

TIME TO UPDATE YOUR HR HANDBOOKS: U.S. SUPREME COURT AND STATE LAW DEVELOPMENTS

June 29, 2020

On June 15, 2020, the U. S. Supreme Court ruled in [*Bostock v. Clayton County, Georgia*](#) that it is illegal for employers covered by Title VII of the Civil Rights Act of 1964, as amended (“Title VII”), to discriminate against individuals on the basis of sexual orientation or gender identity. The ruling involved three cases from different circuits with differing outcomes. Two of the circuit courts previously had determined that discrimination on the basis of sexual orientation and gender identity was illegal, while the third case had ruled discrimination based on sexual orientation was not. To resolve the conflict, the U.S. Supreme Court accepted the cases on appeal.

The facts of the cases were straightforward. Three individuals were terminated because of their sexual orientation or status as transgender. Among their arguments, the employers argued that “sex” did not include “sexual orientation” or “gender identity;” therefore, homosexual and transgender employees were afforded no protection against discrimination or retaliation under Title VII based upon these characteristics. The employers further noted the list of protected applicable characteristics under Title VII included only “sex,” not homosexuality or transgender status, and attempts by Congress to amend Title VII to include these additional characteristics had failed. Further, the original drafters of the Civil Rights Act of 1964 would not have considered these characteristics to be within the scope of “sex” when the law was adopted.

In response, while admitting that homosexuality and transgender status are distinct concepts from sex, the Supreme Court determined that the term sex did include sexual orientation and gender identity. Discrimination based on homosexuality and transgender status necessarily entails discrimination based on sex because it is a form of adverse treatment based on traits or actions that would be tolerated for members of the opposite sex. The Court noted previous distinct concepts which may not have been contemplated by the original drafters had also been included within the scope of sex such as sexual harassment and motherhood.

[*Bostock* Takeaways](#)

1) Sexual orientation and gender identity are protected classes under Title VII. Discrimination against employees on the basis of either is illegal for employers with fifteen (15) or more employees. Managers and other supervisory employees whose actions will bind the employer should be trained to ensure they appropriately respond to complaints of discrimination or retaliation.

2) There is no grace period to come into compliance. Because the Supreme Court found that discrimination based on sexual orientation and gender identity was a form of discrimination based on sex under Title VII, the holding of the case arguably applies to current or potential legal claims for sexual orientation or gender identity still within the statutory timelines.

3) The scope of any religious exemption under Title VII remains an open question. While the Bostock Court noted the religious exemption under Title VII, prior case law regarding religious exemptions and the Religious Freedom Restoration Act, it declined to discuss the manner in which these doctrines will interact with its interpretation of Title VII, leaving that to later cases.

Virginia Legislation

Effective July 1, 2020, several significant changes to Virginia law go into effect, including the prohibition on employers discriminating on the basis of sexual orientation and gender identity. See Hancock Daniel's April 23, 2020, client advisory [here](#). Additional important state law updates include the prohibition of discrimination and retaliation for reasons related to childbirth, pregnancy, or related medical conditions, including lactation. Virginia law now will require employers to make "reasonable accommodations" for such protected individuals, unless the employer can show that such an accommodation would cause undue hardship on the employer. **Employers must provide notice of the prohibition of such discrimination by posting a notice in a conspicuous location and including the expanded protection in employee handbooks.** Employers also must provide the information to an employee 10 days after she informs the employer she is pregnant.

While race discrimination has long been prohibited by Virginia law, it will now be defined to include traits historically associated with race, including "hair texture, hair type, and protective hairstyles such as braids, locks, and twists." It is important that decisionmakers understand the evolution of current laws as Courts will apply the new guidelines going forward.

Four significant anti-retaliation bills also will become laws in July:

1) Employers are prohibited from discharging or discriminating against an employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding related to the failure to pay wages, or because an employee testified or is about to testify in any such proceeding. Any employee discharged or discriminated against for such reasons may file a complaint with the Commissioner of Labor and Industry, who may institute proceedings for remedies such as reinstatement and recovery of lost wages;

2) Employers are prohibited from discharging or retaliating against an employee because such employee has discussed or disclosed wage or compensation matters with another employee. However, the new law will not apply to employees who regularly have access to such information as a part of their job function who disclose such information to another employee who does not have such access unless the disclosure is in response to a formal complaint, a part of an investigation by the employer, or consistent with a legal duty to disclose such information;

3) Employers may not discriminate or retaliate against an employee because the employee reports a violation of law to a supervisor or governmental body, is requested to participate by or provides information to a governmental body in a hearing or investigation, refuses to engage in criminal conduct, or refuses to follow orders to perform an action the employee believes to be in violation of law provided the employee states such reason for refusal. This legislation will significantly expand Virginia's longstanding and previously limited common law claims for wrongful or retaliatory discharge; and

4) It will be illegal for Virginia employers to discriminate or retaliate against an employee or independent contractor because that employee or independent contractor reported the employer to a proper authority for misclassifying the employee and failed to pay required benefits. The provisions only apply to an employee or independent contractor who discloses such information in good faith with a reasonable belief that the information is accurate. An employer may be penalized up to an amount equal to the employee's lost wages because of the violation.

New prohibitions on entering or enforcing covenants not to compete for "low wage" employees (as the statute defines that term) also will go into effect July 1, 2020.

Finally, Virginia's revised wage payment law creates important updated protections for employees. Employees may directly sue an employer for failure to pay wages (rather than relying on the Commissioner of Labor and Industry) and may bring a collective action claim with similarly situated co-workers. Such claims obviously are appealing to plaintiffs and their counsel as they provide an opportunity to recover significant attorneys' fees for a fraction of the work otherwise required to bring multiple separate lawsuits. It also is noteworthy that employees may sue to recover: (1) back wages owed; (2) the same amount of wage as liquidated damages; (3) prejudgment interest; and (4) attorneys' fees and costs. If an employee is able to prove that an employer has knowingly failed to pay wages, the employee can recover triple the amount of wages due and reasonable attorney fees and costs – a stronger remedy than ever has been available under the Fair Labor Standards Act.

Recommended actions

1) Review personnel policies to ensure supervisors and employees clearly understand that discrimination based on sexual orientation and gender identity is illegal.

2) If current discrimination training does not include categories of sexual orientation and gender identity as protected classes, training materials should be revised, and employees should be trained on the new concepts as soon as possible.

3) Ensure decisions to discipline or terminate employees are reviewed with these new risk criteria as part of your analysis.

4) Ensure required notices are posted and training is provided, as Virginia employers face significantly increased exposure for the expanded discrimination and retaliation causes of action now available to aggrieved employees. Previously, the Virginia Human Rights Act ("VHRA") allowed only limited back pay and attorneys' fee awards to prevailing plaintiffs and such claims were significantly less risk than their equivalent counterparts. In contrast, the

amended VHRA permits a plaintiff to potentially recover unlimited compensatory damages, punitive damages, attorneys' fees, costs, and injunctive relief (although Virginia's statutory cap of \$350,000 for punitive damages should still apply).

For questions, please contact a member of Hancock Daniel's [Labor & Employment](#) team.

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