Looking back on 2014, a dual theme emerges of expanding executive action in the face of a dysfunctional Congress and state legislation passed either in response to the White House agenda or to Congress’ refusal to enact legislation regarded by many as necessary.

In this final issue of a three-part series on the year that has passed and the year ahead, Employment Law Daily takes a look at the most important executive actions taken by President Barack Obama in 2014, as well as key federal and state legislative activity last year, and offers a glimpse of what’s on the horizon for 2015.

**Strong executive action**

President Obama took several strong executive actions in 2014 that affect the labor and employment landscape. The most important of these were related to overtime wage exemptions, rules governing federal contractors, and immigration reform.

**White-collar exemption**

“Arguably the President’s most significant action in 2014 in the labor and employment space was his March 13, 2014, Memorandum to Secretary Perez instructing the Department of Labor to revise the Part 541 white-collar overtime exemption regulations,” according to Paul DeCamp, Shareholder in the Washington, D.C., Region office of Jackson Lewis P.C. and national leader of the firm’s Wage and Hour Practice Group. The president directed the labor secretary to update the regulations to address what Obama “described as ‘millions of Americans’ who are not currently entitled to overtime but who should, in his view, be non-exempt,” the Jackson Lewis attorney explained.

**What could be the impact of this regulatory modification?** “The Department’s regulations, which should issue in proposed form in the spring of 2015, have the potential to bring about significant upheaval for an enormous number of workers and employers alike,” DeCamp said. “If millions of exempt workers suddenly find themselves non-exempt, they will likely see a significant reduction in hours and pay resulting from the heavy financial pressure that the Fair Labor Standards Act exerts on employers who employ non-exempt workers for more than 40 hours in a week,” he predicted.

**Federal contractors**

Federal contractors were on the receiving end of several executive actions last year. “For federal contractors, 2014 was the year of the Executive Order,” declared F. Christopher Chrisbens, Of Counsel in Jackson Lewis’ Denver office.

By Pamela Wolf, J.D.

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Chrisbens suggested this best practice tip: “As with OFCCP’s new Scheduling Letter, the Equal Pay Report should prompt federal contractors to proactively analyze pay practices, under privilege, before turning over data to OFCCP.”

**Immigration**

President Obama’s “far-reaching” **immigration executive action** is likely “his most significant 2014 policy decision affecting employers,” according to John Doran, Member of Sherman & Howard’s Labor and Employment Department at the firm’s Phoenix office. “The executive action defers deportation for parents of U.S. citizens and permanent residents who have lived in the U.S. for at least five years,” he noted. “Many of these individuals will be eligible to receive work permits.”

The president’s executive action also expands the **Deferred Action for Childhood Arrivals program** instituted in 2012 by expanding the age and time limits for those seeking deportation deferral, Doran explained. “Estimates indicate that some 4-5 million undocumented immigrants will be affected.” As part of Obama’s “unilateral immigration reform,” Doran said, “ICE and the DOL will increase coordination with other state and federal agencies to step up their game on I-9 audits and workplace immigration enforcement.”

**What do these immigration changes mean for employers?** “On the bright side, the executive action may allow employers to provide earlier raises to employer-sponsored, highly skilled professionals during the green card process, and allow for their spouses to obtain work authorization under certain circumstances,” Doran observed. “The action also will supposedly streamline the H1-B and L-1 visa processes. Nonetheless, the end result of the executive action, assuming Congress cannot effectively block its implementation, will be to significantly increase the risk of an employer undergoing an audit and enforcement penalties.”

Bourgeacq echoed similar sentiments. “Politically, the president’s executive actions on immigration are probably the most far-reaching of last year,” he said. “The impact of that action—on employment, social services, law enforcement, and in other areas—is too early to tell.”

**What about 2015?**

Can we expect any significant executive action by President Obama in calendar year 2015? Bourgeacq made this prediction: “If last year was any barometer of the president’s willingness to stretch the law and his...
authority, we can expect more executive orders or more regulatory actions from the agencies.”

**Dearth of Federal Legislation**

2014 proved to be a desert for new federal laws targeted to American workplaces—plenty of bills were introduced, but few came to fruition. “In 2014, the general dysfunction in Congress resulted in little successful federal employment and labor legislation,” observed Brooke A. Colaizzi, Member of Sherman & Howard’s Labor & Employment Department.

**Workforce Innovation Opportunity Act**

Colaizzi, however, identified one proposal that did make its way through. On July 22, 2014, President Obama signed into law the Workforce Innovation and Opportunity Act, a comprehensive bill aimed at assisting workers to gain job skills for modern workplaces. The Act “brings together adult education and literacy programs, state vocational rehabilitation grant programs, and employment and training services provided by the Department of Labor to provide targeted support to improve the skills of the American workforce,” she explained.

**Cooperative and Small Employer Charity Pension Flexibility Act**

There were a couple of other legislative actions on the federal front that are worth noting—the fact that they saw the light of day probably makes them worthy of mention. In April 2014, President Obama signed the Cooperative and Small Employer Charity Pension Flexibility Act, which amends the funding rules for multiple employer defined benefit pension plans offered by cooperative associations and charities, also known as CSEC. The new law will ensure that charitable and cooperative associations are not swept into the Pension Protection Act of 2006 (PPA) funding rules, which would require them to divert funds from critical services and jeopardize their ability to provide pension benefits to their workers.

Many charities and cooperative associations provide their employees with retirement benefits through defined benefit multiple employer pension plans, also known as CSEC plans. Using such plans, small, community-focused employers can pool their resources to achieve economies of scale otherwise only available to large employers. When Congress passed the PPA, which fundamentally changed the way most pension plans are funded in order to protect participants and the Pension Benefit Guaranty Corporation (PBGC), it recognized that the new rules were not necessarily appropriate for rural cooperative multiple employer defined benefit plans because, by design, the plans pose little risk that they will be unable to pay benefits.

As a result, Congress granted the plans a temporary exemption from the PPA, which was later broadened to include eligible charities by the Pension Relief Act of 2010. Without Congressional action, the temporary exemption would have expired, and CSEC plans would have been forced to comply with the PPA funding rules. The result would have been that many small, non-profit employers would be unable to continue to provide pension benefits to middle-class families.

