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## Employment Law

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## EMPLOYMENT LAW

*D. Paul Holdsworth* \*

### INTRODUCTION

Against the backdrop of a year that saw the COVID-19 pandemic alter the American workplace in an unprecedented way, the employment law landscape in Virginia also underwent a recent sea change. Historically considered an employer-friendly state, the General Assembly shifted away from tradition by enacting several significant pieces of employee-friendly legislation, which will surely have a long-lasting impact on Virginia employees, businesses, and Virginia's economy at large.

This Article highlights these critical developments in Virginia employment law.<sup>1</sup> It does not provide an in-depth analysis of every development but highlights the most significant changes affecting employers and employees in the Commonwealth. Part I of this Article provides a brief overview of the added employee protections from the federal legislation passed pursuant to the COVID-19 pandemic and discusses Virginia's efforts in creating the nation's first COVID-19 workplace safety mandate. Part II briefly highlights legislation enacted in 2019, which set the stage for the General Assembly's activism in 2020, and then discusses in detail Virginia's new employment laws. Part III then addresses two recent landmark employment law decisions from the Supreme Court of the United States of which employees and employers alike should be aware.

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1. This Article encompasses key developments between the latter half of 2019 and July 2020.

## I. EMPLOYMENT LEGISLATION OF THE COVID-19 PANDEMIC

A. *Families First Coronavirus Response Act*

In response to the rapid arrival and immediate impact of COVID-19 on the American workforce, Congress enacted the Families First Coronavirus Response Act (“FFCRA”), which President Trump signed into law on March 18, 2020, and which took effect on April 1, 2020.<sup>2</sup> The FFCRA’s primary protections for American workers are two-fold: first, it requires eighty hours of paid sick time for full-time employees who were unable to work for a variety of reasons related to COVID-19, with part-time workers entitled to the average number of hours the employee works over a two-week period.<sup>3</sup> Second, it expands the Family and Medical Leave Act of 1993 (“FMLA”) to provide paid leave to employees who are unable to work in order to care for a child whose school or daycare center had been closed because of COVID-19.<sup>4</sup> Importantly, despite its intentionally broad reach (i.e., applying to all employers with 500 or fewer employees), the FFCRA exempts certain categories of workers from these protections, namely healthcare providers and emergency responders.<sup>5</sup> The FFCRA’s protections are set to expire on December 31, 2020.<sup>6</sup>

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2. Families First Coronavirus Response Act of 2020 (FFCRA), Pub. L. No. 116-127, 134 Stat. 178; see also Petra Cahill, *Coronavirus: Crisis Moves from China to Europe, Trump Signs Aid Bill, and Hospitals Prepare for Tough Decisions*, NBC NEWS (Mar. 19, 2020), <https://www.nbcnews.com/news/morning-briefingM/coronavirus-crisis-moves-china-europe-trump-signs-aid-bill-hospitals-n1163636> [<https://perma.cc/Q9YD-MFZA>]; *News Release: U.S. Department of Labor Publishes Guidance Explaining Paid Sick Leave and Expanded Family and Medical Leave Under the Families First Coronavirus Response Act*, WAGE & HOUR DIVISION, U.S. DEP’T LAB. (Mar. 24, 2020), <https://www.dol.gov/newsroom/releases/whd/whd20200324> [<https://perma.cc/UD9F-QX6Q>].

3. FFCRA § 5102(a)–(b), 134 Stat. at 195–96.

4. *Id.* § 5102(a), 134 Stat. at 195–96.

5. *Id.* § 3105, 134 Stat. at 192. After the FFCRA’s enactment, the Department of Labor (“DOL”) issued myriad clarifications, including as to the definition of “health care provider.” *Families First Coronavirus Response Act: Questions and Answers*, WAGE & HOUR DIVISION, U.S. DEP’T LAB., <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#55> [<https://perma.cc/WB7Y-WSAJ>]. While the FFCRA mimics the definition of “health care provider” in the FMLA and applies that definition where “health care provider” is being used to determine individuals whose advice to self-quarantine can be relied upon by employees seeking paid leave, the DOL’s guidance expands the definition of “health care provider” when it is being used to identify which types of employees may be exempt from the FFCRA’s protections altogether. *Id.* In the latter scenario, the term “health care provider” extends to employees employed at educational institutions, medical schools, nursing facilities, retirement facilities, facilities that perform medical laboratory testing, pharmacies, and other similar entities, in addition to doctor’s offices, hospitals, medical clinics, and the like. *Id.*

6. FFCRA § 5109, 134 Stat. at 198.

## 1. Emergency Paid Sick Leave Act

Encompassed within the FFCRA is the Emergency Paid Sick Leave Act (“EPSLA”).<sup>7</sup> The EPSLA provides up to eighty hours (i.e., two weeks, or ten workdays) paid sick leave for any full-time employee (or part-time employees on a pro-rated basis), irrespective of how long the employee has been employed,<sup>8</sup> who is unable to work due to one of the following circumstances:

- (1) The employee is subject to quarantine or isolation under a local, state, or federal order related to COVID-19;
- (2) The employee has been advised by a healthcare provider to self-quarantine because of concerns associated with COVID-19;
- (3) The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis of the same;
- (4) The employee is caring for an individual who is subject to quarantine or isolation under a local, state, or federal order related to COVID-19, or has been advised by a healthcare provider to self-quarantine;
- (5) The employee is caring for a minor child whose school, daycare center, or other childcare provider has closed or become unavailable because of COVID-19; or
- (6) The employee is experiencing a substantially similar condition, as specified by the Department of Health and Human Services.<sup>9</sup>

If the reason for the employee’s need for paid sick leave falls within scenarios (1), (2), or (3) above, the employer is required to pay the employee at the higher of the employee’s average regular rate, the federal minimum wage, or the local minimum wage, capped at \$511 per work day (\$5110 over two weeks).<sup>10</sup> By contrast, if the employee’s need for paid sick leave falls within scenarios (4), (5), or (6) above, the employer is only required to pay two-thirds of the employee’s regular rate of pay, up to \$200 per day (\$2000 over two weeks).<sup>11</sup>

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7. *Id.* § 5101, 134 Stat. at 195.

8. *Id.* § 5102(e)(1), 134 Stat. at 196.

9. *Id.* § 5102(a)(1)–(6), 134 Stat. at 195–96.

10. *Id.* § 5110(5)(A)(ii)(I), 134 Stat. at 200.

11. *See id.* § 5110(5)(A)(ii)(II), 134 Stat. at 200.

Employers are prohibited from requiring an employee to exhaust other paid leave prior to using the paid sick leave afforded by the EPSLA.<sup>12</sup> Importantly, the protections do not apply to employees who are able to work remotely via telecommuting.<sup>13</sup>

## 2. Emergency Family and Medical Leave Expansion Act

In addition to the EPSLA, the FFCRA also includes protections for employees under the Emergency Family and Medical Leave Expansion Act (“EFMLEA”).<sup>14</sup> The EFMLEA allows eligible employees to take up to twelve weeks of leave due to the employee’s inability to work, including telework, in order to care for a minor child whose school, daycare, or other childcare provider has closed or become unavailable as a result of the COVID-19 pandemic.<sup>15</sup> As is the case under the FMLA, an employer is required to reinstate an employee who takes leave under the EFMLEA to his or her position, or a reasonable equivalent.<sup>16</sup>

There are some significant differences between the EFMLEA and the FMLA, however. For example, whereas the FMLA requires an employee to have been employed by his or her employer for at least twelve months (and 1250 hours of service) before the employee can take protected leave, the EFMLEA only requires the employee to have been employed for thirty days in order to take protected leave.<sup>17</sup> Additionally, the EFMLEA applies to all employers with fewer than 500 employees whereas the FMLA applies to employers with fifty or more employees.<sup>18</sup>

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12. *Id.* § 5102(e)(2), 134 Stat. at 196. Employers may also not require that the employee find a replacement employee to cover the hours which the employee will miss. *Id.* § 5102(d), 134 Stat. at 196.

13. *Id.* § 5102(a), 134 Stat. at 195.

14. *Id.* § 3101, 134 Stat. at 189.

15. *Id.* sec. 3102(b), § 110, 134 Stat. at 189.

16. *Id.* sec. 3102(b), § 110(d), 134 Stat. at 191. For employers with fewer than twenty-five employees, an employer is not required to reinstate an employee who takes leave under the EFMLEA if (i) the employee’s position no longer exists because of “economic conditions or other changes in operating conditions” as a result of COVID-19; (ii) the employer has made a reasonable effort to restore the employee to an equivalent position; and (iii) if, after the employer’s reasonable efforts no reinstatement can be made, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available within one year after the end of the public health emergency or the end of the employee’s twelve-week leave, whichever is earlier. *Id.* sec. 3102(b), § 110(d)(1)–(3), 134 Stat. at 191.

17. *Id.* sec. 3102(b), § 110(a)(1)(A), 134 Stat. at 189.

18. *Id.* sec. 3102(b), § 110(a)(1)(B), 134 Stat. at 189. As with the EPSLA, however, an employer with fifty or fewer employees may be exempt if they can establish that providing

Under the EMFLEA, the first ten days of leave is unpaid; however, an employee can elect to take paid leave under the EPLSA or can use any other accrued paid leave during this ten-day period.<sup>19</sup> After the initial ten-day period, an employer is required to remunerate the employee at a rate of two-thirds his or her regular rate of pay, up to \$200 per day but may not exceed a total of \$10,000.<sup>20</sup>

## B. CARES Act Overview

On April 24, 2020, President Trump also signed the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), in order to support businesses and employees impacted by the COVID-19 pandemic.<sup>21</sup> Although a deep dive into the CARES Act is beyond the scope of this update, the CARES Act contains several key financial and other protections for employers due to the expected impact of COVID-19 on the United States economy. A cursory overview of some of these protections follows:

### 1. Paycheck Protection Program

Allows eligible employers with fewer than 500 employees to obtain a loan for the purpose of paying overhead, such as payroll, employee benefits, rent, utilities, etc., subject to certain restrictions and requirements (including a good-faith certification that the funds are necessary to support ongoing operations and will be used to retain and maintain workers or the employer’s mortgage, lease, or utility payments).<sup>22</sup>

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EFMLEA leave would “jeopardize the viability of the business as a going concern.” *Id.* sec. 3102(b), § 110(a)(3)(B), 134 Stat. at 190.

