

## February 2020 Legal HR Updates

### General/Federal

#### Department of Transportation Random Drug and Alcohol Testing Rates Increase for 2020

##### **What happened?**

The Department of Transportation (DOT) operating agencies have announced that their random drug and alcohol testing for 2020 have been increased.

##### **What are the details?**

The following increases are broken down below. Those not listed have remained the same from the previous year.

Agency	2020 Random Drug Testing Rate	2020 Random Alcohol Testing Rate
Federal Aviation Administration	25%	10%
Federal Motor Carrier Administration	50%	10%
Federal Railway Administration	25% covered service	10% covered service
Federal Railway Administration	50% maintenance-of-way	25% maintenance-of-way
Federal Transit Administration	50%	10%
Pipeline and Hazardous Materials Safety Administration	50%	N/A
United States Coast Guard	50%	N/A

##### **What do employers need to do?**

It is important for employers to review their random drug and alcohol testing policies and programs and make the necessary change to remain compliant.

**U.S. DOT:** <https://www.transportation.gov/odapc/random-testing-rates>

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## **Ban on Employment Credit Checks**

### **What happened?**

On January 29, 2020, the U.S. House of Representatives passed legislation that strictly prohibits employers from using credit reports for employment decisions, except when required by law.

### **What are the details?**

The new bill not only prohibits the use of credit reports, but also prohibits managers from asking questions about an applicant's financial past during a job interview. Furthermore, questions about credit history cannot be included on job applications. Some employer groups are opposing the bill by stating that the information provided in a credit report gives an ideal assessment of an individual's judgment and potential risk they could impose. This is particularly the case with positions where the duties involve handling accounting and/or finances of a business.

### **What do employers need to do?**

No action is required at this time since the legislation is pending. If the Senate approves the bill, we will provide an update.

## California

### **Employee Bag Checks – Court Case**

#### **What happened?**

The California Supreme Court determined that time spent by employees while they are waiting for their bag to be searched is compensable time under California law.

#### **What are the details?**

Most California employees must be paid for the time they are under the control of their employer. In the past several years, it has been unclear to employers whether security bag check falls under compensable time, especially since most employees have clocked out when the bag check occurs. A decision was made on February 13, 2020 that the following multi-factor test was applied to this situation to determine if this activity is "employer-controlled" and, therefore, compensable:

- The mandatory nature of the activity;
- The location of the activity;
- The degree of the employer's control;
- Whether the activity primarily benefits the employee or employer; and
- Whether the activity is enforced through disciplinary measures.

The court has made this decision effective retroactively and employers should keep in mind that the determination of this case does not only apply to security bag checks.

### **What do employers need to do?**

Employers should review their policies regarding bag checks, or anything closely related, and consult legal counsel to determine if a change is needed.

**Court Case:** <https://www.courts.ca.gov/opinions/documents/S243805.PDF>

**Article:** [https://www.fisherphillips.com/resources-alerts-sound-the-alarm-what-californias-latest-bag?click\\_source=sitopilot06!5977!bHZpbGxhbnVldmFAd29ya%E2%80%A6](https://www.fisherphillips.com/resources-alerts-sound-the-alarm-what-californias-latest-bag?click_source=sitopilot06!5977!bHZpbGxhbnVldmFAd29ya%E2%80%A6)

## Colorado

### **New Wage Payment Requirements**

#### **What happened?**

Colorado's new Overtime and Minimum Pay Standards Order 36 (COMPS 36) becomes effective March 16, 2020.

#### **What are the details?**

The Colorado Department of Labor and Employment (CDLE) made an announcement that they will adopt and enact the COMPS 36. This Order will replace the current Minimum Wage Order 35 and all previous minimum wage orders.

COMPS 36 expands the scope of the state's wage orders, sets a schedule for increasing salary levels under the state's overtime white collar exemptions, offers expanded employee break rights, and clarifies employer obligations.

Employers must display the new poster beginning March 16, 2020. The Order does not apply to state, county, city, or municipal organizations.

#### **What do employers need to do?**

Review the details of the order to ensure compliance with the changes. Complete and display the new poster and review handbooks for potential changes.

**COMPS 36:** [https://www.colorado.gov/pacific/sites/default/files/7%20CCR%201103-1%20Adopted%20COMPS%2036%20Clean\\_0.pdf](https://www.colorado.gov/pacific/sites/default/files/7%20CCR%201103-1%20Adopted%20COMPS%2036%20Clean_0.pdf)

#### **COMPS 36 Poster:**

<https://www.colorado.gov/pacific/sites/default/files/COMPS%20Order%20%2336%20Poster%20Final%20022020.pdf>

**CO DOL:** <https://www.colorado.gov/pacific/cdle/news/labor-department-adopts-new-colorado-overtime-and-minimum-pay-standards-rule>

## Maryland

### **"Ban the Box"**

#### **What happened?**

The new Maryland law, the Criminal Record Screening Practices Act (the Act), will take effect on February 29, 2020.

