

2021 US Labor & Employment Webinar Week
Insights and Compliance Strategies for a New World

February 1 – 4, 2021



The Total Legal Landscape: A Plenary Overview of Federal & State Legislative Developments & Trends

February 4, 2021

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Wage & Hour Updates



FLSA Salary Basis

It went up.

U.S. DOL increased salary basis requirement for “white collar” exemptions to \$684/week (\$35,568/year) from \$455/week (\$23,660/year), effective January 1, 2020.

- Must generally be predetermined, fixed, and non-fluctuating.
- Up to 10% may be satisfied with nondiscretionary bonuses, incentives, and commissions that are paid annually.

Highly-compensated-employee exemption’s salary requirement increased to \$107,432/year from \$100,000/year.

Minimum Wage for Federal Government Contractors

Re-evaluated annually based on inflation.

On or after
January 1, 2015

EO 13658 established minimum wage for employees of covered federal contractors.

Effective
January 1, 2015

Minimum wage originally \$10.10/hour.

Effective
January 1, 2019

Increased to \$10.60/hour (\$7.40/hour for tipped employees).

Effective
January 1, 2020

Increased to \$10.80/hour (\$7.55/hour for tipped employees).

Effective
January 1, 2021

Increased to \$10.95/hour (\$7.65/hour for tipped employees).

Independent Contractor Classification: FLSA

What's the big deal?

Independent contractors are not subject to FLSA's minimum wage and overtime requirements.

Employees are subject to FLSA's minimum wage and overtime requirements, subject to exemptions.

Independent Contractor Classification: FLSA (Cont.)

On January 7, 2021, U.S. Department of Labor established the “economic reality” test.

Before the rule took effect, the **Biden Administration halted it**. While it is unclear what will happen, President Biden has voiced support for expanding California’s ABC test nationwide.

Under the ABC test, a worker is an employee unless **all three** of these conditions are met:

1. The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
2. The worker performs work that is outside the usual course of the hiring entity’s business.
3. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.



Joint Employers

Whose employee is it anyway?

Joint Employers Under the Fair Labor Standards Act (FLSA)

On January 12, 2020, the U.S. Department of Labor established a four-part balancing test to determine joint-employer status. Evaluates whether the potential employer:

- hires or fires the employee;
- supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
- determines the employee's rate and method of payment; and
- maintains the employee's employment records.

SDNY struck down the rule as to vertical joint employers in *State of New York v. Scalia*, No. 1:20-cv-1689-GHW (Sept. 8, 2020).

- Appeal pending before the Second Circuit.

What will the Biden Administration do?

Joint Employers Under the National Labor Relations Act (NLRA)

On February 26, 2020, the National Labor Relations Board (NLRB) established a standard to determine joint-employer status.

- An entity must possess and exercise substantial direct and immediate control over at least one essential term and condition of employment of another employer's employee.
- Essential terms and conditions: wages, benefits, hours of work, hiring, termination, discipline, supervision, and direction.
- Substantial direct control involves “a regular or continuous consequential effect,” as contrasted with control that is merely “sporadic, isolated, or de minimis.”



COVID-19

2019 Never Ends

COVID 19

Extension of FFCRA Tax Credits

The mandate is gone, but the incentives remain.

- Families First Coronavirus Response Act (“FFCRA”) required certain employers to provide emergency paid sick leave and partially paid emergency family leave for specified reasons related to COVID-19.
- FFCRA provided private employers with dollar-for-dollar offset from payroll taxes for wages paid to employees taking paid leave required under FFCRA.
- Paid leave requirements expired on December 31, 2020.
- Most recent stimulus relief package extended payroll tax credit through March 31, 2021, but did not extend the paid leave requirements.
- If employers choose to continue providing FFCRA leave through March 31, 2021, they may still claim the FFCRA payroll tax credit.



