
ACC Association of Corporate Counsel
NATIONAL CAPITAL REGION
"Riding The Wave of Recent Employment Law Changes in D.C., Maryland, & Virginia"
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What's Up Maryland?

- "Fight for Fifteen" Minimum Wage Law
- Workplace Harassment Law Changes
- Organ Donor Leave
- Ban the Box
- Noncompete/Conflict of Interest Agreements
- Equal Pay Penalties

Minimum Wage Laws

- **This law increases the minimum wage in increments from the current hourly rate of $10.10 to $15.00. For employers with 15 or more employees, the schedule of hourly rate increases is as follows:**

January 1, 2020: $11.00
January 1, 2021: $11.75
January 1, 2022: $12.50
January 1, 2023: $13.25
January 1, 2024: $14.00
January 1, 2025: $15.00

Workplace Harassment Amendment

- On October 1, 2019, several changes to Maryland's anti-discrimination law went into effect, which vastly expanded the scope of liability for employers under State law.
- The definition of "employee" was expanded to include independent contractors
- The definition of "employer" was revised to increase the scope of liability for cases of harassment from any employer with 15 or more employee to any employer with a single employee;

Workplace Harassment Amendment

- **The statute now expressly prohibits an employer from harassing an employee**
- **The statute now expressly states an employer is liable for *harassment* for the acts or omissions toward any employee or applicant committed by an individual who (1) undertakes or recommends tangible employment actions including hiring, firing, demotion, promoting and reassigning; or (2) directs, supervises or evaluates the work activities of the employee; or (3) if the negligence of the employer led to the harassment or continuation of harassment.**

Organ Donor Leave

- As of Oct. 1, 2019, employers with 15 or more employees are required to provide eligible employees (employed for at least 12 months and at least 1,250 hours during the previous 12 months) up to 60 business days of unpaid leave in any 12-month period to serve as an organ donor, and up to 30 business days of unpaid leave in any 12-month period to serve as a bone marrow donor.
- Organ Donor Leave *does not* run concurrently with leave taken pursuant to the Family and Medical Leave Act.

Ban The Box

- **The new Maryland law, the Criminal Record Screening Practices Act, took effect on February 29, 2020.**

- **Employers with 15+ full-time employees may not, before the first in-person interview, require an applicant for employment to disclose a criminal record or if criminal accusations brought against him/her.**

- **"Criminal record:" an arrest; a plea or verdict of guilty; a plea of nolo contendere (i.e. no contest); the marking of a charge "STET" on the docket (i.e. no further prosecution); a disposition of probation before judgment; or a disposition of not criminally responsible.**

Ban The Box

- An employer may require an applicant to disclose during the first in-person interview whether the applicant has a criminal record or has had criminal accusations brought against the applicant.

- Employers also are prohibited from retaliating or discriminating against an applicant or employee as retribution for alleging a violation of the Act.

- Applies to traditional employment, but also to "any work for pay and any form of vocational or educational training, with or without pay," including contractual, temporary, seasonal, or contingent work, and work assigned through a temporary or other employment agency.

Ban The Box

- Even if get the information legally, cannot apply the information in a discriminatory way.

Exemptions

- The Act does not apply to employers that provide programs, services, or direct care to minors or vulnerable adults.

- The Act also does not prohibit an employer from making a criminal record inquiry or taking other action that the employer is required or authorized to take under another federal or state law.

Noncompete/Conflict of Interest Provisions

- Employers are prohibited from including a noncompete or conflict of interest provision in an employment contract, "or similar document or agreement" with an employee earning $15 or less per hour or $31,200 or less annually.

- Such provisions, which restrict the ability of the employee to work for a new employer or become self-employed in the same or similar business or trade, are void as against public policy.

- Employers may still prohibit such employees from taking client lists or other proprietary client-related information.

Noncompete/Conflict of Interest Provisions

- The law does not mention whether an employer faces penalties for violations nor does it explain or create an enforcement scheme or provide a private right of action for aggrieved workers.