19. *Id.* sec. 3102(b), § 110(b)(1)(A)–(B), 134 Stat. at 190.

20. *Id.* sec. 3102(b), § 110(b)(2)(A)–(B), 134 Stat. at 190–91.

21. Coronavirus Aid, Relief, and Economic Security Act of 2020 (CARES Act), Pub. L. No. 116-136, 134 Stat. 281; see also Lauren Egan, *Trump Signs Coronavirus Aid Bill as Tensions Rise over Next One*, NBC NEWS (Apr. 24, 2020), <https://www.nbcnews.com/politics/white-house/trump-expected-sign-interim-coronavirus-bill-tensions-rise-over-next-n119171111> [<https://perma.cc/7EBK-HGQK>].

22. CARES Act § 1102, 134 Stat. at 286.

## 2. Loan Forgiveness Program

Allows employers who receive a loan under section 1102 to apply to have a portion of their paycheck protection loan forgiven based on certain reduction requirements and thresholds.<sup>23</sup>

## 3. Emergency Grants

Authorizes the Small Business Administration to provide emergency grants of \$10,000 to qualifying employers for the purposes of providing paid sick leave to employees who are unable to work because of COVID-19, maintaining payroll, paying mortgage or rent, or other allowable purposes.<sup>24</sup>

## 4. Enhancement of Unemployment Insurance Protections (Sections 2101–2116 of the CARES Act)

Extends unemployment insurance by thirteen weeks and provides a four-month enhancement of benefits, including an additional \$600 per week benefit in addition to the employee's state's benefit amount.<sup>25</sup>

Expands the scope of eligible recipients by making unemployment benefits available to those with limited work history or who have exhausted their state unemployment benefits.<sup>26</sup>

Individuals who are unable to work remotely and who are otherwise unemployed or partially unemployed because of COVID-19 are covered.<sup>27</sup>

## 5. Retirement Account Access Provisions

Waives the IRS's 10% excise tax on early distribution from retirement plans if the distribution is for an individual who is diagnosed with COVID-19, whose spouse or dependent is diagnosed

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23. *Id.* § 1106, 134 Stat. at 297.

24. *Id.* § 1110, 134 Stat. at 306.

25. *Id.* §§ 2102(c)(2), 2104(e), 2107(a)–(b), 134 Stat. at 315, 319, 323–25.

26. *Id.* § 2102(a)(3), 134 Stat. at 313.

27. *Id.*

with COVID-19, or who is furloughed, laid off, or unable to work due to COVID-19.<sup>28</sup>

6. Relaxed Tax Provisions (Sections 2301–2302, 3607–3608 of the CARES Act)

Allows employers to claim a tax credit equal to 50% of “qualified wages” paid to employees from March 13, 2020, to December 31, 2020, if the employer’s operations are fully or partially suspended due to COVID-19 or if the employer’s 2020 gross receipts are less than 50% of the gross receipts for the same calendar quarter in 2019.<sup>29</sup>

Permits all employers, regardless of the level of COVID-19’s impact, to delay payment of 2020 Social Security taxes (with 50% payable by December 31, 2021, and the remaining 50% payable by December 31, 2022).<sup>30</sup>

C. *Survey of COVID-19-Related Issues Affecting or Soon-to-be Affecting Virginia Employers*

The lasting effect of COVID-19 on the American workplace remains to be seen. As local, state, and federal leaders grapple with trying to reopen businesses and the economy while preventing additional spread or subsequent waves or outbreaks of positive COVID-19 cases, employers nationwide are left to navigate a new and challenging reality fraught with unique and novel questions.<sup>31</sup> In the aftermath of the pandemic, litigation related to COVID-19 has and will continue to increase.<sup>32</sup> The following is a non-exhaustive list of areas in which employment litigation may increase because of COVID-19:

(1) Discrimination and retaliation claims arising from a given employee’s selection for layoff or furlough;

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28. *Id.* § 2202(a), 134 Stat. at 340.

29. *Id.* § 2301, 134 Stat. at 347.

30. *Id.* § 2302, 134 Stat. at 351.

31. *COVID-19 Implications for Business*, MCKINSEY & CO. (July 23, 2020), <https://www.mckinsey.com/business-functions/risk/our-insights/covid-19-implications-for-business> [<https://perma.cc/3WGX-D3MK>].

32. Christopher R. Dyess, *The Coming Tsunami of Employment-Related COVID-19 Litigation*, N.Y. L.J. (Apr. 21, 2020), <https://www.law.com/newyorklawjournal/2020/04/21/the-coming-tsunami-of-employment-related-covid-19-litigation> [<https://perma.cc/3VG6-FW2N>].



- (2) Discrimination and retaliation claims arising from a failure to hire or rehire due to protected class (such as age, where the employee or applicant is at a higher risk for adverse COVID-19 symptoms);
- (3) Disparate impact claims in disproportionately selecting higher-risk employees for layoff or furlough;
- (4) Breach of contract claims for rescinding offers of employment due to an employer's loss of profitability;
- (5) Failure to accommodate employees who are at higher risk for adverse COVID-19 symptoms;
- (6) Failure to accommodate telecommuting as a reasonable accommodation;
- (7) Increased claims based on persons being regarded as disabled or having COVID-19;
- (8) Alleged violations of the paid sick leave and emergency medical leave provisions of the FFCRA;
- (9) Workplace safety claims relating to an employer's failure to furnish a safe workplace;
- (10) Workplace safety whistleblower and retaliation claims arising from an employee's complaint about an unsafe workplace; and
- (11) Negligence or other personal injury claims related to potential or actual COVID-19 exposure while on the job.

D. *Executive Order No. 63: Virginia's Workplace Safety Mandate*

In response to an executive order from Governor Ralph Northam, Virginia became the first state to adopt an emergency workplace safety standard addressing occupational health and safety concerns raised by COVID-19.<sup>33</sup> Governor Northam entered Executive Order 63 in May, directing the Virginia Department of Labor and Industry's Safety and Health Codes Board ("DOLI Board") to create an enforceable regulation to combat COVID-19.<sup>34</sup>

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33. Vin Gurrier, *Va. Adopts Nation's First COVID-19 Workplace Safety Mandate*, LAW 360 (July 15, 2020), <https://www.law360.com/employment/articles/1292428> [https://perma.cc/6XA3-M3ZW].

34. *Id.*

On July 15, 2020, the DOLI Board voted to approve the new infectious disease prevention rule.<sup>35</sup>

Under the mandate, Virginia businesses must provide workers with personal protective equipment and adhere to strict guidelines for sanitizing the workplace, enforcing social distancing, and establishing infectious disease response plans.<sup>36</sup> Moreover, if an employee tests positive for COVID-19, the employer is required to inform all employees within twenty-four hours and direct all workers who are suspected to have had contact with the infected employee to stay home for ten days or until he or she tests negative for COVID-19 twice in a row.<sup>37</sup>

Following the DOLI Board's vote to approve the rule, Governor Northam and others praised Virginia's efforts in "creating the nation's first enforceable workplace safety requirements," which was necessary due to the "absence of federal guidelines" and "[i]n the face of federal inaction"—referring presumably to the U.S. Department of Labor's Occupational Safety and Health Administration's issuance of non-binding workplace safety guidance but refusal to set a federal nationwide standard.<sup>38</sup> Governor Northam remarked that

[w]orkers should not have to sacrifice their health and safety to earn a living, especially during an ongoing global pandemic. . . . Keeping Virginians safe at work is not only a critical part of stopping the spread of this virus, it's key to our economic recovery and it's the right thing to do.<sup>39</sup>

## II. LEGISLATIVE UPDATES: A CHANGING LANDSCAPE IN VIRGINIA

### A. *Prequel 2019 Legislation*

Prior to 2020's sweeping changes in Virginia employment law, the General Assembly foreshadowed its intent to bolster protections for employees through a couple of key precursor pieces of legislation in 2019, which are discussed in turn.

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35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

## 1. Personnel Records

Although an employee's personnel file has historically been viewed as solely within the purview of the employer,<sup>40</sup> the General Assembly passed Senate Bill 1724, which amended Virginia Code section 8.01-413, to afford employees greater rights to access their personnel records.<sup>41</sup>

Where Virginia Code section 8.01-413.1 previously concerned the admissibility of wage and salary records in litigation, the amendment—which took effect July 1, 2019—requires all employers to provide current and former employees with copies of certain employment records within thirty days of his or her written request.<sup>42</sup> The employee is not entitled to every record in the employer's possession, but is entitled to records showing the employee's (1) dates of employment; (2) wages or salary; (3) job description and title; and (4) injuries sustained in the course of employment.<sup>43</sup> As amended, Virginia Code section 8.01-413.1(B) reads:

Every employer shall, upon receipt of a written request from a current or former employee or employee's attorney, furnish a copy of all records or papers retained by the employer in any format, reflecting (i) the employee's dates of employment with the employer; (ii) the employee's wages or salary during the employment; (iii) the employee's job description and job title during the employment; and (iv) any injuries sustained by the employee during the course of the employment with the employer.<sup>44</sup>

The employer must provide these documents, subject to a reasonable reimbursement of costs, within thirty days of the employee's request; however, if the employer is unable to provide such records within the thirty-day timeline, it may notify the employee or his attorney and explain the reason for the delay.<sup>45</sup> If the employer does so, the statute allows them thirty additional days to respond.<sup>46</sup> If, after the additional thirty days, the employer fails to

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40. Diane Cadrain, *Setting the Records Straight*, HR MAG. (June 1, 2007), <https://www.shrm.org/hr-today/news/hr-magazine/pages/0607cadrain.aspx> [<https://perma.cc/4TQH-24QA>].

