



A Law Firm of Action

THE LAST 60 DAYS OF ACTION IN EMPLOYMENT LAW

February 1, 2021

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Federal

On January 20, 2021, his first day in office, President Biden issued a number of executive orders. Among them was Executive Order 13985, revoking former President Trump's Executive Order 13950, which prohibited "divisive concepts" regarding race and sex stereotyping in workplace diversity training offered by the federal government, federal contractors, or federal grantees. President Biden's Executive Order addresses policies regarding racial equity and LGBT protections. [See Executive Order 13985](#).

On January 12, 2021, the United States Court of Appeals for the Fifth Circuit rejected the commonly used two-step framework for conditional certification of collective actions under the Fair Labor Standards Act because its flexibility had led to unpredictability, and its rigidity distracted courts from the ultimate issues. Instead, the Fifth Circuit held that courts must determine whether plaintiffs meet the "similarly situated" standard before sending notice to potential plaintiffs. [See Swales v. KLLM Transp. Servs., L.L.C.](#), No. 19-60847, 2021 U.S. App. LEXIS 827 (5th Cir., Jan. 12, 2021).

On January 7, 2021, the United States Department of Labor (DOL) issued a final rule clarifying the standard for determining who is an employee versus an independent contractor under the Fair Labor Standards Act. The rule reaffirms the "economic reality" test, where the ultimate inquiry is whether the worker is dependent on a particular individual, business, or organization for work or is in business for him- or herself. [See our previous article](#) for more information on this topic.

On December 23, 2020, the DOL issued guidance explaining how employers can distribute virtually the workplace postings that are required under federal employment laws. [See guidance](#).

On December 22, 2020, the DOL announced a final rule that allows non-tipped hospitality workers to share in gratuities under the Fair Labor Standards Act. The final rule prohibits management from keeping any portion of employees' tips, regardless of whether the employer takes a tip credit (a tip credit allows employers that meet certain criteria to pay tipped workers less than minimum wage, as long as their tips make up the difference). The rule also codifies DOL guidance on how the tip credit applies

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to employees who perform a mix of tipped and non-tipped duties. The final rule becomes effective on March 1, 2021. [See final rule.](#)

California

The following changes to California law became effective on January 1, 2021:

California adjusted its overtime exemption rate for computer software employees to \$47.48 and increased the minimum annual salary exemption to \$98,907.70, reflecting the 2% increase in the California Consumer Price Index for Urban Wage Earners and Clerical Workers. [See State of California Department of Industrial Relations Overtime Exemption for Computer Software Employees.](#)

California amended its Labor Code to provide leave and antidiscrimination protections to employees who suffer physical or mental injury due to crime, regardless of whether anyone is arrested, prosecuted, or convicted of committing the crime. [See 2019 Cal. AB 2992.](#)

California expanded employees' entitlement to family and medical leave under the California Family Rights Act (CFRA) by extending job-protected leave to employees who work for businesses with five or more employees (the previous threshold was 50 or more employees). Other changes to the CFRA include: (1) expanding the permitted uses of leave to include care for grandparents, grandchildren, siblings, domestic partners, children of domestic partners, and nondependent adult children; (2) permitting employees to take leave because of a qualifying exigency related to

covered active duty or call to covered active duty of an employee's spouse, domestic partner, child, or parent in the U.S. Armed Forces; (3) removing the provision permitting employers to deny reinstatement to "key employees" following leave; and (4) requiring an employer of both parents of a child to grant each parent up to 12 weeks of leave to bond with a child. [See 2020 Cal SB 1383.](#)

Colorado

The following changes to Colorado law became effective on January 1, 2021:

Colorado enacted the Equal Pay for Equal Work Act. 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 and the Colorado Department of Labor and Employments Rules](#) regarding the Act.

Colorado enacted the Healthy Families and Workplaces Act. Employers with 16 or more employees must begin providing paid sick leave to their employees. Beginning January 1, 2022, *all* employers must begin providing paid sick leave. Paid sick leave will accrue at the rate of one hour for every 30 hours worked. [See 2022 Colo. SB 205.](#)

District of Columbia

On January 11, 2021, District of Columbia Mayor Bowser signed the Ban on Non-Compete Agreements Amendment Act of 2020. The Act, with limited exceptions, applies to all employers in the District. It forbids agreements and policies that prohibit an employee from being employed by

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another person, performing work or providing services for pay for another person, or operating the employee's own business after the employee's separation from employment. The Act also bans agreements and policies that prohibit those activities during the employee's employment (i.e., "moonlighting"). The Act expressly permits employers to restrict the disclosure of confidential, proprietary, or sensitive information, client or customer lists, and trade secrets. It also expressly permits non-competes contained in an agreement for sale of a business. The Act does not apply retroactively. Thus, non-competes executed before the effective date of the Act (the effective date is unknown at this time) are not impacted. [See D.C. Act. 23-563.](#)

Florida

Effective January 1, 2021, Florida enacted a law making the use of the E-Verify system mandatory for all government employers and certain private employers. The E-Verify system is an internet-based system operated by the United States Department of Homeland Security that allows participating employers to verify electronically the employment eligibility of newly hired employees. [See 2020 FL S.B. 664.](#)

Louisiana

On December 22, 2020, the City of New Orleans, Louisiana amended its anti-discrimination law to prohibit discrimination based on any hairstyle or hair texture commonly associated with race or national origin. [See Calendar No. 33,184.](#)

Maine

Effective January 1, 2021, Maine enacted a law guaranteeing employees' entitlement to paid personal leave. The new law applies to employers in Maine that employ 10 or more employees for more than 120 days in a calendar year. Employers must allow employees to use accrued paid leave for any purpose, including non-medical personal reasons. [See Me. Rev. Stat. tit. 26, § 637](#) and the Maine Department Labor's [rules](#) and [FAQs](#) regarding the law.

