sup> It is an agency of the Secretary of Commerce and Trade.<sup>4</sup> DOLI is led by a Commissioner, who is appointed by the governor.<sup>5</sup> The agency is charged with enforcing the state's labor and employment laws under Title 40.1 of the Virginia Code,<sup>6</sup> including occupational safety and health standards, apprenticeship programs, and labor laws. This report will concentrate on the Labor and Employment Law Division, which is charge of enforcing Virginia's wage-and-hour laws: the Virginia Minimum Wage Act (VMWA)<sup>7</sup> and the Virginia Wage Payment Act (VWPA).<sup>8</sup>

## Administrative Wage-Claim Process

DOLI offers workers an administrative wage-claim process that is meant to be a simpler, cheaper, and faster alternative to filing a lawsuit in court. A worker can file a complaint with DOLI if their employer fails to pay the worker the wages that the employer promised to pay,<sup>9</sup> or if the employer fails to pay the minimum wage under Virginia law.<sup>10</sup> DOLI then processes the complaints in accordance with its Field Operations Manual:

- 1. The worker files a complaint.** To file a complaint, the worker simply fills out a two-page form and sends it to DOLI by mail.
- 2. DOLI reviews the form and either rejects the claim or accepts it for investigation.** Upon receiving a claim form, a DOLI "Compliance Officer" (investigator) reviews the form, determines whether the worker has completed the form properly, and decides if DOLI has jurisdiction over the worker's claim. If so, DOLI will accept the claim for investigation. If not, DOLI will reject the claim.
- 3. A DOLI Compliance Officer investigates and decides the claim.** DOLI investigations are usually done remotely, with the agency communicating by phone, mail, fax, or email. A Compliance Officer first calls the worker in order to clarify, verify, and get more details about the information that the worker provided on the wage-claim form. The Compliance Officer then calls the employer to notify them of the complaint and interview them about the allegations made by the worker. Finally, the Compliance Officer decides whether the employer owes any wages to the worker and in what amount, then notifies the parties in writing. The employer must pay any wages owed within 18 days.
- 4. (If Requested) DOLI holds an administrative hearing.** DOLI also allows the employer (but not the worker) to request an administrative hearing called an "Informal Factfinding Conference." These hearings are normally conducted by telephone. At the hearing, the parties can present additional evidence and argument to support their positions, and they may be represented by attorneys. A Hearing Officer then decides whether the employer owes any wages to the worker and in what amount, then notifies the parties in writing. The employer must pay any wages owed within 18 days.
- 5. Collections.** If the employer still fails to pay the worker's back wages, DOLI issues a Final Order setting out the employer's liability, files the Final Order in Circuit Court, and attempts to collect the wages through the judicial system.



## Problems With DOLI's Wage-Claim Process & Recommendations for Change

DOLI's administrative wage-claim process often functions better in theory than in practice. To begin with, DOLI does not have appropriate procedures for determining whether a complaining worker is an employee or an independent contractor—a critical question that determines whether DOLI has jurisdiction over the worker's claim. DOLI also frequently rejects wage claims unnecessarily, based on internal criteria that sometimes defy common sense—and that DOLI could fix today without the need for any new laws or regulations. These and the other procedural reforms recommended below would make DOLI's administrative wage-claim process fairer, more accurate, and more predictable for workers and employers alike.

### **DOLI should overhaul its procedures for determining whether a complaining worker is an employee or an independent contractor under Virginia wage law.**

DOLI does not have an appropriate process for determining whether a worker who files a wage claim is an employee or an independent contractor under Virginia wage law.

Under Virginia's Wage Payment Act (VWPA), if an employer fails to pay a worker's promised wages, the worker can file a complaint with DOLI.<sup>11</sup> DOLI can then investigate the worker's wage complaint, decide if the complaint has merit, and bring administrative or court proceedings to recover the wages owed.<sup>12</sup> However, the VWPA only protects the wage-payment rights of **employees**.<sup>13</sup> If DOLI finds that the worker is an independent contractor, DOLI will dismiss the complaint.<sup>14</sup> Thus, DOLI's decision to classify a complaining worker as an employee or an independent contractor is a critical part of every wage-theft case that the agency receives.

*DOLI should revise its claim form to capture the information necessary to determine whether a worker is an employee or an independent contractor.*

Because the General Assembly has given DOLI the sole power to enforce the VWPA,<sup>15</sup> there is no question that DOLI has the power to determine whether a worker is or is not an employee covered by the Act.<sup>16</sup> And Virginia wage law defines the word “employ” extremely broadly, using language modeled on the federal Fair Labor Standards Act (FLSA).<sup>17</sup> Thus, DOLI should look to federal court cases in order to determine whether a worker is an employee under Virginia wage law.<sup>18</sup> Both the Supreme Court and the Fourth Circuit Court of Appeals have long held that to answer this question, courts (and by extension DOLI) should consider at least six factors:<sup>19</sup>

- The degree of control that the putative employer has over the manner in which the work is performed;
- The worker's opportunities for profit or loss dependent on his managerial skill;
- The worker's investment in equipment or material, or his employment of other workers;
- The degree of skill required for the work;
- The permanence of the working relationship; and
- The degree to which the services rendered are an integral part of the putative employer's business.

DOLI's wage-claim complaint form, however, does not ask the worker about any of these factors. It simply asks the worker, "Were you hired to work as a subcontractor or an independent agent?" and "Did you work for this business as a self-employed person?"<sup>20</sup> But these questions are actually completely irrelevant to the employee-or-contractor determination. Even if a worker signs a contract at the time of hiring that says "I agree that I am being hired to work as an independent contractor," the Supreme Court has said that lower courts (and by extension DOLI) must consider the "economic reality" of the working relationship, rather than any labels given by the parties.<sup>21</sup> The ultimate question is whether, as a matter of economic reality, the worker is economically dependent on the business (and therefore an employee) or in business for him or herself (and therefore an independent contractor). The six-factor test is intended to make sure that DOLI considers all of the relevant facts and comes to a reasoned decision.<sup>22</sup> Until DOLI considers these six factors, its procedures for making that decision will remain fundamentally flawed. For this reason, LAJC urges DOLI to adopt a new wage-claim form as soon as possible. Our proposal for a new form accompanies this report at Appendix D.

*DOLI should stop using the IRS's narrow definition of "employment" and should stop telling workers to ask the IRS whether DOLI has jurisdiction over their wage claims.*

DOLI should also stop telling workers to ask the IRS whether DOLI has jurisdiction over their claims. At present, DOLI's Field Operations Manual states that "DOLI accepts and hereby adopts IRS's determination as to when an individual is an employee and when an individual is a subcontractor/independent agent. If the employer disputes the employment status of the claimant, the claimant

should be referred to the IRS for a determination on employment status."<sup>23</sup> For numerous reasons, this approach is unreasonable:

- First and foremost, Virginia wage law defines "employee" far more broadly than federal tax law does.<sup>24</sup> That is, many workers are "employees" under Virginia wage law even if they would be considered independent contractors under federal tax law. By using the more narrow definition, DOLI will wrongly reject the worker's wage claim every time where this is the case.
- DOLI has the expertise and the statutory authority to make the employee-or-contractor determination on its own.<sup>25</sup> There is simply no reason to outsource this duty to an unrelated federal agency.
- The IRS has made clear that DOLI's practice of referring workers to them is improper. Although workers are allowed to ask the IRS for a determination of their employee/independent contractor status, the IRS clearly states that they may do so "only in order to resolve federal tax matters."<sup>26</sup> A claim for unpaid wages under Virginia state law is not a federal tax matter.
- Requiring workers to fill out IRS forms in order to make wage claims is unduly burdensome. The IRS estimates that reviewing, preparing, and sending the applicable form will take the worker over seven hours to complete.<sup>27</sup> Workers with little formal education or who have limited proficiency in English may find the process even more burdensome—they may be inclined to simply give up rather than demand the wages they are rightly owed.

- Referring workers to the IRS allows employers to disrupt DOLI investigations with ease. After all, under DOLI's current practice, employers can trigger an IRS referral simply by "disputing" a complaining worker's employment status. And even if the worker manages to submit the proper paperwork to the IRS, it can take six months or more before the IRS finally gives the worker an answer.<sup>28</sup> This imposes an unreasonable delay on what is supposed to be a quick and inexpensive way to resolve claims for unpaid wages. Employers should not be permitted to derail DOLI investigations in this way.
- The IRS can share with the employer any information that the worker provides.<sup>29</sup> This places the worker at increased risk, because Virginia wage law allows employers to retaliate against workers for filing DOLI complaints.<sup>30</sup>

### **Recommendation**

Rather than refer workers to the IRS, DOLI should revise its wage-claim form to allow DOLI to make the employee/contractor determination itself. If DOLI determines that the complaining worker is an independent contractor and dismisses the worker's claim on that basis, DOLI should briefly explain how it reached that determination and should give the worker a chance to provide additional evidence of employee status.



photo credit: Ron Cogswell

### **DOLI should revise or eliminate internal policies that cause it to unnecessarily dismiss meritorious wage claims.**

Although DOLI's procedures for classifying a worker as an employee or independent contractor need improvement, this is at least an inquiry that is required by the Virginia Code. However, DOLI also uses numerous internal criteria to reject otherwise-valid wage claims. Many of these internal procedures defy common sense, and they often work to deny justice to workers who have been denied their just wages. These internal policies have no basis in any statute or regulation, meaning that DOLI could revise or eliminate them immediately.

