Virginia Is for Employees: New Laws Employers Need to Know

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On April 9, 2020, Virginia Governor Ralph Northam signed multiple new employment laws to go into effect July 1, 2020, including restrictions on covenants not to compete for low-wage workers, expansion of employment discrimination protections for LGBT and pregnant employees, new private right of action and investigative authority regarding misclassification of workers as independent contractors, and stricter penalties for employers who commit wage violations. We highlight the key takeaways for employers in these new laws.

I. Covenants Not to Compete Banned for Low-wage Workers

New legislation (SB 480) bans employers from entering into or seeking to enforce “covenants not to compete” for “low-wage” “employees” after July 1, 2020. Each of these terms is defined broadly. First, the definition of “covenant not to compete” includes any agreement between an employer and employee that “restrains, prohibits, or otherwise restricts an individual’s ability, following the termination of the individuals’ employment, to compete with his former employer.” The definition, however, does “not 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.” The law also clarifies that nondisclosure agreements, including those protecting trade secrets and proprietary and confidential information, remain valid.

Second, the term “low-wage” is something of a misnomer, because it in fact applies to below-average wages. The law defines a “low-wage” employee as someone whose average weekly earnings are less than the average weekly wage of the Commonwealth as determined by the Virginia Employment Commission ($1,125 per week in the latest estimates), thus rendering roughly half of Virginia employees “low-wage” earners. The law also includes low-wage independent contractors who are compensated for services at an hourly rate that is less than the median hourly wage for the Commonwealth, as reported by the Bureau of Labor Statistics of the United States Department of Labor.

Third, the law defines “employee” to include independent contractors, interns, students, apprentices, and trainees employed, with or without pay, at a trade or occupation in order to gain work or educational experience. However, the law does not appear to include most salespersons, as it excludes “any employee whose earnings are derived, in whole or in predominant part, from sales commissions, incentives, or bonuses paid to the employee by the employer.”
Employers in Virginia should be aware that the law not only prohibits such agreements, but further provides a private right of action to bring a claim against an employer who seeks to enforce a covenant not to compete against a low-wage worker, with a penalty of $10,000 per violation. The law further requires that an employer post a copy of the new code section or a summary approved by the Commonwealth in the same location where other employee notices are posted.¹

II. Discrimination Protections Extended to LGBT Employees

Virginia has become the first southern state to ban discrimination against LGBT employees. The legislation (HB 1049) “prohibits discrimination in employment on the basis of sexual orientation or gender identity.” Its sweeping provisions also prohibit discrimination based on sexual orientation or gender identity in housing, public accommodation, public contracting, apprenticeship programs, banking, and insurance.

III. Discrimination Protections Also Extended to Pregnant Employees

New legislation (HB 827) also amends the Virginia Human Rights Act to explicitly prohibit discrimination in employment on the basis of pregnancy, childbirth, or related medical conditions. It requires employers to engage in an interactive process to determine whether reasonable accommodation is possible for limitations related to pregnancy, childbirth, or related medical conditions. Employers are also specifically prohibited from requiring an employee to take leave if another reasonable accommodation can be provided.

An employer must post and include in any employee handbook information concerning (i) the prohibition against unlawful discrimination and (ii) an employee’s rights to reasonable accommodation for limitations related to pregnancy, childbirth, or related medical conditions. This information must also be provided to new employees and any employee within 10 days of the employee informing the employer of a pregnancy.

IV. Tougher Approach to Worker Misclassification

Virginia passed four bills seeking to crack down on employers who misclassify workers as independent contractors instead of employees. First, Virginia created a private right of action (HB 984/SB 894) for a misclassified worker to bring a claim against his employer for misclassification where the employer had knowledge of the worker’s misclassification. A court is permitted to award damages in any amount of any wages, salary, employment benefits, insurance expenses, all compensation lost to the individual, and reasonable attorneys’ fees and costs. This bill states that a worker is presumed to be an employee “unless it is shown that the individual is an independent contractor as determined under the Internal Revenue Service’s guidelines.”

Second, Virginia’s bill (HB 1199/SB 662) prohibits retaliation against a person for reporting misclassification. The law allows the Commission of Labor and Industry to institute proceedings against an employer who has taken retaliatory action, and to seek remedies including reinstatement of the employee, and recovery of lost wages. An employer could also be liable for a civil penalty equal to the value of the employee’s lost wages.

Third, new legislation (HB 1407/SB 744) authorizes the Department of Taxation to conduct investigations into suspected cases of worker misclassification. Note that this law does not go into effect until January 1, 2021.
Finally, new legislation (HB 1646) provides that the Board of Contractors shall require a contractor to classify workers appropriately as independent contractors or employees. The Board was given the ability to sanction contractors who are found to have misclassified workers intentionally.

V. Employers Will Face Stiffer Penalties for Wage Violations and Worker Misclassification

Finally, new legislation (SB 838) to prevent wage theft also goes into effect on July 1, 2020. Employees will have a private cause of action against an employer who fails to pay wages to recover the amount of wages due, plus eight percent interest annually from the date the wages were due. If an employer is found to have knowingly failed to pay wages, the employee is entitled to recover an amount equal to triple the amount of wages due along with reasonable attorney fees and costs. Employees are empowered to bring an action individually, jointly, with other aggrieved employees as a collective action, or on behalf of similarly situated employees as a collective action consistent with the collective action procedures of the federal Fair Labor Standards Act. Employers will continue to face possible civil and criminal penalties under state law.

The Governor did not sign, and instead proposed amendments to, the following bills: A bill to increase the minimum wage on January 1, 2021 (the Governor suggested extending the proposal until May 1, 2021) (HB 395; SB 7), and a proposed bill lessening restrictions on collective bargaining (SB 939). These amendments will go back to the legislature for review. Paul Hastings is monitoring all developments and will provide a new Client Alert should any of these bills become law.
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1 The legislation does not specify, and the Virginia Department of Labor and Industry has not yet stated, when a sample
notice will be provided.