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E-UPDATE

December 30, 2022

RECENT DEVELOPMENTS

New Federal Law Requires Reasonable Accommodations for Pregnant Workers: What Employers Need to Know

"Omnibus" is defined as providing for many things at once, and the new federal omnibus funding bill is exactly that. In addition to the critical action of funding the government, it contains a multitude of unrelated new laws, including the Pregnant Workers Fairness Act (as well as the new workplace breastfeeding law, discussed elsewhere in this E-Update). The PFWA, which is largely modeled on the Americans with Disabilities Act and existing State law protections for pregnant workers, requires employers with 15+ employees to provide pregnancy-related reasonable accommodations to employees and applicants, absent an undue hardship.

Who Is Protected. The PFWA protects individuals with "known limitations," meaning a physical or mental condition arising from pregnancy, childbirth, or a related medical condition, whether or not the condition constitutes an ADA-covered disability. As under the ADA, the individual must be "qualified," meaning that they are able to perform the essential functions of the job, with or without reasonable accommodation. The PFWA goes on to specifically provide that the individual will be considered qualified if: they are only temporarily unable to perform an essential job function; they will be able to perform that function in the near future; and the inability to perform the function can be reasonably accommodated. The individual must notify the employer of their limitation and need for accommodation.

What Employers Must (and Must Not) Do. The PFWA requires employers to provide reasonable accommodations for pregnancy/childbirth-related limitations, absent an undue hardship. (The standards for whether an accommodation is reasonable and whether it poses an undue hardship are the same as under the ADA). As with the ADA, employers must engage in an interactive process to identify possible accommodations, and may not require an employee to accept an accommodation that was not identified as part of this process. Employers also may not require an employee to take leave if another accommodation is available. Moreover, they may not deny employment opportunities to an individual because they need a reasonable accommodation. Retaliation for exercising rights under the PFWA, including for requesting or using a reasonable accommodation, is prohibited.

What Next? The EEOC is directed to issue regulations to implement the new PFWA within one year. The regulations will provide examples of reasonable accommodations for pregnancy/childbirth-related conditions. The law will not preempt State laws that provide greater protections.

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At this time, employers should watch out for the forthcoming regulations, which will first be issued in proposed form for public comment, before being issued in final form. But in the meantime, and even after the regulations issue, employers should be mindful of any applicable state laws requiring pregnancy/childbirth accommodations, as such laws may contain more requirements and/or restrictions with regard to what accommodations must be considered and provided.

New Federal Workplace Protections for Nursing Mothers: What Employers Need to Know

In addition to the Pregnant Workers Fairness Act discussed elsewhere in this E-Update, the 2023 federal omnibus spending act also included the Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP" Act). This new law expands the existing lactation accommodations for nursing mothers under the Fair Labor Standards Act (FLSA).

What Is Currently Required. The FLSA was amended in 2010 to require employers to provide reasonable break time as needed and a private place, other than a bathroom, for nursing mothers to express breast milk for one year following a child's birth. This requirement, however, applied only to non-exempt employees. Employers with fewer than 50 employees are not subject to this requirement if compliance would impose an undue hardship, determined by looking at the difficulty or expense of compliance in the context of the size, financial resources, nature and structure of the particular employer's business.

Employees using existing paid break time for this purpose must be paid for the nursing break; any additional break time required for this purpose can be uncompensated.

What the New Law Does. The PUMP Act expands the breastfeeding accommodations to include exempt, as well as non-exempt, employees. It also specifies that the employee must be completely relieved from work, otherwise the time is counted as hours worked, which is relevant for non-exempt employees whose actual time worked must be tracked for purposes of calculating compensation and overtime. The new law maintains the exception for small employers for whom compliance would impose an undue hardship. There are new exceptions for certain employees of air and rail carriers, as well as motorcoach services operators.

The same guidelines as to payment for the break time are carried over into the new law. However, there are new provisions related to the location: employers have 10 days in which to come into compliance with the location requirement after an employee notifies them of their need for nursing breaks, and an employee can bring a lawsuit against the employer if it fails to do so. The 10-day period does not apply if the employee has been fired because they requested a nursing break/location or opposed an employer's conduct related to this requirement, or if the employer has stated that they will not provide an appropriate private location for the purpose of expressing breast milk.

