



THE LAST 60 DAYS OF ACTION IN EMPLOYMENT LAW

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Federal

On May 28, 2021, the Equal Employment Opportunity Commission updated its [guidance](#) regarding COVID-19 and how it may implicate the Americans with Disabilities Act, the Rehabilitation Act, and other equal employment opportunity laws. The updated guidance addresses COVID-19 vaccinations, including employer incentive programs.

Effective May 6, 2021, the United States Department of Labor withdrew the Trump Administration's rule that proposed a new multi-factor test for determining independent contractor status. [See](#) 86 Fed. Reg. 24303. In its press release, the Department of Labor identified reasons for the withdrawal, including the independent contractor rule's "tension" with the Fair Labor Standards Act's text and purpose, as well as judicial precedent, and argued that the rule's emphasis on two core factors "undermined" the more holistic analysis of the employment relationship.

Effective April 30, 2021, the United States Department of Labor issued a final rule that prohibits employers from taking any portion of workers' gratuities. The DOL has delayed other aspects of the rule. [See](#) 85 Fed. Reg. 86756; FR 2021-08927.

On April 27, 2021, the United States Court of Appeals for the Second Circuit held that claims of willful Fair Labor Standards Act violations must plead willfulness plausibly (i.e., must be supported by factual allegations) for a three-year statute of limitations to apply (as opposed to the two-year statute of limitations that is applicable to non-willful violations). The Court also opined that the Tenth Circuit incorrectly had found that the mere allegation of willfulness is sufficient for the plaintiff to enjoy a three-year statute of limitations. [See](#) Whiteside v. Hover-Davis, Inc., No. 20-798, 2021 U.S. App. LEXIS 12415 (2d Cir. Apr. 27, 2021).

Alabama

On May 17, 2021, Alabama passed the Darren Wesley "Ato" Hall Compassion Act, which permits the use of medical marijuana to treat certain medical conditions. The law does not permit recreational marijuana use. The law is effective immediately, but medical marijuana will not become available for at least a year. Medical marijuana may be used in a variety of forms, but may not be used by smoking or vaping, or by consuming food products. Employers are not required to permit or accommodate the use of medical marijuana. [See](#) 2021 AL S.B. 46.

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California

On May 20, 2021, California released a new Employer Vaccination Toolkit to ease the process for employers to request a workplace clinic or local provider partner to make COVID-19 vaccines even more accessible for their employees.

The [Employer Vaccination Toolkit](#) provides employers with vaccine education materials, information on COVID-19 Supplemental Paid Sick Leave, and other guidance for employees, as well as an online form to request vaccination support.

On April 16, 2021, California enacted a law establishing a statewide requirement that employers in the hospitality and business services industries (e.g., hotels, airports, building service providers, and large event centers) provide written offers to rehire workers laid off due to the COVID-19 pandemic within five business days of openings becoming available for jobs for which they are qualified. The law became effective immediately and will remain in effect until December 31, 2024. [See](#) 2021 Cal. SB 93.

Beginning March 31, 2021, California requires employers with 100 or more employees to annually report pay data categorized by gender, race, and ethnicity. [See](#) 2020 Cal. SB 973 and <https://www.dfeh.ca.gov/paydatareporting/>

Colorado

Effective April 14, 2021, the Colorado Department of Labor and Employment (CDLE) revised its Wage Protection Rules relating to Colorado employers' paid sick

leave obligations under the Healthy Families and Workplaces Act (HFWA). The HFWA requires Colorado employers to provide at least 48 hours of paid sick and safe leave each year either on an accrual basis based on hours worked or frontloaded annually. This requirement remains unchanged. However, the law now also requires all Colorado employers to provide employees access to up to 80 hours of public health emergency paid leave upon the declaration of a public health emergency by federal, state, or local authorities. The revisions clarify how public health emergency leave accrues for part-time employees and clarifies that employees who are hired *during* a public health emergency are entitled to such leave. [See Wage Protection Rules, 7 CCR 1103-7.](#)

Delaware

On April 13, 2021, Delaware amended its Discrimination in Employment Act to prohibit discrimination based on traits historically associated with race, including hair texture and protective hairstyles. The amendment is effective immediately. [See](#) 2021 Del. SB 32.

