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Employment

USA: Trends & Developments

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chambers.com

2020

Trends and Developments

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Employers in the United States must comply not only with federal law, but also with the laws of the states, and even municipalities, in which they operate. Given the highly partisan environment in the current US Congress, many states and municipalities have taken the initiative to pass employment-related legislation that has foundered at the federal level.

Over the past several years, we have seen certain trends in the types of laws that have been widely considered and enacted at the state and local level, including minimum wage, paid sick and safe leave, medical and recreational marijuana, pay equity, sexual orientation and gender identity discrimination, sexual harassment, worker misclassification, and non-competition agreements. Furthermore, in light of the COVID-19 pandemic, state and local jurisdictions have also implemented laws, ordinances, orders, and other guidance applicable to the workplace.

COVID-19 Laws and Ordinances

The COVID-19 pandemic has had a devastating impact in the workplace. State and local jurisdictions have moved to fill in gaps in the federal Families First Coronavirus Response Act and the Coronavirus Aid, Relief, and Economic Security Act. At the state and local levels, these initiatives have taken many forms, including the following: shut-down orders for non-essential businesses and gradual reopening restrictions, face covering/mask requirements, emergency paid leave for COVID-19-related reasons, workers' compensation presumptions, enhanced unemployment benefits, business liability immunity, travel restrictions and quarantine orders. As of the end of July 2020, however, only the state of Virginia has issued mandatory workplace safety standards related to COVID-19.

Because these efforts are specific to each state and local jurisdiction, and because this is a fast-changing situation, employers must be careful to check the current applicable requirements and restrictions in the jurisdictions in which they do business – including for newly-remote workers in another state.

Minimum Wage

Since 2009, the federal minimum hourly wage has been USD7.25. A full-time worker making minimum wage will earn USD15,080 a year, which is slightly above the current federal poverty level for a one-person household (USD12,140) and below that of a two-person household (USD16,460). For many years, workers' advocacy organisations have sought to increase the minimum wage, and their efforts found momentum in the "Fight for USD15," a labor union-driven campaign to raise the minimum wage to USD15/hour.

Although an increase in the federal rate does not seem likely any time soon, 30 states and the District of Columbia currently have minimum wage rates that are higher than the federal rate. A large number of municipalities have also increased their rates. Many of those rates are subject to additional scheduled increases over the next several years.

However, even in those states with higher minimum wage rates, there has been a push to increase wages even further, to the USD15 mark. In the past year, the number of states scheduled to hit the USD15 rate has increased from three to seven: California (by 2022), Connecticut (by 2023), Illinois (by 2025), Maryland (by 2025), Massachusetts (by 2025), New Jersey (by 2024), and New York (increases tied to inflation rate, capped at USD15). In addition, the District of Columbia has also implemented a USD15 wage (by 2020).

Family and Medical Leave Laws, Including Paid Sick Leave

The United States is the only advanced economy without a federal law requiring employers to provide paid sick leave. States and municipalities have sought to fill that void, with paid sick and safe leave legislation finding increasing success at that level, but creating a patchwork of requirements for multi-state employers.

Thus far, thirteen states (Arizona, California, Colorado, Connecticut, Maryland, Massachusetts, Michigan, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington) and the District of Columbia have passed laws requiring private employers to provide paid sick and safe leave to employees. Sick leave legislation has been proposed in many other states. In addition, numerous local municipalities have enacted such laws. Of particular interest, in 2019, Maine and Nevada passed laws mandating paid leave that may be used for any purpose, including sick and safe reasons. These most recent laws may herald a new and dramatic expansion of paid leave rights for employees.

Sick and safe leave

In general, the sick and safe leave laws specify that the leave may be used for multiple reasons, including for needs arising from domestic violence (ie, "safe" leave), to care for an employee's

or family member's illness or injury, and for preventative care. Some of the laws provide for additional reasons, such as parental leave following the birth/adoption/foster placement of a child, closure of the workplace or a child's school due to a public health emergency, household quarantine, and even leave to attend school conferences or meetings. The family members covered by the laws encompass a wide range of individuals, typically including a spouse, child, parent, grandparent, grandchild, and sibling, by blood or adoption, and sometimes in-law relationships.

