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## An Overview on New Virginia Laws That Impact Employers

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### Virginia Values Act

Earlier this month, the Virginia Governor signed the Virginia Values Act (VVA). The VVA prohibits discrimination based on sexual orientation and sexual identity in employment and creates a **Virginia cause of action for discrimination**, adding these new categories to race, gender, national origin, age, religion, and disability. This state-level court action in some ways mirrors the current federal actions under the federal Civil Rights Act but provides greater procedural leverage.

An aggrieved employee must first file an administrative charge with a newly formed state agency and receive a **right to sue letter** before filing in court. Unlike federal claims that can be capped, the new state action is not subject to a cap on damages. Bringing these cases in **state court** gives the employee litigant procedural advantages over employers. If they prevail, the court is empowered to award the employee his or her attorney fees.

The new law covers some employers not currently covered by federal law. Employers with 15 or more employees are subject to the law, but state “wrongful discharge” claims may be brought against employers with only five (5) or more employees. State age discrimination cases alleging wrongful discharge are limited to employers between 5 and 20 employees.

This new law, and several others that passed this year, significantly increase risk for Virginia employers. Some observers feel a significant number of new cases will be filed in state court, which is less friendly to summary proceedings, forcing employers to more strongly consider settling cases that they would have otherwise sought to dismiss in federal court.

## Virginia Wage Payment Act

Under another law – an amendment to the Virginia Wage Payment Act - employees now enjoy greater leverage in enforcing wage and hour laws. Specifically, effective July 1, 2020, employees can sue their employer in state court to recover unpaid wages, where previously employees could only assert breach of contract claims for unpaid wages. The new law provides the successful employee litigant with damages including lost wages, 8% interest on those wages, and triple damages if an employer is found to have “knowingly” (deliberately or recklessly) violated the law. Employers may also face civil penalties, reasonable attorneys’ fees, and costs. In some cases, the employer may face criminal liability.

## Whistleblower Law

Under a comprehensive new **whistleblower protection law**, employers are prohibited from discharging, disciplining, threatening, discriminating against, or penalizing an employee for:

- Reporting violations of federal or state law or regulation to a supervisor or governmental body or law enforcement official;
- Participating in an investigation, hearing, or inquiry requested by a governmental body or law enforcement official;
- Refusing to engage in a criminal act that would subject the employee to criminal liability;
- Refusing an employer’s order to perform an action that violates federal or state law and informing the employer that the order is being refused for that reason; or
- Providing information or testimony to a governmental body or law-enforcement official investigating an alleged violation by the employer.

This law also allows employees to file suit in state court, providing the successful employee litigant with remedies such as injunctive relief, reinstatement, lost wages and benefits, and reasonable attorneys’ fees and costs.

These changes are a departure from current Virginia law related to “wrongful discharge” where in the past such employee litigants had to rely on a narrow, rarely permitted Virginia Supreme Court precedent known as the *Bowman* Rule – a “public policy exception” to Virginia’s at-will employment rule requiring allegations that the (i) the employer violated an employee’s statutorily-created rights; (ii) the employer violated a public policy explicitly expressed in a statute and the employee is a member of the class of persons entitled to such protection; or (iii) the employee’s discharge was based upon the employee’s refusal to commit or participate in a criminal act.

Because the term in the new law, “any violation of federal or state law or regulation”, is broad, we expect more employee “whistleblower” claims in state court to avoid federal proceedings such as summary judgement, again providing greater employee litigant leverage.

## **Ban on Restrictive Covenants for “Low-Wage” Employees**

Effective July 1, 2020, another new law prohibits employers from entering into, enforcing, or threatening to enforce a non-compete or other similar “restrictive covenant” agreement with employees whose average weekly earnings are less than the average weekly wage of the Commonwealth (currently about \$1,000). The law does not affect nondisclosure agreements or agreements preventing misappropriation of an employer’s confidential information or trade secrets, and it is not retroactive. Employers with existing agreements that may later violate the law have some limited time to address the issue (to either void the agreement or raise the employee’s salary). In addition, employers must post a notice outlining the new law.

Included among the protected employees are “interns, students, apprentices, or trainees employed, with or without pay, at a trade or occupation in order to gain work or educational experience,” as well as independent contractors who earn less than the median hourly wage in Virginia (Currently a little less than \$20 per hour.) Excluded from the law are employees who primarily earn their income from commissions, incentives, or bonuses.

The new law permits employees to challenge the enforceability of the agreement in court and provides for the recovery of liquidated damages (not defined), lost compensation, and reasonable attorneys’ fees. Employers whose agreements are challenged by the employee may choose to “consent to” (but not admit) a penalty paid to the state Department of Labor. If the employer does not consent and is found in violation, the Department may levy a civil penalty of up to \$10,000 for every violation.

## **Misclassification of Workers as “Independent Contractors”**

Under two recently passed bills, effective July 1, 2020, workers classified as “independent contractors” may sue his or her employer for improper classification, and recover damages, including wages, salary, and employee benefits, as well as reasonable attorney fees and the worker’s costs of bring his or her claim. The new law lays out a “presumption” that all workers are employees, *unless* the employer can show that the worker actually is an “independent contractor” under Internal Revenues Service guidelines. Under the second bill, employers are prohibited from taking any “retaliatory action” (discharging, disciplining, threatening, discriminating against, or penalizing) against the worker who in “good faith” believes that his or her claim is accurate and “reports or plans to report” the alleged improper classification. Employers found in violation of this act may also face civil penalties equal to the employee’s “lost wages.”

## **Contact Us**

Please feel free to contact us if you have any questions or would like to schedule a consultation on any of these issues.