Virginia has long billed itself as a business-friendly state with low taxes and commonsense employment regulations. But recent changes—largely adopted with little fanfare or scrutiny—are poised to revolutionize the labor and employment landscape in Virginia. These changes—compounded by the likely recession resulting from the COVID-19 pandemic—will present tremendous challenges for Virginia employers.

Below are five of the most impactful changes recently approved by the Virginia General Assembly. We will provide additional guidance regarding these and other changes throughout the year, so stay tuned.

1. **Virginia Values Act (passed on March 6, 2020, signed into law by Governor Ralph Northam on April 11, 2020)**

   Senate Bill 688 was promoted as a targeted measure amending the Virginia Human Rights Act (Virginia’s primary anti-discrimination statute) to include sexual orientation and gender identity as protected categories. However, the Virginia Values Act did far more than advertised, and represents nothing short of a sea change in Virginia employment law.

   By substantially amending the Virginia Human Rights Act, the Virginia Values Act will likely render Title VII of the Civil Rights Act of 1964 and many other federal employment statutes a non-factor for most litigants, driving most Virginia employment litigation from federal court to state court (which lacks a functional summary judgment mechanism), and imposing theoretically limitless damages.

   Historically, the Virginia Human Rights Act applied to small employers (those with between 6 and 19 employees), and created a very limited cause of action applicable only to discriminatory discharge. The Virginia Values Act dramatically overhauls that statute by:

   - Adding a prohibition against discrimination in employment, public accommodation, the provision of credit, and housing on the basis of sexual orientation, gender identity, and several additional bases;
   - Creating a broad cause of action for discrimination in public accommodations; and
   - Creating a broad cause of action for employment discrimination that applies to nearly all Virginia employers;
may be filed by aggrieved employees in state court after completing administrative exhaustion requirements; and
permits the award of compensatory damages, punitive damages, attorneys’ fees and costs, and injunctive relief to prevailing plaintiffs, without a cap.

Among these changes, perhaps the most impactful will be the move from federal to state court. This is because Virginia state courts lack a functional summary judgment procedure, except in disputes solely between business entities. As a result, defending employment claims in Virginia will likely become far more expensive, and result in a higher likelihood of trial.

Virginia joins a small minority of other states with similar frameworks (for example, West Virginia) that effectively migrate most employment claims from federal to state court, thereby imposing even greater risks and expenses on employers.

2. Private Cause of Action for Violations of the Virginia Wage Payment Act (passed on March 18, 2020, signed into law by Governor Northam on April 10, 2020)

The General Assembly also approved a measure **SB 838**, creating a private cause of action for violations of the Virginia Wage Payment Act, which primarily governs the form and frequency of pay for employees, and imposes restrictions on withholding and forfeiture of wages. Specifically, SB 838 supplements the current administrative and criminal enforcement scheme by permitting employees to bring individual or collective actions in court for failure “to pay wages to an employee in accordance with” the Virginia Wage Payment Act. Successful plaintiffs can recover back wages, liquidated damages, interest, and attorneys’ fees and costs. For knowing violations, courts are instructed to award treble damages.

Although the impact of SB 838 is difficult to predict, it has the potential to greatly increase the number of claims filed against employers. In particular, SB 838 could be used to generate large and costly collective action litigation over minor or technical violations. Thus, SB 838 has the potential to create significant headaches for Virginia employers.

3. Public-Sector Collective Bargaining (Implementation delayed until May 1, 2021)

With the recent passage of **House Bill (HB) 582**, the General Assembly approved a limited public-sector bargaining law permitting—but not requiring—localities (i.e., cities, towns, counties, and political subdivisions) to recognize and bargain with labor unions. Although this measure will likely have serious consequences for the Commonwealth and its localities, the final bill represents a far less onerous approach than earlier versions.

Historically, public employees in Virginia were prohibited from bargaining collectively, and both the Commonwealth and localities were prohibited from recognizing unions. As a practical matter, this meant that although groups such as teachers, police officers, and firefighters formed voluntary associations to advocate for their interests, their power was somewhat limited.

