

Virginia's Evolving Employment Landscape: 2022 Legislative Updates

Virginia Society for Certified Public Accountants

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Agenda

1. Virginia Human Rights Act
2. Wage & Hour
3. Worker Misclassification
4. Whistleblower Protection
5. Supply Chain Issues
6. Cannabis/Marijuana
7. 2022 General Assembly Activity
8. Q&A

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Virginia Human Rights Act

- New Private Cause of Action
- New Office of Civil Rights
- Workplace Accommodations
- Handbook/Posting Requirements



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But don't forget Title VII of the Civil Rights Act!

Federal Courts in the Eastern and Western Districts of Virginia and in the Fourth Circuit continue to apply these federal anti-discrimination laws to Virginia employers.



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VHRA provides more expansive remedies than Title VII, but VHRA's exhaustion of administrative remedies depends on the OAG Office of Civil Rights

- Employees now have a private cause of action
 - Significantly broadens the application to employers
 - Adds protected classes
 - Adds additional covered adverse workplace actions
 - 300-day deadline to file claims
- Available Remedies:
 - Unlimited compensatory damages
 - Punitive Damages
 - Temporary and Permanent Injunctive Relief
 - Attorneys' Fees and Costs

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Disability Accommodations Under Virginia Law

Employers with **5 or more employees** must provide reasonable accommodations to employees experiencing a **known** physical or mental impairment to perform the essential functions of the job, without **undue hardship** on employer

Employers Must Also:

- Engage in a timely, good faith interactive process with the employee
- Place notice of rights to reasonable accommodations in handbooks and postings.
- Provide notice to new hires and within 10 days of that employee's **notice** to employer of a disability.

Employers Cannot:

- Refuse to grant reasonable accommodations.
- Take adverse employment action against employee requesting an accommodation.
- Deny employment or promotion opportunities because of need for a reasonable accommodation.
- Require an employee to take leave if another reasonable accommodation can be provided to the employee.

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Pregnancy & Lactation

Employers with **5 or more employees** must provide reasonable accommodations to employees experiencing “pregnancy, childbirth, or related medical conditions,” including lactation.

- Employee handbooks and postings must now include these provisions
- Reasonable accommodations include:
 - More frequent or longer bathroom breaks
 - Breastmilk pumping breaks
 - Access to private location to express breastmilk
 - Modification of equipment or seating
 - Transfer to a less strenuous or hazardous position
 - Light duty assignments
 - Leave to recover from childbirth
- **Remember, NO need to exhaust administrative remedies.**



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Sovereign Immunity: Defense for Some Public Employers?

- *Fogleman v. Corson, Commonwealth of Va., and VCU*, Case No. CL21003860 (City of Richmond Circuit Court)
- Plaintiff: Nichole Fogleman
 - Former VCU student, over 50 years old, withdrew after plagiarism accusation
 - Allegation of age discrimination under VHRA, which states: “It is the policy of the Commonwealth to: Safeguard all individuals within the Commonwealth from unlawful discrimination because of . . . age . . . in places of public accommodation, including educational institutions”
- Defendant: Commonwealth of Virginia/VCU
 - Sovereign immunity, which the General Assembly did not explicitly waive
- Ruling: Judge Clarence Jenkins granted Virginia’s motion to dismiss on March 15

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Wage & Hour

- Virginia Minimum Wage Act
- Virginia Wage Theft Act
- Virginia Overtime Wage Act, and amendments

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Virginia's New Minimum Wage

- Effective January 1, 2021, Virginia's minimum wage is now higher than federal law (currently, \$7.25/hr)

Effective Date	Minimum Wage
January 1, 2021	\$9.50
January 1, 2022	\$11.00
January 1, 2023	\$12.00
January 1, 2025	\$13.50
January 1, 2026	\$15.00



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“Virginia Wage Theft Act”: Va. Code § 40.1-29

- Effective July 1, 2020, Virginia recognizes a new private right of action:

