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Give Me Liberty, or Give Me Employment Law Reform: Virginia Enacts Sweeping Legislation Changing the Employment Law Landscape of the Commonwealth

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Virginia's Democratic legislative body and Governor Ralph Northam have recently enacted a myriad of new legislation, and expanded existing laws providing protections for employees in the Commonwealth. Effective July 1, 2020, these laws will establish greater protections for employees in Virginia than what federal law currently provides. The expanded protections include prohibition of discrimination based on LGBTQ status, pregnancy, and natural hairstyles, prohibition of noncompetition agreements for low-wage employees, whistleblower protections, a state-wide minimum wage increase, and remedies and penalties for worker misclassification. This article provides a summary of the key provisions of these new employment laws, as well as key takeaways and best practices for employers in Virginia. Since as early as 1969, Virginia has been "for lovers." But, after July 1, 2020, Virginia will be for employees, and here is why.

Expansions to Virginia's Human Rights Act

Prohibition of Discrimination Based on LGBTQ Status

Historically, the [Virginia Human Rights Act](#) safeguarded employees in the Commonwealth from unlawful discrimination based on protected classifications such as race, religion, national origin, sex, disability and pregnancy. Notably, on April 11, 2020, Virginia became the first southern state to include sexual orientation and gender identity as protected classifications under its existing Human Rights Law. [H.B. 1049/SB 868](#) prohibits discrimination in public and private employment, public accommodations, access to credit, and housing on the basis of sexual orientation and gender identity.

The Amendment expands the definition of the term "employer" to include any public or private employer employing more than five persons in the state of Virginia. This Amendment reflects a significant departure from the existing law, which only covered employers with between five and 15 employees.

Prohibition of Discrimination Based on Natural Hairstyles and Textures

On March 4, 2020, Virginia became the fourth U.S. state to prohibit discrimination in places of public accommodation, educational institutions, real estate transactions, and employment on the basis of hairstyle and hair texture. [HB 1514/SB 50](#) amends the definition of the term "on the basis of race" under Virginia's Human Rights Act to include traits historically associated with race, such as hair texture, hair type, and protective hairstyles, such as braids, locks, and twists. This Amendment also covers employers in Virginia with more than five employees working in the state.

Prohibition of Discrimination and Reasonable Accommodation for Pregnancy and Childbirth

Also effective July 1, 2020, [HB 827/SB 712](#) includes another amendment to the Virginia Human Rights Act, expanding its existing protections from discrimination "on the basis of sex or gender" to include discrimination on the basis of pregnancy, childbirth or related medical conditions, including lactation. The Amended Act prohibits discrimination with respect to compensation, terms, conditions or privileges of employment, and

refusing 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. Reasonable accommodations may include:

- More frequent or longer bathroom breaks;
- Breaks to express breast milk;
- Access to a private location other than a bathroom for the expression of breast milk;
- Acquisition or modification of equipment, or access to or modification of employee seating;
- A temporary transfer to a less strenuous or hazardous position;
- Assistance with manual labor and job restructuring;
- A modified work schedule with light duty assignments; and
- Leave to recover from childbirth.

Under the Amended Act, an "Employer" is defined to include any person, or agent who employs five or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. Covered employers in Virginia are required to post a notice in a conspicuous location informing employees of the prohibition against discrimination and their rights to reasonable accommodation. Employers should also include this information in their employee manuals or handbooks and ensure that it is provided to any employee within ten days of the employee notifying their employer that they are pregnant. Under the Amended Act, these notices must be provided by October 29, 2020.

Employee Remedies Available

The Amendments to Virginia's Human Rights Act permit employees to file suit in state court for violations and seek uncapped damages, including compensatory damages, punitive damages, reasonable attorneys' fees and costs, and other non-monetary relief. However, under the Amendments to the Act, the requirement that an employee file an administrative charge of discrimination as a prerequisite to suit remains unchanged.

Best Practices for Virginia Employers – Pregnancy and the Right to Reasonable Accommodation

- Include information on the prohibition against discrimination and the right to reasonable accommodation to the known limitations of a person related to pregnancy, childbirth, or related medical conditions in your employee handbook no later than October 29, 2020;
- Post the required notice in a conspicuous location no later than October 29, 2020;
- Provide information regarding these protections of the Amended Act directly to new hires at the start of their employment; and
- Provide notice directly to pregnant employees within ten days of the date when the employee notifies you that they are pregnant.

