



A Law Firm of Action

## THE LAST 60 DAYS OF ACTION IN EMPLOYMENT LAW

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### Federal

In late June 2021, the Equal Employment Opportunity Commission extended – until August 23, 2021 – the deadline to submit and certify 2019 and 2020 EEO-1 Component data. The EEO-1 Component 1 report is a mandatory annual data collection that requires all private sector employers with 100 or more employees, and federal contractors with 50 or more employees meeting certain criteria, to submit demographic workforce data. [See update here.](#)

On May 21, 2021, in Roberts v. Glenn Industrial Group Inc., the United States Court of Appeals for the Fourth Circuit endorsed a broad view of what constitutes same-sex harassment in the workplace. The Court held that the three routes for proving same-sex harassment as outlined in a 1998 United States Supreme Court case, Oncale v. Sundowner Offshore Services, were not an exhaustive list of viable Title VII claims. (The court in Oncale said that a plaintiff could prove that same-sex harassment was based on sex when evidence exists that the harasser is gay, when the harassment indicated a general hostility toward a specific sex, or when the harasser treated men and women differently). The Fourth

Circuit reversed a North Carolina federal judge's grant of summary judgment to Glenn Industrial Group, Inc. and revived the lawsuit of Chazz Roberts, a utility worker, regarding his supervisor's comments. Roberts claims that his direct supervisor repeatedly called him gay and made sexually charged comments and physically assaulted him on two occasions. Roberts complained to human resources to no avail, and he was later terminated for alleged safety violations. [See Roberts v. Glenn Indus. Grp. Inc.](#), 998 F.3d 111 (4th Cir. May 21, 2021).

On June 3, 2021, the United States Supreme Court held that, under the Computer Fraud and Abuse Act, individuals exceed authorized use when they access a computer with authorization but then obtain information from areas of the computer to which their authorization did not extend, but not when they obtain information that is otherwise available to them for an improper purpose. [See Van Buren v. United States](#), No. 19-783, 2021 U.S. LEXIS 2843 (June 3, 2021).

### California

On July 26, 2021, the California Supreme Court held that the statute of limitations on a failure to promote claim under the

harassment provision of the Fair Employment and Housing Act begins to run when the employee knows or reasonably should know of the employer's allegedly unlawful refusal to promote. See Pollock v. Tri-Modal Distribution Servs., No. S262699, 2021 Cal. LEXIS 5257 (July 26, 2021).

On July 15, 2021, the California Supreme Court held that employers must pay premiums to employees for missed meal and rest breaks at their regular rate of pay (i.e., their hourly wage plus other nondiscretionary payments) rather than their base hourly rate. See Ferra v. Loews Hollywood Hotel, No. S259172, 2021 Cal. LEXIS 4877 (July 15, 2021).

### Colorado

On June 14, 2021, the Colorado Supreme Court held that, pursuant to the Colorado Wage Claim Act, employers must pay accrued but unused vacation to employees upon termination. See Neito v. Clark's Mkt., Inc., No. 19SC553, 2021 Colo. LEXIS 423 (June 14, 2021).

### Connecticut

On June 24, 2021, Connecticut enacted An Act Deterring Age Discrimination in Employment Applications, which bans employers from inquiring about the ages; dates of birth; or dates of attendance at or graduation from an educational institution from prospective employees "on an initial employment application." Employers may request age information if the inquiry is based on a bona fide occupational qualification or need, or if the employer needs the information to comply with applicable state or federal laws. The Act becomes effective on October 1, 2021. See 2021 CT S.B. 56.

On June 23, 2021, Connecticut enacted a law requiring employers to provide two hours of unpaid leave for employees to vote in state elections. The law is effective immediately. See 2021 CT S.B. 1202, § 108.

On June 22, 2021, Connecticut enacted An Act Concerning Responsible and Equitable Regulation of Adult-Use Cannabis, which legalizes the recreational use of marijuana. Some provisions of the Act became effective on July 1, 2021, including (1) allowing adults who are 21 years of age or older to possess up to one and a half ounces of marijuana or up to five ounces of marijuana in a locked container; (2) permitting the expungement of certain convictions for marijuana-related offenses; and (3) setting up a framework for businesses to apply for licenses to grow, manufacture, sell, and distribute marijuana. The Act also imposes certain restrictions on employers and provides certain protections for employees, which become effective on July 1, 2022. Those provisions include (1) requiring any drug-free workplace policy to be in writing and made available to employees or applicants before becoming effective; (2) generally prohibiting an employer from discharging or taking adverse action against an employee because the employee uses cannabis outside of the workplace; (3) generally prohibiting an employer's discharge, refusal to hire, or adverse action against an employee or applicant (unless they work in certain industries/roles) for use of cannabis outside the workplace before the individual was hired by the employer; (4) allowing employers to take appropriate adverse action based upon (a) a reasonable suspicion of an employee's use of cannabis while working or on call or (b) determining that an employee "manifests specific, articulable symptoms of drug impairment" while working or on call; and (5) allowing

adverse action against employees or applicants in certain circumstances in connection with a positive marijuana drug test. See 2021 CT S.B. 1201A.

