

Changes to Virginia Employment Laws Effective July 1, 2020

(unless otherwise noted below)

Virginia has added or rewritten several employment laws to provide new protections and rights to employees. Included below is the information related to changes and the **actions that all Districts need to take to ensure compliance (impacts all Districts)**.

- The Virginia Human Rights Act (VHRA), as amended by the 2020 Virginia Values Act (VVA) now covers small employers, adds protected categories and expands the remedies available to employees who allege discrimination and choose to pursue legal remedy. VVA now enables employees to bring discrimination claims to state court first, where it is much more difficult to defeat discrimination claims without trial.
 - **Districts must update their personnel policies EEO statement and anti/non-discrimination policies to also prohibit discrimination on the following basis: sexual orientation, gender identity, and veteran status, race discrimination including traits historically associated with race, including hair texture, hair type, and protective hairstyles such as braids, locks, and twists.**
 - Impact of Change: Employees must exhaust their administrative remedies before suing in state or federal courts by first filing an administrative charge with the Virginia Division of Human Rights (VDHR) or the federal EEOC, who then cross-files with the other. VDHR or EEOC will investigate and issue a “right to sue” letter, which now gives the employee the right to bring a lawsuit in state court prior to a federal court.
 - Impact: More discrimination claims in Virginia will now likely go to trial in state courts prior to federal courts, which may substantially increase (double) costs and disruption of defending against claims. NOTE: VA’s cap for punitive damages is still set at \$350,000.
 - Impact: The amended VHRA does not require administrative exhaustion in cases of alleged discriminatory termination because it does not amend Va. Code § 2.2-3903(C). That section allows a terminated employee to file a lawsuit directly in general district or circuit court within 300 days of the alleged discriminatory termination.
 - **Sample EEO statement for handbooks and anti/non-discrimination policies:** It is the District’s intent to make all employment decisions based on objective merit criteria such as qualifications, experience and job performance. The District’s intent is to not discriminate in any of its employment practices, terms and conditions on the basis of race or color, national origin, traits historically associated with race or religion including traits associated with hair, religion or creed, gender, gender identity, sexual orientation, disability, age, pregnancy status, childbirth or related medical conditions, marital status, veteran status, whistleblower status or genetic information.
- New VHRA requirements: The VHRA has been amended to require employers to **post and provide** information about an employee’s right to reasonable accommodations for limitations related to pregnancy.
 - Districts must provide reasonable accommodations (absent undue hardship) to applicants and employees due to pregnancy, childbirth, and related medical conditions, including lactation. Examples of accommodations are included in the new language.
 - Employees who claim they were not accommodated or that they were discriminated against due to pregnancy, childbirth, or related medical conditions may now sue in state court without the normal requirement of administrative exhaustion (filing a claim to be investigated by the VDHR)
 - **Districts must post information regarding these rights in a conspicuous location in the workplace; include the information in employee handbooks; and provide the information to all current employees by October 29, 2020. Provide info to new hires at orientation.**

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- **Districts must provide information to any employee who informs the District she is pregnant within 10 days of her notification.**
- Sample notification and policy is attached.
- Two changes to Virginia law related to pay transparency and pay stubs.
 - Pay transparency. Employers may not retaliate against employees who inquire about, discuss, or disclose wages or other compensation information (except for employees such as human resources personnel who have access to such information as part of their jobs and disclose such information to those without access). This law is enforced by the VDHR through assessment of civil penalty of \$100 per violation; there is no private right of action. **NOTE: If your District has a written policy related to employees discussing their own pay with other employees, rescind it.**
 - Pay stubs. Effective January 1, 2020 (and amended by recent legislation), Virginia now requires employers to provide employees with a paystub each pay period, which must include the following information: (i) name and address of the District; (ii) the number of hours the nonexempt employee worked in the pay period (excludes salaried exempt employees); (iii) the employee's rate of pay for the hours worked; (iv) the gross wages earned during the pay period; and (v) the amount of, and reason for, any payroll deductions. Bottom line: include "sufficient information to enable the employee to determine how the gross and net pay were calculated."
 - **Districts – check and make sure your paystubs include ALL the information bolded above.**
- Misclassification of employees as independent contractors. Not sure if this impacts any Districts.
 - New legislation creates a private cause of action for misclassified workers, prohibits retaliation against individuals challenging their classification in good faith, establishes new penalties against employers who misclassify workers and prohibits agreements that misclassify workers. It also creates a presumption in favor of an employer-employee relationship, unless the employer can show under IRS guidelines that the individual is an independent contractor (paid by W9)
 - **NOTE:** Anyone who receives a W2 from the District was/is an employee of the District subject to the rights, policies and provisions accorded other similarly situated employees. **Check (or establish) your policies related to employee types (hourly, salaried, temporary, part-time full-time).**
- New Ban-the-box law prohibits employers from requiring job applicants to disclose information concerning any arrest, criminal charge or conviction for simple possession of marijuana. This does not apply to distribution of or intent to distribute marijuana. In addition to restricting employers' questions during the hiring process, the law also gives applicants a statutory right not to disclose such information to their prospective employers. Specifically, the law allows job applicants when answering questions about arrests, criminal charges and convictions to exclude information about simple possession of marijuana.
 - **Districts review and update your job application form.**
 - **If requiring background checks, cannot exclude from employment based on arrest, charge or conviction of simple possession of marijuana.**
 - **Train all District staff, directors, etc. who may be or are conducting interviews on what is and is not allowable in the screening and interview processes (or document and distribute clear procedures for conducting legally job screening and interviews).**

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- New minimum hourly wage in Virginia. As currently approved, the bill provides for the following minimum hourly wage rates and effective dates:
 - May 1, 2021 — \$9.50
 - Jan. 1, 2022 — \$11.00
 - Jan. 1, 2023 — \$12.00
 - Jan. 1, 2025 — \$13.50 *(contingent on further action by the General Assembly prior to July 1, 2024)*
 - Jan. 1, 2026 — \$15.00 *(contingent on further action by the General Assembly prior to July 1, 2024)*

Districts will need to review all nonexempt, hourly and temporary employees' hourly rates, and the hourly equivalent rates of salaried or exempt employees. If any employee's hourly rate falls below the mandatory minimum hourly wage rate, the District is required to adjust that employee's hourly rate to at least the required minimum, so that in the pay period that contains the effective date, the employee is paid at a hourly rate that is at least equal to the mandatory minimum hourly wage rate.