**“In 2014, the general dysfunction in Congress resulted in little successful federal employment and labor legislation”**

– Brooke A. Colaizzi, Sherman & Howard

**How does the new law help employers?** The Cooperative and Small Employer Charity Pension Flexibility Act will help charities and cooperative associations by implementing pension funding rules that reflect the unique design of their CSEC plans and are protective of plan participants. The rules are substantially similar to those to which CSEC plans were previously subject, with modifications to make them work better and result in far less volatility. CSEC plans will have the flexibility to opt into the PPA in 2014 if they want, and importantly, the Act imposes additional transparency requirements on CSEC plans so that participants have access to accurate information.

**Funding with strings attached**

The Consolidated and Further Continuing Appropriations Act, 2015 is worth mentioning because of the strings attached to restrict the use of funds and curb certain agency actions. The provisions included in the massive, $1.1 trillion so-called “CRomnibus” bill also effectively exempt insurance adjusters from FLSA overtime provisions for two years after a major disaster and roll
back maximum hours-of-work regulations for property-carrying commercial motor vehicles. President Obama signed the bill on December 17, 2014; it includes funding for federal agencies for fiscal year 2015, which ends September 30, 2015.

Restriction on NLRB funding. Along with funding for the NLRB came an administrative provision that bars funds both currently and previously provided from being used “to issue any new administrative directive or regulation that would provide employees any means of voting through any electronic means in an election to determine a representative for the purposes of collective bargaining.”

Hours-of-work rules for truck drivers. The bill also makes several regulatory changes. Notably, it includes language that effectively rolls back the current maximum hours-of-work regulations for property-carrying commercial motor vehicles through a temporary suspension of enforcement of 49 C.F.R. Secs. 395.3(c) and (d). These provisions have no force or effect from the date the funding bill was enacted until the later of September 30, 2015, or the submission of a report on a “naturalistic study of the operational, safety, health and fatigue impacts of the restart provisions in sections 395.3(c) and 395.3(d) of title 49, Code of Federal Regulations, on commercial motor vehicle drivers.” In the meanwhile, the restart provisions that were in effect on June 30, 2013, will apply.

This spending bill provision provides relief from two new restrictions of the hours-of-service restart rule (amount of rest required) pertaining to commercial truck drivers. It specifically suspends the requirement that all qualifying restarts contain two consecutive periods of time between 1 a.m. and 5 a.m., and that it can only be used once every 168 hours (or seven days), according to the American Trucking Association. Said differently, the restart rule reverts back to the simple 34-hour restart in effect from 2003 to June 2013.

FLSA insurance industry exemption. The spending bill also provides an exemption to FLSA overtime rules for certain insurance industry employees during a two-year period following a major disaster as declared by any state or federal agency or department. During that two-year period, Section 7 would not apply to any employee:

- Employed to adjust or evaluate claims resulting from or relating to such major disaster, by an employer not engaged, directly or through an affiliate, in underwriting, selling, or marketing property, casualty, or liability insurance policies or contracts;
- Who receives from such employer an average weekly compensation of not less than $591 per week or any minimum weekly amount established by the Secretary, whichever is greater, for the number of weeks such employee is engaged in any of the activities described below; and
- Whose duties include any of the following:
  - interviewing insured individuals, individuals who suffered injuries or other damages or losses arising from or relating to a disaster, witnesses, or physicians;
  - inspecting property damage or reviewing factual information to prepare damage estimates;
  - evaluating and making recommendations regarding coverage or compensability of claims or determining liability or value aspects of claims;
  - negotiating settlements; or
  - making recommendations regarding litigation.

Definitions of applicable terms are included in the provision.

**Bills that didn’t make it**

“Although both Republicans and Democrats introduced bills that addressed traditional labor and employment issues during 2014, none of those bills passed out of Congress,” Colaiazzi noted. “In 2014, the Republican-controlled House introduced legislation to curtail union and NLRB activity, particularly by preventing unions from using membership dues for political purposes without notice and/or authorization (S. 1712, H.R. 175), mandating recertification of unions when a majority of the authorizing workforce turns over (S. 1712), requiring secret ballots for elections (S. 1712), and prohibiting ‘ambush’ elections.” On the other side of the aisle, Colaiazzi said, “Democrats focused their efforts on bills to reduce the number of employees who qualify for white collar exemptions to the FLSA’s minimum wage and overtime requirements (S. 2486), to prevent employers from requesting credit reports during the job application process (S. 1836), to prohibit discrimination based on sexual orientation and gender identity (HR 1755), and to extend workers’ leave rights (H.R. 3999).”

**On the horizon for 2015**

The experts weighed in with some predictions for federal legislative activity likely to arise in 2015. Bills aimed at the union landscape, to advance Democratic priorities, and for trade secret protections are some of the possibilities. DeCamp however, offered a dim
forecast for 2015, seeing “nothing of significance in the labor and employment space, at least nothing that Congress and the president can agree on, resulting in enacted legislation.”

Union landscape. “If 2014 was any indication, bills to limit union activity and curtail the NLRB’s functions are likely to be introduced and passed by the Republican-led Congress in 2015,” according to Colaizzi. “However, President Obama is likely to veto the most ambitious of that legislation—such as bills to prohibit ‘ambush’ elections, requiring secret ballots for elections, and mandating reauthorization of union representation every time 50 percent of the workforce that originally authorized the union turns over.”

Bourgeacq made a similar prediction, saying that we can expect “very little in terms of enacting or amending existing labor laws, unless it’s to restrict agencies in enforcing their various organic statutes. That might be accomplished more through budget restrictions rather than changes to the labor laws themselves.”

Democratic priorities. As to Democratic priorities, Colaizzi suggested that “prohibiting job discrimination based on sexual orientation and gender identity, reducing pay disparity between male and female workers, extending workers’ leave rights, and reducing the pool of employees who qualify for white collar exemptions to the FLSA’s minimum wage and overtime requirements are unlikely to pass out of Congress in 2015.”

