

# What New Va. Anti-Bias Law Means For LGBTQ Workers

By **Dallas Hammer, Katherine Krems and Jason Zuckerman** (April 28, 2020)

On April 11, Gov. Ralph Northam signed into law the Virginia Values Act, a statute that significantly broadens the scope of prohibited employment discrimination in Virginia. It expands the Virginia Human Rights Act, making Virginia the first Southern state to enact comprehensive anti-discrimination protections for the LGBTQ community.

The law also expands employer coverage, extends the private right of action, and removes a cap on back pay damages. It comes as part of a push from Democrats to pass progressive legislation in the 2020 session after taking control of the state's Senate and House of Delegates this past November. The Values Act will go into effect on July 1, and it will likely result in additional litigation and pro-employee decisions in the state.

## **The Values Act expands the state's employment discrimination law, including LGBTQ protections and a broad private right of action.**

The Virginia Values Act, S.B. 868, expands the state's existing law prohibiting employment discrimination. The Virginia Human Rights Act[1] now prohibits employers from discriminating against employees on the basis of sexual orientation or gender identity.

Virginia joins 20 states and Washington, D.C., in prohibiting employment discrimination based on these characteristics. The statute defines sexual orientation as "a person's actual or perceived heterosexuality, bisexuality, or homosexuality" and gender identity as "the gender-related identity, appearance, or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth."

Sexual orientation and gender identity join race; color; religion; national origin; status as a veteran; sex; marital status; and pregnancy, childbirth or related medical conditions in the list of protected characteristics under the Human Rights Act.[2]

The Values Act also meaningfully expands the rights and remedies available to complainants alleging discriminatory employment practices. Previously, the Human Rights Act provided a private right of action only to plaintiffs alleging unlawful termination. The law formerly had narrow employer coverage, covering private sector employers with between six and 14 employees, except for in cases of termination based on age, where the law covered those with between six and 19 employees.

Now, in addition to unlawful termination, state law will allow plaintiffs to challenge other discriminatory employment actions in court. The act adds a private right of action for unlawful discrimination similar to that of Title VII, including for failure to hire and otherwise discriminating with respect to compensation or the terms and conditions of employment.



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Employers with 15 or more employees are covered for unlawful discrimination claims and those with six or more employees are covered for unlawful termination other than that based on age. The employer coverage for termination based on age remains unchanged.

The burden of proof to prevail in employment discrimination claims is a motivating factor, another favorable aspect of the law for employee plaintiffs because they can prevail even when other factors were at play in the adverse action. The act also repeals the previous cap on back pay damages of 12 months and the cap on attorney fees of up to 25% of the back pay award.

The law now specifies that a prevailing plaintiff may receive compensatory and punitive damages and reasonable attorney fees and costs, as well as other equitable relief such as injunctions and restraining orders. Virginia state law has a general \$350,000 cap on punitive damages, but the law does not have any other damages caps, which could result in significant awards for prevailing plaintiffs.[3]

The Values Act maintains the state's previous requirement that a complainant alleging discrimination file a written complaint with the Virginia Division of Human Rights, or DHR, before filing in state court. The DHR investigates the complaint and either dismisses the charge with no finding of discrimination or attempts to resolve a finding of discrimination through informal methods.

After dismissing or unsuccessfully resolving, the DHR issues the complaining party with a notice of their right to sue. A complainant may also submit a written request for a notice of a right to file, which the DHR provides after either 180 days from the date the original complaint was filed or when it determines it will not complete its investigation within 180 days.

### **The Values Act complements other causes of action to provide workers with robust remedies for employment discrimination.**

The Values Act is understood best in the context of its companion laws. It should complement those existing protections and strengthen workers' remedies by filling gaps left by other anti-discrimination laws.