#### ***Written Employment Contract***

Bafflingly, DOLI will refuse to investigate a worker's wage claim if the worker and the employer had a written employment contract.<sup>32</sup> This policy has no basis in statute, regulation, or DOLI's Field Operations Manual, and it is difficult to think of any justification for it. After all, an employment agreement would presumably help DOLI to more accurately decide whether the employer owes money to the worker, and in what amount. Indeed, DOLI's own wage-claim form instructs the worker to submit any employment agreement that might support the worker's estimate of wages owed.<sup>33</sup> And as DOLI acknowledges, an employment agreement might also help the agency determine whether there are any other individuals or companies who might be jointly responsible for paying the worker's missing wages.<sup>34</sup>

Moreover, DOLI sometimes over-applies its policy and rejects wage claims even where no written agreement existed, as seen in the worker narrative at the start of this section.

#### **Recommendation:**

DOLI should end its policy of rejecting wage claims in cases where there was a written employment contract. Instead, DOLI should use such agreements to help determine whether the worker is owed unpaid wages, in what amount, and by whom.

### **FROM A WORKER:**

“ I worked as a housepainter near Springfield in Fairfax County. My boss failed to pay me for 32 hours of work. I filed a claim with DOLI, but they rejected my claim because they said I had a written work contract. That was not correct: I had sent DOLI screenshots of some text messages between my boss and me, just to show that I did in fact work for him. But the messages were not an employment contract—they were just messages from me asking him to pay me my wages and replies from him saying that he didn't have the money.

When I wrote back to DOLI and explained this to them, they sent me another letter. This time DOLI rejected my case because they said I was an independent contractor and not an employee. This wasn't true either. But after two wrongly rejected DOLI complaints, I gave up. That's how my boss was able to steal \$576 from me. ”

**“Felipe,” Temple Hills, Maryland <sup>31</sup>**

### *Employee Worked Over 40 Hours In One Week*

DOLI will not investigate a wage claim if the worker worked over 40 hours in any workweek—even if the worker does not ask for (or is not entitled to) the federal Fair Labor Standards Act’s time-and-a-half overtime premium.

Unlike federal law, Virginia law does not require employers to pay their employees a time-and-a-half overtime premium for an employee’s weekly hours over 40. For example, consider a worker who works 50 hours a week at a regular rate of \$10 per hour. Under Virginia law, the worker is entitled to only \$500 for that week. If the worker is covered by the federal overtime law, the worker would be owed \$550 due to the overtime premium.

But not every employee is covered by federal overtime law, and many Virginia workers are not entitled to overtime pay. The FLSA exempts some occupations from overtime coverage entirely—including farmworkers, live-in domestic workers, and auto-dealership mechanics.<sup>35</sup> Workers are also entitled to overtime only if their work has some connection to interstate commerce,<sup>36</sup> meaning that (1) the worker works in multiple states; (2) the employer regularly operates in multiple states; or (3) the employer does at least \$500,000 in business per year.<sup>37</sup> Many Virginia workers work for businesses that are simply too small and too local to meet the interstate-commerce threshold, making them exempt from overtime. DOLI, however, has no process to determine whether a worker is entitled to overtime: if the worker worked over 40 hours in any one week, DOLI will reject the claim. This is wrong.

Moreover, even if a worker is entitled to overtime under federal law, there is no reason why DOLI cannot or should not honor the worker’s choice to seek enforcement of their wage-payment rights under Virginia law.

### **Recommendation:**

If a worker is owed wages under Virginia law, DOLI should investigate and prosecute her wage claim regardless of the number of hours she worked in a week.

## **FROM A WORKER:**

“ I used to work for a small painting and construction company. My boss never paid me for over 143 hours of work. I filed a DOLI complaint asking for my boss to pay me what he owed me. But DOLI refused to investigate my wage claim because I had worked over 40 hours in some of my workweeks. ”

**“Javier,” Manassas, Virginia**



## FROM A WORKER:

“ I worked in the kitchen of a bar in Stafford County. When the bar suddenly shut down, the company never paid me for my last 50 hours of work. It was only \$600, but that’s money that I couldn’t afford to lose. When I complained to DOLI, they said they couldn’t do anything because the bar had closed. But when I checked online, the company was still in existence and had not filed for bankruptcy. ”

“Alicia,” Stafford, Virginia

### *Business Closed*

DOLI claims that it “cannot pursue wage claims against a closed business.”<sup>38</sup> That may be true if the employer has formally filed for bankruptcy.<sup>39</sup> But nothing in the Virginia Code or DOLI’s regulations restricts the agency’s power to investigate and collect wages against a company just because it has hung an “out-of-business” sign on the door.

In LAJC’s experience, business closures are one of the top contexts in which wage theft occurs. When employers are about to close their business, they must decide which of their various creditors to pay with the limited funds they have left. And far too often it is the employees at the bottom who are the first to get stiffed, because business owners know that low-wage workers are less likely than

other creditors to hire lawyers and sue. Thus, DOLI’s practice of universally refusing to pursue wage claims against businesses that deem themselves “closed” encourages these businesses to refuse to pay their own workers and to pay other suppliers instead.

There is every reason for DOLI to investigate companies that have gone out of business. Even if a company has closed its doors to the public, the corporate entity may still have assets that can be used to satisfy unpaid-wage obligations to its workers. If a business organization has a corporate presence on file with the State Corporation Commission, there is still an entity that DOLI can investigate and sanction for failure to pay wages.<sup>40</sup>

Even more importantly, even if the now-closed business has no assets, DOLI may still be able to bring unpaid-wage proceedings against the company’s owners where they act as general managers. Often when a business is about to shut down, the owners—who see the writing on the wall before anyone else—try to wring as much cash out of it as possible for their personal benefit. As DOLI recognizes, the overwhelming majority of courts hold that a corporate officer with operational control of a corporation is an “employer” along with the corporation, and as such is jointly and severally liable along with the corporation for paying a worker’s unpaid wages.<sup>41</sup> But because DOLI automatically rejects any wage claims where the corporate entity has gone out of business, DOLI lets all of these other potentially responsible parties off the hook.

Moreover, even where the business that directly employed the worker has shut its doors, DOLI may be able to collect the unpaid wages from other corporate entities. Multiple businesses are jointly responsible for a work-

er's unpaid wages if those businesses had the power to "share or codetermine the essential terms and conditions of the [unpaid] worker's employment," a concept known as "joint employment."<sup>42</sup> This frequently occurs in the construction industry. Consider the common scenario in which a general contractor hires various subcontractors, who in turn hire rank-and-file construction workers to perform different tasks. If a general contractor fails to pay a subcontractor for a major job, forcing the subcontractor out of business and leaving behind dozens of unpaid workers directly employed by the subcontractor, the general contractor may be responsible for the subcontractor's wage violations, depending on the degree of control that the general contractor had over the terms and conditions of the rank-and-file workers' jobs.

The Fourth Circuit has issued specific guidance on the joint-employment issue, and has directed lower courts (and by extension DOLI) to look at various factors, including whether the business entities jointly shared or allocated the power to hire, fire, or supervise workers; jointly shared or allocated the power to modify workers' terms and conditions of employment; jointly provided the tools and materials necessary to do the work; or jointly controlled the premises where the work took place.<sup>43</sup> But here too, DOLI's policy falls short—it simply ignores the joint-employer doctrine completely. The result is that if the worker's direct employer goes out of business, DOLI lets the joint employers get away with the wage theft as well.

For all these reasons, DOLI should not reject a worker's wage claim against a corporation simply because the business has closed its doors to the public.

### **Recommendations:**

DOLI should end its policy of refusal to investigate wage claims brought against businesses that have closed. Even where a corporation has been dissolved, DOLI can and should investigate the worker's claim and determine whether there are any assets that DOLI can go after to satisfy the worker's claim. In addition, DOLI should always attempt to determine whether any other individuals or business entities can be held responsible for the unpaid wages as "joint employers." DOLI should update its wage-claim complaint form to capture the information that the Fourth Circuit has deemed relevant in answering the joint-employer question.

### *Work Performed Outside Virginia*

Even if the offending employer is located in Virginia, DOLI will not investigate a case where the worker performed the work out of state.

DOLI claims that it “do[es] not have jurisdiction” over wage cases where the work was done outside of Virginia, even if the employer is a Virginia resident.<sup>44</sup> This is not true. The Virginia Wage Payment Act creates legal duties for “employers.”<sup>45</sup> And under Title 40.1 of the Virginia Code, the word “employer” means a person or business “doing business or operating within this Commonwealth” who employs a worker.<sup>46</sup> The Code does not specify that the work must have been performed in Virginia, and no other Code provision strips DOLI of jurisdiction over work performed out of state. A Virginia court would unquestionably have jurisdiction over a Virginia employer who entered into an employment contract in Virginia, even if the contract required the worker to perform all of the work out of state.<sup>47</sup> There is no reason why DOLI’s jurisdiction should be any different.

