January 2020 Legal HR Updates

General/Federal

Employee Retirement Income Security Act - Increased Penalties

What happened?

The Department of Labor (DOL) has increased the penalties for employers if they are found to be in violation under the Employee Retirement Income Security Act of 1974 (ERISA) for group health plan reporting and disclosures.

What are the details?

The following penalties apply effective after January 15, 2020:

- **Summary of Benefits and Coverage (SBC):** Up to $1,176 per participant or beneficiary for failure to provide group health plan participants and beneficiaries with an SBC.
- **Employer Children's Health Insurance Program (CHIP) Notice:** Up to $119 per day per employee for failure to provide a CHIP Notice to employees in states that offer group health plan premium assistance through a state CHIP.
- **Summary Plan Description (SPD):** Up to $159 per day (not to exceed $1,594 per request) for failure to furnish an SPD to the DOL upon request.
- **Form 5500:** Up to $2,233 per day for failure to file an annual report with the DOL (unless a filing exemption applies).

What do employers need to do?

As always, employers should be mindful and ensure they are abiding by the requirements set forth in the Reporting and Disclosure Guide for Employee Benefit Plans.

DOL Issues Final Rule on Joint Employer Relationship

What happened?

The DOL published its final rule January 16, 2020. This final rule will become effective March 16, 2020. The final rule puts clarity on the DOL's interpretation and adopts a more modified version of a four-factor test.

What are the details?

To determine whether an entity is a joint employer, DOL's new test examines whether the alleged joint employer:

1. hires or fires the employee;
2. supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
3. determines the employee's rate of pay and method of payment; and
4. maintains the employee's employment records.

The final rule also clarifies that the potential joint employer must *exercise* one or more of the four indicia of control to be jointly liable under the FLSA; it is insufficient that an entity has the ability, power, or reserved contractual right to exercise control.

What do employers need to do?

- Companies should remain diligent over the use of contingent workers by business lines and potential business partners to ensure they are not exercising direct or even indirect control.
- Companies should make sure that vendors, franchisees, and other business partners determine rates, methods of pay, and how, when, and where work will be performed.
- Companies should also take steps to confirm who controls hiring, training, and conducting evaluations.

Bill: https://www.federalregister.gov/documents/2020/01/16/2019-28343/joint-employer-status-under-the-fair-labor-standards-act

Article: https://www.jdsupra.com/legalnews/dol-issues-final-rule-on-flsa-joint-32355/
https://www.hrdive.com/news/dol-finalizes-flsa-joint-employer-rule-limiting-business-liability/570306/

OSHA 300A Posting Requirements

What happened?

By February 1 of each year, employers that are subject to the Occupational Safety and Health Administration's (OSHA) routine recordkeeping requirements, must post copies of their completed OSHA Form 300A ("Summary of Work-Related Injuries and Illnesses") from the previous year in visible locations within their employees' workplaces.

What are the details?

The postings must then be kept in place until at least April 30 every year. These requirements apply to all employers that are not in a partially exempt industry and have more than 10 employees.

What do employers need to do?

On February 1, 2020, employers subject to OSHA recordkeeping requirements must ensure that copies of their completed Forms 300A from 2019 are posted in each of their establishments in a conspicuous place or places where notices to employees are customarily posted.

Until April 30, 2020, these employers must also ensure that their Form 300A postings remain in place and are not altered, defaced, or covered by other material.

OSHA300A: https://www.osha.gov/recordkeeping/new-osha300form1-1-04-FormsOnly.pdf

Article: https://www.osha.gov/recordkeeping/ppt1/RK1exempttable.html

---

OSHA Electronic Reporting Deadlines

What happened?

Each year, employers that are subject to OSHA's electronic reporting requirements must submit data from their OSHA Form 300A ("Summary of Work-Related Injuries and Illnesses") from the previous calendar year, using OSHA's Injury Tracking Application (ITA). For 2019 information, OSHA started accepting electronic submissions as of January 2, 2020.

What are the details?

Employers have until March 2, 2020, to complete their 2019 electronic reports. These requirements apply to:

- Covered establishments in a high-risk industry with 20-249 employees; and
- Covered establishments with 250 or more employees.

What do employers need to do?

Employers subject to OSHA electronic reporting should ensure that they have entered data from their 2019 OSHA forms 300A into OSHA's ITA by March 2, 2020.