For example, while the Values Act contains an anti-retaliation provision similar to that of Title VII, a separate law also enacted during the 2020 legislative session prohibits retaliation for reporting "a violation of any federal or state law or regulation to a supervisor or to any governmental body or law-enforcement official" or providing "information to or testif[ying] before any governmental body or law-enforcement official conducting an investigation, hearing, or inquiry into any alleged violation by the employer of federal or state law or regulation." [4]

This broad scope of prohibited retaliation will protect employees from reprisal for reporting discrimination to a supervisor, the DHR or the U.S. Equal Employment Opportunity Commission. Further, it will protect employees who participate in an investigation of discrimination conducted by the DHR or EEOC.

Likewise, the Values Act fills gaps left by other anti-discrimination laws. It further opens up Virginia state court as a potentially favorable forum. The protections for the LGBTQ community currently are stronger than those under federal law. The act allows for robust remedies that are in some respects superior to other laws.

## **Virginia state courts will become an encouraging option for employees**

The Values Act has made it so that Virginia state court is a viable, attractive forum for employees. With its narrow scope and restricted remedies, Virginia state law has until now been unfavorable to plaintiffs alleging employment discrimination.

Therefore, the majority of employment discrimination claims arising in the state have been filed under federal law and end up in federal court, where plaintiff employees often struggle to get past summary judgment. But state court rules are less favorable to employers and widely disallow basing summary judgment on discovery depositions.[5] This means an employer may not base a motion for summary judgment on an employee's deposition statement, increasing the likelihood of a judge finding a genuine dispute of a material fact between the parties and the employee surviving the motion.

The Values Act promises to change the employment discrimination litigation landscape in Virginia and will likely result in a significant uptick in plaintiffs filing employment discrimination claims in state court. With more cases being filed in state court and potentially surviving summary judgment, the act increases the probability of more discrimination cases getting in front of a jury in the state.

## **The Values Act provides an important remedy for sexual orientation and gender identity discrimination.**

The Values Act provides explicit protection for LGBTQ employees while federal employment law's protections are murky at best. No federal statute explicitly prohibits employment discrimination on the basis of sexual orientation or gender identity.

Title VII of the Civil Rights Act's prohibition on sex discrimination[6] forbids gender stereotyping, which can incidentally provide a remedy to some LGBTQ employees. However, such protections are inconsistent in practice and do not directly prohibit sexual orientation or gender identity discrimination.[7]

Although that all may change soon, the Values Act could play a meaningful role in protecting LGBTQ workers. The U.S. Supreme Court is deciding several cases that revisit whether Title VII's prohibition on employment discrimination based on sex encompasses sexual orientation and gender identity.[8] Regardless of the outcome, the Values Act will at least provide employees who suffer sexual orientation or gender identity discrimination a meaningful alternative remedy.

## **The Values Act authorizes substantial remedies.**

The Values Act authorizes remedies that could be superior to other available remedies for discrimination. In particular, as mentioned above, prevailing plaintiffs can recover uncapped compensatory damages and up to \$350,000 in punitive damages under the act.

In contrast, Title VII limits combined compensatory and punitive damages to \$300,000 (and less for employers with fewer than 500 employees). Accordingly, Virginia state law may now offer significantly better remedies to employees with high noneconomic damages.

In conclusion, the Virginia Values Act amended state anti-discrimination law in meaningful ways that have created a potentially strong alternative remedy. Increased litigation is likely to result, especially in state courts, and more cases are likely to be tried before juries.

Overall, this bodes well for plaintiffs in employment discrimination claims in Virginia.

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[1] Va. Code §§ 2.2-3900 et seq.

[2] Disability discrimination in employment is prohibited under a different state statute. Id. at § 51.5-41.

[3] Id. at § 8.01-38.1.

[4] Id. at § 40.1-27.3.

[5] See id. at § 8.01-420.

[6] See 42 U.S.C. § 2000e-2.

[7] See, e.g., *Chavez v. Credit Nation Auto Sales, LLC*, 641 Fed. Appx. 883 (11th Cir. 2016); *Christiansen v. Omnicom Group, Inc.*, 852 F.3d 195 (2d Cir. 2017).

[8] *Bostock v. Clayton Cty., Ga.*, No. 17-1618; *Altitude Express Inc. v. Zarda*, No. 17-1623; *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*, No. 18-107.