Illinois

On April 27, 2021, Illinois amended its Employee Sick Leave Act to require employers to allow employees to take personal sick leave for absences due to “personal care of a covered family member,” including “activities to ensure that a covered family member’s basic medical, hygiene, nutritional, or safety needs are met, or to provide transportation to medical appointments, for a covered family member who is unable to meet those needs himself or herself.” The Act now also covers “being physically present to provide emotional

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support to a covered family member with a serious health condition who is receiving inpatient or home care.” See 2021 Ill. HB 158.

Indiana

On April 22, 2021, Indiana enacted a law setting out the process for pregnant workers to seek a reasonable accommodation from their employers. The new law provides that an employee may request, in writing, an accommodation related to pregnancy, childbirth, or any related medical conditions. An employer must respond to the employee's request within a reasonable amount of time, but is not required to provide an accommodation (however, existing federal or state law may require an accommodation). An employee who seeks an accommodation under the new law is protected from discipline, termination, or other forms of retaliation for seeking or using an accommodation. The new law applies to employers with at least 15 employees and becomes effective on July 1, 2021. See 2021 Ind. HB 1309.

Montana

On May 7, 2021, Montana amended its Human Rights Act to become the first jurisdiction to recognize an individual's vaccination status as a protected category. The law, which became effective immediately, also prohibits employers from requiring employees to disclose their immunization status and bars employers from requiring employees to receive certain types of vaccines or to possess an immunity passport. See 2021 Mont. HB 702.

On May 3, 2021, Montana amended its Wage Protection Act to allow employers to

require tip pooling, as long as they adhere to certain requirements, including (1) notifying employees of any mandatory tip-pooling arrangement; (2) excluding employers and exempt salaried supervisors or managers from a tip pool; (3) not requiring employees to contribute more than the amount of tips they actually receive to a tip pool; (4) fully distributing any tips collected no later than the regular payday for the workweek in which the tips were collected; and (5) maintaining payroll and other records showing the tips received and distributed under the tip-pooling arrangement. See 2021 Mont. SB 190.

On March 31, 2021, Montana amended its Wrongful Discharge from Employment Act. The amendments extend to 12 months (previously six months) the default probationary period during which an employee may be discharged without good cause; increase proof required for wrongful discharge (an employer's violation must be material and must deprive the employee of a fair and reasonable opportunity to maintain employment, the definition of "good cause" to terminate employment was expanded to include an employee's material or repeated violation of an express provision of the employer's written policies, and Montana Supreme Court precedent was codified to provide that an employer has the broadest discretion when making discharge decisions regarding managerial or supervisory employees); expand the sources of income that are required to be subtracted from an employee's award (awards must include a deduction for post-discharge compensation, including unemployment benefits); and simplify notice that employers must provide to an employee of their internal grievance

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procedure (notice must be provided within 14 days of discharge), which an employee must exhaust prior to filing a wage claim. See 2021 Mont. HB 254.

Nebraska

On May 5, 2021, Nebraska amended the definition of race in its Fair Employment Practices Act to include characteristics such as skin color, hair texture, and protective hairstyles. The amendment becomes effective on September 11, 2021. See 2021 Neb. LB 451.

New Mexico

On April 12, 2021, New Mexico passed a law, which becomes effective on June 29, 2021, legalizing recreational marijuana. Unlike other states' recent marijuana laws, New Mexico's law does not "prevent or infringe upon the rights of an employer to adopt and implement a written zero-tolerance policy regarding the use of cannabis products." The law also expressly permits zero-tolerance policies that impose discipline or termination for a positive marijuana test result. However, the law does not restrict rights afforded to medical marijuana users under state law. See 2021 N.M. HB 2.

On April 7, 2021, New Mexico enacted the Healthy Workplaces Act, requiring private employers in New Mexico with at least one employee to provide paid sick leave to employees. The new law becomes effective on July 1, 2022. Under the Act, employers must allow employees, including part-time, seasonal, and temporary workers, to accrue earned sick leave at a rate of one hour for every 30 hours worked, or employers may grant the full 64 hours to employees on

January 1 each year. Employees may use up to 64 hours of sick leave in a 12-month period and may carry over unused time. Employees may use leave to care for their own or a family member's health condition, diagnosis, or preventive care; meetings at the employees' child's school or place of care related to the child's health or disability; and for certain needs related to domestic abuse, sexual assault, or stalking suffered by employees or their family members. See 2021 N.M. HB 20.