Article: https://www.federalregister.gov/documents/2016/05/12/2016-10443/improve-tracking-of-workplace-injuries-and-illnesses#h-4

IRS Issues Standard Mileage Rates for 2020

What happened?

The Internal Revenue Service (IRS) issued the 2020 optional standard mileage rates used to calculate the deductible costs of operating an automobile for business, charitable, medical, or moving purposes.

What are the details?

Beginning on January 1, 2020, the standard mileage rates for the use of a car (also vans, pickups, or panel trucks) will be:

- 57.5 cents per mile driven for business use, down one-half of a cent from the rate for 2019.
- 17 cents per mile driven for medical or moving purposes, down three cents from the rate for 2019.
- 14 cents per mile driven in service of charitable organizations.

What do employers need to do?

Ensure employers are paying employees accordingly.

Bill: https://www.irs.gov/pub/irs-drop/n-20-05.pdf

Article: https://www.irs.gov/newsroom/irs-issues-standard-mileage-rates-for-2020

California

AB 5 vs. Truckers

What happened?

A preliminary injunction was granted to prevent the enforcement of AB 5 against motor carriers operating in California.

What are the details?

The preliminary injunction will be in effect until a trial has taken place; however, the Ninth Circuit can decide differently. This injunction allows truck drivers to continue to operate as independent contractors in California.

What do employers need to do?

If you have any independently contracted truck drivers in California, no changes need to be made. We will continue to monitor this topic closely.

Article: https://www.seyfarth.com/news-insights/state-enforcement-of-ab-5-against-motor-carriers-preliminarily-enjoined.html

---

AB 5: Will *Dynamex* be Applied Retroactively?

What happened?

On January 15, 2020, the California Supreme Court appealed, then stalled the previous decision to apply the *Dynamex* decision retroactively.

What are the details?

The California Supreme Court will decide whether the *Dynamex* decision will, in fact, be applied retroactively. If this decision is approved, it will also mean that AB 5 will be applied retroactively as well which will open up employers to possible liability and potential wage and hour violations.

What do employers need to do?

There aren't any actions employers can take to change the past; however, employers should always make sure they are following the new guidelines in AB 5 in determining if an individual is an employee or independent contractor.

AB 5: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5

Temporary Hold on AB 51

What happened?

On December 30, 2019, an order was placed temporarily halting the enforcement of AB 51 (anti-mandatory arbitration law).

What are the details?

AB 51 does not allow employers to require employees to sign into an arbitration agreement upon hire. The Eastern District of California decided to put a hold on the new law, which was set to go into effect January 1, 2020, until the District Court can review it. The Eastern District is concerned that the new law is preempted by federal law (which favors the use of arbitration).

What do employers need to do?

During this hold, employers are strongly advised to review their current arbitration agreements with their legal counsel.

AB 51: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB51

Connecticut

New Restaurant Wage Law Codifies "80/20 Rule" for Tipped Employees

What happened?

Connecticut has enacted compromise legislation that attempts to clarify how restaurants and other hospitality industry employers must pay workers who receive tips in customer service jobs that also require untipped work. The new law, Public Act 19-1, directs the state's Labor Commissioner to adopt regulations codifying the so-called "80/20 rule" and to conduct random wage and hour audits of restaurants to ensure wage and hour compliance. It also restricts the right of employees to bring future class actions against restaurants for alleged violation of wage rules. It is not entirely clear when the regulation imposing the 80/20 rule will become effective in Connecticut. The Labor Department is expected to post its intent to adopt the proposed regulation on April 1, 2020, but the final regulation will not become effective until after a comment and hearing process, review by the state attorney general, and approval by the Legislative Regulation Review Committee.

What are the details?

Section 31-62-E4:

1. The job must be one in which tips have customarily constituted part of the employee's remuneration and the employee must be made aware of this when hired;
2. The amount of gratuities claimed by the employer as "tip credit" toward the state minimum wage must be recorded as a separate item in the employee's wage record on a weekly basis; and
3. The employer must have and maintain substantial evidence, such as a statement signed by the employee that the amount of tips claimed was in fact received by the employee.

What do employers need to do?

Employers should make every effort to comply with the specific requirements of Section 31-62-E4 until the new regulation actually becomes effective.

Article: https://www.littler.com/publication-press/publication/connecticuts-new-restaurant-wage-law-codifies-8020-rule-tipped

Florida

Medical Marijuana

What happened?