	Virginia Wage Theft Act	FLSA
Claim Type	Individual and Collective	Same
Statute of Limitations	3 years, all claims	2 years, but 3 years if willful violation is proven
Damages	<ul style="list-style-type: none"> Mandated Liquidated damages (i.e., double the owed amount) Prejudgment Interest Triple damages, if “knowing” 	<ul style="list-style-type: none"> Permissible Liquidated Damages (except in “good faith”) Prejudgment interest (except with liquidated)
Attorney’s Fees & Costs	Yes	Yes
Civil Penalties	Yes, if “knowing”	Yes, if “willful”
Criminal Sanctions	Class 1 Misdemeanor (<\$10K) or Class 6 Felony (≤ \$10K or 2 nd offense)	Imprisonment up to 6 months for 2+ convictions



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Virginia Overtime Wage Act, Va. Code § 40.1-29.2

- Effective July 1, 2021
- Regular Rate Calculation
 - Hourly workers remained the same: (Hourly rate + Other non-OT pay)/Hours Worked
 - Salaried, non-exempt workers, changed: 1/40th of all wages paid
 - Eliminated “fluctuating workweek method” or other straight time methods
- Remedies available under “Wage Theft Act”
- Ambiguity for:
 - Local governments – Compensatory time and Volunteers
 - Private Employer – Computer Exemption
 - 213(a) Exemptions
 - 213(b) Exemptions



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Virginia Overtime Wage Act, continued ...

- August Budget Amendment clarified that:
 - Section 213(a): Confirmed to be exempt, including computer professionals
 - Section 213(b)(10)(A): “Salesman, partsman, mechanic” exemption intact
 - Compensatory Time available for local governments
 - Public sector volunteers are not employees
- Some industries have lost their exemptions under 213(b), such as
 - Rail and air carriers, taxi drivers
 - Journalists
 - Amusement or recreational establishments
- **Legislative fix required in 2022 General Assembly**



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2022 VOWA Amendment

- Strikes VOWA (including 3 year S/L) and adopts the federal FLSA
- Restores all prior exemptions that were ambiguous, except for:
 - Derivative carriers in airline and railway industry who are no longer exempt from overtime
- Directs Secretary of Labor to study VOWA and report by November 1, 2022
- Lingering Questions:
 - Good faith defense available?
 - Which remedial scheme applies?
 - Recommendations of the work group?
- Effective Date: July 1, 2022; **No retroactive application**



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Employer Takeaways from VOWA 2022

- Evaluate employee complaints about pay against the current VOWA
- “Void for Vagueness” doctrine: A statute must provide a person of average intelligence a reasonable opportunity to know what the law expects from him or her.
- Ensure that employee handbooks contain a complaint mechanism for pay complaints.

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Worker Misclassification

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Virginia Rules for Classification of Employees/Independent Contractors

Va. Code §§ 58.1-1900 *et seq.*, § 40.1-28.7:7, § 40.1-33.1, § 11-4.6 and § 54.1-1102.

1. Presumption = employee.
2. To classify as an independent contractor look to the Internal Revenue Service guidelines.
3. Agreements misclassifying employees as independent contractors are prohibited.
4. Employers who misclassify employees are subject to civil penalties and debarment from contracts with public bodies.
5. Individuals have a private right to file lawsuits against their employers for misclassification.



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Virginia Rules, continued

6. Damages for these claims include wages, salary, employment benefits, expenses incurred that would have been covered by insurance, reasonable attorney's fees and costs.
7. Retaliation is prohibited.
8. Violations are subject to a civil penalty.
9. A general construction contractor is deemed jointly and severally liable with its subcontractors for failure or refusal to pay wages owed to employees, and the Board for Contractors may sanction any construction contractor that misclassifies its employees.



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Federal Misclassification Rules for Independent Contractors

The DOL's economic reality test adopted in the Fall of 2020 remains in force and effect.

The Biden Administration had put this rule on hold but their efforts to do so were deemed illegal by a Texas District Court.

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The Six Factor "Economic Reality" Test

1. Employer's right to control the way the work is performed;
2. Employee's opportunity for profit or loss based on managerial skill;
3. Employee's investment in equipment and materials or his employment of helpers;
4. Whether the services rendered require special skills;
5. Degree of permanency of the working relationship;
6. Whether the service rendered is an integral part of the employee's business.

