

**THE
EMPLOYMENT
LAW
CLAIM CHECKLIST
FOR
VIRGINIA ATTORNEYS**

Prepared By

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I. PRIMARY FEDERAL STATUTES

**A. Title VII of the Civil Rights Act of 1964
[42 U.S.C. § 2000e et seq.]**

1. Application: Prohibits discrimination in employment, including hiring, firing, compensation, terms, conditions or privileges of employment on the basis of race, color, religion, sex or national origin. Section 701(k) amendment also prohibits discrimination on the basis of pregnancy.
2. Coverage: Title VII applies to all public and private employers with 15 or more employees.
3. Remedies:
 1. After the Civil Rights Act of 1991, the following remedies are available under Title VII:
 - (i) Back pay (diminished by interim earnings, but including lost benefits).
 - (ii) Front pay, including benefits.
 - (iii) Equitable relief, including injunction, promotion and/or reinstatement.
 - (iv) Compensatory damages, including emotional distress, and medical or psychiatric expenses.
 - (v) Punitive damages.
 - (vi) Attorney's fees and costs.
 - b. The compensatory and punitive damages now available are subject to a cap based upon the size of the employer. The caps apply as a restriction on the combined compensatory and punitive damages award, but do not encompass the past and future lost income and benefits, or the attorney's fees and costs, set separately by the Court.
 - (i) 15 to 100 employees - \$50,000.
 - (ii) 101 to 200 employees - \$100,000.
 - (iii) 201 to 500 employees - \$200,000.
 - (iv) 500 plus employees - \$300,000.
4. Prevailing defendant/employer recovering attorney's fees:

A defendant employer is only entitled to attorney's fees if it demonstrates that the claim is frivolous, unreasonable or groundless. The prevailing defendant, however, is entitled to recover taxable costs.

5. Jury trials: Now available as a matter of right to plaintiffs. However, the Court awards benefits, back pay, front pay, all injunctive relief (including promotion and/or reinstatement) and attorney's fees and costs.
6. A Virginia State agency, the Virginia Council on Human Rights, was designated a deferral agency for the purpose of investigating Title VII charges, on March 25, 1994.
7. Administrative requirements:
 - a. Title VII charges must be filed with the EEOC and/or the Virginia Council on Human Rights. There remains an issue of dispute in the Virginia federal courts as to whether the charge must be filed within 180 or 300 days after "a reasonable plaintiff should have known facts that would support a charge of discrimination," whether it is mandatory to file with the Council first, and whether the state law employment discrimination claims must be included in the charge to avail the employee of the 300 days. Compare Tinsley v. First Union Nat. Bank, 155 F.3d 435 (4th Cir. 1998) with Dodge v. Philip Morris, Inc., WL 162955 (4th Cir., March 25, 1999)(rehearing and rehearing *en banc* denied June 10, 1999).
 - b. The EEOC and/or Council will request evidence, typically in the form of exhibits, affidavits, employee interviews, and position statements in conducting investigation.
 - (i) Following the investigation, the EEOC or Council will render a determination, either finding "no cause" or "cause" to believe the discrimination occurred.
 - (ii) Normally, the EEOC and the Council will issue a "right to sue" letter following the conclusion of the investigation.
 - (a) An employee must file suit within 90 days after receipt of the right to sue letter from the EEOC to preserve his/her right to litigate the discrimination charge. Courts have been inconsistent in interpreting the meaning of "receipt of." It is safest to file within 90 days of the file stamp. If the employee claims receipt more than the 3 day mailing time, the employee should have evidence of the receipt at a later date.

B. Age Discrimination in Employment Act of 1967
[29 U.S.C. § 621- 634]

1. Application: Prohibits discrimination in employment due to plaintiff's age. Applies to all employees 40 or older with no maximum age. Recently, the U.S. Supreme Court held that preferential treatment of older workers (over age 50) over "relatively young" workers (ages 40 to 49) does not violate the ADEA. General Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004).
2. Coverage: Employers with 20 or more employees, including state and political subdivisions.
3. Attorney's fees: Prevailing plaintiffs are entitled to attorney's fees and taxable and non-taxable costs.
4. Jury trial: Available as a matter of right to plaintiffs. Since the Court determines whether reinstatement is feasible, front pay, attorney's fees and costs are determined by the Court.
5. Charges under this law are also investigated by the EEOC and/or the Virginia Council on Human Rights.
 - a. Similar time requirements to Title VII for filing charges with the EEOC or the Council and for filing lawsuits after the EEOC or the Council issues the "right to sue" letter.
 - (i) However, the ADEA plaintiffs have an absolute right to file a lawsuit after waiting only 60 days following the filing of an EEOC charge.
6. A 1990 amendment to the ADEA, the Older Workers Benefit Protection Act, requires that any waiver of rights signed by individuals over 40 years old must now adhere to strict statutory requirements.
 - a. The employee must be given written notice of his/her right to have an attorney review any such waiver.
 - b. The employee must be given at least a 21-day review period.
 - c. The employee must be given 7 days to void any waiver he/she signs.
 - d. The employee must be given benefits he/she would not otherwise have been entitled to receive in exchange for the waiver.
 - e. Failure to comply with the strict requirements of OWBPA regarding waivers will invalidate the waiver and even permit the employee to retain severance paid and still file suit. Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998).

