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Employment Law Check-Up for Business
Owners and Managers:

*An Update on Recent Changes in Virginia Law
and the Top Ten Mistakes for Employers to
Avoid*

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What Recent Changes in Virginia Law Should you be Aware of?

Employee Access to Personnel Records

- Va. Code § 8.01-413.1
- Effective July 1, 2019
- Upon employee (or attorney's) written request, employer **MUST** provide documents showing:
 - (1) Dates of employment;
 - (2) Wages or salary;
 - (3) Job description and title; and
 - (4) Injuries sustained in the course of employment.

Employee Access to Personnel Records

- Request must be written.
- Records must be produced within **30 days** of written request.
- **BUT** the law does not create an obligation to keep particular records or to keep personnel files for a particular length of time.
- Limited exception:
 - Employers not required to produce records if doing so would reasonably endanger the employee or another person.

Employee Access to Personnel Records

Key Takeaways for Employers

- Don't ignore requests for information from current or former employees or their attorneys.
- Make sure handbook policies are updated and consistent with this law.
- Review record retention policies and know where records are located.

Nondisclosure Agreements and Sexual Assault

- Va. Code § 40.1-28.01
- Effective July 1, 2020
- Employers **may not** require that job applicants or employees sign a “non-disclosure or confidentiality agreement that has the purpose or effect of concealing the details relating to a claim of sexual assault.”
- Any such agreement would be void and unenforceable as contrary to public policy.
- “Sexual assault” is not defined. However, the statute applies to claims arising under Virginia laws on rape (Va. Code § 18.2-61), forcible sodomy (§ 18.2-67.1), aggravated sexual battery (§ 18.2-67.3), and sexual battery (§ 18.2-67.4).

Nondisclosure Agreements and Sexual Assault

- BUT VA law relates only to such agreements being made “as a condition of employment.” Therefore, the VIRGINIA law does not apply to agreements with *former* employees.
- Nondisclosure and confidentiality provisions in severance and settlement agreements are not affected by the new law, as long as the employee signs the agreement after the end of employment.
- **But wait... Late Breaking News-** A recent decision from the NLRB suggests that employee severance agreements in both unionized and non-union workplaces could be deemed unlawful if they contain confidentiality and non-disparagement provisions (common provisions for severance agreements) that restrict an employee’s rights to speak about the agreement terms or otherwise talk negatively about their former employer. **USE CAUTION UNTIL THERE IS MORE CLARITY ON THIS**



Nondisclosure Agreements and Sexual Assault

Key Takeaways for Employers

- Review template agreements, including employment agreements, confidentiality agreements, and severance templates to ensure that they do not violate this law.
- Carefully review any settlement agreements, severance agreements and releases executed by current employees to ensure agreements do not violate this law.
- Pay attention to non-disparagement provisions, which may implicitly violate this law when signed by current employees.
- WE ADVISE THAT YOU OBTAIN COUNSEL ON CONFIDENTIALITY AND NON-DISPARAGEMENT CLAUSES IF YOU ARE USING AN OLDER “FORM” AGREEMENT

Virginia Values Act

- Effective July 1, 2020
- Amends the Virginia Human Rights Act, which is Virginia's equivalent to Title VII of the Civil Rights Act of 1964.
- Provides protections and relief beyond Title VII.



Before the Virginia Values Act

Prior to July 1, 2020:

- The VHRA only protected employers with between 6 and 15 employees.
- Only prohibited unlawful *discharge* based on a protected characteristic.
- The only remedies for employees were:
 - Up to 12 months' backpay.
 - Reasonable attorneys' fees (not to exceed 25% of the backpay award).
- Prohibited compensatory and punitive damages.
- Prohibited reinstatement of the employee.