On June 7, 2021, Connecticut enacted An Act Concerning the Disclosure of Salary Range for a Vacant Position. Under the new law, which becomes effective October 1, 2021, an employer may not (1) fail or refuse to provide an applicant for employment the wage range for a position for which the applicant is applying, upon the earliest of (a) the applicant's request or (b) prior to or at the time the applicant is made an offer of compensation; or (2) fail or refuse to provide an employee the wage range for the employee's position upon (a) the hiring of the employee or (b) a change in the employee's position with the employer or (c) the employee's first request for a wage range. The law also modifies the prohibition against sex-based wage discrimination to comparable (rather than equal) work. See 2021 CT H.B. 6380.

On June 4, 2021, Connecticut engaged An Act Concerning Breastfeeding in the Workplace, which amends existing law that protects an employee's right to breastfeed or express breast milk at the workplace during a meal or rest period. The amended law better defines the "room or other location" that an employer must provide to an employee to express breast milk in private. Effective October 1, 2021, the room or other location will have to (1) be free from intrusion and shielded from the public while the employee expresses breast milk; (2) include or be situated near a refrigerator or employee-provided portable cold storage device in which the employee can store breast milk; and (3) have access to an electrical outlet. See 2021 CT H.B. 5158.

## Illinois

On July 9, 2021, Illinois amended its Wage Payment and Collection Act to increase – from two percent to five percent of the amount of the underpayment per month – the penalty for underpaying wages. The amendment became effective immediately. See 2021 IL H.B. 118.

On June 25, 2021, the Chicago City Council passed an Ordinance that creates new wage theft protections and expands the covered reasons for use of paid sick leave. The wage theft provisions took effect on July 5, 2021, and the paid sick leave provisions took effect on August 1, 2021. With respect to wages, an employer is liable for wage theft if it fails to timely pay a covered employee wages that are required for work performed, paid time off, or contractually required benefits. The penalty is two percent per month of the unpaid wages for the time the wages remain unpaid, or the amount specified in the Illinois Wage Payment and Collection Act, whichever is greater. With respect to paid sick leave, the Ordinance expands Chicago's paid sick leave law to allow employees to use leave to obtain professional care services, such as services for behavioral health, mental health, and substance abuse; to care for a family member whose school, class, or place of care has been closed; to obey a stay at home order issued by the Mayor, the Governor of Illinois, the Chicago Department of Public Health, or a treating healthcare provider to minimize the transmission of a communicable disease; to remain at home while experiencing symptoms, or sick with, a communicable disease; and to obey a quarantine or isolation order issued to the employee. See Ordinance No. O2021-2182.

## Indiana

Effective July 1, 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. See 2021 IN H.B. 1309.

## Iowa

On June 25, 2021, the Iowa Supreme Court held that an employer's failure to notify an employee of the cost of a drug retest violated the state's drug testing law because, without knowing the cost of the retest, the employee did not have a meaningful opportunity to consider whether to undertake the retest. See Woods v. Charles Gabus Ford, Inc. No. 19-0002, 2021 Iowa Sup. LEXIS 87 (June 25, 2021).

On June 18, 2021, the Iowa Supreme Court held that the Iowa Code preempted the City of Waterloo's ban-the-box ordinance to the extent that it seeks to regulate whether an employer can consider an employee's criminal history, but valid to the extent it regulated only the timing of any criminal history inquiry. See Iowa Ass'n of Bus. & Indus. v. City of Waterloo, No. 20-0575, 2021 Iowa Sup. LEXIS 79 (June 18, 2021).

## Louisiana

On June 17, 2021, Louisiana amended its Employment Discrimination Law to extend

reasonable accommodation requirements to pregnancy, childbirth, and related medical conditions. The law became effective on August 1, 2021. See 2021 LA S.B. 215.

## Maine

On July 6, 2021, Maine enacted a law that, with limited exceptions, prohibits employers from seeking information regarding criminal history on an initial employment application. The law further prohibits an employer from stating on an initial employee application form or in a job advertisement that a person with a criminal history may not apply or will not be considered for the job. The law becomes effective on October 18, 2021. See 2021 ME H.P. 845.