7. Remedies: The ADEA does not provide for compensatory or punitive damages. Plaintiffs are entitled to the following, however:
 - a. Back pay, including benefits.
 - b. Front pay, including benefits, for a reasonable period of time, if reinstatement is not feasible.
 - c. Discretionary liquidated damages (double recovery for back pay, including benefits), for willful violations of the ADEA.
 - d. Equitable relief, including injunction, promotion, and/or reinstatement.

**C. Americans with Disabilities Act of 1990
[42 U.S.C. § 12101 et seq.]**

1. Application: Prohibits discrimination against a job applicant or employee who is "a qualified individual with a disability."
2. Coverage:
 - a. Employers with 15 or more employees.
 - b. Employees who are qualified individuals with a disability.
 - (i) The Act provides protection for any individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position held or desired.
 - (ii) "Essential function" means any job task that is fundamental, and not marginal, to the job.
 - c. Disability.
 - (i) A physical or mental impairment that substantially limits one or more major life activities, or
 - (ii) A record of such an impairment, or
 - (iii) Being regarded as having an impairment.
 - d. Reasonable accommodation:
 - (i) The Act requires that a person's disability be reasonably accommodated so as to enable him/her to perform the job.

- (a) This could involve job restructuring, modified schedules, reassignment to vacant positions, eliminating non-essential elements of the job, re delegating assignments, exchanging assignments with another employee, and redesigning procedures for task accomplishment.
 - (ii) Accommodation must be provided unless it constitutes an "undue hardship" on the employer. "Undue hardship" is defined as an action requiring significant difficulty or expense, such as an action that is unduly costly, extensive, substantial, disruptive or that will fundamentally alter the nature of a program. The following factors will be considered.
 - (a) The nature and cost of the needed accommodation.
 - (b) Site factors, looking at the overall financial resources of the facility in providing the accommodation.
 - (c) Parent company factors, looking at the overall financial resources of the entity.
- e. Illegal drug use exception – individuals who currently use illegal drugs are specifically excluded from the definition of an individual with a disability.
- f. Enforcement:
 - (i) The powers, remedies and procedures set forth in Title VII are available to the plaintiff. The EEOC and the Virginia Council on Human Rights enforce the ADA.
 - (ii) Punitive damages recoverable only if employer engaged in discrimination with malice or reckless indifference.
 - (iii) Employers should note that the new, expanded remedies of the Civil Rights Act of 1991 also apply to ADA plaintiffs including the right to a jury trial.

**D. Family and Medical Leave Act of 1993
[29 U.S.C. § 2601 et seq.]**

1. Application: Entitles eligible employees to 12 weeks of unpaid leave from employment.
2. Coverage: Applies to all employers with 50 or more employees.

3. Eligible employee.
 - a. An eligible employee is one who has been employed by the employer for at least 12 months and has at least 1,250 hours of service (25 hours per week) during the previous 12 months.
4. Protected leave:
 - a. An eligible employee shall be entitled to 12 weeks of leave during a one-year period:
 - (i) Because of the birth or adoption of a child.
 - (ii) If the employee is needed to care for a son, daughter, spouse or parent of the employee who has a serious health condition.
 - (iii) Because of a "serious health condition" that makes the employee incapable of performing the functions of his or her position.
5. Paid and unpaid leave:
 - a. The 12-week requirement can consist of paid leave, including accrued paid vacation leave, personal leave, medical or sick leave already available to the employee.
 - b. FMLA leave is unpaid leave. There is no requirement that an employer pay an employee for leave under this Act.
6. Serious health condition.
 - a. Serious health conditions are illnesses that require (i) inpatient care in a hospital, (ii) hospice or residential medical care facility, or (iii) continuing treatment by a health care provider.
 - b. The employer can require medical certification and a second medical opinion justifying the need for leave for an illness of the employee or a family member.
7. Enforcement.
 - a. Can file action with Secretary of Labor or private suit in court.
 - b. Suit must be filed within two years, or within three years if violation was willful.
 - c. May recover lost compensation, lost benefits, attorney's fees and costs.

