

Virginia Employment Laws: A New Frontier

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Historic Virginia Values Act

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Governor Northam Signs Virginia Values Act

Virginia is first Southern state to provide sweeping anti-discrimination protections for LGBTQ people

RICHMOND—Governor Ralph Northam today announced he has signed the Virginia Values Act, making Virginia the first state in the South to enact comprehensive protections for the LGBTQ community against discrimination in housing, employment, public spaces, and credit applications.

Beyond the Headlines: VVA does much more than simply protect LGBTQ workers

- Creates an entirely new litigation scheme under Virginia Law.
- As of July 1, Virginia businesses no longer have the advantage.
- Leading Plaintiff's lawyer: *"I'm grinning from ear to ear."*

A Broad Range of Claims

“Wrongful Discharge”



- ANY aspect of the employment relationship.
- Hiring
- Firing
- Benefits
- Pay
- Promotion/demotion
- Application process
- Etc.



A Broad Range of Employers

- Employee who works in Virginia, for an employer with at least 5 employees.
- Employers with 15 or more employees may see claims under both Virginia law and federal law (Title VII).
- Age discrimination under the VHRA still more than 5 but less than 20 employees.



Watch out...

- The Virginia Values Act appears to open the door to *individual* liability as well as liability for an employer.
- Supervisors, co-workers, etc. can be sued individually for harassment, discrimination, etc.
- Consider:
 - Will employee need different lawyer?
 - Increased costs

General District Court vs. Circuit Court

General District Court

- Wild wild west bench trials
- Claims up to \$25,000
- No jury
- Limited or no discovery
- Either party has automatic right to de novo appeal to Circuit Court within 10 days

General District Court vs. Circuit Court

Circuit Court

- Jury trials
- Few law clerks = slow
- Plaintiff nonsuit issue looms = one time do-over
- Jury pools are local, unlike federal court, which is drawn from larger region
- Judges not familiar with employment claims

“OK, so what’s the big deal?”

No limit on damages.

- Backpay
- Uncapped compensatory damages
- Attorneys’ fees for the employee’s attorney
- \$350,000 cap on punitive damages applies



Discrimination Protections Extended to Pregnant Employees

- Cannot discriminate on the basis of pregnancy, childbirth, or related medical conditions
 - “Related medical conditions” includes lactation
- Cannot discriminate against employees or applicants



Pregnancy: Reasonable Accommodations & Interactive Process

- Applies to employers with 5+ employees
- Employers must provide reasonable accommodations unless it imposes an undue hardship on the employer
- Law provides 10 examples of reasonable accommodations
- If requested accommodation is not reasonable, must discuss alternatives

Must Inform EEs of New Pregnancy Protections

- Must inform employees of new law by October 29, 2020 (120 days from July 1)
 - Must post at the workplace and include in any employee handbook
 - Must provide to new employees
 - Must provide within 10 days of an employee informing the employer of a pregnancy

Race Discrimination Based Upon Hair

- Virginia joins California, New York, and New Jersey in adopting legislation regarding race discrimination based upon hair.
- Bans discrimination based upon traits historically associated with race
 - Includes hair texture, hair type, and hairstyles such as braids, locks, and twists.
- Does policy that includes requirement to wear hair in a “business-like manner” violate new law?

Minimum Wage Increase

- Increases minimum wage from \$7.25/hr to \$9.50 on **May 1, 2020** (a 31% increase)
 - Increase delayed due to COVID-19.
 - Increase each year until January 2026 when it reaches \$15.00/hr.



Marijuana Decriminalization

- Virginia voted to decriminalize the simple possession of marijuana.
- Possession of up to one ounce is now a civil – not criminal – violation.
- Employers are prohibited from requiring an applicant to disclose information concerning any arrests, criminal charges, or convictions related to now decriminalized marijuana offenses.
- What about drug tests?
 - Employers can still drug test for marijuana. It is still a federal offense and employees are not permitted to be under the influence of drugs while on the job.

Use of Cell Phones While Driving

- Existing restriction only prohibited texting while driving. Now, individual cannot even hold a cellphone while driving – no matter the reason.
- If you have employees who operate a company vehicle or drive on company business, inform them and update your policies that they cannot touch their phone – even for directions – while driving.



