

Alert | Labor & Employment



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Reminder: Virginia's New Employment Laws Take Effect July 1

Virginia's General Assembly and governor worked together this year to enact a broad range of new employment laws that impact virtually every aspect of the employment relationship. These laws create new substantive and procedural protections for employees and impose new liabilities and burdens on employers, and they take effect July 1, 2020.

Expanded Protections, Coverage, and Remedies Under the Virginia Human Rights Act

Senate Bill 868, known as the Virginia Values Act (VVA), amends the Virginia Human Rights Act (VHRA) to add new employee protections and increase employer coverage, including:

Adding sexual orientation and gender identity to the VHRA's list of protected classifications. Before the VVA's enactment, the VHRA's protected classifications comprised race, color, religion, national origin, sex, pregnancy, childbirth and related medical conditions, age, marital status, and veteran status.¹

Broadening the scope of covered employers. Before the VVA's enactment, the VHRA covered smaller employers that were not covered under federal anti-discrimination laws. In particular, for all forms of prohibited discrimination other than age, the VHRA covered employers that employed between six and 14

¹ Although disability is included in the VHRA's anti-discrimination policy declaration, the Commonwealth's disability protections are codified in an altogether different statute – the Virginians with Disabilities Act (VDA).

employees, and, for age discrimination, covered employers with between six and 19 employees. The VVA expands the VHRA's coverage to all employers with 15 or more employees (except for age discrimination). In addition, for purposes of *unlawful discharge claims* based on unlawful discrimination (other than age), the VHRA now covers all employers with more than five employees.²

Expanding Virginia's enforcement powers. The VVA grants expanded powers to the Virginia Division of Human Rights (DHR) and grants the Commonwealth's attorney general authority to initiate a civil action on behalf of an aggrieved individual seeking injunctive relief, compensatory and punitive damages, reasonable attorneys' fees and costs, as well as civil penalties.

Expanding a private right of action. The VVA's most significant change is perhaps that individuals may now bring a civil action for any type of VHRA claim in Virginia state court after exhausting their administrative remedies. (Previously, the VHRA only provided a private right of action for discriminatory discharge claims.) An individual who prevails in a civil action is entitled to relief previously unavailable, including compensatory and punitive damages, reasonable attorneys' fees and costs. Unlike its federal law counterparts, the VHRA imposes no caps on monetary damages.

Expanded VHRA Race Discrimination Protections

House Bill 1514 amends the VHRA to expressly state that race discrimination includes discrimination on the basis of traits historically associated with race, specifically including "hair texture, hair type, and protective hairstyles such as braids, locks and twists."

Expanded VHRA Protections for Pregnancy, Childbirth, and Related Medical Conditions

House Bill 827/Senate Bill 712 amends the VHRA to: (1) prohibit employers with *five or more employees* from discriminating against an employee or applicant on the basis of her pregnancy, childbirth, or related medical conditions, *including lactation*; (2) require covered employers to make reasonable accommodations for any such known limitations related to those conditions unless the employer can demonstrate that the accommodations impose undue hardship on the employer; (3) prohibit covered employers from taking adverse action against an employee who requests or uses, or an applicant who requires, a reasonable accommodation related to those conditions; and (4) require covered employers to provide information concerning these protections in a conspicuous workplace location, in any employee handbook, to new employees upon commencement of employment, and to any employee within 10 days of her providing notice that she is pregnant.

The procedural rights afforded under this section are significantly broader than those afforded under the VHRA's other anti-discrimination protections. Although, as with all VHRA discrimination claims, an individual with a claim under this section may file an administrative charge with the DHR, she has choice, not afforded those with other VHRA claims, to instead file a civil action without exhausting her administrative remedies. Furthermore, unlike individuals with other VHRA claims, who generally must file a DHR charge within 180 days of the violation, an individual with a claim under this section has two years from the violation date to file her DHR charge or civil action.

² For age discrimination, including age-based discharge claims, the VHRA continues to cover employers with between six and 19 employees.

Protections Against Non-Competes for Low-Wage Workers

House Bill 330/Senate Bill 480 prohibits employers from entering into or enforcing non-compete covenants with low-wage employees. The law applies to covenants not to compete that are entered into on or after July 1. Every employer is required to post a copy or approved summary of the law in the same location where other employee notices required by state or federal law are posted.

