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New Virginia laws: Now's the time to comply

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Now that fall is here, it's a good time for you to make sure you are in compliance with newly effective Commonwealth of Virginia laws affecting the workplace. This year, there are two such laws of which you need to be aware. One affects the scope of nondisclosure agreements, and the other requires you to provide certain personnel records to your employees.

Nondisclosure limitations

The #MeToo movement has highlighted the common practice in the resolution of sexual harassment claims to require employees to keep completely confidential any information regarding the complaint that was made. This practice has come under increased criticism for covering up the wrongdoing of corporate executives and enabling them to continue their harassing and untoward behavior.

Some advocates have gone so far as to call for the ban of such agreements based on public policy grounds. Indeed, in this year alone, proposed legislation relating to limiting or prohibiting nondisclosure agreements has been introduced in 16 states.

New requirements

One of those states is Virginia, where the general assembly passed a law limiting the confidentiality requirements an employer may impose on an employee. At the beginning of this year's general assembly session, Delegate Karrie Delaney (D-Centreville) introduced **House Bill (HB) 1820**. The bill prohibits an employer from requiring a current or prospective employee—as a condition of employment—to sign confidentiality agreements or nondisclosure agreements that have the purpose of concealing the details relating to sexual assault claims, including rape, forcible sodomy, sexual battery, and aggravated sexual battery.

The legislation says such a nondisclosure provision is against the Commonwealth's public policy and is void and unenforceable. The general assembly unanimously passed HB 1820, and Governor Ralph Northam signed it. The new law became effective on July 1, 2019.

Steps to take

The law applies to new confidentiality provisions being executed and renewals of nondisclosure agreements. Nonetheless, courts interpreting the new statute are likely to prohibit the enforcement of any provision in a current agreement that doesn't conform to the new legal requirements. Accordingly, you should review your current nondisclosure agreements, including those that may be in your employee handbook, to make sure the language could not be read as running afoul of the new law.

Also, when drafting new agreements for your employees to sign, keep the new law's limitations in mind. Given the importance of this issue, especially in the wake of mounting criticism of—and hostility to—nondisclosure restrictions, it's advisable to consult with knowledgeable employment counsel to make certain your agreements won't be struck down as against public policy.

Personnel records

In the past, private-sector Virginia employers haven't needed to provide either current or former employees with access to their personnel files or other records, nor were employees or former employees entitled to copies of their records. That

was then. In July, a new legal requirement took effect. Now, under new Virginia Code § 8.01-43.1, you must provide the following records to current and former employees:

- Dates of employment with your company;
- Their wages or salary during their employment;
- Their job description and job title; and
- Any injuries sustained during the course of employment.

Upon receipt of a written request, you will need to provide the records within 30 days. The law allows you to charge a reasonable fee per page for copying the records if they are kept in paper format and a reasonable fee for providing electronic records. If you need more than 30 days, you must provide a written notice of the delay. Such written notice will give you another 30 days to comply.

Narrow exceptions

The only statutory exception to producing the required records is if the employee's treating physician or clinical psychologist, in the exercise of professional judgment, has determined that releasing the records is reasonably likely to endanger the life or physical safety of the employee or another person. In this limited circumstance, you still must provide the records if they are to go to the employee's attorney or authorized insurer, rather than directly to the employee. Of course, this exception is very narrow, so in most cases you will need to comply with the new law's disclosure and production requirements.

Penalties/compliance

Failure to abide by the new legal requirement can have serious consequences. Employees can enforce the new law by subpoenaing the documents from you. If you then intentionally refuse to comply with the subpoena, you may end up in court. If the court finds you failed to follow the law, it may award damages, costs, and attorneys' fees. That is a result you don't want to face.

Accordingly, you should review your employee handbooks, policies, and employment agreements to ensure the provisions dealing with the production of employee records conform to the new legal requirements. It's also important to follow the time limits for record requests. To ensure that is done, you may want to designate a person within HR who is responsible for receiving, evaluating, and ultimately responding to personnel records requests. By doing so, you will be far less likely to run afoul of the new law, especially the 30-day window to respond to a written request.

Potential legal concerns

In addition to making certain you have the procedures in place to provide personnel records to current and former employees, you need to bear in mind that the records you produce, especially wage and salary information, won't necessarily stay confidential. The documents may well be circulated among your employees who will be able to compare what they are paid to that of their colleagues.

For many employers, this may not present any problem. There always is a potential, however, that wage comparisons will indicate disparities in what employees are paid that might create legal problems for you. For example, if most of your female employees are paid less than their male peers doing comparable jobs, the wage disparity may well indicate sex discrimination.

To avoid any potential problems down the road, now is a good time to take a look at your pay practices. If disparities exist, be prepared to provide a business-related reason for the differences. If, in the course of your analysis, you determine some of the wage disparities aren't business-justified, then you should take steps to correct any problem. Because wage disparity issues raise potential liability concerns, consult with employment counsel about how best to deal with the situation. An ounce of prevention truly will outweigh any costs of having to defend against a charge of discriminatory pay practices.

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