IslerDare PC
Client Alert

EMPLOYMENT LAW UPDATE

Rough Roads Ahead: Significant Changes to the Virginia Human Rights Act

The Pre-July 2020 Virginia Human Rights Act

Prior to the new laws, the Virginia Human Rights Act ("VHRA" or the "Act") only prohibited certain small employers from discharging an employee in two scenarios: (1) employers with 6 to 14 employees are prohibited from discharging an employee on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, including lactation; and (2) employers with 6 to 19 employees are prohibited from discharging an employee on the basis of age (40 or older). The Act also had limited damages (no punitive or compensatory) and a limited right to attorneys' fees. For these reasons, many employers are not even aware that the VHRA even exists.

All of that has now changed.

This year, Governor Northam signed several new laws that dramatically alter the VHRA. These changes, which, among other things, broaden the Act's employer coverage, expand the types of actionable adverse actions, and add new protected classes, will become effective on July 1, 2020. Employers should begin preparing now for what will likely be a new legal landscape in the Commonwealth.

How The VHRA Has Changed

Broadened Employer Coverage

The Virginia Values Act, which was signed on April 11, 2020, significantly broadens employer coverage under the VHRA. As noted, previously, the VHRA only covered smaller employers (those with 6 to 14 employees).

Effective July 1, 2020, the VHRA's coverage will expand to all employers employing 15 or more employees.

New Protected Classes

In addition to the current protected classes, the amended VHRA adds:

- Veteran Status;
- Hairstyle based on Race;
- Sexual Orientation; and
- Gender Identity.

- *Hairstyle*. The terms "because of race" and "on the basis of race" in the VHRA have been expanded to include "because of or on the basis of traits historically associated with race, including hair texture, hair type, and protective hairstyles such as braids, locks, and twists."
- *Sexual Orientation*. The Values Act defines "sexual orientation" to mean "a person's actual or perceived heterosexuality, bisexuality, or homosexuality."
- *Gender Identity*. The Values Act defines "gender identity" to mean "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."

Virginia is now the fourth state to ban discrimination on the basis of hairstyle, and the first southern state to prohibit discrimination on the basis of sexual orientation and gender identity.

Expanded Adverse Actions

The amendments to the VHRA also expand the types of adverse actions that constitute actionable discrimination. Currently, the VHRA only prohibits certain smaller employers from discharging an employee.

With the new amendments, employers with 15 or more employees will be prohibited under the VHRA not only from *discharging* an employee on the basis of a protected class, but also from:

(i) failing or refusing to hire, or otherwise discriminating against an individual on the basis of a protected class;

(ii) limiting, segregating, or classifying individuals for employment in a way that would deprive them of equal employment opportunities or otherwise adversely affect their employment status because of a protected class;

(iii) using a protected class as a "motivating factor for any employment practice"; or

(iv) discriminatory advertising.

In other words, the full range of employment actions are covered.

Private Right of Action and New Remedies

The remedies available to a successful plaintiff under the amended VHRA have also been greatly expanded. The VHRA presently provides that courts can, absent special circumstances, award a discharged employee up to 12 months of back pay, plus interest, and attorneys' fees not to exceed 25% of the back pay award, but not other damages or reinstatement. As of July 1, the Value Act will create a private right of action against covered employers with at least 15 employees (or 20 in the case of age discrimination) for any form of discrimination, not just discharge. Additionally, the Values Act will permit recovery of unlimited compensatory and punitive damages, reasonable attorneys' fees and other equitable relief.

Reasonable Accommodations and Private Right of Action for Childbirth, Pregnancy, and Related Medical Conditions, Including Lactation

Effective July 1, the amendments to the VHRA will require employers with 5 or more employees to engage in an interactive process with and provide reasonable accommodations to applicants and employees who are experiencing pregnancy, childbirth, or related medical conditions (including lactation), unless doing so would pose an undue hardship. The Act also prohibits retaliation against an employee who requests a reasonable accommodation.

The amendments to the VHRA allow applicants and employees who are experiencing pregnancy, childbirth, or related medical conditions to bring a civil action for failure to provide a reasonable accommodation, failure to hire, discharge, or other discrimination, without having to first file a charge of discrimination. Such an action must be commenced within 2 years of the adverse action, or, if the applicant or employee filed a charge of discrimination, within 90 days of receipt of the right to sue letter.

Anticipated Questions

Q1. How do employers determine how many employees they have for purposes of the VHRA?

To determine whether an employer is covered by the VHRA, similar to Title VII, the employer must count the number of individuals employed "*for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.*"

Q2. Will the changes discussed above to the VHRA apply retroactively?

Although the amendments to the VHRA are set to take effect on July 1, 2020, it is unclear whether any of them will be applied retroactively. The amendments themselves do not expressly address retroactivity. However, it is likely that courts considering these issues will find the amendments not to be retroactive.

Q3. Is there any sort of administrative exhaustion/charge requirement (like under federal antidiscrimination laws) before an employee can file suit under the amended VHRA?

Yes, with some limited exceptions.

