



## THE LAST 60 DAYS OF ACTION IN EMPLOYMENT LAW

September 30, 2019

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### Federal

On September 24, 2019, the U.S. Department of Labor issued its final overtime rule, raising the standard salary level for exempt executive, administrative, and professional employees to \$684 per week and raising the total compensation for the highly compensated employee exemption to \$107,432. See <https://www.dol.gov/whd/overtime2019>.

On September 20, 2019, the U.S. Court of Appeals for the Tenth Circuit ruled that the Fair Labor Standards Act applies to workers in the marijuana industry. See [Kenney v. Helix TCS, Inc.](#), 2019 U.S. App. LEXIS 28498 (10th Cir. Sept. 20, 2019).

On August 29, 2019, the National Labor Relations Board (NLRB) held that an employer's misclassification of employees as independent contractors, standing alone, does not violate the National Labor Relations Act (NLRA). See [Velox Express](#), 2019 NLRB LEXIS 488 (N.L.R.B. August 29, 2019).

On August 14, 2019, the NLRB held that the NLRA does not prohibit employers from (1) promulgating mandatory arbitration agreements in response to employees opting into collective action; or (2) threatening employees who refuse to sign mandatory

arbitration agreements with discharge. [Cordúa Rests., Inc.](#), 2019 NLRB LEXIS 455 (N.L.R.B. August 14, 2019).

### Alabama

Alabama's Clarke-Figures Equal Pay Act became effective on 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.

Also effective September 1, 2019, Alabama amended its laws to prohibit public employers from refusing to hire an individual with a disability on the basis of the disability alone. See Code of Ala. § 21-7-8.

### California

On September 18, 2019 and effective on January 1, 2020, California codified the ABC test adopted in [Dynamex Operations West, Inc. v. Superior Court](#) for determining whether a worker is an independent contractor and extended its application to the State's labor and unemployment insurance laws. Under the test, a worker is considered an employee unless the hiring party can show that the worker is free from the control and direction of the hiring party in

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connection with the performance of the work; the worker performs work that is outside the usual course of the hiring party's business; and the person is customarily engaged in an independently established trade, occupation, or business. See 2018 Cal AB 5.

On August 30, 2019, California extended, until January 1, 2021, the deadline for small employers' compliance with the sexual harassment prevention training requirements. See 2019 Cal. SB 778.

## Colorado

Effective September 1, 2019, Colorado enacted a ban-the-box law prohibiting private employers from inquiring about criminal history on an initial employment application. See Colo. Rev. Stat. § 8-2-130.

On July 25, 2019, the Colorado Court of Appeals affirmed a trial court's judgment that held that parties to an employment, non-compete, or non-solicitation agreement cannot contractually obligate a court to amend the terms of (or "blue pencil") provisions that the Court determines are unreasonable and in violation of the public policy of Colorado. 23 Ltd. v. Herman, 2019 Colo. App. LEXIS 1102 (Co. App. July 25, 2019).

## Illinois

On August 9, 2019, Illinois enacted amendments to the Workplace Transparency Act. The amendments strengthen the Act's harassment and discrimination protections and reporting requirements. The new amendments restrict the use of non-disclosure, non-disparagement, and arbitration clauses in employment and separation agreements. Additionally, the amendment expands the definition of harassment, extends harassment protections

to non-employees, and requires sexual harassment prevention training under certain circumstances. See 2019 Ill. SB 75.

On August 9, 2019, Illinois enacted the Artificial Intelligence Video Interview Act. This Act requires employers to comply with notification and consent requirements before using artificial intelligence to analyze videotaped interviews of job applicants. Additionally, the employer may not share applicant videos with third parties, with limited exceptions. The Act also provides a method upon which an applicant can request that an employer destroy the video. See 2019 Ill. HB 2557.

On August 1, 2019, Illinois amended its Living Donor Protection Act to prohibit retaliation against an employee for requesting or obtaining a leave of absence pursuant to the Act. See 2019 Ill. HB 2847.

