

# 2020 Legislative Session Heralds a Sea Change in Virginia Employment Law

by Jason Zuckerman and Dallas Hammer



THE 2020 LEGISLATIVE SESSION significantly transformed workers' rights, producing more than 50 employment-related bills that became effective July 1. Some bills make minor adjustments, while others are significant, including strong protections to remedy wage theft and inequality, combat discrimination, and prohibit whistleblower retaliation. This article summarizes the new worker protections and the implications for employees, employers, and the Commonwealth.<sup>1</sup>

## **Private Right of Action for Wage Theft and Extensive Changes to Other Wage Laws**

Prior to 2020, Virginia wage law lacked any private right of action for wage theft, and in contrast to Maryland and Washington, D.C., employers were subject only to the federal minimum wage. Nearly a dozen bills amend Virginia's wage law by establishing a minimum wage, creating a private right of action for wage theft, expanding the authority of the Department of Labor and Industry (DOLI) to remedy wage theft, and prohibiting retaliation against employees who disclose wage theft and other violations of the wage laws.

Virginia's minimum wage will increase from the federal minimum to \$9.50 per hour,

effective May 1, 2021.<sup>2</sup> It will increase gradually to \$15 an hour by January 2026, though the legislature will have to reenact the provision by July 1, 2024 for the full increase to take effect.<sup>3</sup> And effective July 1, 2020, piece-rate and domestic workers must be paid the minimum wage, ending existing exceptions.<sup>4</sup>

As of July 1, 2020, employees will have a statutory cause of action to recover unpaid wages.<sup>5</sup> And employees will be able to bring wage theft claims jointly or as a collective action.<sup>6</sup> Employees need not exhaust administrative remedies before filing suit.<sup>7</sup> A prevailing wage theft plaintiff can recover any owed wages, liquidated damages in an amount equal to the wages owed, prejudgment interest at an annual rate of 8% from when the wages were due, and reasonable attorneys' fees and costs.<sup>8</sup> Where an employer has knowingly withheld wages, a prevailing employee can recover treble damages.<sup>9</sup> The statute defines "knowingly" as having "actual knowledge of the information ... act[ing] in deliberate ignorance of the truth or falsity of the information, or ... act[ing] in reckless disregard of the truth or falsity of the information" – there is no requirement to prove specific intent to defraud.<sup>10</sup>

Previously, Virginia's DOLI could investigate wage theft only when an employee filed a complaint.<sup>11</sup> But now DOLI can conduct a broader investigation of an employer's wage practices where it develops information in the course of an investigation indicating that the employer has failed to pay wages to other employees.<sup>12</sup>

As lower-income workers disproportionately experience wage theft, protection against retaliation is especially vital. As of July 1, 2020, Virginia employers are prohibited from retaliating against any employee for filing a complaint or commencing or testifying in a wage theft proceeding.<sup>13</sup> Retaliation complaints will be filed with DOLI, and the commissioner may institute proceedings on behalf of the employee for reinstatement, recovery of lost wages, and liquidated damages in the amount of the lost wages.<sup>14</sup>

The amendments to Virginia's wage laws also prohibit retaliation against employees for asking about or discussing compensation or for reporting a violation of the provision.<sup>15</sup> A violation will subject an employer to a civil penalty of \$100, and DOLI is authorized to obtain injunctive relief.<sup>16</sup>

### Virginia Values Act and Other Legislation Combatting Discrimination

The Virginia Values Act<sup>17</sup> amends the Virginia Human Rights Act (HRA)<sup>18</sup> by adding sexual orientation and gender identity as protected classes.<sup>19</sup> Virginia now joins 20 states and Washington, D.C., in going a step further than Title VII and explicitly prohibiting employment discrimination based on sexual orientation and gender identity.<sup>20</sup> The Values Act also expands employer coverage, the range of actionable personnel actions, and the remedies available under the law.