Trade secret protections. Clifford Atlas, Shareholder in the New York City Office of Jackson Lewis and national co-chair of the firms Non-Competes and Protection Against Unfair Competition Practice Group, made a projection about proposed legislation that, while unsuccessful last year, could fare well this year. “In 2014 there was another effort to create a civil remedy under the Economic Espionage Act,” he noted. Introduced by Senators Chris Coons (D-Del.) and Orrin Hatch (R-Utah), the Defend Trade Secrets Act “would provide a federal remedy parallel to state law remedies already available,” Atlas explained. “So far nothing yet, but given the hacking of Sony Pictures, I think that some strengthening of federal law in this area is likely.”

States make inroads where Congress failed to act

Among the states, there was a pattern of legislative action in 2014 that made inroads where Congress, mostly due to partisan rancor, has failed to act. Several states and localities, for example, have enacted minimum wage increases, pregnancy protections, paid leave guarantees, and pay equality rights, perhaps taking their lead from the issues targeted by President Obama in his State of the Union Address and some of his policy initiatives.

Minimum-wage hikes

Bourgeacq counted minimum wage increases among the most the most significant state action in 2014. “Mimicking the White House and the unions’ mantra for higher minimum wages, several states passed laws last year raising the minimum wage to over $10,” he noted. Indeed, whether through legislative, ballot initiative, or regulatory action, workers saw minimum wage hikes in a significant number of states.

Ballot initiatives. As a result of ballot initiatives that succeeded in the November 2014 general election, workers saw hourly minimum wage increases in Alaska (from $7.75 to $8.75), Arkansas (from $6.25 to $7.50), Nebraska (from $7.25 to $8.00), and South Dakota (from $7.25 to $8.50). In addition, 67 percent of
Illinois voters favored a non-binding advisory measure to raise state minimum wage from its current $8.25 to $10.00 an hour in 2015.

In California, two city minimum-wage ballot initiatives were approved while another was rejected. San Francisco voters favored a gradual increase of the city’s minimum wage to $15.00 an hour. In Oakland, voters approved an hourly minimum wage increase from the current $9.00 to $12.25 beginning in March 2015. Voters in Eureka, however, voted down a wage hike.

**Legislative action.** Through legislative action in 2014, several other states and the District of Columbia have increased workers’ hourly minimum wage rates (see box story, p. 5).

Smaller wage hikes in other states were tied to cost-of-living increases and wage board determinations. In New York, for example, the hourly minimum wage increased from $8.00 to $8.75, with another increase to $9.00 on December 31, 2015, as part of a series of increases included in the 2013-2014 budget, enacted March 29, 2013.

Minimum hourly wages were also raised by legislative action in several municipalities, including Chicago, Illinois; Louisville, Kentucky; New York, New York; San Diego, California; Seattle, Washington; and Ypsilanti, Michigan.

Notably, Seattle’s minimum wage, which is subject to a two-track phase-in schedule, treats a franchisee as a “large” business if its franchisor (and/or its network of franchisees) collectively has more than 500 employees nationwide. Large employers are subject to a three-year step-up under which the wage rate will be increased incrementally to $15 by January 1, 2017. But small employers will have more time to gradually adjust; the $15 wage floor won’t kick in until January 1, 2021.

That means the city’s Subways, McDonald’s, and other franchised chains will have to pay higher wages sooner than other local sandwich shops and burger joints—putting them at a significant competitive disadvantage, according to the International Franchise Association (IFA), which filed a lawsuit challenging the city ordinance.

While the case, *International Franchise Association, Inc. v. City of Seattle*, is still pending, the federal court has so far refused to enjoin the city from treating franchisees as large employers.

**Paid leave laws**

In 2014, there was also a significant amount of state and local activity centered on paid leave laws. As Jackson Lewis attorneys Frank Alvarez, Joe Lynett, Jamie Allen, and Cynthia Filla put it: “Expansion of paid sick leave provisions/paid sick leave laws seemed to spread like wildfire throughout the country.” As the attorneys noted, these laws generally require employers to provide paid leave for a variety of reasons, “including the employee’s own medical condition, to care for an ill or injured family member, absences resulting from domestic violence or sexual assault, and even to use when a business or child’s school is closed during a declared public emergency.”

The Jackson Lewis team pointed to California’s paid sick and safe law, enacted last year, as well as similar measures that became law elsewhere: “In a ballot question, Massachusetts voters also approved paid sick leave for employees for certain covered employers. The city councils of Trenton, Passaic, East Orange, Paterson, and Montclair, New Jersey, passed paid sick leave ordinances. Voters in Oakland, California, approved a ballot initiative requiring employers in the city to provide sick leave to their employees.”

Alvarez, Lynett, Allen, and Filla also noted that similar laws already have taken effect in other jurisdictions. “Employers are finding it a challenge to develop policies that comply with all of these laws,” they added.

Indeed, a brief tour of some of the paid leave measures enacted in 2014 reveals substantial variety from a compliance standpoint.

- **California.** In California, effective July 1, 2015, the *Healthy Workplaces, Healthy Families Act of 2014* (A.B. 1522) requires employers to provide paid sick leave to employees who work 30 or more days within a year of the start of employment. Employees will earn a minimum of one hour of paid sick leave for every 30 hours worked. The new law applies to private employers as well as to the state, political subdivisions of the state, and municipalities.

  Discrimination or retaliation against an employee who requests paid sick days is prohibited under the new law.

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Employers will also have to meet certain posting, notice, and recordkeeping requirements.

**Connecticut.** Legislation intended to create parity between paid sick leave benefits and other leave benefits offered by employers was enacted in Connecticut. Effective January 1, 2015, the new law changes the method for determining whether a nonmanufacturing business is exempt from providing paid sick leave as required under Connecticut law.

Previously, nonmanufacturing businesses were required to provide paid sick leave if they employed 50 or more individuals in Connecticut during any quarter in the previous year. Businesses must determine whether they exceed this threshold by January 1 each year, based on the quarterly reports they submit to the state labor commissioner.

Under H. 5269, nonmanufacturing businesses must determine if they meet the annual 50-employee threshold based on the number of employees on their payrolls for the week containing October 1.

The new law also bars nonmanufacturing businesses from taking certain actions to avoid providing paid sick leave, including firing, dismissing, or transferring an employee from one job site to another in an effort to fall below the 50-employee threshold.

