

## THE VIRGINIA VALUES ACT USHERS IN A NEW ERA OF STATE COURT LITIGATION OF EMPLOYMENT CLAIMS

On Friday, April 10, 2020, Governor Northam signed the Virginia Values Act, which among other things greatly expanded rights of employees to pursue discrimination claims against employers in Virginia circuit and general district courts. Highlights of the Act follow:

- **Expanded Protected Classes:** The Act adds sexual orientation and gender identity as protected classes under prohibited employment discrimination. The full list of protected classes includes race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, sexual orientation, gender identity, disability, or status as a veteran.
  - “Gender identity” means gender-related identity, appearance, or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth.
  - “Sexual orientation” means a person’s actual or perceived heterosexuality, bisexuality, or homosexuality.
  - “Age” means an individual who is at least 40 years of age.
- **Prohibited Employment Practices:** It is unlawful for a covered employer to fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to such individual’s compensation, terms, conditions or privileges of employment because of an employee’s protected class.
- **Expanded Employer Coverage:** The prohibitions against discrimination cover employers that employ 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. This is the same coverage under Title VII of the Civil Rights Act of 1964. However, for the purposes of wrongful discharge claims, the Act applies to employers employing more than five persons, with the exception, of age-based discharge claims, which applies to employers with more than five but fewer than 20 employees.
- **Creates a Charge System Similar to the EEOC:** Employees claiming to be aggrieved by an unlawful employment practice may file a written, sworn complaint with the Division of Human Rights Department of Law (the “Division”). Once a complaint is received, the Division will provide notice of the charge to the employer and begin an investigation. The Division will prepare a confidential report of its findings. If the report concludes that there is no reasonable cause to believe that unlawful discrimination occurred, the charge will be

dismissed; and the employee will be given notice of right to commence a civil action. If the report finds probable cause, the Division will engage in information methods to eliminate the discrimination such as a conference, conciliation, and persuasion. Should the informal methods not be successful, the Division shall close the complaint and provide the employee with a notice of right to sue.

- **Timing for filing a charge:** The Act does not specify when a charge must be filed by or when suit must be filed after a notice of right to sue is issued. However, the Act does require that any regulations implementing the procedures for processing charges, must comply with the timing established by the EEOC for analogous federal laws. In other words, charges would have to be filed with the Division within 300 days of the alleged unlawful act; and, suit must be filed within 90 days of the receipt of the notice of right to sue.
- **Lawsuits To Enforce The Act:**
  - **Action by the Attorney General:** Whenever the Attorney General has reasonable cause to believe that any person or group of persons have engaged in a “pattern or practice” of unlawful discrimination, the Attorney General may bring suit in an appropriate circuit court for the following relief:
    - Permanent or temporary injunction, restraining order, or other order;
    - Civil penalty in an amount not exceeding \$50,000 for a first violation, and in an amount not exceeding \$100,000 for any subsequent violation – the civil penalties are payable to the Literary Fund.
    - Award the prevailing plaintiff reasonable attorney fees and costs.
    - Award compensatory and punitive damages as deemed appropriate
  - **Private Right of Action:** An aggrieved party who has received a notice of right to file suit may file a timely action in an appropriate general district or circuit court for the following relief:
    - Compensatory and punitive damages;
    - Reasonable attorney’s fees and costs;
    - Permanent or temporary injunction, temporary restraining order or other order.

#### Takeaway for Virginia Employers

The Virginia Values Act significantly changes the environment for Virginia employers. Although the media may focus on the addition of sexual orientation and gender identity as protected classes, that change has far less potential impact on employers than does the expanded right of private action provided to employees to pursue employment claims in state court. The prior Virginia Human Rights Act was limited to employers with more than 5 and fewer than 15 employees. The VHRA also restricted private suits to claims for discharge; and limited damages

to up to 12 months back pay with interest, with attorneys fees capped at 25% of the back pay awarded. The VHRA specifically prohibited the recovery of any other damages, including compensatory or punitive damages. As a result, there were relative few claims asserted under the VHRA.

By contrast, the Virginia Values Act will provide a favored cause of action for Virginia employees the right to pursue the full range of compensatory and punitive damages. The Act generally applies to employers with 15 or more employees, but also includes employers with more than 5 employees for discharge claims. The Act also has no limitation on potential damages, specifically providing for compensatory and punitive damages. This provides far greater relief for plaintiffs than claims filed in federal court under Title VII, which caps the potential amount of compensatory and punitive damages based on the size of the employer. In addition to providing greater damages for individual plaintiffs due to the absence of any statutory damage caps, the Virginia Values Act allows plaintiffs to pursue their claims in state court without concern of summary judgment given Virginia's unique procedural rules effectively precluding employers from obtaining summary judgment in state court. While every other state permits the use of sworn deposition testimony to dismiss non-meritorious claims on summary judgment, Virginia's General Assembly has declined to adopt summary judgment legislation to provide the same summary judgment mechanism for employers as exists in federal court. Given the choice of venue, putative plaintiffs are likely to pursue these claims in Virginia state court instead of federal court, where they can expect to litigate their claims without fear of summary judgment dismissal

While the Virginia Values Act has quietly passed without much fanfare, its potential impact will be far reaching for Virginia businesses and the employment law landscape in the Commonwealth. This statute more than any other will significantly increase both the number of discrimination claims filed in circuit court as well as the potential liability and cost of doing business for Virginia employers.