On July 31, 2019, Illinois amended its Equal Pay Act, effective September 29, 2019, to broaden the prohibited acts and protected categories, add a salary history inquiry ban, outline circumstances when compensatory and punitive damages are appropriate for violations of the Act, and to prohibit employers from requiring employees to sign contracts that prevent them from discussing or disclosing their compensation. See 820 Ill. Comp. Stat. 112/10; 112/30 (2019 Ill. HB 834).

## Maine

Effective September 19, 2019, Maine passed an Act to Promote Keeping Workers in Maine, which (1) prohibits employers from entering into no-poach agreements with one another; (2) bars employers from entering into non-competes with lower wage employees; (3) limits employers' ability to enforce non-competes; (4) mandates

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advanced disclosure of non-compete obligations; and (5) imposes a delay between the date an employee agrees to the terms of a non-compete and when the non-compete obligations become effective. See Me. Rev. Stat. tit. 26 §§ 599-A, 599-B.

Effective September 19, 2019, Maine amended its Human Rights Act to include gender identity as a protected class and to require reasonable accommodations for pregnancy-related conditions. The revised anti-discrimination statute applies to all employers located in the State. See Me. Rev. Stat. tit. 5, § 4553 and § 4572-A.

Effective September 19, 2019, Maine enacted An Act to Prevent Wage Theft and Promote Employer Accountability. Pursuant to the Act, an employee or the Department of Labor may seek injunctive relief to enjoin wage theft and, under certain circumstances, the Commissioner of Labor may order an employer to cease its business operations until the wage theft is abated and proper payment practices and policies are put in place. See Me. Rev. Stat. tit. 26, § 637 (2019 Me. SP 473).

Maine enacted, effective September 19, 2019, an Act To Create Veteran-friendly Workplaces. The Act requires employers to allow veterans to take time away from work to attend appointments at medical facilities operated by the U.S. Department of Veterans Affairs. See Me. Rev. Stat. tit. 26, § 637 (2019 Me. HP 1190).

Effective September 17, 2019, Maine amended its mini-WARN notice requirements. Employers must issue a written notice within 90 days before closing or relocating a worksite. The amendment also clarifies additional penalties for

noncompliance. See Me. Rev. Stat. tit. 26, § 625-B.

Also effective September 17, 2019, Maine enacted An Act Regarding Pay Equity, which applies to all employers in Maine. Employers are prohibited from inquiring into the compensation history of a prospective employee either from the prospective employee or from a current or former employer. See Me. Rev. Stat. tit. 26, § 628-A. However, employers may inquire into a prospective employee's compensation history (1) once an employment offer that includes all terms of compensation has been negotiated and made to the prospective employee; (2) if an employee or prospective employee voluntarily discloses his or her compensation history, in which case the employer may confirm such information before making an employment offer; or (3) if a State or Federal law specifically requires the disclosure or verification of compensation history for employment purposes.

## Minnesota

The City of Minneapolis enacted an anti-wage theft ordinance on August 8, 2019, effective January 1, 2020, that includes stricter notice requirements and different penalties than the State's anti-wage theft law that was enacted in May. Additionally, the Minneapolis ordinance extends anti-retaliation protections to employees who exercise their rights regarding wage theft. See Minneapolis Ordinance No. 2019-031.

## Nebraska

Effective September 7, 2019, Nebraska amended the Nebraska Fair Employment Practices Act to prohibit covered employers from discriminating against employers who inquire about, discuss, or disclose employee

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wages, benefits, or other compensation. See Neb. Rev. Stat. Ann. § 48-1114.

### **New Jersey**

New Jersey enacted the Wage Theft Act, effective August 5, 2019. The Act significantly amends the State's wage and hour laws and provides for, among other things, liquidated damages, increased penalties, a longer statute of limitations in wage and retaliation claims, and more protections for retaliation claims. See 2018 Bill Text NJ S.B. 1790, N.J. Stat. § 34:11-4.10.

### **New Mexico**

On August 20, 2019, the local government of Bernalillo County, New Mexico enacted, effective July 1, 2020, an ordinance that requires employers to allow employees to accrue paid time off to use for any reason. The Ordinance is based, in part, on the belief that paid time off will reduce recovery time from illness and provide other benefits. See Bernalillo County Government, Paid Time Off Ordinance No. 2019-17.