The timeframe for accruing paid sick leave is also modified by H. 5269. Previously, employees accrued one hour of sick leave for every 40 hours worked per calendar year. Under the new law, employees accrue one hour of paid sick leave for every 40 hours worked during whatever 365-day year the business uses to calculate employee benefits. This change permits employers to start the benefit year on any date, rather than only on January 1.

Paid sick leave rights granted to other service workers in specified occupational categories are also now extended to radiologic technologists.

**District of Columbia.** In the District of Columbia, the *Accrued Sick and Safe Leave Act of 2008* was amended to expand the definition of employee to give protection to additional types of workers and clarify those who are excluded, as well as by strengthening anti-retaliation provisions, among other measures (B. 480, enacted January 2, 2014).

Also, the *Accrued Sick and Safe Leave Act of 2008* was amended with respect to enforcement (B. 671, enacted September 19, 2014).

**Massachusetts.** A ballot measure in Massachusetts to provide employees with earned sick time was approved by 59.5 percent of voters in the November 4, 2014, election. *Question 4* provided: “Employees who work for employers having eleven or more employees could earn and use up to 40 hours of paid sick time per calendar year, while employees working for smaller employers could earn and use up to 40 hours of unpaid sick time per calendar year.” The earned sick leave measure will take effect July 1, 2015.

**New York City.** The first law to which the new mayor of New York City, Bill de Blasio, affixed his signature was the expanded version of the city’s new paid sick leave law, known as the *Earned Sick Time Act*. Under the new law, enacted March 20, 2014, and effective April 1, 2014, businesses with five or more employees are required to provide up to 40 hours of paid sick time to employees who work 80 or more hours per calendar year. Businesses with less than five employees are required to provide the same amount of sick time to employees who work at least 80 hours a calendar year, but on an unpaid basis.

**Marijuana laws**

Jackson Lewis Shareholder Kathryn Russo, one of the Practice Leaders of the firm’s Drug Testing and

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**What is the impetus behind the push for paid sick leave?**

California legislators provided these justifications for A.B. 1522:

- Nearly every worker will at some time during the year need time off from work to take care of his or her own health or the health of family members.
- Many workers do not have any paid sick days, or have an inadequate number of paid sick days, to care for their own health or the health of family members.
- Low-income workers are significantly less likely to have paid sick time than other workers.
- Providing workers time off to attend to their own health care and the health care of family members will ensure a healthier and more productive workforce.
- Paid sick days will have “an enormously positive impact on the public health” by allowing sick workers paid time off to care for themselves when ill, thus lessening their recovery time and reducing the likelihood of spreading illness to coworkers.
- Paid sick days will allow parents to provide personal care for their sick children, ensuring children’s speedy recovery, preventing more serious illnesses, and improving children’s overall mental and physical health.
- Providing paid sick days is affordable for employers and good for business.
- Employers who provide paid sick days enjoy greater employee retention and reduce the likelihood of employees coming to work sick.
Substance Abuse Management Practice Group, pointed to state legislation directed at marijuana use as a significant trend: “2014 continued the trend of states enacting and implementing their own laws addressing medical marijuana and legalized recreational marijuana, despite the fact that marijuana continues to be illegal under federal law.”

Russo noted that Illinois’ and Nevada’s medical marijuana laws became effective in 2014, and Minnesota and New York have both passed such laws. Twenty-three states and the District of Columbia now have medical marijuana laws, she said. In November 2014, Alaska, Oregon, and the District of Columbia passed recreational marijuana laws, joining Colorado and Washington (where such laws were approved in 2012).

“The ever-growing number of state laws permitting the use of medical marijuana and recreational marijuana creates a quandary for employers,” Russo observed. “Should they follow federal law, which provides that marijuana is illegal? Or should employers follow state laws permitting the use of marijuana in certain circumstances? Some state medical marijuana laws prohibit discrimination against medical marijuana users, making this issue particularly complex for employers.”

Civil unions and same-sex marriage

According to Colaizzi, state laws pertaining to civil unions and same-sex marriages have had, and will continue to have, a significant impact in the employment law arena. “Specifically, changes in the treatment of these institutions at the federal and state level affect the wide range of employee benefits offered by employers to employees, as well as leave laws on the federal and state level,” she observed. “Despite movement at both the state and federal level toward recognition of civil unions and same-sex marriage, disconnect still exists. Employment attorneys and HR professionals will face the continuing challenge of complying with conflicting legal standards unless and until federal and state law align with respect to the legal status of same-sex partners and spouses.”

Of course, whether or not states can lawfully ban same-sex marriage is now before the U.S. Supreme Court. Although earlier petitions for certiorari were unsuccessful, a fresh round of petitions filed in the wake of a circuit split created by the Sixth Circuit’s consolidated ruling upholding same-sex marriage bans in Kentucky (Bourke v. Beshear), Michigan (DeBoer v. Snyder), Ohio (Obergefell v. Hodges), and Tennessee (Tanco v. Haslam) were granted and consolidated to examine two questions:

- Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?
- Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

After the Sixth Circuit ruling, there has been considerable confusion in some states, such as Alabama, where a federal district court’s invalidation of the state’s man-woman marriage laws prompted the chief justice of the state supreme court to declare that despite the federal court ruling, he would continue to recognize Alabama’s same-sex marriage ban. The U.S. Supreme Court will hear oral argument in the same-sex marriage cases on April 28, 2014.

Bullying

Bourgeacq cited California’s “anti-bullying” training law as significant. That law requires employers with more than 50 employees to conduct mandatory training on recognizing and avoiding sexual harassment. “While not outlawing ‘bullying’ in general (whatever that is), the law’s intent is to make managers more sensitive to harsh management styles,” Bourgeacq observed. “More than half of the states in the country have urged some form of workplace anti-bullying legislation. We’ve already seen several states pass similar legislation applicable to schools. The California experiment may open the door in other states for similar or more rigorous anti-bullying legislation.”

