

What Employers Should Watch For in Election 2018

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Election Day may result in significant changes in our country's labor and employment landscape. This article discusses some issues employers should watch closely.

Arbitration

Congressional Democrats have proposed legislation intended to overturn the U.S. Supreme Court's 2018 ruling that employers do not violate the National Labor Relations Act by requiring workers to sign arbitration agreements with class-action waiver provisions as a condition of their employment. See our article, [Supreme Court: Class Action Waivers in Employment Arbitration Agreements Do Not Violate Federal Labor Law](#). Should the legislation pass, the ability of employers and employees to use arbitration agreements that waive the right to class litigation will be severely curtailed.

The bill (H.R. 7109) was introduced by Representatives Jerrold Nadler (D-N.Y.) and Bobby Scott (D-Va.) in the House of Representatives. Senator Patty Murray (D-Wash.) introduced similar legislation in the Senate. While the current political makeup of the House and Senate makes passage of the bill unlikely, the odds may change in its favor if the Democrats gain a majority in either chamber.

Cannabis/Marijuana

Tensions between federal and state laws and policy on marijuana persist. Marijuana use is illegal under federal law. However, at the state and municipal level, a number of marijuana-related ballot initiatives seek to add to an existing patchwork of laws on the medicinal and recreational use of marijuana. Unfortunately, many of these ballot initiatives provide little or no guidance to employers on their potential obligations to applicants and employees around cannabis use, drug testing, and disability-related accommodations.

Adding to the uncertainty, some believe that President Donald Trump might consider favorably a bill legalizing the medical use of marijuana. However, Attorney General Jeff Sessions is staunchly opposed to legalization of any sort.

With every seat in the House of Representatives up for vote this Election Day, and popular attitudes on marijuana evolving, employers (especially those with multi-state operations) should continue to monitor developments across the nation.

Transgender Accommodations

Individuals in Massachusetts have had [the right](#) to use restrooms, changing rooms, and locker rooms that correspond to their gender identity, regardless of their assigned sex since October 1, 2016. This Election Day, Massachusetts voters will decide whether these public accommodation protections will be kept by answering [ballot question #3](#). A "yes" vote will keep the prohibition of discrimination on the basis of gender identity in places of public accommodation. A "no" vote will repeal the public accommodation protection.

The Massachusetts ballot initiative does not affect private employers. Even if the protection is repealed, employers must continue to comply with [federal law](#) prohibiting discrimination based on sex stereotyping and [Massachusetts law](#) against hate crimes and employment and housing discrimination based on gender identity.

State challenges such as the Massachusetts ballot initiative are consistent with the Trump Administration's position to change the definition of "gender." According to [The New York Times](#), the Administration is considering limiting protections under Title IX by narrowly defining gender as a biological, immutable condition determined by genitalia at birth. (Title IX prohibits sex discrimination in any educational program or activity at any educational institution that is a recipient of federal funds.) This definition would not include gender identity or expression. The opposition to public accommodation laws also is consistent with the Department of Justice's [brief](#) submitted to the U.S. Supreme Court arguing that gender identity is not protected under Title VII of the Civil Rights Act. (Title VII protects individuals against employment discrimination on the bases of race, color, religion, sex, or national origin.) The brief follows

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two petitions pending review by the Supreme Court that also question whether gender identity is protected under Title VII. See *Altitude Express Inc. v. Zarda*, No. 15-3775 (2d Cir. Feb. 26, 2018), *petition for cert. filed* (U.S. May 29, 2018) (No. 17-1623); *Bostock v. Clayton Cty.*, No. 17-13801 (11th Cir. May 10, 2018), *petition for cert. filed* (U.S. May 25, 2018) (No. 17-1618).

State Legislatures

Control over state legislatures should be monitored. In New York, the current Republican control of the State Senate hangs by a one-vote margin. Should the New York State Senate control flip to the Democrats this Election Day, progressive, pro-employee measures that have consistently passed the State Assembly, but rejected by the State Senate, likely will be taken up and passed by a new, liberal Senate majority. See our article for examples of these measures, [Election 2018: Midterms' Effect on Employment Law Issues and Advocacy](#).

Maine is another state in which control of the chambers of the state legislature may change this Election Day. Democrats hold a narrow majority in the state House, and Republicans hold an even narrower majority in the state Senate.

Jackson Lewis will continue to monitor and provide updates on these and other issues that affect your business.

Related:

- [Election Day is Coming – What are Your Obligations as an Employer?](#)

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