



- SPECIAL REPORT -

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July Is the New January: Beware of Employment Regulations About to Take Effect

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As we close out the first half of the year, July ushers in numerous changes in labor and employment law. Notably, many statutes and administrative regulations across the country become operative in July. Before the fireworks start, this article highlights some of the more notable state developments that are about to take effect.

Arizona

Franchisors. Arizona has enacted a law explaining that, for purposes of the state's labor and employment laws, a franchisor is not an employer or co-employer of either a franchisee or an employee of the franchisee, unless the franchisor agrees, in writing, to assume that role. This law, effective July 6, also provides that the owner of a trademark or service mark is not an employer or co-employer of a licensee. Similar laws clarifying the franchisor-franchisee relationship take effect in July in two other states (South Dakota and Wyoming).¹

Paid Sick Leave. Under the Fair Wages and Healthy Families Act, beginning July 1, Arizona workers will accrue, and have the legal right to use, a minimum amount of paid sick time each year. Employees earn paid leave at a rate of one hour for every 30 hours worked, up to certain caps that are based on the size of the employer. Employees may use paid sick time as it is accrued, for their own injuries or illnesses, to care for a family member, or in other situations (e.g., for absences due to domestic violence, abuse, or stalking).²

Arkansas

Social Media. Effective July 31, Arkansas's social media statute will permit employers to ask, suggest, or cause employees or applicants to add other employees, supervisors, or administrators of the employer to contact lists in social media accounts. Employers still will be prohibited from *requiring* an individual to grant employer access to a social media account.

California

Criminal History. The California Fair Employment and Housing Council has promulgated regulations detailing when an employer may face liability for using an applicant's or employee's criminal history in hiring and other employment decisions.³ California already bars employers from considering or seeking information about certain types of criminal records, e.g., an arrest that did not result in a conviction. Effective July 1, the new regulations will prohibit an employer's reliance on any non-felony conviction for possession of marijuana that is older than two years. Additionally, they impose a new notice requirement on employers before taking any adverse action against a candidate or employee based on conviction history.

The regulations also prohibit employers from considering criminal history in employment decisions if doing so will result in an adverse impact on individuals within a protected class. The regulations set forth how such claims may be analyzed, proved, and defended.⁴

Notice Requirements. Certain employers must comply with new workplace notice requirements in California as of July 1. First, based on a package of bills enacted last year to ensure the welfare of nail salon workers, the owners of licensed nail salons must post notice informing employees of their rights and the applicable wage and hour laws. The Department of Labor Standards Enforcement has issued a model notice, which covers various topics, including distribution of tips, and is available in English, Spanish, Vietnamese, and Korean.⁵

Second, employers with 25 or more employees must inform each new employee upon hire (and other employees upon request), in writing, that California offers certain rights and protections to victims of domestic violence, sexual assault, or stalking. Employers may not discriminate against such employees, for example, and must provide them with reasonable accommodations, including leave for specified purposes. A model notice is now available in English and Spanish.⁶

Transgender Regulations. Comprehensive regulations take effect in California on July 1 concerning the rights of transgender employees in the workplace.⁷ The Department of Fair Employment and Housing has amended its sex discrimination regulations to include,

among other things, expanded definitions. The new regulations define "transitioning" and update the term "sex stereotype" to include assumptions about "gender roles, gender expression, or gender identity."

More substantively, the regulations provide guidance for employers on how to resolve certain situations associated with transgender employees. For example, California employers must grant employees access to the restroom that corresponds with their gender identity or expression, without proof of any medical procedure or similar documentation. Employers with single-occupancy facilities must use gender-neutral signage. Employers must take feasible measures as needed to ensure the privacy of all employees, such as staggered schedules for showering. The new regulations also preclude employers from requiring employees to dress in a manner that is inconsistent with their gender identity or expression, absent business necessity.

The regulations legally obligate employers to respect the names, genders, and pronouns preferred by employees for identification purposes. Moreover, employers may not require individuals to provide documentation of sex, gender, gender identity, or gender expression as a condition of employment. Finally, the regulations make clear that discrimination against an individual who is transitioning, has transitioned, or is perceived to be transitioning is unlawful.

District of Columbia

Minimum Wage Increase. The minimum wage rate for Washington, D.C. goes up on July 1, to \$12.50 per hour.

Florida

Civil Air Patrol Protections. As of July 1, Florida law requires employers with 15 or more employees to provide up to 15 days of unpaid leave to eligible members of the state wing of the Civil Air Patrol, which is an auxiliary of the U.S. Air Force. The statute also generally entitles returning employees to job reinstatement, with seniority and benefits, and prohibits retaliation against employees who take leave.

