



## 2020 Virginia Employment Law Changes

Elections have consequences, so they say. An example is the Virginia General Assembly.

The last two elections have brought sweeping changes to the General Assembly. The 2020 session was marked by highly publicized disputes, primarily on social agenda issues. While the high profile bickering ruled the headlines, proponents of major changes to Virginia's employment laws pushed through transformational changes outside the media spotlight.

These changes, which take effect July 1, 2020 (except as noted in this article), require significant work on your employment handbook, personnel policies, processes, and training. Because of these sweeping revisions expanding employee rights, you may want to take the opportunity to review your personnel processes, including HR personnel and manager training and a handbook review, with the assistance of counsel well versed in these issues.

Here is a guide to the changes with which you should become familiar.

### THE VIRGINIA WAGE THEFT LAW HB123/SB838

The title given to this bill by its proponents should tell you all you need to know about their view of Virginia employers.

Before passage of this law, any complaint about wages under the wage statute could only be pursued by the Virginia Department of Labor and Industry. An employee could sue for breach of contract, but that offered no opportunity for enhanced damages or attorneys' fees.

The new law changes that dramatically. While the Department of Labor can still bring enforcement actions for wage disputes, now an employee can bring his or her own lawsuit to recover damages directly under the wage statute. If successful, the employee can recover wages owed, and an additional equal amount as liquidated damages, 8% in prejudgment interest from when the wages were due, and attorneys' fees and costs. If the court finds that an employer knowingly failed to pay wages, the employee can be awarded

treble damages, plus attorneys' fees and costs. This new statute permits collective lawsuits over wage disputes like those permitted under the federal Fair Labor Standards Act, a break from Virginia tradition where class action lawsuits have not been permitted in state court.

The new law adds to the Commissioner's weapons the right to seek a civil penalty of up to \$1,000 per violation. That is besides the potential criminal charges that always could be levied under the wage statute against an employer who "willfully and with intent to defraud" fails or refuses to pay wages.

#### *What Should You Do?*

- Make sure your pay plans are clear and protect the dealership's interests. The law is unforgiving with an automatic imposition of liquidated damages and attorneys' fees besides recovery of wages, in the event the dealer is found liable because of an ambiguous pay plan. Make sure there is little room for dispute in pay plans.
- Train your managers about the new law. Managers should understand the need for complete employee records about earnings to support employee payments.
- Managers should understand the pay plans for employees under their supervision so wage calculations are in line.
- HR personnel should check calculations each pay period to ensure that employees are paid properly under their pay plans.
- Review your personnel handbook and employment dispute procedures. Are they clear on how to complain about a pay dispute? You want to be sure that you have an opportunity to engage on any question about pay before the matter turns into a lawsuit.
- Be especially careful about withholding from pay. While you do not need written authorization for withholding authorized or required under federal or state law, you do need a clear, written authorization specifically giving you the right to withhold any other amounts due the company by an employee.
- Be especially careful in calculating final pay. A terminated employee is most likely to sue.

## **REPORTING HOURS ON PAYCHECKS HB689**

As of July 1, 2020, employers must report, on a wage statement provided to an employee, the number of hours an employee has worked if the employee is paid based on:

1. The number of hours worked; or
2. A salary that is less than the standard salary adopted by regulation of the U.S. Department of Labor under the Fair Labor Standards Act.

In addition, a wage statement must include sufficient information to enable an employee to determine how gross and net pay are calculated.

This change integrates with the “wage theft law” and the penalties available under the revised law are available regarding proper reporting of employee hours.

### *What Should You Do?*

- Inform the general office or your payroll service of the requirements of the new law.
- Be sure that wage statements are adequately provided to meet the qualifications of the new law.

## **THE VIRGINIA VALUES ACT SB868**

This law revamps the Virginia Humans Rights Act. It expands the Act beyond federal law to prohibit discrimination based on sexual orientation or gender identification. It provides rights of action for unlawful discrimination using procedures similar to those of the federal Equal Employment Opportunity Act.

The bill repealed prior language that limited employees’ rights to sue employers for certain types of discrimination. It expands the right to sue for all forms of discrimination and retaliation prohibited by the expanded definition of prohibited practices in the new law.

Legal action may be taken by the attorney general or by a private lawsuit after review by the Division of Human Rights of the Department of Law.

- In an action by the Attorney General, a court may award civil penalties up to \$50,000 for a first violation or up to \$100,000 for a second violation, attorneys’ fees and costs, and compensatory and punitive damages.
- The Civil Rights Division is given the opportunity to investigate. If it finds no reasonable cause, it may issue a finding to that effect and a notice of right to sue by the employee. If it finds reasonable cause, it will try to settle

the complaint. If it cannot be settled, it will issue a notice of right to sue in a civil action.

