



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

MEMORANDUM

TO: Wendy Inge, Director
Division of Labor and Employment Law

Labor and Employment Law Staff
C. Ray Davenport
FROM: C. Ray Davenport
Commissioner

DATE: April 30, 2015

SUBJECT: ADMINISTRATIVE SUBPOENAS AND INTERROGATORIES ISSUED
IN ACCORDANCE WITH VA. CODE §40.1-6(4)

PURPOSE

In furtherance of the Department's mission to make Virginia a better place to work, live and conduct business, the following policy is being adopted to assure to the fullest extent of the law that comprehensive investigations are conducted by Labor and Employment Law personnel.

POLICY

At the discretion of the Commissioner or in those instances where cooperation from an employer, employee or other individual is not forthcoming during the pendency of an investigation, the Investigator shall consult with the Director of the Division of Labor and Employment to determine whether the use of an administrative subpoena and/or interrogatories under Va. Code §40.1-6(4) is needed to complete the investigation. The Division of Legal Services will be available to provide support in preparing the administrative subpoena/interrogatories.

ADMINISTRATIVE SUBPOENAS

- A. Va. Code §40.1-6(4) of the Code of Virginia authorizes the Commissioner, in the discharge of his duties, to take and preserve testimony, examine witnesses and administer oaths. In accordance with § 40.1-6(5), the Commissioner of Labor and Industry may appoint such representatives as are necessary to carry out the functions outlined in §40.1-6(4). Such appointments shall be made in writing; identify the individual being appointed, the length of appointment, and the method of withdrawal of such appointment; and specify what duties are being prescribed (see Appendix A).
- B. The oath shall be administered by the commissioner's appointed representative to the witness as follows: "Do you swear or affirm to tell the truth."
- C. Questioning of employers, owners, operators, agents or employees under oath shall be in private in accordance with § 40.1-6(8)(b).
- D. Testimony given under oath shall be recorded by a court reporter.
- E. Submission to witness; Changes; Signing. Reference: Excerpt with noted revisions, Rule 4:5(e) of the Supreme Court of Virginia is hereby incorporated by reference:

Rule 4:5.(e) *Submission to Witness; Changes; Signing.* When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness ~~and by the parties~~. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the ~~officer~~ [COMMISSIONER'S REPRESENTATIVE] with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the ~~parties by stipulation~~ [WITNESS] waive[s] the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 21 days of its submission to him, the ~~officer~~ [COMMISSIONER'S REPRESENTATIVE] shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed. ~~unless on a motion to suppress under Rule 4:7(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.~~

- F. Certification. Reference: Excerpt with noted revisions, Rule 4:5(f)(1) of the Supreme Court of Virginia is hereby incorporated by reference:

"(1) The ~~officer~~ [COMMISSIONER'S REPRESENTATIVE] shall prepare an electronic or digitally imaged copy of the deposition transcript, including signatures and any changes as provided in subsection (e) of this Rule, and shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness."

- G. In accordance with § 40.1-10, if any person who may be sworn to give testimony shall willfully fail or refuse to answer any legal and proper question propounded to him concerning the subject of the examination under § 40.1-6, he shall be guilty of a misdemeanor. Such person, upon conviction thereof, shall be fined not exceeding \$100 nor less than \$25 or imprisoned in jail not exceeding 90 days or both. Any such refusal on the part of any person to comply with this section may be referred by the Commissioner of Labor and Industry to the appropriate attorney for the Commonwealth for prosecution.

