

Virginia Enacts Comprehensive Whistleblower Protection

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Virginia Governor Ralph Northam has signed a comprehensive whistleblower protection law, the first of its kind for Virginia. The Whistleblower Law becomes effective on July 1, 2020.

HB 798 protects workers from retaliation for:

- Reporting to a supervisor or any governmental body violations or suspected violations of federal or state law;
- Refusing to engage in a criminal act or carry out an order that would violate federal or state law; or
- Otherwise engaging in protected activity by participating in an investigation.

The Whistleblower Law also authorizes an employee-whistleblower to bring a lawsuit seeking injunctive relief, reinstatement, and uncapped compensation for lost wages, benefits, and other remuneration.

Key Provisions

Previously, Virginia law offered almost no statutory protections for private-industry whistleblowers. Instead, alleged whistleblowers had to rely on a wrongful discharge in violation of public policy claim for as a narrow exception to Virginia's at-will employment doctrine. These types of cases, often referred to as "*Bowman*" claims (named after the Virginia Supreme Court case that first established them), typically were viable only if a termination violated a clearly stated public policy within a Virginia statute.

The new Whistleblower Law broadly prohibits an employer from discharging, disciplining, threatening, discriminating against, or penalizing an employee, or taking other retaliatory action affecting an employee's compensation, terms, conditions, location, or privileges of employment because of the employee's protected conduct.

The definition of protected activity under the Whistleblower Law also is broad. It includes:

1. Reporting in good faith a violation of any federal or state law or regulation to a supervisor or to any governmental body or law enforcement official;
2. Being requested by a governmental body or law enforcement official to participate in an investigation, hearing, or inquiry;
3. Refusing to engage in a criminal act that would subject the employee to criminal liability;
4. Refusing an employer's order to perform an action that violates any federal or state law or regulation when the employee informs the employer that the order is being refused for that reason; or
5. Providing information to or testifying 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.

The Whistleblower Law does not:

1. Authorize an employee to make a disclosure of data otherwise protected by law or any legal privilege;
2. Permit an employee to make statements or disclosures knowing that they are false or that they are in reckless disregard of the truth; or
3. Permit disclosures that would violate federal or state law or diminish or impair the rights of any person to the continued protection of confidentiality of communications provided by common law.

The new law does not require that a purported whistleblower first exhaust administrative remedies before bringing a lawsuit. Employees alleging retaliation may immediately bring suit in court within one year of an alleged violation.

A prevailing whistleblower also can obtain:

1. An injunction restraining further violations;
2. Reinstatement to the same or an equivalent position; or
3. Compensation for lost wages, benefits, and other remuneration, together with interest, and reasonable attorneys' fees and costs.

Implications for Virginia Employers

Like other federal and state whistleblower statutes, the Virginia Whistleblower Law's policy goal is to encourage legitimate whistleblowing and protect employees who have complained about alleged violations of law. The difference between the new Virginia law and many existing whistleblower laws is the broad scope of protected activity.

Most federal whistleblower statutes limit protected activity to complaints about particular alleged unlawful conduct relevant to those statutes' policy aims. Under the False Claims Act, for example, protected activity is tied to complaints about alleged government fraud. Securities and Exchange Commission whistleblowers must complain about purported shareholder fraud at publicly traded companies. IRS whistleblowers must complain about alleged tax fraud.

The Virginia law appears to have no such tether. Any employee who complains about any perceived violation of any federal or state law to any supervisor, government body, or law enforcement official would be protected and have a potentially viable claim should they face nearly any form of reprisal.

Purported whistleblowers also can seek immediate redress in Virginia state courts, a forum in which it is difficult to obtain pre-trial dismissal of claims.

The new law and other new employee protections recently enacted in Virginia present a higher risk of increased employment litigation for Virginia's employers.

Please contact a Jackson Lewis attorney if you have any questions about the new law or other legal developments.

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