In September 2014, California Governor Edmond G. Brown, Jr., approved the anti-bullying legislation cited by Bourgeacq. Specifically, the new law mandates prevention of abusive conduct as a component of the already-required sexual harassment training and education. The measure, A.B. 2053, seeks to combat workplace bullying, not make it illegal. The law was effective January 1, 2015.

Preventative approach. The bill’s author, Assembly Member Lorena Gonzalez (D-Dist. 80) said that the bill takes a measured approach to the problem because, instead of being punitive, the legislation aims to prevent the offensive conduct from ever happening by educating managers. It also couples anti-bullying education with sexual harassment training since these problems often go hand-in-hand.

What is abusive conduct? While most people recognize it when they see it, the new law defines “abusive
conduct” as employer or employee workplace conduct, with malice, that a reasonable person would find hostile, offensive, and unrelated to legitimate business interests. It may include repeated infliction of verbal abuse, such as use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, as well as gratuitous sabotage or undermining of an individual’s work performance. But a single act is not abusive conduct, unless it is especially severe and egregious.

Bourgeacq queried: “Will hypersensitive employees be the new protected class?”

**Pregnancy discrimination**

In 2014, five states (listed below) and the District of Columbia added protections against pregnancy discrimination. Generally, these laws bar employment discrimination based on pregnancy, childbirth, and related conditions, and require reasonable accommodations for known limitations related to pregnancy and childbirth, unless doing so would result in an undue hardship to the business.

**How is undue hardship determined?** Several of these laws also spell out the factors to be taken into account in determining whether an accommodation would impose an undue hardship, such as these delineated in a Delaware law, which defines “undue hardship” to mean an action that requires significant difficulty or expense, in light of factors such as:

- the nature and cost of the accommodation;
- the employer’s overall financial resources;
- the overall size of the employer’s business with respect to the number of employees, and the number, type, and location of its facilities; and
- the effect on expenses and resources, or the impact otherwise of the accommodation upon the employer’s operations.

Under the Delaware law, the fact that the employer provides or would be required to provide a similar accommodation to another employee creates a rebuttable presumption that the accommodation does not impose an undue hardship.

Other aspects of the various pregnancy discrimination laws enacted among the states in 2014 are reflected in the brief summaries that follow.

**Delaware.** The Delaware legislation was enacted to address pregnancy accommodations in the workplace and to clarify that current prohibitions against sex discrimination in employment include pregnancy.

Effective September 9, 2014, Senate Bill 212 amends Delaware state law to make it an unlawful employment practice for an employer with four or more employees to fail to hire or to discharge an individual or to otherwise discriminate against that person as to compensation, terms, conditions, or privileges of employment because of pregnancy. Employers are also prohibited from limiting, segregating, or classifying employees in any way so as to deprive them of employment opportunities or otherwise adversely affecting an individual’s status as an employee because of pregnancy.

The new law requires employers to provide notice of the right to be free from discrimination in relation to pregnancy, childbirth, and related conditions, including the right to reasonable accommodation to known limitations related to pregnancy, childbirth, and other related conditions. This notice must also be conspicuously posted at the employer’s place of business in an area accessible to employees.

**District of Columbia.** A similar pregnancy discrimination measure, the Protecting Pregnant Workers Fairness Act of 2014, was approved in October 2014 in the District of Columbia. Employers are required

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**What pregnancy accommodations may be necessary?**

Accommodations under these pregnancy discrimination laws may include things such as these, expressly listed in a new Illinois law:

- more frequent or longer bathroom breaks, breaks for increased water intake, and breaks for periodic rest;
- private non-bathroom space for expressing breast milk and breastfeeding;
- seating;
- assistance with manual labor;
- light duty;
- temporary transfer to a less strenuous or hazardous position;
- provision of an accessible worksite;
- acquisition or modification of equipment;
- job restructuring;
- a part-time or modified work schedule;
- appropriate adjustment or modifications of examinations, training materials, or policies;
- reassignment to a vacant position;
- time off to recover from conditions related to childbirth; and
- leave necessitated by pregnancy, childbirth, or medical or common conditions resulting from pregnancy or childbirth.
to provide reasonable workplace accommodations for workers whose ability to perform job functions are limited by pregnancy, childbirth, a related medical condition, or breastfeeding.

Under B. 769, employers must in good faith engage in a timely and interactive process with an employee requesting or otherwise needing a reasonable accommodation to determine an appropriate reasonable accommodation for that employee. An employer may require an employee to provide a certification from a health care provider concerning the medical advisability of a reasonable accommodation to the same extent a certification is required for other temporary disabilities.

**Illinois.** Effective January 1, 2015, pregnant women in Illinois enjoy protection from pregnancy discrimination. House Bill 8 expands the protected categories of employees in the Illinois Human Rights Act to include pregnancy. The term is defined to mean “pregnancy, childbirth, or medical or common conditions related to pregnancy or childbirth.”

It is also a civil rights violation under H.B. 8 for an employer, after a request by an applicant or employee (including full-time, part-time, and probationary employees), not to make reasonable accommodations for any medical or common condition related to pregnancy or childbirth, unless the employer can demonstrate that the accommodation would impose an undue hardship on its ordinary business operations.

The new law defines “reasonable accommodations” to mean “reasonable modifications or adjustments to the job application process or work environment, or to the manner or circumstances under which the position desired or held is customarily performed, that enable an applicant or employee affected by pregnancy, childbirth, or medical or common conditions related to pregnancy or childbirth to be considered for the position the applicant desires or to perform the essential functions of that position.” (See box story, p. 9 for examples.)

**Minnesota.** The Women’s Economic Security Act (H.F. 2536) was signed into law in Minnesota on Mother’s Day 2014, and became effective the following day.

Among other things, it expands workplace accommodations and protections for pregnant women and nursing mothers. The Act requires employers to offer reasonable accommodations to an employee for health conditions related to pregnancy or childbirth, unless the accommodation would result in an undue hardship on the operation of the employer’s business.

A pregnant employee is expressly not required to obtain the advice of her licensed health care provider, nor can an employer claim undue hardship for the following accommodations:

- more frequent restroom, food, and water breaks;
- seating; and
- limitations on lifting over 20 pounds.