On June 20, 2021, Maine amended its minimum wage law to increase – from \$30 per month to \$175 per month – the amount of tips an employee must receive to be considered a service employee. As a result, many low tip earners will need to be paid minimum wage. The tip amount will be increased proportionately based on increases in the cost of living, beginning January 1, 2022. The amendment becomes effective on October 18, 2021. See 2021 ME H.P. 1103.

On June 14, 2021, Maine enacted an Act to Include Grandparents Under Maine's Family Medical Leave Laws. The law amends the Maine Family Medical Leave Act to allow an employee to take unpaid leave to care for a grandchild or a domestic partner's grandchild. The Act becomes effective on October 18, 2021. See ME H.P. 27.

## Maryland

On May 30, 2021, Maryland amended its Flexible Health Act to permit employees to use paid leave in connection with the death of an immediate family member. The law becomes effective on October 1, 2021. See 2021 MD H.B. 56.

## Minnesota

On June 30, 2021, Minnesota amended its statute regarding nursing mothers to require employers to provide “reasonable break times” for 12 months following the birth of a child. Currently, the statute requires “reasonable unpaid break time” for the purpose of expressing breast milk for an infant child. The amendment now requires reasonable break “times” (plural), caps the accommodation requirement at 12 months, and removes “unpaid” in favor of a prohibition against reducing an employee’s compensation for time used for the purpose of expressing milk. The amendment becomes effective on January 1, 2022. See 2021 MN S.B. 9.

## Mississippi

Effective July 1, 2021, Mississippi voted to legalize medical marijuana. See Initiative Measure No. 65.

## Missouri

On July 14, 2021, Missouri enacted a law requiring employers to make reasonable safety accommodations, in a timely manner, to the known limitations of an otherwise qualified employee or applicant resulting from circumstances relating to being a victim of domestic or sexual violence or a family or household member being a victim of domestic or sexual violence. The law becomes effective on August 28, 2021. See 2021 MO H.B. 432.

## Nevada

On June 2, 2021, Nevada enacted a law to promote pay equity. Under the new law, which is effective October 1, 2021, employers may not seek an applicant’s wage or salary history; use an applicant’s wage or salary history to determine whether to hire the applicant or to determine the applicant’s rate of pay; or discriminate or retaliate against an applicant for refusing to provide

wage or salary information. Employers still may ask applicants about their compensation expectations. The law further requires employers to disclose to applicants who have interviewed for a position the wage or salary range for the position. See 2021 NV S.B. 293.

Also on June 2, 2021, Nevada amended its discrimination laws to define “race” to mean “traits associated with race, including, without limitation, hair texture and protective hairstyles,” such as natural hairstyles, afros, bantu knots, curls, braids, locks, and twists. The amendment is effective immediately. See 2021 NV S.B. 327.

On May 29, 2021, Nevada enacted a law requiring employers in the private sector that offer paid or unpaid sick leave to allow their employees to use that leave to assist an immediate family member who has an illness or injury, medical appointment, or other authorized medical need. “Immediate family” is defined as the employee’s child or foster child; spouse or domestic partner; sibling; parent, stepparent, or parent-in-law; grandchild; grandparent; and any person for whom the employee is the legal guardian. The law becomes effective on October 1, 2021. See 2021 NV A.B. 190.

On May 25, 2021, Nevada amended its Unfair Trade Practice Act regarding non-competition agreements. The new law provides that a non-compete may not be enforced against an employee paid solely on an hourly basis, exclusive of tips and gratuities. In addition, the new law provides that a court “shall” award an employee reasonable attorney’s fees and costs in an action where either an employer seeks to enforce or an employee seeks to challenge a non-compete, and the court finds that the non-compete either applies to an hourly



wage employee or seeks to restrict an employee from doing business with former customers whom the employee did not solicit. The amendments are effective on October 1, 2021. See 2021 NV A.B. 47.

### **New Jersey**

On June 8, 2021, the New Jersey Supreme Court held that an adverse employment action is not a necessary element in a failure to accommodate claim under the state's Law Against Discrimination. See Richter v. Oakland Bd. of Educ., No. 083273, 2021 N.J. LEXIS 548 (June 8, 2021).

### **New Mexico**

Effective June 29, 2021, New Mexico passed a law legalizing recreational marijuana. The 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 NM H.B. 2.

### **New York**

Effective July 29, 2021, New York City enacted a law 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. See Int. No. 1314-A.

