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Virginia Employers Get Ready: New Laws Dramatically Expand Employee Protections and Employer Liability in the Commonwealth

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In the wake of Virginia voting in Democratic majorities in both houses of the state legislature last year, the Virginia legislature has passed, and Virginia Governor Ralph Northam has signed into law, a slew of new measures providing Commonwealth employees broad protections and enhanced mechanisms by which to bring claims against their employers for violations of those protections. These laws address issues such as employee misclassification, wage payment, and non-competition agreements.

However, perhaps the most consequential new law is Senate Bill 868, known as the "Virginia Values Act," which significantly expands the scope of Virginia's Human Rights Act ("VHRA") by not only broadening the characteristics protected by and actions prohibited by the law, but by also greatly enhancing the remedies available to employees and significantly expanding the employers covered by the law.

Key provisions of Virginia's new employment laws are discussed below.

Sweeping Changes to Virginia's Anti-Discrimination Law

As previously reported, Virginia recently amended the VHRA to ban discrimination on the basis of hairstyle. On April 11, 2020, the Governor signed into law more extensive changes to the VHRA. The VHRA had been a fairly modest anti-discrimination law, generally covering only small employers not covered by federal anti-discrimination laws and providing for fairly modest recoveries.

The amendments expand the VHRA's prohibition on employment discrimination to include discrimination on the basis of sexual orientation and gender identity, and veteran status. Virginia is now the first southern state to prohibit discrimination on the basis of sexual orientation and gender identity. Additionally, the amendments greatly expand the applicability of the VHRA, eliminate limits on damages, and create a new private right of action. These changes become effective July 1, 2020. Key changes to the VHRA include:

- Beginning July 1, 2020, the VHRA will prohibit any "unlawful employment practice," which includes "fail[ing] or refus[ing] to hire, discharg[ing], or otherwise discriminat[ing] against any individual with respect to such individual's compensation, terms, conditions, or privileges of employment" because of certain expanded characteristics. The new protections under the VHRA will not only prohibit discrimination in employment on the basis of race, color, religion, national origin, age, sex, marital status, and pregnancy, childbirth or related medical conditions including lactation, but also sexual orientation and gender identity, and veteran status.
- Before these amendments, the VHRA had limited application as it only applied to employers with more than five and fewer than 15 employees (or, with respect to age, employers with more than 5 and fewer than 20 employees). However, when the amendments go into effect, the new prohibitions on unlawful employment practices will apply to all ***employers with 15 or more employees***. This threshold is lowered for the prohibition on "unlawful discharge" for the protected characteristics noted above (except for age), which will apply to ***employers with five or more employees***. The VHRA's prohibition against unlawful discharge on the basis of age (meaning because the individual is 40 years old or older) will continue to apply only to employers with more than five but fewer than 20 employees.
- Accordingly, a much broader group of employers is now subject to the law's private right of action, which has been expanded to provide a claim for any unlawful employment practice under the law (not just discharge as was previously the case). The new law establishes an administrative charge prerequisite to filing a lawsuit, which appears similar to the system in place for claims under Title VII of the Civil Rights Act of 1964.
- The remedies available to employees who bring a claim under the amended VHRA have also been greatly expanded. The VHRA formerly provided that that courts could, absent special circumstances, only award a prevailing employee "up to 12 months' back pay with interest" and were not entitled to "other damages, compensatory or punitive,

. . . [or] reinstatement." In addition, the VHRA provided that attorneys' fees available to prevailing employees were limited to "attorney fees from the amount recovered, not to exceed 25 percent of the back pay awarded." By contrast, the new law permits recovery of compensatory and punitive damages, reasonable attorneys' fees and other equitable relief, without caps.

Together, these changes create a dramatically different world for Virginia employers. Until now, most Virginia employers had only federal anti-discrimination laws about which to be concerned and, if sued, could take some comfort in the caps on compensatory damages and the federal forum in which such claims would be litigated. Effective July 1, 2020, all employers in the Commonwealth with more than five employees will be subject to discrimination claims for characteristics beyond those protected by federal law, which will not be subject to damages caps, and could be forced to litigate in Virginia courts in which it is difficult to obtain early dismissal or even summary judgment. In other words, the amendments to the VHRA radically change the legal landscape for Virginia employers.