This issue is of particular importance in the highly populated region of Northern Virginia. Northern Virginia is part of a larger metropolitan area that includes Maryland and Washington D.C. Businesses that operate in the northern part of the state frequently hire workers to perform jobs outside the state, despite being Virginia-based entities. For example, a cleaning company based in Arlington might have a crew of workers that cleans office buildings only in Washington D.C., and Bethesda. It cannot be that these in-state employers are simply immune to DOLI wage-claim enforcement merely because they require their workers to perform their tasks elsewhere.

#### **Recommendation:**

DOLI should exercise its jurisdiction over all wage claims where the employer is a Virginia employer and the employment contract was formed in Virginia, regardless of where the work was performed.



photo credit: Image by engin akyurt from Pixabay

### *Worker Did Not Demand Wages From The Employer First*

DOLI will not investigate a worker's wage claim unless the worker has already asked the employer to pay the unpaid wages.<sup>48</sup>

DOLI requires employers to demand their back wages from their employer prior to filing a DOLI claim. DOLI presumably has this policy because it does not want to spend its time and resources investigating claims that can be resolved without the government's help. But the Virginia Wage Payment Act requires employers to pay wages whether the worker asks for them or not. DOLI should not force workers to ask their employers to give them what is rightfully theirs.

Moreover, DOLI's "ask-first" policy puts Virginia's most vulnerable employees at risk. Because unlike the federal FLSA, Virginia wage-and-hour law has no protections against employer retaliation.<sup>49</sup> This means that an employer can fire or otherwise discriminate against a worker merely because the worker asks the employer to pay wages as required by Virginia law. Workers can even be legally fired for filing wage claims with DOLI. Nonetheless, DOLI will not accept a worker's wage claim unless the worker has asked the employer to pay the wages first.

#### **Recommendation:**

DOLI should eliminate this policy.

### *Claim Amount Too High*

DOLI will not investigate a wage claim if the amount of the claim is greater than \$15,000.<sup>50</sup>

If a worker is owed more than \$15,000 in unpaid wages, DOLI will not pursue the matter.<sup>51</sup> But unscrupulous employers should not be allowed to get away with wage theft simply because amount of the theft is large. DOLI may believe that these larger wage claims are a low priority because they may be attractive to the private bar. However, there is no private right of action under the Virginia Wage Payment Act.<sup>52</sup> DOLI has exclusive jurisdiction to enforce the Act: if DOLI doesn't do it, no one will.

Moreover, DOLI sometimes applies this policy improperly. DOLI's wage-claim data show that between 2015 and 2019, the agency dismissed at least 8 wage claims based on this policy even where the claim was for \$15,000 or less.

#### **Recommendation:**

DOLI should either eliminate this policy or raise the wage-claim threshold to \$25,000—the maximum amount recoverable in Virginia's General District Courts.

### *Tipped Employees*

DOLI will not investigate a worker's wage claim if the worker worked as a "tipped employee."<sup>53</sup>

Under Virginia law, employers can pay a tipped employee as little as \$2.13 per hour, as long as the employee receives tips from customers during the workweek sufficient to raise the worker's effective hourly pay to the Virginia minimum of \$7.25 per hour.<sup>54,55</sup> This makes tipped workers particularly vulnerable to wage theft, especially in the restaurant industry. In the Legal Aid Justice Center's experience, it is not uncommon for small restaurants not to pay their waitstaff even the base \$2.13 minimum wage at all, making these workers entirely dependent on tips from customers. Employers may also illegally steal a portion of the tips that their workers receive.<sup>56</sup> No matter how it occurs, wage theft from tipped workers is egregious and potentially economically ruinous—particularly for workers in low-wage restaurant jobs whose income (even with tips) is already meager.

Nothing is stopping DOLI from addressing this problem other than the Department's internal policy. No Virginia law or regulation forbids DOLI from pursuing wage claims against businesses who steal workers' tips. Nor does DOLI's Field Operations Manual instruct Department staff to reject wage claims made by tipped workers. Nonetheless, if a tipped worker files a wage claim, DOLI will not pursue it.

#### **Recommendation:**

DOLI should eliminate this policy.

### *Attorney Involvement*

DOLI will sometimes reject a worker's wage claim if the worker has consulted with a lawyer to help them with their claim.

Understandably, DOLI will not pursue a wage claim where the worker is already suing the employer for the same wages in court. But DOLI sometimes rejects wage claims even where the worker has merely consulted with a free legal-aid lawyer in order to receive pro se assistance with the DOLI wage-claim process, such as seeking help with filling out DOLI's wage-claim form or finding a good address or phone number for the employer. On multiple occasions, LAJC has seen DOLI reject wage claims merely because the worker mailed the claim to DOLI using an envelope with LAJC's return address. On other occasions, DOLI has rejected cases that it had previously accepted, merely because an LAJC attorney contacted DOLI to ask about the status of the case.

This approach makes little sense. While the DOLI wage-claim process is meant to be simple enough for a worker to use it without the help of an attorney, in practice a complaining worker may have a good reason to seek a lawyer's help. For example, a worker may not know whether she is an employee or an independent contractor—a legal determination that even courts and lawyers sometimes struggle to resolve. DOLI's website even advises potential wage claimants that they may wish to consult with an attorney to figure out if they are an employee.<sup>57</sup> But if DOLI learns that the worker has made such a consultation, the agency may reject the worker's claim. This puts the worker in a no-win situation.



Moreover, DOLI's own procedures specifically allow the complaining worker to hire a lawyer to represent them in a later stage of the wage-claim process. A critical part of DOLI's wage-claim investigation process is the Informal Fact Finding Conference.<sup>58</sup> Although DOLI refers to it as "informal," this conference is an adversarial administrative hearing at which the parties have the right to reasonable notice, an opportunity to be heard and to present additional evidence, and a written statement of the reasons underlying DOLI's final decision.<sup>59</sup> Critically, the parties also have the right to be represented at the conference by an attorney.<sup>60</sup> If the worker has the right to full representa-

tion by an attorney at the end of the wage-claim process, there is no reason why the worker should not be able to seek counsel from the start.

**Recommendation:**

DOLI should revise this policy. DOLI should allow a worker to consult with an attorney for assistance with their DOLI wage claim, so long as the worker does not file a lawsuit seeking the same wages in court.



photo credit: Sandra MarreroReleased

**DOLI should update and consistently apply its policies for determining whether a wage claim presents a “joint employment” scenario.**

DOLI has powerful tools to hold multiple individuals and businesses jointly and severally liable for unpaid wages under Virginia wage law. But the agency’s policy on the matter focuses on individuals only, does not incorporate important updates in federal case law, and is inconsistently applied.

Whenever a worker files a wage claim, DOLI should always attempt to determine whether any other individuals or businesses can also be held responsible for the unpaid wages as “joint employers.” This is especially important in the case where the worker’s direct employer is bankrupt, out of business, or judgment-proof. But no matter the situation, consistently using the joint-employer doctrine would be a sound and effective way to ensure that workers actually receive the wages they are due.

DOLI does have a policy memorandum recognizing that certain corporate officers or owners can be held responsible for unpaid-wage violations under Virginia law.<sup>61</sup> But this memorandum does not reflect important changes that the Fourth Circuit has made to the joint-employment analysis—and it does not recognize that other businesses can be liable as joint employers, not just individuals.<sup>62</sup> And DOLI does not perform a joint-employment inquiry in all wage cases, thereby letting potentially responsible parties of the hook.

**Recommendation:**

Every time DOLI investigates a wage case, the agency should determine whether any other individuals or businesses can be held responsible for the unpaid wages. DOLI should update its wage-claim complaint form to capture the information that the Fourth Circuit has deemed relevant in answering the joint-employer question.

## **DOLI should implement improved procedures for processing wage claims.**

*DOLI should always give workers an opportunity to present additional evidence and arguments before rejecting their claims.*

Of the nearly 4,000 wage claims it has received over the last five years, DOLI rejected nearly half of them (over 47%) on the same day they were received—either because DOLI believed that it lacked jurisdiction over the worker’s claim, because there was some problem with the claim form (e.g. the worker forgot to fill in a required field). When this happens, DOLI’s standard practice is to simply send the worker a template rejection letter and close the case. DOLI rarely gives the worker an opportunity to provide additional information, correct errors on the claim form, or otherwise explain to DOLI why it should accept the case for investigation.

By contrast, DOLI always gives employers a chance to challenge the agency’s findings. DOLI procedures authorize the agency to hold an Informal Fact Finding Conference, an administrative hearing at which the parties can submit additional evidence and arguments, and at which they may be represented by a lawyer. However, DOLI will hold such a hearing only if requested by the *employer*—not the worker.<sup>63</sup> This deprives the worker of an equal opportunity to be heard and goes against principles of basic fairness.

### **Recommendation:**

When DOLI decides to reject a claim, it should send a worker a notice stating the reason for the decision and giving the worker an opportunity to submit additional evidence or to correct any issues with the claim form. DOLI should also allow all parties to request an administrative hearing, not just the employer.

*DOLI should keep workers apprised of the status of their wage claims in writing, and in a language they understand.*

In LAJC’s experience, DOLI does not do an effective job of communicating with workers about the status of their claims. Workers often go months without hearing anything about their case. Additionally, DOLI sometimes notifies the worker that it is rejecting their claim solely by calling the worker on the telephone. When that happens, the worker has no written record of the denial or the reasons for it. And even though DOLI makes its wage-claim form and website available in both English and Spanish, DOLI almost always sends written communications exclusively in English—even if the worker submitted the Spanish-language version of the wage-claim form.