The law defines a “low-wage employee” as any employee whose average weekly earnings are less than the average weekly wage of the Commonwealth as determined by the Virginia Workers’ Compensation Commission (VWC).³

The law does not limit employers’ use of confidential information or nondisclosure agreements intended to prevent the misappropriation of trade secrets and proprietary or confidential information.

Virginia’s Department of Labor and Industry (DOLI) is authorized to administer and enforce the law, including implementing regulations, initiating investigations, determining violations, issuing warnings, imposing civil penalties, and prosecuting violations in civil court.

In addition to the DOLI enforcement provisions, the law permits an employee to bring a civil action against an employer that attempts to enforce a covenant not to compete. The court has the power to order all appropriate relief, including enjoining the employer’s conduct, ordering payment of liquidated damages, and awarding damages (including lost compensation). If the employer is found liable, the court is required to award the employee reasonable attorneys’ fees, expert witness fees, and costs. Employers are prohibited from retaliating against an employee who brings a civil action under this law.

Protections Against Worker Misclassification

There are a number of new laws designed to prevent and remedy worker misclassification.

Private Right of Action. House Bill 984/Senate Bill 894 permits an individual who has not been properly classified as an employee to bring a civil action against an employer that had knowledge of the misclassification. The law requires the court to presume that an individual who performs services for a person for remuneration is an employee of the person, unless it is established that the individual is an independent contractor under IRS guidelines. If the court finds that the employer did not properly classify the individual as an employee, the court may award the individual damages, including lost compensation and employment benefits, reasonable attorneys’ fees and costs.

Non-Retaliation Protections. House Bill 1199/Senate Bill 662 prohibits employers from retaliating against an employee or independent contractor because the employee or independent contractor (1) reported or plans to report that an employer has failed to properly classify an individual as an employee and failed to pay required benefits or other contributions, or (2) is requested or subpoenaed by an appropriate governmental authority to participate in an investigation, hearing, or inquiry by the governmental authority or in a court action. These protections only apply to an employee or independent contractor who disclosed information about suspected worker misclassification in good faith and upon a reasonable belief that the information was accurate.

³ “Low-wage employee” expressly includes interns, students, apprentices, or trainees who are not paid or are paid below the Commonwealth’s average weekly wage. Significantly, “low-wage employee” also includes independent contractors who are compensated at an hourly rate that is less than the median hourly wage for the Commonwealth, as reported by the U.S. Bureau of Labor Statistics. The law excludes employees whose earnings are derived, in whole or in predominant part, from sales commissions, incentives, or bonuses.

An employee discriminated or retaliated against in violation of this statute may file a complaint with the DOLI, which is authorized to institute proceedings against the employer for appropriate remedies, including reinstatement and recovery of lost wages. The DOLI also will assess an employer that violates this statute a civil penalty not to exceed the amount of the employee's lost wages.

Expanded Enforcement Powers. Finally, House Bill 1407/Senate Bill 744, which takes effect Jan. 1, 2021, prohibits any person from requiring or requesting that an individual enter into an agreement or sign a document that results in the individual's misclassification as an independent contractor or otherwise does not accurately reflect the relationship with the employer. The statute makes it unlawful for an employer (or any other party) to retaliate against any person who exercises rights under the law (but does not provide a private cause of action).

Virginia's Department of Taxation is authorized to administer and enforce the statute, including making classification determinations based on IRS guidelines, and imposing civil penalties. An employer, *or an officer or agent of the employer*, that improperly classifies an individual as an independent contractor, and fails to pay taxes, benefits, or other contributions required to be paid an employee, is subject to civil monetary penalties that escalate with subsequent violations. If the employer is a government contractor, the Department will notify the appropriate government agency of a first violation; in the event of subsequent violations, the government contractor will be debarred for a period of time.

Expanded Wage Payment Protections

The Virginia Wage Payment Act (VWPA), Virginia Code § 40.1-29, generally requires employers to pay salaried employees at least once a month and hourly employees at least once every two weeks or twice a month, and, upon termination of employment for any reason, to pay all final wages on the next regularly scheduled payday. In its current form, the VWPA authorizes the DOLI to administer and enforce the statute, including investigating potential violations and assessing civil and criminal penalties.