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Whistleblower Protections & Retaliation

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New Whistleblower Law



- Va. Code § 40.1-27.3
- Prohibits retaliation against employees who:
 - Report to a **supervisor** or government official a violation of federal or state law or regulation
 - Is requested by a law enforcement officer to participate in a hearing or inquiry
 - Refuses to engage in criminal activity
 - Refuses to engage in acts that violate federal and/or state laws and informs employer of this refusal; and
 - Participates in an investigation, hearing, or inquiry related to the violation
- Does not authorize disclosure of information protected by law or legal privilege.



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New Right of Action for Whistleblower Claims

- Private right of action to bring a claim within 1 year of retaliation
- Remedies available:
 - Injunctive relief;
 - Reinstatement to the same or equivalent position;
 - Compensation for lost wages, benefits, and other remuneration, with interest;
 - Attorney's fees and costs.

Has this section essentially eliminated the common law action for wrongful dismissal in violation of public policy?

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Retaliation for Unpaid Wages or Benefits, Va. Code § 40.1-33.1 to 40.1-33.2

- | | |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> • Protected activity: <ul style="list-style-type: none"> • Report or plans to report/file complaint/instituted proceedings with appropriate authority that worker is misclassified and has unpaid wages • Requested/subpoenaed to testify • Good faith, reasonable belief • Employers may not: <ul style="list-style-type: none"> • Discharge; • Discipline; • Threaten; • Discriminate against; or • Penalize employee. | <ul style="list-style-type: none"> • File complaint with VDOLI to investigate • Remedies available through VDOLI: <ul style="list-style-type: none"> • Reinstatement • Lost wages • Liquidated damages (equal to lost wages) • Civil Penalties • NO private right of action for wage and misclassification |
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Alexander v. City of Chesapeake (May 20, 2021)

- First reported case under Va. Code § 40.1-27.3
- Whistleblower Activity: City employee complained about the City's alleged violation of state mandatory reporting requirements for suspected child abuse to her supervisor, the City Attorney, and Child Protective Services.
- Retaliatory Activity: Termination from employment.
- City moved to dismiss the lawsuit
- Judge Taylor of the Chesapeake Circuit Court denied the motion:
 - Internal report to supervisor was protected
 - Complaint to the City Attorney was protected as a report to a governmental body

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Other Whistleblower Protections

- Virginia Fraud and Abuse Whistleblower Protection Act, Va. Code §§ 2.2-3009 *et seq.* (2019)
- Virginia Fraud Against Taxpayers Act, Va. Code §§ 8.01-216.1 *et seq.* (2002)
- Virginia Occupational Safety and Health Act, Va. Code §§ 40.1-51.2:1 and 40.1-51.4:5 (1979)

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Supply Chain



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Supply Chain Challenges

A Baby Formula Shortage Leaves Desperate Parents Searching for Food

Some parents are driving hours at a time in search of supplies. Others are watering down formula or rationing it, hoping for an end to the shortage.



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What's Behind America's Shocking Baby-Formula Shortage?

Bacteria, a virus, a trade policy—and a lesson

By Derek Thompson



BUSINESS

U.S. baby formula shortage is worrying parents. Here's what to know.

Nationwide out of stock levels for infant formula hit 43 percent last week

By Bryan Pietsch, Grace Moon and Taylor Telford
May 11, 2022 | Updated May 11, 2022 at 10:41 p.m. EDT



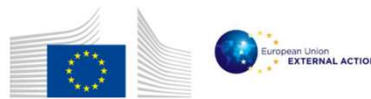
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What Is Forced Labor?

“[A]ll work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.

--The International Labor Organization (ILO) Convention No. 29 on Forced Labor

See https://trade.ec.europa.eu/doclib/docs/2021/july/tradoc_159709.pdf.