This is the first bill filed in the Florida Legislature that would provide job protections for medical marijuana cardholders in Florida. The bill has a section covering public employers, the Medical Marijuana Public Employee Protection Act, and another section covering private employers, the Medical Marijuana Employee Protection Act. Both sections would prohibit "an employer from taking adverse personnel action against an employee or job applicant who is a qualified patient using medical marijuana," require "an employer to provide written notice to an employee or job applicant who tests positive for marijuana of his or her right to explain the positive test result," and to confirm testing before taking adverse action if there is no response by the employee or applicant as to the result.

What are the details?

Employers would not be required to extend protections to positions with "safety-sensitive job duties." An employer may also take appropriate adverse personnel action against any employee if it "establishes by a preponderance of the evidence that the lawful use of medical marijuana is impairing the employee's ability to perform his or her job responsibilities," particularly "if the employee displays specific articulable symptoms while working which decrease or lessen the performance of his or her duties or tasks." "Safety-sensitive" is broadly defined to include tasks or duties of a job which the employer reasonably believes could affect the safety and health of the employee performing the tasks or duties or other persons, including, but not limited to, any of the following:

1. The handling, packaging, processing, storage, disposal, or transport of hazardous materials.
2. The operation of a motor vehicle, equipment, machinery, or power tools.
3. The repair, maintenance, or monitoring of any equipment, machinery, or manufacturing process, the malfunction or disruption of which could result in injury or property damage.
4. The performance of firefighting duties.
5. The operation, maintenance, or oversight of critical services and infrastructure, including, but not limited to, electric, gas, and water utilities or power generation or distribution.
6. The extraction, compression, processing, manufacturing, handling, packaging, storage, disposal, treatment, or transport of potentially volatile, flammable, combustible materials, elements, chemicals, or any other highly regulated component.
7. The dispensing of pharmaceuticals.
8. The carrying of a firearm.
9. The direct care of a patient or child.

What do employers need to do?

Employers need to review their interview and hiring practices to ensure compliance, as well review new hire paperwork.

Bill: https://www.flsenate.gov/Session/Bill/2020/962 https://www.flsenate.gov/Session/Bill/2020/595

Article: https://ogletree.com/insights/2020-01-14/new-year-new-legislative-session-greets-florida-employers/

Family Leave Act

What happened?

Florida Family Leave Act will take effect July 1, 2020.

What are the details?

The proposed Florida Family Leave Act would require employers to allow employees who work an average of 20 or more hours per week and who have been employed for at least 18 months to take up to three months of paid family leave to bond with a minor child upon the child's birth, adoption, or foster care placement. This bill would also expressly prohibit employment discrimination on the basis of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth, and provide for leave, maintenance of health coverage, reasonable accommodation, and job return rights for an employee who is disabled from pregnancy, childbirth, or a medical condition related to pregnancy or childbirth. This version of the bill may prove to be problematic for employers because it covers part-time employees without defining a look-back period for the 20-hours-per-week determination. It is also unclear how these requirements would interact with short-term disability benefits, as well as how spouses/parents who work for the same employer would be treated.

What do employers need to do?

Employers should prepare for the Act to take place by reviewing employee handbooks and making the proper modifications to reflect the new leave.

Bill: http://flsenate.gov/Session/Bill/2020/1194/BillText/Filed/HTML

Article: https://ogletree.com/insights/2020-01-14/new-year-new-legislative-session-greets-florida-employers/

Heat Illness Prevention

What happened?

This is the first bill that would require Florida "employers in industries where employees regularly perform work in an outdoor environment, including, but not limited to, agriculture, construction and landscaping," to provide drinking water, shade, and annual training to employees and supervisors. This takes effect October 1, 2020.

What are the details?

The bill would further require the Florida Department of Agriculture and Consumer Services and the Department of Health "to adopt specified rules." The requirements would give teeth to similar heat illness prevention guidance published by the federal Occupational Safety and Health Administration.

What do employers need to do?

Employers need to prepare for the law in October and gather supplies needed to ensure compliance.

Bill: https://www.flsenate.gov/Session/Bill/2020/513

Article: https://ogletree.com/insights/2020-01-14/new-year-new-legislative-session-greets-florida-employers/

Maine

Paid Leave to Use for "Any Reason"

What happened?

