

## New Laws for the New Year

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Now that we have said goodbye to 2020, many are wondering what 2021 will bring. For employers, a number of consequential changes to state law will go into effect in the new year. On the federal level, in what is starting to become a quadrennial custom, the presence of a new presidential administration is sure to bring both new federal regulations as well as a change in agencies' prioritization and enforcement of current regulations.

In order to assist employers in adapting to these changes, we have provided a list of certain changes in state law that will go into effect in 2021. This list is not exhaustive, but is intended to provide an overview of the new laws (or changes to existing laws) that we believe employers absolutely must have on their radars. We have also provided a forecast of the regulatory changes we believe may be upcoming from the new Biden administration. We have also identified several areas where we expect to see a change (in most cases an increase) in activity from the employment and labor related agencies.

### **State Law**

Although there were no major changes to Nebraska's employment laws in 2020, there are a number of substantial changes in several other states as highlighted below.

#### Generally Applicable State Laws

California AB 685 (eff. January 1, 2021). In the event an employee who has been working on-site tests positive for COVID-19, the employer is required to provide written notice to "all employees" who were at the worksite within the "infectious

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period.” The new law also includes certain additional reporting requirements to local health authorities in the event of a COVID-19 outbreak at an employer’s worksite.

California AB 1363 (eff. January 1, 2021). This new law expands the coverage of the California Family Rights Act (*e.g.*, the California equivalent of the Family Medical Leave Act) from employers with 50 or more employees within a 75 mile radius, to employers with 5 or more employees within a 75 mile radius.

Colorado SB19-085 (eff. January 1, 2021). Employers in Colorado cannot request an applicant’s salary history. Furthermore, the new law imposes fairly substantial internal and external posting and notice requirements for employers in connection with promotional decisions and job openings.

Colorado SB20-205 (eff. January 1, 2021). As of January 1, 2021, this act requires Colorado employers with 16 or more employees to provide paid sick leave to their employees, accrued at one hour of paid sick leave for every 30 hours worked, up to a maximum of 48 hours per year. Effective January 1, 2022, the requirement will apply to all employers, regardless of the number of employees.

Please note that there are a number of states, cities, and counties that have adopted paid sick leave requirements recently and the list above is not exhaustive. Multi-state employers should conduct a comprehensive review of applicable state laws before preparing and implementing paid sick leave policies.

### Minimum Wage Laws

On November 3, 2020, voters in Florida approved a ballot measure establishing a \$10.00 per hour minimum wage, which will go into effect on September 30, 2021. Under the ballot measure, the minimum wage will increase \$1.00 per hour each year on September 30 until it reaches \$15.00 per hour on September 30, 2026.

Many other states and localities have an increased minimum wage that will go into effect in 2021 by varying amounts, from 8¢ to \$1.50 per hour.

- Alaska - 15¢ to \$10.34
- Missouri - 85¢ to \$10.30
- Arizona - 15¢ to \$12.15
- Montana - 10¢ to \$8.75

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- Arkansas - \$1.00 to \$11.00
- New Jersey - \$1.00 to \$12.00
- California - \$1.00 to \$14.00
- New Mexico - \$1.50 to \$10.50
- Colorado - 32¢ to \$12.32
- Nevada - 75¢ to \$9.75 (7/1/21)
- Connecticut - \$1.00 to \$13.00 (8/1/21)
- New York - 70¢ to \$12.50
- Florida - \$1.45 to \$10.00 (9/30/21)
- Ohio - 10¢ to \$8.80
- Illinois - \$1.00 to \$11.00
- Oregon - 75¢ to \$12.75 (7/1/21)
- Maine - 15¢ to \$12.15
- South Dakota - 15¢ to \$9.45
- Maryland - 75¢ to \$11.75
- Vermont - 79¢ to \$11.75
- Massachusetts - 75¢ to \$13.50
- Washington - 19¢ to \$13.69
- Minnesota - 8¢ to \$10.08

### Marijuana

On November 3, 2020, the voters of Arizona, Montana, New Jersey and South Dakota all approved measures legalizing marijuana for either medicinal or recreational purposes. The effective date of these laws vary by state. Under the measure enacted in South Dakota, medical marijuana used in accordance with the measure must be treated as any other prescribed

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“pharmaceutical medication, as it pertains to: (1) Any interaction with a person’s employer; [or] (2) Drug testing by a person’s employer . . .”<sup>[i]</sup> There are no clear employment protections in any of the other recently adopted ballot measures.

### **Federal Regulations and Agency Activity**

In addition to the changes that may come with the stimulus package being negotiated in Congress, employers can expect a healthy dose of developments on the regulatory front with a new administration in the White House. Provided below is a brief summary of several areas where employers are most likely to see a change in regulations and agency enforcement.