Equal Pay Violation Penalties

- **Penalties for Maryland's Equal Pay for Equal Work law increased on October 1, 2019. Employers found to have violated the law twice (or more) within a three-year period may be assessed a penalty equal to 10% of the damages owed by the employers, which are paid into the General Fund of the State of Maryland.**

Tips and Take-Aways for MD Employers

- Reassess whether you are a "covered employer" particularly in light of amendments to the Workplace Harassment Amendment (adding independent contractors as employees; and expanding coverage to employers with one or more employees).
- Review policies and procedures manuals to make sure new laws are included.
- Make sure you have all required notices posted.
- Make sure you train personnel in the new laws, amendments (train management and non-management separately)
- Audit pay practices to avoid Equal Pay Violation Penalties.

What's new with you, Virginia?

- Virginia Values Act
- New Misclassification Laws
- Wage Theft Law Enhancements
- Prohibitions on Noncompetes with Low-Wage Earners
- Minimum Wage Change Delay
- New Whistleblower Protections
- Anti-retaliation for Sharing Wage Information

Virginia Values Act

<u>Effective July 1</u>:

- **Creates causes of action for unlawful discrimination in public accommodations and employment in the Virginia Human Rights Act.**
- **Currently, under the Act there is no cause of action for discrimination in public accommodations**

Virginia Values Act

- The only causes of action for discrimination in employment are for (i) unlawful discharge on the basis of race, color, religion, national origin, sex, pregnancy, or childbirth or related medical conditions including lactation by employers employing more than five but fewer than 15 persons and (ii) unlawful discharge on the basis of age by employers employing more than five but fewer than 20 persons.

Virginia Values Act

- **Virginia employers now must provide reasonable accommodations related to pregnancy, childbirth, or related medical conditions and lactation when requested by an employee, without reference to whether the accommodations impose an undue hardship on the employer.**

Virginia Values Act

- Additionally, the bill (a) prohibits discrimination in public accommodations on the basis of sexual orientation, gender identity, or status as a veteran; (b) prohibits discrimination in credit on the basis of sexual orientation, gender identity, pregnancy, childbirth or related medical conditions, disability, and status as a veteran; and (c) adds discrimination on the basis of an individual's sexual orientation, gender identity, or status as a veteran as an unlawful housing practice.

Virginia Values Act

- **In separate legislation also amending the VHRA, H.B. 1514 and S.B. 50 expand the race discrimination protections by defining the terms "because of race" and "on the basis of race" to include traits historically associated with race, including hair texture, hair type, and protective hair styles such as braids, locks, and twists – protections not expressly afforded under federal law.**

Virginia Values Act

- The bill allows the causes of action to be pursued privately by the aggrieved person or, in certain circumstances, by the Attorney General.
- Before a civil cause of action may be brought in a court of the Commonwealth, an aggrieved individual must file a complaint with the Division of Human Rights of the Department of Law, participate in an administrative process, and receive a notice of his right to commence a civil action.

Virginia Values Act

- Employees may proceed to state court once they have exhausted this administrative remedy.

- Significantly, the procedural provisions contained in S.B. 868 do not contain clear deadlines and are confusing, and at times, contradictory.

- The bill signed by the governor does not contain a deadline by which an employee must file a complaint with the VDHR.

Virginia Values Act

- An employee is entitled to a jury trial under the amended VHRA, and potential damages include uncapped compensatory damages, punitive damages up to the state cap of $350,000, reasonable attorney's fees and costs, as well as injunctive or other relief as may be appropriate.

- Unlike federal law, compensatory damages are not capped by employer size.

VA's New Misclassification Laws

1) Private Cause of Action for Workers

- House Bill 984/Senate Bill 894 creates a private right of action for workers who claim to have been misclassified as an independent contractor.
- Creates a presumption that "an individual who performs services for a person for remuneration" is that person's employee.
- Presumption may be rebutted if the "employer" shows that the individual is an independent contractor per IRS guidelines.