### **Recommendation:**

DOLI should give complaining workers regular updates about the status of their wage claims and should do so in writing. If the worker filled out the claim form in Spanish, all written communications from DOLI should include a Spanish-language version.

*DOLI should provide for administrative review of its decisions.*

If DOLI rejects a worker's wage claim outright or dismisses the claim after an investigation, the worker has no way to ask DOLI to review its decision.<sup>64</sup>

**Recommendation:**

Workers should have an opportunity to petition the Commissioner of Labor and Industry to review an adverse DOLI decision. Virginia law does not allow workers to seek such review in court,<sup>65</sup> and administrative review would likely be cheaper and easier for low-wage pro se workers, including LAJC's clients. Administrative review would ensure fairer and more consistent outcomes at all stages of the DOLI investigative process.

*DOLI should refer appropriate cases to law enforcement for criminal investigation.*

Wage theft isn't just wrong: it's a crime.<sup>66</sup> And given the relatively weak civil remedies available under the VWPA, criminal referrals would be a strong and effective way to deter unscrupulous employers from stealing their workers' pay. DOLI's procedural manual instructs the Department's supervisors to refer wage claims to law enforcement for criminal investigation in appropriate cases.<sup>67</sup> However, DOLI rarely makes such referrals—if ever. Over the last five years, DOLI has not made a criminal referral for a wage claim even once.

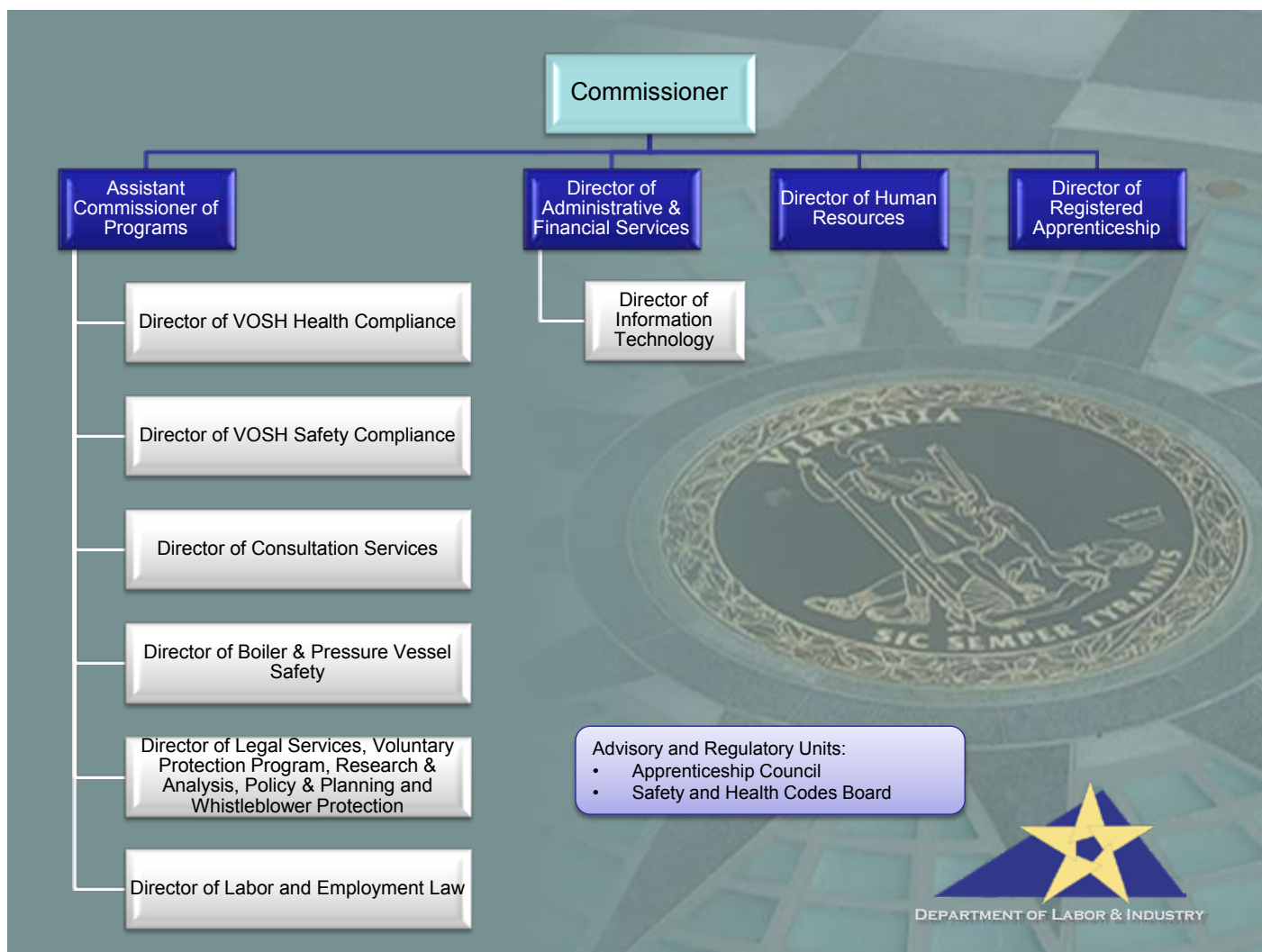
**Recommendation:**

If DOLI believes that an employer is withholding a worker's wages willfully and with intent to defraud the worker, DOLI should refer the case to law enforcement for criminal investigation. This is yet another reform that DOLI could implement immediately without any new laws or regulations.

## CONCLUSION

For nearly 40% of working families, an unexpected shortfall of even a few hundred dollars in wages can have severe financial consequences.<sup>68</sup> But few low-wage workers are able to invest the time and resources necessary to pursue such modest wage claims in court. DOLI's administrative wage-claim process thus has the potential to be a vitally important tool to recover stolen wages—particularly for Virginia's lowest-paid workers. As it stands, however, DOLI does not have appropriate internal procedures for ensuring that Virginia workers' wage-payment rights are effectively enforced. But by overhauling its wage-claim enforcement procedures, DOLI can make great strides in the right direction without delay, and without the need for a single new law or regulation. The reforms recommended in this report will go far in making Virginia a better place for all to work.

## Appendix A: DOLI Organizational Chart



Source: Virginia Department of Labor and Industry



## Appendix B: DOLI's Template Rejection Letter



**COMMONWEALTH of VIRGINIA**  
DEPARTMENT OF LABOR AND INDUSTRY

C. Ray Davenport  
COMMISSIONER

Main Street Centre  
600 East Main Street, Suite 207  
Richmond, Virginia 23219  
PHONE (804) 371-2327  
FAX (804) 371-6524

November 30, 2018

RE: Claim of Unpaid Wages

Dear Sir or Madam:

Your claim for unpaid wages has been received and reviewed. The claim will not be accepted for the reason(s) noted below. Please refer again to the "Questions to Answer Before Completing the Claim for Unpaid Wages" sheet on our website [www.doli.virginia.gov](http://www.doli.virginia.gov), if you have any questions concerning why your claim was not accepted.

- ☐ The claim form is not complete or is a copy (the original claim form must be submitted).
- ☒ The business is closed, in bankruptcy, or you performed work outside the state of Virginia.
- ☐ Your claim exceeds the two-year limit for acceptance.
- ☐ You were a Director, Officer, or Partner in the company.
- ☐ You hired a lawyer or there is a case pending in the court system. The courts have the final authority.
- ☐ Your claim involves Vacation, Holiday, Per Diem and/or Severance Pay. These are fringe benefits and are therefore not collectible by the Department.
- ☐ Your claim involves overtime, prevailing wage, minimum wage and/or you performed work as a tipped employee.
- ☐ You were self-employed or worked as a subcontractor or independent agent.
- ☐ You had a written employment agreement with the employer. The Department does not investigate claims, which involve such agreements.

\_\_\_ You are a public sector employee or the work you performed was on a federal installation/property.

\_\_\_ Your total gross claim amount exceeds the \$15,000 limit for claim acceptance.

\_\_\_ Work was conducted outside the state of Virginia.

\_\_\_ Other: \_\_\_\_\_  
\_\_\_\_\_

If your employment is covered by the FLSA or involves tips, work performed on federal property, overtime, prevailing wage, minimum wage, FMLA and/or wage issues involving public sector employees, please contact the U.S. Department of Labor for further assistance. Please refer to their website: [www.dol.gov](http://www.dol.gov) or call 1-866-487-2365 for an office location.

Although we are unable to assist you, you may also have recourse through the courts. Please check with your local courthouse and/or attorney for further assistance.

Sincerely,

Virginia Department of Labor and Industry  
600 E Main St  
Suite 207  
Richmond, VA 23219

## Appendix C: DOLI's Current Wage Claim Form (English)

### Virginia Department of Labor and Industry Labor & Employment Law Division

#### INSTRUCTIONS FOR COMPLETING "CLAIM FOR WAGES" FORM

#### ***PLEASE READ THESE INSTRUCTIONS CAREFULLY***

The attached claim for unpaid wages form must be fully completed, printed-out, signed and returned by mail in order for your claim to be investigated. Please fill in all areas completely. If necessary, use a separate sheet of paper to provide additional information or explanation. Send the original claim form and include copies of all documents which will support your claim. You must be able to prove that you are owed unpaid or wrongfully deducted wages. Incomplete forms will be returned, causing a delay in the investigation of your claim. If you have not requested payment of your wages from your employer, you **must** do so before filing a claim. Only after you have been denied your wages should you file a claim with this office.

