

CHANGE COMES TO THE COMMONWEALTH

A Virginia Employment Law Update

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OVERVIEW OF NEW VIRGINIA LEGISLATION

- Employee Protections for Non-Payment of Wages (HB123) – Effective July 1, 2020
- Prohibition on Non-Compete Covenants for Low-Wage Earners (HB 330/SB480) – Effective July 1, 2020
- Virginia Values Act Amending the Virginia Human Rights Act (HB 1049/SB 868; HB 827/SB712) – Effective July 1, 2020
- Whistleblower Protections for Virginia Employees (HB 798) – Effective July 1, 2020
- Misclassification of Employees as Independent Contractors (HB 984/SB 894; HB 1646; HB 1407/SB 744; HB1199/SB 662) – Effective July 1, 2020/January 1, 2021

OVERVIEW OF NEW VIRGINIA LEGISLATION

- Minimum Wage Increases (HB 395/SB 7) – Phase in begins May 1, 2021
- General Contractor Liability for Subcontractor’s Failure to Pay Wage (SB 838) – Effective July 1, 2020
- Mandatory Paystub Requirements (HB2664 - 2019) – Effective January 1, 2020
- Employee Access to Personnel Records (SB 1724 – 2019) – Effective July 1, 2019
- Ban the Box for Simple Marijuana Possession (SB2 ER2) – Effective July 1, 2020

EMPLOYEE PROTECTIONS FOR NON-PAYMENT OF WAGES

- Significant amendments to the Virginia Wage Payment Law
- Creates a private cause of action (i.e., the employee can sue the employer in court) and potential for class actions
- New enhanced damages and potential recovery for:
 - Amount of wages due
 - 8% interest from the date the wages were due
 - Additional amount of liquidated damages
 - Reasonable attorneys' fees and costs if the employer *knowingly* failed to pay wages
- If the failure to pay wages was *willful and with intent to defraud* the employee, court may award 3x damages
- Civil penalties of up to \$1,000 for each violation

EMPLOYEE PROTECTIONS FOR NON-PAYMENT OF WAGES (GENERAL CONTRACTORS)

- Further amendments to Wage Payment Act create significantly greater exposure to liability for general contractors (GC)
- Applies to any contractor on or after July 1, 2018
- Makes the GC, and all tiers of subcontractors on a project contractually liable to pay wages to their subcontractors (at any tier) – joint and several liability
- GC (or sub) obligated to pay wages per contract or Virginia minimum wages, whichever is greater
- GC is deemed to be employer of all sub's employees
- GC liable for all same civil and criminal penalties as the sub who did not pay the wage
- Provides that the sub shall indemnify the GC

PROHIBITION ON NON-COMPETE COVENANTS FOR LOW-WAGE EARNERS

- Prohibits employers from entering into, enforcing or threatening to enforce a covenant not to compete with a “low-wage” earner
- Applies to covenants not to compete entered into on or after July 1, 2020
- Does not prohibit the use of non-disclosure agreements
- Excludes employees whose compensation is predominantly from sales commissions, incentives or bonuses
- Provides a private cause of action by the employee for injunctive relief, liquidated damages, lost compensation, attorney fees and costs, and expert witness fees
- Two year statute of limitations from date of attempt to enforce such provision
- Employers must post a notice approved by the Virginia DOL in the workplace and are subject to a civil penalty after the first failure to do so
- Anti-retaliation provision

PROHIBITION ON NON-COMPETE COVENANTS FOR LOW-WAGE EARNERS

- “Low-wage” earner is defined as:
 - An employee, intern, student, apprentice, or trainee whose average weekly earnings are less than the average weekly wage of Virginia; or
 - An independent contractor who is compensated for services at an hourly rate that is less than the median hourly rate for Virginia as reported by the Bureau of Labor statistics
- Current average weekly wage is \$1,125/week (\$58,500/annum). The figure is updated quarterly.
- “Covenant not to compete” is defined as any agreement, or provision of an agreement that restrains, prohibits or otherwise restricts an individual’s ability to compete with his former employer
- Prohibition includes prohibiting the employee from providing services to a client/customer of the employer if the employee *does not initiate contact with or solicit the customer*

VIRGINIA VALUES ACT

- Significantly expands protections against discrimination under the Virginia Human Rights Act (VHRA)
- Virginia is now the first state in the south to enact non-discrimination protections for LGBTQ employees
- VHRA had covered the following:

Race	Color	Religion
National Origin	Sex	Pregnancy
Age	Marital Status	Disability
Childbirth or related medical conditions		
- Value Act adds “sexual orientation” and “gender identity” as protected classes
- Value Act adds protections from discrimination on the basis of pregnancy, child birth or related medical conditions, and lactation

VIRGINIA VALUES ACT LGBTQ RIGHTS

- Adds “sexual orientation” and “gender identity” as protected classes
- “Sexual orientation” is defined as “a person’s actual or perceived heterosexuality, bisexuality or homosexuality”
- “Gender identity” is defined as “gender-related identity, appearance or other gender-related characteristics of an individual, without regard to the individual’s designated sex at birth