What Next? Many employers were already providing nursing breaks/locations for exempt employees, despite the fact that the FLSA's mandate applied only to non-exempt employees. Those employers who did not provide such breaks/locations will now need to do so.

The PUMP Act specifically does not preempt State or local laws that provide greater protections. For example, Baltimore City's ordinance imposes extremely detailed and strict requirements for the

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breastfeeding location (within a certain distance of the employee's workspace) and amenities (e.g. table, refrigerator, running water), as well as requiring a written policy, in addition to other mandates, as discussed in our April 11, 2019 E-lert. Thus, employers should ensure that they are aware of any additional requirements that may apply beyond the federal law.

Employers, Don't Forget About the Flu!

Prior to the COVID-19 pandemic, many employers did not have flu-specific policies and procedures (healthcare employers being one significant exception). However, seasonal flu can be a serious and dangerous illness, and employers should not treat it lightly. Many of the lessons we collectively learned from COVID-19 are equally applicable to the flu. And employers should also note that federal enforcement agencies are not ignoring the flu.

Guidance from the CDC. The Centers for Disease Control and Prevention has a Flu Resources for Business webpage that collects information and resources for employers in three major categories:

- Prevent flu. The CDC offers tips for preventing the spread of flu at work, including the following:
    - Encourage employees to become vaccinated against flu.
    - Consider hosting a flu vaccine clinic and provide resources on where to get a vaccine in the community.
    - Develop/review sick leave policies to encourage employees to stay home while sick.
    - Separate and send home any employees who are sick.
    - Develop telework (if appropriate for the job) and leave policies to enable employees to care for sick family members or for children in the case of school closures.
    - Employees with a sick family member may come to work as long as they are well, but should monitor their condition. Those with underlying conditions or who are pregnant should seek prompt treatment if they become ill.
    - Implement preventive measures at work, such as providing tissues, no-touch trash cans, hand soap and/or sanitizer.
    - Provide workers with information on flu risk factors and preventive actions on respiratory etiquette and hand hygiene.
- Promote vaccination. The CDC discusses the benefits of vaccination for both employers and employees, and offers suggestions on encouraging vaccination and hosting a flu clinic. It provides specific suggestions on planning, promotion and logistics.
- Stay home when sick. The CDC also provides guidance for when employees should stay home and when they may return to work. If an employee has a fever, they should not return to work until fever-free for 24 hours without medication. If they have other symptoms, they should stay home for at least 4-5 days after the onset of such symptoms.

Other CDC resources on the webpage include guidance on a pandemic response plan and print resources.

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Vaccination Mandates and the EEOC. Of course, as we saw in the context of the COVID-19 pandemic, vaccination mandates are one way to promote vaccination. Employers who choose to implement such a mandate should be aware that exemptions for medical or religious reasons may be required as reasonable accommodations. This issue received heightened attention during the COVID-19 pandemic, and employers who have previously imposed flu vaccination mandates may experience greater pushback than before.

It is worth noting that the Equal Employment Opportunity Commission has recently brought suit against a hospital that denied a religious exemption from its flu vaccine mandate to a maintenance employee. In its press release, the EEOC noted that the employee had previously been granted such an exemption, and specifically noted that the employee had "extremely limited interaction with the public or staff." These are considerations that come into play when assessing a request for exemption from a vaccination mandate, and employers need to be thoughtful in imposing mandates and reviewing exemption requests.

TAKE NOTE

Employers May Need to Bargain Over Their Compliance with the Law. Although unionized employers have no choice but to comply with the law, they may have choices about how to accomplish that – and may be required to bargain with the union over those decisions, as the U.S. Court of Appeals for the Fourth Circuit recently reiterated.

In *NLRB v. Frontier Communications Corp.*, the employer discovered it was "massively noncompliant" with its I-9 obligations under the Immigration Reform and Control Act, lacking properly completed forms for over 90% of its 16,400 employees. After the employer directed employees to submit new forms, the union demanded to bargain over the form completion process – including obtaining assurances that a process previously agreed to several years earlier, in the context of another attempt to address the I-9 compliance issues, would remain in effect. The employer refused, stating that it was required to comply with the federal legal mandate. The union filed an unfair labor practice charge, and the Board found that the employer had, in fact, committed unfair labor practices.

