VIRGINIA EMPLOYMENT LAW LEGISLATIVE UPDATE - 2020

While You Were Quarantining…

Important New Virginia Employment Laws Will Begin

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While businesses have been focused on dealing with the Covid-19 pandemic, working remotely, educating kids, and figuring out how to return to work safely, new laws will go into effect starting on July 1, 2020 that you need to know about. These laws will significantly impact Virginia employers.

Due to the enactment of these new laws in Virginia, businesses will need to understand what the laws require, update their employee handbooks, polices and pay statements, educate and train their supervisors/managers accordingly, and ensure compliance.

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Virginia Human Rights Act

The General Assembly passed the Virginia Values Act and other amendments that significantly amended the Virginia Human Rights Act ("VHRA" or "Act"). Generally, it:

1. Added additional protected classifications;
2. Further clarified and expanded types of prohibited discrimination;
3. Included the requirement that employers provide reasonable accommodations for pregnant workers;
4. Expanded the definition of "employer" thus expanding the scope of employers subject to the newly revised Act; and
5. Provided new remedies.

Now, almost all Virginia employers (except those with five or less employees) will be subject to the Act, which significantly increases the number of businesses covered by the Act as well as their liability associated with employment discrimination claims.

Additional Protected Classifications and Clarification/Expansion of Types of Discrimination

Sexual orientation, gender identity, and veteran status were added to the list of protected classifications under VHRA. Discrimination based on race was defined to now specifically include discrimination based on traits historically associated with race, including hair texture, hair types, and protective hairstyles such as braids, locks, and twists.

Amendments Related to Pregnancy and Childbirth

While VHRA already prohibits discrimination on the basis of pregnancy and childbirth or related medical conditions, it now specifically states childbirth and related medical conditions includes "lactation." Employers are also required to provide reasonable accommodations related to pregnancy, childbirth or other medical conditions including lactation, unless the accommodation would impose an undue hardship on the employer. Employers are also prohibited from taking adverse actions against an employee for requesting such accommodations.

The Act requires employers to provide notice to their employees of these rights by posting information in a conspicuous location and also including it in their employee handbooks. In addition, employers must also provide such information to new employees upon commencement of their employment, and within 10 days of an employee providing notice to the employer that she is pregnant.

Summary of Protected Classifications Under Amended VHRA

Accordingly, pursuant to VHRA as of July 1, 2020, it will be unlawful for an employer to discriminate against an employee because of race, color, religion, national origin, sex,

pregnancy, childbirth or related medical conditions, age, marital status, sexual orientation, gender identity, disability, or status as a veteran.

Expansion to Cover Almost All Employers

Prior to July 1, 2020, VHRA only applied to a very small group of employers that were too small to be covered by federal anti-discrimination laws. Essentially, it only applied to employers with between six and fourteen employees and the law made only it unlawful to terminate employment based on unlawful discrimination.

The new amendments significantly overhaul the VHRA. The amended VHRA defines "employer" to include every business with fifteen or more employees. Therefore, for employers with fifteen or more employees, they are now subject to the VHRA for discrimination in the employment relationship for such things as compensation, promotions, and job assignments. In addition, the Act will apply to all employers with more than five employees for claims that an employee was unlawfully terminated due to prohibited discrimination (other than based on age). For age-related termination claims, the Act covers employers with between six and nineteen employees.

Expansion of Remedies

Under the prior VHRA, the remedies for unlawful termination based on prohibited discrimination are limited to twelve months of back pay and recovery of attorneys' fees of no more than 25% of the backpay award. The overhauled VHRA no longer has any cap or limit on the type or amount of damages which can be recovered. Unlike federal anti-discrimination statutes (which caps recoverable compensatory and punitive damages based on an employer's size), there is no limit on the amount of compensatory damages that an employee who prevails on their claims will be able to recover – regardless of employer's size. Punitive damages are already capped in Virginia at $350,000. The new Act also provides that a successful claimant may recover attorneys' fees.

Public Employers

The new laws also prohibits public employers such as the state and localities, from discriminating against an individual on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, disability, sexual orientation, gender identity, or status as a veteran.

Sharing Wage Information

A new law in Virginia provides that employers may not discharge or take a retaliatory action against employees because they:

1. Discussed or disclosed information to another employee about their own wages and compensation, or wages of others.
2. Filed a complaint alleging a violation of this Code with Virginia Department of Labor and Industry.

If employers have a policy prohibiting employees from discussing their wages with others, they should remove or revise this policy so that it complies with updated Virginia law.

However, employers may still prohibit employees from disclosing wage information if that employee has access to employee or applicant data as part of their essential job functions. Therefore, employers can still have a policy prohibiting HR or payroll employees from discussing employee information discovered through their job. However, employers cannot prevent these employees from disclosing this information if it is provided in response to a formal complaint, investigation, or consistent with a legal duty to furnish information.