Effective July 4, 2021, New York City Council enacted a law that prohibits 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 law further requires the employer to provide, within five days of the adverse action, a written explanation of the "precise reasons" for termination or 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.

### **Pennsylvania**

On July 21, 2021, the Pennsylvania Supreme Court held that time spent on an employer's premises waiting to undergo, and undergoing, mandatory security screening constituted hours worked under the Pennsylvania Minimum Wage Act. See Heimbach v. Amazon.com, Inc., No. 43 EAP 2019, 2021 Pa. LEXIS 3047 (July 21, 2021).

Effective June 28, 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. See 2021 PA H.B. 203.

### **Rhode Island**

On July 6, 2021, Rhode Island enacted a pay equity law. The Act generally prohibits an employer from paying wages to any employee at a rate less than the rate that it pays to employees of another "race, color,

religion, sex, sexual orientation, gender identity or expression, disability, age (40 or over), or country of ancestral origin” for performing “comparable work.” The Act also prohibits employers from seeking or relying on the wage history of an applicant either to decide whether to hire the applicant or to determine the wages to pay the applicant. Lastly, the Act requires employers to provide, upon request, the “wage range” of a position and to provide the same to an employee, upon request, for a current position. The Act becomes effective on January 1, 2023. See 2021 RI H.B. 5261.

### **South Dakota**

Effective July 1, 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 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 SD H.B. 1154.

### **Texas**

Texas has enacted several laws that expand employee protections against sexual harassment:

On June 9, 2021, Texas enacted a law that lengthens the statute of limitations for filing sexual harassment claims with the Texas Workforce Commission from 180 days to 300 days from the date of the alleged harassment. The longer statute of limitations applies only to sexual harassment claims that are based on conduct alleged to have occurred on or after September 1, 2021. See 2021 TX H.B. 21.

On May 30, 2021, Texas enacted a new section to the Texas Labor Code that defines “employer” for purposes of sexual harassment claims. The definition includes anyone who (1) employs one or more employees (the current law applies only to employers of 15 or more employees); or (2) acts directly in the interest of an employer in relation to an employee (thus, it appears that now supervisors and coworkers, as well as third parties acting on behalf of the employer, may be held liable on sexual harassment claims). This new law’s Labor Code section also heightens an employer’s duty to remedy sexual harassment. While the current law states that employers must take “adequate” remedial action if they know or should know of harassment, the new law states that the employer’s action must be “immediate and appropriate.” The law becomes effective on September 1, 2021. See 2021 TX S.B. 45.

## Virginia

Effective July 1, 2021, recreational use of marijuana is legal in Virginia. Thus, individuals who are 21 years of age or older may possess up to one ounce of marijuana. Home cultivation of up to four marijuana plants also became legal. Also effective July 1, 2021, Virginia enacted a law prohibiting employers from disciplining, discharging, or discriminating against employees who lawfully use cannabis oil if the employee possesses a valid written certification from a practitioner that substantiates the employee's treatment needs. Employers still may prohibit marijuana on their premises and may take adverse action against employees who are impaired at work due to marijuana. See 2021 VA S.B. 1406 and 2021 VA H.B. 1862.

Effective July 1, 2021, Virginia amended its Human Rights Act to replace the term "veteran" with the term "military status" throughout the Code of Virginia to extend protections not just to veterans but to current members of the military. See 2021 VA H.B. 2161.

Effective July 1, 2021, Virginia enacted 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. See 2021 VA H.B. 2137.

Effective July 1, 2021, Virginia enacted the Virginia Overtime Wage Act. 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 H.B. 2063.

Effective July 1, 2021, Virginia expanded the scope of its Human Rights Act to



prohibit discrimination on the basis of disability, requiring employers to make reasonable accommodations – absent undue hardship – for known physical and mental impairments of a person who is otherwise qualified for a job. See 2021 VA H.B. 1848.

## **Washington**

Effective July 25, 2021, Washington amended its paid family and medical leave law to expand the definition of a “family member” for whom an employee may use leave benefits. Currently, “family member” is defined as a child, grandchild, grandparent, parent, sibling, or spouse of an employee. The amendment expands the definition to “any individual who regularly resides in the employee’s home or where the relationship creates an expectation that the employee care for the person and that individual depends on the employee for care.” See 2021 WA S.B. 5907.

Effective July 25, 2021, Washington enacted amendments to its long-term care insurance program that requires employees who wish to opt-out of the program and corresponding payroll tax to purchase long-term care insurance by November 1, 2021. See 2021 WA H.B. 1323.