VIRGINIA VALUES ACT

PREGNANCY, CHILD BIRTH & RELATED CONDITIONS

- Adds a prohibition against discrimination on the basis of pregnancy, child birth, or related medical conditions
- Includes the obligation of an employer to provide a reasonable accommodation for “known limitations related to pregnancy, child birth, or related medical conditions”
- “Related medical condition” includes lactation

VIRGINIA VALUES ACT

PREGNANCY, CHILD BIRTH & RELATED CONDITIONS

- Employer must make reasonable accommodation if such accommodation is necessary to assist such person in performing a particular job unless the employer can show the accommodation imposes an undue hardship
- The fact that the employer provides or would be required to provide a similar accommodation to other employees shall create a rebuttable presumption that there is no undue hardship
- Employer cannot require employee to use leave if a reasonable accommodation is required
- “Reasonable accommodation” includes: more frequent or longer bathroom breaks, breaks to lactate, access to a private location other than a restroom, assistance with manual labor, job restructuring, modified work schedule, light duty assignments, leave to recover from child birth and modification or acquisition of equipment, temporary transfer to a less strenuous/hazardous job

VIRGINIA VALUES ACT

“GAME CHANGERS”

- The real “game changers” are the dramatic expansion of private causes of action, protections against all forms of discrimination and removal of limits on remedies/damages
- Act expanded to cover employers with 15+ employees for all categories except age discrimination (age discrimination still limited to employers with 20 or fewer employees)
- Amended to prohibit all forms of discrimination and retaliation, not just discharge
- Eliminated 12-month backpay damages cap – now no cap on compensatory damages, allows punitive damages of up to \$350,000 and allows back pay, front pay and emotional distress damages
- Significantly more cases likely to be filed in state court, which is a much less favorable jurisdiction than federal court for employers

VIRGINIA VALUES ACT POSTING & NOTICE REQUIREMENTS

- Under the VHRA, employers are required to post in a conspicuous location and include in any employee handbook:
 - Information concerning the prohibition of discrimination based on pregnancy, childbirth, or related medical conditions
 - Information on an employee's rights to reasonable accommodation for known limitation related to pregnancy, childbirth, or related medical conditions
- Further, employers must provide this information to any new employee when hired and within 10 days to any employee who provides notice that she is pregnant

WHISTLEBLOWER PROTECTIONS

- Employer may not discharge, discipline, threaten, discriminate against, penalize or take any other retaliation regarding an employee's terms and conditions of employment, location or privileges of employment because the employee:
 - Reports violation in good faith of a violation or suspected violation of any state or federal law or regulation to any supervisor, government body or law enforcement official
 - Participates in an investigation, hearing or inquiry
 - Refuses to engage in a criminal act or subject thereto
 - Refuses an employer's order to perform an act the employee believes violates any state or federal law or regulation and so informs the employer
 - Provides information to or testifies before any government body or law enforcement official conducting an investigation, hearing or inquiry about a violation by the employer of a state or federal law or regulation

WHISTLEBLOWER PROTECTIONS

- Statute creates a private right of action and 1-year statute of limitations
- Remedies:
 - Reinstatement
 - Compensation for lost wages, benefits and other remuneration with interest
 - Injunctive relief
 - Attorney fees and costs
- Employee may not:
 - Disclose data otherwise protected by law
 - Make statements the employee knows are false or are in reckless disregard of the truth
 - Make disclosures that violate state or federal law or that are protected by law as confidential communications

MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS

- Virginia law now provides a specific private cause of action for employee misclassification
- Law presume that all persons who provide services for remuneration are employees of the payor
- Employer must satisfy IRS guidelines for independent contractor status to rebut the presumption
- Applies for purposes of Labor & Employment code, Tax code, Unemployment Compensation laws and Workers Compensation laws
- Potential damages include: amount of wage, salary or benefits, including expenses that would have otherwise been covered by insurance; other compensation lost; attorney fees and costs

MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS

- When classifying a worker for federal tax purposes the focus must be on **the degree of control and independence** that that worker has:
 - Relevant facts which fall into three categories:
 - Behavioral – Does company control or have right to control what the worker does and how the worker does his or her job?
 - Financial – Are the business aspects of the worker's job (inc. how the worker is paid, reimbursements, providing of tools and supplies) controlled by the payor?
 - Type of Relationship – Are there written contracts or employee type benefits? Will the relationship continue and is the work performed a key aspect of the business

MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS

- Prohibits employer from discharging, disciplining, threatening, discriminating against, or penalizing an employee or independent contractor because:
 - The employee/IC reported or plans to report that an employer or any officer or agent has failed to properly classify an individual as an employee and failed to pay required benefits or other contributions; or
 - The employer/IC participates in a hearing, investigation or inquiry or in a court action
- Applicable only if employee/IC reports information in good faith and upon reasonable belief it is accurate
- Employer may be liable for civil penalties not to exceed the amount of lost wages as a result of the violation

MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS (EMPLOYERS LICENSED BY BOARD OF CONTRACTORS)

- Contractors licensed by the Board for Contractors face severe requirements and penalties
- Same presumption of employee status and IRS guidelines apply
- Any officer or agent is subject to civil penalties up to \$5,000 for each misclassified individual
- Tax Department is authorized to share information with other agencies
- Violations subject the employer to sanction by the Board and possible disbarment from state contracts
- Employer prohibited from requiring employees to enter into an independent contractor agreement if inaccurate
- Anti-retaliation and discrimination prohibitions

MANDATORY NEW PAYSTUB REQUIREMENTS

- Amends the Virginia Wage Payment Act
- Requires employers to provide employees with a hard copy or electronic paystub on each regular pay date showing:
 - Employer's name and address
 - Number of hours the employee worked during the pay period
 - Employee's rate of pay
 - Gross wages earned during the pay period
 - Amount and purpose of any deductions
- Applies to non-exempt and exempt employees
- Enforcement of requirement to show hours worked for salaried and piece work employees starts July 1, 2020

EMPLOYEE ACCESS TO PERSONNEL RECORDS

- Amends the Virginia Rules of Civil Procedure
- Upon written request by a current or former employee, employer must provide all records reflecting:
 - The employee's dates of employment
 - The employee's wages or salary during employment
 - The employee's job description and job title during employment
 - Any injuries sustained by the employee during employment
- Information must be provided within 30 days of receipt of a written request
- Employer may have a 30-day extension by notifying the employee in writing and providing an explanation of why it can't complete the request in the original 30-day timeframe

EMPLOYEE ACCESS TO PERSONNEL RECORDS

- Exceptions to required disclosure:
 - If the file contains a written statement by the employee's treating physician or clinical psychologist that disclosing the information is likely to endanger the life or physical safety of the employee or another person; or
 - If the requested records refer to a person other than a healthcare provider who is reasonably likely to suffer substantial harm if the employee has access
- Employer must still give the information to the employee's attorney or authorized insurer
- Also an exception for documents that were destroyed under an existing document-retention policy and cannot be produced

EMPLOYEE ACCESS TO PERSONNEL RECORDS

- Employee may obtain a subpoena from court if the employer fails to provide the records
- If the court finds the employer “willfully refused” to comply without good cause, it can:
 - Order the employer to reimburse the employee for expenses
 - Award the employee court costs and attorney fees
- Employer may charge a reasonable fee for producing the information

VIRGINIA MINIMUM WAGE INCREASES

- Minimum wage increases as follows:
 - May 1, 2021 \$9.50/hour
 - January 1, 2022 \$11.00/hour
 - January 1, 2023 \$12.00/hour
- If reenacted by the General Assembly prior to July 1, 2024, continued increases as follows:
 - January 1, 2025 \$13.50/hour
 - January 1, 2026 \$15.00/hour
 - Each January 1 thereafter – Increases based on the Consumer Price Index

VIRGINIA MINIMUM WAGE INCREASES

Other changes of significance:

- Employers may pay employees enrolled in on-the-job-training program a “training wage” for up to 90 days
- Removes exempt status for:
 - Home care providers
 - Persons with certain disabilities
 - Piece workers
 - Domestic service workers

BAN THE BOX FOR SIMPLE MARIJUANA POSSESSION

- New law decriminalizes simple possession of marijuana – civil violation with a max fine of \$25
- Criminal penalties remain for marijuana distribution or intent to distribute
- Records related to any arrest, charge or conviction for simple marijuana possession will not be open for public inspection
- Employers may not ask (and applicants may refuse to disclose) whether they have been arrested, charged or convicted for simple marijuana possession
- Employers may be subject to criminal penalties for willfully violating the new ban the box rule

RESPONSIVE ACTIONS

- Review and update payroll practices to:
 - Confirm compliance with new minimum wage law and paystub requirements
 - Ensure that the business has a system for employees to report, and the business to review and correct, potential compensation errors
- Post new and updated workplace notices

RESPONSIVE ACTIONS, CONT.

- Review and update handbooks and policies to:
 - Reflect new protected statuses
 - Comply with new law on employee access to personnel records
 - Include a policy on reasonable accommodation of pregnancy related disabilities
 - Include whistleblower policy with non-retaliation provisions

RESPONSIVE ACTIONS, CONT.

- Review existing contracts and new contracts
 - As a general contractor, incorporate indemnification provisions to protect in the event of wage claims from a subcontractor's employees
 - Do not use non-competes in new agreements for low wage workers and amend existing agreements that contain impermissible non-competes
- Review and reassess independent contractor classifications

CONCLUSIONS | Q+A

If you have any questions, please don't
hesitate to contact us.



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