Employers who violate this statute will be subject to a civil penalty of $100 per violation.

Arrests, Charges, or Convictions: Employment Applicants

A new law prohibits Virginia state agencies and localities from inquiring whether a prospective employee has ever been arrested, charged, or convicted of a crime until the staff interview stage of the application process. During or after the staff interview stage of the employment application process, a Virginia state agency and locality may inquire whether an employee has been arrested, charged, or convicted of a crime – but not before.

However, the new law does not require a state agency or locality to wait until the staff interview stage under the following circumstances: positions designated as sensitive; law enforcement agencies; state agencies expressly permitted to inquire into an individual's criminal arrests or charges; positions for employment by the local school board; positions responsible for the health, safety, and welfare of citizens or critical infrastructure; and positions with access to federal tax information in approved IRS agreements.

In response to the new law, Virginia state agencies and localities should remove from employment applications questions that ask about a prospective employee's arrests, charges, or convictions. In addition, state agencies and localities should train employees not to ask applicants about arrests, charges, or convictions until the staff interview stage of the application process.

Prohibition Against Inquiring Into Possession of Marijuana: Employment Applicants

Private Employers: A new law provides that Virginia employers are prohibited from requiring employment applicants to disclose information concerning any arrest, criminal charge, or conviction for unlawful marijuana possession in any application, interview, or otherwise.

Public Employers: This new law also prohibits state and local government agencies, officials, and employees from requesting from applicants for governmental service, information regarding marijuana possession arrests, charges, or convictions. Unlike the law discussed above – which prohibits state agencies and localities from inquiring into general arrests, charge, or convictions until the staff interview stage – state and local government agencies cannot inquire about marijuana possession arrests, charges, or convictions at any stage of the application process.

However, the new law does permit state agencies to use information from an arrest, charge or conviction that is open for public inspection, for purposes such as: 1) screening for full-time or part-time employment with the State Police or a police department or sheriff's office that is a part of or administered by the Commonwealth or any political subdivision; 2) screening persons who apply to be a volunteer with or an employee of an emergency medical services agency; 3) screening for full-time or part-time employment with the Department of Forensic Science; or 4) by the Department of Motor Vehicles for the purpose of complying with the regulations of the Federal Motor Carrier Safety Administration.

Penalties for Public and Private Employers: Employers should take this new law seriously since **a violation can result in criminal prosecution** for individuals who violate the law. A person who willfully violates this law **is guilty of a Class 1 misdemeanor for each violation**.

If an employer has a form inquiring whether an individual has been charged or convicted of a crime, they should include a carve out stating that this inquiry does not apply to the arrest, criminal charge, or conviction of a person for unlawful possession of marijuana. Similarly, employers should train employees not to inquire about any arrests, charges, or convictions for marijuana possession. Employers should also be aware of EEOC guidance regarding the use of employee arrests, charges, or convictions in employment decisions.

Required Written Statement of Hours Worked

A new law effective January 1, 2020, requires employers to provide employees with a written statement – by a paystub or online accounting – showing the employer's name and address and the number of hours the employee worked during the pay period. An amendment to this new law, effective March 10, 2020, clarifies that employers must only provide this written statement to employees paid on the basis of: (i) the number of hours worked or (ii) a salary less than the DOL's minimum salary threshold. The amendment also clarifies that an employer must provide applicable employees with their rate of pay, gross wages earned during the pay period, the amount and purpose of any deductions therefrom, and sufficient information to enable the employee to determine how the gross and net pay were calculated.

Employers should review pay statements it provides employees to ensure compliance with this enacted law.

Employee Private Right of Action for Wage Violations

The General Assembly passed a new law (effective July 1, 2020) which will allow employees to bring a private cause of action against employers who fail to pay them their wages. Under the new law, employees may bring such an action individually, jointly, with other aggrieved employees, or on behalf of similarly situated employees as a collective action.

General Construction Contractor Liability for Subcontractor Wage Violations

Under the new law, a general construction contractor is liable for subcontractor wage violations. For any construction contract entered into on or after July 1, 2020, the general contractor and subcontractor are jointly and severally liable to pay the greater of: 1) the rate and terms in an employment agreement between the subcontractor and its employees, or 2) the amount of wages the subcontractor is required to pay under applicable law. The general contractor is also subject to all penalties, criminal or civil under existing law.

However, this new law also requires subcontractors to indemnify general contractors (except as stated in a contract) for wages, damages, interest, penalties, or attorney's fees owed as a result of the subcontractor's failure to pay, unless the failure to pay subcontractor's employees was a result of the general contractor's failure to pay the subcontractor.

Minimum Wage Increase

Virginia employers will need to comply with a new Virginia minimum wage increase to $9.50 an hour starting May 1, 2021. Initially the minimum wage increase was planned for January 1, 2021, but Governor Northam delayed the increase as a result of the COVID-19 pandemic.

