



THE LAST 60 DAYS OF ACTION IN EMPLOYMENT LAW
Part I – Pay and Pay Equity

July 24, 2019

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The courts and legislatures have been busy over the last two months. Thus, this installment of our 60-day newsletter will be broken down by subject-matter, with the first dealing with changes in pay and pay equity laws. Most notable are the trends toward ensuring pay equity by prohibiting employers from inquiring about an applicant's salary history. Also notable are the States' efforts to increase minimum wage; though, while increases are scheduled in many States, Maryland passed a law allowing employers to pay minors 85 percent of minimum wage.

Federal

The Department of Labor's Wage and Hour Division recently confirmed that paralegals earning at least \$100,000 annually are "exempt" employees. The WHD concluded that paralegals satisfy the highly compensated employee exemption if the paralegals' duties are non-manual, they receive total annual compensation of at least \$100,000, and they perform at least one exempt duty of an administrative employee. However, the WHD noted that some paralegals who do not exercise discretion and independent judgment on significant matters may not qualify for the administrative exemption. See WHD Opinion Letter, 2019 DOLWH LEXIS 8.

The Wage and Hour Division also clarified the calculation of overtime pay for nondiscretionary bonuses under the Fair Labor Standards Act. Under the FLSA, an employee's regular rate of pay must be recalculated for purposes of overtime compensation if the employee receives a nondiscretionary bonus based on a fixed percentage of the employee's straight-time wages. Alternatively, an employer does not need to recalculate the regular rate if the employer pays a bonus on percentage of total earnings. The WHD concluded that the employer may wait until the end of the bonus period to include the employee's annual bonus in the regular rate calculation. See WHD Opinion Letter, 2019 DOLWH LEXIS 7.

In another Opinion Letter, the Wage and Hour Division affirmed that, under the Fair Labor Standards Act, employers may round the amount of hours worked (to the nearest five minutes, one-tenth of an hour, one-quarter of an hour, or one-half hour) provided that, over a period of time, the rounding practice does not fail to compensate employees for all time they have actually worked. See WHD Opinion Letter, 2019 DOLWH 9.

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Alabama

On June 10, 2019, Alabama enacted the Clarke-Figures Equal Pay Act. Effective September 1, 2019, the law prohibits employers from paying employees at a lower wage for the same work on the basis of sex or race, unless the difference is pursuant to a seniority system, a merit system, or a system that measures earnings by quantity or quality of production. See 2019 Al. HB 225.

Arkansas

Effective July 24, 2019, Arkansas amended its minimum wage law. The amendments include specifying that the statute of limitations for wage claims is two years and that an employee must prove that a violation is willful to be entitled to liquidated damages. See Ark. Code Ann. § 11-4-218.

California

The Ninth Circuit Court of Appeals reversed the district court's grant of summary judgment for Nike in a class action by plaintiff and similarly situated Nike employees who sought compensation for "off the clock" exit inspections every time they leave the store. The district court had held that the federal *de minimis* doctrine – which precludes recovery for otherwise compensable amounts of time that are small, irregular, or administratively difficult to record – barred plaintiff's claims. After the district court's decision, the California Supreme Court held, in Troester v. Starbucks Corp., 421 P.3d 1114 (Cal. 2018), that the federal *de minimis* doctrine does not apply to wage and hour claims brought under California law. Accordingly, the Ninth Circuit remanded the Nike matter for further proceedings consistent with Troester.

See Rodriguez v. Nike Retail Servs., 2019 U.S. App. LEXIS 19475 (9th Cir. June 28, 2019); see also Chavez v. Converse, Inc., 2019 U.S. App. LEXIS 19494 (9th Cir. June 28, 2019) (similar case consolidated with Rodriguez for oral argument).

Colorado

On May 21, 2019, Colorado enacted the Equal Pay for Equal Work Act. Effective January 2021, the Act prohibits wage discrimination on the basis of sex and prohibits employers from seeking or relying on the wage rate histories of prospective employees. See 2019 Colo. SB 85.

