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Virginia Employment Law Update: Important Changes Effective July 1, 2023

Date Jun 6, 2023

Executive Summary: Three new Virginia employment laws become effective July 1, 2023, and Virginia employers must understand and comply with these new rules. Virginia employers will need to update employee handbooks and confidentiality agreements, as well as change certain personnel practices to address these new state requirements.

Speak Out Laws

There is currently a nationwide campaign to pass state and federal "Speak Out" laws. These laws prohibit employment contract provisions that restrict employees' ability to communicate about certain incidents of sexual harassment or sexual assault (although some other state laws have an even broader application).

Virginia passed its own version of the "Speak Out Act," which goes into effect July 1, 2023. The new Virginia version is different from the federal version that became law in December 2022. Due to these differences, employers must consider **both** the federal version and Virginia version when crafting confidentiality, severance, and settlement agreements.

The federal Speak Out Act provides that "[w]ith respect to a sexual assault dispute or sexual harassment dispute, no nondisclosure clause or nondisparagement clause agreed to ***before*** the dispute arises shall be judicially enforceable in instances in which conduct is alleged to have violated Federal, Tribal or State law." (emphasis added). The federal statute therefore renders unenforceable nondisclosures and nondisparagement provisions that were signed ***before*** a dispute arose regarding sexual assault or sexual harassment, but not ***after***.

The Virginia version states the prohibition against nondisclosure and nondisparagement in different and potentially more expansive terms. Instead of a statute that on-its-face is limited to pre-dispute agreements, the Virginia version arguably applies to post-dispute agreements too (i.e., settlement agreements). The Virginia version states that:

> [n]o employer shall require an employee or a prospective employee to execute or renew any provision in a nondisclosure or confidentiality agreement, including any provision relating to nondisparagement, that has the purpose or effect of concealing the details relating to a claim of sexual assault pursuant to

§ 18.2-61, 18.2-67.1, 18.2-67.3, or 18.2-67.4 or a claim of sexual harassment as defined in § 30-129.4 as a condition of employment. Any such provision is against public policy and is void and unenforceable.

House Bill 1895, to amend and reenact Va. Code § 40.1-28.01

While Virginia policymakers stated that they intended to mirror federal policy, the different language changes the type of contract provision covered. The Virginia version may extend beyond pre-dispute agreements because the words "condition of employment" can arguably mean as a condition of becoming employed, remaining employed, or having been employed. This means the prohibition arguably applies to any agreement entered into during employment. In addition, the chosen definition of sexual harassment (referring to the definition used in Va. Code § 30-129.4) is broader than the definition used by the Equal Employment Opportunity Commission and federal courts in assessing Title VII claims. This definition is arguably broader because it does not exclude "simple teasing, offhand comments or isolated incidents that are not very serious," like the federal standard. Instead, under Va. Code § 30-129.4: "sexual harassment" means "unwelcome 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." Therefore, the Virginia version's definition of sexual harassment is not clearly tethered to frequency or severity at all, which is a significant difference to the federal standard for sexual harassment, which is limited to conduct that is severe and/or pervasive.

To make matters more complicated, the National Labor Relations Board (NLRB) recently issued a significant opinion that also must be considered. The NLRB held that it is a violation of a covered employee's rights under the National Labor Relations Act (NLRA) when a severance agreement contains provisions such as a nondisparagement or nondisclosure provision that restricts current/former employees' right to speak out about their terms and conditions of employment. The NLRA protects most private sector employees regardless of whether a union is present in the workplace and generally applies to employees under the supervisory level. Current and former employees have a right to communicate so long as the communication is not so disloyal, reckless, or maliciously untrue such that it loses protection of the Act.

For more information about this decision, please see our previous Alert, New NLRB Decision Prohibits Overly Broad Language in Non-Disparagement and Confidentiality Provisions in Severance Agreements.

Use of Employee Social Security Numbers

Beginning July 1, 2023, employers are prohibited from using an employee's Social Security number, or any number "derivative thereof" as an employee's identification number. SB 1040

Organ Donation Leave

Employers with 50 or more employees will need to provide eligible employees (employees employed for at least a 12-month period and 1,250 hours worked during the preceding 12 months) with up to 60 business days per 12-month period of unpaid organ donation leave and up to 30 business days per 12-month period of bone marrow donation leave. Similar to leave under the federal Family and Medical Leave Act (FMLA),

the leave is unpaid, and employees must be restored to the same or an equivalent position with equivalent pay, benefits, and other terms and conditions of employment. Other similar FMLA-type provisions also apply such as maintenance of health benefits, and a prohibition against treating such leave as a break in service for other benefits. Commission-based employees must still be paid any earned commissions. However, organ donation leave is in addition to any FMLA leave the employee may be entitled to, and it cannot run concurrently with FMLA leave. Violations of the organ donation leave law can result in fines from $1,000 (first violation), to $2,500 (for a second violation) and up to $5,000 for successive violations.

Covered Virginia employers need to implement an organ donation leave policy, and ensure that all requests for organ donation leave are handled in accordance with the new statute. SB 1086

The Bottom Line:

- Evaluate all confidentiality agreements to determine if a carve-out is needed to comply with the federal and Virginia (and other state) Speak Out Acts.
- Before entering into any severance (lay off) or settlement agreement, consider whether a carve-out is needed for any Speak Out Act, and whether the agreement conflicts with the NLRB's new requirements.
- Make sure that by July 1, 2023, no employee identification such as badges, access cards or other items issued to employees refers in any manner to their social security number.
- Update your handbooks for organ donation leave.

If you have any questions about the issues discussed in this Alert, please contact the authors, Karen Elliott, partner in our Richmond office at kelliott@fordharrison.com, and Brendan Horgan, counsel in our Richmond office at bhorgan@fordharrison.com. Of course, you can also contact the FordHarrison attorney with whom you usually work.

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