Virginia will also increase the minimum wage several times over the next few years under the following schedule:

- January 1, 2022 – $11.00 per hour.
- January 1, 2023 – $12.00 per hour.
- January 1, 2025 – $13.50 per hour.
- January 1, 2026 – $15.00 per hour.

Although the initial start of the minimum wage increase was delayed, the subsequent wage increase dates currently remain the same.

These increases would apply to most employees in Virginia, including home care providers (the new law removed home care providers from the list of employees exempt from minimum wage requirements).

The new minimum wage increase will not just apply to private employers, but also to the Commonwealth, any of its agencies, institutions, or political subdivisions, and any public body.

Hiring & Classifying Independent Contractors

A new law requires Employers to submit independent contractor information to the Virginia New Hire Reporting Center in the same manner as employees if the independent contractor: i) has not previously had a contract with an employer; or ii) previously entered into a contract with an employer and received a payment pursuant to the agreement after receiving no payments for at least 60 consecutive days.

Employers Liable if Misclassify Employee as Independent Contractor and Subject to Debarment from Public Contracting

(*This new law is effective January 1, 2021*.)

A new law prohibits an employer from misclassifying an individual as an independent contractor if s/he is an employee. Virginia Department of Taxation will determine the correct classification by applying Internal Revenue Service Guidelines. Any employer, or officer or agent of the employer that fails to properly classify an individual as an employee is subject to a civil penalty of up to $1,000 per misclassified individual for a first offense, and up to $2,500 per misclassified individual for a second offense, and up to $5,000 per misclassified individual for a third or subsequent offense.

In addition to the penalties above, after an employer receives a second notice from the Department of Taxation that they misclassified an independent contractor, all public bodies and covered institutions will be prohibited from awarding a contract to that employer for up to one year. With a third or subsequent notice, all public bodies and covered institutions will be prohibited from awarding a contract to that employer for up to two years.

This law is significant for employers who have contracts with the state, local governments, and/or public institutions of higher education since they risk losing those contracts for independent contractor misclassification. In addition, an employer faces reputational damage when they receive their first notice of misclassification from the Department of Taxation, as the law provides that the Department will notify all public bodies and covered institutions of the employer's first misclassification.

Virginia Workers' Compensation Act Claims

Within 30 days after an employee files a claim with the Virginia Workers' Compensation Act, employers will be required to advise the employee whether: 1) it intends to accept the claim; 2) it intends to deny the claim; 3) it is unable to make a determination because it lacks sufficient information from the employee or a third party. If the employer intends to deny the claim, it shall provide the employee with notice of the reasons. Provided the employee consents, the new law permits employers to send required responses by email.

Non-Compete Agreements with Low Wage Employees

A new law prohibits Virginia employers from entering into, enforcing, or threatening to enforce non-compete agreements with low wage employees. A "low-wage employee" is defined as a worker whose average weekly earnings during the previous 52 weeks "are less than the average weekly wage of the Commonwealth" (emphasis added). The Virginia Employment Commission ("VEC") determines the average weekly wage each quarter. Currently, for the first quarter of 2020, the average weekly wage is $1,204.00 a week or $62,608.00 a year. If an employee's average weekly earnings fall below the VEC's average weekly earnings - they qualify as low wage employees. The law also covers low wage interns, students, apprentices, and trainees.

The new law also applies to independent contractors who are compensated for their services at an hourly rate that is less than the median hourly wage for the Commonwealth as reported by the Bureau of Labor Statistics (currently $20.30 per hour).

Under the new law, low-wage employees (including interns, students, apprentices, and trainees) and low-wage independent contractors subject to a non-compete agreement may bring a civil action against an employer and seek appropriate relief, including enjoining the conduct of the employer, ordering payment of liquidated damages, and being awarded lost compensation, damages, and reasonable attorney fees and costs. Employers who violate the law are also subject to a civil penalty of $10,000 per violation.

Employers should be cautious if they have a non-compete agreement with an employee near the low wage threshold since the VEC updates average annual wages each quarter, and the new law does not identify a date employers should use to determine whether an individual qualifies as a low-wage employee. To illustrate how easily an employee can qualify as having a low wage, in January 2020 an individual who made $58,500 qualified as low wage, and as of April 2020 that number jumped to $62,608.

Posting Requirement: The new law also requires employers to post in the workplace a notice of the prohibition against non-compete agreements for low wage employees. Employers will be issued a warning for their first violation of the posting requirement and will be subject to a civil penalty thereafter.

QUESTIONS?

For further information or questions about these new laws, or for any questions regarding employment laws applicable to Virginia employers, please contact:

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The attorneys in the employment law department of VFN are available to help you revise your employee handbook and policies as well as provide training so that your organization complies with these new and other applicable law. Alternatively, if your organization does not have an employee handbook, our firm can draft a handbook tailored to meet your business's needs.

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