- New Anti-Retaliation Whistleblower Protections. New law that prohibits employers from taking any retaliatory adverse action against employees who engage in certain protected activity. Federal laws protect "whistleblower" employees who report or protest federally prohibited practices. The new Virginia generally statute protects any employee acting in good faith who engages in one or more of the following actions:
 - Reports any violation of any federal or state law or regulation to a supervisor or to any governmental body or law-enforcement official
 - Receives a request to participate in a government investigation or law-enforcement inquiry
 - Participates in an investigation, hearing, or inquiry requested by a governmental body or law-enforcement official
 - Refuses to engage in an act that would subject the employee to criminal liability
 - Refuses an employer's order to perform an action that violates any federal or state law or regulation, provided the employee explains his or her reasoning to the employer
 - Testifies or otherwise provides information in connection with a governmental or law enforcement investigation, hearing or inquiry into the employer's alleged violation of any federal or state law.
- Exception. An employee's conduct is not protected if the employee's disclosure is false or in reckless disregard of the truth, the employee discloses privileged information, or the disclosure by the employee is illegal.
- Impact: Employees who believe they have been retaliated against may sue their employer and may recover lost wages, benefits and "other remuneration," along with injunctive relief, interest and attorneys' fees and costs. Under the new Virginia law, an employee seeking protection need not file a charge — he or she may go straight to court. Given the difficulty of obtaining summary judgment in Virginia state courts, the burden on employers seeking to avoid or contest retaliation complaints will be even higher.
- **Districts should update or create anti/non-discrimination policies to ensure they include an anti-retaliation statement, procedures for good faith reporting of any suspected violation of any federal or state law or regulation, procedures for handling and reporting an order or instruction to perform an act suspected of violating any federal or state law or regulation.**

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In summary, Districts need to:

- Update or establish an anti-discrimination/harassment policy to specifically prohibit discrimination or harassment on the basis of the new protected categories
- Update or establish a workplace policy prohibiting the unlawful discrimination on the basis of pregnancy, childbirth, or related medical conditions and the right to reasonable accommodation for pregnancy, childbirth, or related medical conditions
- Post notice of rights and responsibilities related to pregnancy, childbirth, or related medical conditions and the right to reasonable accommodation for pregnancy, childbirth, or related medical conditions in the workplace in a conspicuous location by October 29, 2020
- Provide a notice of rights and responsibilities related to pregnancy, childbirth, or related medical conditions and the right to reasonable accommodation for pregnancy, childbirth, or related medical conditions to all current employees by October 29, 2020 and to new hire employees at time of employment (new hire orientation)
- Provide a notice of rights and responsibilities related to pregnancy, childbirth, or related medical conditions and the right to reasonable accommodation for pregnancy, childbirth, or related medical conditions to pregnant employees within 10 days of receiving notice from the employee that she is pregnant
- Update or establish an anti-retaliatory policy to specifically prohibit discrimination or harassment on the basis of the new state categories of protected whistleblower activities, include anti-retaliatory protections for an employee who “in good faith reports a violation of any federal or state law or regulation”
- Update or establish a policy and procedures for good faith reporting of a violation of any federal or state law or regulation, include the best practices of a clear complaint procedure and multiple adequate potential complaint recipients
- Audit employees’ pay stubs and ensure the stub provides all the required information. Revise employees’ pay stubs to ensure they provide all the required information
- Audit to ensure that anyone who has received, or will receive, a W2 is classified as a District employee.
- Update or establish a policy identifying and defining different categories of employees, part-time, full-time, temporary, hourly, nonexempt and exempt. If a person receives a w2 they are a District employee. If a person receives a W9 they are not a District employee.
- Audit employees’ hourly pay rate, or hourly pay rate equivalent if paid on salary basis, to ensure employee’s hourly pay rate exceeds the minimum wage rate
- Audit all exempt employees’ annual salary to ensure it exceeds the federal minimum annual salary threshold of \$35,568/year. If not, reclassify as nonexempt or raise the salary to equal or exceed \$35,568/ year.
- Audit practices to make sure Districts are not using non-compete agreements
- Post the mandatory non-compete summary (sample attached) in the workplace
- Audit handbooks and policies to ensure there are no prohibitions on employees inquiring about, disclosing or discussing their own compensation information
- Update or establish a policy and procedures for investigating allegations of discrimination/harassment or unlawful activity, and, where appropriate, remediating problems discovered in the investigation
- Audit the employment application used and train interviewers to be sure there are no questions about marijuana use, arrests, charges or convictions for marijuana possession
- Train District staff, supervisors, Board on the changes in the relevant policies referenced above. In particular, supervisors should be well-prepared on how to deal with complaints of discrimination/harassment or unlawful activity made by employees, and, in particular, trained not to retaliate (and what retaliation, which courts may interpret broadly, means) if they are accused of discrimination, harassment, or unlawful activity.