Expansion of Paycheck Protection Program (PPP) Loans

- Under the CARES Act, PPP loans could previously be used for payroll expenses, covered utilities, and covered rent.
- The Consolidated Appropriations Act 2021 (CAA) makes several changes to the PPP, including but not limited to:
 - Allowing PPP loans to be used for these additional purposes:
 - covered operations expenditures;
 - covered property damage costs;
 - covered supplier costs; and
 - covered worker protection expenditures.
 - Allowing borrowers to select a covered period of 8-24 weeks after loan origination.

Expansion of Employee Retention Tax Credit

The CAA also extends the employee retention tax credit through June 30, 2021.

Employee retention credit = 70% of qualified wages paid January 1–June 30, 2021.

A maximum of \$10,000 in qualified wages per employee per calendar quarter may be counted.

Qualified wages accounted for in calculating the employee retention credit may not also be counted as payroll costs under the PPP.



Pending Federal Legislation

Pregnant Worker Accommodations

There is bipartisan congressional support for mandating pregnancy accommodations in employment.

In September 2020, the U.S. House of Representatives voted 329-73 to pass the Pregnant Workers Fairness Act.

The Act would require employers to provide reasonable accommodations to workers who experience limitations related to pregnancy, childbirth, or related medical conditions.

Would apply to employers with 15+ employees.

Exception where accommodations would cause undue hardship.

Uses the “interactive process,” similar to the Americans with Disabilities Act.

More than half of the states have their own pregnancy accommodation laws.

Protect the Right to Organize Act (PRO Act)

Passed by the U.S. House of Representatives on February 6, 2020.

If enacted, the PRO Act would fundamentally alter federal labor law by making the following changes, among others:

- Codify NLRB precedent such as the *Browning-Ferris Industries* joint-employer rule, *Specialty Healthcare* standard for bargaining units, and *Purple Communications* rule permitting workplace email access for purposes of union organizing.
- Adopt California's ABC test for independent contractor classification nationwide.
- Ban so-called "right-to-work" laws.
- Establish new penalties for violations of labor laws.
- Supersede *Epic Systems Corp. v. Lewis*, which held that arbitration agreements requiring individual arbitration are enforceable under the Federal Arbitration Act.

Raise the Wage Act

Passed by the U.S. House of Representatives on July 18, 2019.



If enacted, the Raise the Wage Act would:

- Raise the federal minimum wage to \$15 by 2025.
- Index future increases in the federal minimum wage to median wage growth.
- Phase out the subminimum wage for tipped workers.
- Phase out the subminimum wage for youth workers.
- End subminimum wage certificates for workers with disabilities.



State & Local Trends

Ban-the-Box Laws

States & localities are restricting pre-employment criminal background checks and inquiries.

- Numerous states and local jurisdictions have enacted ban-the-box laws.
- In 2020-2021, ban-the-box laws were passed or took effect, in whole or in part, in several jurisdictions:
 - **California:** Applies to employers with 5+ employees. Department of Fair Employment and Housing (“DFEH”) recently expanded the scope of the state’s Fair Chance Act and voiced its intent to enforce the law.
 - **Colorado:** Currently applies to employers with 11+ employees. Will apply to employers of all sizes effective September 1, 2021.
 - **Hawaii:** Applies to employers of all sizes.



Ban-the-Box Laws (Cont.)

States & localities are restricting pre-employment criminal background checks and inquiries.



- **Maryland:** Applies to employers with 15+ employees in the state.
 - **Montgomery County, MD:** Applies to employers of all sizes (effective February 19, 2021).
- **St. Louis, MO:** Applies to employers with 10+ employees within the city.
- **Suffolk County, NY:** Applies to employers with 15+ employees in the county.
- **Virginia:** Applies to state agencies, state and local governments, and educational institutions.
- **Waterloo, IA:** Applies in part to employers of all sizes, with certain restrictions applicable to employers with 15+ employees.

Salary History Bans & Pay Equity Laws

States and localities are aiming to eliminate the gender pay gap.

These laws take many forms. For example, they may:

- prohibit requesting/relying on an applicant's salary history in hiring/setting compensation; or
- require employers to provide a wage range for a position upon request or in job postings.

