

Latest Virginia Legislative Sessions Usher In New Employment Laws

By Jessica Summers

So far, in 2021 the Virginia General Assembly has completed its regular session as well as one special session. As the Governor recently finished reviewing and signing the legislation passed in the special session, now is a good time for Virginia employers to familiarize themselves with the latest updates.

The following are the notable employment laws enacted so far in 2021 –

- **Protections for Off-Duty Medical Use of Cannabis Oil** – This law prohibits employers from discharging, disciplining or discriminating against an employee for the lawful use of medically prescribed cannabis oil to treat a medical condition. The law does not extend to other cannabis products or require that employers permit employees to use or possess the oil at work or to be under the influence during work. In a nod to government contractors, it also does not require “an employer to commit any act that would cause the employer to be in violation of federal law or that would result in the loss of a federal contract or federal funding.” Finally, there is further carve out for drug testing by defense industrial base sector employers.
 - An additional note – during the special session, Virginia also legalized possession of small amounts (1 oz) of marijuana effective July 1, 2021 and will allow for the sale of recreational marijuana in 2024. Check out our other blog for more on what this will mean for employers.
- **State Overtime Provisions** – While Virginia already had a wage payment law on the books, that law did not include any provisions on the payment of overtime. The new Virginia overtime law largely tracks the federal law requiring employers to pay employees 1.5 times their regular rate of pay for hours worked over 40 hours in a workweek. The Virginia law incorporates the federal overtime exemptions, including those regularly used for executive, administrative and professional employees. So why did the General Assembly enact a law that largely mirrors the federal overtime law? Because now employees will be able to assert an overtime claim under Virginia’s wage and hour law and pursue such claims in Virginia state courts (where before their only option was a federal Fair Labor Standards Act claim).
- **PPE for Contractors** – In response to issues that have come up during the COVID-19 pandemic, this law amends the Commonwealth’s laws on worker classification. Now, the fact that a business has provided someone with personal protective equipment (PPE) in response to a communicable disease outbreak for which a state of emergency has been declared, should not be considered in determining whether that individual should be classified as an employee or independent contractor. In other words, the new law allows businesses to provide PPE to a contractor without fear that doing so jeopardizes the worker’s classification as a contractor.
- **Paid Sick Leave for Home Health Workers** – The law provides mandatory paid sick leave for home health workers who work an average of at least 20 hours per week or 90 hours per month. These workers must accrue paid sick leave at a minimum rate of one hour of paid leave for every 30 hours worked, up to 40 hour per year. There is no requirement that the individual be permitted to carryover unused leave from one year to the next. Home health workers may use accrued paid sick leave to care for their own or a family member’s physical or mental illness, injury or health condition. They may also use such leave to seek medical care or treatment for themselves or a family member. The law also includes a number of provisions regarding requesting and use of sick leave with which home health providers in the Commonwealth should carefully familiarize themselves and comply.
- **Expansion of VA Human Rights Act to Domestic Workers** – This new law expands the protections of the VA Human Rights Act to domestic workers (as defined in the bill). In doing so, it amends the definition of who constitutes an employer covered by the Human Rights Act to include anyone that employs 5 or more people or anyone who employs one or more domestic workers. In short, anyone in Virginia who employs a domestic worker, such as a nanny or housekeeper, should take note of this new law.
- **Expansion of Health and Safety Laws to Domestic Workers** – The General Assembly also expanded the definitions section in the VA workplace health and safety law to provide that the law protects

domestic workers and applies to anyone who engages a domestic worker. Previously, the health and safety laws only applied to those “engaged in a business”. Again, anyone who employs a domestic worker in the Commonwealth should take note of this change.

- **Entry Level Minimum Wage** – For those employers that are employing entry level employees as part of the Virginia Jobs Investment Program, this new law modifies the minimum rate of pay for such workers (to account for the new minimum wage law passed last year) and provides that such workers must be paid 1.2 times the federal minimum wage or the Virginia minimum wage, whichever is higher.

The following employment bills were introduced but did not pass in the regular or special sessions, whether because they were rejected, or because there simply insufficient time or momentum to get them across the finish line. That said, they are worth being aware of as bills are often reintroduced in subsequent sessions.

- **Paid Sick Leave** – The proposed legislation would have required public and private employers with 35 or more employees to provide employees with paid sick leave.
- **Paid Family Leave** – The proposed legislation would have created a system, similar to that in place in DC, to establish paid family leave funded through premiums assessed against employers and employees.
- **Use of Sick Leave for the Care of Immediate Family Members** – The proposed legislation would have required employers that voluntarily provide employees with paid sick leave to allow employees to use that leave to care for immediate family members who are sick. This proposal was very similar to the law currently in place in Maryland.
- **Hazard Pay for Essential Workers** – This proposal would have required employers to pay essential workers 1.5 times their regular rate of pay for hours worked during a state of emergency when a stay-at-home or shelter-in-place order has been issued. The proposed legislation would have also required employers to provide certain PPE to essential workers.
- **Postponement of the State Minimum Wage Increases** – The proposed legislation would have postponed the state minimum wage increases passed by the General Assembly during its 2020 session and set to begin this year.
- **Equal Pay Act** – In addition to prohibiting employers from discriminating against any protected category of employees in the payment of wages, the proposed legislation would have also prohibited employers from considering a new employee's wage history in setting such employee's rate or pay. The proposed legislation would have further established standards for how wage discrimination is reviewed and created a state law prohibition against rules that limit employees from discussing their wages with one another.
- **Independent Contractor Test** – The proposed legislation would have broaden the rules for when a worker may be classified as an independent contractor under Virginia law, in particular placing greater emphasis and focus on whether the worker and business entered into an agreement specifying that the worker would not be an employee of the business.
- **Elimination of the Minimum Wage Exemption for Farm Workers** – Certain farm and temporary foreign workers are currently exempt from Virginia's minimum wage requirements. The proposed legislation would have eliminated those exemptions and made these employees subject to the Virginia minimum wage provisions.
- **Workers' Compensation Retaliatory Discharge** – Currently, under Virginia law, an employee can only establish a claim for retaliatory discharge based on his or her exercising rights under the Commonwealth's workers' compensation law if the exercise of those rights was the sole reason for the discharge. The proposed legislation would have prohibited any form of retaliation against an employee that is motivated in any way by the fact or belief that the employee has exercised rights under the workers' compensation law.

As always, our Paley Rothman Employment Law Group is here to help if you need assistance working through any of these new laws.