#### **EMPLOYEES PAID BY THE HOUR:**

If you are claiming wages based on an hourly wage, include the dates, days, and hours worked for which you were not paid and include the total amount of wages you are claiming. Please provide documentation, such as a paycheck stub to verify employment and rate of pay; otherwise, our enforcement may be limited.

#### **EMPLOYEES PAID BY SALARY:**

If you are claiming wages based on a salary rate, include the maximum number of hours and days you were required to work to receive the salary rate. Please provide documentation, such as a paycheck stub to verify that the salary or the deductions from salary you are claiming is accurate. Provide dates, days, and hours worked for which you were not paid and include the total amount of wages you are claiming.

#### **EMPLOYEES PAID BY COMMISSION:**

State the total amount of wages you claim are due and indicate how you arrived at the dollar amount of your claim. Please provide a copy of your commission agreement with your employer. Indicate what you had to do to earn the commission and under what circumstances the commission would become due and payable if no written commission document exists. Account for any and all "draws" you may have received. Identify each specific account for which you seek payment of a commission and state the dollar amount of the commission you claim for each account. Provide documentation such as a paycheck stub to verify employment and the commission rate you are claiming is accurate.

#### **ACCEPTANCE OF THIS CLAIM DOES NOT GUARANTEE COLLECTION OF WAGES**

Upon acceptance of your claim by the Virginia Department of Labor and Industry, do not assume that your claim is valid and collectible. In cases where the employer disputes your charges, it will be YOUR responsibility to provide documentary evidence of the amount and validity of your claim. Also, you must provide the company's complete name and mailing address along with the owner's or company representative's full name and address. Since wage claims are handled by individual compliance officers, we do not provide periodic progress reports. Requests for progress reports only hinder the prompt resolution of your claim. When a final determination has been made, or when additional information is needed, you will be notified.

Please notify this office immediately in writing of any change in your address, telephone number, or if you receive payment from your employer. You may contact via U.S. Postal mail to the address below or by email to [laborlaw@doli.virginia.gov](mailto:laborlaw@doli.virginia.gov).

## Instructions for Filing the Initial Claim for Unpaid Wages

**U.S. Postal mail only. Faxed forms cannot be accepted!**

If you are claiming pay for work performed, please print out and submit your completed claim form to the following address by U.S. Mail:

**Division of Labor and Employment Law  
Virginia Department of Labor and Industry  
600 East Main Street, Ste. 207  
Richmond, Virginia 23219.**

Remember to sign the claim form and make sure to include the employer's full address as well the total amount of wages claimed.

Please include your email address for notices about your claim.

**Reminder: Faxed or emailed forms cannot be accepted.**

Appendix C: DOLI's Current Wage Claim Form (English) - continued

LLA-3

Rev. 4/17

**VIRGINIA DEPARTMENT OF LABOR AND  
INDUSTRY STATEMENT OF CLAIM FOR UNPAID  
WAGES**

(Please print clearly. We may be unable to assist you if your answers are incomplete.)

YOUR FULL NAME: \_\_\_\_\_

YOUR STREET ADDRESS: \_\_\_\_\_

CITY: \_\_\_\_\_ STATE: \_\_\_\_\_ ZIP: \_\_\_\_\_

HOME PHONE: \_\_\_\_\_ WORK PHONE: \_\_\_\_\_

E-MAIL ADDRESS: \_\_\_\_\_ BIRTH DATE: \_\_\_\_\_

WHAT WAS YOUR JOB TITLE: \_\_\_\_\_

HIRE DATE: \_\_\_\_\_ TERMINATION DATE: \_\_\_\_\_ LAST DATE ACTUALLY WORKED: \_\_\_\_\_

HAVE YOU DEMANDED PAYMENT OF THE WAGES YOU CLAIM? ☐ YES ☐ NO. IF SO ON WHAT DATE DID  
YOU ASK FOR YOUR WAGES? \_\_\_\_\_

NAME OF PERSON WHO REFUSED TO PAY YOU: \_\_\_\_\_

REASON GIVEN: \_\_\_\_\_

-----

BUSINESS NAME OF EMPLOYER: \_\_\_\_\_

TYPE OF BUSINESS: \_\_\_\_\_

APPROXIMATE NUMBER OF EMPLOYEES: \_\_\_\_\_

DID THEY USE ANY OTHER NAME(S)? ☐ YES ☐ NO. IDENTIFY: \_\_\_\_\_

STREET ADDRESS: \_\_\_\_\_

CITY: \_\_\_\_\_ STATE: \_\_\_\_\_ ZIP: \_\_\_\_\_

BUSINESS PHONE: \_\_\_\_\_ EMPLOYER'S HOME PHONE: \_\_\_\_\_

MAILING ADDRESS, IF DIFFERENT FROM STREET ADDRESS: \_\_\_\_\_

COMPANY OFFICER OR OWNER: \_\_\_\_\_ THEIR TITLE: \_\_\_\_\_

OFFICER/OWNER'S HOME ADDRESS: \_\_\_\_\_

CITY: \_\_\_\_\_ STATE: \_\_\_\_\_ ZIP: \_\_\_\_\_

*Statement of Claim for Unpaid Wages*

*Page 3 of 4*



IDENTIFY THE PLACE WHERE YOU PERFORMED WORK FOR THIS BUSINESS. CITY: \_\_\_\_\_  
COUNTY: \_\_\_\_\_ STATE: \_\_\_\_\_ STREET ADDRESS: \_\_\_\_\_

1. ☐ YES ☐ NO IS THIS BUSINESS CLOSED OR IN BANKRUPTCY? If so, circle which status applies.
2. ☐ YES ☐ NO DID YOU HAVE A WRITTEN EMPLOYMENT AGREEMENT? (Attach a photocopy of any agreement you may have)
3. ☐ YES ☐ NO WERE YOU HIRED TO WORK AS A SUBCONTRACTOR OR AN INDEPENDENT AGENT?
4. ☐ YES ☐ NO DID YOU WORK FOR THIS BUSINESS AS A SELF-EMPLOYED PERSON?
5. ☐ YES ☐ NO WERE YOU A CORPORATE DIRECTOR, OWNER OR PARTNER IN THIS BUSINESS?
6. ☐ YES ☐ NO DID YOU FILE A COURT CASE FOR UNPAID WAGES?  
If so, state name of court \_\_\_\_\_
7. ☐ YES ☐ NO HAVE YOU HIRED A LAWYER? \_\_\_\_\_
8. ☐ YES ☐ NO EXCEPT FOR TAXES, WERE MONIES SUBTRACTED FROM YOUR WAGES WITHOUT YOUR WRITTEN CONSENT?  
If so, how much money was deducted? \$ \_\_\_\_\_  
What was the purpose of the deduction? \_\_\_\_\_
9. ☐ YES ☐ NO DID THE BUSINESS GIVE YOU A "BAD" PAYROLL CHECK? (Attach copies of all bad checks you were given.)
10. CHECK WHAT APPLIES TO YOU: ☐ SALARIED; ☐ HOURLY; ☐ COMMISSIONS;  
☐ DAILY RATE; ☐ PAID BY JOB OR PIECE
11. WHAT WAS YOUR RATE OF PAY? \$ \_\_\_\_\_ PER \_\_\_\_\_  
(Hour, Month, Year, Piece, Etc.)
12. HOW OFTEN WERE YOU PAID? \_\_\_\_\_ LAST DATE YOU WERE PAID? \_\_\_\_\_
13. FOR WHAT TIME PERIOD WERE YOU NOT PAID YOUR WAGES? \_\_\_\_\_ THRU \_\_\_\_\_  
(Month-Day-Year) (Month-Day-Year)
14. TOTAL GROSS AMOUNT OF UNPAID WAGES YOU CLAIM: \$ \_\_\_\_\_  
("Gross" means before taxes have been subtracted from your wages.) NOTE: Sick Leave, Paid Holidays, Vacation Leave, Severance Benefits, Per Diem and Expense Reimbursements are NOT "wages" within the meaning of the wage statute. DO NOT INCLUDE THESE ITEMS IN THE DOLLAR AMOUNT OF YOUR CLAIM.

**USE THIS SPACE TO SHOW US HOW YOU ARRIVED AT THE DOLLAR AMOUNT OF YOUR WAGE CLAIM. ATTACH COPIES OF PAYROLL CHECK STUBS, "BAD CHECKS", FEDERAL W-2 OR 1099 FORMS, EMPLOYMENT AGREEMENTS AND ANY OTHER SUPPORTING DOCUMENTS YOU MAY HAVE.**

I swear and certify that the information I have provided to the Department of Labor and Industry is true and accurate, and I hereby authorize the Virginia Department of Labor and Industry to release any and all information contained in my complaint file, to investigate my charges and to take any action it deems necessary to enforce the provisions of Section 40.1-29, Code of Virginia. I further authorize a photocopy of this complaint form, together with my supporting documents, to be released to the business I have named in this complaint. I understand that if I knowingly make a false statement on this complaint form, or if I knowingly make a false statement to any state member of the Department of Labor and Industry, I could be subject to a fine of up to \$10,000 or imprisonment for up to 6 months or both.

