



5 Recent Trends in Employment Law Affecting Your Business

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As employment law continues to become more local, compliance with federal laws may not be necessarily enough. Employers must understand which state and local employment laws affect them.

Here are five important trends changing the landscape of employment law.

1 Pay Equity Legislation

States continue to pass tough pay equity legislation. For instance, Colorado recently passed what is being termed the “toughest” state pay equity law to date. Other states with rigorous pay equity laws include California and New Jersey. The differences in the standards are significant. Some jurisdictions require “equal pay for equal work,” others require equal pay for “substantially similar work,” and still others require equal pay for “comparable work.” It is critical to know what standard applies in the jurisdictions in which you operate. In addition, consider the best approach to understanding the basis for pay disparities, whether they are linked to seniority, education, or experience — all allowable reasons for disparities — or sex or some other protected characteristic — prohibited reasons for disparities.

Tougher pay equity legislation means increased penalties for non-compliance. Some states allow aggrieved employees to collect several years of back pay and treble (three times) damages for violations. But there is good news, too. Some states offer employers a “mini-safe harbor” if they conduct proactive self-evaluations of their compensation practices to attempt to remedy unlawful pay disparities.

2 Equal Opportunity and Non-Harassment Training

In response to the #MeToo movement, some states have passed legislation requiring employers to conduct annual sexual harassment prevention training. This trend is expected to continue. Many jurisdictions require employers to conduct

training for new hires and annual training for all existing employees. Employers need to know whether they are subject to mandatory training requirements, and what those requirements are (such as interactive training with an opportunity for trainees to ask questions). Even if your jurisdiction does not have a mandatory training requirement, it may soon. Of course, training managers (and all employees, if practicable) on equal opportunity and harassment prevention — not just sexual harassment, but all types — is a best practice even absent a statutory requirement.

States with a mandatory training requirement include New York, California, and Connecticut.

3 Fair Labor Standards Act Regulations

The U.S. Department of Labor recently issued a Notice of Proposed Rulemaking to revise regulations under the federal wage and hour law, the Fair Labor Standards Act (FLSA). One of the proposed revisions is to increase the minimum salary level for an individual to be exempt from the FLSA’s overtime compensation requirement. The FLSA generally requires employers to pay non-exempt or hourly employees 1.5 times their regular rate for all hours worked over 40 in a workweek.

Current regulations generally provide that employees earning at least \$455 per week (\$23,660 annually) and performing certain enumerated exempt duties (commonly referred to as the “duties test”) are not entitled to or exempt from overtime. Payment of a salary alone does mean an individual is exempt from the

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overtime requirement. The individual also must satisfy the duties test. The proposed amendments will increase the minimum salary threshold perhaps to around \$679 per week (equivalent to \$35,308 annually) or more. The “duties test” likely will be unchanged, subject to the final rules. This means, to the extent an exempt employee’s weekly salary is \$455, the business will need to adjust it up. Consider now how this will impact the bottom line. Remember, many states have higher minimum salary thresholds for overtime exemptions under state law. Other proposed FLSA regulation revisions include increasing the annual compensation threshold for “Highly Compensated Employees” to \$147,414 per year, changing how employers determine an employee’s “regular rate” by including nondiscretionary bonuses and incentive payments to satisfy a portion of an employee’s salary for the “salary level test” for exempt status, and clarifying what other benefits (paid time off, meal breaks, and even tuition assistance) employers may use to calculate an employee’s salary level.

Finally, employers should be aware that the increase in the salary threshold may lead to more employees suddenly becoming eligible for overtime compensation.

4 Paid Sick Leave

While such a law has not been enacted on a federal level, more states and localities are passing private sector “paid sick leave” laws, which provide employees of businesses of certain sizes with guaranteed paid time off to be used for the employee’s own illness, to tend to a family member’s illness, or even attend events like school conferences for their children. Covered reasons for taking paid sick leave vary by jurisdiction, so it is important to know the rules in the jurisdictions in which you operate. Employers also must know how such time is accrued, and



the maximum amount of paid leave an employee may earn per year. Additionally, some states allow employees to “cash out” unused sick time at the end of the year or carry over unused time.

If your business already provides paid time off, your existing policy may comply with the paid time leave requirement in your jurisdiction, as long as your policy is as least as generous as the statutory requirement, and otherwise complies with the law.

California and Washington have both statewide and local laws in some of their municipalities with which employers must comply. However, other states, like New York, Pennsylvania, and Texas, do not have a statewide law, but employers in certain localities in the state must contend with local paid sick leave laws.

5 Regulations that Affect the Hiring Process

Fair employment laws generally protect not only current employees, but also prospective employees. Over the past several years, state

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and local laws have limited what employers can inquire into during the hiring process. At least 23 states or localities have adopted some form of “Ban the Box” laws in recent years addressing the types of questions and inquiries employers can make of prospective employees. Criminal history is one of the most common statuses protected by these laws, and many jurisdictions are extending protections for prospective employees to issues like salary history and unemployment status.

Some jurisdictions have “Ban the Box” laws that cover all private employers. Other jurisdictions’ legislation affects only employers with at least a certain number of employees.

It is important to know what your

business can and cannot ask prospective employees, verbally or in writing, to avoid the legal traps.

Employers must keep up-to-date about new laws and regulations that affect their business. The cost of not doing so can be significant. Consult with a Human Resources professional or employment counsel to ensure compliance. **NPA**

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