



Expansion of Employee Rights Creates a Complex Compliance Landscape for U.S. Employers

Nadia P. Bermudez Klinedinst PC

In the last few years, employers have seen an ever-growing legislative expansion of employee rights throughout the country, which creates compliance difficulties based on varied legal obligations among cities and states of operations. This scenario is further complicated by the ever-increasing demand for remote work, which could trigger the application of local laws based on an employee's residence. From cannabis to codified bereavement leave, new employment laws require businesses to proactively prepare for constant policy changes and conduct compliance trainings for front-line managers.

BEREAVEMENT AND LOSS

Though not required by federal law, a few jurisdictions have established their own

bereavement leave laws following the loss of a family member or other designated person.

For example, starting in 2023, covered Illinois and California employers are required to provide employees with unpaid bereavement leave following the loss of a family member. Illinois' Family Bereavement Leave Act (FBLA), an amendment to the Child Bereavement Leave Act (CBLA), expands leave time requirements to cover pregnancy loss, failed adoptions or surrogacies, unsuccessful reproductive procedures, and other diagnoses or events negatively impacting pregnancy or fertility. Illinois' FBLA requires employers (who are already covered by the federal Family and Medical Leave Act) to provide 10 working days of unpaid leave time after the loss of

family members not already covered by the CBLA. California's new bereavement law provides eligible employees with up to five days of unpaid bereavement leave upon the death of a qualifying family member. California's form of bereavement leave protection can be taken intermittently within three months of the family member's date of death. Illinois also allows for leave to be taken months after the initial need.

CANNABIS & EMPLOYMENT

Once again, California leads the charge by passing a law, effective next January 2024, prohibiting employers from penalizing workers for using marijuana outside of work and limiting the type of pre-hire drug testing. The law also authorizes the state's

Civil Rights Department to investigate and pursue complaints of employer violations. Of note, California has a long-standing unique Labor Code provision that prevents employers from retaliating against employees for lawful off-duty conduct, which ostensibly includes permitted recreational use of marijuana in the state.

Most states now have some form of legalized medical or recreational cannabis usage laws. Just a few states, however, require employers to actually accommodate usage or cover usage under an anti-discrimination framework. Within the last few years, D.C., New Jersey and Nevada passed laws protecting workers from employer adverse actions involving off-duty cannabis usage for medical needs. While employers may still maintain drug-free workplace policies, enforcement mechanisms are now impacted by these laws.

"PAY TRANSPARENCY" LAWS IN HALF OF ALL STATES

More than half of all states have enacted some form of salary history disclosure ban, which proponents believe will minimize pay disparity across racial and gender lines. Where active, the scope and application of these bans differ from state to state or in cities that have enacted local ordinances. For example, these laws apply depending on factors such as the size of the employer, whether the employer is governmental, or whether the request for information is made post-offer.

Delaware, Oregon and Pennsylvania were among the first states to enact some form of pay history disclosure ban. Pennsylvania's law, for example, only applies to governmental agencies, while Oregon's law is only triggered after a job offer is made. Alabama passed a law effective in 2019, applying statewide, that says job applicants are not required to disclose their previous salary if asked and that they cannot be retaliated against for such a refusal. Other states, such as California and Colorado, have statewide laws that prohibit an employer from ever seeking a pay history of a job applicant. Still, other states, like Maine and Oregon, prohibit salary history disclosures but permit it after a job offer has been made.

An expansion of pay transparency laws now includes requiring employers to provide pay scale information to would-be applicants for openings or promotions within a company. A "pay scale" is defined by at least one state as the salary or hourly wage range that the employer reasonably expects to pay for the position. Such laws are far less common than salary history dis-

closure bans. California's pay scale law became effective in 2023 and requires larger employers to provide a salary range in all job postings. California's law also requires covered employers to provide current employees with a pay scale for their position if requested.

Starting in September 2023, certain New York state employers will have pay transparency obligations related to job advertisements and promotions. The state followed the lead of New York City and other municipalities that had already passed their own salary transparency measures.

With many companies now offering remote jobs throughout the nation, employers will be required to monitor compliance nationwide. In the case of California, these rules apply to third parties that are "engaged" to list job openings.

Most of these pay transparency laws provide for a private enforcement mechanism or other penalties for non-compliance. This leads to potential claims of violations that could be brought by a person merely browsing company career webpages. Interestingly, pay scale information could also be used to view otherwise confidential financial data of competitors or vice versa. Candidates might also peruse such information to leverage their own compensation negotiations.

MINIMUM WAGES VARY BY JURISDICTION

The federal minimum wage for covered nonexempt employees has held firm at \$7.25 per hour since July 2009. Of course, numerous states and municipalities have increased the minimum wage to sometimes double that figure depending on the locality and/or size of the employer. In some scenarios, the hourly minimum wage affects the salary exemption that may apply to exempt workers, which is two times the hourly rate per workweek.

In addition to state legislatures passing minimum wage laws, so are city councils; about a dozen states have cities and other municipalities that have passed local ordinances to raise the minimum wage beyond state requirements. California has around 30 cities with unique minimum wage ordinances, which in some cases also include enhanced paid sick leave laws. More than a dozen states have minimum wages greater than or equal to \$12.50 per hour. Washington D.C. clocks in with one of the highest minimum wages of \$16.10 per hour, with annual adjustments made mid-year. Numerous jurisdictions are closely eyeing increases in the cost of living or inflation figures to make future automatic increases.

OTHER UNIQUE EMPLOYMENT LAWS AFOOT

New York City passed its Automated Employment Decision Tools Law, which has had its implementation delayed until later this year. The term "automated employment decision tool" means any "computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence" that issues "a score, classification, or recommendation" used to "assist or replace discretionary decision making for making employment decisions." Use of such technology, such as artificial intelligence ("AI") tools, in employment decisions will be subject to disclosure and bias audits.

Down the East Coast, Miami Beach passed an anti-discrimination ordinance protecting the wearing of hairstyles commonly associated with race and national origin. Nearly a dozen states already have similar CROWN (Create a Respectful and Open Workplace for Natural Hair) laws.

This year, New York and California were among the states expanding the list of persons covered by certain family leave laws. California now adds "designated persons" to the list of family members covered by its FMLA-state counterpart leave rules. New York added siblings to the definition of family member under its leave laws.

What do these patchwork employment laws mean to businesses operating in multiple states? It means that having competent human resource professionals and expert legal counsel in place has never been more important. Since many of these new laws create private right of actions for enforcement, managing risk in labor practices will be heightened. Even frontline managers may need to be trained to issue spot relevant rights triggered by employee requests. Last, in jurisdictions with active legislatures, business and HR professionals may also need to monitor pending legislature bills in order to proactively plan for policy changes and training.



Nadia Bermudez is an employment and business litigation attorney with [Klinedinst PC](#) in San Diego, California. Bermudez assists clients navigate an increasingly complex business environment. She was named a Top 25 San Diego Woman Super Lawyer for 2019-2023. She is a sought-after trainer who also conducts workplace investigations. Bermudez graduated from Stanford Law School in 2001.