Virginia Values Act (Expanded Coverage)

- Now broader coverage for ALL employers with 15 or more employees.
- VHRA still covers employers with between 6 and 14 employees, but only prohibits unlawful discharge based on a protected characteristic.
- Also now extends to:
 - Employment agencies
 - Labor organizations
 - State agencies
 - School boards

Virginia Values Act (Protects More Classes)

- Pre-Virginia Values Act protections based on race
 - On March 4, 2020, definition of “race” in VHRA was amended.
 - Discrimination based on race now includes discrimination based on **traits historically associated with race**.
 - These include:
 - Hair texture
 - Hair type
 - Protective hairstyles (such as braids, locks, and twists)
 - Virginia was only the 4th state to prohibit discrimination based on hairstyles.

Virginia Values Act (Protects More Classes)

- Virginia Values Act amends VHRA to prohibit discrimination on more classes of workers.
- Discrimination is now prohibited on basis of:
 - **Sexual orientation**
 - “[A] person’s actual or perceived heterosexuality, bisexuality, or homosexuality.”
 - **Gender identity**
 - “[T]he gender-related identity, appearance, or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth.”
 - **Lactation**
 - Now specifically included within the class of “pregnancy, childbirth, and related medical conditions.”
 - **Veteran status**

- More than just an unlawful discharge.
- Employers **MAY NOT** “fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to such individual’s compensation, terms, conditions, or privileges of employment” because of a protected characteristic.
- Follows prohibition in Title VII.

Virginia Values Act (Protections Bolstered)

Virginia Values Act (Expands Remedies)

- **Private right of action** against all employers with 15 or more employees (or 20 or more employees, if action is based on age discrimination).
 - BUT, like Title VII, employee must first file a Charge of Discrimination with the EEOC and/or Virginia Division of Human Rights before filing suit.
 - Although the statute does not list the time limit by which a lawsuit must be filed following dismissal (90 days under Title VII and other federal discrimination laws).
- **Unlimited compensatory damages (i.e., no statutory caps).**
 - **Greater protection than under federal law.**
- Punitive damages
- Reasonable attorneys' fees (not limited to 25% of backpay award)
- Permanent and temporary injunctive relief.

Virginia Values Act (Reasonable Accommodations)

- All employers with 5 or more employees **must** provide reasonable accommodations to applicants and employees with “pregnancy, childbirth, or related medical conditions,” including lactation.
- Examples of reasonable accommodations, include:
 - More frequent or longer bathroom breaks
 - Breastmilk pumping breaks
 - Access to private location to express breastmilk
 - Modification of equipment or seating
 - Transfer to a less strenuous or hazardous position
 - Light duty assignments
 - Leave to recover from childbirth
- Exception is if the accommodation would cause an undue hardship on the employer.

Virginia Values Act (Reasonable Accommodations)

- Employers and employees **MUST** engage in “interactive process” to determine appropriate and reasonable accommodation.
- Prohibits retaliation against employees who request a reasonable accommodation.
- Employers beware:
 - Grants a private right of action to employees to challenge an employer’s failure to provide a reasonable accommodation.
 - **No requirement to file a Charge of Discrimination.**
 - 2 year statute of limitations.

Virginia Values Act – Takeaways

- Makes suing for discrimination in state court very attractive, for the first time.
 - More favorable remedies
 - Away from the Rocket Docket
 - No summary judgment in state court
- Employers should revisit their Handbooks now to ensure conformance with the Virginia Values Act.

Worker Misclassification Law

Va. Code § 40.1-28.7:7

- Effective July 1, 2020
- Two primary objectives:
 - (1) Establishes presumption that an individual providing services for payment is an employee, not an independent contractor.
 - (2) Creates a private right of action for workers to challenge classification as an independent contractor.

Worker Misclassification Law (Private Right of Action)

- An individual not properly classified as an employee can bring a civil action for damages.
- Presumption in favor of “employee” status.
- **Unless** the employer shows that the worker is an independent contractor under the IRS guidelines.
- If successful, Court may award:
 - Lost wages
 - Lost benefits (including expenses that would have been covered)
 - Reasonable attorneys’ fees and costs.

Worker Misclassification Laws (Retaliation)



- Va. Code § 40.1-33.1
 - Technically separate from Va. Code § 40.1-28.7:7
- Unlawful for an employer to discharge, discipline, threaten, discriminate against, or penalize an employee or independent contractor, or take other retaliatory action because s/he:
 - Has reported or plans to report that an employer failed to properly classify an individual as an employee and failed to pay required benefits or other contributions; or
 - Is requested or subpoenaed by an appropriate authority to participate in an investigation, hearing, or inquiry by an appropriate authority or in a court action.