Some of the laws include legal guardians and those standing in loco parentis, and even unrelated individuals with a close personal relationship to the employee. Most of the laws specifically allow employers to verify the need for leave, although the conditions under which verification may be required differ. Most, but not all, do not require payout of unused leave.

The laws vary greatly with regard to the size of employers covered – some laws ease the burden on smaller employers by reducing the amount of leave that must be granted or requiring only the provision of unpaid leave. They also vary in the amounts of leave granted overall, ranging from 24 to 80 hours a year, as well as whether and how much leave must be carried over to the next year, and how much leave may be used in a year. In addition, notice provisions differ amongst the various laws.

State-run benefits programme

A related type of legislation that has been receiving increased interest sets up a state-run benefits programme, through which employees may receive benefits during certain family and medical leaves. Thus far, eight states (California, Connecticut, Massachusetts, New Jersey, New York, Oregon, Rhode Island, and Washington) and the District of Columbia have enacted such benefits programmes, and similar legislation is pending in a number of other states.

Depending on the state, the benefits are funded through employer contributions, employee contributions, or a combination of the two. Employees may receive benefits during parental leave and leave for personal or family illness and injury. Some states also include other qualifying reasons, such as qualifying exigencies arising from a family member's call to active duty, bone or organ marrow donation, or domestic violence. The definition of family member also varies from state to state, with some laws taking an expansive view of the term. In addition, the period of paid leave benefits ranges widely, from four weeks up to 52 weeks. Benefit amounts also vary.

Medical and Recreational Marijuana

Medical marijuana use has been legalised in 33 states and the District of Columbia. Recreational marijuana use has been legalised in 11 states, as well as the District of Columbia. Yet, marijuana is still illegal under the federal Controlled Substances Act, while regulations applicable to Department of Transportation-covered employers prohibit the use of marijuana by covered employees. This, along with varying and sometimes contradictory statements of policy by the federal government, has led to some tension and confusion with regard to the use of marijuana by employees.

Under federal and state disability laws, employers are required to provide reasonable accommodations to disabled employees that enable them to perform the essential functions of their jobs. The federal Americans with Disabilities Act expressly excludes illegal drug use from the definition of a qualified individual with a disability. It is silent on whether permitting the use of medical marijuana is a reasonable accommodation for an otherwise disabled employee; the fact that marijuana is still illegal under federal law suggests that it would not. The answer may be different, however, under state law.

At least one state's law (Nevada) specifically requires employers to attempt to make reasonable accommodations for the medical needs of an employee who uses medical marijuana. On the other hand, many states' laws expressly state that employers are not required to "accommodate" the use of medical marijuana during work hours or on work premises. The remaining states' laws are silent on accommodations. Under all these laws, employers may prohibit the use or being under the influence of marijuana while at work – the only question is whether off-duty use must be permitted.

Court decisions

Several court decisions have examined the interplay of state law and federal law, examining closely the language of the state law, while noting that the Controlled Substances Act does not regulate the employment relationship or expose employers to liability, and that state law may thereby require employers to tolerate the off-duty use of medical marijuana. See Noffsinger v SSC Niantic Operating Co., LLC, 2018 U.S. Dist. LEXIS 150453 (D. Conn. Sept. 5, 2018); Barbuto v Advantage Sales & Mktg., LLC, 78 N.E.3d 37 (Mass. 2017); Callaghan v Darlington Fabrics Corp., No. PC-2014-5680 (R.I. Super. Ct., May 23, 2017). On the other hand, a Maine state court found the CSA to preempt state law. Bourgoin v Twin Rivers Paper Co., 187 A.3d 10, 14 (Me. June 14, 2018). Other court decisions have offered protections to medical marijuana users under state discrimination law without reference to federal law. See Whitmire v Wal-Mart Stores, Inc., 2018 U.S. Dist. LEXIS 198407 (D. Ariz. Nov. 21, 2018); Gordon v Consolidated Edison, Inc., 2018 N.Y. Misc. LEXIS 2105 (N.Y. Sup. Ct. May 29, 2018). Thus, employers will need to pay close attention to both the language of the particular state law at issue, as well as how courts in those states react to this issue.