Reasonable accommodations under the new law may include temporary transfer to a less strenuous or hazardous position, seating, frequent restroom breaks, and limits to heavy lifting. Employers are not, however, required to create a new or additional position in order to accommodate the employee. Nor are they required in providing an accommodation to discharge any employee, transfer any other employee with greater seniority, or promote any employee.

In addition, the law requiring employers to provide reasonable unpaid break time each day for an employee who is nursing in order to express breast milk for her infant child is amended to provide greater protections and prohibit retaliation against employees who assert rights or remedies under the law.

**New Jersey.** In New Jersey, effective January 17, 2014, S2995 amends the state’s antidiscrimination law to make it unlawful for employers to discriminate against a person because of pregnancy, childbirth, or medical conditions relating to pregnancy or childbirth, including recovery from childbirth.

The law also makes it unlawful for an employer to treat, for employment-related purposes, a woman
employee that the employer knows, or should know, is affected by pregnancy in a manner less favorable than the treatment of other persons not affected by pregnancy in their ability or inability to work.

In addition, employers are required to make available to an employee who is pregnant reasonable accommodations in the workplace, such as bathroom breaks, breaks for increased water intake, periodic rest, assistance with manual labor, job restructuring or modified work schedules, and temporary transfers to less strenuous or hazardous work for needs related to the pregnancy, when the employee, based on the advice of her physician, requests the accommodation. Employers must make the workplace accommodations unless they can show that providing such accommodation would be an undue hardship on the employer’s business operations.

Further, workplace accommodations and paid or unpaid leave provided to an employee affected by pregnancy cannot be provided in a manner less favorable than accommodations or leave provided to other employees not affected by pregnancy, but who are similar in their ability or inability to work.

West Virginia. In West Virginia, the Pregnant Workers’ Fairness Act (HB 4284) effective June 4, 2014, makes it an unlawful employment practice for a “covered entity” to do any of the following:

- Not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a job applicant or employee, following delivery by the applicant or employee of written documentation from the applicant’s or employee’s health care provider that specifies the applicant’s or employee’s limitations and suggesting what accommodations would address those limitations, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business;
- Deny employment opportunities to a job applicant or employee, if such denial is based on the refusal of the covered entity to make reasonable accommodations to known limitations related to the pregnancy, childbirth, or related medical conditions of an employee or applicant;
- Require a job applicant or employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation that such applicant or employee chooses not to accept; or
- Require an employee to take leave under any leave law or policy of the covered entity if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions of an employee.

Pay equality

In 2014, at least five states either enacted equal-pay laws or enhanced existing equal-pay protections. Notably, the federal Paycheck Fairness Act (S. 2199) once again failed to see the light of day last year. If enacted, that measure would have amended the Equal Pay Act to revise enforcement remedies and existing exceptions to prohibitions against sex discrimination in the payment of wages.

Pay equality is also on the White House radar. This is perhaps one of those areas where momentum for additional protections has increased at the state level despite the absence of Congressional action.

According to its sponsors, the legislation would provide more effective remedies to victims of discrimination in the payment of wages on the basis of sex. Since 1997, when it was first introduced, the legislative proposal has repeatedly failed to gain enough support to become law.

Pay equality is also on the White House radar. This is perhaps one of those areas where momentum for additional protections has increased at the state level despite the absence of Congressional action. The following are examples of some of the pay equity-related provisions that were enacted by states in 2014.

Illinois. The Illinois Equal Pay Act of 2003 was amended in 2014 by H. 5563 to centralize all complaints and investigations of women workers who fail to receive equal pay for equal work because of their gender. House Bill 5563 allows the Illinois Department of Labor to refer complaints of alleged violations of the Equal Pay Act to the Illinois Department of Human Rights (DHR) to help avoid confusion and centralize discrimination investigations.

Louisiana. In Louisiana, a bill that began as a “good faith” exception in wage disputes ended up also barring intentional pay discrimination based on sex under
state law. Effective August 1, 2014, Senate Bill 359 makes it unlawful discrimination in employment for an employer to intentionally pay wages to an employee “at a rate less than that of another employee of the opposite sex for equal work on jobs in which their performance requires equal skill, effort, and responsibility, and which are performed under similar working conditions.” The measure expressly bars an employer from reducing the wages of another employee in order to reach compliance.

The bill also amends existing law to provide that it is not unlawful discrimination for an employer to apply different standards of compensation or different terms, conditions, or privileges of employment based on a bona fide seniority or merit system, or a system that measures earnings by quantity or quality of production, or any other differential based on any factor other than sex, or to employees who work in different locations, if the differences are not the result of an intention to discriminate based on race, color, religion, sex, or national origin.

In other legislation, S.B. 322 amended the Louisiana Equal Pay for Women Act with regard to enforcement and filing of complaint procedures, to move jurisdiction for review and investigation of claims to the Louisiana Commission on Human Rights and/or the EEOC.

**Michigan.** Under the Workforce Opportunity Wage Act, S.B. 934, employers in Michigan are prohibited from discriminating against employees on the basis of sex by paying wages to employees at a rate less than the rate at which the employer pays wages to employees of the opposite sex for equal work on jobs, the performance of which requires equal skill, effort, and responsibility and that is performed under similar working conditions. The law, which was effective May 27, 2014, carves out an exception when the payment is made under a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a wage differential based on a factor other than sex. Any amount owing to an employee that has been withheld in violation of equal pay requirements is considered unpaid minimum wages under the new law.

**Minnesota.** In Minnesota, the Women’s Economic Security Act eliminates barriers for women by, among other things, ensuring equal pay for equal work on state contracts and protecting employees’ right to discuss wages. The measure, H.F. 2536, requires businesses with 40 or more employees seeking state contracts of over $500,000 to certify they are paying employees equal wages, regardless of gender. Contractors also must certify there are no pay gaps between men and women by job class. Existing law under Chapter 181 of the Minnesota

Why are states enacting “ban-the-box” laws?