New York

On March 31, 2021, New York passed a law to legalize recreational marijuana. It is now legal for individuals 21 years of age and older to possess and purchase up to three ounces of marijuana. At their place of residence, individuals are also permitted to possess up to five pounds of marijuana. The law also modified the state's existing medical marijuana program by expanding the types of medical conditions for which marijuana can be prescribed. In addition, it is now unlawful for employers to refuse to hire, employ, or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion, or terms, conditions, or privileges of employment because that individual uses marijuana as permitted under state law. The law, however, allows employers to take action based on an employee's or a prospective employee's use of marijuana where required by federal or state law, or when an employee is impaired while on the job. See 2021 N.Y. SB S854A.

Ohio

Effective April 12, 2021, Ohio passed the Employment Law Uniformity Act, which

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significantly changed 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. See 2019 Ohio HB 352.

Oklahoma

On April 21, 2021, Oklahoma enacted the Oklahoma Uniformed Services Employment and Reemployment Rights Act. The law aims to protect members of the Oklahoma National Guard and provides that National Guard members who have to leave their jobs due to active duty must be reemployed when their service is complete as long as they provide advance notice to the employer and their absence is no longer than five years cumulatively. Oklahoma National Guard members called up for federal active duty by the President are protected by federal law; however, before Oklahoma passed this law, if National Guard members were activated by the Governor, they did not enjoy the same employment protection. The law also prohibits employers from discriminating against employees or prospective employees based on their membership or service in the

Oklahoma National Guard. See 44 Okla. Stat. § 4300 et seq.

Oregon

On May 21, 2021, Oregon amended its non-competition statute to (1) make non-competition agreements “void and unenforceable” (previously “voidable” by a court) unless statutory conditions are met (including, as amended, (i) the employer advised the employee in a written employment offer at least two weeks before the first day of employment that a non-competition agreement is required, or the non-competition agreement is executed upon the employee’s bona fide advancement; (ii) the employee is exempt from Oregon minimum wage and overtime law; (iii) the employer has a protectable interest, generally limited to access to trade secrets or competitively sensitive confidential information; (iv) the employee meets the salary threshold [see below]; (v) the employer provided the employee with a signed copy of the agreement within 30 days after the last day of employment; and (vi) the duration of the non-compete does not exceed 12 months); (2) shorten the maximum period of restriction from 18 months to 12 months; (3) increase the income threshold for enforcement of non-competition agreements to \$100,533, which will be adjusted annually for inflation (the statute previously used the median income of a family of four per the U.S. Census Bureau); (4) provide that a non-competition agreement generally is enforceable for up to 12 months if the employer agrees in writing to provide the employee, for the period of restriction, with the greater of at least 50% of the employee’s annual gross base salary and commissions at the time of termination,

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or 50% of \$100,533, adjusted annually for inflation. The law does not contain an effective date, so it will become effective on January 1, 2022, consistent with Oregon law. See 2021 OR S.B. 169.

Pennsylvania

On April 29, 2021, the Pennsylvania Supreme Court held that a no-hire clause between two shipping companies was an unreasonable restraint of trade and therefore unenforceable. See Pittsburgh Logistics Sys. v. Beemac Trucking, LLC, No. 31 WAP 2019, 2021 Pa. LEXIS 1853 (Apr. 29, 2021).

On April 28, 2021, the City of Philadelphia, Pennsylvania enacted a law that, with limited exceptions, prohibits employers from testing for marijuana as a condition of employment, effective January 1, 2022. See Bill No. 200625.

On April 27, 2021, Pennsylvania enacted the Living Donor Protection Act, which requires employers covered by the Family and Medical Leave Act (generally, employers with 50 or more employees) to provide the same leave to which an eligible employee is entitled under the Family and Medical Leave Act for surgery preparation and recovery related to organ or tissue donation. The Act becomes effective on June 28, 2021. See 2021 Pa. HB 203.

Rhode Island

On May 20, 2021, Rhode Island enacted a law that created a schedule to increase the minimum wage to \$15 per hour by 2025. See 2021 RI H.B. 5130.