Under the National Labor Relations Act, an employer must bargain in good faith over the terms and conditions of employment. They are not, however, required to bargain over "non-discretionary actions taken to comply with legal obligations." However, this principle is not absolute – as the Fourth Circuit noted, employers also "must bargain over the 'effects,' or impacts, that non-negotiable managerial decisions may have on employees and their terms and conditions of employment." And "effects bargaining requires that bargaining representatives receive 'pre-implementation notice' of an employer's legally mandated action and an opportunity to negotiate over any discretionary aspects of how the action will be carried out." In this case, there was room to negotiate over details of the form completion process.

This case reminds employers that compliance with the law is not the end of any bargaining obligation. How that compliance is accomplished may need to be negotiated with the union.

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An Employee "on Thin Ice" Cannot Insulate Herself with the FMLA. The Family and Medical Leave Act protects the use of qualifying leave for an employee's (or their family member's) serious health condition – but does not insulate the employee from all attendance and performance issues, as the U.S. Court of Appeals for the Eighth Circuit recently reminded employers.

In *Corkrean v. Drake University*, an employee with multiple sclerosis worked for many years without requiring or requesting FMLA leave. But when a new dean arrived, she was unhappy with the employee's performance and erratic work schedule. At that point, the employee requested and was approved for FMLA. However, she continued to miss time for non-FMLA reasons, sometimes without notifying the dean. The dean continued to counsel her for both attendance and performance, and in turn, the employee repeatedly complained of harassment by the dean in connection with the counseling. The employee was eventually put on a PIP that set out specific absence notice requirements that were intended to address her harassment concerns. She was also told that her FMLA absences were separated from her other absences. She was subsequently terminated for her continuing performance and attendance issues. She sued, alleging violations of the FMLA and Americans with Disabilities Act.

The Eighth Circuit rejected her claims, finding that the employee offered no evidence that the employer's explanation for termination was pretext for discrimination or retaliation under the FMLA (or ADA). Instead, the employer established "a robust, well-documented set of legitimate reasons" for termination – "a plethora of performance deficiencies … as well as non-FMLA tardiness and attendance problems" for which there was a months-long performance improvement process. Notably, the Eighth Circuit observed that "an employee who exercises her rights under the FMLA has no greater protection against termination for reasons unrelated to the FMLA than she did before doing so. Otherwise, a problem employee on thin ice with the employer could effectively insulate herself from discipline by engaging in protected activity."

This case demonstrates the value of extensive and careful documentation. The employer's separation of FMLA and non-FMLA leave was critical to its ability to demonstrate that the employee was not, in fact, punished for using FMLA leave. Similarly, the thorough documentation of performance issues, which went back to before the dean became aware of the employee's medical condition.

NIOSH Offers Best Practices for Protecting Temporary Workers. In a recent blog post, the National Institute of Occupational Safety and Health noted that temporary workers provided to a host employer by staffing companies experience higher injury rates than regular employees. To address this issue, NIOSH developed Temporary Workers: Best Practices for Host Employers, along with checklists and other resources for host employers that are available on a CDC webpage.

The best practices are organized in three sections:

- Evaluation and contracting.
    - With regard to evaluation, NIOSH suggests the host employer conduct a joint risk assessment with the staffing company, provide safety data to the staffing company, allow site visits, and ensure a commitment to safety and health.
    - As to contracting, NIOSH suggests the host employer spell out the following details in the staffing contract: pertinent job details (e.g. tasks and qualifications, hazards and controls, training, personal protective equipment); communication and

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documentation responsibilities; injury and illness reporting, response, and recordkeeping responsibilities; and other aspects of workplace safety and health (e.g. supervision, peer mentors, workers' compensation, etc.)