The preamble to Delaware’s ban-the-box law sets out several reasons, including:

- **The incarceration rate of the United States has tripled since 1980 and is now nearly eight times its historic average.**
- **It’s in the entire community’s interest that people reentering society after incarceration become productive members, and the ability of these people to obtain employment is key to their productivity.**
- **Research shows that many people with prior criminal histories pose no greater risk of future criminality than do people with no criminal history and are equally qualified, reliable, and trustworthy employment candidates.**
- **Unemployment is a significant cause of recidivism, and people who are employed are significantly less likely to be re-arrested.**
- **People who have paid their debts to society deserve a fair chance at employment and the opportunity to be judged on their own merit during the submission of the application and at least until the completion of one interview.**
- **Obstacles to employment for people with criminal records and other barriers to reentry are creating permanent members of an underclass that threatens the health of the community and undermines public safety.**

Statutes requires equal pay for equal work in private employment but provides exemptions for state and local government entities. While the Act extends equal pay to state contracts, exemptions in other aspects of state government remain. The equal pay certification requirement does not apply with respect to a specific contract if it is determined that it would cause undue hardship to the contracting entity.

**New Hampshire.** New Hampshire updated its pay equity law to eliminate loopholes, increase wage transparency, and give workers the tools and resources to help them earn a fair and equal paycheck, without fear of retaliation. Effective January 1, 2015, S.B. 207 bars employers from requiring, as a condition of employment, that an employee (1) refrain from disclosing the amount of his or her wages or (2) sign a waiver or other document that purports to deny the employee the right to disclose the amount of his or her wages, salary, or other benefits.

Employers are prohibited from discharging, formally disciplining, or otherwise discriminating against an employee who discloses the amount of his or her wages,
salary, or other paid benefits. Employers are also barred from discharging or discriminating in any way against an employee who has filed a charge, a complaint, or has initiated an investigation, proceeding, hearing, or action related to the Act.

“Ban-the-box” laws

There was substantial state legislative activity in 2014 as part of the growing “ban-the-box” movement aimed at removing barriers to gainful employment for those who were formerly incarcerated. These laws regulate the use of arrest and criminal conviction information by employers during the hiring process. At least six states enacted ban-the-box laws in 2014.

In addition to limitations on criminal history inquiries during the application process, new state laws in this area may also address how employers can use information after a conditional offer of employment has been extended. Below is a sampling of various provisions included in state legislation on criminal background information enacted in 2014.

California. In California, the Fair Chance Employment Act (A. 1650) became law on September 30, 2014. Effective January 1, 2015, the new law requires that any person submitting a bid to the state on a contract involving onsite construction-related services must certify that the person will not ask an applicant for onsite construction-related employment to disclose orally or in writing information concerning the conviction history of the applicant on or at the time of an initial employment application. The law does not apply to a position for which the person or the state is otherwise required by state or federal law to conduct a conviction history background check, or to any contract position with a criminal justice agency. Exception is also made for a person to the extent that he or she obtains workers from a hiring hall pursuant to a bona fide collective bargaining agreement.

Delaware. The Diamond State finalized legislation on May 8, 2014, that prohibits public employers from inquiring into applicants’ criminal records before their first interview. House Bill 167 forbids the practice of asking job candidates to check a box if they have a criminal record.

After a conditional offer is extended, the public employer is permitted to inquire about and take into consideration the applicant’s criminal background. However, once a criminal background check is conducted, employers may take into account only felony convictions not more than 10 years old and misdemeanor convictions not more than five years old, counting from the date of release from custody, or sentencing if the individual was not taken into custody.

Moreover, in making any employment decision, public employers are required to consider these factors in evaluating any candidate or employee and the results of any criminal history inquiry:

- The nature of the crime and its relationship to the duties of the position sought or held;
- Any information pertaining to the degree of rehabilitation and good conduct, including any information produced by the candidate or employee, or produced on his or her behalf;
- Whether the prospective job provides an opportunity for the commission of a similar offense(s);
- Whether the circumstances leading to the offense(s) are likely to reoccur; and
- How much time has elapsed since the offense(s).

In addition to limitations on criminal history inquiries during the application process, new state laws in this area may also address how employers can use information after a conditional offer of employment has been extended.

Police forces, the Department of Corrections, and other positions with a statutory mandate for background checks are excluded from the law’s provisions.

District of Columbia. The Fair Criminal Record Screening Amendment Act of 2014 (B. 642; Act 20-422) in the District of Columbia is aimed at successfully reintegrating formerly incarcerated people into the community by removing barriers to gainful employment. Effective December 17, 2014, the law bars consideration of a job applicant’s arrest record during the hiring process and restricts an employer’s inquiry into a job applicant’s prior convictions before a conditional offer of employment.

The prohibition does not apply where federal or D.C. laws or regulations require consideration of an
applicant’s criminal history; the position is designated as part of a government program aimed to encourage employment of those with criminal histories; or where a facility or employer provides programs, services, or direct care to minors or vulnerable adults.

Once extended, a conditional offer of employment may be withdrawn only for a legitimate business reason that is reasonable in light of several factors that are similar to those specified in the Delaware law above.

For purposes of the D.C. law, “employer” means any person, company, corporation, firm, labor organization, or association, including the District government, but not including the courts, that employs more than 10 employees in the District.

Illinois. In Illinois, the Job Opportunities for Qualified Applicants Act (H.B. 5701) which became law on July 21, 2014, prohibits a private employer with 15 or more employees, or an employment agency, from inquiring about or considering an applicant’s criminal history until the applicant has been determined to be qualified for the job and selected for an interview, or if there is no interview, a conditional job offer is made. The new law does not apply to certain jobs where employers must exclude applicants with criminal histories. The legislation, which was recommended by the bipartisan Illinois Employment Restrictions Task Force, is effective January 1, 2015.

The law does not prevent employers from notifying applicants in writing of specific offenses that will disqualify an applicant from employment in a particular position due to federal or state law or the employer’s policy.

Nebraska. On April 16, 2014, Nebraska enacted a “ban the box” law (L.B. 907) that applies to public employers. With specified exceptions, a public employer may not ask an applicant for employment to disclose information concerning the applicant’s criminal record or history, including any inquiry on any employment application, until the public employer has determined the applicant meets the minimum employment qualifications.

The criminal inquiry prohibition does not apply to law enforcement agencies or any position for which a public employer is required by federal or state law to conduct a criminal history record information check. Nor does it apply to any job for which federal or state law specifically disqualifies an applicant with a criminal background.