In addition to the "Virginia Values Act", the Governor recently signed House Bill 827/ Senate Bill 712 into law, which, among other things, requires employers with five or more employees to "make reasonable accommodation to the known limitations of a person related to pregnancy, childbirth, or related medical conditions, unless the employer can demonstrate that the accommodation would impose an undue hardship on the employer." The law further prohibits employers from retaliating against employees for requesting or using a reasonable accommodation for pregnancy or related conditions. Employers must post information about "(i) the prohibition against unlawful discrimination on the basis of pregnancy, childbirth, or related medical conditions and (ii) an employee's rights to reasonable accommodation for known limitations related to pregnancy, childbirth, or related medical conditions." This information must be included in any employee handbook and directly provided to new employees upon the commencement of their employment and to any employee within 20 days of the employee providing notice to her employer that she is pregnant. Employees aggrieved under the law may bring an action within two years of the alleged violation and may be awarded compensatory damages, back pay, reasonable attorney fees and costs, and other injunctive relief. This law takes effect July 1, 2020.

Virginia's New Employee Misclassification Laws

Governor Northam recently signed into law several bills addressing employment misclassification.

- ***Private Right of Action for Misclassification***: House Bill 984/Senate Bill 894 creates a private right of action for workers who claim to have been misclassified as an independent contractor. The new law creates a presumption that "an individual who performs services for a person for remuneration" is that person's employee. The presumption may be rebutted if the putative employer shows that the individual is an independent contractor under the guidelines of the Internal Revenue Service ("IRS"). An employee who has been misclassified may be awarded "damages in the amount of any wages, salary, employment benefits, including expenses incurred by the employee that would otherwise have been covered by insurance, or other compensation lost to the individual, a reasonable attorney fee, and the costs incurred by the individual in bringing the action." The effective date of this law is July 1, 2020.
- ***Misclassification Investigations***: House Bill 1407/Senate Bill 744 authorizes the Virginia Department of Taxation to determine, based on IRS guidelines, whether or not an employee is an independent contractor. The law imposes civil penalties on "[a]ny employer, or any officer or agent of the employer, that fails to properly classify an individual as an employee," of up to $1,000 per misclassified individual for the first offense, up to $2,500 per misclassified individual for the second offense, and up to $5,000 per misclassified individual for the third or subsequent offense. Upon finding that an employer failed to properly classify an individual as an employee, the Department of Taxation will share that determination with "all public bodies"; subsequent violations may result in debarment. The law further prohibits "require[ing] or request[ing] that an individual enter into an agreement or sign a document that results in the misclassification of the individual as an independent contractor or otherwise does not accurately reflect the relationship with the employer," and makes it "unlawful for an employer or any other party to discriminate in any manner or take adverse action against any person in retaliation for exercising rights" provided under the law.

The law also authorizes the Department of Taxation "to work and share information . . . to identify employers who fail to properly classify individuals as employees . . . : [with] the Department of Labor and Industry, the Virginia Employment Commission, the Department of Small Business and Supplier Diversity, the Department of General Services, the Workers' Compensation Commission, and the Department of Professional and Occupational Regulation." This law has an effective date of January 1, 2021.

- ***Prohibition Against Retaliation for Reporting Misclassification***: House Bill 1199/Senate Bill 662, among other things, prohibits employers from "discharge[ing], discipline[ing], threaten[ing], discriminat[ing] against, or penaliz[ing] an employee or independent contractor, or tak[ing] other retaliatory action regarding an employee or independent contractor's compensation, terms, conditions, location, or privileges of employment, because the employee or independent contractor . . . : [h]as reported or plans to report to an appropriate authority that an employer, or any officer or agent of the employer, has failed to properly classify an individual as an employee and failed to pay required benefits or other contributions." The law makes clear the prohibitions are limited to disclosures made "in good faith and upon a reasonable belief that the information is accurate." The law further prohibits employers from retaliating against employees or independent contractors for participating in an "investigation, hearing or inquiry" or court action regarding employee classification. The law provides for an administrative enforcement mechanism initiated by a complaint filed with the Commissioner of Labor and Industry. Employers that violate the law are subject to a civil penalty up to the value of the wages lost by the individual as a result of the violation, and the Commissioner may also obtain other "appropriate remedies . . . including reinstatement of the employee." The effective date of the law is July 1, 2020.