GUIDANCE

ON DUE DILIGENCE FOR EU BUSINESSES TO ADDRESS THE RISK OF FORCED LABOUR IN THEIR OPERATIONS AND SUPPLY CHAINS¹



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New Legal Prohibitions on Forced Labor

United States

- **Uyghur Forced Labor Prevention Act:**
 - Purpose: “Ensuring that goods made with forced labor in the Xinjiang Uyghur Autonomous Region of the People’s Republic of China do not enter the United States market”
 - Creates a rebuttable presumption that goods produced in whole or in part in this region of China are produced with forced labor.
 - Blocks importation of these goods.
 - Enforcement begins June 21, 2022.

European Union and Canada

- EU guidance document, July 2021: “European Commission committed to provide guidance to assist EU businesses on taking appropriate measures to address the risk of forced labor in their operations and supply chains, in line with international due diligence guidelines and principles.”
- Movement in Europe to “introduce mandatory human rights and environmental due diligence” requirements for corporations.
- Canadian efforts to prevent forced labor in supply chains.

BILL S-211: CANADA GETS READY TO JOIN THE FIGHT AGAINST FORCED LABOUR AND CHILD LABOUR IN SUPPLY CHAINS

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Cannabis & Marijuana

- Legalization of Recreational Marijuana
- Workplace Protections for Cannabis Oil Users



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Marijuana

- Classifies varieties of *cannabis* that contain more than 0.3% THC (tetrahydrocannabinol)
- Medical and recreational use
- Illegal under federal law as a Schedule 1 narcotic under the Controlled Substance Act (CSA), *see* 21 U.S.C. § 812(b)(1)
- Method of consumption
 - Smoking leaves, buds, vaping oil
 - Oral pills, edibles, ingestible oils
- Absorption, metabolism, and secretion of chemical compounds significantly impacted by the method of consumption



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CBD: Cannabidiol

- Nonpsychoactive
- Benefits: analgesic, antianxiety, anti-inflammatory, and pain-relieving
- Derived from hemp = Legal in all 50 states
 - 2018 Farm Bill
 - Cannot legally contain more than 0.3% THC
- Emerging in popularity for its mental and physical benefits without the side effects of THC (i.e., paranoia)



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THC: Tetrahydrocannabinol

- Primary chemical that creates most of the intoxicating, psychological effects of cannabis
 - Releases dopamine
 - Hallucinations
 - Memory Loss
 - Impaired impulse control
 - Emotional changes (anxiety, paranoia, panic attacks)
 - Decreased complex motor skills
 - Interference with attention span
- Effects of THC last about 2 hours



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Virginia's Path to Decriminalization

- Effective July 1, 2020, Virginia decriminalized marijuana by replacing criminal convictions for simple possessions with a modest civil fine, under Va. Code § 18.2-250.1(A) (*now repealed*).
- Effective July 1, 2020, employers are prohibited from requiring applicants from disclosing histories of simple possession of marijuana, under Va. Code § 19.2-389.3.
 - Willful violations: Class 1 misdemeanor
 - Misdemeanor convictions now subject to automatic expungement
- Effective November 9, 2020, Virginia law enforcement prohibited from stops, seizures, and searches based solely on the odor of marijuana, under SB 5029.

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2021 Cannabis Control Act, Va. Code §§ 4.1-600

- Effective July 1, 2021:
 - Virginians age 21+ may legally possess (up to 1 oz) and cultivate marijuana (up to 4 plants)
 - >1 oz. is punishable as a civil offense with a fine of up to \$25.00
 - >1 lb. is a felony punishable by up to 10 years in jail and a fine of up to \$250,000
 - Open use of marijuana or cannabis products remains illegal
- Sales of commercial/recreational marijuana have not been authorized by the General Assembly. Medicinal sales remain legal pursuant to a valid prescription.



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Cannabis Oil Users: A New Protected Class?

Va. Code § 40.1-27.4. Discipline for employee's medicinal use of cannabis oil prohibited.

A. As used in this section, "cannabis oil" means the same as that term is defined in § 54.1-3408.3.

B. No employer shall discharge, discipline, or discriminate against an employee for such employee's lawful use of cannabis oil pursuant to a valid written certification issued by a practitioner for the treatment or to eliminate the symptoms of the employee's diagnosed condition or disease pursuant to § 54.1-3408.3.

