Legal Update Article

While We Were Social Distancing … Heading Back to the Office in a New Virginia

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In Virginia, returning — or planning to return — to the physical workplace following the COVID-19 pandemic means ensuring employment practices comply with the Commonwealth's significantly changing legal landscape.

This is a great time for Virginia employers to perform a compliance review and update their policies and practices. With so many changes from "business as usual," use the following 14 Q&As to identify any areas to address (and follow the embedded links for a deeper dive into a specific area).

Q1: Are company policies updated to reflect new employee protections?

Virginia has enacted many employee protections that affect a broad range of workplace policies. Among other changes, Virginia has:

- Expanded the Virginia Human Rights Act to protect against discrimination on the basis of sexual orientation, gender identity, veteran status, medical cannabis oil use, and traits historically associated with race (such as hairstyles).
- Obligated employers to accommodate pregnant individuals and individuals with disabilities. Employers must adopt accommodation policies to the extent they do not do so already.
- Created expansive new protections for "whistleblowers." Under the Virginia whistleblower law, employers are broadly prohibited from retaliating against an employee who complains about any perceived violation of any federal or state law to any supervisor, government body, or law enforcement official.
- Adopted a pay transparency law that prohibits employers from retaliating against an employee for discussing wages or compensation.
- Enacted new overtime pay rules that change the way employers must compensate non-exempt, salaried employees.

Policies that may be affected by these legal changes include anti-discrimination, anti-retaliation, whistleblower, dress code, accommodation, confidentiality, drug-free workplace, and others. Review and update these policies as appropriate with the assistance of counsel to ensure they conform to the current laws.

Q2: How and when should an internal investigation be conducted?

Virginia's expansive employee protections, including under the wide-ranging whistleblower law, mean employers would be well-advised to ensure they adopt and follow appropriate processes for soliciting and understanding employees' concerns, as well as conducting internal investigations where appropriate.

A key decision when conducting an investigation is whether to engage outside counsel. Often, an investigation protected by the attorney-client privilege can help employers develop a thorough understanding of the key facts needed to assess potential legal

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exposure, memorialize the good-faith response, protect senior management or the board, and address the misconduct as appropriate.

Jackson Lewis attorneys can help assess whether an internal investigation should be conducted and assist with conducting one that is protected by the attorney-client privilege.

Q3: Are the processes for providing the new required notices on pregnancy and disability accommodation created and implemented?

Employers with at least five employees must provide notices that include information about employees' rights to reasonable accommodation due to pregnancy, childbirth, or related medical conditions. In addition, employers with more than five employees must provide notices that include information about employees' rights to reasonable accommodations for disabilities. These notice requirements supplement the requirement that employers maintain policies that include this information. Employers must provide the required notices to new hires, as well as to any employee who discloses they have a disability or are pregnant within 10 days of that disclosure. Employers should ensure they have processes for timely providing the required notices and tracking their compliance with these requirements.

Q4: Are the mandatory posters alerting employees about their right to pregnancy and disability accommodation posted?

Virginia requires employers with at least five employees to post in a conspicuous location information about employees' rights to reasonable accommodation due to pregnancy, childbirth, or related medical conditions. Employers with more than five employees must also post notices on accommodations for disabilities. While employers are not required to use a specific government-issued poster, the Virginia Office of Civil Rights provides a sample disability accommodations poster and sample pregnancy accommodations poster.

Q5: Are requests for access to personnel files being promptly responded to?

Since 2019, employers must provide copies of certain employment records within 30 days of receiving a written request from the employee or their attorney. Applicable records include the dates of employment, wages or salary during employment, job description and title, and any injuries sustained by the employee during employment.

Q6: Are any workers misclassified as independent contractors?

It is imperative that employers regularly review their contractor arrangements and ensure workers are not misclassified. Workers in Virginia are now *presumed* to be employees rather than contractors. Moreover, in addition to the previous exposure for not providing employee benefits, potential exposure for misclassification-related liabilities has increased dramatically. For example, an organization may now face criminal and civil liability for failing to pay wages owed, and back pay may be doubled (or even tripled) as part of damages for failing to pay wages owed. Misclassified workers can also bring a civil action — including a collective action under certain circumstances — for unpaid wages.

Jackson Lewis attorneys can help review compliance with these laws and assist with remedial efforts where appropriate.

Q7: Are pay practices compliant with Virginia's new overtime pay and minimum

wage laws?

Given the increased liabilities (described above) now available in connection with wage and hour violations, it is critical for employers to ensure their pay practices comply with Virginia (and federal) laws.