Maine Governor Janet Mills has signed into law "An Act Authorizing Earned Employee Leave," the first law in the nation to allow employees to use mandated paid leave *for any reason.* The new law, signed on May 28, 2019 will take effect on January 1, 2021.

What are the details?

- The law requires Maine employers with at least 10 employees who work more than 120 hours in a calendar year, other than seasonal workers, to provide one hour of paid leave for every 40 hours an employee works.
- An employee can earn up to 40 hours of paid leave annually.
- The law does not apply to an employee subject to a collective bargaining agreement during the period between January 1, 2021, and the expiration of the agreement.
- Employees will begin accruing earned pay leave at the start of employment and are eligible to use the accrued paid leave after 120 days of employment.
- Employees are required to provide "reasonable notice" of the intent to take leave, absent an emergency or other sudden necessity.
- However, the law does not define what constitutes reasonable notice, although it provides that "use of leave must be scheduled to prevent undue hardship on the employer."
- During the paid leave, an employee must be paid the same base rate of pay earned prior to taking leave and receive the same benefits as provided to other types of paid leave pursuant to the employer's "established" policies.

The taking of paid leave may not result in the loss of any accrued employee benefits. Employers who violate the law will be subject to penalties of up to $1,000 per violation.

What do employers need to do?

While employers await the pending rules, they should be prepared to update their paid leave policies and handbooks to comply with the new law.

Article: https://www.jacksonlewis.com/publication/new-maine-law-requires-employers-provide-employees-paid-leave-use-any-reason

Massachusetts

Paid Family and Medical Leave (PFML) Quarterly Returns and Contributions

What happened?

Employers that are participating in the Commonwealth's PFML program (meaning they have not applied for and received an exemption for qualifying private family and medical leave plans) must file their returns and remit PFML contributions for October 1, 2019 through December 31, 2019 by January 31, 2020.

What are the details?

Employers can file their returns and remit contributions electronically on MassTaxConnect. Each employer has a PFML account on MassTaxConnect, where they will see an option to "File Return" for the quarter ending December 31, 2019. Employers will be asked to include employee names, Social Security Numbers or Individual Taxpayer Identification Numbers, and applicable wages for the covered quarter. The return also asks for PFML Eligible Year-to-Date (YTD) Wages. For Q4 2019, the Department of Family and Medical Leave (DFML) has clarified that employers should not provide actual YTD wages. Rather, they should only provide PFML eligible wages from Q4, given that PFML contributions were not withheld for the first three quarters of 2019. This means that the Social Security annual wage cap will only be applied against fourth quarter wages.

The DFML has provided step-by-step videos on how to file returns on behalf of individual employees and how to file bulk returns on behalf of groups of employees on its website.

What do employers need to do?

Once an employer has filed its return, MassTaxConnect will ask for payment of contributions. Employers can make this payment through an electronic payment from their checking or savings account or with a credit or debit card.

Article: https://www.seyfarth.com/news-insights/massachusetts-pfml-quarterly-returns-and-contributions-due-by-january-31-2020.html

New Jersey

Final Regulations for Earned Sick Leave Law Released

What happened?

The New Jersey Department of Labor and Workforce Development (the "Department") issued regulations regarding enforcement of New Jersey's Earned Sick Leave Law (ESLL), as well as its responses to comments about the initially proposed regulations on January 6, 2020. The final regulations contain minimal changes and therefore do not require additional public notice or comment.

What are the details?

One notable change from the proposed regulations is the deletion of language requiring employers to establish a single benefit year for all employees, which would have prohibited employers from defining the benefit year based on an employee's anniversary date.

The Department declined to adopt that provision and indicated it will propose a new rule in the future to enable employers to establish multiple benefit years. The final regulations did not, however, affect the processes through which an employer may change a benefit year.

Once the benefit year is established, employers can change it only by providing written notice to the Department at least 30 days prior to making the intended change. Such notice must include the proposed new benefit year, the reason for the change, and a list of employees with contact information and each employee's two-year history of accrual, use, payment, payout, and carryover of earned sick leave. If the Department determines that an employer is changing the benefit year to prevent accrual or use of leave, it may impose a benefit year on the employer.

The Department clarified that if an employer chooses to maintain a single paid time off (PTO) bank to comply with the ESLL, the entire PTO bank must comply with the requirements of the ESLL.