Wage Theft Laws Enhanced

In March, the Governor enacted the following wage-theft related laws:

- ***Private Right of Action for Failure To Pay Wages***: The Virginia Wage Payment Act ("VWPA") provides employees with a number of protections with respect to wages, such as requirements that they be paid twice per month, restrictions on deductions from wages, and requirements that employees who are terminated be paid all wages due "on or before the date on which he would have been paid for such work had his employment not been terminated." But the VWPA did not provide employees with a private right of action to enforce those protections, until now. House Bill 123 creates a private right of action for employees if their employer fails to pay wages owed under the VWPA. The law provides that employees may recover "wages owed, an additional equal amount as liquidated damages, plus prejudgment interest thereon . . . and reasonable attorney fees and costs." The law also provides "if the court finds that the employer knowingly failed to pay wages to an employee in accordance with this section, the court shall award the employee an amount equal to triple the amount of wages due and reasonable attorney fees and costs." The effective date of this law is July 1, 2020.

- ***Broadened Authority To Investigate Wage Theft Claims***: House Bill 336/ Senate Bill 49 allows the Virginia Department of Labor and Industry ("DOLI") to investigate employers' failure to pay wages in accordance with the VWPA. The law gives DOLI the "authority to investigate whether the employer has failed or refused to make any required payment of wages to other employees" if, while investigating an employee's complaint of a violation of the VWPA, DOLI "acquires information creating a reasonable belief that other employees of the same employer may not have been paid wages in accordance with [the VWPA]." The effective date of the law is July 1, 2020.

Non-Competes for "Low-Wage Employees" Prohibited

On April 11, 2020, Virginia joined the growing number of states that prohibit non-agreements with low-wage workers by enacting House Bill 330/Senate Bill 480. When it goes into effect, the new law will prohibit employers from "enter[ing] into, enforce[ing], or threaten[ing] to enforce a covenant not to compete with any low-wage employee."

The law defines a "low-wage employee" as an individual whose average weekly earnings are "less than the average weekly wage of the Commonwealth as determined pursuant to subsection B of [Va. Code] § 65.2-500." Low-wage employees include "interns, students, apprentices, or trainees employed, with or without pay, at a trade or occupation in order to gain work or educational experience." "Covenants not to compete" are defined in the new law as any agreement "between an employer and employee that restrains, prohibits, or otherwise restricts an individual's ability, following the termination of the individual's employment, to compete with his former employer." The law appears to include in this definition agreements that "restrict an employee from providing a service to a customer or client of the employer if the employee does not initiate contact with or solicit the customer or client."

However, the law expressly provides that it does not "limit the creation or application of nondisclosure agreements intended to prohibit the taking, misappropriating, threating to misappropriate, or sharing of certain information, including trade secrets . . . and proprietary or confidential information." In other words, employers may continue to enter into confidentiality or non-disclosure agreements with low-wage workers.

The new law also has a notice requirement. Employers must post a copy of the law or a DOLI-approved summary. Employers who fail to do so will be subject to a written warning for the first violation, a penalty of up to $250 for the second violation, and a penalty of up to $1,000 for every subsequent violation.

Employers who violate the law may face civil penalties of $10,000 per violation. Additionally, the law provides a private right of action for low-wage employees that may be brought against any person "that attempts to enforce a covenant not to compete against such employee in violation of" the new law. The statute of limitations for such claims is "within two years of the latter of (i) the date the covenant not to compete was signed, (ii) the date the low-wage employee learns of the covenant not to compete, (iii) the date the employment relationship is terminated, or (iv) the date the employer takes any step to enforce the covenant not to compete." Remedies available under the new law including voiding the restrictive covenant and "all appropriate relief, including enjoining the conduct of any person or employer, ordering payment of liquidated damages, and awarding lost compensation, damages, and reasonable attorney fees and costs." The law also prohibits discriminating or retaliating against a low-wage employee for bringing a civil action under the new law.

The effective date of the law is July 1, 2020.

Minimum Wage Increase to $9.50 Per Hour Delayed Until May 1, 2021

When the Governor signed a number of the measures discussed above into law, he stated "[t]hese new laws will support workers and help our economy rebound as quickly as possible from COVID-19." However, in light of the pandemic, the Governor declined to sign into law House Bill 395/Senate Bill 7, which would have raised Virginia's minimum wage to $9.50 per hour effective January 1, 2021. Instead, the Governor has proposed amendments that would delay the wage increase until May 1, 2021. On April 22, 2020, the House and Senate approved the Governor's recommendation, meaning that the bill, as amended, has become law and the minimum wage increase will become effective on May 1, 2021.

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Beginning July 1, 2020, employers in Virginia will face additional legal requirements and potential liability as a result of the rash of new laws enacted by the Virginia government in recent weeks. Virginia employers should review with counsel their employment, compensation, and non-compete practices, and re-examine their independent contractor relationships to ensure they will be in compliance with the new laws once they go into effect.

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