#### **What are the details?**

Under the Act, employers with at least 15 full-time employees may not, before the first in-person interview, require an applicant for employment to disclose whether the applicant has a criminal record or has had criminal accusations brought against the applicant. The Act applies not only to traditional employment, but also applies more broadly to "any work for pay and any form of vocational or educational training, with or without pay," including contractual, temporary, seasonal, or contingent work, and work assigned through a temporary or other employment agency.

Under the Act, an employer may require an applicant to disclose during the first in-person interview whether the applicant has a criminal record or has had criminal accusations brought against the applicant.

Employers also are prohibited from retaliating or discriminating against an applicant or employee as retribution for alleging a violation of the Act.

The Act does not apply to employers that provide programs, services, or direct care to minors or vulnerable adults. The Act also does not prohibit an employer from making a criminal record inquiry or taking other action that the employer is required or authorized to take under another federal or state law.

#### **What do employers need to do?**

- Review employment applications to ensure they do not include any prohibited inquiries about an applicant's criminal history.
- Review their advertisements (paper and electronic) soliciting applications and remove any language that states applicants will not be considered for employment because of their criminal history.
- Educate key employees in the hiring process about the ordinance's requirements.
- Update forms and practices for inquiring into an applicant's criminal record, after the initial employment application process is completed.

For each subsequent violation, in the Commissioner's discretion, the Commissioner may assess a civil penalty of up to \$300.

**Article:** <https://www.jacksonlewis.com/publication/maryland-becomes-latest-state-ban-box>

**Bill:** <https://legiscan.com/MD/text/SB839/id/1987057>

## Missouri (St. Louis)

### **"Ban the Box" Ordinance**

#### **What happened?**

The City of St. Louis passed "ban the box" legislation prohibiting employers in the City of St. Louis, Missouri from basing job hiring or promotion decisions on applicants' criminal histories.

#### **What are the details?**

The Ordinance will take effect on January 1, 2021, for employers with at least 10 employees unless the employer can demonstrate its decision is based on all available information, including consideration of the frequency, recentness, and severity of the criminal history, and that the history is reasonably related to or bear on the duties and responsibilities of the position.

Further, the Ordinance prohibits an employer from asking about an applicant's criminal history until after it has been determined an applicant is otherwise qualified for the position.

The Ordinance also prohibits employers from publishing job advertisements excluding applicants based on criminal history, as well as barring employers from including statements excluding applications based on criminal history in job application forms and other employer-generated forms used in the hiring process. Employers also are banned from seeking to obtain publicly available information concerning job applicants' criminal history.

#### **What do employers need to do?**

City of St. Louis employers covered by the Ordinance should consider taking these steps to ensure they follow the Ordinance's requirements:

- Review employment applications to ensure they do not include any prohibited inquiries about an applicant's criminal history.
- Review their advertisements (paper and electronic) soliciting applications and remove any language that states applicants will not be considered for employment because of their criminal history.
- Educate key employees in the hiring process about the Ordinance's requirements.
- Update forms and practices for inquiring into an applicant's criminal record, after the initial employment application process is completed.

Violations of the Ordinance may expose employers to significant penalties. For the first violation, an employer will receive a warning issued by the Office of the License Collector, or an order requiring that it come into compliance within 30 days. For the second violation, an employer will receive an order issued by the Office of the License Collector requiring that it come into compliance within 30 days and a civil penalty as determined by the License Collector. After three violations, the Office of the License Collector may revoke an employer's business operating license.

**Article:** <https://www.jacksonlewis.com/publication/city-st-louis-missouri-passes-new-ban-box-ordinance>

**Bill:** <https://www.stlouis-mo.gov/internal-apps/legislative/upload/Ordinances/BOAPdf/71074%20Combined.pdf>

## New York

### **Stores to Accept Cash Requirement**

#### **What happened?**

The legislation aims to eliminate what supporters say is discrimination against low-income New Yorkers who lack bank accounts and credit cards. Many businesses, on the other hand, cited a variety of reasons for opposing the legislation, including a desire to appeal to card-toting consumers, speed up service, increase employee safety by reducing the chance of robbery, and eliminate the need to count cash or arrange for armored car pickups. The new law will take effect 270 days after Mayor de Blasio—who has expressed support for the bill—signs it into law.