- A person given a right to sue by the Civil Rights Division may file a civil action in general district court or circuit court for compensatory and punitive damages, attorneys’ fees and costs, and even non-monetary relief such as a permanent or temporary injunction.

### *What Should You Do?*

- Review and revise your employee handbook and any separate non-discrimination policy to be sure they include the expanded definition of prohibited bases of discrimination under the law.
- Review and revise your handbook and any separate non-discrimination policy to be sure your procedure for handling claims of discrimination cover the new definition of prohibited bases for discrimination.
- Be sure you have procedures in place for investigations on any alleged discrimination issue that comes to the attention to management.
- Be sure you have in place a process for training employees on bringing to the attention of management a prohibited discrimination situation.
- Train managers in handling reports of discrimination, including investigations.
- Train managers on proper methods to take action on any conclusion to which they come during an investigation.
- Review and make any necessary revisions to the company’s anti-retaliation policy and procedures. Since retaliation claims are the most prevalent claims received by the federal EEOC, it is expected that the same will be the case under this new Virginia law.

## **WHISTLEBLOWER PROTECTION ACT HB798**

Under the new law, which is one of the broadest and least well-defined of its type in the country, an employer may not retaliate (i.e., discharge, discipline, penalize) an employee:

- who in good faith reports violations of federal or state laws or regulations to a supervisor, any governmental body, and/or law enforcement official;
- who participates in an investigation, hearing, or inquiry that is requested by a governmental body or law enforcement official;
- refuses to engage in criminal acts that would subject the employee to criminal liability;
- refuses an employer’s order to take employment action that violates any federal or state law or regulation, and

## VA Employment Law from page 2

the employee informs the employer of the refusal for that reason; or

- provides information to or testifies before a governmental body or law enforcement official conducting an investigation, hearing, or inquiry into any alleged violation by the employer of a federal or state laws or regulations.

This new, and broadly drafted, law provides employees easily abused rights. The law clarifies it does not cover (i) disclosure of data otherwise protected by law or legal privilege, (ii) statements or disclosures made that the employee knows to be false or made with reckless disregard to the truth, or (iii) disclosures that would violate federal or state laws or diminish or impair the rights of any person to the continued protection of confidentiality of communications provided by common law. However, because of its breadth, it provides a sword and a shield to a disciplined or terminated employee, or one who expects to be. By simply making a complaint to a supervisor or claiming one was made on a matter facially covered by the law, an employee can claim protection as a whistleblower making disciplining the employee very complicated, even when justified.

An employee who sues within one year from the alleged retaliation can seek an injunction, reinstatement to the same position or equivalent, and compensation for lost wages, benefits, other remuneration, interest, and attorneys' fees and costs.

### *What Should You Do?*

- Review and make any necessary revisions to your employment handbook and policies on non-retaliation.
- Make sure that the handbook and policies are broad enough to cover the new protections.
- Review your policy and procedure on reviews of employees. Are your reviews perfunctory with rote praise for employees' performance that can later undermine claims of non-performance?
- Review policies and procedures on record keeping for employee performance. Are your managers taking the necessary steps to note in the personnel records of employees instances of improper performance or non-performance or when discipline is appropriate. The lack of any employment record notations can later be used to show that discipline or termination was for an improper retaliatory reason rather than for performance.
- Review your policies and procedures for logging and tracking employee complaints to avoid a claim that an employee made a covered claim and nothing was done.
- Train managers in the new requirements of the law.

### **MISCLASSIFICATION HB984/1199/1407**

Under the new law, a worker improperly classified as an independent contractor employee may bring a civil action for

damages if the employer knew of the individual's misclassification. The law includes a presumption that a worker is an employee, unless it can be shown that the individual is an independent contractor under IRS guidelines.

If a lawsuit is filed and succeeds, the employee can receive damages in the amount of any wages, employment benefits, including expenses incurred by the employee otherwise covered by insurance, and other compensation lost because of misclassification as an independent contractor, along with attorneys' fees and costs. The law also adds to the Virginia Code a section specifically prohibiting retaliation against a worker who reports or plans to report to the appropriate authority that the employer has failed to properly class a person as an employee and failed to pay for benefits or other contributions.

A worker has a private right to take a legal action in the event of a claim of retaliation for a variety of remedies including reinstatement or recovery of lost wages.