VA's New Misclassification Laws

- An employee who has been misclassified may be awarded "damages in the amount of any wages, salary, employment benefits, including expenses incurred by the employee that would otherwise have been covered by insurance, or other compensation lost to the individual, a reasonable attorney fee, and the costs incurred by the individual in bringing the action."
- The effective date of this law is July 1, 2020.

VA's New Misclassification Laws

2) Misclassification Investigations

- House Bill 1407/Senate Bill 744 authorizes the Virginia Department of Taxation to determine, based on IRS guidelines, whether an employee is an independent contractor.

VA's New Misclassification Laws

- Imposes civil penalties on "[a]ny employer, or any officer or agent of the employer, that fails to properly classify an individual as an employee," of up to $1,000 per misclassified individual for the first offense, up to $2,500 per misclassified individual for the second offense, and up to $5,000 per misclassified individual for the third or subsequent offense.

VA's New Misclassification Laws

- Upon finding that an employer failed to properly classify an individual as an employee, the Department of Taxation will share that determination with "all public bodies"; subsequent violations may result in debarment.

VA's New Misclassification Laws

- Prohibits "require[ing] or request[ing] that an individual enter into an agreement or sign a document that results in the misclassification of the individual as an independent contractor or otherwise does not accurately reflect the relationship with the employer."
- Makes it "unlawful for an employer or any other party to discriminate in any manner or take adverse action against any person in retaliation for exercising rights" provided under the law.

VA's New Misclassification Laws

- **Authorizes DOT "to work and share information . . . to identify employers who fail to properly classify individuals as employees… [with] the Department of Labor and Industry, the Virginia Employment Commission, the Department of Small Business and Supplier Diversity, the Department of General Services, the Workers' Compensation Commission, and the Department of Professional and Occupational Regulation."**
- **This law has an effective date of January 1, 2021.**

VA's New Misclassification Laws

3) Prohibition Against Retaliation for Reporting Misclassification:

- House Bill 1199/Senate Bill 662, prohibits employers from 'discharge[ing], discipline[ing], threaten[ing], discriminat[ing] against, or penaliz[ing] an employee or independent contractor, or tak[ing] other retaliatory action regarding an employee's/ independent contractor's compensation, terms, conditions, location, or privileges of employment...'

VA's New Misclassification Laws

- **Prohibitions are limited to disclosures made "in good faith and upon a reasonable belief that the information is accurate."**
- **The law further prohibits employers from retaliating against employees or independent contractors for participating in an "investigation, hearing or inquiry" or court action regarding employee classification.**

VA's New Misclassification Laws

- Complaints can be filed with the Commissioner of Labor and Industry.
- Employers subject to a civil penalty up to the value of lost wages.
- The Commissioner may also obtain other "appropriate remedies . . . including reinstatement of the employee."
- The effective date of the law is July 1, 2020.

VA's Wage Theft Laws

- **Previously, the Virginia Wage Payment Act (VWPA) did not provide employees with a private right of action to enforce its protections.**

- **House Bill 123 creates a private right of action for employees if their employer fails to pay wages owed under the VWPA.**

VA's Wage Theft Laws

- Employees may recover "wages owed, an additional equal amount as liquidated damages, plus prejudgment interest . . . and reasonable attorney fees and costs."
- If the employer found to have knowingly failed to pay wages … the court *shall* award the employee triple the amount of wages due and reasonable attorney fees and costs.
- The effective date of this law is July 1, 2020.

VA's Wage Theft Laws

- House Bill 336/Senate Bill 49 allows the Virginia Department of Labor and Industry ("DOLI") to investigate employers' failure to pay wages in accordance with the VWPA.

VA's Wage Theft Laws

- If, while investigating *one* employee's complaint DOLI "acquires information creating a reasonable belief that *other* employees of the same employer may not have been paid wages in accordance with [the VWPA]," DOLI has authority to broaden investigation to *other* employees"

- The effective date of the law is July 1, 2020.