Best Practices for Virginia Employers – Anti-Hairstyle and LGBTQ Discrimination

Since these Amendments to the Virginia Human Rights Act create a private right to sue on the basis of discrimination for these added protected classifications, and lift damage caps that existed under the prior version of the Act, Virginia state courts are now an attractive option for employees to sue. Updating your anti-discrimination policies and training materials is an effective tool to limit your business' exposure to liability.

- It is imperative that covered employers in Virginia revise all handbook and policy materials that may impact employees based on their LGBTQ status and the style and texture of their natural hair to be compliant with the law (for example, personal grooming, anti-discrimination and anti-harassment policies).

- Also, revise training materials, hiring protocols and all other practices to make supervisory employees aware of the changes to the law in advance of the July 1, 2020 effective date.

Virginia Bans Noncompetition Agreements for Low-Wage Workers

On April 9, 2020, Governor Northam signed [HB 330/SB 480](#) into law, which prohibits all Virginia employers from entering into and enforcing noncompetition agreements with "low-wage" employees. Generally, a covenant not to compete is an agreement included in an employment contract that restrains or prohibits the employee from engaging in competition with their former employer. This change reflects an emerging employment law trend, as several other states like Maryland, New Hampshire and Washington State have enacted similar legislation to restrict enforcement of noncompetition agreements with low-wage employees, and Virginia has followed suit.

What Is a Low-Wage Employee?

This law prohibits entering into or seeking to enforce noncompetition agreements with employees whose weekly wage is less than the average weekly wage of the Commonwealth. To determine whether an employee is a "low-wage employee," employers must add the amount of compensation the employee earned in the 52 weeks immediately preceding the employee's termination date and divide that figure by 52. According to data available from the Virginia Workers' Compensation Commission, the average weekly wage in the Commonwealth will be \$1,137 (which averages to a yearly salary of \$59,124). This law also takes effect July 1, 2020.

Employee Remedies and Penalties

[HB 330/SB 480](#) permits an employee to bring a private cause of action in civil court against any employer who seeks to enforce such an agreement, within two years of the latter of:

- The date the covenant not to compete was signed;
- The date the low-wage employee learns of the noncompetition agreement;
- The date the employment relationship is terminated; or
- The date the employer takes any step to enforce the covenant not to compete.

Moreover, if an employee prevails in a lawsuit alleging a violation, the court may order the employer to pay liquidated damages, lost compensation, reasonable costs (including fees for expert witnesses) and attorneys' fees. Even in the event that an employee does not allege a violation, the Virginia Department of Labor may assess a hefty civil penalty of \$10,000 per violation.

This law also contains a notification requirement, which employers may satisfy by posting either a copy of the statute or a summary of the statute approved by the Virginia Department of Labor in the same location where other required notices are posted.

Best Practices for Virginia Employers

First, the prohibitions against entering into and enforcing noncompetition agreements with low-wage employees are effective July 1, 2020, and do not apply retroactively – so it is entirely permissible to enforce agreements entered into prior to the July 1, 2020 effective date. Notably, this law does not mean a complete ban. Nondisclosure agreements that prohibit an employee from taking and/or misappropriating trade secrets and proprietary or confidential information are permitted.

If entering into non-competition agreements with employees is a standard practice of your business, consider the following best practices:

- Post the required notice – so employees are aware of the protections afforded by the statute;
- Do the math – calculate an employee's average weekly wage prior to entering into or seeking to enforce the agreement to ensure that the threshold is met; and
- Consult with counsel – to review your standard noncompetition agreement as applied to the specific details of your employer-employee relationship to ensure compliance with the law.

Virginia Enacts Comprehensive Whistleblower Protection Law

Also effective July 1, 2020 is [HB 798](#), which expands existing whistleblower protections for Virginia employees. Virginia's Whistleblower Protection Law protects workers in the state from retaliation for:

- Reporting to a supervisor or any governmental body violations or suspected violations of federal or state law;
- Refusing to engage in a criminal act or carry out an order that would violate federal or state law; or
- Otherwise engaging in protected activity by participating in an investigation.