41. Act of Mar. 21, 2019, ch. 733, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 8.01-413.1 (Cum. Supp. 2020)).

42. VA. CODE ANN. § 8.01-413.1(A)–(B) (Cum. Supp. 2020).

43. *See id.* § 8.01-413.1(B) (Cum. Supp. 2020).

44. *Id.*

45. *Id.*

46. *Id.*

produce the requested documents, the employee or his attorney may seek the issuance of a subpoena duces tecum and recourse in the circuit court.<sup>47</sup>

The General Assembly did provide employers with a narrow exception to this requirement. Employers are not required to furnish the requested documents to an employee if those documents contain a written statement from the employee's treating physician or clinical psychologist stating that

the furnishing to or review by the employee of such records or papers would be reasonably likely to endanger the life or physical safety of the employee or another person, or that such records or papers make reference to a person, other than a health care provider, and the access requested would be reasonably likely to cause substantial harm to such referenced person.<sup>48</sup>

Importantly, Virginia Code section 8.01-413.1 does not impose an obligation on employers to keep particular records, or to keep personnel files for a particular length of time.

## 2. Nondisclosure Agreements and Sexual Assault

On February 22, 2019, the General Assembly passed House Bill 1820 to create Virginia Code section 40.1-28.01, which prohibits employers from requiring employees or applicants to sign a "nondisclosure or confidentiality agreement that has the purpose or effect of concealing the details relating to a claim of sexual assault."<sup>49</sup> The law voids and renders unenforceable any such agreement.<sup>50</sup> The term "sexual assault" is not technically defined in the statute, but Virginia Code section 40.1-28.01 otherwise makes clear by reference to other statutes that it applies to claims arising under Virginia's laws on rape (Virginia Code section 18.2-61), forcible sodomy (Virginia Code section 18.2-67.1), aggravated sexual battery (Virginia Code section 18.2-67.3), and sexual battery (Virginia Code section 18.2-67.4).<sup>51</sup> Importantly, insofar as the new law contemplates the execution of nondisclosure or confidentiality agree-

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47. *See id.* § 8.01-413.1(C)–(D) (Cum. Supp. 2020).

48. *Id.* § 8.01-413.1(E) (Cum. Supp. 2020).

49. Act of Feb. 22, 2019, ch. 131, 2019 Va. Acts 282, 282 (codified at VA. CODE ANN. § 40.1-28.01(A) (Cum. Supp. 2020)).

50. VA. CODE ANN. § 40.1-28.01(A) (Cum. Supp. 2020)).

51. *Id.*

ments “as a condition of employment,” it does not impact the inclusion of nondisclosure or confidentiality provisions in severance or settlement agreements.<sup>52</sup>

### 3. Written Pay Statements

The General Assembly also amended Virginia Code section 40.1-29 to impose additional obligations to employers in the provision of pay statements to employees.

Prior to January 1, 2020—the amendment’s effective date—employers were only required to furnish paystubs showing an employee’s gross pay and applicable deductions, and only at the employee’s request.<sup>53</sup> As amended, employers are now required to provide a written statement, by paystub or online accounting, of an employee’s earnings that states or shows the following: (1) the employer’s name and address; (2) the number of hours the employee worked during the pay period; (3) the employee’s rate of pay; (4) the employee’s gross wages for the pay period; and (5) the amount and purpose of any deductions from the employee’s pay.<sup>54</sup> Under the amendment, this information must be provided regardless of any specific request from the employee.<sup>55</sup>

## B. 2020 Legislation

### 1. Virginia Values Act and Changes to the Virginia Human Rights Act

Of the several new pieces of employment legislation signed into law by Governor Northam in 2020, the Virginia Values Act (Senate Bill 868) is perhaps the most notable, as it significantly broadens the scope of the Virginia Human Rights Act (“VHRA”) by expanding protections for additional classes of persons as well as providing additional remedies beyond what is provided under federal anti-discrimination laws.<sup>56</sup>

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52. *See id.* § 40.1-28.01(B) (Cum. Supp. 2020).

53. Act of Apr. 3, 2019, ch. 845, 2019 Va. Acts 1989, 1990 (codified as amended at VA. CODE ANN. § 40.1-29(C) (Cum. Supp. 2020)).

54. VA. CODE ANN. § 40.1-29(C) (Cum. Supp. 2020).

55. Ch. 845, 2019 Va. Acts at 1990.

56. Act of Apr. 11, 2020, ch. 1140, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. §§ 2.2-3900 to -3908 (Cum. Supp. 2020)).

Prior to the Virginia Values Act, which took effect July 1, 2020, the VHRA only applied to a narrow category of employers—those with more than five and fewer than fifteen employees (or, fewer than twenty employees with respect to age).<sup>57</sup> And it only prohibited the *discharge* of an employee on the basis of the following characteristics: (i) race, (ii) color, (iii) religion, (iv) national origin, (v) sex, (vi) pregnancy, and (vii) childbirth or related medical conditions, including lactation.<sup>58</sup> The only remedies that were available to affected employees were a maximum twelve months of backpay and reasonable attorneys' fees (not to exceed 25% of the backpay award).<sup>59</sup> The VHRA prohibited the recovery of any other compensatory or punitive damages as well as prohibited reinstatement of the employee.<sup>60</sup>

To summarize, prior to the Virginia Values Act, the VHRA only applied to small employers not covered by Title VII of the Civil Rights Act of 1964 ("Title VII") and other similar federal anti-discrimination laws, only protected against discrimination which resulted in an employee's discharge, and only permitted modest damages.<sup>61</sup>

The Virginia Values Act expands the VHRA in the following ways: it (i) broadens employer coverage; (ii) affords protections to additional classes; (iii) prohibits more than just an employee's unlawful discharge; (iv) augments the available remedies for affected employees; and (v) requires employers to provide reasonable accommodations for pregnancy, childbirth, and related medical conditions, including lactation.<sup>62</sup> Each of these are discussed in turn.

#### a. Broadened Employer Coverage

As amended, the VHRA now covers all employers with fifteen or more employees, and not just those employers with between six and fourteen employees.<sup>63</sup> Moreover, the VHRA now extends to

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57. VA. CODE ANN. § 2.2-3903(B) (Repl. Vol. 2017).

58. *Id.*

59. *Id.*

60. *Id.*

61. *See supra* notes 56–59 and accompanying text.

62. Act of Apr. 11, 2020, ch. 1140, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. §§ 2.2-2901.1, -3900, -3905 to -3908 (Cum. Supp. 2020)).

63. VA. CODE ANN. § 2.2-3905(A) (Cum. Supp. 2020); *id.* § 2.2-3903(B) (Repl. Vol. 2017).

other entities not previously covered, including employment agencies, labor organizations, state agencies (and other similar state-based entities), and school boards.<sup>64</sup>

b. Additional Classes Protected

On March 4, 2020, shortly before the passing of the Virginia Values Act, Governor Northam signed an amendment to the definition of “race” under the VHRA to include traits historically associated with race, such as hairstyles.<sup>65</sup> In so doing, Virginia became just the fourth state (behind California, New Jersey, and New York) to make discrimination based on hairstyles unlawful.<sup>66</sup> As amended, the VHRA now provides that “[t]he terms ‘because of race’ or ‘on the basis of race’ or terms of similar import when used in reference to discrimination . . . 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.”<sup>67</sup> Importantly, while the amendment expressly identifies hairstyles, the amendment applies to any other traits historically associated with race.

A little more than one month following the augmented definition of race for purposes of the VHRA, Governor Northam signed an amendment prohibiting discrimination in employment on the basis of sexual orientation and gender identity.<sup>68</sup> “Sexual orientation” is defined in the statute as “a person’s actual or perceived heterosexuality, bisexuality, or homosexuality.”<sup>69</sup> “Gender identity” is defined in the statute 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.”<sup>70</sup>

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64. *Id.* §§ 2.2-2901.1(B), -3905(B), 15.2-1500.1(B), 22.1-295.2(B) (Cum. Supp. 2020). The protections afforded under the VHRA also apply to places of public accommodation. *See id.* § 2.2-3904(B) (Cum. Supp. 2020).

65. Act of Mar. 3, 2020, ch. 107, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 2.2-3901(D) (Cum. Supp. 2020)).

66. Guy Brenner & Caroline Guensberg, *Virginia Becomes the Fourth State to Ban Discrimination on the Basis of Hairstyles*, PROSKAUER ROSE LLP: LAW AND THE WORKPLACE (Mar. 4, 2020), <https://www.lawandtheworkplace.com/2020/03/virginia-becomes-the-fourth-state-to-ban-discrimination-on-the-basis-of-hairstyles/> [<https://perma.cc/GD9A-BS2H>].

67. VA. CODE ANN. § 2.2-3901(D) (Cum. Supp. 2020).

68. Act of Apr. 11, 2020, ch. 1140, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 2.2-3905(B) (Cum. Supp. 2020)).

69. VA. CODE ANN. § 2.2-3901(C) (Cum. Supp. 2020).

70. *Id.* § 2.2-3901(B) (Cum. Supp. 2020).