Georgia

Kin Care. Georgia enacted a "kin care" law, effective July 1. The statute requires an employer that provides sick

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leave for its employees to permit employees to use their sick leave for the care of an immediate family member (including grandparents, grandchildren, or any person identified as a dependent on the employee's most recent tax return). Covered employers are those with 25 or more employees, though exceptions apply. The new law does not require an employer to offer a sick leave policy, or to allow an employee to use more than five days of earned sick leave per calendar year for kin care purposes. The law is scheduled to sunset in 2020 unless extended by the legislature.

Preemption. Georgia has expanded the scope of its state preemption law, which prohibits localities from enacting employment laws that require employers to provide greater benefits to employees than those required under federal or state law. The state now specifically bans local governments from enacting ordinances that mandate additional pay based on employee schedule changes.

Indiana

Criminal History. Like Georgia, Indiana has expanded the coverage of its state preemption law. The amendment, effective July 1, provides that no political subdivision may prohibit an employer from obtaining, inquiring about, or using criminal history information during the hiring process. Under the law, municipalities cannot bar employers from inquiring about criminal history at the time of initial employment or requiring the candidate to disclose such information.

This new law also states that evidence of an employer's knowledge of an employee's (or former employee's) criminal history may not be used as evidence in a civil action against the employer under certain circumstances, as set forth in the statute.

Iowa

Distracted Driving. As of July 1, it is illegal in Iowa to use a handheld electronic communication device (*i.e.*, a cell phone or gaming device) to write, read, or send an electronic message, including texts or social media posts. Violation of these enhanced distracted driving provisions is also now a "primary offense" under state law, enabling officers to pull over and ticket drivers engaging in such conduct.

Drug Testing. Iowa has amended its drug-testing law to expressly permit the testing of hair samples, for prospective employees only. The statute also now includes collection and privacy procedures for hair sample testing.

Maryland

Minimum Wage Increase. The statewide minimum wage rate will increase to \$9.25 on July 1.

Montana

Criminal History. Montana has enacted a law that will protect private employers that employ individuals with criminal records. As of July 1, an employer will not be liable for negligent hiring or negligent employment for acts committed by an employee with a criminal record, should the employee act outside the scope of employment. This safe harbor applies only under certain circumstances, as set forth in the statute.

Nevada

Lactation Accommodation. Nevada enacted a law earlier this year to provide protections to breastfeeding employees with children under one year of age. As of July 1, all employers must provide reasonable unpaid break time for covered employees to express breast milk as needed. With certain exceptions, an employer also must provide a place to express milk, other than a bathroom, that is reasonably free from dirt or pollution, protected from the view of others, and free from intrusion. Retaliation is also prohibited.

National Guard Protections. Nevada expanded the protections previously offered to employees belonging to the state National Guard. Beginning on July 1, the leave and reemployment rights applicable to Nevada National Guard members also extend to members of the National Guard of any state.

Minimum Wage Increase. Although increases to the Nevada minimum wage and daily overtime rates take effect on July 1 when authorized, the Office of Labor Commissioner did not implement an increase for 2017.

New Hampshire

Wage Payment. New Hampshire's wage payment law had required employers to pay employees within eight days

following the week in which the work was performed. By amendment effective July 11, however, the state has extended that time period, requiring employers to pay all wages due to employees at regular intervals not to exceed 14 days. The law still permits the state labor commissioner, upon an employer's written petition showing "good and sufficient reason," to permit payment of wages less frequently, but at least once each calendar month.

New York

Paid Family Leave Benefits. Last year, New York enacted the New York Paid Family Leave Benefits Law (PFLBL). Benefits under the PFLBL will be financed by deductions from employee pay and will provide paid benefits for a leave period not covered by workers' compensation benefits, state disability benefits, or private disability insurance. On July 1, employers may begin collecting the weekly employee contribution for paid family leave—although employees may not start using this leave until January 1, 2018.⁸

New Mexico

National Guard Protections. As in Nevada, New Mexico is expanding the protections presently offered to employees belonging to the state National Guard. Effective July 1, the leave and reemployment rights applicable to Nevada National Guard and U.S. military servicemembers also extend to members of the National Guard of any state.

Oregon

Minimum Wage Increase. Generally speaking, Oregon uses a three-tiered system to determine its minimum wage rates, which will increase significantly on July 1. The minimum wage will be \$10.25 (general), \$11.25 (urban), or \$10.00 (nonurban), depending on location of employer.

