

Virginia's Values Act Fundamentally Rewrites the Human Rights Act

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Effective July 1, 2020, the [Virginia Values Act](#) expands the scope of the Virginia Human Rights Act to prohibit discrimination in employment and housing on the basis of sexual orientation and gender identity. The new law also fundamentally changes the legal rights and remedies available to employees who sue their employers under the Human Rights Act.

Key Provisions

The Values Act expressly adds sexual orientation and gender identity to the list of protected classifications under the Virginia Human Rights Act.

In addition, the law creates all new protections and private rights of action in places of public accommodation, housing, and credit on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, disability, and status as a veteran.

The Values Act also fundamentally changes the Human Rights Act's private rights of action and remedies available to employees who sue their employers (and purveyors of housing). Previously, § 2.2-3903 of the Human Rights Act contained only a limited private right of action for employment discrimination for:

1. Unlawful discharge on the basis of race, color, religion, national origin, sex, pregnancy, or childbirth or related medical conditions, including lactation, by employers employing more than five but fewer than 15 persons; and
2. Unlawful discharge on the basis of age by employers employing more than five but fewer than 20 persons.

Section 2.2-3903 also limited a prevailing employee's remedies to:

1. 12 months of backpay plus interest; and
2. Attorneys' fees capped at 25% of the backpay award.

In addition, § 2.2-3903 expressly precluded the award of any "other damages, compensatory or punitive, nor ... reinstatement of the employee."

The Values Act repeals § 2.2-3903 in its entirety. This means the Human Rights Act's private right of action for aggrieved employees is essentially without limits. For example, where the private right of action was limited to cases of "unlawful discharge," the Values Act expands the right of action to include all forms of discrimination and retaliation, like federal law under Title VII of the Civil Rights Act.

Additionally, under the Values Act, in cases of allegedly unlawful discharge, employers with as few as five employees can be sued in Virginia state court for alleged Human Rights Act violations.

The Values Act also removes the Human Rights Act's 12-month backpay damages cap. Instead, it states that courts may award prevailing employees "compensatory and punitive damages" and uncapped "reasonable attorney fees and costs," among other non-monetary relief available to employees for the first time.

The new law retains the requirement that before employees can sue their employers, they must submit an administrative charge of discrimination to the Virginia Division of Human Rights. After the Division has completed its investigation, it will issue a "reasonable cause" or "no reasonable cause" finding.

After issuing a reasonable cause finding, the Division will attempt to conciliate the dispute. If conciliation cannot be reached, the Division will close its investigation and provide the complainant with a notice of their right to commence civil action.

If the Division issues a no reasonable cause finding, it will close the case and provide the employee with a notice of their right to commence civil action without attempting conciliation.

This procedure closely resembles that of the U.S. Equal Employment Opportunity Commission in its investigations of Title VII charges of discrimination.

Implications

The Values Act makes Virginia the first state in the South to enact non-discrimination protections for LGBTQ people, the first state in more than a decade to add both sexual orientation and gender identity to an existing non-discrimination law, and the first state since 1993 to add a prohibition on discrimination in public accommodations (which applies to all Virginians) where none existed before.

Given these expansions, Virginia state courts are now—for the first time—an attractive place for employees to sue Virginia employers. Not only does the Values Act greatly expand the protected classifications under the Human Rights Act, it also makes Virginia employers of nearly all sizes now subject to private suit with greatly expanded damages availability, including more than 12 months of backpay, compensatory and punitive damages, and uncapped potential attorneys' fees awards.

The previous iteration of the Human Rights Act resulted in nearly all private employment discrimination lawsuits against Virginia employers being brought in Virginia federal courts. One advantage employers have in federal court over Virginia state court is the relative chances of prevailing on a motion for summary judgment. In Virginia state courts, summary judgment is difficult to obtain, especially in the employment context. Historically, summary judgment is regularly granted to employers in cases in federal court where, after discovery, the court finds there is no genuine dispute of material fact and the employer is entitled to judgment as a matter of law.

By contrast, in Virginia state courts, by law and rule, litigants generally cannot use either deposition transcripts or affidavits to support a motion for summary judgment. This is why when employment cases are litigated in federal court, the employee's deposition testimony — which they cannot later contradict to defeat summary judgment — is often an employer's most important collection of evidence. However, given the Values Act's enhancements to plaintiff's potential recovery in state court actions, this quirk of Virginia law and procedure may significantly impact employers'

evaluations of discrimination claims.

Please contact a Jackson Lewis attorney with any questions about the fundamental change to employment discrimination litigation in Virginia.

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