The new law, which was effective when enacted, expressly does not prevent public employer school districts or educational service units from requiring applicants to disclose any criminal record or history relating to sexual or physical abuse.

New Jersey. In the Garden State, the Opportunity to Compete Act (A. 1999), approved on August 11, 2014, and effective March 1, 2015, bars employers in the state from asking about an applicant’s criminal record during the initial employment application process. There are three exceptions to the new law’s general ban against criminal record inquiries during the initial employment application process:

■ Where the position is in law enforcement, corrections, the judiciary, homeland security, or emergency management;

■ When the position is one in which a criminal history record background check is required by law, rule, or regulation; or an arrest or conviction by the person for one or more crimes or offenses would or could preclude the person from holding such employment as required by any law, rule, or regulation; or where any law, rule, or regulation restricts an employer’s ability to engage in specified business activities based on the criminal records of its employees; or

■ Where the position is designated by the employer to be part of a program or systematic effort designed predominantly or exclusively to encourage the employment of persons who have been arrested or convicted of one or more crimes or offenses.

An employer is not prohibited by the new law from asking an applicant about his or her criminal record after the initial employment application process has concluded. An employer also is not precluded from rejecting an applicant for employment based on his or her criminal record, unless the record (or a relevant portion) has been expunged or erased through executive pardon, provided that the hiring rejection is consistent with other applicable laws, rules, and regulations.

“Expect to see more states passing legislation to legalize medical marijuana and recreational marijuana.”

– Jackson Lewis shareholder Kathryn Russo
The new law also bars employers from knowingly or purposefully publishing (or causing to be published) any job advertisement that explicitly indicates the employer will not consider any applicant who has been arrested or convicted of one or more crimes or offenses. The advertising prohibition includes exceptions similar to those carved out for applicant inquiries.

In addition, the Opportunity to Compete Act expressly states that it cannot be construed to create or establish a standard of care or duty for employers with respect to any law other than the Act. Further, evidence of an employer’s violation or alleged violation of the Act’s provisions is not admissible in any legal proceeding with respect to any law or claim other than a proceeding to enforce the Act’s own provisions. Nor can the Act be construed to create, establish or authorize a private cause of action by an aggrieved person against an employer that has violated, or is alleged to have violated, the provisions of the Opportunity to Compete Act.

**What state legislative activity is likely in 2015?**

Many of these legislative trends will likely continue through 2015. One unknown factor is what the Supreme Court will hold in the consolidated same-sex marriage cases. The decision will undoubtedly have a profound impact, no matter what the majority of the Justices rule. As to other anticipated legislative developments among the states, a few that stand out are discussed below.

**Marijuana laws.** “Expect to see more states passing legislation to legalize medical marijuana and recreational marijuana,” according to Russo, who pointed to several states to watch: Georgia, Indiana, Kentucky, Nevada, New Jersey, and Rhode Island. “State legislators may feel emboldened by the fact that Congress passed a federal spending bill for 2015 that prohibits the use of federal funds to prevent states from implementing medical marijuana laws,” she suggested.

However, in December 2014, Nebraska and Oklahoma asked the U.S. Supreme Court to permit them to file a lawsuit against Colorado, challenging that state’s legalization of marijuana, Russo noted. “Nebraska and Oklahoma contend that Colorado marijuana flows into neighboring states, thereby interfering with their own anti-drug laws,” she explained. “Colorado’s neighbors argue, among other things, that the state’s marijuana legalization program violates the federal Controlled Substances Act, which makes the cultivation, trafficking and possession of marijuana unlawful and that federal law is controlling under the U.S. Constitution.”

Nebraska and Oklahoma invoked a rarely used constitutional provision giving the High Court original jurisdiction over suits between states, and they seek a declaration that the Colorado legalization program is unconstitutional, Russo explained. “If the Supreme Court allows the suit to proceed, the case will be closely followed and the outcome could have repercussions in many states.”

“*If the patchwork of state and local protections grows, watch for the feds to step in and consider a comprehensive statute providing paid sick leave benefits.*”

– Jackson Lewis attorneys Frank Alvarez, Joe Lynett, Jamie Allen, and Cynthia Filla

**Paid leave laws.** “We think it is likely that state and local legislatures will continue a trend of proposing and enacting paid sick and safe leave laws, Jackson Lewis attorneys Frank Alvarez, Joe Lynett, Jamie Allen, and Cynthia Filla predicted. “Currently, the New Jersey legislature also is considering a sick leave bill that, if passed in its current form, might preempt the growing patchwork of local laws passed in the state. The South Carolina legislature is also considering a paid sick leave bill. If the patchwork of state and local protections grows, watch for the feds to step in and consider a comprehensive statute providing paid sick leave benefits.”

Bourgeacq, too, sees a continuing trend of states enacting paid sick leave measures.

Colaizzi predicted that employee rights groups in Colorado will likely introduce legislation creating a system of paid family and medical leave in the state that will be administered by the Colorado Department of Labor and Employment. “Past proposals funded the paid leave through optional employee payroll contributions,” she observed. “These proposals did not require employer contributions but did place significant administrative responsibilities on employers. It has been anticipated that such a program would require the creation of a
special section within the Colorado Department of Labor and Employment to administer the program."

**Minimum wage hikes.** Bourgeois also forecasts “more activity with minimum wage hikes, mostly in the blue states.”

Indeed minimum wage hike proposals are likely to continue in the face of stalled efforts on the federal front. Some of those efforts will probably take place at the municipal level.

**Anti-bullying laws.** We can also expect more interest in anti-bullying laws, according to Bourgeois, particularly those governing the workplace. These measures, however, may be more demanding than the California law, which really only requires training.

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**About the Author**

Pamela Wolf is an attorney and legal analyst who tracks and analyzes labor and employment law issues, court decisions, and trends for Employment Law Daily. She previously served as editor of Insight, a component of Wolters Kluwer's Labor Relations service, and EEOC Compliance Manual and its companion newsletter, as well as contributing editor to Employment Practices Guide. As a practicing attorney for 12 years, Wolf's experience included litigation of employment and civil rights matters.