Moreover, while the VHRA already prohibited discrimination based on pregnancy, childbirth or related medical conditions, it did not previously specify lactation as being covered within those categories. As amended by the Virginia Values Act, the VHRA now includes lactation within the definition of “on the basis of pregnancy, childbirth or related medical conditions.”<sup>71</sup> “Lactation” is defined as “a condition that may result in the feeding of a child directly from the breast or the expressing of milk from the breast.”<sup>72</sup>

Lastly, the VHRA prohibits discrimination based on veteran status, which had not previously been prohibited under Virginia law despite having long been protected under federal law.<sup>73</sup>

### c. Expands the Possible Bases for Relief

As mentioned, before the Virginia Values Act, the VHRA did not apply to discrimination that did not result in an employee’s discharge. Similar to its federal counterpart,<sup>74</sup> the VHRA now prohibits an employer from engaging in an “unlawful employment practice,” which includes “fail[ing] or refus[ing] to hire, discharg[ing], or otherwise discriminat[ing] against any individual with respect to such individual’s compensation, terms, conditions, or privileges of employment” because of a protected characteristic.<sup>75</sup>

Employers with between six and fourteen employees remain subject only to claims of unlawful discharge, as before the Virginia Values Act.<sup>76</sup>

### d. Expands the Available Remedies

The Virginia Values Act also amends the VHRA to include enforcement mechanisms and remedies previously unrecognized. For example, the VHRA now affords employees with a private right of action against all covered employers with fifteen or more employees (or twenty or more employees if the discrimination is based on

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71. Act of Apr. 11, 2020, ch. 1139, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 2.2-3901(A) (Cum. Supp. 2020)).

72. VA. CODE ANN. § 2.2-3901(E) (Cum. Supp. 2020).

73. *Id.* § 2.2-3905(B) (Cum. Supp. 2020).

74. 42 U.S.C. § 2000e-2.

75. VA. CODE ANN. § 2.2-3905(B) (Cum. Supp. 2020).

76. *See id.* § 2.2-3905(A) (Cum. Supp. 2020).



age) for an employer's "unlawful employment practice."<sup>77</sup> And where employees were previously limited to twelve months' back-pay and a limited attorneys' fees award, the VHRA expands the available damages to include an unlimited amount of compensatory damages, punitive damages, reasonable attorneys' fees, and costs, in addition to temporary and permanent injunctive relief.<sup>78</sup> The unlimited amount of compensatory damages is significant because it now provides employees with greater protection than exists under federal law, as claims under Title VII and other federal laws are subject to compensatory damages caps which cannot exceed \$300,000.<sup>79</sup>

Importantly, like its federal counterpart,<sup>80</sup> the VHRA now requires an aggrieved employee to first file a charge of discrimination with the Virginia Division of Human Rights or Equal Employment Opportunity Commission (and cross-file with the Virginia Division of Human Rights) before the employee can bring an action in court.<sup>81</sup> Upon receipt of notice that the charge will be dismissed, the employee can file a lawsuit in general district court (subject to jurisdictional limits) or circuit court.<sup>82</sup>

e. Requires Employers to Provide Reasonable Accommodations to Certain Classes

In addition to including lactation in the definition of "pregnancy, childbirth or related medical conditions," the Virginia Values Act also created a new statutory obligation for employers with more than five employees to provide reasonable accommodations to both applicants and employees who are experiencing pregnancy, childbirth or related medical conditions, unless doing so would cause an undue hardship.<sup>83</sup>

"Reasonable accommodation" under the amendment is defined to include

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77. Act of Apr. 11, 2020, ch. 1140, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. §§ 2.2-3905(A), -3907(B) (Cum. Supp. 2020)).

78. *Id.* at \_\_ (codified as amended at VA. CODE ANN. § 2.2-3906(B)-(C) (Cum. Supp. 2020)).

79. *Id.* at \_\_; 42 U.S.C. § 1981a(b).

80. *See* 42 U.S.C. § 2000e-5(b).

81. VA. CODE ANN. § 2.2-3907 (Cum. Supp. 2020).

82. *Id.* § 2.2-3907(B), (F)-(G) (Cum. Supp. 2020).

83. *Id.* § 2.2-3909 (Cum. Supp. 2020).

more frequent or longer bathroom breaks, breaks to express breast milk, access to a private location other than a bathroom for the expression of breast milk, access to a private location other than a bathroom for the expression of breast milk, acquisition or modification of equipment or access or modification of employee seating, a temporary transfer to a less strenuous or hazardous position, assistance with manual labor, job restructuring, a modified work schedule, light duty assignments, and leave to recover from childbirth.<sup>84</sup>

As under the Americans with Disabilities Act,<sup>85</sup> the VHRA requires employers and employees to engage in an “interactive process” to determine an appropriate and reasonable accommodation and similarly prohibits retaliation against employees who request a reasonable accommodation.<sup>86</sup>

The new law also expressly creates a private right of action for an aggrieved employee to challenge an employer’s failure to provide a reasonable accommodation, failure to hire, discharge, or other discrimination.<sup>87</sup> Importantly, the General Assembly did not make this private right of action subject to the employee first filing a charge of discrimination.<sup>88</sup> Under the law, an employee has two years from the date of the last adverse action to bring an action in general district or circuit court (or within ninety days if the employee filed a charge of discrimination).<sup>89</sup>

Lastly, the VHRA requires employers to post information on the prohibition against discrimination and the right to a reasonable accommodation in a conspicuous location and to include the same in their employee handbooks.<sup>90</sup> In addition to new employees, the law also requires employers to provide this information to all employees who provide notification of an impending pregnancy within ten days.<sup>91</sup>

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84. *Id.*

85. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. § 12101–12213).

86. VA. CODE ANN. § 2.2-3909(C) (Cum. Supp. 2020).

87. *Id.* § 2.2-3909(E) (Cum. Supp. 2020).

88. *See id.*

89. *Id.*

90. *Id.* § 2.2-3909(D) (Cum. Supp. 2020).

91. *Id.*

## 2. Employee Misclassification

In 2020, Virginia also joined a growing number of states that enacted legislation specifically designed to curb the practice of employers classifying workers as independent contractors instead of employees.<sup>92</sup>

Governor Northam's directed efforts to address employee misclassification began in August 2018 when he reconstituted a taskforce, the Inter-Agency Taskforce on Worker Misclassification and Payroll Fraud ("Taskforce"), specifically charged with providing recommendations on how to "measure and combat misclassification in Virginia."<sup>93</sup> The Taskforce included representatives from several state agencies, including the Virginia Employment Commission, the Department of Labor and Industry, the Department of Professional and Occupational Regulation, and the Office of the Attorney General.<sup>94</sup>

In its November 22, 2019, report, the Taskforce observed that

[t]he misclassification of actual employees as 'independent contractors' creates a competitive disadvantage for Virginia businesses that follow the law, deprives the Commonwealth of millions of dollars in tax revenues necessary to supply services to Virginia's citizens, and prevents workers from receiving protections and benefits to which they are legally entitled.<sup>95</sup>

Citing to a similar report from 2012, the Taskforce approximated that "up to one-third of audited employers in certain industries misclassify employees," which allows those employers to lower their overhead by as much as 40% by avoiding obligations to purchase workers' compensation insurance, to pay unemployment and insurance taxes, or to comply with minimum wage and overtime obligations.<sup>96</sup> The cited 2012 report observed that misclassification affects as many as 214,000 workers and further estimated that

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92. INTER-AGENCY TASKFORCE ON MISCLASSIFICATION & PAYROLL FRAUD, REPORT FOR EXECUTIVE ORDER THIRTY-EIGHT 8 (2019), [https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/Final\\_Worker-Misclassification-Report.pdf](https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/Final_Worker-Misclassification-Report.pdf) [<https://perma.cc/GNL9-ARRG>]. Other states that have enacted penalties for misclassified workers include: Alaska, California, Colorado, Connecticut, Delaware, Florida, Illinois, Kansas, Louisiana, Maine, Maryland, Massachusetts, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, Rhode Island, Texas, Utah, Vermont, and Wisconsin. *Id.*

93. *Id.* at 5.

94. *Id.* at 6, 28–35.

95. *Id.* at 3.

96. *Id.*

worker misclassification lowered Virginia's annual state income tax revenue by as much as \$28 million.<sup>97</sup>

The Taskforce then offered eleven recommendations aimed at curbing employee misclassification, including (i) assessing greater penalties to dissuade worker misclassification; (ii) eliminating employers' ability to claim good faith defenses (such as through the receipt of advice and counsel on its business model); (iii) creating a private cause of action permitting misclassified workers to sue for wages, taxes, lost benefits, etc.; (iv) providing whistleblower protections to those who report suspected misclassification; and (v) making misclassification a sanctionable offense for Board of Contractors-licensed businesses.<sup>98</sup>

In response to the Taskforce's efforts, the General Assembly enacted Virginia Code section 40.1-28.7:7. This new law, which took effect July 1, 2020, accomplishes two primary objectives. First, it establishes a presumption that an individual providing services for remuneration is an employee, not an independent contractor.<sup>99</sup> Second, it creates a private right of action for workers to challenge and enforce misclassification.<sup>100</sup> In other words, an aggrieved worker may now bring a civil action for damages against their employer if the employer had knowledge of the individual's misclassification.<sup>101</sup> If that worker successfully challenges his or her misclassification, he or she is entitled to lost wages, salary, employment benefits (including resulting expenses that would have otherwise been covered by insurance), reasonable attorneys' fees, and costs.<sup>102</sup>

In addition to the presumption in favor of employee status and the creation of a private right of action to challenge one's employee classification, the General Assembly also enacted a separate statute, Virginia Code section 40.1-33.1 (also effective July 1, 2020), prohibiting employers from retaliating against workers who report suspected misclassification.<sup>103</sup> Virginia Code section 40.1-33.1, as enacted, provides in pertinent part:

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97. *Id.* at 3–4.

98. *Id.* at 6–7.

99. VA. CODE ANN. § 40.1-28.7:7(B) (Cum. Supp. 2020).

100. *Id.* § 40.1-28.7:7(A) (Cum. Supp. 2020).

101. *Id.*

102. *Id.*

103. *Id.* § 40.1-33.1 (Cum. Supp. 2020).

