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NEW VIRGINIA LAW WILL PROHIBIT LGBT DISCRIMINATION AND EXPAND WORKPLACE LAWSUITS

Insights
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Virginia Governor Ralph Northam (D) just signed into law this weekend sweeping legislation that not only protects the rights of LGBT Virginians in employment, housing, and accommodations, but also expands the ability of plaintiffs to sue in Virginia state court. When the Virginia Values Act takes effect on July 1, 2020, the Virginia Human Rights Act will prohibit discrimination in employment on the basis of sexual orientation and gender identity, becoming the first Southern state to adopt such protections.

Additionally, once the law takes effect, plaintiffs alleging any form of employment discrimination in state court claims will be able to seek compensatory and punitive damages, as well as increased attorneys' fees, ushering in a new era for employers. If you have operations in Virginia, you should begin to take immediate steps to ensure you are prepared for these impending changes.

BACKGROUND

In November 2019, Virginia Democrats took full control of the state legislature for the first time in more than two decades. With Democrat Ralph Northam already in the governor's office, Democrats snared full control of the state government. Virginia Democrats quickly set to work to pass bills long stymied by Republican control of the House of Delegates, targeting LGBT rights and current limitations on state law employment claims.

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On the national front, there has been growing debate regarding whether Title VII of the Civil Rights Act of 1964's prohibition on sex discrimination also includes a prohibition on the basis of sexual orientation and gender identity. While the EEOC is of the opinion that it does, [the federal appeals courts](#) have [split on the issue](#). The U.S. Supreme Court is expected to resolve the split and [issue a final ruling on the matter sometime](#) in the next few months, but Virginia lawmakers did not want to wait to see the outcome and instead decided to take the matter into their own hands.

LGBT DISCRIMINATION PROHIBITED

The new law is sweeping, covering many types of LGBT discrimination. For discrimination in private employment, defined as covering employers who employ 15 or more employees, the antidiscrimination law is far-reaching. The state law will soon prohibit discrimination on the basis of "sexual orientation," meaning a person's actual or perceived heterosexuality, bisexuality, or homosexuality. It will also encompass bias because of "gender identity," meaning the gender-related identity, appearance, or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth.

The law grants employees a civil cause of action to sue their employers for violations of these new provisions. Successful plaintiffs can be awarded attorneys' fees and compensatory and punitive damages. And unlike Title VII, there is no damages cap under the Virginia law, which will soon make litigation under the state statute an attractive option for private lawsuits.

In addition to banning discrimination in private employment, the Virginia law will also soon ban discrimination on the basis of sexual orientation and gender discrimination in other areas:

- **Public Employers.** The law will ban public employers in Virginia from discriminating on the basis of sexual orientation and gender identity.
- **Public Accommodations.** The law will prohibit discrimination on the basis of sexual orientation and gender identity in places of public accommodation. This provision covers all businesses offering or holding out to

the general public goods, services, privileges, facilities, advantages, or accommodations.

- **Creditors.** The law will ban creditors from discriminating on the basis of sexual orientation and gender identity against applicants or with respect to any credit transaction.
- **Housing and Real Estate.** The law will prohibit discrimination on the basis of sexual orientation and gender identity in the housing and real estate industries.

INCREASED ABILITY TO SUE IN STATE COURT

Equally significant to employers, but perhaps escaping the spotlight due to the attention being paid to the LGBT protections in the new statute, it will soon be easier for plaintiffs to sue employers under claims of discrimination in Virginia state court.

Currently, plaintiffs can only sue under the Virginia Human Rights Act if they have been discharged from employment as a result of the alleged discrimination or retaliation on account of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age (over 40 years), marital status, or disability. Damages are limited to up to 12 months of back pay, and attorneys' fees are capped at 25% of the backpay award. Compensatory and punitive damages are not available, nor is injunctive relief.

Under the new law, however, plaintiffs will be able sue for any violation of the anti-discrimination laws — not just when they have been discharged from employment. Additionally, plaintiffs will be able to recover compensatory and punitive damages, lost wage damages with no 12-month limitation, and reasonable attorneys' fees with no limitation. The court can also issue injunctive relief, such as ordering reinstatement of the plaintiff.

WHAT DOES THIS MEAN FOR EMPLOYERS?

Regarding the law's new LGBT provisions, for employers who operate in many jurisdictions, the new Virginia law may be somewhat of a non-story. Almost half of the states in the country and many local governments already have laws prohibiting sexual orientation discrimination in employment.

Many multistate employers have integrated workplace protections and policies to include LGBT applicants and workers.

But for those employers who operate only in Virginia, or do not yet have antidiscrimination policies related to sexual orientation and gender identity, the time is now to take action. You should review and revise workplace policies and practices, managerial training materials, employee antidiscrimination and anti-harassment training sessions, interview and hiring protocols, benefits offerings, and any other practice which may otherwise impact workers because of their sexual orientation and gender identity. You will want to make sure all of these changes are in place well ahead of the July 1, 2020 effective date, so the time to act is now.

Regarding the new law's expansion of plaintiffs' rights to sue in state court, the cost of defending the discrimination and retaliation claims may soon increase significantly. Currently, plaintiffs generally avoid bringing suit in Virginia state court because of the various damages caps and limitations. Because those limitations will soon be removed, there will be no barrier to suing in state court rather than federal court.

Because obtaining summary judgment in Virginia state court cases is nearly impossible – parties can only rely upon pleadings and cannot rely upon depositions or documents outside of pleadings to support summary judgment – employers will not, in the vast majority of cases, be able to dismiss cases prior to trial. Further, plaintiffs' counsel will be able to file suit in notoriously plaintiff-friendly jurisdictions in Virginia, thereby increasing the risk of an outsized verdict at trial.

If you have questions about the new Virginia law or its effect upon your business, please contact the author, [David Klass](#), your Fisher Phillips attorney or any attorney in our [Washington, D.C. metro office](#) in Arlington.

This Legal Alert provides an overview of a specific new state law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.