Worker Misclassification Laws

- Va. Code § 58.1-1900.
- Department of Taxation is responsible for determining whether an individual is an independent contractor by applying IRS guidelines.
- Monetary penalties:
 - First offense: up to \$1,000 per misclassified individual.
 - Second offense: up to \$2,500 per misclassified individual, possible one-year contract debarment.
 - Third or subsequent offense: up to \$5,000 per misclassified individual, possible three-year contract debarment.

Worker Misclassification Laws (Board for Contractors)

- Va. Code § 54.1-1102
- Board for Contractors shall:
 - Require a contractor to appropriately classify all workers as employees or independent contractors, as provided by law
 - Provide that any contractor who is found to have intentionally misclassified any worker is subject to sanction by the Board
- Effective July 1, 2020



- Virginia has long adhered to the employment at will doctrine.
- Exception to at-will doctrine first recognized in *Bowman v. State Bank of Keysville*.
- Bowman permitted a cause of action for wrongful termination in violation of public policy.
- Virginia courts, including SCOVA, interpreted *Bowman* narrowly.
- Only permitted wrongful termination claims in these instances:
 - (1) Employer violated an employee's statutory right
 - (2) Employer's actions violated a public policy expressed in a Virginia statute and the employee was within the class of persons that policy was designed to protect
 - (3) Employee refused to engage in a criminal act.

Employment At Will in Virginia....

“Bowman”

(Pre-
Whistleblower
Law)

NOW: A Comprehensive Whistleblower Law (Elements)

Va. Code § 40.1-27.3

Effective July 1, 2020

Prohibits discrimination and retaliation against an employee who:

- Reports a violation of federal or state law or regulation
- Is requested by a law enforcement officer to participate in hearing or inquiry
- Refuses to engage in criminal activity
- Refuses to perform an action that violates federal or state law or regulation, AND the employee informs the employer that he/she is refusing to perform the action for that reason; and
- Participates in an investigation, hearing, or inquiry related to the violation

Comprehensive Whistleblower Law (Remedies)

Available Remedies

Injunctive relief

Reinstatement

Lost wages
(uncapped)

Lost benefits
(uncapped)

Reasonable
attorneys' fees

No requirement
to file an
administrative
charge.

BUT 1-year
statute of
limitations.

The Restrictive Covenant Law (Noncompete Ban)

- Va. Code § 40.1-28.7:8
- Applies to agreements entered into on or after July 1, 2020

Basic Text:

“No employer shall enter into, enforce, or threaten to enforce a covenant not to compete with any low-wage employee.”

The Restrictive Covenant Law

Key definition: “Covenant Not to Compete:”

"Covenant not to compete" means a covenant or agreement, ... that restrains, prohibits, or otherwise restricts an individual's ability, following the termination of the individual's employment, to compete with his former employer.

“Covenant Not to Compete” appears to allow, but also limits, non-solicits of customers:

A "covenant not to compete" shall 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 Restrictive Covenant Law

Key definition:

“Low Wage Employee:”

"Low-wage employee" means an employee whose average weekly earnings ... are less than the average weekly wage of the Commonwealth.

(Right now ~\$69,836.00)

"Low-wage employee" includes interns, students, apprentices, or trainees employed, with or without pay...

“Low Wage Employee” INCLUDES independent contractors:

"Low-wage employee" also includes an individual who has independently contracted with another person to perform services independent of an employment relationship and who is compensated for such services by such person at an hourly rate that is less than the median hourly wage for the Commonwealth... (about \$20/hr)

The Restrictive Covenant Law

**“Low Wage Employee” INCLUDES
interns, apprentices, and trainees:**

"Low-wage employee" also includes interns, students, apprentices or trainees employed, with or without pay, at a trade or occupation in order to gain work or educational experience."

