

Virginia

Employment Law Workbook Addendum

(Update on legislation enacted from Jan. 1, 2015- Dec. 31, 2016)

Topics

I. Discrimination

National Guard Protections

Virginia law prohibits discrimination against, and provides reemployment rights and other benefits for, persons who must leave employment to perform Virginia state duty or military duty. The law protects the service member's right to take unpaid leave for the period of military service and prohibits employers from requiring the service member to use vacation or other accrued leave for the period of military service. In addition, the law protects a service member's right to reinstatement to private employment after the period of military service is completed. This amendment extends the leave of absence, reinstatement, and discrimination protections to members of the National Guards of other U.S. states who are called into active service. Thus, a Virginia employee who is a member of the National Guard of another state is entitled to the employment protections and other benefits afforded under the statute.

Va. Code Ann. § 44-93.2, Va. Code Ann. § 44-93.3, and Va. Code Ann. § 44-93.4 (Effective Date 07/01/2016).

II. Pre-Employment Inquiry Guidelines

No new laws or regulations enacted in 2015 or 2016.

III. Family and Medical Leave

No new laws or regulations enacted in 2015 or 2016.

IV. Wage and Hour Laws

No new laws or regulations enacted in 2015 or 2016.

V. Drug Testing

Virginia has enacted a very limited medical marijuana law that permits medical practitioners to prescribe cannabidiol or THC-A oil to treat or alleviate epilepsy symptoms, and provides individuals with a qualifying prescription a defense against criminal charges of unlawful marijuana possession.

However, the law does not contain any relevant employment-related provisions.

VI. Noncompete and Other Employment Agreements

No new laws or regulations enacted in 2015 or 2016.

VII. Workplace Safety

A. Virginia Final Rule on Recording and Reporting Occupational Injuries and Illnesses

The Virginia Department of Labor & Industry has issued a final rule on improving tracking of workplace injuries and illnesses. In May 2016, OSHA published its final rule on electronic reporting of workplace injuries and illnesses, which requires employers to adopt an electronic recordkeeping system or to transfer all paper records to electronic format for submission. The Virginia final rule incorporates by reference the provisions of the OSHA final rule.

16 VAC 25-85-1904.35, 16 VAC 25-85-1904.36, and 16 VAC 25-85-1904.41 (Effective Date 12/01/2016).

B. Safety Reporting Requirements

Virginia law requires every employer to report to the Virginia Department of Labor and Industry any work-related incidents resulting in an inpatient hospitalization, an amputation, or the loss of an eye. This amendment extends the time in which the employer is required to make the report from 8 to 24 hours after the incident occurred. Employers must still report any work-related incident that results in a fatality within 8 hours of the occurrence.

Va. Code Ann. § 40.1-51.1 (Effective Date 07/01/2016).

C. Injury Reporting

Virginia workplace safety law requires employers to report certain incidents of workplace injuries to the Virginia Department of Labor and Industry. Specifically, an employer must report any work-related incident resulting in a fatality or the inpatient hospitalization of three or more people. This amendment changes the reporting requirements and provides that an employer must report, within eight hours of the occurrence, any work-related incident resulting in:

1. A fatality;
2. Inpatient hospitalization of one or more people;
3. An amputation; or
4. Loss of an eye.

Va. Code Ann. § 40.1-51.1(D) (Effective Date 07/01/2015).

VIII. Workers' Compensation

No new laws or regulations enacted in 2015 or 2016.

IX. Miscellaneous

A. Withholding Tax Forms in Electronic Medium

The Virginia employer tax withholding law provides that employers file annual returns and written statements of withholdings with the Tax Commissioner no later than February 28 of the calendar year after the withholding year. This amendment requires that all tax forms and written statements be submitted in an electronic medium no later than January 31 of the calendar year after the withholding year.

Va. Code Ann. § 58.1-472 and Va. Code Ann. § 58.1-478 (Effective Date 12/01/2016).