Salary history bans/equal pay laws were passed or amended or took effect in several states and local jurisdictions in 2020-2021:

Colorado

Maryland

New Jersey

New York

Ohio: Cincinnati & Toledo

Oregon

Expanding State Human Rights Laws

State laws are covering more employers and prohibiting additional forms of discrimination.

Covering more employers:

New York: Effective February 8, 2020, all employers are covered, regardless of size.

Oregon: Effective October 1, 2020, every employer must implement a detailed workplace discrimination and harassment policy.

Protecting more employees:

More states and localities are prohibiting hair discrimination as a form of race discrimination:

- Colorado (effective September 14, 2020)
- Maryland (effective October 1, 2020)
- Toledo, OH (effective January 10, 2020)
- Virginia (effective July 1, 2020)
- Washington (effective June 11, 2020)

Expanding State Human Rights Laws: Statutes of Limitations

Some states are extending the statute of limitations for employment discrimination claims.

- **California:** Effective January 1, 2021, employees have 1 year (increased from 6 months) to file claims for discrimination, in violation of any law under the Labor Commissioner's jurisdiction, with the Division of Labor Standards Enforcement.
- **New York:** As of August 12, 2020, employees have 3 years to file complaints of sexual harassment in employment with the New York State Division of Human Rights.
- **Oregon:** As of September 29, 2019, employees have 5 years (increased from 1 year) to file harassment claims.

» *But see* **Ohio:** Effective April 15, 2021, employees will have 2 years (down from 6 years generally) to file claims for employment discrimination with the Ohio Civil Rights Commission.



Curtailing Non-Disclosures

More states are limiting employers' use of agreements that, e.g., condition employment, continued employment, promotion, compensation, or the receipt of benefits on an employee's agreement not to disclose prohibited conduct.

States that restrict such contractual terms, in varying ways, include:

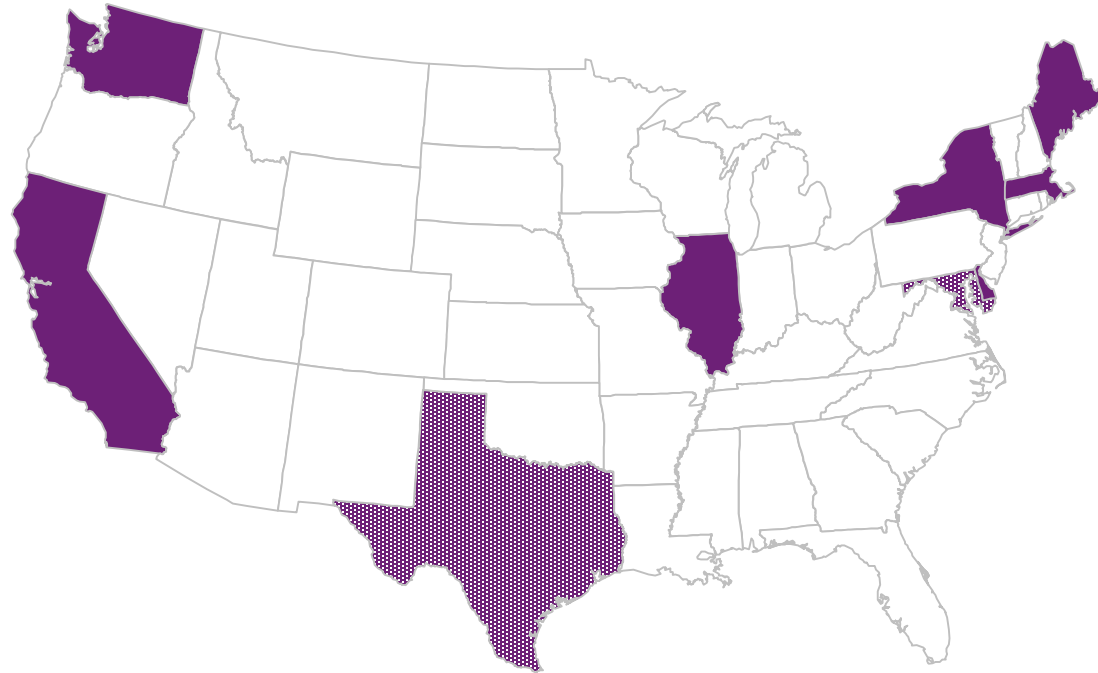
- Arizona
- California
- Hawaii
- Illinois
- Nevada
- New Jersey
- New Mexico
- New York
- Oregon
- Tennessee
- Vermont
- Virginia
- Washington