E. Equal Pay Act of 1963
[29 U.S.C. § 206(d)]

1. Application: Prohibits gender based wage discrimination. Requires same pay to male and female employees when jobs involve equal skills, effort and responsibility and are performed under similar working conditions in the same establishment. Also prohibits retaliation against complaining employee.
2. Coverage: All employers in the "stream of commerce."
3. Administrative prerequisites: None. However, if the employee files a charge with the EEOC, and the EEOC chooses to sue on behalf of the employee, the employee may lose his or her independent right to file a private action in Court.
4. Statute of limitations:
 - a. Fair Labor Standards Act time limitations apply.
 - b. Two years; or three years for a willful violation. Measurement of damages runs from time of filing suit in Court.
 - c. The Court usually determines whether the conduct constitutes a willful violation and whether the employer acted in good faith.
5. Remedies:
 - a. Back pay, plus discretionary prejudgment interest.
 - b. Liquidated damages (double back pay unless the employer proves it acted in good faith and with a sincere and reasonable belief that its conduct was lawful).
 - c. Attorney's fees and costs.
 - d. Injunctive relief.
 - e. Jury trial.

F. Section 1981, Civil Rights Act of 1866
[42 U.S.C. § 1981]

1. Application: Prohibits purposeful race discrimination in employment, including discharge.
2. Coverage: "All persons ... shall have the same right ... to make and enforce contracts ... as is enjoyed by white citizens." "Make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."

- a. Applies to acts of private individuals unsupported by state action, as well as city, county and state entities (but certain immunity defenses may apply for state and local officials).
 - b. Embraces "disparate treatment" theory of discrimination but not "disparate impact" theory.
3. Statute of limitations: 2 years.
 4. Administrative prerequisites: None.
 5. Remedies:
 - a. Compensatory and punitive damages – no limit or cap applies. However, punitive damages must meet the federal standards (where employer's conduct motivated by evil motive or intent or when it involves reckless or callous indifference to federally protected rights), and will not likely be available against a municipality.
 - b. Back pay, including benefits and discretionary prejudgment interest.
 - c. Attorney's fees and costs.
 - d. Equitable relief, including injunction, promotion and/or reinstatement.
 - e. Jury trial.

**G. Section 1983, Civil Rights Act of 1866
[42 U.S.C. § 1983]**

1. Coverage: Employees may plead a cause of action under Section 1983 to recover for the deprivation of "rights, privileges or immunities secured by the Constitution and laws." "Every person" acting under "color of state law" may be sued. Subject to the varying immunities, this includes private persons, cities, counties and other local government entities. This may include acts of discrimination, or other deprivations of federal rights, including retaliation against whistleblowers for exercising their First Amendment rights, or other Constitutional rights.
2. Determining liability of private persons "acting under color of state law" is a proverbial minefield. Multiple tests have been applied, including the two part "fair attribution" test of the Fourteenth Amendment from the U.S. Supreme Court decision of Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982):

- a. The deprivation must be caused by the exercise of some right of privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible. In other words, whether the discriminatory act or policy can be ascribed to a governmental decision.
- b. The party charged with the deprivation must be a person who may fairly be said to be a state actor.

The “state actor” analysis may include the following factors or tests:

- (i) The “public function” test – the extent to which the (private entity exercised powers which are traditionally reserved to the state.
 - (ii) The “state compulsion” test – whether the state exercised such coercive power or provided such significant encouragement, overt or covert, that the choice of the private actor is deemed to be that of the state.
 - (iii) The “symbiotic relationship” or “nexus” test – whether there is a sufficiently close nexus between the state and the action of a regulated entity, such that the action of the actor may fairly be treated as that of the state.
 - (iv) The “joint action” test – where a private party invokes the aid of state officials to take advantage of state-created procedures to deprive a private individual of property rights, such as attachment procedures.
3. Supervisory liability: Supervisors are not vicariously liable for Section 1983 violations of their subordinates. *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658 (1978). However, the supervisor may be liable if it can be established that he or she occupied a position of responsibility, knew or should have known of the misconduct, and failed to act to prevent future harm.
 4. State liability: Unless the state has waived its Eleventh Amendment immunity, or Congress has made some exception, a state cannot be sued directly in its own name.

5. Local Governmental Entities liability: Under the Monell decision, local entities cannot be sued under a *respondeat superior* theory for the unconstitutional acts of their employees. However, Monell also held that a municipality may be sued “like every other § 1983 ‘person’ “ for constitutional deprivations visited pursuant to governmental custom as well as deprivations visited pursuant to a “policy statement, ordinance, regulation, or decision officially adopted and promulgated by the body’s officers.” The U.S. Supreme Court further clarified the meaning of official policy, practice or custom in Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985): “[T]he word policy generally implies a course of action consciously chosen from among various alternatives.” The Fourth Circuit has made clear in its rulings that it requires the municipality to have actual or constructive notice of the custom or usage. See e.g., Spell v. McDaniel, 824 F.2d 1380, 1387 (4th Cir. 1987).
6. Administrative prerequisites: None.
7. Statute of limitations: 2 years.
8. Remedies:
 - a. Compensatory and punitive damages – no limit or cap applies. However, punitive damages must meet the federal standards (where employer’s conduct motivated by evil motive or intent or when it involves reckless or callous indifference to federally protected rights), and will not likely be available against a municipality.
 - b. Back pay, including benefits and discretionary prejudgment interest.
 - c. Nominal damages may be available.
 - d. Attorney's fees and costs.
 - e. Equitable relief, including injunction, promotion and/or reinstatement.
 - f. Jury trial.