#### OSHA

On the second day on the job, President Biden signed an Executive Order directing the Occupational Safety and Health Administration (“OSHA”) to take a number of actions related to improving workplace safety during the COVID-19 pandemic, including to consider whether a temporary emergency standard related to COVID-19 is necessary. The creation of a temporary emergency standard for COVID-19 would almost certainly lead to an increase in OSHA investigations and citations related to COVID-19.

This directive is not surprising given the signs President Biden provided during the campaign and the transition period. For example, President Biden has previously called for “[d]ouble the number of OSHA investigators to enforce the law and existing standards and guidelines.”<sup>[ii]</sup> President Biden has also “call[ed] for the enforcement of more stringent worker safety standards”<sup>[iii]</sup> more generally.

#### NLRB and Union Matters

The nomination of Marty Walsh, a former president of Laborers’ Union Local 223, to Secretary of Labor, provides a strong signal of the pro-union shift to come at the Department of Labor. This shift will be felt most keenly at the National Labor Relations Board (the “NLRB”), which is responsible for enforcing the National Labor Relations Act and other U.S. labor laws, including hearing and deciding numerous unfair labor practice disputes. Employers should expect a return to the pro-union decisions from the NLRB that were common during the Obama Administration.

Independent from the expected changes at the NLRB, President Biden has publicly stated his support for a piece of legislation titled the Protecting the Right to Organize Act (commonly referred to as the “PRO Act”), which was passed by the House of Representatives last year. The PRO Act has been described as “a union wish-list of legislative changes ....”<sup>[iv]</sup> Although the Act is unlikely to be approved by the Senate, to the extent any portion of the PRO Act can be implemented through regulation, it would likely constitute a significant change in U.S. labor law.

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### EEO

In an Executive Order issued on January 20, 2021, President Biden directed all federal agencies to review all orders, regulations, guidance documents, or other agency actions promulgated or administered under Title VII or other laws or regulations that prohibit sex discrimination. If any of these agency actions are found to be inconsistent with prohibiting discrimination on the basis of gender identity or sexual orientation, the agency heads are directed to take appropriate steps to revise, suspend, or rescind such actions, or promulgate new agency actions, to prevent discrimination on the basis of gender identity or sexual orientation.

In its decision *Bostock v. Clayton County*, the Supreme Court resolved a split amongst lower federal courts, stating clearly that Title VII prohibits discrimination on the basis of gender identity or sexual orientation. In its January 20, 2021 Executive Order, the Biden Administration has indicated that it will take a more aggressive approach in implementing Title VII's prohibition on gender identity and sexual orientation discrimination.

### Wage and Hour

President Biden has expressed a strong desire to increase the federal minimum wage to \$15.00 per hour. In fact, President Biden included the \$15.00 minimum wage in his initial stimulus proposal; however, in a recent interview, the President indicated that the minimum wage increase would have to be carved out of the stimulus bill. It is likely that a separate piece of legislation with a \$15.00 federal minimum wage will be introduced sometime this Spring.

On January 29, 2021, the Biden Administration withdrew two (2) opinion letters that were issued in the final days of the Trump Administration. The opinion letters related to the Trump Administration's final rule related to independent contractor classification. Although the withdrawal of opinion letters does not, by itself, have a significant impact on employers, the decision to withdraw the opinion letters is perhaps the strongest signal yet that the Biden Administration intends to reconsider the Trump Administration's final rule regarding independent contractors.

Employers should also be prepared for other regulatory changes in the wage and hour arena. For example, employers should not be surprised if the Department of Labor promulgates a regulation to increase the salary basis threshold for White Collar employees, in a throwback to the final days of the Obama Administration.

Ultimately, employers should buckle up and prepare for changes on both the state and federal levels. For questions related to compliance with existing or anticipated employment laws, please contact a member of the Koley Jessen Employment, Labor and Benefits Practice Group.

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[i] [https://sdsos.gov/elections-voting/assets/2020IM\\_Legalize\\_Marijuana\\_Medical\\_Use\\_AG\\_Statement.pdf](https://sdsos.gov/elections-voting/assets/2020IM_Legalize_Marijuana_Medical_Use_AG_Statement.pdf)

[ii] <https://joebiden.com/joe-bidens-4-point-plan-for-our-essential-workers/>

[iii] <https://news.bloomberglaw.com/daily-labor-report/biden-calls-for-tougher-osha-covid-19-enforcement-signs-order?context=article-related>

[iv] <https://news.bloomberglaw.com/daily-labor-report/house-vote-on-union-backed-bill-sets-up-test-for-2020-elections>