C. Notwithstanding the provisions of subsection B, nothing in this section shall

(i) restrict an employer's ability to take any adverse employment action for any work impairment caused by the use of cannabis oil or to prohibit possession during work hours,

(ii) 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....

Controlled Substances Act, 21 U.S.C. § 812(b)

Marijuana (specifically, THC) remains classified as a Schedule I substance under the CSA because:

- THC has a high potential for abuse
- THC has no currently accepted medical use in treatment in the US
- There is a lack of accepted safety for use of THC under medical supervision

The growth, distribution, use, manufacture, and possession of marijuana remains illegal under federal law . . . for now.

Drug-Free Workplace Act of 1988

- The Drug-Free Workplace Act [41 U.S.C. § 8101 et seq.](#) (DFWA) requires certain federal contractors and federal grant recipients to maintain drug-free workplaces.
- DFWA applies to federal contractors who:
 - Enter into federal contracts valued at \$100,000 or more, or
 - Receive a federal grant (both grantees and sub-grantees)
- Employees must be prohibited from manufacturing, distributing, possessing or using controlled substances.

Omnibus Transportation Employee Testing Act of 1991



Applies to all safety-sensitive transportation employees, including commercial motor vehicle operators required to maintain a commercial driver's license (CDL)

Employers **must**:

- Test employees for drugs if there is a "reasonable cause or suspicion" that:
 - *Employee is under the influence while on the job, or*
 - *Employee is involved in a work-related accident*
- Implement a random drug testing program
- Use certified lab recognized by the Dep't of Health and Human Services
- Use a qualified Medical Review Officer (MRO) to review all tests
- Provide employee opportunity to consult with MRO before results provided
- Provide drug and alcohol awareness training and education to all employees
- Additional 2 hours of training for supervisors on detection, documentation, intervention
- Refer any employee with a substance abuse problem to a trained substance abuse professional to evaluate treatment needs and determine fitness for duty

Transportation Issues

- The U.S. Department of Transportation has clarified that states' legalization of marijuana has not modified its drug-related regulations
 - Employers must continue to follow DOT-regulated employees
 - Includes all individuals employed to drive under a commercial driver's license (CDL)
- DOT requires testing for marijuana, not CBD
- DOT does not authorize marijuana for any reason
- CBD is not a legitimate medical explanation for a positive result for the DOT
- Virginia law: Possession while operating a commercial motor vehicle must be reported to the Department of Motor Vehicles and included on the individual's driving record. See Va. Code 18.2-250.1(B).

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Can Virginia employers still discipline employees for off-duty marijuana use?

Most likely, YES

- Virginia is an at-will state
- ***Coats v. Dish Network*** (2015): Because federal law recognizes marijuana as illegal, employer was free to terminate employment of Colorado employee who tested positive from off-duty use
- ***Swaw v. Safeway*** (2015): Termination for off-duty use of medical marijuana did not establish a Washington employee's disability discrimination claim because marijuana is illegal

However, consider the ADA ...

- ***Barbuto v. Advantage Sales and Marketing*** (2017): Employee with medical marijuana Rx for Crohn's disease allowed to sue for disability discrimination when she was fired after a positive drug test. Court put no stock in the possible argument that marijuana was still illegal under federal law. Employer should have engaged in the interactive process.

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Trends in Federal Law

MORE Than Meets the Eye? How Federal Marijuana Legalization Legislation Could Affect Employers
Thursday, May 12, 2022

Will Democrats keep their promise to decriminalize marijuana?

President Biden said during his campaign that he would reschedule the drug so it's not illegal

Bill To Federally Legalize Marijuana Reintroduced In Congress As Senate Prepares Separate Measure

Published 4 days ago on May 28, 2021
By Kyle Jaeger

Puff Puff Pass: Democrats eye the SAFE Banking Act to motivate a move on full, national legalization

By Dan Mitchell Oct 6, 2021

Sens. Make Bipartisan Push To Advance SAFE Banking Act

By Katryna Perera (May 12, 2022, 4:30 PM EDT) -- A bipartisan group of U. S.

