Legal Update Article

# Virginia Enacts Wage Theft, Non-Compete Laws Amidst Flurry of New Employee Protections

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## Meet the Authors


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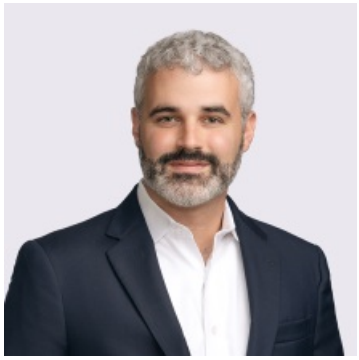


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Virginia has enacted a series of new laws that continue to redefine the employment landscape in the state. In addition to the Virginia Values Act, which fundamentally changes the legal rights and remedies available to employees who sue their employers under the Virginia Human Rights Act, a new comprehensive whistleblower protection law, a contractor misclassification law that presumes employment status, Governor Ralph Northam signed new laws significantly altering the framework of unpaid wages, restrictive covenants, and even the handling of marijuana offenses in Virginia.

### New Wage Theft Law

HB 123/SB 838 (Wage Theft Law) creates a private right of action for employees to sue their employers for allegedly unpaid wages. This is a first of its kind in Virginia.

Previously, a Virginia employee had no private right of action in Virginia courts. The employee had to file an administrative claim with the Virginia Department of Labor and Industry (DOLI) instead.

The Wage Theft Law permits recovery of wages owed (plus 8% interest from the date the wages were due, which is higher than Virginia's 6% statutory pre-judgment interest for most other judgments). The law also permits recovery of *treble damages* and a $1,000 civil penalty per violation. If an employer is found to have committed a "knowing violation," a court can award attorneys' fees.

The law also carries potential *criminal* penalties for knowing violations. If the amount owed is less than $10,000, employers can be found guilty of a misdemeanor. If the amount owed is more than $10,000, or if an employer has similar previous offenses, employers can be found guilty of a felony and subject to a corresponding prison sentence. The definition of "knowing" includes actual knowledge, deliberate ignorance, or acts in reckless disregard of the truth. Establishing that an employer acting knowingly does not require proof of a specific intent to defraud the employee.

The Wage Theft Law's anti-retaliation provision states: "An employer shall not discharge or in any other manner discriminate against an employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under [the Wage Theft Law], or has testified or is about to testify in any such proceeding."

The anti-retaliation provision does not appear to have a private right of action, but it permits the Commissioner of Labor and Industry to institute proceedings for "appropriate remedies for such action, including reinstatement of the employee and recovering lost wages and an additional amount equal to the lost wages as liquidated damages."

The availability of treble damages and attorneys' fees may make Virginia a magnet for "wage theft" claims (as seen in Maryland and the District of Columbia). This can turn

Virginia into a hotspot for "wage and hour" lawsuits, which have been more common in Maryland and the District of Columbia.

### Ban on Restrictive Covenants for "Low-Wage" Employees

HB 330/SB 480 (Restrictive Covenant Law) prohibits employers from entering into, enforcing, or threatening to enforce a restrictive covenant against "low-wage" employees. The law takes effect July 1, 2020, and does not apply retroactively.

The Restrictive Covenant Law defines restrictive covenants as "an agreement that restrains, prohibits, or otherwise restricts an individual's ability to compete with his former employer." The text supports nondisclosure agreements and other efforts to prevent misappropriation "of certain information, including trade secrets, as defined in § 59.1-336, and proprietary or confidential information" and suggests that non-solicitation provisions are still viable as well.

"Low-wage" employees are broadly defined as those whose average weekly earnings are less than the average weekly wage of the Commonwealth. The definition expressly includes "interns, students, apprentices, or trainees employed, with or without pay, at a trade or occupation in order to gain work or educational experience." Even independent contractors who earn "an hourly rate that is less than the median hourly wage for the Commonwealth for all occupations" (a bit less than $20 per hour right now) are included.

Given the average weekly wage in the Commonwealth is a little over $1,000, this "low wage" is not so "low," but regional compensation differences could lead to a greater impact in some areas versus others. Significantly, "any employee whose earnings are derived, in whole or in predominant part, from sales commissions, incentives, or bonuses paid to the employee by the employer" are excluded.

A private right of action for employees seeking to challenge or enjoin their non-compete restriction has been created. If the employee is successful in such a challenge, the employer is liable for liquidated damages, lost compensation and attorneys' fees — but what constitutes "liquidated damages" is undefined by the statute.

The Restrictive Covenant Law requires an employer to post a DOLI-approved notice in the workplace summarizing the law. The new law also directly puts the DOLI into an active role in evaluating restrictive covenants. Not only does it direct the Commissioner to impose a civil penalty of up to $10,000 for each violation it determines, but also provides:

> [The] Commissioner shall prescribe procedures for the payment of proposed assessments of penalties that are not contested by employers. Such procedures shall include provisions for an employer to consent to abatement of the alleged violation and to pay a proposed penalty or a negotiated sum in lieu of such penalty without admission of any civil liability arising from such alleged violation.

With respect to restrictive covenants, Virginia jurisprudence has long disfavored restraint on competition while permitting restraint on *unfair* competition. The new law places a blanket prohibition on any restrictive covenant for half of the workers in Virginia. Employers will need to be more selective in determining which employees they restrict. In some cases, employers may have to choose between raising an employee's

salary or placing absolutely no restriction on an employee's post-employment competition. Nevertheless, given the July 1 effective date and non-retroactivity of the law, now is the time to revisit any Virginia restrictive covenants, including any existing agreements or planned revisions.

## Marijuana Decriminalization, Sealing of Records

While Virginia continues to study the possibility of state-level marijuana legalization, Governor Northam approved SB 2 and HB 972 to decriminalize simple marijuana possession offenses.

The law reduces penalties for simple possession offenses (up to one ounce of marijuana) to a civil violation. It also seals the records related to prior convictions under the marijuana law and prohibits employers (and educational institutions) from requiring an applicant to disclose information concerning any now-decriminalized marijuana arrests, criminal charges, or convictions.

## Implications

These are some of the many "employee-friendly" laws recently passed in Virginia that will fundamentally change the legal landscape for employers in Virginia. The new laws all contain a private right of action and the recovery of attorneys' fees. Virginia's reputation as an "employer-friendly" jurisdiction, compared it its neighbors (Maryland and District of Columbia), may no longer be true.

Please contact a Jackson Lewis attorney with any questions about these fundamental changes in Virginia or any other legal issues.