Maryland

Effective January 15, 2021, Montgomery County, Maryland amended its Human Rights Law to lower the standard for proving workplace harassment. The law rejects the "severe or pervasive" standard that applies under federal law and replaces it with the following standard: "[whether] a reasonable victim of discrimination would consider the conduct to be more than a petty slight, trivial inconvenience, or minor annoyance." An alleged victim also must prove *one* of the following three elements: (1) submission to the conduct is made either explicitly or implicitly a term or condition of an individual's employment; (2) submission to or rejection of the conduct is used as a basis for employment decisions affecting the individual; or (3) the conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating a working environment that is perceived by the victim to be abusive or hostile. [See Montgomery County Bill 14-20.](#)

Missouri

Effective January 1, 2021, the City of St. Louis, Missouri enacted a ban-the-box ordinance that prevents employers with 10

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or more employees from inquiring into a job applicant's criminal history. See St. Louis City Ordinance 71074.

Montana

Effective January 1, 2021, Montana legalized recreational marijuana. See Initiative No. 190.

Nevada

On December 31, 2020, the Nevada Supreme Court held that a district court's order granting a preliminary injunction based on a blue-penciled noncompetition agreement was proper because, although a district court cannot, on its own, blue-pencil a noncompetition agreement to remove unenforceable aspects, a district court was not prohibited from blue-penciling an unreasonable noncompetition agreement if the agreement itself allows for it. The noncompetition agreement in this case had a blue-penciling provision. Thus, the district court did not abuse its discretion by blue-penciling the agreement and enforcing the revised agreement. See Vinh Duong v. Fielden Hanson Isaacs Miyada Robison Yeh, Ltd., No. 79460, 2020 Nev. LEXIS 82 (Dec. 31, 2020).

New Jersey

Effective January 1, 2021, New Jersey amended its state constitution to legalize recreational marijuana. See Resolution No. 183.

On December 4, 2020, New Jersey Governor Murphy signed legislation expanding eligibility for extended unemployment insurance benefits to eligible claimants who have exhausted their benefits

or who earned 40 times their unemployment weekly benefits rate. Under prior State unemployment law, claimants had to satisfy both criteria to receive extended benefits. Extended unemployment insurance benefits offer up to an additional 20 weeks of benefits.

New York

On January 10, 2021, New York City Mayor DeBlasio signed into law a bill that expands the scope of the New York City Fair Chance Act ("ban the box" law). The amendment imposes significant restrictions on an employer's ability to take adverse action against a job applicant or an employee based on pending criminal charges or arrests, or based on convictions arising during employment. The amendment also prohibits asking about or considering adjournments in contemplation of dismissal, or non-criminal violations, in employment decisions. The amendments are effective July 29, 2021. See Int. No. 1314-A.

On December 17, 2020, the New York City Council sent to Mayor DeBlasio two bills that he is expected to sign that will end traditional at-will employment for fast-food workers in New York City. The bill would prohibit fast-food employers from terminating or substantially reducing the hours of an employee without just cause and without first using a written progressive discipline system, or from terminating or substantially reducing the hours of an employee without a bona fide economic reason. The bills further require the employer to provide, within five days of the adverse action, a written explanation of the "precise reasons" for termination or

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reduction in hours and expands New York City's existing predictive scheduling laws to fast-food employers. [See](#) Int. No. 1415-A and Int. No. 1396-A.

On December 1, 2020, the Westchester County Human Rights Commission announced that the New York statewide paid sick leave law preempts the county's earned sick leave law and will now govern paid sick leave in Westchester County. [See Westchester County announcement](#) and [New York paid sick leave law](#).

Ohio

On January 12, 2021, Ohio Governor DeWine signed into law the Employment Law Uniformity Act, which significantly changes future discrimination claims in the state. The Act (1) shortens the statute of limitations for workplace discrimination claims from six years to two years; (2) requires employees to file a charge of discrimination with the Ohio Civil Rights Commission and receive a right to sue letter from the Commission before filing an action against their employers in court; (3) provides an affirmative defense to hostile work environment claims for employers who have robust protections and policies for handling harassment claims; (4) nearly

eliminates the potential for personal liability for supervisors and managers; and (5) aligns the process for filing age discrimination claims to the procedure for filing all other types of discrimination claims. The Act will become effective on April 12, 2021. [See](#) 2019 Ohio HB 352.

Oregon

Effective February 1, 2021, punishment changes take effect in Oregon for the possession of personal-use amounts of hard drugs. Instead of going to trial and facing jail time, someone with a personal-use amount of heroin, methamphetamine, LSD, oxycodone, or other hard drugs have the option of paying a \$100 fine or attending new addiction recovery centers funded by the regulated legalized marijuana industry. [See Drug Addiction Treatment and Recovery Act](#).

Vermont

Beginning January 1, 2021, Vermont's minimum wage will increase \$0.79, from \$10.96 to \$11.75 per hour. This adjustment also impacts the minimum wage of "tipped employees," which equals 50% of minimum wage, or \$5.88 per hour, starting January 1, 2021. [See Press Release](#).

To discuss any of these changes and how they impact your business, contact Patricia Tsipras at 610.408.2029 or ptsipras@rubinfortunato.com.

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