



# “Riding The Wave of Recent Employment Law Changes in D.C., Maryland, & Virginia”

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**New Anti-Discrimination, Anti-  
Harassment and Anti-Retaliation Laws**

# Virginia Values Act

Effective July 1:

- Creates causes of action for unlawful discrimination in public accommodations and employment in the Virginia Human Rights Act.



# Virginia Values Act

## Now: Public Accommodation Protections:

- Protections on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age (18+) , sexual orientation, gender identity, marital status, disability, or status as a veteran.

# Virginia Values Act

## Now: Employment Protections:

a. Based on: race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions including lactation, age (40+), status as a veteran, or national origin; or

# Virginia Values Act

## Now: Employment Protections:

*In additional to actual discriminatory acts, it is an unlawful employment practice for an “employer” to:*

*Cause or attempt to cause an employer to discriminate against an individual in violation of subdivisions a or b.*

Note: This law appears to create individual liability.

# Virginia Values Act

## Now: Employment Protections:

- **Definition of Employer depends on basis of claim:**
  - **“Employer”:** a person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

# Virginia Values Act

- However, (i) for purposes of unlawful discharge on the basis of race, color, religion, national origin, status as a veteran, sex, sexual orientation, gender identity, marital status, pregnancy, or childbirth or related medical conditions including lactation, "employer" means any employer employing more than five persons;
- and (ii) for purposes of unlawful discharge on the basis of age, "Employer" means any employer employing more than five but fewer than 20 persons.



# Virginia Values Act

- Term “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

- An employee is entitled to a jury trial under the amended VHRA, and potential damages include uncapped compensatory damages, punitive damages (presumably) 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.

# Virginia Values Act

- Assess a civil penalty against the respondent (i) in an amount not exceeding \$50,000 for a first violation and (ii) in an amount not exceeding \$100,000 for any subsequent violation.
- Except as otherwise provided, it is unlawful for an employer to protected status as a motivating factor for any employment practice, even though other factors also motivate the practice.

# 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.

# MD's Workplace Harassment Amendment

- 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 employees to any employer with a single employee;

# MD's 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.

# MD's Disclosing Sexual Harassment in the Workplace Act of 2018

- Effective October 1, 2018 and automatically terminates on June 30, 2023.
- Requires employers with 50 or more employee to complete surveys on or before July 1, 2020, and on or before July 1, 2022.

# MD's Disclosing Sexual Harassment in the Workplace Act of 2018

- The survey addresses:
  - (i) the number of settlements made by or on behalf of the employer after an allegation of sexual harassment by an employee;
  - (ii) the number of times the employer has paid a settlement to resolve a sexual harassment allegation against the same employee over the past 10 years of employment; and
  - (iii) the number of settlements made after an allegation of sexual harassment that included a provision requiring both parties to keep the terms of the settlement confidential.



# MD's Disclosing Sexual Harassment in the Workplace Act of 2018

- The survey:
  - Must be submitted electronically.
  - Will include a space for an employer to report whether the employer took personnel action against an employee who was the subject of a settlement
  - Will be part of data made accessible to the public.

# MD's 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.

# New Wage Laws

# DC's Minimum Wage in 2020

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



# MD's Minimum Wage

- Maryland 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



# VA's Minimum Wage

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



# 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

- If, while investigating *one* employee's complaint the Virginia Dept. of Labor and Industry “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.

# New Leave Laws

# DC's 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.



## MD's 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.

# New Non-Compete Laws

# MDs 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.
- 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.



# 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.”
- Effective July 1, 2020



# 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

- 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.

**Other Laws of Which to Be Aware**

# VA's New Misclassification Laws

- House Bill 984/Senate Bill 894 creates a private right of action for workers who claim to have been misclassified as an independent contractor. Effective Date: July 1, 2020.
- 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

- 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

- 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

- 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...’
- Effective Date January 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

- 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.

## MD's Statewide 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.

# MD's Statewide 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.

# Tips and Takeaways

# 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.

# 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.
- Complete the sexual harassment survey online if covered.



# Tips and Take-Aways for DC Employers

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