

Virginia Passes Significant Changes to State Employment Discrimination Law

Article By:

Connie N Bertram

Tony W. Torain, II

Jack Blum

On April 11, 2020, Virginia Governor Ralph Northam signed the Virginia Values Act (“Act”), which significantly strengthens the Virginia Human Rights Act’s prohibition on employment discrimination. Some of the major changes include:

- Greatly expanding the class of employers who can be sued under state law;
- Removing limitations on the relief employees may obtain; and
- Adding sexual orientation, gender identity, and status as a veteran as new protected classes.

These changes show that Virginia’s new Democratic majority is not hesitant to flex its muscles in the area of employment law, and could herald additional changes that may further erode Virginia’s relatively pro-employer legal climate.

The most important change is the Act’s dramatic expansion of employees’ rights to seek relief for employment discrimination under the Virginia Human Rights Act. Prior to the Act, Virginia Code § 2.2-3903 limited employees to bringing claims against employers who employed five to fifteen employees, or five to twenty employees for claims of age discrimination. These size limitations meant that employees could only bring a claim under the Virginia Human Rights Act if their employer was too small to be covered by the federal employment discrimination statutes. Employees whose employers were large enough to be covered by the federal statutes could only bring a federal claim. The remedies available to employees under the Virginia Human Rights Act were also limited. Employees were limited to recovering twelve months of back pay in most circumstances, and could not recover punitive damages or obtain reinstatement to their former position. Attorney’s fee awards were capped at 25% of the employee’s recovery.

The Act repeals all of Section 2.2-3903’s limitations. Now, employees may bring state law

employment discrimination claims against any employer with more than fifteen employees. If the employee claims unlawful discharge, that threshold is reduced to five. Employees can now recover compensatory and punitive damages, as well as attorney's fees, with no cap on recovery. Virginia employees now have a state law employment discrimination claim that is more generous than the federal Title VII (which caps compensatory and punitive damages, but not back pay, at up to \$300,000). Virginia employees bringing claims under the new state law may also now be able in some cases to avoid federal court jurisdiction and thereby escape the "rocket docket" in the Eastern District of Virginia, which is regarded by some as pro-employer.

The Act also broadens the Virginia Human Rights Act by adding "sexual orientation," "gender identity," and "status as a veteran" as new protected classes. "Sexual orientation" is defined as "a person's actual or perceived heterosexuality, bisexuality, or homosexuality," which apparently incorporates an Americans with Disabilities Act-type "regarded as" analysis. Notably, courts hold that such "regarded as" claims are not cognizable under Title VII. "Gender identity" is defined as "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 Act's dramatic expansion of the Virginia Human Rights Act may be a signal that Virginia's Democratic majority intends to enact additional employment protections akin to those in neighboring Maryland and Washington, D.C.

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