Previously, the HRA covered employers with more than five and fewer than 15 employees. Now, for most unlawful discrimination claims the HRA covers employers with 15 or more employees, and for most unlawful termination claims it covers employers with more than five employees.<sup>21</sup> Employers are also prohibited from retaliating against employees for opposing an unlawful employment practice or for filing a charge or otherwise participating in an investigation of discrimination.<sup>22</sup> Further, employees now have a private right of action under the HRA to challenge any unlawful, discriminatory employment practice.<sup>23</sup> Prior to these amendments, the HRA provided a private cause of action only for unlawful termination.

The Values Act expands the remedies available under the HRA. **Formerly, a prevailing plaintiff under the HRA could receive only up to 12 months of backpay and attorneys' fees not to exceed 25% of the backpay award. Now, a prevailing employee may receive uncapped economic and compensatory damages, punitive damages of up to \$350,000,<sup>24</sup> and reasonable attorneys' fees and costs.<sup>25</sup>**

Additional legislation amends the HRA to strengthen and expand rights and remedies for employees who are pregnant or postpartum.<sup>26</sup> Whereas employees alleging discrimination on other bases must still exhaust administrative remedies through the Division of Human Rights before suing in court,<sup>27</sup> an

employee alleging discrimination or refusal to accommodate on the basis of pregnancy, childbirth, or related conditions may file directly in court.<sup>28</sup> Further, the HRA now requires employers to provide reasonable accommodations for pregnant or postpartum employees.<sup>29</sup> These provisions apply to employers with five or more employees for all claims, making employer coverage for pregnancy and related discrimination broader than that for other causes of action under the HRA.<sup>30</sup>

Under the pregnancy accommodation provision, reasonable accommodation includes a modified work schedule, assistance with heavy lifting, provision of a private location other than a bathroom for expression of breastmilk, and leave to recover from childbirth.<sup>31</sup> A covered employer is required to provide reasonable accommodation unless they can prove that the accommodation would cause an undue hardship.<sup>32</sup> The employer providing or being required to provide similar accommodation to other employees creates a rebuttable presumption against hardship.<sup>33</sup> After an employee requests accommodation, the parties should engage in an interactive process to determine if the request is reasonable, and if not, to pursue other options.<sup>34</sup>

Other legislation strengthens the prohibition against race discrimination by covering traits historically associated with race, including hair texture, type, and protective styles such as braids, locks, and twists.<sup>35</sup>

### New Legislation Prohibiting Whistleblower Retaliation

Prior to 2020, Virginia recognized a very narrow public policy exception to employment-at-will. Effective July 1, 2020, however, whistleblowers in Virginia will have robust protection against retaliation. Protected conduct includes reporting in good faith a violation of law to a supervisor, governmental body, or law enforcement official; refusing to engage in a criminal act that would subject the employee to criminal liability; refusing an employer's order to perform an unlawful act; or providing information to or testifying before any enforcement body or official conducting an investigation, hearing, or inquiry into any alleged violation of law by the employer.<sup>36</sup> The statute does not protect employees disclosing data protected by law or legal privilege, making statements or disclosures that are false or made in reckless disregard of the truth, or making disclosures that would violate the law or deprive another or others of confidential communications as guaranteed by law.<sup>37</sup>

A retaliation claim can be brought within one year of the retaliatory action,<sup>38</sup> and a prevailing whistleblower can secure an injunction to stop a continuing violation, reinstatement, compensation including lost wages and benefits plus interest, and attorneys' fees and costs.<sup>39</sup>

### Implications of The New Virginia Employment Laws

These new employment laws represent a sea change for workers' rights in Virginia, and employers will act at their peril when they discriminate or retaliate against employees. Additional implications include:

- The Values Act will likely foster more diverse and tolerant workplaces, which could make Virginia business more profitable and competitive as it seeks to attract businesses and workers that will thrive in the digital age. The benefits of diversity in the workplace include increased innovation and employee engagement, lower turnover, and superior decision-making.
- A robust whistleblower protection law will encourage employees to report unlawful conduct internally, thereby benefiting employers by giving them an opportunity to investigate and rectify misconduct.
- As Virginia civil procedure respects the important right to a jury trial by making it difficult to obtain summary judgment,<sup>40</sup> there will likely be a mass migration of employment litigation from federal court to Virginia circuit court. More employment cases will go to trial, and jury verdicts could encourage employers to comply with these laws. In addition, employment litigation will likely become a much larger portion of circuit court dockets.
- Employers will need to take steps to comply with these new laws and mitigate against the risk of employees bringing claims. For example, employers should consider training managers and supervisors about discrimination and retaliation. In addition, employers should update their policies prohibiting discrimination and retaliation.