Retirement Savings Program. Oregon is in the process of establishing a state-sponsored payroll deduction retirement savings program, known as OregonSaves. The program requires employers that do not offer retirement plans to make payroll deductions from their workers' wages into the state program. OregonSaves begins rolling out on July 1, with a pilot group of employers. Thereafter, employers will enter OregonSaves in phases over the next

three years depending on the size of their workforce. Earlier this year, Oregon issued final rules governing the administration and enforcement of OregonSaves.⁹

Although President Trump recently signed a resolution (H.R.J. Res. 66)¹⁰ scuttling the U.S. Department of Labor's rule designed to help protect such state-sponsored programs from liability,¹¹ Oregon intends to proceed with OregonSaves.

South Dakota

Franchisors. South Dakota has updated its franchise law, effective July 1, to clarify simply that "a franchisee or an employee of a franchisee is not considered an employee of the franchisor."¹²

Vermont

Child Support. Vermont employers are obligated to withhold child support payments from employee wages based on a court order. Employers previously had two options for remitting payments based on an out-of-state court order. As of July 1, however, employers are required to make child support payments directly to the appropriate out-of-state agency.

Criminal History. Vermont has passed a law, effective July 1, that prohibits most employers from asking questions about criminal history on job applications. With a few exceptions, employers may not request criminal history information on an initial employee application form, and may inquire about an applicant's criminal history only during an interview or once the applicant has been deemed otherwise qualified for the position. Moreover, if a candidate with a criminal history is eligible for the job, the employer must give that individual the opportunity to explain that history, including any post-conviction rehabilitation.

Medical Marijuana. Beginning July 1, Vermont permits the use of medical marijuana for additional types of patients, including those suffering from post-traumatic stress disorder, Parkinson's disease, and Crohn's disease.

Virginia

Security Breach. Virginia expanded its data breach notification statute in response to the significant increase in W-2 phishing scams.¹³ By amendment effective July 1,

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Virginia becomes the first state to require employers and payroll service providers to notify the Commonwealth's attorney general if they discover "unauthorized access and acquisition of unencrypted and unredacted computerized data containing a taxpayer identification number in combination with the income tax withheld for that taxpayer."¹⁴ This notice duty is triggered if the employer reasonably believes that the breach has caused or will result in identity theft or fraud. It applies even if other breach notifications (e.g., as to customer information) are not warranted.

Washington

Distracted Driving. Washington updated its law banning the use of cell phones and related devices while driving. Among other things, the amendment includes broader definitions and provides penalties for driving dangerously distracted. Under the amendment, for example, "using" a personal electronic device includes: (1) holding it in either or both hands; (2) using a hand or finger to compose, send, browse, access or retrieve messages or other data; or (3) watching a video.

Pregnancy Accommodation. As of July 23, employers with 15 or more employees must provide reasonable accommodations for pregnant workers unless doing so would impose an undue hardship. The law also prohibits discrimination and retaliation against employees who request, decline, or use any such accommodation. "Reasonable accommodation" is defined to include, for example, more frequent restroom breaks, job restructuring, modified work schedules, seating, and assistance with manual labor.

Service Animals. Washington law prohibits interference with an individual's use of a guide dog or service animal. By amendment effective July 23, the statutory definitions of "guide dog" and "service animal" will also include animals that are currently in training to perform their assistive functions.

West Virginia

Criminal History. West Virginia has enacted a law using a couple of approaches to improve the employment prospects of individuals with certain criminal convictions. First, the new provision allows a person convicted of a qualifying nonviolent felony offense to seek a criminal

offense reduction by petition to the circuit court. If the petition is granted, the offense will be redesignated as a "reduced misdemeanor" and the individual need not disclose it when applying for jobs. Second, as of July 8, the statute grants employers limited civil immunity for hiring convicted felons and persons in reduced misdemeanor status. It disallows lawsuits brought against employers solely for employing a person with a nonviolent, nonsexual offense or a person who had a conviction reduced, and it limits the type of evidence that may be introduced in certain types of actions.

Drug & Alcohol Testing. July brings dramatic changes to West Virginia's law on employee drug testing.¹⁵ The West Virginia Safer Workplace Act explicitly overrules existing case law restricting drug and alcohol testing. This new statute permits employers to require mandatory testing, not only of applicants, but of current employees in a wide variety of circumstances as a condition of continued employment. Employers choosing to adopt a testing policy—or to continue with a current testing practice—must establish a written drug-testing policy that complies with detailed statutory requirements. The policy must be disclosed to all employees subject to testing, as well as prospective employees.

