

Client Alert

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Virginia Human Rights Act Amendment Removes Large Employee Cap; Could Open Floodgate of New Employment Discrimination Cases For Larger Virginia Employers

On Saturday, April 11, 2020 the Virginia Values Act was signed into law. The bill's headlining purpose—adding gender identity and sexual orientation to the list of classes protected under the Virginia Human Rights Act (VHRA)—is commendable and has garnered widespread support. However, another, more technical change in the bill that is unrelated to the headlining purpose is poised to alter the landscape of employment litigation in Virginia and could lead to a significant increase in discrimination lawsuits filed in Virginia's state courts. Virginia employers are well served to begin preparing now for this new procedure in the handling of employment discrimination charges and litigation, as the bill's new provisions go into effect on July 1st.

As we [first observed in February](#), the bill transforms the VHRA's overall significance and reach by uncapping the employer coverage threshold. Historically, the VHRA only covered employers with more than 5 and up to 14 employees (up to 20 employees for age discrimination claims). These thresholds were designed to work in tandem with federal anti-discrimination laws (namely, Title VII and the Age Discrimination in Employment Act) that apply to Virginia employers above the thresholds. The Virginia Values Act removes these upper caps for all but age discrimination claims. This means that every employer in Virginia with more than five employees is now subject to the VHRA, and not just for claims of gender identity and sexual orientation discrimination. Virginia employers of all sizes may now be sued under the VHRA for all forms of prohibited discrimination (i.e., race, color, religion, sex, pregnancy, national origin, disability, veteran status). In the absence of diversity jurisdiction, these claims will be pursued in state court, rather than federal court where most Virginia employers are accustomed to defending employment discrimination claims.

Why is this change so significant for Virginia employers? Two key reasons:

1. **Limited Summary Judgment in Virginia** – Unlike in federal court, it will be very difficult to cause dismissal of an employment discrimination claim in Virginia courts prior to trial. That is because Virginia state court rules limit what courts may consider when ruling on motions for summary judgment. In a nutshell, under Virginia state court rules, a party cannot use deposition testimony in support of a motion for summary judgment. While the majority of federal discrimination lawsuits end before trial with settlement or dismissal, most VHRA lawsuits in state court will likely end up going to a jury trial (unless they settle first).
2. **No Damages Caps** – Title VII has a \$300,000 per claim cap on damages for employers with 501 or more employees, and smaller employers are subject to an even lower cap on damages. The VHRA has no cap on damages. While the drafters of the bill have suggested that Virginia's general \$350,000 cap on punitive damages should apply to VHRA claims, this does not account for the many other forms of damages often claimed by employment plaintiffs—back pay, front pay, emotional distress, and other nonpecuniary harms. None of these damages are capped in the new law. This will substantially inflate

the potential value of employment discrimination lawsuits in Virginia if plaintiffs choose to assert their claims under the VHRA rather than under federal anti-discrimination laws.

This unique combination of factors could result in a flurry of Virginia employment litigation. Plaintiffs are likely to forego the EEOC/Title VII process in favor of a VHRA claim in state court, knowing they can get to a jury that can decide damages without any caps, except on punitives. This dynamic could reduce plaintiffs' willingness to settle employment cases early on. Even though the bill provides for a pre-litigation charge filing process with the Virginia Division of Human Rights, it is doubtful this will lead to the same number of early settlements as in federal litigation, for all of the reasons discussed above. Ultimately, having to try more discrimination cases all the way to jury verdicts will inflate Virginia employers' litigation costs.

These dramatic changes will force Virginia employers to change the way they handle—and even think about—employment litigation in our state. Businesses that never before had to consider litigation claims under the VHRA need to begin planning for a potential wave of litigation under this new, plaintiff-friendly framework.

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