A. An employer shall not discharge, discipline, threaten, discriminate against, or penalize an employee or independent contractor, or take other retaliatory action regarding an employee or independent contractor's compensation, terms, conditions, location, or privileges of employment, because the employee or independent contractor:

1. Has reported or plans to report to an appropriate authority that an employer, or any officer or agent of the employer, has failed to properly classify an individual as an employee and failed to pay required benefits or other contributions; or
2. Is requested or subpoenaed by an appropriate authority to participate in an investigation, hearing, or inquiry by an appropriate authority or in a court action.<sup>104</sup>

The statute also provides that the prohibition only applies to those employees who report suspected worker misclassification "in good faith and upon a reasonable belief that the information is accurate."<sup>105</sup> If the employee recklessly discloses information about suspected worker misclassification or otherwise "knew or should have known" that the information was "false, confidential by law, or malicious," that employee is not entitled to the protections of Virginia Code section 40.1-33.1(A).<sup>106</sup>

Notably, Virginia Code section 40.1-33.1 provides an administrative enforcement remedy to employees who have suffered perceived retaliation for reporting suspected worker misclassification.<sup>107</sup> Under Virginia Code section 40.1-33.1(C), "[a]ny employee who is discharged, disciplined, threatened, discriminated against, or penalized in a manner prohibited by this section may file a complaint with the Commissioner [of the Virginia Department of Labor and Industry]."<sup>108</sup> Thereafter, the Commissioner may proceed on the employee's behalf, to seek reinstatement of the employee and recovery of the employee's lost wages, or other potentially appropriate remedies.<sup>109</sup> In addition, the General Assembly granted the Commissioner the authority to assess "a civil penalty not to exceed the amount of the employee's wages that are lost" to employers

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104. *Id.*

105. *Id.* § 40.1-33.1(B) (Cum. Supp. 2020).

106. *See id.*

107. *See id.* § 40.1-33.1(C) (Cum. Supp. 2020).

108. *Id.*

109. *Id.*

found to have retaliated against an employee that reported suspected worker misclassification.<sup>110</sup>

Lastly, the General Assembly also passed legislation, Virginia Code section 58.1-1900 to -1905, granting additional authority to the Virginia Department of Taxation to investigate and assess tax penalties for worker misclassification. Under Virginia Code section 58.1-1901,

[a]ny employer, or any officer or agent of the employer, that fails to properly classify an individual as an employee . . . and fails to pay taxes, benefits, or other contributions required to be paid with respect to an employee shall, upon notice by the Department to the affected party, be subject to a civil penalty of up to \$1,000 per misclassified individual for a first offense, up to \$2,500 per misclassified individual for a second offense, and up to \$5,000 per misclassified individual for a third or subsequent offense.<sup>111</sup>

Other severe consequences are at stake as well for employers who misclassify their employees. Virginia Code section 58.1-1902 requires that the Virginia Department of Taxation provide notice of the employer's misclassifications to "all public bodies and covered institutions of the name of the employer" and prohibits those public bodies and covered institutions from awarding any contract to that employer for a period of up to one year from the date of the notice of a second offense and up to three years from the date of the notice of a third or subsequent offense.<sup>112</sup> Importantly, the new law also prohibits employers from "requir[ing] or request[ing] that an individual enter into an agreement [such as an independent contractor agreement] or sign a document that results in the misclassification of the individual as an independent contractor or otherwise does not accurately reflect the relationship with the employer" and likewise prohibits retaliation against any individual who exercises rights protected under the new law.<sup>113</sup>

### 3. Additional Whistleblower Protections

The General Assembly also enacted a new comprehensive whistleblower protection law, Virginia Code section 40.1-27.3 (House

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110. *Id.* § 40.1-33.1(D) (Cum. Supp. 2020).

111. *Id.* § 58.1-1901 (Cum. Supp. 2020).

112. *Id.* § 50.1-1902 (Cum. Supp. 2020).

113. *Id.* §§ 58.1-1903 to -1904 (Cum. Supp. 2020).

Bill 798)—the first of its kind in Virginia—which took effect July 1, 2020.

Prior to the General Assembly's enactment of House Bill 798, there was virtually no employment protection for whistleblowers in the private sector. Indeed, Virginia has long adhered to the doctrine of employment at will, which allows an employee to leave his or her employment at any time and for any reason and simultaneously permits an employer to terminate an employee at any time and for any reason.<sup>114</sup>

The Supreme Court of Virginia first recognized an exception to the at-will doctrine in *Bowman v. State Bank of Keysville*,<sup>115</sup> permitting an action for wrongful discharge in violation of public policy.<sup>116</sup> However, since *Bowman*, Virginia courts have exercised significant caution in permitting claims of wrongful termination and have interpreted *Bowman* narrowly.<sup>117</sup> In fact, as the Supreme Court of Virginia recently observed in *Francis v. National Accrediting Commission of Career Arts & Sciences, Inc.*, Virginia courts have only recognized three narrow circumstances in which an employee may sue his or her employer for a wrongful termination in violation of public policy: (1) when the employer violated an employee's exercise of a statutorily created right; (2) when the employer's actions against the employee violate a public policy that is explicitly expressed in a Virginia statute and the employee was a member of the class of persons the public policy was designed to protect; and (3) the employee refuses to engage in a criminal act.<sup>118</sup>

As enacted, Virginia Code section 40.1-27.3 reinforces the right of employees to challenge actions that would fall within the three recognized scenarios under *Bowman* and its progeny and also expands the ability of employees to seek relief beyond what has been

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114. See *Francis v. Nat'l Accrediting Comm'n of Career Arts & Scis.*, 293 Va. 167, 171–72, 796 S.E.2d 188, 190 (2017) (citing *Johnston v. William E. Wood & Assocs.*, 292 Va. 222, 225–26, 787 S.E.2d 103, 105 (2016)).

115. 229 Va. 534, 331 S.E.2d 797 (1985).

116. *Francis*, 293 Va. at 172, 796 S.E.2d at 190 (citing *Bowman*, 229 Va. at 540, 331 S.E.2d at 801).

117. See *id.* at 172, 796 S.E.2d at 190.

118. See *id.* at 172–73, 796 S.E.2d at 190–91; see also *Gerald v. Diversified Prot. Corp.*, No. 118-cv-1154, 2019 U.S. Dist. LEXIS 106660, at \*13 (E.D. Va. June 25, 2019) (reiterating that under the second scenario, a wrongful termination claim under *Bowman* can only exist if based on a public policy in a Virginia, not federal, statute or regulation); *Briggman v. Nexus Servs.*, No. 5:18-cv-00047, 2018 U.S. Dist. LEXIS 209212, at \*10 (W.D. Va. Dec. 11, 2018) (same).

recognized by *Bowman* and its progeny. The new law provides that “[a]n employer shall not discharge, discipline, threaten, discriminate against, or penalize an employee, or take other retaliatory action regarding an employee’s compensation, terms, conditions, location, or privileges of employment”<sup>119</sup> under the following scenarios:

- (1) The employee “[o]r a person acting on behalf of the employee, in good faith reports a violation of any federal or state law or regulation to a supervisor or to any governmental body or law-enforcement official;”<sup>120</sup>
- (2) The employee “[i]s requested by a governmental body or law-enforcement official to participate in an investigation, hearing, or inquiry;”<sup>121</sup>
- (3) The employee “[r]efuses to engage in a criminal act that would subject him or her to criminal liability;”<sup>122</sup>
- (4) The employee “[r]efuses to perform an action that violates any federal or state law or regulation, and the employee informs the employer that the order is being refused for that reason;”<sup>123</sup> or
- (5) The employee “[p]rovides information to or testifies before any governmental body or law-enforcement official conducting an investigation, hearing, or inquiry into the alleged violation... .”<sup>124</sup>

The statute permits an aggrieved employee to file an action against the employer seeking injunctive relief, reinstatement, and an uncapped amount of lost wages, benefits, and reasonable attorney’s fees, but places a one-year statute of limitation on the employee’s right to do so.<sup>125</sup>

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119. VA. CODE ANN. § 40.1-27.3(A) (Cum. Supp. 2020).

120. *Id.* § 40.1-27.3(A)(1) (Cum. Supp. 2020).

121. *Id.* § 40.1-27.3(A)(2) (Cum. Supp. 2020).

122. *Id.* § 40.1-27.3(A)(3) (Cum. Supp. 2020).

123. *Id.* § 40.1-27.3(A)(4) (Cum. Supp. 2020).

124. *Id.* § 40.1-27.3(A)(5) (Cum. Supp. 2020). However, the new whistleblower law provides no protection to an employee for (1) disclosures of data protected by law or a legal privilege; (2) statements or disclosures that are knowingly false or in reckless disregard of the truth; or (3) disclosures that would violate federal or state law or diminish the rights of persons subject to protections of confidentiality in their communications. *Id.* § 40.1-27.3(B)(1)–(3) (Cum. Supp. 2020).

125. VA. CODE ANN. § 40.1-27.3(C) (Cum. Supp. 2020).



#### 4. Restrictive Covenants

The General Assembly also enacted a new law, Virginia Code section 40.1-28.7:8, addressing covenants not to compete for certain low-wage employees, which also took effect on July 1, 2020. As enacted, the new law provides: “No employer shall enter into, enforce, or threaten to enforce a covenant not to compete with any low-wage employee.”<sup>126</sup>

The statute defines “covenant not to compete” as a covenant that “restrains, prohibits, or otherwise restricts an individual’s ability, following the termination of the individual’s employment, to compete with his former employer.”<sup>127</sup> Importantly, it does not restrict “an employee from providing a service to a customer or client of the employer if the employee does not initiate contact with or solicit the customer or client.”<sup>128</sup>

Certainly aware that covenants not to compete, as restraints on trade, have generally been disfavored in Virginia,<sup>129</sup> the General Assembly did not enact a sweeping reform to restrictive covenants for all workers. Instead, Virginia Code section 40.1-28.7:8 only applies to “low-wage employees.”<sup>130</sup> Nevertheless, the statute broadly defines “low-wage employee” to include all those employees whose average weekly earnings are less than the average weekly wage of the Commonwealth, as determined by Virginia Code section 65.2-500 (Virginia Workers’ Compensation Act).<sup>131</sup> The average weekly wage of the Commonwealth, as reflected on the Virginia Workers’ Compensation Commission’s website, is \$1137.00 effective July 1, 2020, which translates to \$59,124.00 annually.<sup>132</sup> In other words, any employee making less than \$1137.00 weekly or \$59,124.00 annually cannot be bound by a non-compete.