- Training for temporary workers and their worksite supervisors.
  - For workers, NIOSH suggests training, identical or equivalent to the training provided to the host employer's own employees and documented, including on the following: approved tasks, hazard identification and control, personal protective equipment, OSHA laws, first aid, emergency procedures, reporting safety and health incidents and concerns, secure sites, and safety and health program participation. Host employers should also assess the workers' knowledge on the training subjects.
  - For supervisors, NIOSH's suggested training includes: approved tasks and any changes, mentoring and supervision, OSHA laws, communication and reporting, and joint responsibilities.

- Injury and illness reporting, response, and recordkeeping.
  - NIOSH suggests that host employers promote injury and illness reporting, inform the staffing company of any incidents, and make the required OSHA reports.
  - If there are temporary worker injuries or illnesses, host employers should conduct joint incident investigations with the staffing company, and coordinate medical treatment and return to work.
  - As for recordkeeping, host employers are required to record incidents on the OSHA log, complete staffing company documentation, and fulfill record requests.

More information may be obtained on from the best practices document and on the government's website.

Fourth Circuit Sets Forth Standard for Retaliatory Hostile Work Environment Claims. Title VII prohibits discrimination based on the creation of a hostile work environment – meaning that working conditions are so "permeated with discriminatory intimidation, ridicule, and insult" that they "alter the conditions of the victim's employment and create an abusive working environment." The law also prohibits retaliation for complaining about discrimination – and according to the U.S. Court of Appeals for the Fourth Circuit, this can include the creation of a hostile work environment.

In *Laurent-Workman v. Wormuth*, the employee brought a claim of retaliatory hostile work environment, among other things. As the Fourth Circuit noted, to establish illegal retaliation, courts historically required some action that impacted a term or condition of employment, essentially resulting in some negative economic impact (like a termination, failure to promote, denial of a raise, etc.). However, the U.S. Supreme Court held in *Burlington Northern & Santa Fe Railway Co. v. White* that retaliation includes a "wider variety of conduct." The standard articulated by the Supreme Court is that retaliation involves "materially adverse" actions that "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." The Fourth Circuit acknowledged that a hostile work environment may constitute retaliation, as long as it is "so severe or pervasive that it would dissuade a reasonable worker from making or supporting a charge of discrimination."

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More specifically, the Fourth Circuit asserted that a hostile work environment claim based on retaliation "must allege that the retaliatory conduct (1) was unwelcome, (2) was sufficiently severe or pervasive that it would dissuade a reasonable worker from making or supporting a charge of discrimination, and (3) can be attributed to the employer." The Fourth Circuit clarified that this does not include "petty slights or minor annoyances that often take place at work and that all employees experience." But a course of generally minor incidents that, when each taken on its own, would "not amount to much," can constitute illegal retaliation under the totality of the circumstances.

Thus, employers must be mindful that to ensure that employees who complain of discrimination or harassment are being treated no differently from other employees, even as to minor things. A pattern of seemingly minor or unrelated negative incidents experienced only by that employee could potentially be combined to support a retaliatory hostile work environment claim.

US DOL Provides New Resources for Workers Impacted by Cancer. In a December 8, 2022 blog post, Secretary of Labor Marty Walsh announced that the U.S. Department of Labor has created new resources to help workers who have cancer or have family members with cancer. A website collects information and resources for those employees on the following topics:

- leave under the federal Family and Medical Leave Act (FMLA) and
- leave under relevant State family and medical leave and temporary disability laws
- leave as a reasonable accommodation under the Americans with Disabilities Act (ADA)
- paid sick leave for employees of federal contractors
- paid sick leave under employer policy (note that some states and local jurisdictions also mandate paid sick leave)
- protections from discrimination under the ADA (with a link to the EEOC's webpage on cancer in the workplace)
- prohibited discrimination under the FMLA

D.C. Expands Employment Protections for Certain Groups and Lowers the Standard for Harassment. The District of Columbia City Council has passed bills that expand protections for several categories: domestic workers, interns, independent contractors and the homeless. It also enshrines into law a definition of harassment that will result in more employees bringing and winning harassment claims before D.C. agencies and courts.