Recreational marijuana

A different analysis applies in the context of the recreational use of marijuana. None of the recreational use statutes requires employers to allow such use, whether at work or off-duty. Some states have statutes that prohibit an employer from taking adverse action against employee for legal off-duty conduct. Thus far, however, the argument that recreational or even medical marijuana use is legal under state law has not been successful, with the only court to address the issue noting that such use is still illegal under federal law. See Coats v Dish Network, LLC, 350 P.2d 849 (Colo. 2015).

2019 saw the introduction of another aspect of marijuana testing legislation. First New York City, and then Nevada, banned the pre-employment testing for marijuana use. This type of legislation is likely to find traction in other states as our society grows increasingly tolerant of marijuana use, despite the continued federal prohibition.

Pay Equity

Although Congress passed the Equal Pay Act in 1963, women's earnings continue to lag behind those of their male counterparts. According to a Pew Research Center analysis of US median earnings, women earned 85% of what men earned in 2018 (a slight improvement over 2017, when women earned 82%). Thus, recent state and local laws have targeted this pay gap through different approaches.

Almost all states have also passed equal pay laws, requiring equal pay for equal work regardless of sex, or laws that prohibit discrimination in wages based on sex. Recently, however, states have taken measures to strengthen these laws. Some have added protected characteristics, such as race or gender identity. They also have extended the time period in which employees may sue, or more specifically defined factors that may be taken into account in establishing legitimate wage differentials.

In addition, an increasing number of states have added pay transparency provisions to their equal pay laws or passed separate pay transparency laws. These laws protect workers' ability to freely discuss their pay, with the thought that the transparency will encourage equity in compensation. Interestingly, this right already existed for non-management employees under the National Labor Relations Act, regardless of union or non-union status. Additionally, President Obama signed Executive Order 13665 in 2015, providing these protections for employees of government contractors.

Another approach that has been taken by at least 16 states and eight municipalities is a salary history ban, under which private employers are prohibited from asking about an applicant's compensation history. The premise behind such laws is that compensation is often based on prior earnings, and since women traditionally have been underpaid or arguably are less assertive in negotiating pay than men, this reliance on past salary perpetuates the wage gap.

Sexual Orientation and Gender Identity Discrimination

Although Title VII, the primary federal anti-discrimination laws prohibiting discrimination based on "sex," does not specifically address sexual orientation or gender identity, the US Supreme Court found that "sex" incorporates sexual orientation and transgender status. Prior to the Supreme Court's landmark ruling in mid-2020, however, at least 21 states and the District of Columbia passed laws specifically prohibiting discrimination based on sexual orientation and gender identity discrimination, while one state prohibits only sexual orientation discrimination.

Sexual Harassment

The #MeToo movement, starting in 2017, brought about a rapid wave of legislation at the state level, covering a wide range of measures intended to combat sexual harassment. These laws have three primary areas of focus:

- non-disclosure or confidentiality provisions in settlement agreements;
- mandatory arbitration or "waiver of rights" agreements; and
- training and policies.

Non-disclosure and confidentiality agreements

The concern about non-disclosure or confidentiality provisions is that they may protect the identity of alleged harassers, thereby enabling them to continue harassing others. On the other hand, such provisions may be desired by victims in order to protect their privacy. Additionally, some employers may be loath to enter into settlements without some guarantee of confidentiality. At the federal level, Congress included a provision in the Tax Cuts and Jobs Act of 2017 that eliminated tax deductions for payments made by a company or organisation in connection with the settlement of sexual harassment or abuse claims, if the settlement agreement contained a non-disclosure or confidentiality provision that prevents the disclosure of the terms of the agreement. Several states have also enacted laws that restrict – although they do not ban outright – the use of such provisions in sexual harassment settlement agreements.

A variation on these non-disclosure laws arises outside of the settlement agreement context, and more broadly prohibits employment agreements that would prevent employees from discussing sexual harassment in the workplace. It is worth noting that the ability of non-management employees to engage in this conduct is already protected by the National Labor Relations Act.