Effective January 1, 2021, the Department of Taxation is given the right to assess penalties for worker misclassification and authority to report the misclassification to an array of Virginia state agencies.

### *What Should You Do?*

- Train managers in the new requirements.
- Review criteria for classification of workers as employees or independent contractors.
- Apply the criteria to each type of employee or individual.
- Make sure anyone you wish to classify as an independent contractor fits within the IRS guidelines. In reviewing the classification, start with a presumption that each worker should be an employee. Diverge from the presumption that a worker is an employee only when the IRS standards justify a clear conclusion that a worker is an independent contractor.

### **RESTRICTIVE COVENANTS LAW HB330/SB480**

The new law provides that employers may not enter into or enforce covenants not to compete with low wage employees. The law also prohibits retaliation against a low wage employee for bringing a civil action against an employer under the statute. To avoid confusion, it clarifies that this does not limit non-disclosure agreements intended to prohibit the taking, misappropriating, or sharing of certain information, including trade secrets.

Under this new law, two definitions are critical.

- "Covenant not to compete" is defined as an agreement between employee and employer that restrains, prohibits, or otherwise restricts an individual's ability, following termination of the individual's employment, to

*VA Employment Law continued on page 4*

compete with his former employer. The agreement also “shall not restrict an employee from providing a service to a customer or client of the employer if the employee does not initiate contact with or solicit the customer or client.”

- “Low-wage” employee is broadly defined as one “whose average weekly earnings,” as calculated “are less than the average weekly wage of the Commonwealth...” It specifically includes “interns, students, apprentices, or trainees employed, with or without pay, at a trade or occupation in order to gain work or educational experience.” It also includes independent contractors who earn “an hourly rate that is less than the median hourly wage for the Commonwealth for all occupations as reported, for the preceding year...”

As you can tell, there are individuals clearly excluded from this statute and clearly those who are included, but there is a large grey area for other employees. You must take great care if you wish to enter into a non-compete agreement with an employee. The statute provides a private right of action which allows an employee to sue two years from the later of the date the covenant not to compete was signed, the date the covered employee learned of the covenant not to compete, the date the employee relationship was terminated, or the date the employer took action to enforce the covenant not to compete.

In any civil action, a court may void a covenant not to compete and provide other relief such as an injunction. There are provisions for awards of compensatory damages and liquidated damages along with the right to attorneys’ fees and costs including recovery of expert witness fees.

#### *What Should You Do?*

- Review your policies and procedures about requiring restrictive covenants.
- Impose strict guidelines on any attempt to require restrictive covenants to ensure the restrictive covenants will comply with the law.
- If you use a non-disclosure agreement, review any forms to eliminate any reference to requirements that can be construed as non-compete restrictions.
- Review your employment handbook and employment policies to eliminate requirements that may be construed as non-compete restrictions.
- **Follow the new posting requirement of the law. Under the new law, employers must post a copy of the restrictive covenant law or summary of the law approved by the Department of Labor and Industry in the same location where other employee notices required by state or federal law are posted.**

## MARIJUANA DECRIMINALIZATION HB972/52

The new law decriminalizes simple marijuana possession offenses in Virginia. It prohibits employers from requiring an applicant to disclose information in an application, interview, or otherwise about any decriminalized marijuana arrests, criminal charges or convictions.

An employer violating this can be held responsible for a class 1 misdemeanor for willful violations.

#### *What Do You Do?*

- Review and revise hiring paperwork to eliminate prohibited inquiries.
- Train interviewers to avoid prohibited inquiries.

## MINIMUM WAGE INCREASE

The new law goes into effect May 1, 2021 (delayed from an earlier start date due to pandemic issues). It provides for special state minimum wage above the federal minimum wage:

- May 1, 2021 – January 1, 2022: Min. Wage of \$9.50
- January 1, 2022 – January 1, 2023: Min. Wage of \$11.00
- January 1, 2023 – January 1, 2025: Min. Wage of \$12.00
- January 1, 2025 – January 1, 2026: Min. Wage of \$13.50
- January 1, 2026 – January 1, 2027: Min. Wage of \$15.00

#### *What Should You Do?*

- Train managers and HR personnel in the new requirements.
- Make sure your general office or payroll provider is given plenty of notice so steps can be taken to prevent violations.
- Know the impact on sales personnel. They must be paid minimum wage for each hour worked. Draws may be insufficient when the minimum wage increases.

CHARAPP & WEISS, LLP  
8180 Greensboro Drive, Suite 1000, McLean, VA  
22102  
Tel: 703.564.0220, Fax: 703.564.0221  
[www.cwattorneys.com](http://www.cwattorneys.com)

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