- The Domestic Worker Employment Rights Amendment Act of 2022 applies to those providing domestic services in or around a private residence. The Act requires a hiring entity to execute a services contract with a domestic worker, whether an employee or an independent contractor. The contract must include (or specifically indicate that the item does not apply) an extensive list of items, and any changes must be reflected in writing. Among other things, the contract may not contain a non-compete in violation of the recently-effected Ban on Non-Compete Agreements Amendment Act of 2020. The hiring entity must also make reasonable efforts to provide the contract in the worker's preferred language. The Mayor's office will make template contracts and required notices available to the public, which will be available on a new website that will provide information about this new law, including how to file complaints of violations.

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The Act also amends the D.C. Human Rights law to include domestic workers within its protections (previously excluded). It also provides that sex may be a bona fide occupational qualification for domestic workers based on legitimate privacy concerns, but protects such workers from discrimination on the basis of actual or perceived sexual orientation, as well as their preferred name or personal pronouns.

This bill will now go to the Mayor's desk for approval and, if signed, will take effect after a 60-day period of Congressional review and publication in the D.C. Register.

- The Human Rights Enhancement Amendment Act, which took effect on October 1, 2022, expanded the definition of "employees" to include interns and independent contractors, similar to other jurisdictions like Maryland. It also added "homeless status" – meaning one who "lacks a fixed, regular, and adequate nighttime residence" – to the list of personal characteristics protected from discrimination.

  The Act further codifies the definition of workplace harassment and sexual harassment under the D.C. Code.
  - "Harassment" means conduct "that unreasonably alters the terms, conditions, or privileges of employment" or creates "an intimidating, hostile, or offensive work environment."
  - "Sexual harassment" means any conduct of a sexual nature that meets the definition of harassment, but also where submission to such conduct is made a term or condition of employment or where submission to/rejection of such conduct serves as the basis for an employment decision.

  In determining whether unlawful harassment exists, the Act states that the totality of the circumstances must be considered and, unlike the standard under federal law, such conduct need not be severe or pervasive. The Act further sets forth a non-exhaustive list of factors to consider, including: frequency; duration; location; whether there were threats, slurs, epithets, stereotypes, or humiliating or degrading conduct; and whether the alleged harasser held a formal or informal position of power over any other party.

  The Act further provides that conduct may constitute illegal harassment regardless of the following: it was a single incident; it was directed towards someone else; the complainant submitted to or participated in the conduct; the complainant was able to do their job despite the conduct; the conduct did not cause tangible physical or psychological injury; the conduct occurred outside the workplace; or the conduct was not overtly directed at a particular protected characteristic.

Another Blow Against the Contractor COVID-19 Vaccine Mandate. As federal contractors may recall, President Biden issued an Executive Order that required their employees to be fully vaccinated against COVID-19 in accordance with guidance from the Safer Federal Workforce Task Force. This order was subject to legal challenge, including by the States of Louisiana, Mississippi and Indiana, and the U.S. Court of Appeals for the Fifth Circuit has now affirmed a preliminary injunction by a federal district court that stayed the implementation of the EO as to those States. The

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Fifth Circuit found that the EO exceeded the President's authority by using "procurement regulations to reach through an employing contractor to force obligations on *individual employees*." Thus, the plaintiff States demonstrated a strong likelihood of success on the merits of their claims, and the Fifth Circuit refused to lift the injunction.

At this time, the contractor mandate has never taken effect (although other COVID-19 precautions have). In addition to this case, another court had issued a nationwide injunction, which was subsequently narrowed by the Eleventh Circuit in August 2022 to apply only to the plaintiffs – the States of Alabama, Georgia, Idaho, Kansas, South Carolina, Utah, and West Virginia, as well as members of the Associated Builders and Contractors (a trade association). Nonetheless, in October 2022, the Safer Federal Workforce Task Force issued guidance that the contractor mandate would not be enforced at this time, pending further guidance from the Task Force. We do not expect such forthcoming guidance to reinstate the vaccine mandate.

NEWS AND EVENTS

Managing Partner Announcement – We are pleased to announce that Teresa D. Teare has been named the co-managing partner of our firm, along with Gary L. Simpler. Teresa is the first woman to serve in that role in our firm's 75-year history. She currently holds other leadership responsibilities, as the current Chair of the Maryland State Bar Association's Labor and Employment Section. Teresa was also recently named the 2023 Litigation – Labor and Employment "Lawyer of the Year" in the Baltimore area by *U.S. News and World Report*/*Best Lawyers in America*©.