**Some employment law practitioners have criticized Virginia’s new employment laws as rendering the Commonwealth the “new California,” a state known for its strong employment and consumer protection laws.**

California also has the world’s fifth largest economy, surpassing the United Kingdom, and is a worldwide hub of innovation, attracting top engineers from around the world to create products and services that have fundamentally changed how

we communicate and transact business. Strong employment legislation should not be viewed as a burden, and instead could hasten Virginia becoming the “Silicon Valley of the East.”

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Endnotes

1 At the time of writing, these bills have not yet been entered into the state code. Code sections as cited are subject to change. All sections cited for new provisions are where the bills as written list them, but there is some overlap and disagreement that the code commission will reconcile.

2 See Va. Code § 40.1-28.10(B); H.B. 395/S.B. 7, Gen. Assemb., 2020 Reconvened Sess. (Va. 2020) (amended bills reenrolled Apr. 22, 2020). Though originally set for January 1, 2021, the legislature delayed the first increase at Gov. Ralph Northam’s suggestion to support businesses in response to the Covid-19 pandemic. See Press Release, Office of the Governor, Governor Northam Hails General Assembly Session That Propels Virginia Forward (Apr. 22, 2020), <https://www.governor.virginia.gov/newsroom/all-releases/2020/april/headline-856287-en.html> (“I am grateful that lawmakers supported my proposals to help ease the impacts of the COVID-19 pandemic on Virginians, on our economy, and on our state budget.”).

3 Va. Code §§ 40.1-28.10(F), (3); H.B. 395/S.B. 7.

4 Va. Code § 40.1-28.9(A); S.B. 78, Gen. Assemb., 2020 Reg. Sess. (Va. 2020); S.B. 804, Gen. Assemb., 2020 Reg. Sess. (Va. 2020).

5 Va. Code § 40.1-29(J); H.B. 123/S.B. 838, Gen. Assemb., 2020 Reg. Sess. (Va. 2020).

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 Va. Code § 40.1-29 (K); H.B. 123/S.B. 838.

11 Va. Code § 40.1-29 (F).

12 *Id.* at § 40.1-29.1; H.B. 336/S.B. 49, Gen. Assemb., 2020 Reg. Sess. (Va. 2020).

13 Va. Code § 40.1-33.1(A); H.B. 337/S.B. 48, Gen. Assemb., 2020 Reg. Sess. (Va. 2020).

14 Va. Code § 40.1-33.1(B); H.B. 337/S.B. 48.

15 Va. Code § 40.1-28.7:7(A); H.B. 622, Gen. Assemb., 2020 Reg. Sess. (Va. 2020). This code section may change, as H.B. 330/S.B. 480 as written add a separate, unrelated stipulation to the same section.

16 Va. Code §§ 40.1-28.7:7(B), (C); H.B. 622.

17 S.B. 868, Gen. Assemb., 2020 Reg. Sess. (Va. 2020).

18 Va. Code §§ 2.2-3900 et. seq.

19 *Id.* at §§ 2.2-3901(B), (C); 2.2-3905(B)(1)(a); S.B. 868.

20 See 42 U.S.C. § 2000e-2.

21 Va. Code § 2.2-3905(A); S.B. 868. Coverage for unlawful termination based on age remains unchanged, with the HRA covering employers with more than five and fewer than 20 employees. *Id.*