VA's Prohibition of Noncompetes for Low-Wage Employees

- **Prohibits employers from "enter[ing] into, enforce[ing], or threaten[ing] to enforce a covenant not to compete with any low-wage employee."**

VA's Prohibition of Noncompetes for Low-Wage Employees

- **"Low-wage employee" is defined as an individual whose average weekly earnings are "less than the average weekly wage of the Commonwealth as determined pursuant to subsection B of [Va. Code] § 65.2-500."**
- **Low-wage employees include "interns, students, apprentices, or trainees employed, with or without pay, at a trade or occupation in order to gain work or educational experience."**

VA's Prohibition of Noncompetes for Low-Wage Employees

- "Covenants not to compete" include agreements that "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."

- Employers may continue to have confidentiality or non-disclosure agreements with low-wage workers.

VA's Prohibition of Noncompetes for Low-Wage Employees

- Employers must post a copy of the law or a DOLI-approved summary.
- Employers who fail to do so will be subject to a written warning for the first violation, a penalty of up to $250 for the second violation, and a penalty of up to $1,000 for every subsequent violation.

VA's Prohibition of Noncompetes for Low-Wage Employees

- **Employers must post a copy of the law or a DOLI-approved summary.**

- **Employers who fail to do so will be subject to a written warning for the first violation, a penalty of up to $250 for the second violation, and a penalty of up to $1,000 for every subsequent violation.**

VA's Prohibition of Noncompetes for Low-Wage Employees

- Employers face civil penalties of $10,000 per violation.
- The law provides a private right of action that may be brought against any person "that attempts to enforce a covenant not to compete against such employee in violation of" the new law.

VA's Prohibition of Noncompetes for Low-Wage Employees

- **The statute of limitations for such claims is "within two years of the latter of (i) the date the covenant not to compete was signed, (ii) the date the low-wage employee learns of the covenant not to compete, (iii) the date the employment relationship is terminated, or (iv) the date the employer takes any step to enforce the covenant not to compete."**

VA's Prohibition of Noncompetes for Low-Wage Employees

- **Remedies include voiding the restrictive covenant and "all appropriate relief, including enjoining the conduct of any person or employer, ordering payment of liquidated damages, and awarding lost compensation, damages, and reasonable attorney fees and costs."**

VA's Prohibition of Noncompetes for Low-Wage Employees

- The law also prohibits discriminating or retaliating against a low-wage employee for bringing a civil action under the new law.
- The effective date of the law is July 1, 2020.

VA's Minimum Wage

- **Minimum Wage Increase to $9.50 Per Hour Delayed**
- **New Effective Date: May 1, 2021**

VA's New Whistleblower Protections

- H.B. 798 creates a new, broad whistleblower statute that includes a private right of action for whistleblowers.

- The law broadly prohibits retaliation by employers against employee whistleblowers for reporting in good faith violations of any federal or state law or regulation to a supervisor, governmental body, or law-enforcement official.

- The law also prohibits retaliation where an employee refuses to perform an act that violates any federal or state law or regulation.

VA's New Whistleblower Protections

- The law is unclear as to whether there must be an actual violation of law or whether an employee's reasonable belief would be sufficient.

- The law does explicitly state that it does not authorize an employee to disclose information protected by law, legal privilege, or common law confidentiality of communications, nor does it permit an employee to disclose information that he/she knows is false or in reckless disregard for the truth.

VA's New Whistleblower Protections

- **Under this new law, an employee may bring a civil lawsuit within one year of the employer's alleged retaliation and may seek injunctive relief, reinstatement, compensation for lost wages, benefits, and other remuneration, and reasonable attorney's fees and costs.**

VA's Prohibition Against Retaliation for Sharing Wage Information

- H.B. 622 prohibits an employer from retaliating against an employee because the employee inquired about, or discussed with another employee, information about either the employee's own wages or about any other employee's wages.

- The law permits the Virginia Department of Labor and Industry to assess a civil penalty not to exceed $100 for each violation of the law.