Thus, if an employer wants to satisfy its obligations under the ESLL with, for example, its single bank of 80 hours of PTO (which may be used for any purpose, including sick time, vacation, personal days, etc.), it must permit employees to use all 80 hours in accordance with the ESLL. This approach means employees would be permitted to use all 80 hours for sick time without providing advance notice to the employer and such absences could not be held against employees or counted under the employer's attendance policy.

What do employers need to do?

Employers should review their current sick leave policies to ensure compliance.

Bill: https://www.nj.gov/labor/earnedsick/index.html

Article: https://www.littler.com/publication-press/publication/new-jersey-department-labor-releases-final-regulations-earned-sick

---

Warn Act Signed into Law

What happened?

On January 21, 2020, the Governor of New Jersey signed Senate Bill 3170 into law, pushing state law far past the corresponding federal requirements of the WARN Act. Governor Phil Murphy issued an omnibus press release identifying this new law as one of 153 pieces of legislation he signed into law on January 21, 2020. The law is scheduled to go into effect 180 days after the date of its enactment, which is July 19, 2020. Would make New Jersey the first state to require severance for layoffs of 50 or more within a 30-day period, while also vastly expanding the definition of "employer," as well as including all part-time employees within the statute's calculations.

What are the details?

As presently drafted and revised, S.3170 will change the scene for employers looking to establish sites in New Jersey and those contemplating whether to remain or grow there. The proposed amendments would result in significant changes, including:

- Increase Notice.
- Part-Time Employee Coverage.
- Add a Severance Benefit and Enhance Severance Penalties.
- Eliminate Waivers.
- Make Everyone an Employer.

What do employers need to do?

Employers that are contemplating closures or mass layoffs should consider accelerating their analysis so as to utilize the 180-day safety period until the effective date of July 19, 2020 is reached.

Bill: https://www.njleg.state.nj.us/2018/Bills/S3500/3170_R3.PDF

Article: https://www.seyfarth.com/news-insights/new-warn-act-signed-into-law-thou-shall-not-leavea-new-jersey-bill-awaiting-signature-by-the-governor-would-dramatically-re-write-existing-mass-layoff-laws.html

---

Misclassification Laws: "Misclassification Package"

What happened?

The five new laws signed by Governor Murphy, referred to as "The Misclassification Package," are meant to address misclassification of independent contractors by greatly increasing the DOL's ability to enforce wage and hour and tax laws. The new laws also broaden private rights of action under New Jersey's wage and hour laws and add joint and personal liability for contractors' violations of tax and benefit laws.

What are the details?

1. **Stop Work Orders (A5838)** – This new law gives the Commissioner of Labor the ability to issue a stop work order against any company that the DOL determines is not in compliance with any wage, benefit, or tax law.
2. **Joint, Several, and Individual Liability (A5840)** – This new law amends New Jersey's wage and hour laws and tax laws (which include the unemployment law, temporary disability law, workers' compensation law, and gross income tax law), creating joint and several liability for "Client Employers" and "Labor Contractors."
3. **Additional Penalties (A5839)** – This new law allows the Commissioner of Labor, upon a finding of misclassification under any state wage, benefit, or tax law, to assess penalties in addition to those provided by the other statutes.
4. **Retaliation Cause of Action & Posting (A5843)** – This new law creates a private cause of action for discharge or discrimination against employees or contractors who inquire or complain about misclassification. Unlike the other laws in The Misclassification Package, this law does not take effect until April 1, 2020.
5. **Sharing of Confidential Tax Information (S4228)** – This bill allows the Department of Treasury to provide the DOL with tax information, audit files, returns, or any other information that would assist in investigating wage, benefit, or tax law violations.

What do employers need to do?

Due to individual liability, the owners of the company would be liable for the assessment and fines, even if the company goes out of business. This is one simple illustration of the power of these new laws. It is strongly recommended that all companies review 1099s issued in 2019, along with reoccurring payments from cash ledgers, and reevaluate those relationships in light of these new laws.

Bill: Stop Work Orders A5838 Joint, Several and Individual Liability A5840; Additional Penalties A5839; Retaliation Cause of Action & Posting A5843; Sharing of Confidential Tax Information S4228

Article: https://www.fordharrison.com/the-gig-is-up-new-jersey-misclassification-laws-create-extreme-risk-for-anyone-utilizing-independent-contractors

---

Proposed Regulations to Affect All Employers Utilizing Tip Credits

What happened?