South Dakota

On March 29, 2021, South Dakota passed a law modifying its statute related to unlawful contracts by prohibiting employment contracts for certain health care providers from containing provisions restricting competition. The law becomes effective on July 1, 2021, and it applies to contracts executed after July 1, 2021. The law applies to certain healthcare professionals who are licensed under certain statutes, including Physicians, Physician Assistants, Certified Nurse Practitioners, Certified Nurse Midwives, Certified Registered Nurse Anesthetists, Registered Nurses, and Licensed Practical Nurses. The law prohibits employment contracts for the applicable healthcare professionals that restrict the right of the provider to (1) practice or provide services for which the provider is licensed, in any geographic area and for any period of time, after the termination of the employment, partnership, or other form of professional relationship; (2) treat, advise, consult with, or establish a provider-patient relationship with any current patient of the employer, or with a patient affiliated with a partnership or other form of professional relationship; or (3) solicit or seek to establish a provider-patient relationship with any current patient of the employer, or with a patient affiliated with a partnership or other form of professional relationship. The prohibitions do not apply to a contract governing the sale and purchase of a healthcare practice. See 2021 S.D. HB 1154.

Texas

On March 31, 2021, a federal court in Texas granted a permanent injunction prohibiting enforcement of Dallas's paid sick leave

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ordinance, ruling that it is preempted by the state minimum wage law because the benefit violates the state's prohibition on local wage laws. See ESI/Employee Sols., L.P. v. City of Dall., No. 4:19-CV-570-SDJ, 2021 U.S. Dist. LEXIS 62879 (E.D. Tex. Mar. 31, 2021).

Virginia

On April 7, 2021, Virginia voted to legalize adult recreational use of cannabis. Effective July 1, 2021, home cultivation and personal possession of cannabis will become legal. Retail sales will begin in January 2024. See 2021 Va. SB 1406.

On March 31, 2021, Governor Ralph Northam signed a law requiring paid sick leave for home health workers. "Home health worker" is defined as "an individual who provides personal care, respite, or companion services to an individual who receives consumer-directed services under the state plan for medical assistance services" – that is, workers who provide services to patients enrolled in Medicaid. "Home health worker" does not include an individual who "(i) is licensed, registered, or certified as a health regulatory board within the Department of Health Professions"; "(ii) is employed by a hospital licensed by the Department of Health"; or "(iii) works, on average, no more than 30 hours per month." Covered home health workers are entitled to one hour of paid sick leave for every 30 hours worked (not to exceed 40 hours in a year), and they can use leave for themselves or to care for or assist a family member. The law becomes effective on July 1, 2021. See 2021 Va. HB 2137.

On March 31, 2021, Governor Northam signed into law the Virginia Overtime Wage Act, which becomes effective on July 1, 2021. Like the federal Fair Labor Standards Act (FLSA), Virginia's Act requires that employers pay one and one-half times an employee's regular rate of pay for hours worked over 40 hours in a workweek. However, Virginia's Act differs from the FLSA in terms of how the regular rate of pay is calculated, the applicable statute of limitations, and the potential damages available. *Regular Rate of Pay:* Under the FLSA, an employee's regular rate of pay is the sum of all remuneration for employment (minus certain statutory exclusions) divided by the total hours worked in a workweek. Under Virginia's Act, for hourly employees, the regular rate of pay is the hourly rate plus any other non-overtime wages paid or allocated for the workweek (minus certain statutory exclusions) divided by the total hours worked in the workweek. For salaried employees, the regular rate of pay is 1/40 of all wages paid for the workweek. *Statute of Limitations:* Virginia's law carries a three-year statute of limitations, while the FLSA's limitations period is two years (three years for willful violations). *Damages:* Virginia's Act provides that all overtime violations are subject to double damages and pre-judgment interest at the rate of eight percent per year (and treble damages for knowing violations), making unavailable the FLSA's good faith argument. The Act also authorizes collective actions. See Va. HB 2063.

Effective May 1, 2021, Virginia increased its hourly minimum wage to \$9.50. The increase, which was originally scheduled to take effect on January 1, 2021, was delayed

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to provide employers with an additional four months to recover from the economic impact of the COVID-19 pandemic. The minimum

wage will increase again on January 1, 2022 to \$11.00, and on January 1, 2023 to \$12.00. See 2020 VA S.B. 7.

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