



UPDATES TO EMPLOYMENT LAW; VIRGINIA GENERAL ASSEMBLY 2020

April 23, 2020

The Virginia General Assembly convened on January 8, 2020, with Democrats controlling both the House of Delegates and the Senate for the first time in 20 years. The new Democrat majority helped shepherd sweeping energy and environmental reform, marijuana decriminalization, and stricter gun control laws. On the employment front, the General Assembly increased the state minimum wage and increased protections for employees. Below is a list of employment-related bills that passed. **Unless otherwise noted, these new laws will become effective on July 1, 2020.**

While some major reforms like repealing Virginia's right-to-work law and mandatory paid sick leave ultimately failed this year, it is important to consider the big picture and note in which direction the legislature is trending. These measures will likely be introduced again next year and gain momentum. Another important note is the General Assembly passed SB 939, which allows localities to adopt ordinances that authorize public employees at the local level to collectively bargain starting May 1, 2021. We can reasonably anticipate this idea will similarly be advocated for state level employees in the future. We also anticipate more legislation to repeal Virginia's right-to-work law in future sessions.

Lastly, we have compiled a short list of best practices to consider immediately while adjusting your policies and practices to comply with the new state laws and regulations to come.

MINIMUM WAGE

SB 7 (Senator Saslaw)/HB 395 (Delegate Ward): **Beginning May 1, 2021**, employers shall pay employees no less than the greater of the federal minimum wage or 75% of the Virginia minimum wage. As of January 1, 2021, the minimum wage for employees in the Commonwealth will be \$9.50 per hour or the federal minimum wage, whichever is higher. We note that absent an increase in the federal minimum wage, which is currently \$7.25 per hour, this does not amount to an increase in the effective minimum wage in 2021 as 75% of \$9.50 per hour is \$7.13. On January 1, 2022, however, the Virginia minimum wage will increase to \$11.00 per hour. From January 1, 2023, to January 1, 2025, the Virginia minimum wage will be set at \$12.00 per hour. Accordingly, based upon the legislative changes set to go into effect currently, the effective minimum wage for employees in the Commonwealth will be \$8.25 in 2022, \$9.00 in 2023 and 2024, or the federal minimum wage, whichever is higher.

The bill then calls for the Virginia minimum wage to increase to \$13.50 on January 1, 2025, and \$15.00 on January 1, 2026. By October 1, 2026, and annually thereafter, the Virginia Commissioner of Labor and Industry must establish an

“adjusted minimum wage” by adding a percentage equal to the average percentage increase in the U.S. Average Consumer Price Index. The adjustment may not amount to a decrease in the minimum wage.

The bill also states that the Virginia Department of Housing and Community Development, the Virginia Economic Development Partnership Authority, and the Virginia Employment Commission shall conduct a joint review to evaluate the institution of a regional minimum wage. The agencies will create a work group to assess the cost of living in the Commonwealth, potential impact on employers, income inequality, impact on agricultural workers, feasibility, economic impact, and the experience of other states with regional minimum wage.

Lastly, the bill states that for the minimum wage to increase to \$13.50 in 2025 and \$15.00 in 2026, the General Assembly must reenact the legislation containing such provisions prior to July 1, 2024. This means a bill authorizing these last two incremental increases must be introduced and passed by the General Assembly in the 2024 legislative session. If not, the last two incremental increases will not become effective and the Commissioner of Labor and Industry must establish the “adjusted minimum wage” by October 1, 2024, to go into effect by January 1, 2025.

This issue was one of the top priorities for Governor Northam as well as the House and Senate Democratic Caucuses heading into 2020.

ANTI-DISCRIMINATION

HB 1049 (Delegate Levine): Adds sexual orientation and gender identity to the list of bases upon which discrimination is prohibited throughout the Code of Virginia, including in public and private employment, education, housing, and in places of public accommodation. Places of public accommodation include retail establishments, educational facilities, and service facilities like hospitals and health care practices.

SB 868 (Senator Ebbin): Prohibits discrimination in employment and in places of public accommodation on the basis of race, religion, national origin, age, disability, status as a veteran, pregnancy, childbirth, sexual orientation, and gender identity. It also authorizes the Attorney General to commence a cause of action against an employer for violation of these rights. A cause of action to recover compensatory and punitive damages is also created for aggrieved individuals. Unlike federal law, there are no caps on damages if the action is brought at the state level. Please note that while there is some duplication between this bill and HB 1049, this bill adds a cause of action and may lead to significantly more employment litigation in Virginia’s state courts as well as significantly diminished opportunities to obtain summary judgment on even meritless claims.

HB 696 (Delegate Roem): Adds gender identity and sexual orientation to the list of bases upon which a locality may enact ordinances banning discrimination in employment.

SB 50 (Senator Spruill)/HB 1514 (Delegate McQuinn): Includes in the definition of racial discrimination traits that are historically associated with race, including hair styles.

