

## Employment Law Outlook

Winter 2020

### Virginia Poised to Significantly Expand its Employment Laws



**David A. Kushner**



**Matthew K. Sarfan**

We have been closely monitoring the current legislative session in Virginia. In the last election, Virginia Democrats gained control of the House of Delegates, the Senate and the Governor's mansion. We have been following a number of bills proposed by the new majority which, if passed, could profoundly affect Virginia's business climate for years to come.

Perhaps the most widely reported potential new law is the Virginia Values Act (VVA), which stems from the combination of HG 1049 and SB 868. This law has been promoted as adding sexual orientation and gender identity to the list of protected classes in Virginia. This is a change that is widely supported by both employee-rights groups and the overwhelming majority of Virginia employers.

However, while the VVA has been advertised as only adding these new protected classes to existing law, the actual text of the proposed law (as was current at the time this article was sent to the publisher), goes *much* further. In fact, if passed in this form and signed by the Governor, the law actually would cause a sea change in Virginia employment law. The VVA would create a new state court cause of action for all protected classes (not just the new ones) against nearly all Virginia employers. The law would remove the requirement of filing with the EEOC or a state administrative agency before proceeding to court, would allow for uncapped punitive damages, would allow individual supervisor liability, and would substantially decrease the opportunity to get frivolous litigation dismissed early.

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### Congress Passes the SECURE Act – Employee Benefit Plan Implications



**Cher E. Wynkoop**



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On December 19, 2019, Congress passed the Setting Every Community Up for Retirement Enhancement (SECURE) Act. The SECURE Act contains many substantial impacts to retirement plans. Most provisions of the Act went into effect on January 1, 2020.

Key changes include:

**Part-Time Employee Eligibility for 401(k) Plans.** Sponsors of 401(k) plans will be required to allow employees who work at least 500 hours during each of three consecutive 12-month periods to make deferral contributions – in addition to employees who have satisfied the general “one year of service” requirement by working at least 1,000 hours during one 12-month period.

**Required Minimum Distributions (RMDs).** The age at which required minimum distributions must commence increased to 72 from 70½.

**Increased Tax Credits.** The cap on start-up tax credits for establishing a retirement plan increase to up to \$5,000 (depending on certain factors) from \$500. Small employers who add automatic enrollment to their plans also may be eligible for an additional \$500 tax credit per year for up to three years.

**Safe Harbor 401(k) Enhancements.** Employers will have more flexibility to add non-elective safe harbor contributions midyear. Additionally, the Act eliminates the notice requirement for safe harbor plans that make non-elective contributions to employees (notice requirement

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## Congress Passes the SECURE Act – Employee Benefit Plan Implications

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still applies to safe harbor matching arrangements). The automatic deferral cap for plans that rely on the automatic enrollment safe harbor model (known as the “qualified automatic contribution arrangement” or “QACA” safe harbor) also will increase to 15% from 10%.

### Other Retirement Plan Highlights

- Penalty-free (but of course, not tax-free) retirement plan withdrawals for a birth or adoption.
- A new objective fiduciary safe harbor for the selection of a lifetime income provider will encourage employers to offer in-plan annuity options. The Act also provides for tax-advantaged portability for a lifetime income product from one plan to another or between plans and IRAs to help avoid surrender charges and penalties otherwise applicable when the option is removed from the particular plan investment platform.
- Participant lifetime income disclosures are required to illustrate the monthly payments if the participant’s account balance was used to provide lifetime income in an annuity.
- Nondiscrimination testing relief for some closed defined benefit plans.
- Guidance relating to the termination of 403(b) custodial accounts and 403(b) retirement income accounts within church-sponsored plans.
- Increase in penalties for failing to file plan returns on time.
- Ability to file consolidated Forms 5500 for similar retirement plans.
- In-service distributions under pension plans now allowed at age 59½ (rather than age 62).

The SECURE Act is one of the most comprehensive retirement plan reforms in a decade and brings many changes for consideration. Plan sponsors should consider how the SECURE Act will impact the administration of their plans. ■



## Changes to Virginia’s “Payment of Wage” Law

Matthew K. Sarfan

Virginia Code § 40.1-29 (the Virginia Payment of Wage Law) regulates numerous wage payment requirements, including the timing and frequency of payment as well as the limited circumstances in which an employer may lawfully deduct from employee wages. Until recently, the Payment of Wage Law required that employers furnish, *upon request of an employee*, a written statement of (1) the gross wages earned by the employee during any pay period and (2) the amount and purpose of any deductions therefrom. However, the Virginia Legislature recently approved an amendment that expands the information employers must automatically provide to Virginia employees.

Effective January 1, 2020, the Payment of Wage Law requires employers to furnish a written statement by paystub or online accounting on **each regular pay date** including the following information:

- The name and address of the employer;
- The number of hours worked during the pay period;
- The rate of pay;
- The gross wages earned by the employee during the pay period; and
- The amount and purpose of any deductions therefrom.

