

Publications

Virginia Employers Must Contend With More Than COVID-19 When They Get Back To Work (Part I)

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As employers begin to reopen their businesses and employees start to return to work, Virginia employers will need to contend with several new workplace laws (in addition to confronting the myriad workplace changes wrought by COVID-19).

Employee Wage Statements and Withholdings

As of January 2020, employers in Virginia have been required to provide their employees a written statement, by a paystub or online accounting, showing the name and address of the employer, the number of hours worked during the pay period, the rate of pay, the gross wages earned by the employee during the pay period, and the amount and purpose of any deductions.

Effective July 1, 2020, employers must report the number of hours worked during the pay period only if the employee is paid based on the number of hours worked or is paid a salary that is less than the standard salary level adopted by the U.S. Department of Labor (currently \$684/week or \$35,568 annually).

Virginia further prohibits employers from withholding any part of an employee's wages or salary except for payroll, wage or withholding taxes, or in accordance with law, without the employee's written and signed authorization.

Wage Theft

Virginia recently enacted a wage theft law creating a private right of action for employees to sue for allegedly unpaid wages. Previously, employees did not have a private right of action, and, instead, had to file administrative claims with the Virginia Department of Labor and Industry.

Now, an employee may bring an action either individually, jointly, with other aggrieved employees, or on behalf of similarly situated employees as a collective action consistent with the collective

procedures under the federal Fair Labor Standards Act. An action must be commenced within three years after the cause of action accrued. An employee may recover the unpaid wages, and, in addition, the court must award an additional equal amount as liquidated damages, plus prejudgment interest (at 8%, which is higher than Virginia's statutory pre-judgment interest), and reasonable attorney fees and costs. If the court finds that the employer knowingly failed to pay wages to an employee, the court must award the employee an amount equal to triple the amount of wages due and reasonable attorney fees and costs. An employer who knowingly fails to make payment of wages is also subject to a civil penalty not to exceed \$1,000 for each violation.

Retaliation Prohibited

Virginia now prohibits employers from discharging or retaliating against employees who inquire about, discuss, or disclose the employee's own wages or other compensation, who file a wage complaint with the Department of Labor and Industries, or who testify in such a proceeding. This does not apply to employees who have access to compensation information as part of their essential job functions who disclose that pay if 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. An employer that violates these provisions is subject to a \$100 civil penalty for each violation.

Noncompete Agreements and "Low-Wage" Workers

Effective July 1, 2020, Virginia employers will be prohibited from entering into, enforcing, or threatening to enforce non-compete agreements with "low-wage employees." The new law broadly defines a covenant not to compete as an agreement that restrains, prohibits, or otherwise restricts an individual's ability to compete with his or her former employer after employment. Additionally, a covenant not to compete may 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.

The law applies only to "low-wage employees." These are defined as employees whose average weekly earnings over the past 52 weeks (or, if employed for fewer than 52 weeks, over the number of weeks actually worked) are less than the average weekly wage of the Commonwealth, which is determined annually. Currently, the average weekly wage is \$1125.

In addition, "low-wage employees" include (1) interns, students, apprentices, or trainees employed, with or without pay, at a trade or occupation in order to gain work or educational experience; and (2) individuals who have independently contracted with another person to perform services independent of an employment relationship and who are compensated at an hourly rate that is less than the median hourly wage for the Commonwealth for all occupations as reported, for the preceding year, by the Bureau of Labor Statistics of the U.S. Department of Labor. Currently, the median hourly wage is \$19.63. A "low-wage employee" does not include an employee whose earnings are derived, in whole or in predominant part, from sales commissions, incentives, or bonuses.

The law does not limit or prohibit the creation or application of nondisclosure agreements intended to prohibit the taking, misappropriating, threatening to misappropriate, or sharing of information such as trade secrets and proprietary or confidential information.

Employers must post a copy of the applicable law or a summary approved by the Virginia Department of Labor and Industry. Employers should review their agreements to ensure that restrictive covenants with “low-wage employees” comply with the law’s new requirements.

Contact your Vorys lawyer if you have questions about these new Virginia laws or other employment issues affecting your Virginia-based operations.

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VORYS COVID-19 TASK FORCE

Outside of this new law, employers continue to face myriad issues as COVID-19 continues to spread and impact communities and workplaces (some of these issues are addressed in our prior alerts located here). We will continue to keep you posted on any important developments. In the meantime, if you have any questions regarding this new law or any other aspect of COVID-19, please contact your Vorys lawyer.

We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at vorys.com/coronavirus.