It also expressly extends to “interns, students, apprentices or trainees employed, with or without pay, at a trade or occupation in order to gain work or educational experience” and independent

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126. *Id.* § 40.1-28.7:8(B) (Cum. Supp. 2020).

127. *Id.* § 40.1-28.7:8(A) (Cum. Supp. 2020).

128. *Id.*

129. *See Preferred Sys. Sols., Inc. v. GP Consulting, LLC*, 284 Va. 382, 392, 732 S.E.2d 676, 681 (2012).

130. VA. CODE ANN. § 40.1-28.7:8 (Cum. Supp. 2020).

131. *Id.* § 40.1-7:8(A) (Cum. Supp. 2020).

132. *Rates*, VA. WORKERS’ COMPENSATION COMMISSION, <http://www.workcomp.virginia.gov/documents/rates-min-max-benefits-cola-mileage> [<https://perma.cc/D2T7-VLGU>].

contractors who earn “an hourly rate that is less than the median hourly wage for the Commonwealth for all occupations.”<sup>133</sup> It does not apply, however, to employees whose earnings predominantly come from sales commissions, incentives, and bonuses.<sup>134</sup> Relatedly, the new law does not apply to nondisclosure agreements, and employers are free to require nondisclosure agreements “intended to prohibit the taking, misappropriating, threatening to misappropriate, or sharing of certain information, including trade secrets . . . and proprietary or confidential information.”<sup>135</sup>

Virginia Code section 40.1-28.7:8 also provides two statutory enforcement mechanisms. First, it provides a private right of action for affected employees to enjoin or void the covenant not to compete.<sup>136</sup> If successful, a low-wage employee may recover (aside from having the non-compete voided) payment of liquidated damages, lost wages, damages, and reasonable attorney’s fees.<sup>137</sup> The statute attaches a two-year statute of limitations on this enforcement mechanism beginning on the latter of (1) when the non-compete was signed; (2) when the employee learned of the non-compete; (3) when the employment ended; or (4) when the employer took steps to enforce it.<sup>138</sup>

Second, the new law grants the Commissioner of the Virginia Department of Labor and Industry the authority to assess a civil penalty of \$10,000 per violation to employers who violate the law.<sup>139</sup> Virginia Code section 40.1-28.7:8(G) also requires employers to post a summary of the law “in the same location where other employee notices required by state or federal law are posted,” and allows the Commissioner to assess civil penalties to violating employers ranging from a written warning for a first violation to \$1,000 for a third or subsequent violation.<sup>140</sup>

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133. VA. CODE ANN. § 40.1-8(A) (Cum. Supp. 2020).

134. *See id.*

135. *Id.* § 40.1-28.7:8(C) (Cum. Supp. 2020).

136. *Id.* § 40.1-28.7:8(D) (Cum. Supp. 2020).

137. *Id.*

138. *Id.* Importantly, if an employer seeks to enforce a given non-compete and the court finds in so doing that the non-compete at issue violated Virginia Code section 40.1-28.7:8, the court may award the respondent employee attorneys’ fees, costs, and expert witness fees. *Id.* § 40.1-28.7:8(F) (Cum. Supp. 2020).

139. *Id.* § 40.1-28.7:8(E) (Cum. Supp. 2020).

140. *Id.* § 40.1-28.7:8(G) (Cum. Supp. 2020).

## 5. Minimum Wage Law

In conjunction with the new laws discussed above, the General Assembly also passed House Bill 395/Senate Bill 7, which established an incremental minimum wage increase to \$9.50 per hour beginning on January 1, 2021 and up to \$12.00 per hour on January 1, 2023 (with the potential to raise the minimum wage to \$15.00 on January 1, 2026, pending reenactment of the operative positions).<sup>141</sup> Unlike the aforementioned legislation which Governor Northam signed into law on April 12, 2020, Governor Northam declined to sign the minimum wage increase into law but instead proposed amendments for the General Assembly's approval, including pushing back the effective date of the wage increase from January 1, 2021 to May 1, 2021 to allow Virginia employers additional time to prepare in light of the COVID-19 pandemic.<sup>142</sup> On April 22, 2020, in a special (and eventful)<sup>143</sup> veto session, the General Assembly narrowly passed Governor Northam's amendments.<sup>144</sup> The Virginia House of Delegates voted forty-nine to forty-five in favor of Governor Northam's amendments, while Lieutenant Governor Justin Fairfax broke the Senate's twenty-to-twenty vote tie in favor of the pushback.<sup>145</sup> As a result, Virginia employers must now prepare to compensate all hourly employees a minimum of \$9.50 per hour beginning May 1, 2021.<sup>146</sup>

As amended, Virginia Code section 40.1-28.10 provides for the following minimum wage increases: (1) \$9.50 per hour, effective May 1, 2021; (2) \$11.00 per hour, effective January 1, 2022; and (3) \$12.00 per hour, effective January 1, 2023.<sup>147</sup> The new amendments also provide that the minimum wage will increase to \$13.50

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141. Act of Apr. 22, 2020, ch. 1204, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 40.1-28.10 (Cum. Supp. 2020)).

142. Mel Leonor & Justin Mattingly, *General Assembly Poised to Delay Minimum Wage Increase During Reconvened Session*, RICH. TIMES-DISPATCH (Apr. 21, 2020), [https://richmond.com/news/virginia/general-assembly-poised-to-delay-minimum-wage-increaseduring-reconvened-session/article\\_598c5109-f53a-5f15-a825-b8cc95570f81.html](https://richmond.com/news/virginia/general-assembly-poised-to-delay-minimum-wage-increaseduring-reconvened-session/article_598c5109-f53a-5f15-a825-b8cc95570f81.html) [<https://perma.cc/ZK2S-XNZ3>].

143. Justin Mattingly, Mel Leonor & Michael Martz, *Lawmakers Back Northam on Key Changes to Budget and Minimum Wage During a Veto Session Like No Other*, RICH. TIMES-DISPATCH (Apr. 22, 2020), [https://www.richmond.com/news/virginia/lawmakers-back-northam-onkey-changes-to-budget-and-minimum-wage-during-a-veto-session/article\\_4eb03a05-e4a5-5219-a8e5-0801c2413710.html](https://www.richmond.com/news/virginia/lawmakers-back-northam-onkey-changes-to-budget-and-minimum-wage-during-a-veto-session/article_4eb03a05-e4a5-5219-a8e5-0801c2413710.html) [<https://perma.cc/8YDH-7R5G>].

144. *Id.*

145. *Id.*

146. VA. CODE ANN. § 40.1-28.10(B) (Cum. Supp. 2020).

147. *Id.* § 40.1-28.10(B)–(D) (Cum. Supp. 2020).

on January 1, 2025, and \$15.00 on January 1, 2026, contingent upon the General Assembly's enactment of those increases by July 1, 2024.<sup>148</sup>

In addition to the incremental wage increase, this new legislation also eliminates some historically recognized exemptions to the state minimum law. For example, the new law removes minimum wage exemptions for the following categories of workers: (1) individuals employed in domestic service or in a private home, such as nannies; (2) individuals who normally work and are paid according to the amount of work done or completed; (3) individuals whose earning capacity is impaired by physical deficiency, mental illness, or intellectual disability; and (4) individuals employed by businesses with less than four employees.<sup>149</sup>

Moreover, the new minimum wage law directs three state agencies—the Virginia Department of Housing and Community Development, the Virginia Economic Development Partnership Authority, and the Virginia Employment Commission—to conduct a joint review of the feasibility of implementing a regional minimum wage structure in the Commonwealth.<sup>150</sup> These agencies must submit their findings to the General Assembly and Governor by December 1, 2023.<sup>151</sup>

## 6. Virginia Wage Payment Laws

Aside from raising the minimum wage, the General Assembly has also tackled the issue of wage payments on four additional fronts.

First, in 2020, the General Assembly amended the Virginia Wage Payment Act, Virginia Code section 40.1-29, to require employers to provide all employees with specific written paystubs.<sup>152</sup>

Second, in an amendment that took effect July 1, 2020, the General Assembly created a private right of action for employees to sue

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148. *Id.* § 40.1-28.10(E)–(F) (Cum. Supp. 2020); Act of Apr. 22, 2020, ch. 1204, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. §§ 40.1-28.9, -28.10).

149. Ch. 1204, 2020 Va. Acts at \_\_ (codified as amended at VA. CODE ANN. § 40.1-28.9(A) (Cum. Supp. 2020)).

150. *Id.* (codified at VA. CODE ANN. § 40.1-28.10(A) (Cum. Supp. 2020)).

