



THE LAST 90 DAYS OF ACTION IN EMPLOYMENT LAW

November 4, 2021

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Federal

On September 24, 2021, the United States Department of Labor issued a final rule asserting its authority to penalize employers up to \$1,162 each time that an employer keeps employee tips or allows its managers or supervisors to receive tips from tip pooling agreements. The rule becomes effective on November 23, 2021. See 86 Fed. Reg. 52973.

Arizona

Effective September 29, 2021, Arizona amended its civil rights act to prohibit discrimination on the basis of pregnancy, childbirth, and related medical conditions. See 2021 Ariz. HB 2045.

California

On October 7, 2021, Governor Newsom signed the “Silenced No More Act” into law. The Act becomes effective on January 1, 2022. Existing law restricts the usage of confidentiality provisions in agreements related to sexual assault and harassment. The Act extends those restrictions to all claims of harassment, discrimination, or retaliation under the Fair Employment and Housing Act. Specifically, the parties to a settlement agreement may not prevent or

restrict an individual from disclosing the underlying factual information relating to their claims. In addition, an employer cannot require an employee to sign a non-disparagement agreement that has the purpose or effect of denying the employee the right to disclose information about unlawful acts in the workplace. If an agreement includes a non-disparagement provision, the agreement must also include the following language: “Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful.” With respect to a severance agreement, an employer must give an employee at least five days to consider it; must notify the employee that the employee has the right to consult an attorney regarding the agreement; and the agreement may not prohibit an employee from disclosing information about unlawful workplace acts unless (1) the agreement resolves an employment discrimination claim that the employee filed in court, with an agency, in an alternative dispute resolution forum, or through an employer’s internal complaint process, and (2) the employee was provided notice and an opportunity to retain an attorney or was

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represented by an attorney. See 2021 Cal. S.B. 331.

Colorado

Effective September 14, 2021, Colorado amended its Anti-discrimination Act to prohibit discrimination on the bases of gender expression and gender identity. See 2021 CO H.B. 1108.

Connecticut

Connecticut enacted the following laws, effective October 1, 2021:

- An Act Deterring Age Discrimination in Employment Applications: The Act 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. See 2021 CT S.B. 56.
- An Act Concerning the Disclosure of Salary Range for a Vacant Position: Under the new law, 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.

- An Act Concerning Breastfeeding in the Workplace: The Act 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. Specifically, 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.

D.C.

Effective October 1, 2021, Washington, D.C. enacted the Universal Paid Leave Emergency Amendment Act of 2021. The Act amends D.C.’s Universal Paid Leave Amendment Act of 2016, as well as its Family and Medical Leave Act of 1990 and Paid Family Leave program, to expand benefits for covered individuals. Some key

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takeaways are: *Prenatal Care* – Eligible individuals may now take up to two workweeks of prenatal leave for (1) routine and specialty appointments, exams, and treatments associated with a pregnancy provided by a health-care provider, including prenatal check-ups and ultrasounds; (2) treatment for pregnancy complications; (3) bedrest that is required or prescribed by a health-care provider; and (4) prenatal physical therapy. These two weeks are in addition to the combined maximum of eight workweeks of paid leave within a 52-week period that eligible employees already may take under the Paid Family Leave program. *Pregnancy Loss* – The Act also amends the definition of a “qualifying medical leave event” to include medical care related to miscarriage or stillbirth. *Extended Duration of Paid Leave* – For personal medical claims between September 26, 2021 and September 30, 2022, the Act increases the maximum duration of leave from two to six workweeks. The Act was passed as emergency legislation and, therefore, will expire after 90 days (*i.e.*, November 21, 2021) unless it is renewed. See [D.C. Act 24-159](#).

Florida

Effective September 30, 2021, Florida will incrementally raise the state minimum wage to \$15.00 by 2026. See [Ballot Initiative 18-01](#).

Illinois

On August 13, 2021, Illinois amended its Freedom to Work Act to impose greater restrictions on non-competes. See our article on the Act [here](#).

On August 2, 2021 and effective immediately, Illinois amended its Human

Rights Act to make it a civil rights violation to discriminate against job applicants or employees based on their work authorization status. This amendment means that any person legally authorized to work in the United States, regardless of the length of their work authorization, is protected by the Illinois Human Rights Act. See 2021 Bill Text IL H.B. 121.

