

# EMPLOYMENT LAW UPDATE

## NEW VIRGINIA EMPLOYMENT LAWS EFFECTIVE JULY 1, 2023

Earlier this year, the Virginia General Assembly passed three new employment-related laws that took effect on **July 1, 2023**. These laws, respectively, (i) prohibit employers from using employees' social security numbers as an identifier in certain circumstances; (ii) prohibit employers from requiring employees or applicants, as a condition of employment, to enter into any nondisclosure, confidentiality, or non-disparagement agreement related to claims of sexual harassment; and (iii) require employers with at least 50 employees to provide unpaid organ and bone marrow donation leave to eligible employees. Below is a summary of the new laws.

### **Prohibition Against the Use of Employees' Social Security Numbers as Identifiers**

On March 21, 2023, Virginia Governor Glenn Youngkin signed Senate Bill 1040, which adds Virginia Code § 40.1-28.7:10. This new law prohibits employers from using an employee's social security number, or any derivative thereof, in the following situations: (i) as the "employee's identification number"; and (ii) on any identification card or badge, any access card or badge, or any other similar card or badge issued to an employee.

#### ***Penalties for Violations?***

"Knowing" violations of the new law can result in a civil penalty of up to \$100 per violation.

#### ***Action Items for Employers:***

Employers should review their current identification card and badge policies (as well as those used by any third-party providers) to ensure that they do not include an employee's social security number, or any number derived thereof.

### **Nondisclosure, Confidentiality, and Non-Disparagement Agreements Related to Claims of Sexual Harassment**

On March 26, 2023, Governor Youngkin signed HB 1895, which amends Virginia Code § 40.1-28.01. Previously, Virginia Code § 40.1-28.01 prohibited employers from requiring employees or applicants to execute, as a condition of employment, a nondisclosure or confidentiality agreement that concealed details regarding claims of sexual assault. The amended law extends this prohibition to claims of sexual harassment, as defined in Virginia Code § 30-129.4, and it clarifies that these restrictions cover both

nondisclosure/confidentiality agreements and non-disparagement clauses. Effective July 1, 2023, any such provision will be “void and unenforceable.”

***Definition of Sexual Harassment:***

The new law defines “sexual harassment” using the definition in Virginia Code § 30-129.4, which states:

[U]nwelcome 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.

***Application to Post-Termination Agreements:***

While it is yet to be seen how the courts in Virginia will interpret the new law, the plain language of the statute limits the prohibition to agreements entered into “as a condition of employment.” Thus, it appears that severance or other post-termination agreements are **not** covered.

***Action Items for Employers:***

Employers should review and revise their employment documents that contain confidentiality, non-disclosure, and non-disparagement clauses and incorporate language permitting employee disclosure of claims of sexual assault and sexual harassment. Proposed language is as follows: “Nothing herein shall preclude the employee from disclosing details relating to a claim of sexual assault or sexual harassment.”

***Organ and Bone Marrow Donation Leave for Large Employers***

On April 12, 2023, Governor Youngkin signed SB 1086, codified in Virginia Code § 40.1-33.7 through 40.1-33.12, which requires Virginia employers with at least 50 employees to provide eligible employees with up to 60 business days of unpaid leave to serve as an organ donor, and up to 30 business days of unpaid leave to serve as a bone marrow donor in any 12-month period.

***Eligible Employees:***

Eligible employee must meet the following qualifications by the date that the requested leave is to begin: (i) have been employed by the employer for at least a 12-month period; and (ii) have worked for that employer at least 1,250 hours in the 12-month period preceding the date of the leave. Employers may require written verification from a physician that the employee is an organ or a bone marrow donor and that there is a medical necessity for the donation.

***Employer Requirements:***

While the leave may be unpaid, employers must (i) continue group health insurance coverage during such leave under the same terms as applicable to active employees; (ii) upon return, restore employees to their same position or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment; (iii) treat the leave as continued service for purposes of employees' seniority, eligibility for salary adjustments, sick leave, vacation leave/PTO, and other employee benefits; and (iv) during the leave, pay certain employees commissions that become due because of work performed prior to the onset of the leave. In addition, the new law prohibits employers from discharging, disciplining, threatening, discriminating against, or retaliating against an employee for requesting leave, taking leave, and/or for filing a complaint regarding any violations of the new law.

***Coordination with the Federal Family and Medical Leave Act:***

Under the new law, organ leave and bone marrow donation leave do **not** run concurrently with leave taken under the federal Family and Medical Leave Act.

***Penalties for Violations?***

The new law will be enforced by the Commissioner of the Virginia Department of Labor and Industry, and violations can result in fines of up to \$1,000 for the first violation, \$2,500 for the second violation, and \$5,000 for each successive violation. Individuals may file a complaint with the Commissioner within one year of the date the individual knew or should have known of the alleged violation.

***Action Items for Employers:***

Covered employers should update their employee handbooks and leave policies to comply with the new law and inform employees of their rights and protections thereunder. Please contact us for a sample policy.

***More Questions?  
We are here to help.***

***In our Tysons Office***

703-748-2690

Eddie Isler (eisler@islerdare.com)

Steve Ray (sray@islerdare.com)

Michelle Radcliffe (mradcliffe@islerdare.com)

Lori Turner (lturner@islerdare.com)

Micah Ticatch (mticatch@islerdare.com)

Ramana Briggs (rbriggs@islerdare.com)

***In our Richmond Office***

804-489-5500

Steve Brown (sbrown@islerdare.com)

Alison Kewer (akewer@islerdare.com)

Amy Smith (asmith@islerdare.com)

Lindsey Komisin (lkomisin@islerdare.com)

Whitney Nelson (wnelson@islerdare.com)

***In our Charlottesville Office***

804-489-5500

Eric Paltell (epaltell@islerdare.com)

Crystal Tyler (ctyler@islerdare.com)

***Questions about employee benefits?  
Our benefits team would be glad to assist.***

Andrea O'Brien (aobrien@islerdare.com)

Vi Nguyen (vnguyen@islerdare.com)

Jeanne Floyd (jfloyd@islerdare.com)

Grace Ristuccia (gristuccia@islerdare.com)

Jessica Kuester (jkuester@islerdare.com)

Ashley Hedge (ahedge@islerdare.com)