SB 712 (Senator McClellan)/HB 827 (Delegate Carrol Foy): Prohibits discrimination and retaliation for reasons related to childbirth, pregnancy, or related medical conditions, including lactation. The bill also requires employers to make reasonable accommodations for such individuals, unless the employer can show that such an accommodation would

cause undue hardship on the employer. The bill also creates a cause of action for employees who are denied these rights by their employer. **Employers must provide notice of the prohibition of such discrimination and the employee's rights thereto to employees by posting in a conspicuous location and including in an employee handbook within 120 days of the effective date of this legislation, which will be July 1, 2020. Accordingly, you should plan to have this notice posted and in your handbook before October 31, 2020.**

WORKERS' COMPENSATION

HB 46 (Delegate Carter): Requires an employer to advise an employee who has filed a claim for workers' compensation whether the employer will accept the claim, deny the claim, or is unable to make a determination within 30 days of filing. The employer must provide reasons for why the employer intends to deny the claim or lacks sufficient information to make a determination.

HB 617 (Delegate Guzman): Directs the Virginia Workers' Compensation Commission to contract with an independent third party to conduct a study to develop options for covering workers' injuries related to repetitive motion, which are injuries like carpal tunnel syndrome that are caused by performing the same motion repeatedly. The study will take into consideration the annual amount of injuries caused by repetitive motion in Virginia as well as how other states handle such claims. While Virginia does provide an exemption for carpal tunnel syndrome, it is the only state in the country that generally prohibits workers compensation claims for repetitive motion injuries.

ANTI-RETALIATION

HB 337 (Delegate Price)/SB 48 (Senator Spruill): Prohibits an employer 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 an employee who has 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.

HB 622 (Delegate Hurst): Prohibits an employer from discharging or retaliating against an employee because such employee has discussed or disclosed wage or compensation matters with another employee. 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.

HB 798 (Delegate Delaney): Prohibits an employer from discriminating or retaliating 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.

SB 662 (Senator Boysko)/HB 1199 (Delegate Tran): Prohibits an employer from discriminating or retaliating 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. The employer may be penalized up to an amount equal to the employee's lost wages as a result of the violation.

MISCELLANEOUS

SB 548 (Senator Edwards): Creates, in addition to a few amendments to the law regarding how unemployment benefits are determined and adjudicated, a voluntary short-time compensation and work sharing program. This program, incentivized by the federal Coronavirus Aid, Relief, and Economic Security Act and recommended by Governor Northam, allows employers who wish to participate in the program to submit a work sharing plan to the Virginia Employment Commission (VEC) for approval. The plan, if approved, will allow the employer to avoid laying off its employees by permitting it to reduce its employees' hours and allowing affected employees to collect reduced unemployment benefits in the form of short-time compensation. The VEC must implement this program by January 1, 2021.

SB 894 (Senator Saslaw)/HB 984 (Delegate Delaney): Creates a cause of action for an employee against an employer who knowingly misclassifies the employee as an independent contractor instead of an employee. Damages could include wages, benefits, and expenses that would have otherwise been covered had the individual been properly classified as an employee.

SB 838 (Senator Ebbin): Creates a cause of action to recover lost wages for an employee against an employer who knowingly fails to pay wages. The statute of limitations on such a cause of action is three years.

HB 330 (Delegate VanValkenburg)/SB 480 (Senator DeSteph): Prohibits an employer from entering into or enforcing a covenant not to compete with any of its low-wage employees. Low-wage employees are defined as an employee whose average weekly earnings are less than the average weekly wage of the Commonwealth, which was \$1,113/week as of the second quarter of 2019. The definition includes independent contractors. Any employer who violates this provision is subject to a \$10,000 fine. The bill also creates a cause of action for employees against employers who attempt to enforce such covenants.

HB 624 (Delegate Hurst): Directs the Attorney General's Division of Human Rights to develop recommendations about what sort of information would be required to share to enable the Division to proactively enforce equal pay laws. The Division must also develop recommendations on proper enforcement mechanisms, including fines and causes of action. The Division must report its recommendations to the Governor and General Assembly before November 30, 2020.

HB 689 (Delegate Aird): Updates existing wage statement law to require that periodic wage payment statements display the number of hours worked if the employee is paid hourly or paid a salary that is less than the standard exempt salary level set by the U.S. Department of Labor, which is currently \$684 per week (\$35,568 per year). The statement must also include sufficient information for the employee to determine how the gross and net pay were calculated. **This legislation contained an emergency clause, meaning it became effective when the Governor signed it on March 10, 2020.**

BEST PRACTICES

Although most of these laws will not become effective until July, and some of the related regulations will not be implemented until later than that, it is best to begin updating procedures and adjusting practices now. We recommend employers take the following actions:

1. Examine your wage structures and levels to determine the short- and long-term impact of the increasing Virginia minimum wage. You may need to adjust entry-level wages and restructure pay levels, pay increases, and bonuses depending on the company's current entry level wage rate and number of employees.
2. Update your employee handbook to ensure that the company's discrimination and retaliation policies reflect the expanded protections in Virginia.
3. Evaluate your grounds and process for termination of employment to ensure they are in line with new state law prohibitions on retaliation.
4. Develop an internal process for communications with employees who file workers' compensation claims to achieve consistency in responding to such claims.
5. Coordinate with your workers' compensation insurance carrier to develop a process for communicating preliminary determinations of coverage with employees who have filed a claim.
6. Review any template agreements that contain non-compete clauses to evaluate enforceability and consider any necessary amendments.
7. Assess processes for ongoing employee evaluations to track behavioral trends and stay current with the composition of your workforce in the event equal pay act legislation is adopted in the future.
8. Schedule training with supervisory employees to ensure they are familiar with the new laws and understand their impact upon their managerial responsibilities.

For questions, please contact a member of our [Labor & Employment Team](#).

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