Because this approach made Virginia something of an outlier, public-sector bargaining in Virginia has long been a goal of the labor movement. Earlier this year, that goal came very close to realization, as the General Assembly considered a measure that would have authorized collective bargaining with public-sector unions
statewide, meaning that all public employers (both statewide and local) would have been vulnerable to unionization. In part because of the tremendous costs such a blanket approach was likely to impose (some estimates put the increased costs into the hundreds of millions of dollars), opposition was swift.

As a result, the General Assembly pursued the compromise approach reflected by HB 582, which makes public-sector bargaining voluntary on the local level, but maintains the statewide prohibition as follows:

- Localities are permitted to pass ordinances authorizing public sector union recognition and bargaining within their jurisdictions;
- Localities are not required to pass such ordinances. However, if a group of public employees informs their locality that they have majority support for a union, then that locality must vote on a collective bargaining ordinance within 120 days.
- Such collective-bargaining ordinances must contain specific procedures for certifying and decertifying unions, including public notice and the opportunity for unions to intervene in the certification process; and
- Strikes by public sector employees remain prohibited.

Although scaled back, this bill is likely to have a serious financial and logistical impact on both localities and state coffers. As a result of its passage, localities can expect substantial organizing activity across their workforces, including among K-12 teachers, law enforcement, firefighters, and other critical positions. Localities should not minimize or understate the risks posed by such organizing, which can result in significant logistical burdens and strain already precarious budgets. Furthermore, local unionization would likely have cascading impacts on state coffers. For instance, the Virginia Department of Planning and Budget estimates that a one percent salary hike for state-funded instructional and support positions at local schools would impose increased statewide spending of over $48 million, not counting the additional local costs that would be incurred.

Because of the costs and logistical burdens associated with unionization, preparation and careful consideration will be paramount for localities considering an ordinance approving public sector union recognition and bargaining.

4. Minimum Wage Increase (Implementation delayed until May 1, 2021)

With little fanfare, the General Assembly recently passed HB 345, which will increase Virginia’s minimum wage from its current level ($7.25 per hour) to as high as $15.00 in 2026. This substantial increase will be tiered according to the following schedule:

- May 1, 2021: $9.50 per hour
- January 1, 2022: $11.00 per hour
- January 1, 2023: $12.00 per hour
- January 1, 2025: $13.50 per hour (if the General Assembly reenacts by July 1, 2024)
- January 1, 2026: $15.00 per hour (if the General Assembly reenacts by July 1, 2024)
5. Independent Cause of Action for Misclassification (passed on February 26, 2020, signed into law by Governor Northam on March 18, 2020)

The General Assembly joined a host of states by passing measures aimed at curbing worker misclassification. However, Virginia’s approach is somewhat unusual in that it appears to create an independent cause of action for the misclassification, even in the absence of allegations that the putative employer failed to pay proper compensation.

Under HB 984, to be codified at Va. Code § 40.1-287.7 and effective July 1, 2020, an allegedly misclassified worker may bring a civil action against his or her putative employer “if the employer had knowledge of the individual’s misclassification.” Successful plaintiffs can recover broad damages, including wages, salary, employment benefits (including recoupment of expenses that would have otherwise been covered by insurance if the individual had been classified as an employee), other compensation lost to the individual, and “reasonable” attorneys’ fees and costs. Only successful plaintiffs (and not defendants) may recover attorneys’ fees and costs.

Importantly, under this new law, there is a presumption of employer/employee status, and the putative employer can only overcome that presumption by proving independent contractor status under the IRS guidelines.

This little-publicized legislation has the potential to create enormous disruptions for Virginia employers. At present, there is no private cause of action for misclassification alone. However, under HB 984, it appears that claims of misclassification alone (even if no overtime is owed) may be sufficient to entitle workers to damages. Moreover, given the presumption of employment status, claims under this new law are likely to be difficult and costly to defend.

**Key Takeaways**

In conclusion, Virginia is quietly and without fanfare moving away from the business-friendly posture it has advertised for decades, and gravitating toward a more regulation-heavy posture favored by states like New York and California. Although these recent changes have been overshadowed by pandemic-related coverage, Virginia employers should be aware of the risks they impose. Given this changing legal landscape and the risk of liability it confers, Virginia employers may want to be proactive and implement these developments into their ongoing compliance efforts.

Ogletree Deakins will continue to monitor these rapidly changing developments in Virginia’s legislature, and will post updates as additional information becomes available.