The New Jersey Department of Labor (NJDOL) has proposed regulations revising the current definition of "wages" to expressly exclude "any gratuities received" by a tipped employee from the employer's obligations under the state's hourly minimum wage requirement. The proposed regulations also define exceptions to the state's minimum wage increases through 2024 and identify the minimum rates across all potential definitions of "employment."

What are the details?

The proposed regulations follow federal law. They define a "tipped employee" to include "any employee engaged in an occupation in which he or she customarily and regularly receives more than $30 a month in tips."

- The NJDOL proposal sets out the cash minimum an employer must pay an employee to lawfully utilize the tip credit against the planned state minimum wage increases over the next several years. If the employer does not utilize the tip credit, even where an employee receives $30 or more a month in gratuities, the employer must pay the applicable minimum wage. The regulations expressly apply the tip credit on a workweek basis.
- The proposed regulations prohibit an employer from utilizing any portion of the gratuity for any reason other than wages or in furtherance of a tip pooling arrangement. The prohibition expressly extends to an employer using a portion of the gratuity to offset any credit or debit card processing fees; the employer must pay to convert a customer's credit or debit card tip into an employee's wages at no cost to the employee.
- The proposed regulations also acknowledge the lawfulness of voluntary tip pooling arrangements. Under such circumstances, the employer would have an affirmative obligation to notify employees of the required tip pool contributions. The employer may only take a tip credit in the amount an individual employee receives through the pool.
- The NJDOL's proposed regulations adopt the 80/20 rule the DOL abandoned because of the confusion and burden they put on employers. The proposed regulations state, "[W]here a tipped employee spends a substantial amount of time (in excess of 20 percent in the workweek) performing related duties, no tip credit may be taken for the time spent in such duties."

What do employers need to do?

A public hearing on New Jersey's proposed regulations is scheduled for February 26, 2020, and comments will be accepted through April 3, 2020. Employers who employ tipped employees should carefully review their current practices against the proposed regulations and determine their potential business impact.

Article: https://www.jacksonlewis.com/publication/tipping-new-jersey-proposed-regulations-affect-all-employers-utilizing-tip-credits

New York

Subminimum Wage for Many Tipped Workers

What happened?

Governor Andrew Cuomo announced December 31, 2019 that the New York State Department of Labor is issuing an order eliminating the tip credit for "miscellaneous" industries statewide by the end of 2020.

What are the details?

New York State law currently allows employers in certain industries to pay tipped employees below the state minimum wage if the employee earns a sufficient amount in tips. This tip credit can only be used if the subminimum wage plus tips add up to at least the minimum wage. Different rules determine the subminimum wage an employer must pay, depending on whether the worker is in the hospitality industry or other "miscellaneous" industries. The formula is particularly complex in non-hospitality industries and varies depending on whether the weekly average of tips received is considered "low" or "high."

By the end of 2020, tipped workers in non-hospitality industries will need to be paid at least minimum wage in addition to any tips they may earn. The elimination of the tip credit will be phased in over a one-year period.

- On June 30, 2020, the difference between the minimum wage and the current subminimum wages will be cut in half.
- On December 31, 2020, the subminimum wage will be eliminated completely.

At that time, tipped workers in miscellaneous industries must be paid the normal minimum wage.

What do employers need to do?

New York employers with tipped employees (outside of the hospitality industry) must take note of this order and be prepared to comply. This means that employers in the impacted industries must increase the wages of tipped employees as of June 30, 2020 and again on December 31, 2020 at which time you must pay tipped employers the normal minimum wage. You should take the necessary steps to change your payroll accordingly.

Bill: https://www.governor.ny.gov/news/governor-cuomo-announces-end-subminimum-wage-across-miscellaneous-industries-statewide

Article: https://www.fisherphillips.com/resources-alerts-new-york-to-end-subminimum-wage-for

Ban on Salary Inquiries

What happened?

As of January 6, 2020, New York employers are prohibited from inquiring about an applicant's prior salary.

What are the details?