**H. Fair Labor Standards Act
[29 U.S.C. § 201 et seq.]**

1. Coverage: All employers in the "stream of commerce."
2. Primary requirements:
 - a. Minimum wage of \$5.15 per hour.
 - b. Overtime of 150% of an employee's regular rate for all hours worked over 40 in any work week.

3. Retaliation against employees for exercising rights guaranteed by FLSA is prohibited. 29 U.S.C. § 215(a)(3).
4. Exemptions:
 - a. Primary exemptions.
 - (i) Executive.
 - (ii) Administrative.
 - (iii) Professional.
 - (iv) Outside salesman.
 - b. Must comply with all technical requirements of any exemption to be entitled to that exemption.
5. Statute of limitations:
 - a. Two years.
 - b. Three years for a willful violation.
6. Remedies:
 - a. In addition to back wages due, employers may be liable for "liquidated" or double his or her unpaid compensation when violations are willful.
 - b. Willful or repeated violations may be subject to a civil penalty , not to exceed \$1,000 per violation.

**I. Whistleblower Protection Act
[5 U.S.C. § 1213 et seq.]**

1. Coverage: Prohibits job-related reprisals against federal employees, applicants, or former employees, for disclosing government illegality, waste, corruption, or endangerment of public health and safety.
2. Administrative prerequisites: Unless specific exemptions, the employee must present its claim to the Office of Special Counsel. The complaint should include the precise ground for the whistleblowing retaliation charge. There is no time limitation specified for the filing of a complaint.
 - a. The Special Counsel must acknowledge receipt within 15 days.
 - b. The Special Counsel must provide a status report within 90 days.

- c. If the Special Counsel finds reasonable grounds to believe a “prohibited personnel practice” has taken place, it may seek to have the Merit Systems Protection Board (MSPB) stay the challenged personnel action, and may take action, including petitioning the MSPB, to have the agency correct the violation.
 - d. The employee is entitled to provide written comments at stages of the process.

- 3. Right of appeal/review: If the employee is unsatisfied with the results of the Special Counsel, or if no action is taken within 120 days of the filing of the original complaint, the employee may file an appeal or request for review with the MSPB. The employee may request a stay of the employment action pending the review or appeal. The appeals process is governed by 5 U.S.C. § 1221. The appeal must be filed within 60 days of receipt of the termination notice.

- 4. Referral to Administrative Law Judge: The hearings of petitions for appeal are governed by 5 C.F.R. § 1209.6(b). The following must be established for the ALJ to hear the case:
 - a. The challenged action is a “personnel action”.
[§ 2302(a)(2)(A)]
 - b. the employee is in a “covered position”.
[§§ 2302(a)(2)(A), 2302(a)(2)(B)]
 - c. The employee is in a “covered agency”.
[§§ 2302(a)(2)(A), (B), and (C)]
 - d. The challenged action is a result of a prohibited personnel practice.
[§ 2302(b)(8)]

- 5. Standards/elements of proof: The employee must establish the protected whistleblowing activity was a “contributing factor” in the adverse personnel action. 5 U.S.C. § 1221(e)(1); 5 C.F.R. § 1209.4(c). The agency has a complete, affirmative defense if it can establish through “clear and convincing” evidence, that it would have taken the same action absent the employee’s whistleblowing. 5 U.S.C. § 1221(e)(2); 5 C.F.R. § 1209.4(d).

- 6. Judicial review: The employee may file a petition for review in the Court of Appeals for the Federal Circuit within 30 days of the decision. 5 U.S.C. § 7703(b).

**J. False Claims Act
[31 U.S.C. § 3729 et seq.]**

1. Primary purpose: This statute was designed to encourage exposure of fraud against the government by government contractors, welfare benefit recipients, and other entities interacting with the federal government, through the filing of false claims, records or statements.
2. Causes of action: The employee may pursue as a *qui tam* action on behalf of the government, against the entity engaging in the fraud. The government may intervene in the action. The employee may have an additional action for retaliation.
3. Remedies: The employee may receive as much as 25-30% of the damages recovered in the case, plus attorney's fees.

II. PRIMARY VIRGINIA STATUTES

**A. Statutory Conspiracy to Injure Another in Trade, Business or Profession
[Va. Code §§ 18.2-499 and 18.2-500]**

1. Elements of action: The plaintiff must prove by clear and convincing evidence:
 - a. A combination of two or more persons;
 - b. For the purpose of *(i)* willfully and maliciously injuring plaintiff in his reputation, trade, business or profession; or *(ii)* willfully and maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act; and
 - c. Resulting in damage to the plaintiff.
2. Malice:
 - a. The element of malice may be established with "evidence that the defendant's primary and overriding purpose is to injure his victim in his reputation, trade, business or profession motivated by hatred, spite, or ill will ... Notwithstanding any additional motives defendant may have had to benefit himself or persons other than the victim." Greenspan v. Osheroff, 232 Va. 388 (1986).