Senators Flooded With Input On Federal Marijuana Legalization Bill

Published 2 weeks ago on September 1, 2021
By Kyle Jaeger

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Trends from Other States

Amazon will no longer test its employees for marijuana

The company is officially going 420 friendly.

By Anagha Srikanth | June 2, 2021

Pre-employment Marijuana Screens Will Be Outlawed for Many in Philadelphia



By Roy Maurer
April 29, 2021

Maine First State To Protect Marijuana Users In The Workplace

Apr 4, 2018 | In the News, Industry News



New York State Bans Most Employers From Drug Testing for Pot

New York officials finally provided drug testing freedoms that workers have been waiting for.

Off-Duty Recreational Cannabis Use to be Protected in New Jersey

By Lauren J. Marcus, Dale Deitchler, Nancy Delogu, and Dylan Dindial on February 24, 2021

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2022 General Assembly



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HB1236: Protected Leave for Eviction Proceedings

House Patrons: Jenkins (D), Plum (D), Scott (D), Simon (D)

Senate Patron: Lucas (D)



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Protection from Adverse Employment Actions for Eviction Proceedings

- Employers cannot fire or take “adverse personnel action” against employees who miss work for unlawful detainer (i.e., eviction) proceedings
- Summonses will include a notice to the tenant-employee of this new protection
- “Adverse action” includes:
 - Discharge
 - Mandatory use of sick leave or vacation time
- Employee must provide reasonable notice to employer
- Employer violations are punishable as Class 3 misdemeanors
- **TIP:** Update your employment handbooks, and require a copy of the summons.

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HB1178: Seizure First Aid Posters

House Patrons: Avoli, Carr, Clark, Convirs-Fowler, Fowler, Glass, Hope, Jenkins, Keam, Kory, Maldonado, Plum, Ransone, Rasoul, Reid, Sewell, Simonds, Wiley
Senate Patrons: Hashmi, Norment

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Seizure First Aid Posting Requirement

- Virginia Department of Labor & Industry must provide **all** employers and employees with informational posters about seizure first aid consistent with the guidelines of the Epilepsy Foundation of America
- All Virginia employers with **25 or more** employees to “physically” display these posters in a “**prominent**” position, visible to employees
- Protects “Good Samaritans” who render emergency care in good faith without compensation



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Seizure First Aid

Employers are NOT required to:

- Create their own poster
- Train employees on seizure first aid
- Administer seizure first aid

Best Practices:

- Include seizure first aid training CPR/AED training
- Train on obtaining consent before administering first aid
- Train on “Regarded As” disability discrimination under the ADA
- Remind employees to **call 911**

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SB271: Living Organ Donor Benefits

Senate Patrons: Ebbin (D), Hashmi (D)



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Living Organ Donors – Insurance Benefits

- Prohibits refusal to insure individuals based on status as a living organ donor
- Protects donors of organs and bone marrow
- Applies to these types of policies:
 - Life insurance
 - Disability insurance
 - Long-term care insurance
- Applies on or after January 1, 2023 to new, amended, renewed, or extended plans

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HB710: Hiring Preference for People with Disabilities in Local Government

House Patrons: Keam, King, Avoli, Glass, Hodges, Krizek, McNamara, Rasoul, Sullivan, Jr., Graves



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Preference in Hiring for Local Governments

- Amends Va. Code 15.2-1509, which already establishes a preference for the hiring of veterans
- Adds “person with a disability” to group of qualified applicants to whom local governments “shall take into consideration or give preference to” in the hiring process
- “Person with a disability”: Any person who has a physical or mental impairment that substantially limits one or more of his major life activities or who has a record of such impairment

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Unsuccessful Bills

(That you probably heard about, and may hear about again in 2023!)

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Bills that Failed in 2022

- HB171: Stop to schedule of minimum wage increases
- HB510: Private right of action for employees injured by medical mandate
- HB580: Prohibition on non-competes for health care professionals
- HB757: Mandatory sexual harassment and anti-discrimination training (5± EEs)
- SB1: Paid family and medical leave for public employees
- SB189: Prohibition against vaccine mandates
- SB494: Clarity that Virginia Human Rights Act applies to employers with 5± EEs

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Questions?

Thank you for your time!



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