151. *Id.*

152. Act of Apr. 10, 2020, ch. 1038, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 40.1-29(C) (Cum. Supp. 2020)).

their employers for unpaid wages.<sup>153</sup> Prior to enacting this new Wage Theft Law (House Bill 123/Senate Bill 838), the Virginia Wage Payment Act required employers to pay salaried employees once per month and hourly employees at least twice per month, restricted unlawful deductions from wages, and required that terminated employees be paid for all work that was due to him or her up until the time of termination.<sup>154</sup> Nevertheless, under the previous statutory scheme, employees who were allegedly denied wages had no private recourse in suit, but instead were required to file an administrative claim with the Virginia Department of Labor and Industry.<sup>155</sup>

Now, after the amendment, an aggrieved employee has a private right of action to enforce his or her employer's failure to pay wages and need not rely on the discretion of the Commissioner to sue on his or her behalf.<sup>156</sup> The new law provides that this right of action applies "without regard to any exhaustion of alternative administrative remedies."<sup>157</sup> Importantly, such an action can be brought individually or as part of a collective action jointly with other aggrieved employees pursuant to the collective action procedures of the Fair Labor Standards Act.<sup>158</sup> The available remedies under this newly created right of action are significant as well. If successful, an aggrieved employee may recover "wages owed, an additional equal amount as liquidated damages . . . and reasonable attorney fees and costs."<sup>159</sup> Moreover, if the court determines that an employer "knowingly failed to pay wages," the new right of action provides that "the court *shall* award the employee an amount equal to *triple* the amount of wages due *and* reasonable attorney fees and costs."<sup>160</sup> In addition, prejudgment interest is awarded at 8% under the amendment, which exceeds Virginia's 6% statutory pre-judgment interest scheme for other judgments.<sup>161</sup>

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153. *Id.* (codified at VA. CODE ANN. § 40.1-29(J) (Cum. Supp. 2020)).

154. VA. CODE ANN. § 40.1-29(A), (C) (Repl. Vol. 2013).

155. *See id.* § 40.1-29(F) (Repl. Vol. 2013). In fact, Virginia courts have declined to read a private right of action into the Virginia Wage Payment Act. *See Pallone v. Marshall Legacy Inst.*, 97 F. Supp. 2d 742, 745 (E.D. Va. 2000); *Eslami v. Global One Commc'ns, Inc.*, 48 Va. Cir. 17, 19 (1999) (Fairfax County).

156. *See* VA. CODE ANN. § 40.1-29(J) (Cum. Supp. 2020).

157. *Id.*

158. *Id.*; *see* 29 U.S.C. § 216(b).

159. *Id.*

160. *Id.* (emphasis added).

161. *See id.* § 40.1-29(G) (Cum. Supp. 2020). As was the case prior to the amendment, the Virginia Wage Payment Act carries with it criminal penalties for an employer's willful

Third, in the same amendment, the General Assembly added specific wage payment obligations for employers in the construction industry, making a general contractor and subcontractor jointly liable for the payment of wages to the subcontractor's employees.<sup>162</sup> The operative provision reads:

Any construction contract entered into on or after July 1, 2020, shall be deemed to include a provision under which the general contractor and the subcontractor at any tier are jointly and severally liable to pay any subcontractor's employees at any tier the greater of (i) all wages due to a subcontractor's employees at such rate and upon such terms as shall be provided in the employment agreement between the subcontractor and its employees or (ii) the amount of wages that the subcontractor is required to pay to its employees under the provisions of applicable law, including the provisions of the Virginia Minimum Wage Act (§ 40.1-28.8 et seq.) and the Fair Labor Standards Act (29 U.S.C. § 201 et seq.).<sup>163</sup>

In addition to the new statutory imposition of joint and several liability, the General Assembly enacted a provision making the general contractor "subject to all penalties, criminal and civil" that would result from a subcontractor's failure to pay all wages to the subcontractor's employee.<sup>164</sup> However, the new law does include an indemnification provision, requiring the subcontractor to "indemnify the general contractor for any wages, damages, interest, penalties, or attorney fees owed as a result of the subcontractor's failure to pay wages to the subcontractor's employees," unless the fault for the nonpayment lies with the general contractor.<sup>165</sup> Liability also does not apply where the construction contract concerns a single residential home or where the value of the project is less than \$500,000.<sup>166</sup>

Fourth, the General Assembly added a new section to the Virginia Wage Payment Act, Virginia Code section 40.1-29.1 (House Bill 336/Senate Bill 49), that broadens the authority of the Virginia Department of Labor and Industry to investigate an employer's

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and intentional defrauding or refusing to pay wages to an employee, absent a bona fide dispute between the employer and the employee. *Id.* § 40.1-29(E) (Cum. Supp. 2020). If the value of the unpaid wages is at least \$10,000, the employer is guilty of a Class 1 misdemeanor. If the value of the unpaid wages is less than \$10,000, or if the employer is a repeat offender, the employer is guilty of a Class 6 felony. *Id.*

162. Act of Apr. 10, 2020, ch. 1038, 2020 Va. Acts \_\_, \_\_ (codified at VA. CODE ANN. § 11-4.6 (Cum. Supp. 2020)).

163. *Id.* at \_\_ (codified at VA. CODE ANN. § 11-4.6(B) (Cum. Supp. 2020)).

164. *Id.* at \_\_ (codified at VA. CODE ANN. § 11-4.6(C) (Cum. Supp. 2020)).

165. *Id.* at \_\_ (codified at VA. CODE ANN. § 11-4.6(D) (Cum. Supp. 2020)).

166. *Id.* at \_\_ (codified at VA. CODE ANN. § 11-4.6(E) (Cum. Supp. 2020)).

failure or refusal to pay wages under the Virginia Wage Payment Act.<sup>167</sup> Specifically, Virginia Code section 40.1-29.1 provides that the Commissioner has the authority to investigate whether an alleged failure or refusal to pay wages affected other employees besides the complainant if, in the course of the Commissioner's investigation into an employee's complaint of a wage payment violation, there is "information creating a reasonable belief that other employees of the same employer may not have been paid" their full wages.<sup>168</sup> Under the new law, if such a violation is found, the Commissioner "may institute proceedings on behalf of any employee against [the] employer."<sup>169</sup>

## 7. Pay Transparency Law

Lastly, on April 22, 2020, the General Assembly passed a new pay transparency law which prohibits employers from discharging or otherwise retaliating against an employee for discussing wages or compensation with another employee.<sup>170</sup> The statute provides, in pertinent part:

No employer shall discharge from employment or take other retaliatory action against an employee because the employee (i) inquired about or discussed with, or disclosed to, another employee any information about either the employee's own wages or other compensation or about any other employee's wages or other compensation or (ii) filed a complaint with the Department alleging a violation of this section.<sup>171</sup>

Specifically excluded from this provision, however, are those

employees who have access to the compensation information of other employees or applicants for employment as part of their essential job functions who disclose the pay of other employees or applicants to individuals who do not otherwise have access to compensation information, unless the disclosure is (a) in response to a formal complaint or charge, (b) in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or (c) consistent with a legal duty to furnish information.<sup>172</sup>

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167. Acts of Mar. 10, 2020, chs. 205 & 206, 2020 Va. Acts \_\_, \_\_ & \_\_, \_\_ (codified at VA. CODE ANN. § 40.1-29.1 (Cum. Supp. 2020)).

168. *Id.* at \_\_, \_\_.

169. *Id.* at \_\_, \_\_.

170. Act of Apr. 22, 2020, ch. 1210, 2020 Va. Acts \_\_, \_\_ (codified at VA. CODE ANN. § 40.1-28.7:9 (Cum. Supp. 2020)).

171. *Id.* at \_\_ (codified at VA. CODE ANN. § 40.1-28.7:9(A) (Cum. Supp. 2020)).

172. *Id.* at \_\_.

The new law also vests authority in the Department of Labor and Industry Commissioner to enforce the prohibition against discrimination and retaliation under this statute. Under the statute, the Commissioner is required to notify a violating employer via certified mail with a description of the alleged violation.<sup>173</sup> Within fifteen days of receiving the notice, the employer may request an informal conference with the Commissioner.<sup>174</sup> An employer who is found in violation of this law is subject to a civil penalty of up to \$100 per violation.<sup>175</sup> The new pay transparency law also took effect July 1, 2020.<sup>176</sup>

### III. NOTABLE EMPLOYMENT LAW DECISIONS FROM THE SUPREME COURT

While Virginia undoubtedly saw a sea change in terms of employment law in 2020, the Supreme Court of the United States decided two landmark cases within the last two years involving the central antidiscrimination law in our county, affecting millions nationwide. In *Bostock v. Clayton County*, the Supreme Court interpreted Title VII to include a prohibition of discrimination in employment based on sexual orientation and gender identity.<sup>177</sup> In *Fort Bend County v. Davis*, the Supreme Court held that the requirement that an employee claiming discrimination file an administrative charge of discrimination prior to filing suit was not jurisdictional.<sup>178</sup> A discussion on each of these cases follows.

#### A. *Title VII Protects LGTBQ+ Employees* (Bostock v. Clayton County)

The landmark decision in *Bostock v. Clayton County* was actually a consolidated decision, being decided jointly with *Altitude Express Inc. v. Zarda*<sup>179</sup> and *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*.<sup>180</sup> In each case, an

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173. *Id.* at \_\_ (codified at VA. CODE ANN. § 40.1-28.7:9(B) (Cum. Supp. 2020)).

174. *Id.* at \_\_.

175. *Id.* at \_\_.

176. *Id.* at \_\_.

177. 140 S. Ct. 1731, 1754 (2020).

178. 139 S. Ct. 1843, 1851 (2019).

179. 883 F.3d 100 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019).

