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Client Alert

EMPLOYMENT LAW UPDATE

Virginia's New Anti-Retaliation/Whistleblower Law

Since 1985, Virginia courts have a recognized a very limited cause of action against employers for "wrongful discharge", sometimes referred to as a "*Bowman* claim" (named after the court case that first recognized the claim).

In theory, under *Bowman* an employee could bring a claim if their employment was terminated because: (1) the employer was preventing the employee from exercising a statutory right; (2) the employer violated a public policy expressly stated in a Virginia statute; or (3) the employee refused to engage in a criminal act. In reality, however, the Virginia Supreme Court has made it nearly impossible to bring a claim for anything other than the third scenario – the refusal to engage in a criminal act.

Perhaps in reaction to the Virginia Supreme Court's narrow view, the General Assembly has now enacted a comprehensive Anti-retaliation (Whistleblower) Law effective **July 1, 2020** that protects a wide-array of employee conduct, and prohibits *any* retaliatory action (not just discharge) against an employee for engaging in the protected conduct.

What's Covered Under The New Antiretaliation Law?

Effective July 1, 2020, employers may not discharge, discipline, threaten, penalize or take any "other retaliatory action regarding an employee's compensation, terms, conditions, locations, or privileges of employment" if the employee engages in any of the protected conduct outlined below.

The new law protects employees for the following reasons:

- The employee makes a good faith report of a violation of any federal or state law or regulation to a supervisor, governmental body, or law-enforcement.
- The employee refuses to engage in a criminal action that would subject the employee to criminal liability.
- The employee refuses any employer's order to perform an action that violates any federal or state law or regulation, when the employee informs the employer the reason for refusing the order.
- The employee is requested to participate in an investigation, hearing, or inquiry by a government body or law-enforcement.

- The employee provides information or testifies before a government body or law enforcement official regarding an alleged violation of law by the employer.

Remedies Under the New Law

The law provides that an employee who prevails on a retaliation claim can recover their lost wages and benefits, interest, along with their reasonable attorneys' fees and costs. A court can also grant injunctive relief to restrain the employer from further violation of the law, as well as ordering reinstatement of the employee to their former position.

In a bit of good news for employers, unlike traditional *Bowman* claims, the statute *does not* allow for successful plaintiffs to recover either compensatory damages (*e.g.*, damages associated with emotional distress) or punitive damages. The statute also requires that a plaintiff bring his action within one year of the alleged retaliatory action.

Anticipated Questions

Q1. What is most concerning about the new law for employers?

First, antiretaliation laws can often be a struggle for employers. Somewhat understandably, managers do not like to be accused of violating the law, especially when those reports have little merit to them. Similarly, managers are likely to have a hard time with an employee who refuses to perform the duties requested of them under the employee's subjective belief that such duties will somehow cause the employee to violate some law. It will be a challenge for managers to not treat these types of employees any differently.

Second, the use of the phrase "*any* federal or state law or regulation" seems especially ripe for abuse. It is not hard to imagine an employee who is worried about being disciplined "reporting" a so-called violation of an obscure regulation to their supervisor in an effort to gain protection from the law.

Q2. Does an employee have to explain his reasoning for refusing to perform an order to avail himself of the protection of the law?

Sometimes. Where an employee refuses an employer's order because the employer is asking him to engage in an act that would subject the employee to criminal liability, the employee is apparently not required to explain himself to the employer. This raises the possibility that the employer may not know that the reason the employee is defying instructions is because the employee believes he/she would violate a criminal law in doing so until a lawsuit arrives.

On the other hand, if an employee is refusing an order because it violates a non-criminal state or federal law or regulation (even if such a violation would not impose personal liability or culpability upon the employee), the law *does* require the employee inform the employer "the order is being refused for that reason." It is not clear that the employee would have to provide much more information other than to state a belief that the employer's requested conduct would violate the law.

Q3. Is an employee engaged in protected conduct if he refuses an order based on an erroneous interpretation of the law?

Probably not. As written, the law only protects a refusal when "an employer's order . . . violates any federal or state law or regulation." Because the statute does not refer to the employee's subjective belief, it would seem that if the order refused by the employee does not actually violate the law, the statute would not seem to provide protection to the employee's refusal. However, employers should use caution, as it is certainly possible that a court could interpret this language more broadly than it currently appears.

Q4. Is an employee engaged in protected conduct if he reports a violation of law to a supervisor based on the wrong interpretation of the law?

Yes. The law specifically states that an employee is protected when making a report of a violation of law in good faith. This means the employee can be wrong about the law being violated, and still be protected for reporting it. Typically, courts in interpreting other similar statutes have required both subjective and objective good faith on behalf of the employee. That means the employee would need to show both that: (i) he personally believed the law or regulation had been violated; and (ii) that an average reasonable person would agree that a violation of law had occurred.

Q5. Is the employee protected if he reports a violation of law or refused to comply with the manager's instruction knowing that there is no reasonable basis for that report or refusal to act?

No, reports to a supervisor must be made in good faith.

Q6. Does the law permit an employee to disclose information in violation of attorney-client privilege?

No. The statute states that it does not "authorize any employee to make a disclosure of data otherwise protected by law or any legal privilege." This is an interesting addition to the statute, as it could contemplate that in employee who is

involved, on behalf of the employer, and consulting with counsel on a legal issue presumably could not disclose or rely upon the view of the attorney as the basis for a claim.

Q7. Is there any sort of administrative exhaustion/charge requirement (as under federal antidiscrimination laws) before an employee can file suit under the Antiretaliation law?

No. An employee who believes that he/she has a claim may proceed directly to court. In most cases that will mean a Virginia state court, where obtaining early dismissal of claims or summary judgment is a notoriously difficult task. The statute *does* require that claims be made within one year of the alleged violation.

Action Items for Employers

1. Employers should ensure they have a whistleblower protection policy that allows for complaints regarding violations of law to be reported without retaliation. While the presence of such a policy does not, by itself, act as a defense if an employee claims that he/she were subjected to some type of retaliatory action as a result of some protected conduct under the new act, it will at least allow the employer to argue that the employee had other avenues to come and make known their concerns.

2. Employers should investigate all such complaints to either ferret out any unlawful activity, or to disprove the basis for the employee's complaint.

3. Employers need to train managers that any time employee protests a directive on the basis that such a directive would be unlawful in some manner, the manager needs to bring the employee's objection to the attention of corporate counsel, human resources, or senior management.

4. Employers should also consider identifying an Ethics Officer who would coordinate the handling of all complaints of violations of laws, and require supervisors to forward all such complaints to that Officer.

5. Large employers may want to consider contracting with an outside provider to set up a 1-800 hotline to receive such complaints. (Many publicly traded companies already have such hotlines as a result of Sarbanes-Oxley).

More Questions?
We are here to help.

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