- b. However, the Virginia Supreme Court has recently held that the code section does not require proof that a conspirator's primary and overriding purpose is to injure another as long there is proof of legal malice: that a defendant acted intentionally, purposefully and without legal justification. Advance Marine Enterprises, Inc. v. PRC Enterprises, Inc., 256 Va. 106 (1998); Commercial Business Systems v. Bell South Services, Inc., 249 Va. 39 (1995).
- 3. Combination:
 - a. A single entity cannot conspire with itself. Employees acting within the scope of their employment cannot "combine" with their employer. Fox v. Deese 234 Va. 412 (1987).
 - b. The intracorporate conspiracy doctrine also applies: A corporation cannot conspire with itself. Charles E. Brauer, Inc. v. NationsBank of Virginia, 251 Va. 28 (1996).
- 4. Statute of limitations: 5 years.
- 5. Remedies:
 - a. Treble damages. "[W]ithout limiting the generality of the term, 'damages' shall include loss of profits." Va. Code § 18.2-500(a).
 - b. Reasonable attorney's fees.

**B. The Virginia Equal Pay Act
[Va. Code § 40.1-28.6]**

- 1. Coverage: Any employee with a claim for unequal pay based upon gender, where the employer is not covered by Fair Labor Standards Act.
- 2. Statute of limitations: 2 years.
- 3. Remedies: The employee shall be entitled to double the amount of wages in dispute.

**C. The Virginia Human Rights Act
[Va. Code § 2.1-714 et seq.]**

1. Established a new state agency, the Virginia Council on Human Rights, but as a result of 1995 amendments, the Act is currently useless as a source of employee rights.
2. The Act prohibits unlawful discrimination because of race, color, religion, national origin, sex, pregnancy, childbirth, or related medical conditions, age, marital status or disability, in places of public accommodation, educational institutions, real estate and employment.
 - a. The Council is empowered to attempt conciliation between employers and employees when unlawful discrimination is found.
 - b. The Council has no enforcement power of its own but may refer findings of unlawful discrimination to other agencies.
3. Coverage: For termination cases, only applies to employers employing 5-15 employees and does not include disability or marital status.
4. Statute of Limitations. Any claim brought under this section must be filed within 180 days from the date of the discharge.
5. Remedies are nominal:
 - a. Up to one year back pay with interest.
 - b. Attorney's fees not to exceed 25% of the back pay awarded – to be paid from the back pay awarded.
 - c. Prohibits compensatory or punitive damages.

**D. The Virginians with Disabilities Act
[Va. Code § 51.5-40 et seq.]**

1. Prohibits job discrimination against any otherwise qualified applicant or employee solely because of a disability unless the nature of the disability prevents him/her from "adequately" performing the job. It also imposes a duty upon the employer to make reasonable accommodation to the known physical and mental impairments of an otherwise qualified person with a disability "if necessary to assist such person in performing a particular job, unless the employer can demonstrate that the accommodation would impose an undue burden on the employer." Va. Code § 51.5-41(c).

2. Coverage: Every employer in Virginia. However, it does not cover any employer covered by the federal Rehabilitation Act of 1973.
3. Jurisdiction: Any action brought under this section must be brought in chancery in the Circuit Court.
4. Statutes of limitations. Any action must be brought within one year “of the occurrence of any violation of rights” but such action is “forever barred” unless the employee or his agent has filed an action, or filed by registered mail, a written statement of the nature of the claim with the potential defendant or defendants within 180 days of the occurrence.
5. Remedies:
 - a. Equitable relief.
 - b. Compensatory damages (defined as not including pain and suffering, and limiting back pay to 180 days from the date of filing the claim, less income received). Potentially the compensatory damages could include medical or psychiatric bills. It is not clear if front pay is available.
 - c. Attorney’s fees to prevailing party, except that defendant may not receive attorney’s fees unless the court deems the claim “frivolous, unreasonable or groundless, or brought in bad faith.”
 - d. No punitive damages.
 - e. The statute specifically states the employee has a duty to mitigate damages.

**E. Virginia Unemployment Compensation Act
[Va. Code § 60.2-100 et seq.]**

1. Former employee will be entitled to unemployment compensation unless employer proves by a preponderance of the evidence either:
 - a. Employee resigned voluntarily (“forced” resignation does not disqualify an employee from benefits); or
 - b. Employee was guilty of misconduct.
 - (i) Deliberate violation of company rules or willful disregard of duties and obligations owed to the employer.
 - (ii) Employee misconduct such as theft and drug use may constitute misconduct depending upon the circumstances.
 - (iii) Mere inefficiency, incapability, mistake or misjudgment are not considered misconduct.

2. VEC claims are relatively common when former employee does not find new employment.
 - a. Liability attaches to last 30-day employer.
 - b. Benefits for a maximum of 26 weeks.