Arbitration and waiver of rights agreements
Another primary area of focus in this type of state legislation is mandatory arbitration and "waiver of rights" agreements. Many employers require employees to sign an agreement at the time of hire that binds the parties to arbitrate any disputes that arise in the course of the employment relationship. Other agreements may require employees to waive certain substantive rights or remedies, which may include the right to a jury trial. The concern that has been expressed about such agreements are that they force employees to give up their right to go to court and that they may protect the identity of harassers. The laws that have been enacted and that are being considered in many other states prohibit such agreements with regard to sexual harassment claims. At least one court, in New York, has found that the state's mandatory arbitration ban is preempted by the Federal Arbitration Act; whether other courts will agree is an issue that has yet to be resolved.

Training and policies
The last primary area of focus is training and policies. Prior to 2018, three states – California, Connecticut and Maine – required employers to provide certain employees with sexual harassment prevention training. Since then, several other states – Delaware, Illinois, and New York – have also passed mandatory training laws, and a number of other states are considering similar legislation. With regard to policies, a number of the recently enacted laws mandate the development of a written anti-harassment policy that meets certain specified requirements.

The individual laws may also contain other provisions aimed at strengthening sexual harassment protections, ranging from reporting to the state, loosening the definition of "harassment," bans on settlement agreement no-rehire provisions, as well as expanding both remedies and statutes of limitations on sexual harassment claims.

Worker Misclassification
Particularly with the rapidly expanding "gig" economy, there has been heightened interest in the issue of worker misclassification – where employees are improperly classified as independent contractors who are not entitled to the benefits and protections granted to employees. Employers additionally avoid employment taxes on compensation paid to independent contractors, which may be a significant cost saving. While many individuals may be called "independent contractors," the reality is that the employing entity may exercise such control over aspects of the relationship to render the worker an employee.

Consequently, there have been a number of state laws enacted to address worker misclassification. These laws typically set forth stringent criteria that must be met in order to be deemed an independent contractor. They may require that the independent contractor be certified or given specific mandatory forms. They also typically impose civil or even criminal penalties, monetary and otherwise, on employers who engage in misclassification. Other states have set up task forces to study the issue for future action.

In addition, state courts have weighed in on the issue. For example, the California Supreme Court issued a landmark decision, Dynamex Operations West, Inc. v Superior Court of Los Angeles, 4 Cal. 5th 903 (Cal. Sup. Ct. 2018), announcing a new "ABC" test for determining whether a worker is an employee or an independent contractor. Under the test, which has been adopted by statute in other states, the individual will be presumed to be an employee unless the employer can show each of the following:

- that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the work contract and in fact;
- that the worker performs work that is outside the usual course of the hiring entity's business; and
- that the worker is customarily engaged in an independently established trade, occupation or business.

Non-competition Agreements/Covenants Not to Compete
The validity of non-competition agreements that restrict an employee's ability to be employed in the same line of work is a matter of state law, and it is an issue that has come under increasing attack from state legislatures. States are taking an aggressive approach to limiting the use of non-competition agreements, particularly with regard to low-wage workers. In the past year or so, Illinois, Maine, Maryland, New Hampshire, and Washington have banned such non-competition agreements altogether, while Massachusetts has significantly weakened non-competition agreements generally. Similar legislation has been proposed in other states.

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Shawe Rosenthal LLP was one of the first law firms in the country devoted exclusively to the representation of management in labour and employment matters, and represents employers throughout the United States in federal and state courts and arbitral forums, as well as before the Equal Employment Opportunity Commission, the National Labor Relations Board, the Department of Labor and other administrative agencies. The firm's 15 attorneys have prior experience in judicial clerkships and federal agencies, as well as large and small firms, bringing a wealth of practical experience on labor and employment matters. Shawe Rosenthal belongs to two major alliances of management labour and employment lawyers: The Employment Law Alliance and Worklaw Network. These alliances afford Shawe Rosenthal access to resources of the highest calibre across the country and around the world to better serve its clients, wherever they may be.

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