Client Alert

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Virginia Enacts Sweeping Employee Protection Laws

After a landmark 2019 election in which Democrats took control of the House of Delegates, Senate, and Governor's office for the first time in 26 years, the new political majority wasted no time enacting several laws that will alter the landscape of Virginia employment law for years to come.

With the passage of these new laws, employment litigation will be more frequent, more costly, and will likely shift from federal to state court. Virginia employers who have never navigated state court will need to become familiar with the unique elements of litigation in the Commonwealth. Employers must now stay abreast of these new state laws that fundamentally change employment law in Virginia.

We summarize and discuss these new laws below.

Virginia Human Rights Act

On April 11, 2020, Virginia Governor Ralph Northam officially signed the Virginia Values Act into law. The bill's headlining purpose—adding gender identity and sexual orientation to the list of classes protected under the Virginia Human Rights Act (VHRA)—is commendable and has garnered widespread support. However, other, more technical changes in the bill that are unrelated to the headlining purpose are poised to change the landscape of employment litigation in Virginia and could lead to a significant increase in discrimination lawsuits filed in Virginia's state courts. Virginia employers are well served to begin preparing now for this new procedure in the handling of employment discrimination charges and litigation, as the bill's new provisions go into effect on July 1.

The bill transforms the VHRA's overall significance and reach by uncapping the employer coverage threshold. Historically, the VHRA only covered employers with more than 5 and up to 14 employees (up to 20 employees for age discrimination claims). These thresholds were designed to work in tandem with federal anti-discrimination laws (namely, Title VII and the Age Discrimination in Employment Act), which apply to Virginia employers above the thresholds. The Virginia Values Act removes these upper caps. This means that *every* employer in Virginia with more than five employees is now subject to the VHRA, and not just for claims of gender identity and sexual orientation discrimination. Virginia employers of all sizes may now be sued under the VHRA for all forms of prohibited discrimination (i.e., race, color, religion, sex, pregnancy, national origin, age, disability, veteran status). Additionally, discrimination based on pregnancy, childbirth or related medical conditions, including lactation is prohibited. The new legislation also clarifies that discrimination "on the basis of race" includes hair texture, hair type, and protective hair styles. In the absence of diversity jurisdiction, VHRA claims will be pursued in state court, rather than federal court where most Virginia employers are accustomed to defending employment discrimination claims.

Why is this change so significant for Virginia employers? Two key reasons:

Limited Summary Judgment in Virginia – Unlike in federal court, it is very difficult to cause dismissal of an employment case in Virginia courts prior to trial. Virginia has procedural rules limiting what courts

may consider when ruling on motions for summary judgment. In a nutshell, under Virginia practice rules, a party cannot use deposition testimony in support of a motion for summary judgment. While the majority of federal discrimination lawsuits end before trial with settlement or dismissal, most VHRA lawsuits will likely end up going to a jury trial (unless they settle first).

No Damages Caps – Title VII has a $300,000 per claim cap on damages for employers with 501 or more employees, and smaller employers are subject to an even lower cap on damages. The VHRA has no cap on damages. While the drafters of the bill have suggested that Virginia's general $350,000 cap on punitive damages should apply to VHRA claims, this does not account for the many other forms of damages often claimed by employment plaintiffs—back pay, front pay, emotional distress, and other nonpecuniary harms. None of these damages are capped in the new law. This will substantially inflate the potential value of employment discrimination lawsuits in Virginia if plaintiffs choose to assert their claims under the VHRA rather than under federal anti-discrimination laws.

This unique combination of factors could result in a flurry of Virginia employment litigation. Plaintiffs are likely to forego the EEOC/Title VII process in favor of a VHRA claim, knowing they can get to a jury that can decide damages without any caps, except on punitives. This dynamic could reduce plaintiffs' willingness to settle employment cases early on. Even though the bill provides for a pre-litigation charge filing process with the Virginia Division of Human Rights, it is doubtful this will lead to the same number of early settlements as in federal litigation, for all of the reasons discussed above. Ultimately, having to try more discrimination cases all the way to jury verdicts will inflate Virginia employers' litigation costs.

These dramatic changes will force Virginia employers to change the way they handle—and even think about—employment litigation in our state. Unfortunately, businesses that never before had to consider litigation claims under the VHRA need to begin planning for a potential wave of litigation under this new, plaintiff-friendly framework.

Private Right of Actions (And Collective Actions) for Wage Payment Violations

On April 10, 2020, the Governor signed a law providing a private right of action for employees individually, jointly, or on behalf of similarly situated employees as a collective action, to sue an employer who fails to properly pay wages. Potential damages include wages owed and an additional equal amount as liquidated damages, as well as attorneys' fees and costs. An employer who "knowingly" fails to pay wages properly is liable for triple the amount of wages owed plus attorneys' fees and costs. Employers should be we aware of the potential for a Fair Labor Standards Act-type collective action, with the potential for treble damages liability for failure to comply with Virginia's wage payment statute.

Independent Contractor Misclassification

The Governor signed three bills into law this session related to the misclassification of workers. The first two are effective on July 1, 2020 and the third is effective on January 1, 2021.

The first law creates a private right of action for workers who have been improperly classified as an independent contractor. Importantly, in such a proceeding, the worker is *presumed* to be an employee of company, unless it is shown that the individual is an independent contractor according to the IRS guidelines. A prevailing plaintiff can recover wages, salary, employment benefits, attorneys' fees, and costs.