180. 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019).



employer terminated an employee who identified themselves as being homosexual or transgender. In the first instance, Gerald Bostock, a Child Welfare Services Coordinator, was terminated by his employer, Clayton County, Georgia after participating in a gay softball league.<sup>181</sup> In *Zarda*, skydiving instructor Donald Zarda was fired by his employer, Altitude Express, shortly after he mentioned he was gay.<sup>182</sup> In *Harris Funeral Homes*, Aimee Stephens was fired after she presented herself as a male but told her employer she planned to “live and work full-time as a woman.”<sup>183</sup> In *Bostock*, the United States Court of Appeals for the Eleventh Circuit held that Title VII, which by its plain language does not list sexual orientation or gender identity in the list of protected classes, does not prohibit employers from discharging an employee because of his or her sexual orientation.<sup>184</sup> In both *Zarda* and *Harris Funeral Homes*, the Second and Sixth Circuits respectively allowed discrimination claims to proceed under Title VII.<sup>185</sup>

In a somewhat surprising six-three decision authored by President Trump’s first Supreme Court nominee, Justice Gorsuch, the Supreme Court held that Title VII’s protections extend to employees identifying themselves as homosexual or transgender, calling the ruling a “straightforward application of legal terms with plain and settled meanings.”<sup>186</sup>

Of course, the majority acknowledged that the terms “sexual orientation” and “gender identity” do not appear in Title VII.<sup>187</sup> In the opinion, the majority certainly acknowledged that Title VII prohibits discrimination in employment because of an employee’s “race, color, religion, sex, and national origin.”<sup>188</sup> After a detailed review of the terms “sex,” “because of,” and discrimination generally, Justice Gorsuch borrowed from the central observation in *Price Waterhouse v. Hopkins*,<sup>189</sup> that an employee’s sex is “not relevant” to employment decisions and held that an employee’s “homosexuality or

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181. *Bostock*, 140 S. Ct. at 1738.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 1843. Although many could foresee the Court’s ruling, few could have predicted the decision would be a six-three decision with two Justices considered to be conservative by most camps ruling in the employees’ favor.

187. *Id.* at 1746.

188. *Id.*

189. 490 U.S. 228, 239 (1989) (plurality opinion).

transgender status is not relevant to employment decisions.”<sup>190</sup> Justice Gorsuch opined that this is because “[a]n employer violates Title VII when it intentionally fires an individual employee based in part on sex.”<sup>191</sup>

To elaborate on this principle, the Court observed that if a male and female employee were both attracted to men, but the employer only fired the man, this decision was based on sex.<sup>192</sup> Similarly, if there are two female employees but an employer fires only the female employee who was a male at birth, then the employer has made this decision because of sex.<sup>193</sup>

The central arguments in Justice Alito’s and Justice Kavanaugh’s dissenting opinions<sup>194</sup> concerned judicial lawmaking, specifically the majority’s choice to read into Title VII protected classes that are not clearly delineated in the words of the statute itself.<sup>195</sup> Citing to the many failed bills that have sought to add protections for the LGBTQ+ community over the forty-five-year history of Title VII, Justice Alito observed that the majority’s opinion has taken the role of legislation on itself in order to interpret a statute in a way that was unimaginable at the time of its inception.<sup>196</sup> Although Justice Kavanaugh “acknowledge[d] the important victory achieved today by gay and lesbian Americans,” he simultaneously expressed disappointment that the victory was won by “judicial dictate” and not “through the democratic process.”<sup>197</sup>

Addressing the argument of legislative history, i.e., that the legislators who enacted the statute could not have foreseen this expansion of Title VII, the *Bostock* majority observed that a statute’s legislative history has no bearing when the text of the statute is clear and unambiguous.<sup>198</sup> On this point, Justice Gorsuch opined that “many, maybe most, applications of Title VII’s sex provision

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190. *Bostock*, 140 S. Ct. at 1741.

191. *Id.*

192. *Id.* at 1741–42.

193. *Id.*

194. Justice Thomas joined Justice Alito’s dissenting opinion.

195. *See id.* at 1754–55 (Alito, J., dissenting); *id.* at 1822 (Kavanaugh, J., dissenting).

196. *Id.* at 1754–55 (Alito, J., dissenting).

197. *Id.* at 1836–37 (Kavanaugh, J., dissenting).

198. *Id.* at 1749–50.

were ‘unanticipated’ at the time of the law’s adoption,”<sup>199</sup> which includes the Court’s decision in *Oncale v. Sundowner Offshore Services, Inc.*,<sup>200</sup> which found that same-sex harassment was prohibited by Title VII, even though it may not have been the “‘principal evil’ legislators may have intended or expected to address” by enacting Title VII.<sup>201</sup>

In concluding, Justice Gorsuch powerfully opined:

Title VII’s effects have unfolded with far-reaching consequences, some likely beyond what many in Congress or elsewhere expected. But none of this helps decide today’s cases. Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations. In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee’s sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.<sup>202</sup>

B. *Exhaustion Remedy Not Jurisdictional* (Fort Bend County v. Davis)

In *Fort Bend County v. Davis*, the Supreme Court resolved a circuit split in resounding, unanimous fashion.<sup>203</sup> The late Justice Ginsburg authored the opinion that was issued a mere six weeks after it was argued, holding that Title VII’s charge-filing requirement was not a jurisdictional requirement of the plaintiff, but was instead a defense that could be theoretically waived by the defendant.<sup>204</sup>

In *Davis*, the respondent Lois M. Davis (“Davis”), was an information technology professional for Fort Bend County, Texas (“Fort Bend”).<sup>205</sup> In 2010, she complained to Fort Bend about sexual har-

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199. *Id.* at 1752.

200. 523 U.S. 75, 79 (1998).

201. *Bostock*, 140 S. Ct. at 1749 (quoting *Oncale*, 523 U.S. at 79); *see id.* at 1743–44 (discussing *Oncale* further).

202. *Id.* at 1754.

203. 139 S. Ct. 1843, 1845–46 (2019).

204. *Id.* at 1846.

205. *Id.* at 1847.

assment by her director, which resulted in the director's resignation.<sup>206</sup> After the director's resignation, however, Davis experienced retaliation by her supervisor, who was a friend of the director.<sup>207</sup> Davis submitted an intake questionnaire and charge of discrimination with the Equal Employment Opportunity Commission ("EEOC").<sup>208</sup> In the meantime, Davis was told to report to work on a Sunday.<sup>209</sup> Davis told her supervisor that she could not work on Sunday due to a church commitment, but was told that if she did not report to work, she would be terminated.<sup>210</sup> On the Sunday in question Davis went to church, did not report to work, and was fired.<sup>211</sup> Subsequently, Davis amended her EEOC intake questionnaire to include religious discrimination, but critically failed to amend her formal EEOC charge to reflect religious discrimination.<sup>212</sup>

Davis sued Fort Bend County in 2012, alleging religious discrimination and retaliation for reporting sexual harassment.<sup>213</sup> The United States District Court for the Southern District of Texas granted Fort Bend's motion for summary judgment.<sup>214</sup> Davis appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed the district court's dismissal of the retaliation claim.<sup>215</sup> However, the Fifth Circuit reversed summary judgment as to the religious discrimination claim and remanded the case back to the district court.<sup>216</sup> Upon remand, Fort Bend asserted for the first time that Davis' failure to amend the formal EEOC charge to reflect religious discrimination barred any relief for the religious discrimination claim.<sup>217</sup> The district court granted Fort Bend's motion to dismiss, holding that the charge-filing requirement was jurisdictional and therefore that Davis had failed to exhaust her administrative remedies as to the religious discrimination claim.<sup>218</sup> On appeal, however, the Fifth Circuit reversed and held that the

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206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 1847–48.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

charge-filing requirement was not jurisdictional and that Fort Bend had waived the right to raise the failure-to-exhaust-administrative-remedies defense by not raising it “until after ‘an entire round of appeals all the way to the Supreme Court.’”<sup>219</sup>

Following the Fifth Circuit’s reversal, the Supreme Court granted certiorari to resolve a divergence of authority in the federal circuit about Title VII’s charge-filing requirement.<sup>220</sup> Affirming the Fifth Circuit’s ruling, Justice Ginsburg opined, “Title VII’s charge-filing requirement is not of a jurisdictional cast.”<sup>221</sup> She drew a distinction between Title VII’s charge-filing requirement and the statutory provisions through which federal courts can hear Title VII’s cases: 28 U.S.C. § 1331 (federal question jurisdiction) and 42 U.S.C. § 2000e-5(f)(3) (giving federal courts “jurisdiction [over] actions brought under this subchapter”).<sup>222</sup> The charge-filing requirement, which is listed in multiple places in Title VII, “[does] not speak to a court’s authority” or “refer in any way to the jurisdiction of the district courts.”<sup>223</sup> Instead, the requirement to exhaust administrative remedies is a procedural obligation, a “processing rule, albeit a mandatory one, [but] not a jurisdictional prescription delineating the adjudicatory authority of courts.”<sup>224</sup>

The actual impact of *Davis* on Title VII litigation may not be known for some years, as it is a rare case where an employer who has a failure-to-exhaust-administrative-remedies defense would not timely assert it.<sup>225</sup> Nevertheless, *Davis* certainly provides employees with an added layer of procedural leniency in filing a charge of discrimination and provides employers with another incentive to be scrupulous and observant in defending against Title VII claims.<sup>226</sup>

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219. *Id.* (quoting *Davis v. Fort Bend Cty.*, 893 F.3d 300, 307–08 (5th Cir. 2018)).

220. *Id.* The United States Court of Appeals for the Fourth Circuit, for example, had previously taken the position that federal courts lack subject matter jurisdiction when a claimant fails to file a charge of discrimination based on a given characteristic with the EEOC or similar state agency. *See Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 300 (4th Cir. 2009).

221. *Davis*, 139 S. Ct. at 1849.

222. *Id.* at 1850–51 (quoting 42 U.S.C. § 2000e5(f)(3)).

223. *Id.* (first quoting *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 512 (2014); and then quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515 (2006)).

224. *Id.* at 1851.

225. *See id.* at 1847 (framing the issue around timeliness in raising defense).

226. *See id.* (describing defense as waived if not timely raised).

## CONCLUSION

The last two years, and particularly 2020, have seen the employment law landscape in Virginia shift towards increased protections for employees and heightened obligations for employers. The COVID-19 pandemic has further thrust employment law into the spotlight, introducing a host of new issues for employees and employers alike to navigate. While the long-term effect of COVID-19 on Virginia's economy is unknown, the General Assembly has worked to bolster the rights of employees in the short term. As Virginians, like the rest of the world, grapple with the uncertainty that 2020 has introduced, one thing remains certain: the workplace, as Virginians have known it, will never be the same.