**F. Worker's Compensation Retaliation Statute
[Va. Code § 65.2-308]**

1. "No employer or person shall discharge an employee solely because the employee intends to file or has filed a [worker's compensation] claim." (The work comp claim cannot be a fraudulent claim).
2. The claim must be brought in "a circuit court having jurisdiction over the employer." At least one federal court has held this action is not removable. Green v. Hajoca Corp., 573 F. Supp. 1120 (E.D. Va. 1983).
3. Right to jury trial: Although several federal courts held the matter could not be determined by a jury, the Virginia Supreme Court held in 1998 that a plaintiff was entitled to have the evidence weighed by a jury. Mullins v. Virginia Lutheran Homes, Inc., 479 S.E.2d 530 (1997).
4. Remedies:
 - a. Equitable relief, including restraining violations, rehiring or reinstatement.
 - b. Actual damages, including back pay plus interest at the judgment rate.
 - c. Attorney's fees.
 - d. No punitive damages.

**G. Garnishment Statute
[Va. Code § 34-29]**

1. Prohibits employer from discharging any employee "by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness." Va. Code § 34-29(f).

H. Blacklisting – Preventing Employment by Others of Former Employees
[Va. Code § 40.1-27]

1. “No person doing business in this Commonwealth, or any agent or attorney of such person” after terminating any employee or after the employee voluntarily departed “shall willfully and maliciously prevent or attempt to prevent by word or writing, directly or indirectly, such employee...from obtaining employment with any other person.”
2. Violation constitutes a misdemeanor, with penalty between \$100 and \$500.
3. Employer may provide truthful reference.
 - a. But a reference is not required.
 - b. Employee also has no right to view his/her personnel file under Virginia law.

I. Virginia Wage Act
[Va. Code § 40.1-29]

1. Employer may virtually never withhold pay of terminated or resigning employee absent voluntary and written authorization.
2. Willful violation of this section may be a misdemeanor.

III. VIRGINIA COMMON LAW CLAIMS

A. Wrongful Discharge in Violation of Virginia Public Policy

1. Virginia's non-discrimination public policies:
 - a. The decision in *Bowman v. State Bank of Keysville*, 229 Va. 534 (1985), recognized a tort of wrongful discharge based on Virginia's public policy.
 - b. Standard of proof: If the discharged employee was exercising a right protected by public policy, and the plaintiff can establish by a preponderance of the evidence that he or she was discharged because of such exercise, the resulting discharge would be wrongful or tortious.

- c. Public policy:
 - (i) Cause of action is limited to discharges which violate public policy (not private rights or interests): "the policy underlying existing laws designed to protect the property rights, personal freedoms, health, safety or welfare of the people in general." Miller v. SEVAMP, Inc., 234 Va. 462 (1987).
 - (ii) Defendants have generally been successful in persuading courts that the public policy must be enunciated in or underlie a Virginia statute. Lawrence Chrysler Plymouth Corp. v. Brooks, 251 Va. 94 (1996).
- d. While some state and federal courts have been confused by the rulings in Doss v. JAMCO, 254 Va. 362 (1997), and Connor v. National Pest Control Assoc., 257 Va. 286 (1999), the Bowman public policy claim clearly remains a viable cause of action in Virginia as long as it is not based upon the Virginia Human Rights Act.

2. Virginia's public policy against employment discrimination.

- a. There is no question that such a public policy exists in the Commonwealth of Virginia.
 - (i) Race.
Lockhart v. Commonwealth Education Systems Corp., 247 Va. 98 (1994).
 - (ii) Gender.
Wright v. Donnelly & Co., 247 Va. 98 (1994);
Bailey v. Scott-Gallaher, Inc., 253 Va. 121 (1997).
 - (iii) Disability.
Bradick v. Grumman Data Systems Corp., 254 Va. 156 (1997).
 - (iv) Age.
Clark v. Manheim, VLW 096-6-061 (Va. Sup. Ct. 1996)(unpublished).

- b. However, there is no longer any such viable cause of action in view of the 1995 amendments to the Virginia Human Rights Act (eradicating any reasonable remedies and damages). The Virginia Supreme Court has now conclusively held that "the General Assembly, in enacting the 1995 Amendments to the VHRA, eliminated a common law cause of action for wrongful termination based on any public policy which is reflected in the VHRA, regardless of whether the policy is articulated elsewhere." Connor v. National Pest Control Association, 257 Va. 286 (1999). See also Doss v. JAMCO, 254 Va. 362 (1997).
 - c. To pursue a Bowman wrongful discharge claim, "an employee must be a member of the class of persons that the specific public policy [enunciated in the Va. statute] was designed to protect." The Supreme Court explicitly stated that the public policy wrongful discharge claim is not a generalized "whistleblower" cause of action. Dray v. New Market Poultry Products, Inc., 258 Va. 187 (1999); see also City of Virginia Beach v. Harris, 259 Va. 220 (2000).
 - d. In its most recent pronouncement, the Virginia Supreme Court (in a 4-3 ruling) held that an employee fired for refusing to engage in a sexual relationship with her boss in violation of the policies underlying Virginia criminal statutes **could** state a viable wrongful discharge claim. The Court held that the same conduct can support more than one theory of recovery, so the employee's claim could proceed even though her claim for sexual harassment and sexual discrimination was precluded by the VHRA amendments and the Conner case. Mitchem v. Counts, 259 Va. 179 (2000).
3. Statute of limitations: 2 years
[Va. Code § 8.01-245]
4. Remedies:
- a. Compensatory damages.
 - b. Punitive damages.

