

Employers Should Note Post-Midterms State Law Changes

By **Susan Groff, Tasos Paimdiris and Kathryn Russo** (November 15, 2022)

As the final tally of ballots comes in for many electoral races across the country, the outcomes of the various state ballot measures that were also part of the Nov. 8 midterm elections could require changes to employers' policies and procedures.

Drug-free workplace policies, wage and hour obligations, collective bargaining rights, and employee benefit plans providing access to abortion-related treatment are some areas affected by statewide ballot initiatives across the country.

Legalization of Marijuana, Psychedelics

Maryland and Missouri passed initiatives legalizing marijuana use for individuals over the age of 21. Additionally, Colorado passed an initiative to legalize psychedelic plants and fungi for individuals over the age of 21.

Maryland voters also approved a state constitutional amendment that will allow the use of cannabis by anyone over the age of 21 on or after July 1, 2023, subject to the General Assembly passing legislation concerning the regulation, distribution, possession and taxation of marijuana.

Missouri voters approved an amendment to the state constitution on medical marijuana and recreational marijuana.

The Missouri medical marijuana law will permit nurse practitioners, in addition to physicians, to recommend medical marijuana use to their patients. The medical marijuana law still prohibits legal claims against employers where employees are barred from being under the influence of marijuana while at work.

New provisions require that employers not discriminate against medical marijuana users, however, unless failure to do so would result in the loss of monetary or licensing-related benefits under federal law, or unless the person was under the influence of marijuana on the employer's premises or during work hours.

The amendment to the Missouri constitution also permits the recreational use of marijuana by adults aged 21 and older. Employers are not required to permit or accommodate the use of marijuana at work or on their property.

Employers are permitted to take adverse employment actions if a person is working while under the influence of marijuana. The law does not define the phrase "under the influence of marijuana" so it is unclear whether employers may rely on positive drug test results for marijuana to prove an employee was under the influence.

Finally, the new Missouri law will allow individuals who are serving prison sentences for certain crimes — including possession of up to three pounds of marijuana — to petition the sentencing court to vacate the sentence, order immediate release, and expunge the government's records. Additional provisions address expungement of criminal records for



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those who previously served prison sentences related to certain marijuana-related crimes.

The Missouri constitutional amendment will take effect Dec. 8, 2022, 30 days after the election.

Colorado's ballot measure will decriminalize the use and possession of certain psychedelic plants and fungi as natural medicine. The state legalized the use of marijuana in 2012.

Arkansas, North Dakota and South Dakota ballot measures seeking to legalize marijuana for individuals over the age of 21 all failed.

While not each of these new laws specifically addresses workplace rights or prohibitions, employers in states like Maryland, Missouri and Colorado that legalized marijuana and decriminalized other substances are not required to permit or accommodate the use, consumption or possession of the substances in the workplace.

Additionally, employers in all three states must evaluate their drug testing policies, as well as any other policies that address or limit employees' rights to participate in legal activities outside of working hours.

Multistate employers may find nationwide compliance with these new state laws a daunting task. Nevertheless, employers should check the requirements in each jurisdiction where they operate, as well as any industry, safety or licensing-specific requirements that affect drug policies and testing.

Minimum Wage

The District of Columbia passed the Tip Credit Elimination Act. Previously, under District of Columbia law, employers of tipped workers were permitted to take a credit against tipped wages received by workers to satisfy the minimum wage guaranteed to all workers under the law.

Under the Tip Credit Elimination Act, the tip credit will gradually be eliminated and the base minimum wage increased until 2027, when the mandatory base wage for tipped workers will match the District of Columbia's minimum wage. Tips will continue as the property of employees and will be in addition to the statutory minimum hourly wage. The first increase for tipped workers will occur on Jan. 1, 2023, increasing tipped worker minimum wage to not less than \$6 an hour with tips.

Nebraska's hourly minimum wage has incrementally increased since 2015 to its current rate of \$9 per hour. The new law increases the minimum wage in stages, ending in January 2026 with a minimum wage of \$15. The first increase will take effect Jan. 1, 2023, increasing the state minimum wage to \$10.50.

Nevada also passed its initiative to add a minimum wage provision to the state constitution. Under the measure, effective July 1, 2024, the minimum wage will increase from \$10.50 to \$12. Thereafter, if at any time the federal minimum wage is higher than \$12, the state minimum wage should be increased accordingly.

Employers will need to monitor the effective dates of these increases to implement systems that will ensure compliance where multiple adjustments are needed to account for changes that will be incremental over a period of several years.

Employers should also verify that they are properly calculating tipped employee wages and overtime based on the new wage rates. This is particularly important when providing any additional compensation or incentives, such as shift differentials, that must be included in the regular rate of pay for overtime purposes.

Additionally, these measures may require employers to reevaluate their overall compensation structure to determine how changes at the lower end of the pay scale affect pay equity in the organization.

Collective Bargaining Rights

Illinois voters are projected to approve an amendment to the state constitution giving employees a right to "organize and bargain collectively through representatives of their own choosing for the purpose of negotiating wages, hours, and working conditions, and to protect their economic welfare and safety at work."

The measure also prohibits any law that interferes with, negates or diminishes the right of employees to organize and bargain collectively.

Because the National Labor Relations Act already covers most private sector workers, the amendment's impact is generally limited to the public sector, such as state and local government workers. However, the amendment does prohibit a right-to-work law in Illinois, making it the only state to add a right-to-work ban in a state constitution.

On the other hand, Tennessee approved a right-to-work amendment to its constitution. The amendment makes it illegal for any workplace to require labor union membership for employees as a condition of employment. While Tennessee already has a right-to-work law in place, it is now the 10th state in the country to engrain such protections to its constitution.

Abortion Rights

California, Michigan and Vermont passed ballot measures that codify rights pertaining to abortion and personal reproductive autonomy into those states' constitutions.

Kentucky's measure failed. It sought to amend the state constitution to specify that it does not protect or secure a right to abortion or require funding of abortions.

Even where there is no mandate for employer action, employers should note these changes and continue tracking the status of abortion-related legislation and litigation as the law continues to develop following the U.S. Supreme Court's June decision in *Dobbs v. Jackson Women's Health Organization*. The constitutional amendments decided in the most recent election do not foreclose new laws from being introduced or passed.

Laws that affect abortion rights may pertain to workplace policies when it comes to discrimination, harassment and retaliation, as well as policies that provide time off or reimbursement for travel to another jurisdiction for an abortion, all of which have been the focus of much attention since *Dobbs*.

Conclusion

The outcome of these ballot measures is another reminder of the challenges multistate employers face to comply with the ever-changing patchwork of workplace laws across the

country.

It is critical for employers operating in multiple jurisdictions, including those with remote employees, to monitor ballot initiatives like these during each election cycle in addition to legislative action, executive orders, rules from regulatory agencies, and other guidance that may require changes to policies and practices in the workplace.

Keeping a constant eye on legal trends, judicial developments and statutory changes at the national and local level will help reduce the risk of noncompliance.

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