Health Benefit Exchange Repeal. In 2011, the West Virginia Health Benefit Exchange Act (WVHBEA) created a state health benefit exchange, which included a small business assistance program. The West Virginia legislature has repealed the WVHBEA, effective July 5.

Labor Disputes. The state has also amended eligibility provisions of its unemployment insurance statutes. The amendments clarify whether and when an employee can claim unemployment benefits in the context of a strike or lockout.

Medical Marijuana. Under the Medical Cannabis Act, West Virginia technically becomes the 29th state to permit the use of marijuana for medicinal purposes on July 6. That being said, the law will not be fully implemented until July 9, 2019, at which time the state will begin to issue the necessary identification cards to patients and caregivers. The law legalizes the use, possession, and distribution of marijuana to treat serious medical conditions, while also protecting employees from discrimination based on their certification for medical marijuana use. Employers will not

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be obligated to make any accommodations for the use of medical cannabis at the workplace.

Wyoming

Franchisors. Effective July 1, franchisors in Wyoming generally may not be considered employers of either a franchisee or a franchisee's employees. Under the new statute, franchisors may be deemed employers only if agreed to in writing by the franchisor and franchisee.

Service Animals. Wyoming has amended its statutes protecting individuals with disabilities who are accompanied by service or assistance animals. The amendment broadens the definitions of service animals (adopting the federal definition and including miniature horses) and assistance animals (including any animal that assists or emotionally supports an individual). It allows service animals into any place of public accommodation to the extent permitted by federal law and prohibits discrimination in housing because of assistance animals. The law also states that any public accommodation that grants access to a service animal will not be liable for any damage or injury caused by the animal. Finally, the law makes it a misdemeanor for an individual to seriously harm a service or assistance animal or, on the other hand, to intentionally misrepresent that an animal is a service or assistance animal in order to obtain privileges.

Don't Lose Track of Localities!

In addition to state legislatures, some municipalities have enacted labor and employment ordinances that also kick in during July. Top of mind are the paid sick leave ordinances taking effect on July 1 in Chicago¹⁶ and Cook County, Illinois,¹⁷ as well as in St. Paul¹⁸ and Minneapolis, Minnesota.¹⁹

On a related topic, employers with 35 employees or more will be covered by San Francisco's "baby bonding" law

as of July 1.²⁰ And on that date, the Los Angeles paid sick leave ordinance will apply to even the smallest employers.²¹ Los Angeles employers must also grapple with yet another new regulation, because employers that violate that city's ban-the-box law may be issued penalties or administrative fines beginning on July 1.²²

Meanwhile, Seattle's secure scheduling ordinance becomes effective on July 1.²³ Among other things, this new law mandates that large retail and food service employers provide two weeks' advance notice to employees of their schedules and compensate employees for alterations to their scheduled hours.

A similar law takes effect on July 1 for fast food and retail employers in Emeryville, California.²⁴ Covered employers will be required to offer additional work hours to current part-time employees before hiring new employees, and also will be required to provide two weeks' advance notice of work schedules.

As a final example, local minimum wage increases become operative on July 1 in: (1) Flagstaff, Arizona; (2) Chicago, Illinois; and (3) Montgomery County, Maryland. Numerous jurisdictions within California will also see hourly wage rates rise, including Emeryville, Los Angeles (city and unincorporated areas of the county), Malibu, Pasadena, San Jose, Santa Monica, and San Francisco (city and county).

In sum, there is a lot more going on this July than backyard barbeques! Employers should be mindful of all relevant upcoming developments in any jurisdiction where they maintain operations.

If you have questions about anything discussed in this article, please contact your Littler attorney.

1 These laws have been quite popular, with similar statutes taking effect this year in Alabama, Arkansas, Georgia, Kentucky, North Carolina, and North Dakota.

2 Neil Alexander & Lindsay Schafer, *New Arizona Law Provides Minimum Wage Increases and Paid Sick Time*, Littler Insight (Nov. 15, 2016), <https://www.littler.com/publication-press/publication/new-arizona-law-provides-minimum-wage-increases-and-paid-sick-time>.

3 Jennifer Mora, *California Employers Are Subject to New Requirements When Using Criminal History Information*, Littler Insight (Feb. 21, 2017), <https://www.littler.com/publication-press/publication/california-employers-are-subject-new-requirements-when-using-criminal>.

4 The new regulations are available at <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/FinalText-CriminalHistoryEmployDecRegulations.pdf>.

