Lawyer Insights

7 Steps Virginia Employers Should Take in Light of New Laws

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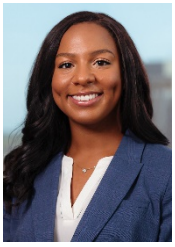

During the COVID-19 pandemic, Virginia lawmakers enacted a series of employee-friendly laws that will change the commonwealth for decades to come. These laws grant employees and independent contractors additional protections, rights and avenues to pursue litigation.

The result is predicable: Virginia employers will see a stark increase in both employment lawsuits and the potential liability associated with those lawsuits. Fortunately, companies still have time to get their policies and practices in order.

Here are seven steps Virginia employers should take to address the new laws.

1. Examine wage and hour practices.

Before this year, Virginia workers who believed they were owed wages had no right to bring a private lawsuit under state law. Now, employees have a private cause of action and a prevailing plaintiff is automatically entitled to double damages and attorney fees. If the employee proves a knowing violation, the damages increase to triple—a remedy that exceeds federal wage law. The law also includes a powerful provision permitting collective actions on behalf of similarly situated employees. A wave of wage and hour lawsuits in Virginia may be on the horizon. When possible, these cases will be brought as collective actions seeking relief on behalf of a large class of employees. So employers should ensure that their wage and hour practices are compliant with both state and federal laws.

2. Review disciplinary and investigative practices.

The Virginia Values Act significantly expands the Virginia Human Rights Act (VHRA), the state's anti-discrimination statute, which historically applied to only small employers. Now the VHRA applies to nearly all employers and provides for uncapped back pay, compensatory damages and attorney fees. Moreover, an aggrieved employee need only establish that discrimination was a motivating factor for mistreatment, not the sole or determinative cause. Given the uncapped damages, plaintiffs' lawyers will have more incentive to file discrimination claims and fight them through trial. Virginia-based companies may be forced to defend these claims in state court, where summary judgment is difficult.

Employers must ensure that adequate practices are in place to mitigate discrimination claims. For instance, are managers adhering to the company's progressive-discipline policy? Are disciplinary

decisions being properly documented? Are discrimination complaints being adequately investigated? These issues should be proactively addressed before they snowball into a lawsuit.

3. Examine independent-contractor relationships.

More than 200,000 Virginia workers are misclassified as independent contractors, according to a study by Gov. Ralph Northam's Inter-Agency Taskforce on Worker Misclassification and Payroll Fraud. In response, the Virginia Legislature passed a series of bills allowing misclassified workers to sue their presumptive employer for damages, including lost wages, benefits and attorney fees. Importantly, the law creates a presumption that the worker is an employee unless the company establishes otherwise. Additionally, companies that are found to have misclassified workers on two occasions are subjected to mandatory debarment from public contracts. Any company that regularly retains independent contractors should carefully examine those relationships to ensure compliance with the law. This includes exempt/nonexempt classifications, working off the clock and a multitude of other overtime-related issues.

4. Stop requiring noncompete agreements for certain workers.

Employers are now prohibited from requiring low-wage employees and independent contractors to sign noncompetes in Virginia. But employers should note that the law defines low-wage employees as those earning less than Virginia's average weekly wage in the preceding year—which is currently $1,204 a week or $60,000 per year. This rate is not exactly what many employers would consider to be a low wage.

The law applies only to noncompetes entered into after July 1, 2020. Violating companies are liable for "all appropriate relief," which includes liquidated damages, lost compensation and attorney fees. Merely requiring low-wage earners to sign a noncompete—without enforcing it—subjects the company to a monetary fine. Additionally, employers must post a copy of this new law with other employment notices or be subject to civil penalties for failing to do so.

5. Examine whistleblower policies and practices.

For years, whistleblowers in Virginia have faced an uphill battle: With no statutory cause of action for wrongful discharge or retaliatory termination, plaintiffs were forced to rely on a few narrow exceptions carved out by the Virginia Supreme Court.

All that has changed with the passage of Virginia's new whistleblower protection law. Employees are protected when they report (either internally or externally) a violation of state law or regulation, participate in a government inquiry or investigation, and refuse to perform an action that would violate the law. A prevailing plaintiff is entitled to back wages, benefits, reinstatement and attorney fees.

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Companies should review their whistleblower policies and practices to ensure that a system is in place to properly respond to employee complaints in a nonretaliatory manner, and managers should be trained on these practices.

6. Review pregnancy-accommodation practices.

The VHRA was amended to require reasonable accommodations for pregnancy, childbirth and related medical conditions. Employers must engage in a timely, good-faith interactive process with employees who request an accommodation to determine if the accommodation is reasonable and, if not, to discuss alternative accommodations that the employer may provide. Reasonable accommodations include a temporary transfer to a less-strenuous or nonhazardous position, job restructuring, a modified work schedule, light-duty assignments and additional leave.

The law also mandates that certain information be made available to employees as follows:

- Posted in a conspicuous location.
- Included in the employee handbook.
- Provided directly to new hires at the start of their employment.
- Provided directly to pregnant employees within 10 days of when the employee notifies the employer of the pregnancy.

7. Ensure compliance with COVID-19 standards.

Virginia became the first state to pass workplace health and safety standards specifically to address the COVID-19 pandemic. The standard went into effect July 27 and imposes significant hazard-assessment, communication and training requirements on employers that are subject to the Virginia Occupational Safety and Health's jurisdiction.

Among other requirements, all employers must conduct an exposure assessment, develop policies for employees to report symptoms, exclude from work employees known or suspected to have COVID-19, and establish a notification system for positive cases.

Employers also are required to implement engineering, administrative and work-practice controls; provide training to employees; and potentially develop an infectious-disease preparedness and response plan.

Virginia's COVID-19-related workplace safety requirements are complex, so employers should consult with experienced counsel to navigate this new frontier.

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