**“Low Wage Employee” DOES NOT
INCLUDE employees paid mostly by
commission or bonus:**

"Low-wage employee" shall not include 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.

The Restrictive Covenant Law

Confidentiality clauses/agreements are still acceptable

“Nothing in this section shall serve to limit the creation or application of nondisclosure agreements intended to prohibit the taking, misappropriating, threatening to misappropriate, or sharing of certain information, including trade secrets, ... and proprietary or confidential information.”

The Restrictive Covenant Law

Two Statutory Enforcement Mechanisms

(1) Private Right of Action

- Employees can sue *“any former employer or other person that attempts to enforce a covenant not to compete.”*
- Damages include lost compensation, attorneys’ fees, litigation costs, and liquidated damages.
- 2 year SOL.

(2) DOLI Commissioner Penalties

- Civil penalty up to \$10,000 per violation.
- Employers also required to post a summary of the law.
 - Penalties range from written warning to \$1,000 for violating posting requirement.

Minimum Wage Law (Incremental Increases)

- \$9.50 effective May 1, 2021
- \$11.00 effective January 1, 2022
- \$12.00 effective January 1, 2023
- \$13.50 effective January 1, 2025
- \$15.00 effective January 1, 2026
- The 2025 and 2026 increases are contingent upon General Assembly's approval by July 1, 2024.

Wage Payment Laws (Requirements)

- Virginia Code § 40.1-29(A)
 - Refresher: Employers must pay salaried employees at least once per month, and hourly employees at least twice per month.
- Virginia Code § 40.1-29(C)
 - Prohibits employer from making deductions from employee's wages.
 - Certain deductions permitted (e.g., insurance premiums, loan repayments, tools and uniform purchases, etc.)
 - 2019 Legislation - Employers must provide written paystubs showing:
 - Number of hours worked
 - Rate of pay
 - Gross wages earned
 - Amount and purpose of any deductions.
 - Should contain sufficient information to show how gross and net pay were calculated.

Wage Payment Laws (Private Right of Action)

- Prior to July 1, 2020, employees who were allegedly denied wages were required to file an administrative claim with DOLI, which the Commissioner could choose to investigate or not.
- Now, employees have a **private right of action**.
 - Applies “without regard to any exhaustion of alternative administrative remedies.”
 - Can be brought individually or as a collective action.
 - 3 year Statute of Limitations
- If successful, may recover:
 - Lost wages
 - Liquidated damages (equal to lost wages)
 - Reasonable attorneys’ fees
 - Prejudgment interest at 8%
 - Treble damages award required if the wage violation was “knowing.”

Wage Payment Laws (Expanded Investigatory Authority for DOLI)

- DOLI has expanded authority to investigate wage theft complaints.
- If, during course of investigation, obtains information that creates “a reasonable belief” that other employees have not been paid wages, DOLI can expand investigation.
- If violation found, DOLI can institute proceedings on behalf of any employee.
- DOLI does not need employee’s consent.

Virginia's Pay Transparency Law

- Effective July 1, 2020
- *“No employer shall discharge from employment or take other retaliatory action against an employee because the employee (i) inquired about or discussed with, or disclosed to, another employee any information about either the employee's own wages or other compensation or about any other employee's wages or other compensation or (ii) filed a complaint with the Department [of Labor and Industry] alleging a violation of this section.”*

New Pay Transparency Law (Exclusions)

Note that it Excludes:



- Employees who have access to such information as part of their essential job functions.
- **Unless** that disclosure is:
 - in response to a formal complaint or charge;
 - in furtherance of an investigation, proceeding, hearing, or action, including an investigation by the employer; or
 - consistent with a legal duty to furnish information.

In these scenarios, the prohibition against retaliation applies.



What Are The Top Ten Mistakes
We Regularly See Employers Get
into Trouble With?