22 Va. Code § 2.2-3905(7); S.B. 868.

23 Va. Code § 2.2-3908(A); S.B. 868.

- 24 See Va. Code § 8.01-420, placing a \$350,000 cap on punitive damages generally.
- 25 Va. Code § 2.2-3908(B); S.B. 868.
- 26 H.B. 827/S.B. 712, Gen. Assemb., 2020 Reg. Sess. (Va. 2020).
- 27 Va. Code § 2.2-3907; S.B. 868.
- 28 Va. Code § 2.2-3904(E); H.B. 827/S.B. 712. The HRA's administrative process is still available to such employees, but it is optional. *Id.*
- 29 Va. Code § 2.2-3904(B)(2); H.R. 878/ S.B. 712.
- 30 Va. Code § 2.2-3904(A); H.R. 878/ S.B. 712.
- 31 *Id.*
- 32 Va. Code § 2.2-3904(B)(2); H.B. 878/S.B. 712.
- 33 Va. Code § 2.2-3904(B)(2)(b); H.B. 878/S.B. 712.
- 34 Va. Code § 2.2-3904(C); H.B. 878/S.B. 712.
- 35 Va. Code § 2.2-3901(C); H.B. 1514/S.B. 50, Gen. Assemb., 2020 Reg. Sess. (Va. 2020).
- 36 Va. Code § 40.1-27.3(A); H.B. 798, Gen. Assemb., 2020 Reg. Sess. (Va. 2020).
- 37 Va. Code § 40.1-27.3(B); H.B. 798.
- 38 Va. Code § 40.1-27.3(C); H.B. 798.
- 39 *Id.*
- 40 See Va. Code § 8.01-420, widely disallowing basing motions for summary judgment on discovery depositions.

## Family Law *continued from page 17*

may lead to greater success in resolving disputes over parenting issues such as when it is safe to resume socializing or travel, whether to alter summer visitation, or how to deal with cancellations or lack of childcare. It seems apparent that the Courts will not be addressing these micro-disputes for quite some time, so parents must find a way to come to an agreement and spare their children months of upheaval.

### (2) The Challenge of Remote Learning in Family Law Cases:

In addition to the financial and interpersonal challenges of divorce, parents are now dealing with supporting their children academically without a traditional school structure. Teachers, friends, and counselors who usually create a support system for children experiencing the breakdown of the traditional family unit are suddenly missing from their lives. **Exhausted parents, desperate to assist their children to cope, now have to figure out how to help educate them while working across differing households.**

School guidance Counselors at Norfolk Academy, an independent school in Norfolk, Virginia offering education for grades 1–12, have uniformly voiced an educational perspective similar to Archer's, regardless of the age of the student. "First and foremost, children need to know that their parents are supporting them and their relationships with both parents in a divorce situation." Counselors hope that parents can remember that the stressors of this situation are not borne by adults alone. "They need to know that their parents are good, responsible and loving people, even if they are not together, and that both of them are there to support them."

With respect to the challenges of the "distance learning" programs that have been implemented with varying degrees of success across the Commonwealth, the counselors at Norfolk Academy and schools across Virginia are urging parents to keep routines in both homes that support healthy habits, which, in turn, support learning. "Children need daily consistency, including sleep schedules." Archer adds that even if children are not enrolled in schools that are well-equipped for distance learning, parents should encourage educational activities. Even when the parents are not together, these goals can be achieved consistently in both homes with communication and cooperation. Parents should consider that even simple activities can create an educationally valuable experience as well as comfort

for children who are moving between homes. Counselors uniformly suggest that these activities might involve "simply reading, journaling their thoughts, and sharing those thoughts with their parents and siblings," or perhaps sharing articles from the same periodical with each parent to create a common experience. The Norfolk Academy guidance office specifically recommends National Geographic, for example, due to its breadth of subject matter, availability, and low cost.

Across the board, school counselors and mental health professionals encourage parents to engage in recreational and athletic activities with their children, particularly when domestic issues and isolation have taken a toll. Educators also echo Archer's opinions about the importance of children's positive relationships with both parents after a separation or divorce. Norfolk Academy's professionals uniformly remind us that "students whose parents have separated and/or divorced" need to understand that that in the long run, things will be much better if they can have a good relationship with both parents. If separated or divorced parents could keep that in mind when talking with their children about each other, it could save them from a world of pain and disillusionment."

In the aftermath of COVID, this advice seems more important than ever. We as family lawyers owe it to those we serve to encourage novel, amicable approaches to preserve their resources and ability to survive the crisis and thrive in the future. ♡



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