\_\_\_\_\_  
(Signature of Claimant - Please sign in ink) DATE: \_\_\_\_\_

## Appendix D: LAJC's Proposed New Wage Claim Form

### VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY STATEMENT OF CLAIM FOR UNPAID WAGES

Please fill out this form as completely as you can. You may attach additional pages if you need more space.

Your full name \_\_\_\_\_  
Your street address \_\_\_\_\_  
City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_  
Home phone: \_\_\_\_\_ Work phone: \_\_\_\_\_  
Email address: \_\_\_\_\_ Birth date: \_\_\_\_\_

What was your job title? \_\_\_\_\_

What were your job duties? \_\_\_\_\_

Hire date: \_\_\_\_\_ Last date you worked: \_\_\_\_\_

Name of the business or person you worked for: \_\_\_\_\_

Did the business use any other names? \_\_\_\_\_

Street address of the business: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Mailing address, if different: \_\_\_\_\_

Business phone: \_\_\_\_\_

Type of business: \_\_\_\_\_ Approximate number of employees \_\_\_\_\_

How many people shared the same job responsibilities as you? \_\_\_\_\_

Is this business closed or in bankruptcy? ☐ Neither ☐ Closed ☐ Bankruptcy ☐ Unsure

Who was the person in charge of the overall day-to-day operation of the business? (If more than one person, provide this information for the other persons on a separate sheet)

Name: \_\_\_\_\_ Their title: \_\_\_\_\_

Home address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Home/cell phone: \_\_\_\_\_

Who managed, directed, or supervised your work? (If none, write "none." If more than one person, provide the other persons' information on a separate sheet).

Name: \_\_\_\_\_ Their title: \_\_\_\_\_

Home address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Home/cell phone: \_\_\_\_\_

Where did you perform your work for this business? If you worked in multiple locations, provide the other addresses on a separate sheet, along with the approximate dates you worked at each one.

Street address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Who decided what tasks you would perform each day?

☐ I did ☐ Someone else (list all people): \_\_\_\_\_

Who decided what days and hours you had to work each week?

☐ I did    ☐ Someone else (list all people): \_\_\_\_\_

Please state your work schedule (days and hours of work)

below: \_\_\_\_\_

Who provided the tools, supplies, equipment, and materials required for your job?

Did any business or individual not listed above ever:

☐ Change your work schedule? ☐ Change the rules you had to follow? ☐ Change the pay or benefits you received? ☐ Hire, fire or supervise you or your coworkers? ☐ Provide the tools or materials necessary to do your work? ☐ Control the physical location where you worked?

If yes, please identify the individual or business and specify what they did:

Did your work require any specialized skill, specialized training, or a professional license or certification? ☐ Yes (describe) \_\_\_\_\_ ☐ No

Did you hire or pay any workers of your own to help with this job? ☐ Yes ☐ No

If you hired any workers, did you need to get anyone's approval first? ☐ Yes ☐ No

Were you hired to perform a one-time job for this employer? ☐ Yes ☐ No

If yes, please describe: \_\_\_\_\_

Did you work for anyone else at the same time as you were doing this job? ☐ Yes ☐ No

Do you own your own business (are you self-employed)? ☐ Yes ☐ No

If yes, was that how you came to be hired for this job? ☐ Yes ☐ No

How were you paid (check all that apply)?

☐ Hourly wage ☐ Fixed sum ☐ Piece rate ☐ Salary ☐ Commission ☐ Other

What was your rate of pay? \$ \_\_\_\_\_ per \_\_\_\_\_ (hour, month, year, job, piece, etc.)

Did your employer ever deduct money (other than taxes) from your wages without your written permission? ☐ Yes ☐ No

If yes, how much? \$ \_\_\_\_\_ What was the reason? \_\_\_\_\_

Were you ever paid with a check that was returned by the bank for insufficient funds?

☐ Yes ☐ No (Attach copies of all insufficient-funds checks)

How often were you paid? \_\_\_\_\_ Last date you were paid: \_\_\_\_\_

For what time period were you not paid your wages? \_\_\_\_\_ to \_\_\_\_\_  
(Month-Day-Year) (Month-Day-Year)

TOTAL gross amount of unpaid wages you claim \$ \_\_\_\_\_ ("gross" means before taxes have

been subtracted from your wages) NOTE: Sick Leave, Paid Holidays, Vacation Leave, Severance Benefits, Per Diem and Expense Reimbursements are NOT "wages" under Virginia law. DO NOT INCLUDE THESE ITEMS IN THE AMOUNT OF YOUR CLAIM.

USE THIS SPACE TO SHOW US HOW YOU ARRIVED AT THE DOLLAR AMOUNT OF YOUR WAGE CLAIM. ATTACH COPIES OF PAYCHECK STUBS, "BOUNCED" CHECKS, FEDERAL W-2 OR 1099 FORMS, TIMESHEETS, EMPLOYMENT AGREEMENTS, AND ANY OTHER SUPPORTING DOCUMENTS YOU MAY HAVE. ATTACH ADDITIONAL PAGES IF NECESSARY.

## Appendix E: Virginia DOLI Complaints By City & County (2015–2019)

| City/County           | Complaints By<br>Location of Employer | Complaints By<br>Location of Worker |
|-----------------------|---------------------------------------|-------------------------------------|
| Accomack County       | 5                                     | 8                                   |
| Albemarle County      | 48                                    | 41                                  |
| Alexandria City       | 49                                    | 45                                  |
| Alleghany County      | 2                                     | 6                                   |
| Amelia County         | 6                                     | 3                                   |
| Amherst County        | 3                                     | 12                                  |
| Appomattox County     | 14                                    | 6                                   |
| Arlington County      | 57                                    | 55                                  |
| Augusta County        | 10                                    | 20                                  |
| Bath County           | 0                                     | 1                                   |
| Bedford City          | 6                                     | 10                                  |
| Bedford County        | 19                                    | 13                                  |
| Bland County          | 0                                     | 0                                   |
| Botetourt County      | 11                                    | 11                                  |
| Bristol City          | 5                                     | 1                                   |
| Brunswick County      | 4                                     | 5                                   |
| Buchanan County       | 1                                     | 1                                   |
| Buckingham County     | 3                                     | 8                                   |
| Buena Vista City      | 2                                     | 2                                   |
| Campbell County       | 10                                    | 9                                   |
| Caroline County       | 8                                     | 21                                  |
| Carroll County        | 2                                     | 5                                   |
| Charles City County   | 4                                     | 5                                   |
| Charlotte County      | 2                                     | 3                                   |
| Charlottesville City  | 1                                     | 0                                   |
| Chesapeake City       | 155                                   | 104                                 |
| Chesterfield County   | 187                                   | 194                                 |
| Clarke County         | 8                                     | 7                                   |
| Colonial Heights City | 20                                    | 16                                  |
| Covington City        | 0                                     | 0                                   |
| Craig County          | 1                                     | 5                                   |
| Culpeper County       | 11                                    | 13                                  |
| Cumberland County     | 0                                     | 2                                   |
| Danville City         | 18                                    | 13                                  |
| Dickenson County      | 0                                     | 2                                   |
| Dinwiddie County      | 2                                     | 9                                   |
| Emporia City          | 0                                     | 0                                   |
| Essex County          | 1                                     | 5                                   |

| City/County              | Complaints By<br>Location of Employer | Complaints By<br>Location of Worker |
|--------------------------|---------------------------------------|-------------------------------------|
| Fairfax County           | 412                                   | 308                                 |
| Fairfax City             | 0                                     | 0                                   |
| Falls Church City        | 10                                    | 1                                   |
| Fauquier County          | 43                                    | 36                                  |
| Floyd County             | 1                                     | 2                                   |
| Fluvanna County          | 8                                     | 6                                   |
| Franklin City            | 8                                     | 9                                   |
| Franklin County          | 6                                     | 14                                  |
| Frederick County         | 30                                    | 25                                  |
| Fredericksburg City      | 29                                    | 15                                  |
| Galax City               | 2                                     | 4                                   |
| Giles County             | 1                                     | 0                                   |
| Gloucester County        | 10                                    | 25                                  |
| Goochland County         | 23                                    | 24                                  |
| Grayson County           | 0                                     | 1                                   |
| Greene County            | 11                                    | 10                                  |
| Greensville County       | 6                                     | 6                                   |
| Halifax County           | 10                                    | 9                                   |
| Hampton City             | 80                                    | 90                                  |
| Hanover County           | 59                                    | 42                                  |
| Harrisonburg City        | 13                                    | 5                                   |
| Henrico County           | 203                                   | 159                                 |
| Henry County             | 4                                     | 11                                  |
| Highland County          | 0                                     | 0                                   |
| Hopewell City            | 11                                    | 12                                  |
| Isle of Wight County     | 10                                    | 8                                   |
| James City County        | 18                                    | 14                                  |
| King and Queen<br>County | 0                                     | 3                                   |
| King George County       | 6                                     | 13                                  |
| King William County      | 5                                     | 5                                   |
| Lancaster County         | 3                                     | 6                                   |
| Lee County               | 0                                     | 3                                   |
| Lexington City           | 0                                     | 0                                   |
| Loudoun County           | 160                                   | 110                                 |
| Louisa County            | 9                                     | 18                                  |
| Lunenburg County         | 2                                     | 3                                   |
| Lynchburg City           | 26                                    | 33                                  |

