

Virginia Legislature Makes Changes to Employment Law

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During Virginia's 2023 legislative session, a number of changes impacting employment law were passed and signed into law by Governor Glenn Youngkin. Those laws will become effective July 1. The following briefly describes some of the bills that most immediately impact employers.

House Bill 1895: Confidentiality, Nondisclosure, and Nondisparagement Agreements

Extending a 2019 law that prohibited employers from conditioning employment on the employee's agreement to a confidentiality or nondisclosure agreement that would restrict disclosure of sexual assault, House Bill 1895 also will prohibit terms in such agreements that would restrict claims of sexual *harassment*. This echoes the federal Speak Out Act of 2022, which barred enforcement of pre-dispute agreements that restrict disclosure of sexual assault or sexual harassment allegations. While the law has been touted as mirroring the Speak Out Act, the language of House Bill 1895 may result in a more expansive application. The Speak Out Act does not apply to settlement agreements regarding already-asserted claims. The Virginia bill, however, may be interpreted to apply to settlement agreements. It reads in relevant part as follows:

No employer shall require an employee or a prospective employee to execute or renew any provision in a nondisclosure or confidentiality agreement, including any provision relating to nondisparagement, that has the purpose or effect of concealing the details relating to a claim of sexual assault pursuant to § 18.2-61, 18.2-67.1, 18.2-67.3, or 18.2-67.4 or a claim of sexual harassment as defined in § 30-129.4 as a condition of employment. Any such provision is against public policy and is void and unenforceable.

House Bill 1895, to amend and reenact Va. Code § 40.1-28.01.

This could be interpreted to apply to any agreement entered during the term of employment, including settlement of claims or complaints. The ultimate construction remains to be seen, but in the meanwhile, employers will need to be cognizant of the prohibitions and draft all agreements with these prohibitions in mind.

Additionally, the bill uses Virginia's definition of "sexual harassment" as contained in Va. Code § 30-129.4, which is broader than the federal definition under Title VII of the Civil Rights Act since the Virginia definition does not incorporate the requirement that the harassment be pervasive or severe. The code provision defines sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when such conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work

environment.”

Senate Bill 1040: Employee Social Security Numbers

As of July 1, employers will be prohibited from using an employee’s Social Security number, “or any number derivative thereof,” as the employee’s ID number or on an employee badge or access card. While the law provides no clarification on what constitutes a “derivative thereof,” it is likely that the common practice of using the last four digits of the number would run afoul of this provision. Knowing violation of this law could subject an employer to a civil penalty of up to \$100 per violation.

Senate Bill 1086: Organ Donation Leave

Starting July 1, Virginia employers with 50 or more employees will be required to provide eligible employees with up to 60 business days per 12-month period of leave for organ donation, as well as 30 days of bone marrow donation leave per 12-month period. Both types of leave are not required to be paid.

Employees are eligible for the leave if they have worked for the employer for at least one full year, and if they accrued 1,250 hours of service during the preceding 12 months. Employees who take this leave must be reinstated, upon their return, to the same position they held prior to taking leave or to a position of equivalent pay, benefits, and conditions of employment. The bill also mandates continuation of the employee’s health benefits plan, and bars employers from treating the leave as a break in continuous service when calculating salary adjustments, sick leave, vacation, paid time off, seniority, or other benefits. Finally, retaliation against employees for taking this leave is expressly prohibited by the bill.

Violation of the terms of organ or bone marrow donation leave can subject employers to a first violation fine of \$1,000, climbing to \$2,500 for the second violation, and \$5,000 for subsequent violations.

House Bill 1924: Sub-Minimum Wage Workers

Currently, Virginia Code § 40.1-28.9 permits employers with a special certificate authorized under the federal Fair Labor Standards Act to pay certain employees with disabilities less than minimum wage to encourage and facilitate employment of this population of individuals. Virginia’s House Bill 1924, passed this past session and going into effect July 1, does away with this exception to Virginia’s Minimum Wage Act.

Those employers that already obtained the exemption prior to July 1 will be grandfathered in and given until July 1, 2030, when their authorization ends, to raise pay for these workers above Virginia’s minimum wage.

For assistance with developing company policies and navigating these issues, please contact a member of [Troutman Pepper’s Labor + Employment Practice Group](#).

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