INTERROGATORIES

- A. Va. Code § 40.1-6(4) authorizes the Commissioner, in the discharge of his duties to file a written list of relevant interrogatories and require full and complete answers to the same to be returned under oath within thirty days of the receipt of such list of questions.
- B. In accordance with § 40.1-10, if any person to whom a written or printed list of such interrogatories has been furnished by the Commissioner shall neglect or refuse to answer fully and return the same under oath, he shall be guilty of a misdemeanor. Such person, upon conviction thereof, shall be fined not exceeding \$100 nor less than \$25 or imprisoned in jail not exceeding 90 days or both. Any such refusal on the part of any person to comply with this section may be referred by the Commissioner of Labor and Industry to the appropriate attorney for the Commonwealth for prosecution.
- C. See Sample Interrogatory Format in Appendix B.
- D. Interrogatories. Excerpt with noted revisions, Rule 4:8(a), (b), (d) – (f) of the Supreme Court of Virginia is hereby incorporated by reference:

(a) *Availability; Procedures for Use.* ~~Any party~~ [THE COMMISSIONER] may serve upon any ~~other party~~ [PERSON] written interrogatories to be answered by the party [PERSON] served or, if the party [ENTITY] served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party [ENTITY]. ~~Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the complaint upon that party.~~

(b) *Form.* The party [PERSON] answering the interrogatories shall restate each question, by photocopying it or otherwise, then insert the word "Answer" and immediately thereafter state the response to that question. The answering party [PERSON] shall attach the necessary oath and certificate of service to the answers.

(d) *Answers.* Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party [PERSON] upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 21 [30] days after the service of the interrogatories, ~~except that a defendant may~~

~~serve answers or objections within 28 days after service of the bill of complaint or motion for judgment upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 4:12(a) with respect to any objection to or other failure to answer an interrogatory.~~

(e) *Scope; Use.* Interrogatories may relate to any matters which can be inquired into under ~~Rule 4:1(b)~~ [APPLICABLE SECTIONS OF TITLE 40.1 OF THE CODE OF VIRGINIA], and the answers may be used to the extent permitted by the rules of evidence ~~and for the purposes of Rule 3:20~~. Only such interrogatories and the answers thereto as are offered in evidence shall become a part of the record. An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, ~~but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre trial conference or other later time.~~

APPENDIX A

[LETTERHEAD]

MEMORANDUM

TO: [NAME], [TITLE]
[DIVISION]

DATE: [DATE]

SUBJECT: Authorization to Take and Preserve Testimony, Examine Witnesses and Administer Oaths in Accordance With Va. Code ' 40.1-6(4)

In accordance with Va. Code ' 40.1-6(5), I hereby appoint [NAME], TITLE, [DIVISION] as my representative to take and preserve testimony, examine witnesses and administer oaths during the investigation phase of the following Labor and Employment Law Division case:

[STYLE OF LABOR LAW CASE]
[CASE NUMBER]

This appointment shall lapse one year from the date of this appointment.

[COMMISSIONER NAME]
Commissioner of Labor and Industry

APPENDIX B

SAMPLE INTERROGATORY FORMAT

**COMMONWEALTH OF VIRGINIA:
AT LARGE:**

[COMMISSIONER NAME]
Commissioner of Labor and Industry

In re an Investigation of

[COMPANY NAME]
Investigation Site:
[ADDRESS]
[CITY], Virginia [ZIP CODE]

COMMISSIONER [COMMISSIONER NAME]=S INITIAL INTERROGATORIES

Pursuant to Virginia Code ' 40.1-6(4) and ' 4:8 Of the Rules of the Supreme Court of Virginia, [COMMISSIONER NAME], Commissioner of Labor and Industry, hereby requests [COMPANY/INDIVIDUAL AND ADDRESS], to serve sworn, written answers to the following interrogatories to the Commissioner at the Department of Labor and Industry, Division of Legal Services, 600 E. Main Street, Suite 207, Richmond, Virginia 23219, within thirty (30) days after service upon [COMPANY/INDIVIDUAL]. This request is directed to [COMPANY/INDIVIDUAL], its agents, employees, representatives, and attorneys, and extends by reference to any information which [COMPANY/INDIVIDUAL] may have in its files, or that was originally provided by any other party.