For claims based on race, color, religion, sex, sexual orientation, gender identity, marital status, age, status as a veteran, or national origin, the Values Act requires an aggrieved party to first file a charge of discrimination with the Division of Human Rights (or the EEOC and cross-filed with the DHR) presumably in accordance with the EEOC's timelines, and receive a right to sue letter before filing a civil action. Upon receipt of a notice of right to sue, the aggrieved party can then bring a lawsuit in general district court or circuit court and can be awarded unlimited compensatory damages, punitive damages, attorneys' fees, and costs, as well as temporary and permanent injunctive relief.

As discussed above, however, for claims based on pregnancy, childbirth or related medical conditions (including lactation), the applicant or employee can go straight to court without having to first file a charge of discrimination.

Q4. Do the changes in the VHRA increase the likelihood that employees will now choose to file claims in Virginia state courts (as opposed to Virginia federal courts)?

Yes, significantly. Because of the current VHRA's small employer coverage and other limitations, most Virginia employers have really only had federal anti-discrimination laws to worry about until now. With the VHRA's expanded coverage and increased protections, however, it is likely that many more plaintiffs (and, in particular, their attorneys) will find Virginia state courts to be an attractive forum for their claims. Obtaining early dismissal or summary judgment from Virginia state courts is a notoriously difficult task, and the expanded remedies under the new VHRA may potentially provide greater recoveries for successful plaintiffs. As a result, it is possible that employers will see both an increase in the number of state actions, as well as an increase in the number of claims that make it to trial.

Q5. Do employers need to display or distribute any new postings?

Yes, employers must post information about the new pregnancy, childcare, and lactation obligations:

(i) the prohibition against unlawful discrimination on the basis of pregnancy, childbirth, or related medical conditions and

(ii) an employee's rights to reasonable accommodation for known limitations related to pregnancy, childbirth, or related medical conditions.

This information must be included in any employee handbook and directly provided to new employees upon the commencement of their employment and to any employee within 10 days of the employee providing notice to her employer that she is pregnant.

We have attached a copy of such a posting for your use. (If you need a copy in MS Word to modify, please reach out to any of the Isler Dare attorneys).

Action Items for Employers

Initially, these changes the Human Rights Act will be reflected predominantly in the employer's policies and posters, an employer should immediately take the following steps.

1. Employers must immediately revise their employee handbooks and EEO policies to incorporate sexual orientation, gender identity, veteran status, and hairstyles historically associated with race into the list of categories protected under their Equal Employment Opportunity and Anti-Harassment Policies.

2. Employers must now also notify employees experiencing pregnancy, childbirth, or related medical conditions, including lactation, of their rights and ability to request a reasonable accommodation, including in their employee handbooks and via a posting in the workplace.

3. Employers should carefully review their other policies, such as their grooming or dress code policies, to ensure that such policies reflect the changes to the VHRA.

4. Employers may also want to consider conducting new training for managers and supervisors to ensure compliance with the VHRA going forward.

More Questions?
We are here to help.

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Protections for Pregnant Workers Under Virginia Law

Prohibited Discrimination

The Virginia Human Rights Act (VHRA) prohibits employment discrimination on the basis of pregnancy, childbirth, lactation, and related medical conditions in all personnel actions, including, but not limited to hiring, promotion, termination, compensation, and other terms, conditions, and benefits of employment.

Accommodations for Pregnancy, Childbirth, Lactation and Related Conditions

Effective July 1, 2020, the VHRA also requires Virginia employers with 5 or more employees to provide reasonable workplace accommodations for employees whose ability to perform job duties is limited because of pregnancy, childbirth, lactation, or a related medical condition.

The employer must engage in good faith and in a timely and interactive process to determine reasonable accommodations. The employer cannot require an employee to take leave if another reasonable accommodation can be provided.

Types of Accommodations

Employers must make reasonable accommodations that do not cause an undue hardship, including but not limited to:

- More frequent or longer bathroom breaks;
- Time off to recover from childbirth;
- Temporarily transferring the employee to a less strenuous or hazardous position;
- Purchasing or modifying work equipment, such as chairs;
- Temporarily restructuring the employee's position to provide light duty or a modified work schedule;
- Breaks to express breast milk;
- Having the employee refrain from heavy lifting;
- Assisting with manual labor;
- Relocating the employee's work area; or
- Providing private (non-bathroom) space for expressing breast milk

Prohibited Actions

Employers may not:

- Take adverse action against an employee for requesting an accommodation;
- Deny employment or promotional opportunities to an otherwise qualified applicant or employee because of the request or need for an accommodation; or
- Refuse to reinstate the employee to her previous position or an equivalent position with equivalent pay, seniority, and other benefits when the need for a reasonable accommodation ceases.

Certification from Health Care Provider

The employer may require an employee to provide certification from a health care provider indicating a reasonable accommodation is medically advisable to the same extent the employer requires certification for other temporary disabilities. The certification should include: (1) the date the reasonable accommodation became or will become medically advisable; (2) an explanation of the medical condition and need for a reasonable accommodation in light of the condition; and (3) the estimated length of time the reasonable accommodation should be provided.

Employees with questions or concerns about this policy or who would like to request a reasonable accommodation should contact Human Resources