Honor – We are delighted that twelve of our partners were recognized by *Super Lawyers*© 2023, an exceptional accomplishment: Bruce S. Harrison, Eric Hemmendinger, Darryl G. McCallum, J. Michael McGuire, Fiona W. Ong, Stephen D. Shawe, Gary L. Simpler, Mark J. Swerdlin, Teresa D. Teare, Parker E. Thoeni, Elizabeth Torphy-Donzella and Lindsey A. White. In addition, three associates were named to the 2023 Maryland Rising Stars list: Courtney B. Amelung, Paul D. Burgin, and Veronica Yu Welsh.

Super Lawyers is a national rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. The patented selection process includes independent research, peer nominations, and peer evaluations. The *Super Lawyers* list recognizes no more than 5 percent of attorneys in each state, while the *Rising Stars* list recognizes no more than 2.5 percent of attorneys in each state. To be eligible for inclusion in *Rising Stars*, an attorney must be either 40 years old or younger, or in practice for 10 years or less.

Honor - *U.S. News and World Report*/*Best Lawyers in America*© released its 2023 "Best Law Firm" rankings, in which we were honored with a top Tier 1 ranking in the Baltimore Metropolitan Area in the areas of Employment Law – Management, Labor Law – Management, and Litigation – Labor and Employment Law. As we previously announced, Teresa D. Teare also was named the 2023 Litigation – Labor and Employment "Lawyer of the Year" in the Baltimore area. In addition, 11 other partners were also recognized by Best Lawyers: Bruce S. Harrison, Eric Hemmendinger, Darryl G. McCallum, J. Michael McGuire, Fiona W. Ong, Stephen D. Shawe, Gary L. Simpler, Mark J. Swerdlin, Parker E. Thoeni, Elizabeth Torphy-Donzella and Lindsey A. White. Of particular note, we have the most listed lawyers in the Baltimore region and in the State of Maryland in the areas of Employment Law – Management and Litigation – Labor and Employment Law.

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Victory – J. Michael McGuire represented one of the largest independent power producers in the nation in a labor arbitration over the amount of the Employer's annual medical insurance contributions for 2022. The arbitrator agreed that the Company correctly implemented the rates set forth in the collective bargaining agreement, rather than the incorrect rates that had been accidentally communicated to the union.

Webinar - Mark J. Swerdlin, Lindsey A. White, and Maya R. Foster presented an one-hour webinar, Employment Law Issues Arising from the Pandemic & Managing a Remote Workforce, on December 21, 2022 to discuss the legal implications of remote work. Click here for the recording.

Webinar – Parker E. Thoeni will be a panelist for the Employment Law Alliance's "United States Employment Law Year in Review," reviewing major developments of interest to employers from this past year. This complimentary webinar will be held on January 11, 2023 at 12 p.m. Eastern. You may register here.

Media – Fiona W. Ong was quoted in a December 15, 2022 Los Angeles Times article by Don Lee, "Surge in remote working due to COVID fuels record employment for people with disabilities." Fiona commented on whether telework may be a reasonable accommodation under the Americans with Disabilities Act."

Presentation – Courtney B. Amelung presented a webinar for HRSimple on November 29, 2022, on "Managing a Hybrid or Remote Workforce." Courtney discussed the legal and practical implications of managing a hybrid or remote workforce as well as telework best practices for employers. The presentation may be viewed here.

TOP TIP: New Minimum Wage Rates for 2023 in the Mid-Atlantic and for Federal Contractors/Subcontractors

The federal minimum wage remains $7.25, with a tipped wage rate of $2.13; however, most states in the mid-Atlantic region have implemented higher minimum wage rates. (The tipped wage rate for tipped employees, together with any tip credit, must meet the minimum wage. Employers are responsible for making up any shortfall.) The minimum wage rate in several states, as well as that for certain federal contractors and subcontractors, increases on January 1, 2023, as noted below.