#### **What are the details?**

***Prohibition of Cashless Policies.*** The legislation amends Chapter 20 of the New York City Administrative Code (titled, “Consumer Affairs”) by adding a new Subchapter 21 that prohibits most businesses from refusing to accept payment in cash.

***Covered Establishments.*** The legislation applies to all “food stores” and “retail establishments.”

***Exceptions.*** The legislation contains certain exceptions and carve-outs.

#### **What do employers need to do?**

- First, covered food stores or retail establishments may refuse to accept payment in cash bills denominated over \$20, or in cash for any telephone, mail, or internet-based transaction, unless the payment for such transaction takes place on the premises of such food store or retail establishment.
- Second, the legislation specifically states that “banks or trust companies,” as defined in Section 2 of Article 1 of the New York State Banking Law, are not “retail establishments” covered under the law.
- Third, the cashless prohibition does not apply to food stores and retail establishments that provide a device on premises that converts cash, without charging a fee or requiring a minimum deposit amount greater than \$1.00, into a prepaid card that allows the consumer to complete a transaction at the store.

**Article:** <https://www.littler.com/publication-press/publication/new-york-city-set-require-stores-accept-cash>

**Bill:** <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3763665&GUID=7800AFC9-D8B1-41FD-9C31-172565712686&Options=Advanced&Search=>

## Pennsylvania

### **Salary History Ban**

#### **What happened?**

The city will set a new effective date with input from the business community. While 120 days from Third Circuit's order would be June 5, 2020, the city could set an earlier date, so employers should begin preparing now.

#### **What are the details?**

The Ordinance prohibits employers from asking prospective employees about past wages, with the stated goal of disrupting the flow of information that might otherwise be used to set pay and possibly perpetuate the gender pay gap.

#### **What do employers need to do?**

- Revise hard copy and online applications to delete questions asking for wage history and consider asking about salary expectations in the application or later in the hiring process.
- Develop talking points or script and forms to document screening calls and interviews that provide guidance on what can and cannot be asked, and how to document any knowing and willing disclosure of wage history.

**Article:** <https://www.littler.com/publication-press/publication/when-hiring-jobs-located-philadelphia-salary-history-will-soon-be>

**Bill:** <https://www.dli.pa.gov/Individuals/Labor-Management-Relations/llc/Pages/Equal-Pay-Law.aspx>

## [Updates Recap](#)

If you missed it, here is a recap of last month's updates:

State/City/County	Legal Update	Effective Date
1/20/2020	Federal	Employee Retirement Income Security Act - Increased Penalties
3/16/2020	Federal	DOL Issues Final Rule on Joint Employer Relationship
2/1/2020	Federal	OSHA 300A Posting Requirements
1/2/2020	Federal	OSHA Electronic Reporting Deadlines
1/1/2020	Federal	IRS Issues Standard Mileage Rates for 2020
N/A	California	AB 5 vs. Truckers
Pending	California	AB 5: Will Dynamex be Applied Retroactively?
Pending	California	Temporary Hold on AB 51
Pending	Connecticut	New Restaurant Wage Law Codifies "80/20 Rule" for Tipped Employees
Pending	Florida	Medical Marijuana
7/1/2020	Florida	Family Leave Act
10/1/2020	Florida	Heal Illness Prevention
1/1/2021	Maine	Paid Leave to Use for 'Any Reason'
N/A	Massachusetts	Paid Family and Medical Leave (PFML) Quarterly Returns and Contributions
N/A	New Jersey	Final Regulations for Earned Sick Leave Law Released
7/19/2020	New Jersey	Warn Act Signed into Law
Multiple	New Jersey	Misclassification Laws "Misclassification Package"
Pending	New Jersey	Proposed Regulations to Affect All Employers Utilizing Tip Credits
06/30/2020 & 12/31/2020	New York	Subminimum Wage for Many Tipped Workers
1/6/2020	New York	Ban on Salary Inquiries
6/27/2020	New York	Women on Corporate Boards Study
Immediately	Virginia	New Restrictions on Nondisclosure and Confidentiality Agreements
1/1/2020	Virginia	New Requirement for Wage Payment Statements Applies to All Employees



## February 2020 Posting Updates

Effective Date	State	Updated Posting	Mandatory or Recommended
02/01/2020	VT	Unemployment Insurance	Mandatory
02/01/2020	NV	Safety & Health (OSHA)	Mandatory
01/01/2020	MI	Youth Employment Standards	Mandatory
01/01/2020	MA	Workers Compensation	Mandatory

*The information and resources provided in this communication are not a substitute for experienced legal counsel and does not constitute legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and any recommendations are based upon HR best practices and procedures. We recommend you consult an attorney for legal guidance.*

**END OF UPDATES**