Louisiana

Effective August 1, 2021, Louisiana passed a measure that prohibits discrimination in employment based on criminal history records and provides criteria for employers making hiring decisions involving criminal history records. Specifically, the law states that, unless otherwise provided by law, when making a hiring decision, an employer shall not request or consider an arrest record or charge that did not result in a conviction, if the employer receives such information from a background check. In addition, if an employer considers other types of criminal history records, it must make an individual assessment of whether the criminal history record has a direct and adverse relationship with the specific duties of the job that may justify denying the position to the applicant. The “individual assessment” must include an assessment of (1) the nature and gravity of the offense or conduct; (2) the time that has elapsed since the offense, conduct, or conviction; and (3) the nature of the job sought. The law further requires that, upon receipt of a written request from an applicant, an employer must “make available to the applicant any background check information used during the hiring process.” See 2021 Bill Text H.B. 707.

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Effective August 1, 2021, Louisiana employers will be required to provide reasonable accommodations for pregnancy, childbirth, or related medical conditions, unless it would pose an undue hardship. Some accommodation examples include light duty, if available; more frequent breaks; and modifying work schedules. See 2021 LA S.B. 215.

Maine

Several laws in Maine became effective on October 18, 2021:

Maine amended its Human Rights Act to prohibit discrimination against individuals who have sought and received an order of protection under the State's domestic violence law. See 2021 ME S.P. 422.

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. See 2021 ME H.P. 845.

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. See 2021 ME H.P. 1103.

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. See ME H.P. 27.

Maryland

Effective October 1, 2021, Maryland amended its Flexible Health Act to permit employees to use paid leave in connection with the death of an immediate family member. See 2021 MD H.B. 56.

Effective October 1, 2021, Maryland extended – from six months to 300 days – the time in which an employee must file a discrimination complaint with the State's Commission on Civil Rights. See 2021 MD H.B. 56.

Effective August 19, 2021, the City of Duluth, Minnesota broadened the covered uses of leave under its Earned Sick and Safe Time (ESST) Ordinance, and amended employer notice and enforcement provisions. Specifically, employees can now use leave when they lose work hours because their place of employment closes for public health reasons; employers must include in their employee handbook a copy of its policy that complies with the ESST Ordinance; employers either must display or provide to employees the City-created poster or other notice advising them of their rights under the ESST Ordinance; and the City will be permitted to order employers to provide employees with written notice of a violation and its corrective action. See Duluth, MN [File # 21-023-O](#).

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Missouri

Effective August 28, 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. See 2021 MO H.B. 432.

Nebraska

Effective September 11, 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. See 2021 Neb. LB 451.

Nevada

The following laws became effective in Nevada on October 1, 2021:

Nevada enacted a law to promote pay equity. 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.

Additionally, 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. See 2021 NV A.B. 190.

Finally, 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. See 2021 NV A.B. 47.

New Jersey

On October 5, 2021, Governor Murphy signed a law that expands the scope of New Jersey's Law Against Discrimination (LAD) to provide protections against age discrimination to employees. The new law extends protections by: (1) implementing a higher standard for a government employer in terms of setting a mandatory retirement age; (2) eliminating the provision of the law that allows employers not to hire or promote workers over 70 years old; (3) removing the provision within the law that permits higher education institutions to require tenured

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employees to retire at 70 years old; and (4) expanding the remedies available to an employee required to retire due to age to include all remedies available under the LAD and not just reinstatement of employment with backpay. See 2020 Bill Text NJ A.B. 681.

On September 24, 2021, and effective immediately, New Jersey amended its Workers' Compensation Law to require employers to give hiring preference to employees who recover from work-related injuries but are unable to return to the position that they held before the injury. See 2020 Bill Text NJ A.B. 2617.

In February, Governor Murphy signed into law the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act, which legalized the recreational use of marijuana for adults who are 21 years of age or older in New Jersey. The employment-related provisions of the Act were not to become "operative" until the Cannabis Regulatory Commission (CRC) published rules and regulations. On August 19, 2021, the CRC published its first set of rules, called the Personal Use Cannabis Rules, related to the Act. The Rules were expected to more fully address the Act's requirement that an employer use a Workplace Impairment Recognition Expert (WIRE) to conduct a "physical evaluation" of an individual who is drug tested for marijuana, including prescribing certain standards for the certification of a WIRE. However, the Rules merely state that, until the CRC develops standards for WIRE certification, "no physical evaluation of an employee being drug tested ... shall be required." Though the Rules do not clear up

the WIRE issue, they do make clear that New Jersey employers are now prohibited from taking adverse action against individuals *solely* because they use marijuana or because they fail a drug test for marijuana. See the [CRC's Personal Use Cannabis Rules](#).