Virginia's New Whistleblower Law

Before July 1, 2020

- No general whistleblower law
- Wrongful discharge tort was limited to terminations that violated public policy contained within Virginia statutes

New Whistleblower Protection Law

- Very broad
- Protects workers from all forms of retaliation if they have reported suspected illegal activity (internally or externally) or have engaged in other forms of protected activity
- Allows an employee to seek an injunction or other equitable relief from a court based on a supervisor's threat to take action

Retaliation is Prohibited

- An employer cannot discharge, discipline, **threaten**, discriminate against, or penalize an employee or take other **“retaliatory action”** regarding an employee’s compensation, terms, conditions, location or privileges of employment *because the employee:*

Because the Employee:

1. Or a person acting on behalf of the employee 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;
5. Provides information to or testifies before any governmental body or law enforcement official conducting an investigation, hearing or inquiry into alleged violation by employer of federal or state law or regulation.

This Law Does Not:

1. Authorize the employee to make a disclosure of data otherwise protected by law or any legal privilege;
2. Permit an employee to make statements or disclosures when they are false or in reckless disregard of the truth;
or
3. Permit disclosures that would violate federal or state law or diminish or impair the right of any person to the continued protection of confidentiality of communications provided by common law.

What Does This All Mean?

- Creates new wrongful discharge claim.
- May allow employee to seek punitive and unlimited compensatory damages against both the company and individual owners or managers.
- Timing is everything.
- Documentation will be more important than ever.

In the real world...

- Whistleblower claim based on:
 - Families First Coronavirus Response Act
 - Virginia's Emergency Temporary Standard
 - Pay equality
 - Virginia Values Act
 - Etc.

New Wage Payment Law w/ Enhanced Damages

- New “Wage Theft” law allows EEs to sue for unpaid wages
- Applies to minimum wage, overtime pay, unlawful deductions
- “Wages” may not be limited to base pay/salary—may include commissions, bonuses, equity compensation
- Not limited to hourly employees (executives also)

“Collective Actions” Permitted

- Allows wage “collective action” in state court—new concept
- Group of employees may “opt in” (similar to FLSA collective action lawsuit)



Also, No Retaliation Against EEs

- No retaliation against EE for protected activity related to nonpayment of wages
- No private right of action, but DOLI may file on behalf of employee
- An employee may have a private claim based on public policy violations
- Employers subject to civil penalties



Independent
Contractor

Employee

Worker Misclassification



Worker Misclassification – Employee or independent contractor?

Four new laws:

1. Worker can file suit against company alleging misclassification
2. Employer cannot retaliate
3. Dept. of Taxation granted broad authority to investigate (goes into effect January 1, 2021)
4. Board of Contractors shall require a contractor to classify workers appropriately

Worker Misclassification – Private Right of Action

- Presumption that worker is employee
- Employer burden to prove person is independent contractor (20 factor IRS guidelines)
- Damages include lost compensation, benefits, expenses, and attorneys fees

Worker Misclassification – No Retaliation

- Employee must first file complaint with DOLI
- DOLI can seek remedies including reinstatement, recovery of lost wages, and an additional civil penalty equal to lost wages.

Noncompete Restrictions No Longer Allowed for “Low Wage” Employees



“Upset at you for breaching the non-compete? Of course not.”

Who is considered a “low-wage” employee?

- Employees whose average weekly earnings are less than the average weekly wage in VA
- Currently \$1,125/week (about \$58,500/year)
 - Includes independent contractors who earn an hourly rate that is less than the median hourly wage in Virginia (~ \$20 per hour)
- Does not include EE w/ earnings “**predominantly**” from sales commissions, incentives, bonuses

To-Do List ASAP

- Update your EEO policies to include “sexual orientation” and “gender identity” as protected classes. You should also include “pregnancy, childbirth, or related medical conditions including lactation” as well.
- Review grooming policy
- Post all required notices (i.e., pregnancy, etc.)
- Ensure your internal complaint processes are robust, well-publicized, and employees know they can lodge internal complaints without fear of retaliation.
- Train supervisors on EEO commitment and protocol.

Questions?

Thank you!

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