Tips and Take-Aways for VA Employers

- Training on the new laws is critical
- Given the expanded nature of the Virginia Values Act, make sure you have proper documentation procedures in place and that they are being followed.
- Make sure more than ever that employment decisions are based upon employee performance.
- Review your job descriptions and position duties/responsibilities to ensure proper classification.
- Review your wage payment procedures and make sure any unpaid wages are rectified before July 1, 2020.
- Update your personnel manuals and notices to include new laws and amendments.

- **New Minimum Wage in DC**
- **Implementation of The Universal Paid Leave Act**
- **DC Covid-19 Laws**

Minimum Wage in 2020

- As of July 1, 2020, the minimum wage in the District of Columbia is $15.00 an hour.

Universal Paid Leave Act

- **On February 17, 2017, D.C. passed the Universal Paid Leave Amendment Act of 2016. Beginning July 1, 2020, the law provides the following government-administered paid leave to D.C. employees:**

  Up to 8 weeks per year to bond with a new child.
  Up to 6 weeks per year to care for a family member with a serious health condition.
  Up to 2 weeks per year to care for the employee's own serious health condition.
- **Notice should have been provided as of February 1, 2020**

DC's COVID-19 Response
Supplemental Emergency Amendment Act of 2020

- Creates a new category of Amended Sick and Safe Leave Act leave called "Declared Emergency Leave."

- Certain employers must provide paid leave to employees for any covered reason provided by the Families First Coronavirus Response Act (FFCRA).

DC's COVID-19 Response
Supp. Emergency Amendment Act

- This leave appears to be *in addition to*: (1) leave provided by FFCRA; (2) leave provided by D.C. FMLA; and (3) leave provided by the employer's policies.

DC's COVID-19 Response
Supp. Emergency Amendment Act

- **Covered Employers are companies employing between 50 and 499 people. This is different from "traditional" ASSLA, which: (1) pertains to all D.C. employers regardless of size; and (2) scales the leave entitlement depending on the size of the employer.**

- **It is unclear that the 50 to 499 employees must all work in D.C. to trigger the law's application, or whether the new law applies to *any* employee who works in D.C. so long as the employer employs between 50 and 499 employees nationwide.**

DC's COVID-19 Response
Supp. Emergency Amendment Act

- **Eligible Employees. An employee is eligible to take Declared Emergency Leave if the employee commenced work for the employer at least 15 days before the request for leave.**

- **This is different from other ASSLA leave, which begins accruing immediately but is accessible only after 90 days of employment.**

DC's COVID-19 Response
Supp. Emergency Amendment Act

- An employee is entitled to Declared Emergency Leave in an amount sufficient to ensure that the employee can remain away from work for two full weeks of work, up to 80 hours or, for a part-time employee, the usual number of hours the employee works in a two-week period.

- This is substantially more leave than other ASSLA leave, which for the largest employers is capped at seven days per calendar year.

DC's COVID-19 Response
Supp. Emergency Amendment Act

- Unlike other ASSLA leave, Declared Emergency Leave does not accrue over time.
- An employee is paid for Declared Emergency Leave at the employee's regular rate of pay.
- In the case of an employee who does not have a regular rate of pay the law provides an equation.
- This must be at least equal to the D.C. minimum wage.

DC's COVID-19 Response
Supp. Emergency Amendment Act

- An employer can require an employee to provide notice of the need to use Declared Emergency Leave but cannot require such notice to be provided more than 48 hours in advance of the need for such leave.

- If the need for leave is an emergency, the employer can require only "reasonable" notice (which still must be no more than 48 hours' notice).