B. Actual and Constructive Fraud

1. Elements of cause of action for actual fraud:

- a. A false representation;
- b. Of a material fact;
- c. Made intentionally and knowingly;
- d. With intent to mislead.
- e. Reliance by the party misled.
- f. Resulting damage to the misled party.

Ashmore v. Herby Morewitz, Inc., 252 Va. 141 (1997).

2. Requirement of misrepresentation: Must relate to a present or pre-existing fact and may not ordinarily be predicated upon unfulfilled promises or statements as to future events. For example, promises made by an individual without any intention of performing them would be actionable.

3. Reliance must be reasonable: This includes an obligation of the plaintiff to engage in reasonable inquiry.

4. Burden of proof: Clear, cogent and convincing evidence.
Elliott v. Shore Stop, Inc., 238 Va. 237 (1989).

5. Statute of limitations: 2 years.
[Va. Code § 8.01-243(A)]

6. Distinction between constructive fraud and actual fraud: In Virginia, plaintiffs also have a cause of action for Constructive Fraud. Instead of proving that the defendant intentionally and knowing misrepresented a material fact with the intent to mislead, the plaintiff only need prove the defendant innocently or negligently misrepresented a material fact with the intent that the plaintiff rely upon it. See VMJI 39.090 (Actual Fraud) and 39.100 (Constructive Fraud). If the employer has a duty to disclose a material fact but conceals that fact from the employee, a cause of action for constructive fraud may lie. Cohn v. Knowledge Connections, Inc., 266 Va. 362 (2003). The standard of proof remains clear and convincing.

7. Remedies:

- a. Rescission.
- b. Compensatory damages: Damages and expenses incurred in reasonable reliance upon the misrepresentation.
- c. Punitive damages: Must establish proof of actual malice.

C. Defamation

1. Plaintiff is entitled to recover if he or she can establish that the defendant made a false statement of fact which was published to a third party resulting in damage to the plaintiff.
2. Statement of fact: The offending words must be understood to convey a false representation of fact as opposed to an opinion. Yeagle v. Collegiate Times, 255 Va. 293 (1998).
3. Burden of proof: The plaintiff must prove by a preponderance of the evidence the falsity of the statement. The defendant does not have the burden to establish truth as a defense. Food Lion v. Melton, 250 Va. 144 (1995).
4. Qualified privilege: Most statements in the employment context are covered by a qualified privilege, which privilege can only be overcome by proving by clear and convincing evidence that the qualified privilege has been abused. Va. Code § 8.01-46.1 (conferring qualified immunity on employers providing information about employees' performance, with presumption that employers acted in good faith, rebuttable only by clear and convincing evidence of employers' knowledge or reckless ignorance of the falsity of such information). The plaintiff can establish that the defendant abused his/her qualified privilege when:
 - a. The defendant knew the statement was false or made it with reckless disregard of whether it was false or not;
 - b. That the statement was deliberately made in such a way that it was heard or seen by persons having no interest or duty in the subject of the statement; or
 - c. That the statement was unnecessarily insulting;
 - d. That the language used was stronger or more violent than was necessary under the circumstances; or
 - e. That the statement was made because of hatred, ill will or a desire to hurt the plaintiff rather than a fair comment on the subject.

Smalls v. Wright, 241 Va. 52 (1991).
5. Workers' compensation is not a bar to a defamation action in the employment setting. Williams v. Garraghty, 249 Va. 224 (1995).
6. Statute of limitations: 1 year. Most courts find that a plaintiff's defamation cause of action accrues at the time of the defendant's communication— even if the plaintiff does not learn about it until later. [Va. Code § 8.01-247.1]

7. Remedies: In the case of *per se* defamation, the plaintiff is entitled to presumed damages, as well as:
 - a. General compensatory damages.
 - b. Punitive damages – but only if the plaintiff establishes constitutional malice (knowing falsity or reckless disregard).

Ingles v. Dibley, 246 Va. 244 (1993).

D. Intentional Infliction of Emotional Distress

1. Elements of cause of action:
 - a. Defendant's conduct must be intentional or reckless.
 - b. Conduct must be outrageous and intolerable, offending generally accepted standards of decency and morality.
 - c. There must a causal connection between the conduct and the emotional distress.
 - d. The emotional distress must be severe.