DEFINITIONS AND INSTRUCTIONS

1. The terms Ayou,@ Ayour,@ and A[COMPANY/INDIVIDUAL]@ refer to [COMPANY/INDIVIDUAL], and its agents, representatives and, unless privileged, attorney.
2. The terms Aaction@ and Acase@ refer to the investigation being conducted of [COMPANY/INDIVIDUAL], investigation number [#####}, by Commissioner [COMMISSIONER NAME]=s representatives pursuant to Va. Code ' 40.1-29 [OR OTHER APPLICABLE CODE SECTION].
3. The term "person" means any individual, partnership, firm, corporation, association, joint venture, business, organization, entity or employee, agent, or representative thereof.
4. The term "document" means the original and any copy of any written, printed, typed, photocopied, photographic, or recorded matter of any kind or character, however produced or reproduced, in your possession or control or known by you to exist, including, but not limited to, all drafts, contracts, diaries, calendars, desk pads, correspondence, communications, letters, telegrams, teletypes, memoranda, notes, studies, reports, drawings, graphs, photographs, films, microfilms, slides, books or other publications, magnetic or electronic recordings, computer tapes or disks, sound recordings, lists, minutes, canceled checks, bank statements, checkbooks, and entries in books of account.
5. The terms Astate,@ "identify," "identity," or "identification," and "describe" or "description":
 - a. When used in reference to an individual, require the specification of that individual's full name, present or last known residential address, business or official affiliation, job title, and business address (by street, city and state);
 - b. When used in reference to a person that is not an individual, require the specification of the type of entity and its business address, and the identification of all partners, officers, directors, and stockholders;
 - c. When used in reference to a document, require the specification of that document's date, author, addressee, title, serial or file number, present location, the identity of its custodian, the substance of the contents thereof, and any other information necessary to the framing of an appropriate request for the production of the document; or alternatively, shall require the production of an authentic copy of that document; and
 - d. When used in reference to any act, occurrence, statement, occasion, meeting, oral communication, discussion, transaction, or conduct ("act") mean to set forth the event or events constituting such act, its location, its date, the identity of persons participating, present, or involved, and the documents, relating or referring in any way thereto; and when used in reference to any discussion, conversation, oral communication, or statement ("discussion"), mean, in addition to the foregoing, to set forth the substance of the discussion.

6. The term "investigation site" refers to [SITE ADDRESS] on or about [DATE COMPLAINT FILED].
7. If any privilege is claimed as to any information called for or any document or oral communication required to be identified by an interrogatory or produced:
 - a. Identify the privilege involved (*e.g.*, attorney-client, work product, etc.);
 - b. State the basis for claiming the privilege as to each specific item of information, document, or oral communication;
 - c. If the privilege is claimed with respect to any information, identify each person who has knowledge of such information, or to whom such information has been communicated at any time and in any way; and
 - d. If the privilege is claimed as to any document or oral communication, state the type of document or communication and the date thereof; identify each person who prepared or made it and each person (if any) who signed it; identify each person to whom the document or communication or any copy, summary, digest, or other description thereof was directed, circulated, or distributed; and identify each person now in possession of the document or such copy, summary, digest, or other description.
8. The singular of any word shall include the plural, and the plural shall include the singular.
9. The conjunctive form "and" and the disjunctive form "or" are mutually interchangeable and are meant to encompass each other.
10. "Any" and "all" are mutually interchangeable and are meant to encompass each other.
11. If the information requested is not available or is unknown, describe the efforts you made to obtain the information and, if known, any source from which the information might be obtained.
12. These interrogatories, requests for production of documents, and requests for admissions shall be deemed continuing so as to require supplemented responses as required by Rule 4:1(e) of the Rules of the Supreme Court of Virginia.

INTERROGATORIES

1. For each of these interrogatories which follow, identify the person(s) who provided the answer and identify every person consulted and every document reviewed in preparing the answer.

ANSWER:

- 2.

ANSWER:

Respectfully submitted,

[COMMISSIONER NAME],
Commissioner of Labor and Industry

Department of Labor and Industry
600 E. Main Street, Suite 207
Richmond, Virginia 23219
804.786.2377

CERTIFICATE OF SERVICE

I hereby certify that on March, ____, 2015, a copy of Commissioner [COMMISSIONER NAME]'s Initial Interrogatories were mailed by UPS to [COMPANY/INDIVIDUAL], [ADDRESS].

[COMMISSIONER]
Commissioner of Labor and Industry