New York

On October 28, 2021, and effective January 26, 2022, New York significantly expanded employee whistleblower protections as follows: (1) The protected activity that entitles an employee to anti-retaliation protection may relate to any violation of any federal, state, or local statute, rule, or regulation, regardless of subject matter, or to practices that affect public health and safety (previously, protected activity had to relate to violations of law that created or presented a substantial and specific danger to public health and safety); (2) The categories of workers protected against retaliation now includes not only employees, but also former employees and independent contractors; (3) The definition of prohibited retaliatory action now includes any adverse action or threatened adverse action (previously, it included only discharge, suspension, or demotion); and (4) The applicable statute of limitations is extended from one to two years. See N.Y. Lab. Law § 740.

Effective October 21, 2021, New York enacted a law that requires all private sector employers to provide retirement options for workers. The new law requires private sector businesses that do not currently provide their employees with a retirement plan to automatically enroll them in the state's Secure Choice Savings Plan. Established in 2015 by the New

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York State Secure Choice Savings Program Act, the Secure Choice Savings plan is a self-sufficient retirement savings program in the form of an automatic enrollment payroll deduction IRA. [See](#) Senate Bill S5395A.

For complaints filed on or after October 12, 2021, the New York State Division of Human Rights (NYSDHR) will no longer discontinue complaints following private settlements. Instead, after a probable cause determination, a complainant's attorney will be required to state, in writing, why they are seeking a discontinuance and, if the reason is private settlement, the discontinuance will not be granted. Parties will be encouraged to either settle the matter through an Order after stipulation that indicates the terms of the settlement or to proceed through the agency's public hearing process. [See](#) the NYSDHR Notice [here](#).

Effective October 8, 2021, the New York Department of Labor issued guidance under the Marijuana Regulation and Taxation Act that clarifies when an employer may take action against an employee who "manifests specific articulable symptoms" of being under the influence of cannabis while on the job. Specifically, the State's Department of Labor stated that, before an employer may take corrective action, the employee's "specific articulable symptoms" must either: (i) decrease or lessen the employee's performance of duties or tasks; or (ii) interfere with the employer's duty to provide a safe and healthy workplace. According to the guidance, "[o]bservable signs of use [e.g., smelling of cannabis or bloodshot eyes] that do not indicate impairment on their own cannot be cited as an articulable

symptom of impairment." [See](#) [Adult Use Cannabis and the Workplace](#).

North Carolina

On August 10, 2021, and effective January 1, 2022, the Charlotte, North Carolina City Council voted to add employment protections for all classes protected by its antidiscrimination statute. Under the new employment protections, which apply to employers of all sizes in the City, it is unlawful for an employer to fail or refuse to hire a person, or otherwise discriminate against them in any employment matter, because of their race, color, gender, religion, national origin, ethnicity, age, familial status, sexual orientation, gender identity, gender expression, veteran status, pregnancy, natural hairstyle or disability. [See](#) Ordinance No. 15-16263.

Pennsylvania

On September 14, Allegheny County, Pennsylvania enacted an ordinance requiring covered employers to provide employees with at least one hour of paid sick time for every 35 hours worked within Allegheny County up to 40 hours of paid sick time per calendar year. Paid sick time is to be used for an employee's or family member's illness, injury, or health condition; need for diagnosis, care, treatment, or preventive care; closure of the employee's place of business due to a public health emergency; the employee's need to care for a child whose school or place of care has been closed due to a public health emergency; or care for a family member when that family member's presence in the community would jeopardize the health of others because of the family member's exposure to a communicable disease. The ordinance will take effect 90 days after the Allegheny

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County Health Department posts the employer notice materials. See [Ordinance 11988-21](#).

On August 5, 2021, the Superior Court of Pennsylvania determined, in a case of first impression, that employees have a private right of action against their employers for claims under the Pennsylvania Medical Marijuana Act (MMA). [Palmiter v. Commonwealth Health Sys., Inc.](#), No. 398 MDA 2020, 2021 PA Super. 155 (Pa. Super. Ct. Aug. 5, 2021).

Texas

For sexual harassment claims that are based on conduct alleged to have occurred on or after September 1, 2021, Texas lengthened the statute of limitations for filing claims with the Texas Workforce Commission from 180 days to 300 days from the date of the alleged harassment. See 2021 TX H.B. 21.

Effective September 1, 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.” See 2021 TX S.B. 45.

Washington

Washington’s law regarding non-competition agreements governs when a non-competition agreement may be considered valid or enforceable under state law. One aspect to the restrictions in Washington’s non-competition law relates to earnings. Unless employees or independent contractors earn a certain threshold income that is established by law, their non-competition agreement is considered void and unenforceable. The Department of Labor & Industries must adjust these income thresholds for inflation each year. Thus, the Department announced on October 27, 2021 that, effective January 1, 2022, the salary threshold for employees will be increased from \$101,390 to \$107,301.04 and, for independent contractors, from \$253,475 to \$268,252.59. See Wash. Rev. Code § 49.62.020.

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