- **Maryland's** minimum wage is subject to an annual increase, with the next increase coming on January 1, 2023 – $13.25 per hour for employers with 15+ employees, and $12.80 for those with 14 or fewer employees. The tipped wage rate remains at $3.63 per hour. Employers must also display the current minimum wage poster, which is available here.

- **Howard County, Maryland** passed a law this past Spring, raising its minimum wage in scheduled annual increases to $16.00. Effective January 1, 2023, the rate is $15.00 per hour for employers with 15 or more employees, and $13.25 per hour for those with under 15 employees. Like Maryland, the county tipped rate is $3.63 per hour. The required poster is available here.

- Also, **New Jersey** is increasing its rate for most employers to $14.00 per hour. Seasonal, and small (fewer than 6 employees) employers in New Jersey are subject to a reduced rate of

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$12.70 per hour, while agricultural employers have a new rate of $11.70. New Jersey's tipped wage rate remains at $5.13. The required poster is available here.

- In **Delaware**, the rate increases to $11.75 per hour. The tipped wage rate remains at $2.23, just slightly higher than the federal rate. The required poster is available here.

- **Virginia**'s minimum wage rate is increasing to $12.00 per hour. The tipped wage remains at the federal rate. Unlike the other states discussed here, Virginia does not have a poster requirement, but an optional poster is available here.

In addition, the minimum wage rate for certain **federal contractors or subcontractors** depends on whether their contracts were entered into prior to January 30, 2022. The covered (sub)contracts are one of the following: construction contracts covered by the Davis-Bacon Act; service contracts covered by the Service Contract Act; concession contracts (*e.g.*, contracts to operate souvenir shops in national parks or restaurants in federal buildings); and contracts in connection with federal property or land under which services are offered to federal employees, their dependents, or the general public (although this last category is not currently being enforced with regard to contracts entered into on or after January 30, 2022) . There is a required poster, available here.

- For contracts entered into prior to January 30, 2022, the required wage rate increases to $12.15 per hour for workers performing work on or in connection with covered contracts, with a tipped rate of $8.50 per hour. The required poster (which has yet to be updated) will be available here.

- For new, renewed, or extended contracts that are entered into on or after January 30, 2022, the wage rate is $16.20 per hour, with a tipped rate of $13.75 per hour.

This is also a good time to remind employers of the applicable wage rates in other states and local jurisdictions throughout the Mid-Atlantic region, some of which have minimum wage rates above the federal rate:

- **Montgomery County, Maryland**: $15.65 per hour for employers with more than 50 employees, $14.50 for those with 11-50 employees, and $14.00 for the remaining smallest employers. The tipped employee rate is $4.00 per hour. The next scheduled increase takes place on July 1, 2023. Our November 30, 2017 E-Update provides more detail on this law. The required poster is available here.

- **District of Columbia**: $16.10 per hour, with a tipped wage rate of $5.35 per hour. The next scheduled increase will take place on July 1, 2023. The required poster is available here.

- **West Virginia**: $8.75 per hour, with a tipped wage rate of $2.62 per hour. The required poster is available here.

- **Pennsylvania**: Applies the federal rate.

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Employers should ensure that they are complying with the applicable minimum wage rates, and also updating any required posters as necessary.

RECENT BLOG POSTS

Please take a moment to enjoy our recent blog posts at laboremploymentreport.com:

- Are College Athletes "Employees" Under Federal Labor Law? We Are About to Find Out… by Chad M. Horton, December 28, 2022
- The NLRB's Reinstatement of a Worker-Friendly Standard for Property Access by Evan Conder, December 20, 2022
- NLRB Reaffirms Safeguards for Questioning Employees in Preparation for NLRB Proceedings by Chad M. Horton, December 16, 2022
- The Return of the Micro-Unit: The NLRB Shifts Course Yet Again by Fiona W. Ong, December 14, 2022
- NLRB Expands its Make Whole Remedy to Include "Direct or Foreseeable" Financial Harms by Paul Burgin, December 14, 2022
- Wait, Is that Pro Golfer an Employee or Independent Contractor? by Evan Conder, December 8, 2022

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