The second law prohibits an employer from discharging, disciplining, threatening, discriminating against, or penalizing an employee or independent contract because such individual, in good faith and upon reasonable belief, reported or plans to report that they have been misclassified as an independent

contractor. Any such claim must be filed with the Department of Labor and Industry, who then can institute a proceeding against the company. Aggrieved workers can recover lost wages, reinstatement, and other "appropriate remedies."

The third law provides the Commonwealth with various tools to combat misclassification. The law revises the Taxation, Workers Compensation, and Unemployment Compensation codes to create a presumption that a worker who performs services for an employer "shall be considered an employee" unless proven otherwise pursuant to the IRS guidelines. The law authorizes the Tax Commissioner to share its misclassification findings with other state agencies. Companies (or persons) who have been found to have misclassified workers on at least two occasions are subject to disbarment from public contracts. Lastly, the law provides for increased civil penalties for misclassification.

Taken together, these new laws place an increased emphasis on proper classification of workers. Virginia employers should reassess their independent contractor relationships under the new requirements or risk government enforcement and private actions for misclassification.

Minimum Wage

The new minimum wage law increases over the next several years, with a target wage of $15.00/hour by 2026. On May 1, 2021, the minimum wage in Virginia will increase to the greater of $9.50/hour and the federal minimum wage. Then, the minimum wage increases incrementally from 2021 through 2026 when it's set to be $15.00/hour. After 2026, increases to the minimum wage will be tied to a cost of living index. Employers need to factor in these minimum wage increases when preparing their budgets for 2021 and beyond. Moreover, the minimum wage increases could create wage compression for employees already receiving pay at or above the new minimum wage, which could lead to a domino effect of wage increases across all job classifications.

Public Bargaining

This landmark new law permits counties, cities, and towns to adopt local ordinances authorizing them to recognize labor unions as a bargaining agent of public employees and to collectively bargain with those unions about any matter relating to employment. These local ordinances must provide a procedure for certification of the exclusive bargaining representatives that allows for public notice and an opportunity for labor organizations to intervene. Such an ordinance cannot restrict the locality's authority to establish a budget or appropriate funds. In the event that a locality has not adopted such an ordinance, it must decide on whether to adopt an ordinance permitting public-employee bargaining within 120 days of being presented with certification from a majority of public employees in a unit those employees consider appropriate for bargaining. Although public-sector employees may be able to organize and bargain in localities that permit it, they may not participate in a strike.

This new legislation is significant because, prior to 2020, Virginia expressly prohibited local governments from recognizing or bargaining with any labor union purporting to represent its public employees. With the enactment of this new law localities are welcome to recognize and bargain with labor unions, should they choose to adopt an ordinance permitting such actions. But the freedom to choose how to proceed remains with localities, providing local governments with wide latitude to determine whether and how to allow for public sector union activity. This new law is effective May 1, 2021.

Non-Competes for Low-Wage Employees

On April 9, 2020, the Governor signed a law prohibiting non-competes for low-wage employees. Low-wage employees are those that made less than Virginia's average weekly wage in the preceding year. The most recent Virginia Employment Commission data shows the average weekly wage to be $1,125 per week – not exactly a "low-wage". Low-wage employees can bring a private action against any former employer or person that attempts to enforce a non-compete against them. A court can void the covenant not to compete, issue an injunction, order payment of liquidated damages, lost compensation, damages, and attorneys' fees and costs. Employers cannot retaliate against low-wage employees who bring such private action. Additionally, an employer who violates this section is subject to a $10,000 civil penalty for each violation. Employers must post a copy of this new law with other employment notices and are subject to civil penalties for failing to do so. The law applies to covenants not to compete entered on or after July 1, 2020.

Whistleblower Protections

Virginia employees have long had few statutory avenues to pursue whistleblowing claims, often having to rely upon the narrow common law cause of action created under the Supreme Court of Virginia's *Bowman v. State Bank of Keysville* decision.

Effective July 1, 2020, Virginia has a broad statutory cause of action for employees who believe that they have been retaliated against for engaging in whistleblowing and other protected conduct—both internally and externally. The law protects an employee who (i) reports a violation of any federal or state law or regulation to a supervisor, governmental body, or law-enforcement official in good faith, (ii) is requested by a governmental body or law-enforcement official to participate in an investigation, hearing, or inquiry, (iii) refuses to engage in a criminal act that would subject the employee to criminal liability, (iv) refuses an employer's order to perform an action that violates any federal or state law or regulation and the employee informs the employer of that reason, or (v) provides information to or testifies before any governmental body or law-enforcement official conducting an investigation, hearing, or inquiry into any alleged violation by the employer of federal or state law or regulation.

The statute provides some exceptions to protected conduct by clarifying that it does not (i) authorize an employee to make a disclosure of data otherwise protected by law or any legal privilege, (ii) permit an employee to make statements or disclosures knowing they are false or that they are in reckless disregard of the truth, or (iii) 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.

The law does not have an administrative exhaustion requirement. Claims must be brought within one year of an employer's "prohibited retaliatory action."

A prevailing employee can be awarded lost wages, lost benefits, reinstatement, attorneys' fees, costs, and "other remuneration."

Applicant Disclosure of Marijuana Possession

On May 21, 2020, the Governor signed a law prohibiting employers from requiring an applicant for employment to disclose information related to an arrest, criminal charge, or conviction related to marijuana possession. This law is designed to work in tandem with other new legislation in the Commonwealth decriminalizing marijuana possession.

Prevailing Wage

This new law requires contractors and subcontractors under any public contract worth more than $250,000 with a state agency for public works to pay the prevailing wage rate to mechanics, laborers, and workers performing services in connection with the contract. This could increase contractors' expenses on state and local government contracts, which need to be taken into account prior to submitting a bid. This new law is effective May 1, 2021.

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