Name _____

Signature _____

Date _____



1. **Does the Company have a Sexual Harassment/ Equal Employment Opportunity Policy? If so when was it last updated?**
 - Recent cases have changed the law here.
2. **If Company has 50 or more employees, do they have a Family and Medical Leave Act or “FMLA” policy?**
 - If so, is it properly posted and communicated to employees?
3. **Does the Company have an employee handbook or personnel manual?**
 - If so, does it contain an express disclaimer that it does not create a contract of employment?
4. **Does the Company use employment application forms? If so how old are they?**
 - Many forms more than a few years old ask questions which violate the Americans with Disabilities Act, EEOC guidelines, and state law. For example, you generally cannot ask about arrests or whether an applicant is a U.S. citizen)
 - Or do you require online applications? If so... Let’s talk accessibility!

5. Does the Company provide severance benefits to departing employees? If so, when was the form release agreement reviewed?

- Releases for employees age 40 and older now need to meet strict disclosure requirements, including specific reference to the age discrimination statutes, a 21 or 45 day offer period and a revocation period. Releases that don't include these provisions are invalid as to age discrimination claims.
- Do you include confidentiality or non-disparagement provisions?

6. Does the Company run credit checks on applicants?

- Employers who use credit reports and criminal background check services are required to make several disclosures to applicants and employees.

7. What are the Company's record retention policies?

- For example, under federal law payroll records must be maintained for at least three years, occupational injury and illness records for at least five years, summary plan and reports on benefit plans for at least six years.

8. What is the Company's policy for accommodating disabled applicants and employees?

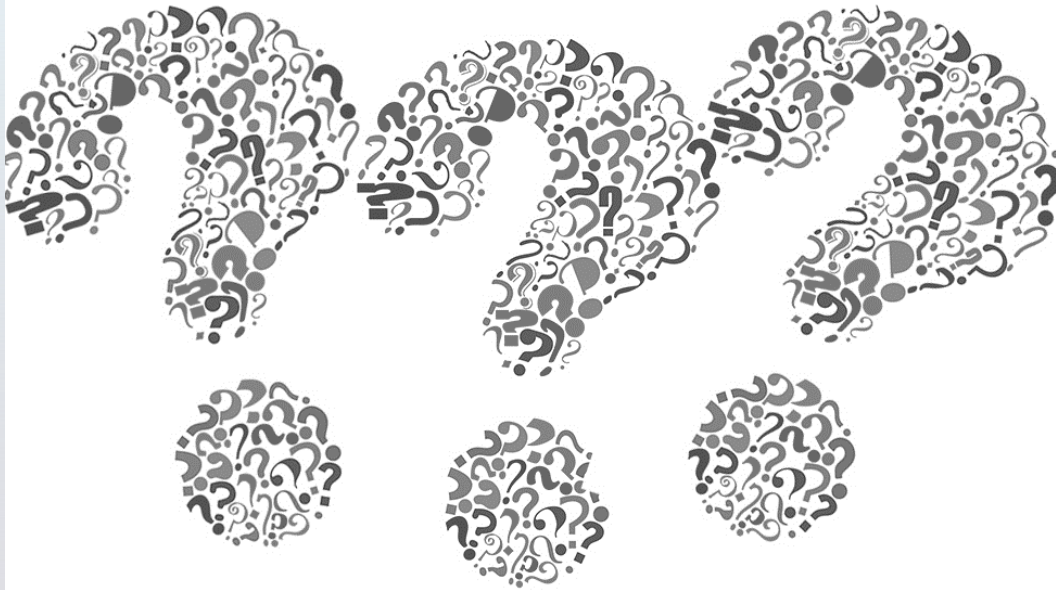
- Companies must accommodate “otherwise qualified” applicants and employees under the Americans with Disabilities Act.

9. Is the Company adequately protecting its intellectual property and investment in its employees?

- Carefully drafted non-solicitation and confidentiality agreements are enforceable in Virginia.
- Broad non-compete agreements are disfavored, and will get extra scrutiny and must be narrowly tailored to the position.

10. What training has the Company done in the last year on sexual harassment, discrimination, hiring and firing, and union free management practices?

- Companies who invest in regular training of their supervisors and employees can limit exposure in later claims, and may waive certain defenses if they don't.



THANK YOU
FOR JOINING US
THIS AFTERNOON!

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QUESTIONS?