| City/County              | Complaints By<br>Location of Employer | Complaints By<br>Location of Worker |
|--------------------------|---------------------------------------|-------------------------------------|
| Madison County           | 1                                     | 6                                   |
| Manassas City            | 3                                     | 0                                   |
| Manassas Park City       | 9                                     | 14                                  |
| Martinsville City        | 26                                    | 11                                  |
| Mathews County           | 1                                     | 4                                   |
| Mecklenburg County       | 14                                    | 16                                  |
| Middlesex County         | 3                                     | 4                                   |
| Montgomery County        | 21                                    | 19                                  |
| Nelson County            | 1                                     | 2                                   |
| New Kent County          | 5                                     | 10                                  |
| Newport News City        | 108                                   | 128                                 |
| Norfolk City             | 124                                   | 158                                 |
| Northampton County       | 0                                     | 2                                   |
| Northumberland<br>County | 1                                     | 0                                   |
| Norton City              | 1                                     | 1                                   |
| Nottoway County          | 7                                     | 2                                   |
| Orange County            | 6                                     | 7                                   |
| Page County              | 3                                     | 10                                  |
| Patrick County           | 3                                     | 4                                   |
| Petersburg City          | 28                                    | 32                                  |
| Pittsylvania County      | 7                                     | 11                                  |
| Poquoson City            | 4                                     | 8                                   |
| Portsmouth City          | 56                                    | 78                                  |
| Powhatan County          | 4                                     | 6                                   |
| Prince Edward<br>County  | 7                                     | 13                                  |
| Prince George County     | 11                                    | 12                                  |
| Prince William<br>County | 255                                   | 270                                 |
| Pulaski County           | 6                                     | 4                                   |
| Radford City             | 2                                     | 7                                   |
| Rappahannock<br>County   | 2                                     | 4                                   |

| City/County             | Complaints By<br>Location of Employer | Complaints By<br>Location of Worker |
|-------------------------|---------------------------------------|-------------------------------------|
| Richmond City           | 197                                   | 238                                 |
| Richmond County         | 0                                     | 3                                   |
| Roanoke City            | 42                                    | 56                                  |
| Roanoke County          | 31                                    | 27                                  |
| Rockbridge County       | 4                                     | 1                                   |
| Rockingham County       | 11                                    | 14                                  |
| Russell County          | 6                                     | 4                                   |
| Salem City              | 21                                    | 13                                  |
| Scott County            | 2                                     | 0                                   |
| Shenandoah County       | 11                                    | 14                                  |
| Smyth County            | 5                                     | 5                                   |
| Southampton County      | 1                                     | 5                                   |
| Spotsylvania County     | 60                                    | 77                                  |
| Stafford County         | 55                                    | 65                                  |
| Staunton City           | 13                                    | 12                                  |
| Suffolk City            | 19                                    | 49                                  |
| Surry County            | 1                                     | 5                                   |
| Sussex County           | 4                                     | 3                                   |
| Tazewell County         | 4                                     | 6                                   |
| Virginia Beach City     | 274                                   | 244                                 |
| Warren County           | 20                                    | 18                                  |
| Washington County       | 12                                    | 13                                  |
| Waynesboro City         | 17                                    | 15                                  |
| Westmoreland County     | 6                                     | 11                                  |
| Williamsburg City       | 23                                    | 16                                  |
| Winchester City         | 18                                    | 14                                  |
| Wise County             | 6                                     | 9                                   |
| Wythe County            | 9                                     | 11                                  |
| York County             | 31                                    | 18                                  |
| Out Of State            | 322                                   | 415                                 |
| Not Recorded By<br>DOLI | 110                                   | 33                                  |



# Endnotes

1. Oxfam America, “The Best States to Work Index: A Guide to Labor Policy in U.S. States,” [https://policy-practice.oxfamamerica.org/static/media/files/Best\\_States\\_to\\_Work\\_Index.pdf](https://policy-practice.oxfamamerica.org/static/media/files/Best_States_to_Work_Index.pdf) (August 2018).
2. Id. at 10.
3. Library of Virginia, “A Guide to the Virginia Department of Labor and Industry, Records 1921–1944,” <http://ead.lib.virginia.edu/vivaxtf/view?docId=lva/vi00531.xml> (2005). Some of DOLI’s functions had previously been performed by the Virginia Bureau of Labor and Industrial Statistics, created in 1898.
4. Office of the Secretary of the Commonwealth, “Organization of Virginia State Government,” <https://www.commonwealth.virginia.gov/va-government/organization-of-virginia-state-government/> (last accessed September 28, 2019).
5. Va. Code § 40.1-5.
6. Va. Code § 40.1-6.
7. Va. Code §§ 40.1-28.8 through 40.1-28.12.
8. Va. Code §§ 40.1-29.
9. DOLI Field Operations Manual Chapter 10: Payment of Wage, pp. 3–9 [https://townhall.virginia.gov/L/GetFile.cfm?File=C:\TownHall\docroot\Guidance-Docs\181\GDoc\\_DOLI\\_5539\\_v2.pdf](https://townhall.virginia.gov/L/GetFile.cfm?File=C:\TownHall\docroot\Guidance-Docs\181\GDoc_DOLI_5539_v2.pdf) (Rev. April 2015).
10. DOLI Field Operations Manual Chapter 1: Minimum Wage Act, pp. 11–12 <https://townhall.virginia.gov/L/ViewGDoc.cfm?gdid=1759> (Rev. July 2019).
11. Va. Code § 40.1-29(F).
12. Va. Code § 40.1-29(F); 16 Va. Admin. Code § 15.
13. See Va. Code § 40.1-29(F).
14. DOLI.virginia.gov: “Payment of Wage (English),” <https://www.doli.virginia.gov/labor-law/payment-of-wage-english/> (last accessed Sept. 20, 2019) (“This Department has the authority to assist only employees; we do not have jurisdiction over independent contractors.”) (emphasis in original).
15. Va. Code § 40.1-29(F) (“The [DOLI] Commissioner... may institute proceedings on behalf of an employee to enforce compliance with [the VWPA]”); *Pallone v. Marshall Legacy Inst.*, 97 F. Supp. 2d 742, 746 (E.D. Va. 2000) (enforcement by DOLI is “the sole remedy” provided by the VWPA).
16. See *Fed. Power Comm’n v. Louisiana Power & Light Co.*, 406 U.S. 621, 647 (1972) (recognizing “the primary authority of an agency to determine its own jurisdiction”).
17. Compare Va. Code § 40.1-2 (“‘Employ’ shall include to permit or suffer to work”) with 29 U.S.C. § 203(g) (“‘Employ’ includes to suffer or permit to work”). Supreme Court Justice Hugo Black, who drafted the FLSA while serving as a U.S. Senator, approvingly called the suffer-or-permit standard “the broadest definition that has ever been included in any one act.” *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945), quoting 81 Cong. Rec. 7657.
18. See DOLI Policy Memorandum, “Individual Liability for Wage Claims,” at pp. 2–5 [https://townhall.virginia.gov/L/GetFile.cfm?File=C:\TownHall\docroot\GuidanceDocs\181\GDoc\\_DOLI\\_6121\\_v1.pdf](https://townhall.virginia.gov/L/GetFile.cfm?File=C:\TownHall\docroot\GuidanceDocs\181\GDoc_DOLI_6121_v1.pdf) (April 6, 2015) (the definition of “employer” under Va. Code § 40.1-2 “tracks wording from the definition of ‘employer’ contained in § 203 of the [FLSA].... Therefore, it is appropriate to look to judicial rulings established under federal law as a guide for interpreting the Virginia statute.”)
19. See *United States v. Silk*, 331 U.S. 704, 716 (1947); *Schultz v. Capital Int’l Sec., Inc.*, 466 F.3d 298, 304–05 (4th Cir. 2006). No single factor is dispositive, and courts are directed to look at the totality of the circumstances.
20. DOLI Form LLA-3, “Statement of Claim for Unpaid Wages,” [https://www.doli.virginia.gov/wp-content/uploads/2018/02/lla3-form-2017\\_English.pdf](https://www.doli.virginia.gov/wp-content/uploads/2018/02/lla3-form-2017_English.pdf) (Rev. April 2017).
21. See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) (where the working relationship demonstrates an employer-employee relationship, “putting on an ‘independent contractor’ label does not take the worker from the protection of the [FLSA].”)
22. *McFeeley v. Jackson St. Entm’t, LLC*, 825 F.3d 235, 241 (4th Cir. 2016).
23. DOLI Field Operations Manual Ch. 10, *supra* n. 9, at p. 24.
24. In almost all cases, the IRS determines whether a worker is an employee for tax-law purposes using common-law agency rules. See IRS.gov: “Independent Contractor (Self-Employed) or Employee?” <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee> (setting out the common-law rules) and “Statutory Employees” <https://www.irs.gov/businesses/small-businesses-self-employed/statutory-employees> (setting out the few unusual exceptions). However, the Fourth Circuit and other courts have recognized that “Congress intended for the FLSA to ‘stretch[ ] the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law principles.”” *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 136 (4th Cir. 2017), quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992). See also nn. 17 and 18, *supra* (because Virginia wage law defines “employ” in keeping with the FLSA, DOLI should use federal FLSA cases to interpret the VWPA).
25. See *Fed. Power Comm’n v. Louisiana Power & Light Co.*, *supra* n. 16 (agencies always have the power to determine their own jurisdiction).
26. Internal Revenue Service, “Instructions for IRS Form SS-8: Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding,” <https://www.irs.gov/pub/irs-pdf/iss8.pdf> at p. 1 (Rev. May 2014).
27. Id. at p. 3.
28. IRS.gov: “Independent Contractor (Self-Employed) or Employee?” *supra* n. 24.
29. Internal Revenue Service, IRS Form SS-8: “Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding,” <https://www.irs.gov/pub/irs-pdf/fss8.pdf> at p. 1 (rev. May 2014).
30. Compare, e.g., Va. Code § 40.1-51.2:1 (prohibiting retaliation against workers who file occupational health and safety complaints) with Va. Code §§ 40.1-29 – 40.1-33 (no equivalent prohibition for workers who file DOLI complaints).
31. Workers’ names throughout this report have been changed to protect their privacy.
32. DOLI.virginia.gov, “Payment of Wage (English),” *supra* n. 14.
33. DOLI Form LLA-3, “Statement of Claim for Unpaid Wages,” *supra* n. 20 (“Use this space to show us how you arrived at the dollar amount of your wage