Womack v. Eldridge, 210 S.E.2d 145 (Va. 1974).
2. Outrageous conduct: Defendants have mistakenly relied upon Russo v. White, 241 Va. 23 (1991) in support of the proposition that most conduct does not rise to the level of “outrageous conduct.” In Russo, the defendant had made multiple, successive hang-up calls to Ms. Russo for a period of months. However, the Virginia Supreme Court held in Russo “We will agree with the plaintiff and assume, without deciding, that defendant’s conduct rose to the level of outrageousness required to support the cause of action.” 241 Va., at 27. Instead, the Court rejected the claim because Ms. Russo had not alleged sufficiently severe emotional distress.
3. Severity of emotional distress: The Virginia Supreme Court has held that absent objective physical injury, medical attention, lost income or confinement to home or hospital, the plaintiff must establish “emotional distress that is so severe that no reasonable person could expect to endure it.” Russo v. White, 241 Va. 23, 28 (1991).
4. Burden of proof: Clear and convincing evidence.
5. Statute of limitations: 2 years
6. Remedies:
 - a. Compensatory damages.
 - b. Punitive damages.

E. Assault and Battery

1. Assault - Elements of cause of action: Any threatening act that puts plaintiff in reasonable fear of physical injury. (VMJI 36.010)
 - a. "Threatening act" is defined as: "an overt act or an attempt, or the unequivocal appearance of an attempt with force and violence, to do physical injury to the person of another". Merritt v. Commonwealth, 164 Va. 653 (1935). Words or gestures alone, however abusive, cannot amount to assault. Harper v. Commonwealth, 196 Va. 723 (1955).
2. Battery - Elements of cause of action:
 - a. A touching;
 - b. No matter how slight;
 - c. Of another person;
 - d. In a rude, insulting or angry way. (VMJI 36.000)
3. Claims are not barred by Workers' Compensation Act because injury does not constitute "injury by accident." An assault that is "personal to the employee," not directed against the employee as such, is outside the scope of the Workers' Compensation Act. Butler v. Southern States Cooperative, Inc., 270 Va. 459 (2005).
4. Burden of proof: Preponderance of the evidence.
5. Statute of limitations: 2 years
[Va. Code § 8.01-248]
6. Remedies:
 - a. Compensatory damages.
 - b. Punitive damages.

F. Negligent Hiring

1. Elements for a cause of action:
 - a. Proof that an employment relationship exists.
 - b. Proof that the employee who caused the injury was unfit for hiring or retention.
 - c. Proof that the employer had actual or constructive knowledge that the employee is unfit.
 - d. Proof that the employee's tortious act was the cause in fact of plaintiff's alleged injury and that the negligent hiring was the proximate cause of the alleged injury.

- e. The injury must have been foreseeable – not a mere probability – to the employer.
- f. Actual damages or harm must have resulted.

J. v. Victory Tabernacle Baptist Church, 236 Va. 206 (1988).

- 2. Definition: "Negligent hiring is a doctrine of primary liability; the employer is principally liable for negligently placing an unfit person in an employment situation involving an unreasonable risk of harm to others." Victory Tabernacle at 211.
- 3. In 1988, the Virginia Supreme Court found that an employer could be liable for negligent hiring when it hired an employee who had recently been convicted of aggravated sexual assault and was on probation for that offense where the employee subsequently raped and sexually assaulted a 10-year-old girl he met at the workplace. Victory Tabernacle, supra.
- 4. Statute of limitations: 2 years.
[Va. Code § 8.01-248]
- 5. Remedies:
 - a. Compensatory damages.
 - b. Punitive damages.

G. Negligent Retention

- 1. Negligent retention differs from negligent hiring only with regard to the time at which an employer is charged with knowledge of an employee's unfitness. Negligent retention occurs when knowledge of unfitness arises during the tenure of employment.
- 2. State and federal courts widely disagreed on whether Negligent Retention was a cause of action in Virginia. In February of 1999, the Virginia Supreme Court unequivocally held that such a cause of action was indeed actionable in Virginia. Southeast Apartments Management v. Jackman, 257 Va. 256 (1999); Call v. Shaw Jewelers, No. 3:98CV449 (E.D. Va. 1999).
- 3. Elements of the claim. The plaintiff must establish that the employer negligently retained an employee the employer knew or should have known could cause harm to a person because of his employment position.

4. Critical to the analysis of this tort is the nexus between the conduct previously engaged in by the employee and the conduct giving rise to a claim of liability against the employer. The previous conduct must be sufficiently close to put the employer on notice that this employee could engage in similar or related conduct. In Southeast Apartments Management v. Jackman, the Court held that the nexus was insufficient to put the employer on notice of an assault on an apartment tenant.
5. Statute of limitations: 2 years.
[Va. Code § 8.01-248]
6. Remedies:
 - a. Compensatory damages.
 - b. Punitive damages.