5 Cal. Lab. Code § 98.10. The model notice (Required Workplace Posting for All California Barbering and Cosmetology Licensees) is available at <https://www.dir.ca.gov/dlse/DLSE-Publications.htm>.

6 Cal. Lab. Code § 230.1. The model notice (Rights of Victims of Domestic Violence, Sexual Assault and Stalking) is also available at <https://www.dir.ca.gov/dlse/DLSE-Publications.htm>.

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- 7 The new regulations are available at <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/FinalTextRegTransgenderIdExpression.pdf>.
- 8 Stephen Fuchs et al., *New York Proposes Regulations on New Paid Family Leave Law*, Littler Insight (Mar. 20, 2017), <https://www.littler.com/publication-press/publication/new-york-proposes-regulations-new-paid-family-leave-law>; see also Stephen Fuchs & Bruce Millman, *Understanding New York's New Paid Family Leave Law*, Littler Insight (May 23, 2016), <https://www.littler.com/publication-press/publication/understanding-new-yorks-new-paid-family-leave-law>.
- 9 Cody Emily Schvaneveldt, *Oregon Board Adopts Final Rules to Implement Retirement Savings Program*, Littler Insight (May 4, 2017), <https://www.littler.com/publication-press/publication/oregon-board-adopts-final-rules-implement-retirement-savings-program>.
- 10 President Trump also signed House Joint Resolution 67 into law, which likewise disapproves the DOL rule concerning savings plans established by municipalities.
- 11 See, e.g., Nancy Ober & Sean Brown, *Mandatory Payroll Deduction Savings Programs Are on the Rise*, Littler Insight (Nov. 7, 2016), <https://www.littler.com/publication-press/publication/mandatory-payroll-deduction-savings-programs-are-rise> (discussing these types of programs and where they have been enacted, and summarizing the now-defunct DOL rule providing safe harbor).
- 12 S.B. 137, 2017 Legis. Sess. (S.D. 2017).
- 13 Philip L. Gordon & Joon Hwang, *Security Breach Notification Becomes More Complex for Employers*, Littler Insight (Apr. 24, 2017), <https://www.littler.com/publication-press/publication/security-breach-notification-becomes-more-complex-employers>.
- 14 Va. Code Ann. § 18.2-186.6(M).
- 15 Richard M. Wallace & J. Todd Bergstrom, *West Virginia Employers Soon to Enjoy Greater Flexibility in Drug Testing Employees, Despite Enactment of Nation's 29th Medical Marijuana Law*, Littler Insight (May 4, 2017), <https://www.littler.com/publication-press/publication/west-virginia-employers-soon-enjoy-greater-flexibility-drug-testing>.
- 16 Sarah J. Gorajski & Larry D. Robertson, *Chicago to Become the Second City in the Midwest to Mandate Paid Sick Leave in 2016*, Littler Insight (June 24, 2016), <https://www.littler.com/publication-press/publication/chicago-become-second-city-midwest-mandate-paid-sick-leave-2016>.
- 17 Larry D. Roberson & Stephanie L. Mills-Gallan, *Cook County, Illinois Sick Leave Rules Create Thorny Landscape for Employers*, Littler Insight (June 14, 2017), <https://www.littler.com/publication-press/publication/cook-county-illinois-sick-leave-rules-create-thorny-landscape>; Darren Mungerson & Stephanie L. Mills-Gallan, *Cook County, Illinois Publishes Final Rules for Sick Leave Ordinance: Employers, Are You Ready?*, Littler ASAP (June 7, 2017), <https://www.littler.com/publication-press/publication/cook-county-illinois-publishes-final-rules-sick-leave-ordinance>.
- 18 Sarah Gorajski, *Saint Paul Becomes the Second City in Minnesota to Mandate Paid Sick and Safe Time*, Littler Insight (Sept. 12, 2016), <https://www.littler.com/publication-press/publication/saint-paul-becomes-second-city-minnesota-mandate-paid-sick-and-safe>.
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- 21 L.A., CAL., MUN. CODE §§ 187.01 *et seq.*; see also Maria Harrington & Sebastian Chilco, *City of Los Angeles Updates Paid Sick Leave Rules and FAQs*, Littler ASAP (Mar. 27, 2017), <https://www.littler.com/publication-press/publication/city-los-angeles-updates-paid-sick-leave-rules-and-faqs>.
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- 24 Emeryville, Cal., Mun. Code §§ 5-39.01 *et seq.* For more information on the Emeryville ordinance, see <http://www.ci.emeryville.ca.us/1136/Fair-Workweek-Ordinance>.

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