The law applies to all public and private employers within New York State and covers applicants and employees who have taken an affirmative step to seek full-time, part-time, or temporary/seasonal employment with an employer. The law does not apply to independent contractors, freelance workers, or other contract workers unless they are to work through an employment agency. The law prohibits all New York employers from taking the following actions with respect to any applicant or current employee:

- Relying on the wage or salary history of an applicant in determining whether to offer employment to such individual or in determining the wages or salary for such individual;
- Seeking, requesting, or requiring (orally or in writing) the wage or salary history from an applicant or current employee as a condition to be interviewed as a condition of continuing to be considered for an offer of employment or as a condition of employment or promotion;
- Seeking, requesting, or requiring (orally or in writing) the wage or salary history of an applicant or current employee from a current or former employer, current or former employee, or agent of the applicant or current employee's current or former employer;
- Refusing to interview, hire, promote, otherwise employ or otherwise retaliating against an applicant or current employee based upon prior wage or salary history;
- Refusing to interview, hire, promote, otherwise employ, or otherwise retaliating against an applicant or current employee because such applicant or current employee did not provide wage or salary history in accordance with the law; and
- Refusing to interview, hire, promote, otherwise employ, or otherwise retaliating against an applicant or current or former employee because the applicant or current or former employee filed a complaint with the department alleging a violation of the law.

An applicant may choose to voluntarily disclose his or her prior salary. If an applicant voluntarily (and without prompting) discloses his or her salary history, an employer may factor in that voluntarily disclosed information in determining the salary for that person. According to guidance issued by New York State, an employer may ask an applicant for his or her salary expectations, as opposed to his or her salary history.

What do employers need to do?

Employers should take steps to ensure anyone with interviewing or hiring responsibilities refrain from seeking any information from an applicant about his or her prior salaries. Employers should also review job applications and other documents used in the hiring process to ensure that any questions about wage history are removed. If an employer uses third-party vendors in the hiring process (e.g., for background checks), they should ensure the vendors are aware of the new law and have taken steps to ensure compliance.

Bill: https://www.ny.gov/programs/salary-history-ban

Article: https://www.jacksonlewis.com/publication/guidance-new-york-s-ban-salary-inquiries-issued

---

Women on Corporate Boards Study

What happened?

New York recently enacted the "Women on Corporate Boards Study" law (S. 4278). The new law applies to domestic and foreign corporations "authorized to do business" in the state, given the expanse of companies doing business in New York. According to the state's press release on the new law, the New York legislation will take effect on June 27, 2020.

What are the details?

Under the new law, both foreign and domestic corporations, including publicly traded and privately held, are required to report the number of directors appointed to their board and to report how many directors are female. The bill also requires the U.S. Securities and Exchange Commission to create a Diversity Advisory Group, which would ultimately "make recommendations of strategies that issuers could use to increase gender, racial, and ethnic diversity among board members."

What do employers need to do?

Employers (that apply) will need to familiarize themselves with the new law and its reporting requirements.

Bill: https://www.nysenate.gov/legislation/bills/2019/s4278?intent=support

Article: https://www.corporatecomplianceadvisor.com/2020/01/new-york-enacts-legislation-related-to-board-diversity/

Virginia

New Restrictions on Nondisclosure and Confidentiality Agreements

What happened?

A new Virginia statute limits employers' use of nondisclosure and confidentiality agreements with respect to "sexual assault" as a condition of employment.

What are the details?

Under the new law, "Nondisclosure or Confidentiality Agreements; Sexual Assault, Condition of Employment" (Va. Code § 40.1-28.01), employers may not require job applicants or current employees to execute nondisclosure agreements that would conceal the details of any "sexual assault" claim an employee may have against the employer. The statute provides that any such agreement will be treated as against public policy and therefore, void and unenforceable.

"Sexual assault" is not defined. However, the statute applies to claims arising under Virginia laws on rape (Va. Code § 18.2-61), forcible sodomy (§ 18.2-67.1), aggravated sexual battery (§ 18.2-67.3), and sexual battery (§ 18.2-67.4).

The statute is narrowly tailored to apply to applicants and current employees. It does not restrict nondisclosure or confidentiality agreements with former employees. Therefore, nondisclosure and confidentially provisions in severance and settlement agreements, which typically are executed when an employee is no longer working for an employer, are not affected by the new law.

What do employers need to do?

Virginia employers should review their employment agreements, nondisclosure or confidentially agreements, and employee handbook provisions that applicants and current employees are required to sign and ensure they comply with the new law.

Bill: https://law.lis.virginia.gov/vacode/title40.1/chapter3/section40.1-28.01/

Article: https://www.jacksonlewis.com/publication/virginia-s-new-restrictions-nondisclosure-confidentiality-agreements-affect-workplace

---

New Requirements for Wage Payment Statements Applies to All Employees

What happened?