Make sure to review the organization's pay practices for compliance with the state's new overtime pay law. This law obligates employers to pay one-and-one-half times an employee's regular rate of pay for hours worked beyond 40 in a workweek. In Virginia, the regular rate of pay is an employee's hourly rate plus any other non-overtime wages paid or allocated for the workweek — excluding the items that would be excluded under the Fair Labor Standards Act (FLSA) — and then divided by the total number of hours worked in the workweek. While this law may appear similar to the FLSA, it represents a major change for employers that compensate nonexempt employees in Virginia with salaries; those individuals may now be entitled to more overtime pay since Virginia employers no longer can use the "fluctuating workweek" method of calculating overtime pay (as permitted under the FLSA).

In addition, make sure to review Virginia's updatedminimum wage, which increased to $9.50 per hour as of May 1, 2021. The minimum wage will continue to rise each year until it reaches $12.00 per hour in 2023.

Jackson Lewis attorneys can help review compliance with these laws and assist with remedial efforts where appropriate.

Q8: Are compliant wage statements being issued?

Employers should confirm their payroll practices or systems create compliantwage statements that they are timely issued to all employees.

Q9: Are applicants asked about previous marijuana offenses?

Virginia prohibits most private employers from requiring job applicants to disclose certain prior marijuana offenses; however, it does not require employers to commit any act in violation of federal law or that would lead to the loss of a federal contract or federal funding. Jackson Lewis attorneys can help assess whether your organization is required to inquire into prior marijuana offenses (for example, under any federal contracts), and can help update background check disclosures accordingly.

Q10: Are "low-wage" employees asked to enter new noncompete agreements?

Employers cannot enter into, enforce, or threaten to enforcenew noncompete agreements against "low-wage" employees. "Low-wage" employees are broadly defined as those whose average weekly earnings are less than the average weekly wage in Virginia, currently, approximately $56,000 a year.

Q11: Are plans compliant withVirginia's Permanent Standard on COVID-19 in place?

Since 2020, private employers in Virginia have been required to assess hazard levels of all job tasks, post or present state-prepared information about COVID-19, provide COVID-19 training where required, and prepare and follow infectious disease preparedness and response plans where appropriate.

Q12: Are the new enforcement mechanisms and penalties for workplace law violations under Virginia's updated human rights, whistleblower, and wage and

hour laws understood?

There are many new enforcement mechanisms and increased penalties for alleged workplace law violations in Virginia. Among other things, Virginia laws now:

- Allow employees to sue over any claim of discrimination or retaliation under the Human Rights Act as lawsuits are no longer limited to cases involving unlawful discharge.
- Without the prior Human Rights Act's 12-month backpay damages cap, courts may award prevailing employees compensatory and punitive damages and uncapped reasonable attorneys' fees and costs.
- Provide broad relief to a prevailing whistleblower under the new whistleblower law, including injunctive relief, reinstatement, back pay, interest, and reasonable attorneys' fees and costs.
- Greatly increase the potential relief available to workers suing for unpaid wages.
- Create the potential for civil and criminal penalties for employers who fail to pay wages willfully and with intent to defraud.
- Allow workers suing for unpaid wages to bring a civil action — including a collective action under certain circumstances — against the organization.

Q13: Are laws applicable to remote employees being complied with?

Even if the organization does not maintain a Virginia office, it may be covered by some Virginia laws if at least one employee works remotely from the Commonwealth. Whether a particular law applies to a remote employee depends on the law's specific definition of "employer," "employee," and related concepts. Unfortunately, a case-by-case analysis is often necessary.

Q14: Are managers trained on these crucial legal changes?

An organization's managers are key to maintaining good employee relations and complying with the law. Now is an especially good time to conduct manager training on the substantial new employee protections in Virginia, particularly to ensure consistent guidance is provided.

An effective training program should ensure managers understand the current laws, their organization's expectations, and the importance of strong relationships with employees. The training should prepare managers to deal appropriately with employees' concerns without retaliation. Moreover, it should instruct managers how to document the legitimate bases for any disciplinary and performance issues. Finally, an effective training program should teach managers when to ask HR for help and encourage them to work closely with HR on any tricky employee relations issue (such as a termination). Jackson Lewis attorneys can assist with creating and providing effective manager training.

Comfortable with your answers? Please reach out to the authors or any Jackson Lewis attorneys with whom you work with additional questions.

(Summer law clerk Felicia Kalkman contributed significantly to this article.)

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