- claim. Attach copies of payroll check stubs...employment agreements and any other supporting documents you may have.”)
34. DOLI Policy Memorandum, “Individual Liability for Wage Claims,” supra n. 18, at p. 5 (“During the course of the wage claim investigation, Investigators will gather information from many different sources to determine potential individual liability.” A bulleted list of sources follows, one of which is “employment contracts”).
  35. See 29 U.S.C. §§ 213(b)(10)(A), (b)(12), and (b)(21).
  36. See 29 U.S.C. § 207(a).
  37. See 29 U.S.C. §§ 203(b) and (s).
  38. DOLI.virginia.gov: “Payment of Wage (English),” supra n. 14. See also DOLI Field Operations Manual Ch. 10, supra n. 9, at p. 2 (listing as uncollectible “[m]oneys owed for work performed by a company that is closed or out of business”).
  39. DOLI claims that it “do[es] not have jurisdiction” over employers in bankruptcy proceedings. DOLI.virginia.gov: “Payment of Wage (English),” supra n. 14. That is incorrect: as a government agency, DOLI can still seek a court judgment or hold an administrative hearing to determine whether the employer owes unpaid wages under the VWPA, and in what amount. 11 U.S.C. § 362(b)(4); see also *Martin v. Chambers*, 154 B.R. 664, 667 (E.D. Va. 1992) (U.S. Department of Labor’s lawsuit for damages and injunctive relief under the FLSA was not subject to the Bankruptcy Code’s automatic-stay provision). However, even DOLI would be stayed from trying to enforce any money judgment it were to render administratively or obtain in court. See *id.* Thus, DOLI’s practice of not pursuing wage claims against employers in bankruptcy is probably a prudent one.
  40. See Va. Code § 13.1-906(B)(4) (dissolution of a corporation does not prevent commencement of a proceeding against the corporation); *id.* at (A)(3) (a dissolved corporation continues its corporate existence and may continue to take action to discharge its liabilities—which would include unpaid wages to its workers); Va. Code § 13.1-1050.5 (the cancellation of existence of a limited liability company shall not take away or impair any remedy available against the [LLC] or its members for any right or claim existing, or any liability incurred, before the cancellation.”)
  41. DOLI Policy Memorandum, “Individual Liability for Wage Claims,” supra n. 18, at p.3, quoting *Donovan v. Agnew*, 712 F.2d 1502 (1st Cir. 1981).
  42. Salinas, supra n. 24 at 139.
  43. *Id.* at 141–42.
  44. DOLI.virginia.gov, “Payment of Wage (English),” supra n. 14. See also DOLI Field Operations Manual Ch. 10, supra n. 9, at p. 3 (“Wage complaints will generally not be investigated in situations where...[a]n in-state employer hired a Virginia resident to perform work out of state”).
  45. See Va. Code § 40.1-29.
  46. Va. Code § 40.1-2.
  47. See *I.T. Sales, Inc. v. Dry*, 278 S.E.2d 789 (Va. 1981) (Virginia courts have personal jurisdiction over parties to an employment contract made in Virginia even if all of the work is performed elsewhere.)
  48. This policy does not appear in DOLI’s Field Operations Manual or policy memoranda and is not listed as a reason for rejection on DOLI’s template case dismissal form. But DOLI’s wage-claim form asks if the worker has demanded payment of the wages claimed and asks for details about the demand. See Appendix C.
  49. Compare 29 U.S.C. § 215(a)(3) (prohibiting retaliation against workers who file FLSA complaints) with Va. Code §§ 40.1-29 – 40.1-33 (no equivalent protection for workers who file DOLI complaints).
  50. See Appendix B, DOLI Template Rejection Letter. (“Your total gross claim amount exceeds the \$15,000 limit for claim acceptance.”)
  51. DOLI Field Operations Manual Ch. 10, supra n. 9, at p. 2.
  52. *Pallone v. Marshall Legacy Inst.*, 97 F. Supp. 2d 742, 745 (E.D. Va. 2000).
  53. Appendix B, DOLI Template Rejection Letter. DOLI defines a “tipped employee” as one who “customarily and regularly receives tips.” DOLI Field Operations Manual Ch. 1, supra n. 10, at p. 10.
  54. Va. Code § 40.1-28.10 (Virginia’s minimum wage is equal to the federal minimum wage); 29 U.S.C. § 206(a)(3) (the federal minimum wage is \$7.25 per hour); 29 U.S.C. § 203(m)(2) (establishing the “tip credit” principle for tipped workers).
  55. DOLI Field Operations Manual Ch. 1, supra n. 10, at p. 10 (applying the tip-credit principle under the Virginia Minimum Wage Act).
  56. From 2010–2012, the U.S. Department of Labor conducted a compliance sweep of nearly 9,000 full-service restaurants. The Department found about 1,170 tip-credit infractions resulting in nearly \$5.5 million in back wages. S. Allegretto & D. Cooper, Economic Policy Institute, “Twenty-Three Years and Still Waiting for Change: Why It’s Time to Give Tipped Workers the Regular Minimum Wage,” <https://www.epi.org/files/2014/EPI-CWED-BP379.pdf> at p. 18 (July 2014).
  57. DOLI.virginia.gov, “Payment of Wage (English),” supra n. 14.
  58. DOLI Field Operations Manual Ch. 10, supra n. 9, at pp. 4–5.
  59. *Id.* at p. 5.
  60. *Id.*
  61. See DOLI Policy Memorandum, “Individual Liability for Wage Claims,” supra n. 18.
  62. See Salinas, supra n. 24 at 141–42.
  63. DOLI Field Operations Manual Ch. 10, supra n. 9, at p. 4 (“Upon the written request of the employer, an informal fact finding conference shall be conducted.”)
  64. *Id.* at p. 5 (“The determination of the presiding official shall be final and is not subject to appeal”).
  65. See generally *Mar v. Malveaux*, 732 S.E.2d 733 (Va. App. 2012).
  66. Va. Code § 40.1-29(E) (failure or refusal to pay wages, if done willfully and with intent to defraud, is a Class 1 misdemeanor or Class 6 felony).
  67. DOLI Field Operations Manual Ch. 10, supra n. 9, at pp. 9–10: “Wage Procedure (Criminal).”
  68. See Board of Governors of the Federal Reserve System, “Report on the Economic Well-Being of U.S. Households in 2018,” <https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf> (May 2019) (“If faced with an unexpected expense of \$400... 27 percent [of adults] would borrow or sell something to pay for the expense, and 12 percent would not be able to cover the expense at all.”)



## LEGAL AID JUSTICE CENTER

The Legal Aid Justice Center (LAJC) fights injustice in the lives of individual Virginians while rooting out exploitative policies and practices that keep people in poverty. LAJC uses impact litigation, community organizing, and policy advocacy to solve urgent problems in areas such as housing, education, civil rights, worker's rights, immigration, healthcare and consumer finance. LAJC's primary service areas are Charlottesville, Northern Virginia, Richmond, and Petersburg, but the effects of its work are felt statewide.

### **Charlottesville**

1000 Preston Avenue, Suite A  
Charlottesville, VA 22903  
Phone: 434-977-0553

### **Richmond**

123 East Broad Street  
Richmond, VA 23219  
Phone: 804-643-1086

Toll-free: 800-763-7323 (clients only)  
International: 1-800-892-1751 (In Mexico, dial 001 first)  
[www.justice4all.org](http://www.justice4all.org)

### **Northern Virginia**

6066 Leesburg Pike, Suite 520  
Falls Church, VA 22041  
Phone: 703-778-3450

### **Petersburg**

237 North Sycamore Street  
Petersburg, VA 23803  
Phone: 804-862-2205