B. Small Group Employer Definition

The federal Protecting Affordable Care Coverage for Employees Act (PACE Act), enacted on October 7, 2015, amended the Patient Protection and Affordable Care Act (ACA) and the Public Health Service Act to include employers with 51 to 100 employees as large employers for purposes of health insurance markets. Prior to the amendment, employers with 51 to 100 employees were considered small employers. However, before January 1, 2016, states had the option to treat these employers as large employers. Under the ACA, health insurance offered in the small group market must meet additional requirements, including the requirement to cover essential health benefits as defined in the ACA.

In accordance with the federal PACE Act, this amendment to Virginia's health care law deletes provisions that as of January 1, 2016, would have changed the definition of a "large employer" from an employer who employed an average of more than 50 employees to an employer who employed more than 100 employees during the preceding calendar year. Accordingly, the amended law retains the previous definition of small group employers as those who employ an average of 50 or fewer employees, and large employers as those who employ an average of 51 or more employees.

Va. Code Ann. § 38.2-3406.1, Va. Code Ann. § 38.2-3431, and Va. Code Ann. § 38.2-3551 (Effective Date 01/26/2016).

C. Employer Access to Social Media

Under a new employer access to social media law, an employer cannot:

- Require an employee or applicant to disclose the individual's social media account username and password;
- Require an employee or applicant to add an employee, supervisor, or administrator to the contact list of the individual's social media account;
- Take action against, or threaten to fire, discipline, or otherwise penalize an employee, or fail or refuse to hire an applicant, because the individual exercised rights provided under the law.

The prohibitions apply only to an individual's personal social media account. The term "social media account" does not include an account: 1) opened or set up by an employee at the employer's request; 2) provided to an employee by an employer (e.g., company email, other software program owned or operated exclusively by the employer); or 3) set up by an employee to impersonate an employer by using the employer's name, logos, or trademarks.

It is not unlawful, however, for an employer to view information about an employee or applicant that is publicly available. Also, the law does not prevent an employer from complying with federal, state, or local laws, rules, or regulations or the rules or regulations of self-regulatory organizations. Additionally, the law does not affect an employer's rights or obligations to request that an employee disclose his or her social media account username and password if the account is reasonably believed to be relevant to a formal investigation or related by proceeding by the employer concerning allegations the employee violated federal, state, or local law, or the employer's written policies. However, if an employer exercises its rights, the username and password can only be used for these purposes.

If an employer inadvertently receives an employee's social media account username, password, other login information because the employee uses an employer-provided

electronic device, or via a program monitoring an employer's network, the employer is not liable for having the information but cannot use the information to gain access to the account.

Va. Code Ann. § 40.1-28.7:5 (Effective Date 07/01/2015).

D. Civil Penalties for Child Labor & Medical Exam Violations

Penalty provisions related to child labor and required medical examinations have been amended. In Virginia, employers cannot employ, procure, or permit a child to be employed unless permitted by state law. Also, employers cannot require employees or applicants to pay for medical examinations, or the cost of providing medical records, the employer requires as a condition of employment. Before these statutes were amended, they provided that a penalty for a violation became final unless the employer notified the labor commissioner within 15 days of receiving notice about the proposed penalty that it would challenge the determination.

The amended statute provides a more detailed penalty and appeals process. The Commissioner, by certified mail or overnight delivery, notifies the employer of the alleged violation, which must contain a description of the violation. To contest the proposed penalty, within 21 days of receiving the notice the employer must request an informal conference. If it fails to timely contest, the violation and penalty become final and are not subject to agency or court review unless good cause is shown. If it does timely contest, the conference will occur, the commissioner's decision will be sent by certified or overnight mail, and the decision will be appealable in state court if a notice of appeal is filed within 30 days of the employer receiving the notice of decision. If the appeal concerns a matter of law, the burden will be on the party seeking review to designate and demonstrate an error of law subject to court review. Moreover, concerning fact issues, the court will be limited to ascertaining whether substantial evidence existed to reasonably support the commissioner's findings of fact.

Va. Code Ann. § 40.1-113 and Va. Code Ann. § 40.1-28 (Effective Date 07/01/2015).