Effective January 1, 2020, an amendment to the Virginia Payment of Wage Law will now require employers to provide employees with a written statement by paystub or online accounting.

What are the details?

The new required, written statement must include:

1. The name and address of the employer;
2. The number of hours worked during the pay period;
3. The rate of pay;
4. The gross wages earned by the employee during the pay period; and
5. The amount and purpose of any deductions.

The law applies to all employees, even those who are not paid on an hourly basis, such as salaried and piece work employees.

The Virginia Department of Labor and Industry (DOLI) also stated that for salaried, piece work employees, and others who are not traditionally paid on an hourly basis, it would not enforce the requirement until July 1, 2020. The delay in the enforcement of this policy applies only to the hours-of-work requirement, not to any other provisions of the Virginia Payment of Wage Law.

What do employers need to do?

Employers affected by the new law should review and update their payroll practices to ensure compliance. They also should review and revise any employee handbook policies dealing with wage statements or timekeeping.

Bill: https://law.lis.virginia.gov/vacode/40.1-29/

Article: https://www.jacksonlewis.com/publication/virginia-clarifies-new-requirement-wage-payment-statements-applies-all-employees

---

Updates Recap

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

State/City/County	Legal Update	Effective Date
N/A	California	AB5 Resource Website Released
N/A	California	Court Case - Mandatory Service Charge May Be a Gratuity Owed to Employees
1/1/2020	California	Overtime for Ag Workers
12/19/2019	Colorado	Vacation Pay Forfeiture
3/1/2020	Colorado	Wage and Hour Laws
1/2/2020	Connecticut	State's Minimum Wage Regulations Incorporate the "80/20" or "20%" Tip Credit Rule
1/1/2020	Federal	2020 Minimum Wage
1/15/2020	Federal	Final Rule on Regular Rate of Pay
N/A	Federal	NLRB Confirms Prohibiting Use of Company Equipment Is Lawful
N/A	Federal	Employers May Require Confidentiality in Workplace Investigations
1/1/2020	Federal	W-4
1/1/2020	Illinois	Mandatory Sexual Harassment Training
1/1/2020	Maine	Employers to see Workers' Compensation Law Change
10/1/2019	Maryland	Amends Data Breach Notification Law
2/6/2020	Maryland (Montgomery County)	CROWN Act
12/19/2019	New Jersey	CROWN Act
1/7/2020	New York	Employee Handbook Revisions Needed
Immediately	Oklahoma	Workers' Compensation Update
N/A	Oregon	Court Case - ER to Ensure Full 30-Minute Meal Breaks
N/A	Oregon	Employers Must Ensure Employee Meal Breaks
7/1/2020	Pennsylvania	Minimum Wage
4/1/2020	Pennsylvania (Philadelphia)	Fair Workweek Lay Delayed
3/15/2020	Pennsylvania (Pittsburgh)	Paid Sick Days
1/1/2020	Washington D.C.	Paid Family Leave Notice Requirements

January 2020 Posting Updates

Effective Date	State	Updated Posting	Mandatory or Recommended
01/01/2020	AK	Minimum Wage	Mandatory
12/2019	WA	Minimum Wage	Mandatory
01/01/2020	WA	Paid Family and Medical Leave	Mandatory
01/01/2020	WA	Domestic Violence Resources	Mandatory
01/01/2020	CA	**San Francisco:** The Health Care Security Ordinance	Mandatory
01/01/2020	CA	Workplace Discrimination and Harassment	Mandatory
01/01/2020	CA	Family Care, Medical Leave & Pregnancy Disability Leave	Mandatory
01/01/2020	CA	Transgender Rights in the Workplace	Mandatory
01/01/2020	NM	Minimum Wage Act	Mandatory
01/01/2020	NM	**Bernalillo County:** Labor Law Notice	Mandatory
01/01/2020	IL	Minimum Wage	Mandatory
01/01/2020	IL	Unpaid Wages	Mandatory
01/01/2020	IL	Equal Pay Act	Mandatory
01/01/2020	IL	Labor Law Notices	Mandatory
01/01/2020	LA	Earned Income Credit	Mandatory
01/01/2020	NY	Minimum Wage	Mandatory
01/01/2020	NY	Discrimination	Mandatory
01/01/2020	NY	Labor Law Notices	Mandatory
01/01/2020	Federal	Minimum Wage	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