DC's COVID-19 Response
Supp. Emergency Amendment Act

- **Certification of Need for Leave. An employer may require an employee to provide certification of the need to use Declared Emergency Leave only if: (1) the employer contributes payments toward a health insurance plan on behalf of the employee; and (2) the employee uses three or more consecutive working days of paid leave.**

- **If the employer requires certification, the employee cannot be required to provide the certification until one week after the employee's return to work.**

DC's COVID-19 Response
Supp. Emergency Amendment Act

- **No Retaliation. An employer may not retaliate against an employee who seeks Declared Emergency Leave.**

- **An employer may not require an employee who needs Declared Emergency Leave to search for or identify another worker to perform the employee's work during the leave.**

DC's COVID-19 Response
Supp. Emergency Amendment Act

- **Employers may require that an employee exhaust any available leave under federal or D.C. law or an employer's own policies prior to using Declared Emergency Leave.**

- **If an employee uses all of the Declared Emergency Leave available and subsequently informs the employer of the employee's continued need to be absent from work, the employer must inform the employee of any paid or unpaid leave to which the employee may be entitled pursuant to federal law, other D.C. law or the employer's own policies.**

DC's COVID-19 Response
Supp. Emergency Amendment Act

- **Declared Emergency Leave is in addition to: (1) the leave provided by FFCRA; (2) the 16 weeks of leave provided by D.C. FMLA (as modified on March 17, 2020, by Act 23-247); and (3) leave provided by the employer's policies.**

- **Employers will need to analyze the patchwork of available leave entitlements when determining the sequencing of leave to which an employee may be entitled under the circumstances.**

DC's COVID-19 Response
Supp. Emergency Amendment Act

- **Amendments to DC FMLA for DOE leave – which controls unpaid leave requirements:**
- **Expands definition of covered employee to any employee who is unable to work because they have been ordered or recommended to quarantine or isolate by the Department of Health, any other D.C. or federal agency, or a medical professional.**
- **DOE leave under DCFMLA applies to any employer, regardless of the number of people it employs in D.C.**

DC's COVID-19 Response
Supp. Emergency Amendment Act

- **The amount of DOE leave is not specified; rather, DOE leave is available during a period of time for which the mayor has declared a public health emergency.**

- **Certification of the need for DOE leave is established by a recommendation or mandate from the mayor, Department of Health, any other D.C. or federal agency or a medical professional that the employee self-quarantine or self-isolate.**

DC's COVID-19 Response
Supp. Emergency Amendment Act

- **Employers will need to evaluate whether the circumstances entitle an employee to either or both DOE leave and FFCRA sick leave. Eligibility for these types of leave may overlap in some circumstances; in others, they will not.**

DC's COVID-19 Response
Supp. Emergency Amendment Act

- **Modifications to the D.C. Unemployment Compensation Act:**

  An "affected employee" means an employee otherwise eligible for unemployment who has become "unemployed or partially unemployed" because of the declared public health emergency, including employees who are: (1) under a quarantine or isolation order; (2) self-quarantined or self-isolated; or (3) employed by an employer that ceased or reduced operations as a result of the public health emergency or an order or guidance from the mayor or Department of Health.

DC's COVID-19 Response
Supp. Emergency Amendment Act

- "Affected employees:"
  - are not required to search for work in order to maintain eligibility for unemployment; and
  - are eligible for unemployment regardless of whether the employer has provided a date certain for the employee's return or the employee has a reasonable expectation of re-employment.

DC's COVID-19 Response
Supp. Emergency Amendment Act

- **Employees are eligible for unemployment if they resign voluntarily for "good cause."**

DC's COVID-19 Response
Supp. Emergency Amendment Act

- **"Good cause" is expanded to include these situations:**
  - **An employer fails to timely comply with a written directive from the mayor or DOH regarding public safety measures during a public health emergency.**
  - **An employer requires an employee to be physically in the workplace, despite having been: (1) quarantined/isolated by the government; or (2) self-quarantined/self-isolated upon recommendation or guidance of the DOH, any other applicable D.C. or federal agency, or a medical professional.**

Tips and Take-Aways for DC Employers

This is an exceptional year as it pertains to new laws and drastic changes. Therefore:

1) **Make sure your policies are revised (should be done by July 1 at the latest) to reflect the new laws and their provisions.**
2) **Make sure you have posted all needed notifications.**
3) **Make sure when dealing with sick leave related to COVID-19, you carefully consider the interplay between the various local and federal laws.**