Bloomberg Law®

INSIGHT: Virginia Overhauls Anti-Discrimination Laws—Could Other States Follow?

May 22, 2020, 4:01 AM

Effective July 1, it will be illegal for Virginia employers to discriminate on the basis of sexual orientation, gender identity, and veteran status, making Virginia the first Southern state to enact anti-discrimination protections for LGBTQ+ workers. Morgan Lewis attorneys say the anticipated increase in state court litigation may be particularly impactful because of severe procedural limitations on Virginia's summary-judgment process and predict other states may follow.

The Commonwealth of Virginia recently enacted an expansive overhaul of its anti-discrimination laws. This has rightly grabbed headlines for adding new protected classes to the existing prohibitions on employment discrimination, including for those in the LGBTQ+ community, but the changes also significantly expand the reach of the Virginia Human Rights Act by allowing most individual employees to file private discrimination lawsuits under Virginia law for the first time.

Virginia's recent actions will have a major impact on the litigation of discrimination claims in the Commonwealth, and may preview a coming tide of similar legislation in other states.

The Virginia Human Rights Act

As currently enacted, the Virginia Human Rights Act (VHRA) prohibits discrimination on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, and disability. But the VHRA does not allow most employees to vindicate these rights in court.

Instead, the statute provides for a private right of action only against employers with between five and 15 employees, leaving most employees to pursue discrimination claims under federal law. Even for the limited group of employees who can file suit under the existing VHRA, the statute limits recovery to 12 months of back pay, plus attorneys' fees capped at 25% of the back pay award.

When the VHRA's amendments take effect on July 1, these parameters will shift substantially.

First, adding to the existing protected classes under the statute, it will now be illegal for Virginia employers to discriminate on the basis of sexual orientation, gender identity, and veteran status. This amendment, as widely reported, makes Virginia the first Southern state to enact anti-discrimination protections for LGBTQ workers.

Second, the VHRA now provides virtually all Virginia employees with a private right of action. More specifically, all employers with more than five employees will be susceptible to individual lawsuits for discriminatory discharge, and employers with more than 15 employees can be sued for other alleged acts of employment discrimination (short of discharge).

Third, the amended VHRA eliminates the prior caps on damages and recovery. Prevailing employees can now recover "compensatory and punitive damages," plus "reasonable attorney fees and costs," without any cap.

Practical Consequences for Employers

Employers in Virginia should begin to prepare for these impending changes in several ways.

Most immediately, employers should begin to incorporate the VHRA's new protections for sexual orientation, gender identity, and veteran status into their policies and procedures, to the extent they are not already. Employers should re-examine and revise, as necessary, their anti-discrimination policies, and employers should consider conducting additional anti-discrimination training for managers and employees.

Employers should also prepare for a significant uptick of employment discrimination lawsuits filed in Virginia's state courts. To date, employment discrimination cases have been litigated almost exclusively in Virginia's federal courts because employees must file claims under federal law, providing an easy basis for removal under "federal question jurisdiction."

Under the VHRA's new regime, employees are likely to file suit in Virginia's state courts, where the cases are likely to remain absent diversity of citizenship to trigger a basis for removal. And even then, an employer may still be unable to remove the case for other reasons, including if the employer's headquarters are located in Virginia (potentially precluding removal under the forum defendant rule) or if the employee names a Virginia-based manager or supervisor as a co-defendant (to defeat complete diversity), which the revised VHRA would seem to allow—since the amended statute applies not only to the "employer," but also to the "agent of any such person."

The anticipated increase in state court litigation may be particularly impactful because of the procedural limitations on Virginia's summary-judgment process. Although Virginia courts allow for the dismissal of cases at summary judgment in concept, litigants generally cannot rely on deposition testimony or affidavits in support of such a motion.

Thus, absent a clear legal defense that does not depend on the plaintiff's admissions or testimony, it could be difficult for employers to defeat claims at summary judgment. Depending

on how Virginia courts approach these cases, it is possible that most claims under the VHRA, as amended, will now proceed to jury trials.

Potential Implications for Other States

Virginia's recent statutory changes came out of a legislative session that saw both houses of the Virginia General Assembly under Democratic control for the first time in more than 25 years. In light of the upcoming 2020 elections in many statehouses across the country, employers may wonder whether Virginia's expansion of its anti-discrimination laws—including the creation of private rights of action for employment discrimination claims—may become a roadmap for other states that have not yet taken that step.

For instance, in neighboring North Carolina—an increasingly "purple" jurisdiction—the state's Equal Employment Practices Act does not currently provide for a private right of action that would allow employees to bring suit directly (although North Carolina courts allow allegations of discriminatory discharge to serve as a basis for a claim of wrongful discharge in violation of public policy). Instead, enforcement is left to the North Carolina Human Rights Commission, as used to be true in Virginia.

Indiana presents another example, as its Civil Rights Law does not currently provide for a private right of action for claims of employment discrimination, and leaves the law's administration and enforcement in the hands of the Indiana Civil Rights Commission. Other state laws carry the same or similar limitations.

Given the limited resources of many state fair-employment agencies—resources that will almost certainly be stretched even more in the wake of the current global coronavirus pandemic—it is possible that other state legislatures may look to Virginia's recent actions as a model for expanding their own anti-discrimination laws in the same way.

This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.

Author Information

Lincoln O. Bisbee is a partner the Washington, D.C., and New York offices of Morgan, Lewis & Bockius LLP.

Matthew J. Sharbaugh is an associate in Morgan Lewis's Washington, D.C., office.