This law also permits employees to file suit directly in state court within one year of the alleged violation without first exhausting administrative remedies. The Court may grant injunctive relief, reinstatement to their former or an equivalent position, attorneys' fees and uncapped compensation for lost wages, benefits and other remuneration. Virginia's Whistleblower Protection law does not protect disclosures of information protected by attorney-client privilege, and also does not permit employees to make disclosures of knowingly false information, or statements made with reckless disregard of the truth.

Best Practices for Virginia Employers

As the COVID-19 pandemic evolves and as states continue to gradually reopen and employees begin to return to work, employers should anticipate an uptick in employee reporting and complaints. Here are a few best practices that employers should consider:

- Review, revise, and/or implement whistleblower or internal reporting policies to ensure that employees are aware of how, when, and to whom they should raise a complaint within the organizational structure of your business;
- Train employees with managerial authority to take complaints seriously, and to establish a culture where employees "speaking up" is encouraged. This way, employees will feel comfortable raising concerns inside of the organization; and
- Do not terminate or discipline an employee who has a history of documented complaints of violations of law, unless there is a legitimate non-retaliatory reason for doing so, and there exists adequate records to document that reason.

Virginia's Minimum Wage Increase

The Virginia General Assembly has also approved an amendment by Governor Northam to [SB 81](#), which would gradually increase the minimum wage in the Commonwealth to \$12.00 per hour, effective January 1, 2023. This Amendment will mark the first time that Virginia's state minimum wage has surpassed the federal minimum wage amount. Under the new law, the hourly minimum wage in Virginia is projected to increase as follows:

- \$9.50 effective May 1, 2021;
- \$11.00 effective January 1, 2022;

- \$12.00 effective January 1, 2023;
- \$13.50 effective January 1, 2025; and
- \$15.00 effective January 1, 2026.

In order for Virginia's minimum wage to go beyond \$12.00 per hour, Virginia's legislature would be required to act prior to July 1, 2024, by voting on the increase.

Virginia Employee Misclassification Updates

Prohibition Against Retaliation for Reporting Misclassification

Effective July 1, 2020, [HB 1199/SB 662](#) prohibits employers from terminating, disciplining, threatening, discriminating, or taking any other retaliatory action against an employee or independent contractor for:

- Reporting or planning to report that an employer or their officer or agent has misclassified an individual as an independent contractor and has failed to pay required benefits or other contributions; or
- Being requested or subpoenaed by an appropriate authority to participate in an investigation, hearing, or inquiry by an appropriate authority or in a court action.

Individuals who allege that they have been misclassified by their employers now have a private right to sue in Virginia state court by first filing a complaint with the Commissioner of Labor. Then the Commissioner, on behalf of the employee, may seek lost wages, benefits and reinstatement to the former or an equivalent position that the employee held before the alleged retaliatory conduct occurred. Similar to the good faith requirement imposed by the Whistleblower Protection law, employees may only be granted these protections when reporting information in good faith and upon reasonable belief that the information is accurate.

Employer Misclassification Investigations

In a similar vein, effective July 1, 2021, [HB 1407](#) permits the Virginia Department of Taxation to utilize [guidelines](#) set forth by the Internal Revenue Service to determine whether an individual is an employee or independent contractor. The civil penalties permitted by this law may be assessed to employers who fail to pay taxes, benefits, or other contributions required to be paid. The penalties authorized under this law are as follows:

- Up to \$1,000 per misclassified individual for a first offense;
- 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.

These civil penalties are required to be paid into the general fund.

Best Practices for Employers

Worker misclassification can be a complicated and costly issue to litigate. It may be beneficial to conduct an audit of your current workforce in conjunction with counsel to review existing independent contractor agreements to determine whether reclassification or revision of those agreements is necessary to rectify any issues that are identified. Employers should also ensure that individuals with supervisory authority are familiar with the distinguishing characteristics of the independent contractor relationship.

If you have questions about any of Virginia's new employment laws, and how these laws may impact your business, please contact [Reba Letsa](#), or any member of Baker Donelson's [Labor & Employment Group](#).