### **New York**

On August 20, 2019, New York amended the New York State Human Rights Law, effective November 18, 2019, to expand protections for domestic violence victims. The protections include requiring employers to provide reasonable accommodations to domestic violence victims who are absent from work for domestic violence-related reasons, including but not limited to, seeking medical attention, obtaining legal services, and obtaining psychological counseling. See N.Y. Exec. Law § 296(22).

On August 12, 2019, and effective immediately, New York amended its employment discrimination and harassment

laws in various ways. Among other amendments, the updates include extending harassment protections to domestic workers and non-employees, lowering the burden of proof for harassment claims, extending the statute of limitations for sexual harassment claims from one to three years, prohibiting non-disclosure provisions in settlement agreements unless it is the employee's preference, and prohibiting mandatory arbitration provisions in all types of discrimination claims. See 2019 N.Y. AB 8421.

On August 9, 2019, and effective October 8, 2019, New York amended the New York Human Rights Law to prohibit discrimination against an employee based on clothing or facial hair worn in accordance with the requirements of the employee's religion. See 2019 N.Y. AB 4204.

### **North Dakota**

Effective August 1, 2019, North Dakota amended its emergency responder leave protections to include members of the National Guard from any State as covered under the ambit of "volunteer emergency responder." Under the law, employers may not discriminate against or deny employment to volunteer emergency responders based on their status as such. See N.D. Cent. Code, § 37-29-01 et seq.

Effective August 1, 2019, North Dakota decriminalized the use of marijuana for individuals 21 years of age or older. See 2019 N.D. HB 1050.

Effective August 1, 2019, North Dakota prohibited local governments from enacting or enforcing laws that exceed the State minimum wage. See 2019 N.D. HB 1193.

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## Oklahoma

Effective August 30, 2019, Oklahoma employers may refuse to hire or take other adverse action against medical marijuana users if they are applying for or hold a safety sensitive position. See Okla. Stat. tit. 63, § 427.8 (2019 OK. HB 2612, § 8).

## Oregon

Effective on September 29, 2019, Oregon enacted a paid family and medical leave law. The law establishes a State-managed insurance program that employers and employees will fund. The law applies to all employers with one or more employees working in Oregon. Contributions to the fund will begin in January 2022, and employees will be eligible for benefits beginning in January 2023. The program will provide Oregon employees who earn at least \$1,000 annually with up to 12 weeks of leave per benefit year for family, medical, and/or safe leave purposes. This leave can be combined with other leaves under Oregon law. See 2019 Bill Text OR H.B. 2005.

Effective September 29, 2019, Oregon amended its lactation accommodation law to apply to employers with 10 or more employees and to require employers to provide employees with a reasonable rest period each time the employee has a need to express milk. See Or. Rev. Stat. § 653.077.

## Rhode Island

On July 15, 2019, Rhode Island enacted the Rhode Island Noncompetition Agreement Act governing non-compete agreements, which, among other items, provides that non-compete agreements are unenforceable against several categories of employees, including but not limited to: employees classified as non-exempt under the Federal

Fair Labor Standards Act; low-wage workers; employees aged eighteen and below; and college interns. See 2019 R.I. HB 6019.

## Texas

Effective August 1, 2019, the City of Dallas enacted a sick leave ordinance. Employers with more than five employees who perform at least 80 hours of work per year in Dallas are entitled to one hour of earned paid sick time for every 30 hours of time worked. See Dallas, Texas Code of Ordinances Sec. 20-1, et seq.

The City of San Antonio delayed the effective date of its paid sick time ordinance from August 1, 2019 to December 1, 2019. The Ordinance was enacted to provide employees with the ability to accrue and use paid sick time when they need to be absent from work because the employee or the employee's family member is ill. See Ordinance No. 2018-08-16-0620 City of San Antonio, Metropolitan Health District, Paid Sick Leave.

Effective September 1, 2019, Texas amended its jury duty leave law to include protections for employees serving as grand jurors and to prohibit employers from making threats of termination, intimidating, and/or coercing employees in relation to jury service. See Tex. Civ. Prac. & Rem. Code § 122.001.

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