Connecticut

On May 29, 2019, Connecticut enacted a law establishing a schedule to increase the minimum wage to \$15 per hour by June 1, 2023. See Conn. Gen. Stat. § 31-58(i).

Idaho

Effective July 1, 2019, Idaho increased the statute of limitations for an employee filing a claim for additional salary, wages, penalties, or liquidated damages to 12 months (previously, the statute of limitations was six months). By "additional," the statute refers to a situation where an employee has been paid for work done or services performed but the employee seeks more compensation for that work or those services. All other actions for wages, penalties, and liquidated damages must be commenced within two years. See Idaho Code § 45-614.

Maryland

Effective June 1, 2019, employers are permitted to pay employees under 18 years of age the subminimum rate of 85% of the

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state minimum wage. See Md. Code Ann., Lab. & Empl. § 3-413(d).

Minnesota

Effective July 1, 2019, Minnesota enacted an anti-wage theft law that includes two areas of enforcement: (1) civil enforcement of wage payments, increasing the penalties for failure to pay wages and creating certain notice and recordkeeping requirements; and (2) criminal penalties for intentional wage theft. See 2019 Minn. H.F. No. 2, Article 3.

Missouri

On May 23, 2019, Kansas City enacted a law prohibiting employers from inquiring about an applicant's salary history. The law does not prohibit employers from engaging in discussions with applicants about their compensation expectations. See Kansas City, Mo., Municipal Code § 38-102.

Nevada

On June 12, 2019, Nevada amended its Minimum Wage Increase Initiative. Under the new law, minimum wage in Nevada will increase gradually to \$12 per hour over the next five years for employees who are not offered health insurance and \$11 for those who are offered health insurance. Beginning July 1, 2020, the state will raise the minimum wage 75 cents with annual increases scheduled until 2024. See Nev. Rev. Stat. Ann. § 608.250.

New Jersey

Effective July 1, 2019, New Jersey raised its minimum wage to \$10.00 per hour and established a schedule to increase the minimum wage to \$15 per hour by 2024. See N.J. Stat. Ann. § 34:11-56a4.

New York

On July 10, 2019, New York enacted a law prohibiting employers from asking job applicants and employees about their wage or salary history. However, applicants and employees may volunteer to disclose or verify their salary history, including for the purpose of negotiating wages or salary. The law is effective January 6, 2020. See 2019 N.Y. SB 6549.

On July 10, 2019, New York amended its equal pay Labor Law 194. Effective October 8, 2019, the law will apply to the following protected classes: age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, and domestic violence victim status. See 2019 N.Y. SB 5248.

Ohio

On June 26, 2019, the City of Toledo passed an ordinance that prohibits employers from inquiring into or using an applicant's salary history in making employment decisions. See City of Toledo, Ohio, Ordinance 173-19.

Washington

Effective July 28, 2019, Washington enacted the Equal Pay and Opportunities Act to prohibit employers with at least 15 employees from seeking the wage or salary history of a job applicant from either the applicant or the applicant's current or former employer. See Rev. Code Wash. (ARCW) § 49.58.005. An employer may confirm an applicant's wage or salary history if the applicant has voluntarily disclosed it or after the employer has negotiated and made an

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offer of employment with compensation to the applicant. The Act also requires an employer, upon request from an applicant after an initial employment offer has been extended, to provide the minimum wage or salary for the position for which the applicant is applying. This requirement applies equally to a request from an existing employee who is offered a promotion or an internal transfer to a new position.

Wyoming

Effective July 1, 2019, Wyoming amended its Equal Pay Act to increase penalties for violations, including fines up to \$500 (previous fines were between \$25 and \$200) and imprisonment of not less than 10 days nor more than 180 days. Each day a violation continues constitutes a separate offense. See Wyo. Stat. § 27-4-304.

To discuss any of these changes, contact Patricia Tsipras at 610.408.2029 or ptsipras@rubinfortunato.com.

Tricia thanks Jomana Abdallah, the Firm's Summer Associate, for her assistance with this newsletter.

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