Private Right of Action. House Bill 123 amends the VWPA to permit an employee to file a civil action for VWPA violations. Specifically, if an employer fails to pay wages to an employee in accordance with the statute, the employee may bring a civil action against the employer to recover payment of the wages plus prejudgment interest. If the court finds that the employer *knowingly* failed to pay wages in accordance with the statute, the employee is entitled to recover the amount of the wages due (plus prejudgment interest) and reasonable attorneys' fees and other costs. Furthermore, if the court finds that the employer *willfully and with intent to defraud* failed or refused to pay wages when due, the employee also is entitled to recover an amount equal to three times the amount of wages due.

Non-Retaliation Protections. House Bill 337/Senate Bill 48 amends the VWPA to prohibit employers from retaliating against an employee because the employee (1) filed any complaint or instituted any proceeding under the VWPA or (2) testified or is about to testify in any such proceeding. An employee who is retaliated against under this section may file a complaint with the DOLI, and the DOLI is authorized to pursue legal action on behalf of the employee for appropriate remedies, including reinstatement, lost wages, and liquidated damages equal to the lost wages. There is no private right of action under this section.

Construction Contractor Liability. Senate Bill 838 amends the VWPA to hold a general contractor jointly and severally liable for its subcontractors' failure to pay their employees in accordance with the VWPA (subject to a right of indemnification if the violation was not due to the general contractor's own failure to pay the subcontractor).

Expanded Enforcement Powers. Finally, House Bill 336/Senate Bill 49 gives the DOLI greater investigative and enforcement powers under the VWPA and permits the agency to institute proceedings on behalf of the aggrieved employee(s).

Expanded Protections for Sharing Wage Information

House Bill 622 prohibits employers from discharging or taking other retaliatory action against an employee because the employee (1) inquired about or discussed with, or disclosed to, another employee any information about either the employee's own compensation or any other employee's compensation, or (2) filed a complaint with the DOLI alleging a violation of the statute.

Expanded Whistleblower Protections

As we previously reported (*see GT Alert, New Virginia Whistleblower Law Alters Employment Litigation Landscape, April 28, 2020*), Virginia's Fraud and Abuse Whistle Blower Protection Act prohibits private employers from discharging, disciplining, threatening, discriminating against, or penalizing an employee, or taking other retaliatory action regarding an employee's compensation, terms, conditions, location, or privileges of employment, because the employee (1) in good faith reports a violation of any federal or state law or regulation to a supervisor or to any governmental body or law-enforcement official, (2) is requested by a governmental body or law-enforcement official to participate in an investigation, hearing, or inquiry, (3) refuses to engage in a criminal act that would subject the employee to criminal liability, (4) refuses an employer's order to perform an action that violates any federal or state law or regulation and the employee informs the employer that the order is being refused for that reason, or (5) provides information to or testifies before any governmental body or law-enforcement official conducting an investigation, hearing, or inquiry into any alleged violation by the employer of federal or state law or regulation.

An employee may bring a civil action under the statute, within one year of the alleged retaliatory action. As remedies, the court may issue an injunction to restrain continued violations, reinstate the employee, and award compensatory damages, together with interest, and reasonable attorneys' fees and costs.

Implications for Virginia Employers

The General Assembly's significant expansion of Virginia's employment laws requires employers to take immediate action to ensure compliance with new legal requirements that affect virtually every aspect of their workforce operations – from recruitment to termination, and beyond.

Significantly, these new laws will open the doors to the Virginia courthouses and permit litigation of many of these claims directly in state court. Broader enforcement powers may also result in greater exposure for the unwary employer.

With respect to discrimination, retaliation, and reasonable accommodations, worker classification (both exempt employees and independent contractors), wage payment, and restrictive covenants, employers must review, and make any necessary changes to, their existing employment policies and practices (including posting and notice requirements), train their human resources and management personnel, and educate their workforce. In addition, given that employee lawsuits in Virginia's state court system may increase, employers may wish to consider steps to avoid or minimize that risk, including, for example, using forum selection or arbitration agreements to the extent feasible.

Authors

This GT Alert was prepared by:

- **Ronda B. Esaw** | +1 703.749.1357 | esawr@gtlaw.com
- **Theresa A. Queen** | +1 703.749.1300 | queent@gtlaw.com
- **John Scalia** | +1 703.903.7539 | scaliaj@gtlaw.com
- **Robert “Woody” Angle** | +1 703.749.1391 | anglew@gtlaw.com

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