Notably, the new requirement does not apply to employers engaged in agricultural employment like agribusiness and forestry, which need only provide a written statement of (1) the gross wages earned by the employee during any pay period and (2) the amount and purpose of any deductions therefrom.

Most payroll companies already provide the required information on paystubs. However, it is certainly worth checking your current practices to ensure they comply with the law, as civil and criminal penalties could apply for a willful failure to follow the law. ■

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### Background of the Long-Standing Legal Framework

For decades the Virginia Human Rights Act has been viewed as a vehicle that only creates causes of action against employers who are not covered by federal law. Indeed, the VHRA creates a private cause of action only against employers with less than 15 employees (those not already covered by equivalent protection in federal laws like Title VII). Employees of larger employers are deferred to the federal system, and must generally file an administrative charge with the EEOC before filing suit. The EEOC process serves as a “cooling off” period, and allows for an administrative investigator to inform plaintiffs with weak cases that they have an uphill battle. This results in the vast majority of frivolous cases being weeded out at the EEOC level and never heading to court where expenses increase substantially. When a plaintiff does proceed to court, nearly all employment litigation in Virginia occurs under federal laws in federal courts, where frivolous cases may be dismissed upon a Motion for Summary Judgment. In federal litigation under Title VII, punitive and emotional damages are capped at, depending on the size of the employer, no more than \$300,000. Wage losses remain uncapped under federal law.

The VVA (as constituted as of the date of drafting) would completely change the way employment law is handled in Virginia, and would stack the deck against the employer even in completely frivolous cases. The following are the key changes in the current draft of the law (which may have changed by the time you receive this):

- Plaintiffs in all protected classes (such as race, gender, age, etc.) will no longer have to file with the EEOC or a state agency first. They will be permitted to file a lawsuit immediately in state court under the new state discrimination cause of action created by the VVA.
- Plaintiffs will be able to sue any employer with more than 5 employees, or even an agent of the employer. Thus, Virginia's state discrimination law will no longer just apply to small employers not covered by Title VII or other federal laws. It will apply to nearly all Virginia employers.
- Supervisors, executives, and employees could be sued in their individual capacities.
- There would be no cap on punitive or emotional damages, which means the potential size of judgments could increase exponentially.
- Under current Virginia procedural rules, summary judgment is essentially not possible in these types of cases in state court. This means that even frivolous cases will have a strong chance of proceeding to trial. This would make resolving cases more difficult, would greatly increase litigation costs, and will eventually make it more difficult to part ways even with poorly performing employees.
- Overnight, employment litigation would move from the federal court system, which has decades of experience in these cases, to state courts which have never heard employment cases before. Given the lack of an administrative prerequisite to filing suit (and the fact that thousands of EEOC charges are filed each year in Virginia), state courts could be overwhelmed with a new form of litigation.

It is not an overstatement to say that the current draft of the VVA would drastically affect Virginia employers and would create significant direct and indirect costs.

### Recommendations

If the new law has not yet passed at the time of publication, we recommend that Virginia employers contact (or have their government relations professionals contact) their legislators and the governor to make it clear that, while you strongly support the addition of sexual orientation and gender identity to Virginia's list of protected classes, you do not support the other unrelated wholesale change to Virginia's current system.

We have already been working hard trying to make sure legislators and business groups understand the unadvertised parts of this law and the potential effect it may have on Virginia employers. However, adding the voice of additional employers will help this effort.

If the law passes in its current form, we suggest that you review your insurance coverage with your insurance broker to ensure that you remain adequately covered against claims under the new law. It will also be even more important that you document performance deficiencies and have a strong case before proceeding with adverse actions such as termination.

We will continue to closely monitor these and other laws, and are available should you have any questions. ■

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## **Proposed State Wage and Leave Laws Could Create New Obligations for Virginia Employers**

**Cameron A. Bonney**

Virginia's 2020 legislative session has brought a wealth of new proposals, attributable to the new democratic majority in all branches of Virginia's state government. There have been several proposals that would greatly impact Virginia employers.

Both the House and Senate each have their own version of a minimum wage bill. Both propose step increases of minimum wage over the next several years to reach \$15.00 per hour. It is expected that these versions will be reconciled within the next month. Employers should follow the progress of these bills to determine whether there will be a new minimum wage in effect in the upcoming months.

We have seen the explosion of state paid sick leave laws all across the United States over the past several years, and now Virginia might be the latest state to join in. Virginia is currently considering its own paid sick leave law. The proposed law would require employers with 15 or more employees to provide paid sick leave at the rate of one hour per every 30 hours worked. The total accrued paid sick leave would be capped at 40 hours of paid sick leave. The proposed law would take effect January 1, 2021. If this paid sick leave law were to pass, many Virginia employers would have to revisit their policies this year to assure compliance.

With the potential for a variety of new employment laws to take effect in the upcoming year, we will continue to keep you updated on the developments impacting Virginia employers. ■

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