Expanding Required Anti-harassment Training

States are increasingly requiring employers to provide workplace harassment-prevention training.

States that **require**
anti-harassment
training

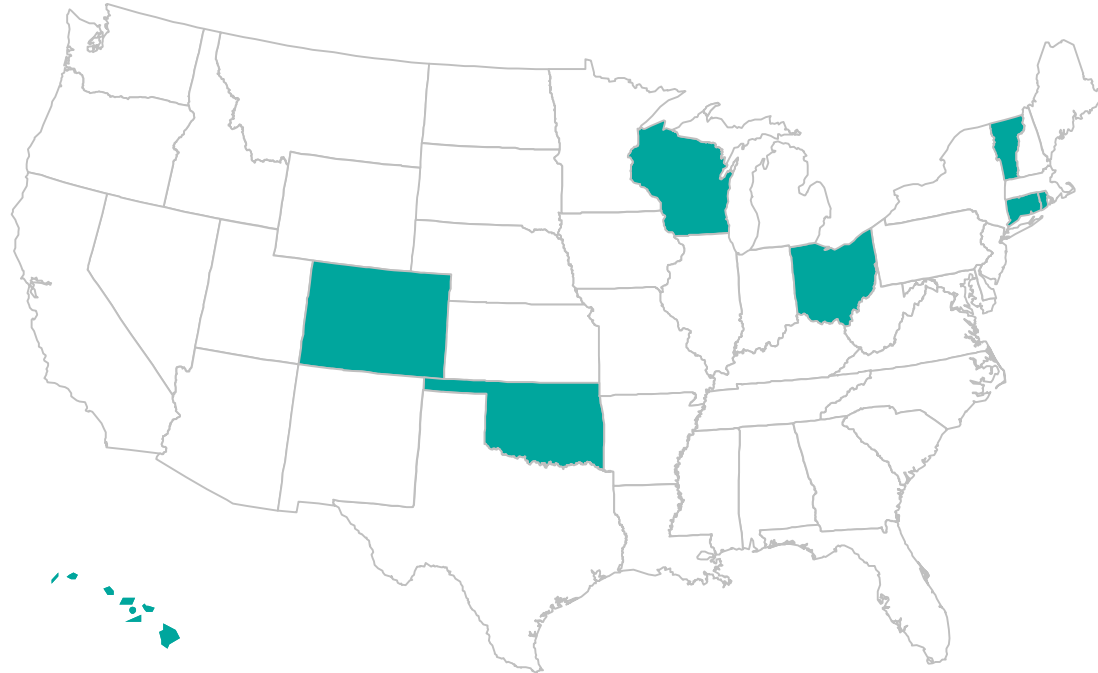


- **California** (now requires training to include harassment based on sexual orientation or gender identity or expression)
- **Connecticut**
- **Delaware**
- **Illinois**
- **Maine**
- **Maryland** (state government only)
- **New York**
- **Texas** (state government only)
- **Washington**

Expanding Required Anti-harassment Training (Cont.)

States are increasingly requiring employers to provide workplace harassment-prevention training.

States that simply **encourage** anti-harassment training



- Colorado
- Hawaii
- Massachusetts
- Ohio
- Oklahoma
- Rhode Island
- Vermont
- Wisconsin

Emergency Paid Sick Leave

Several states and localities are requiring leave for reasons related to public health emergencies.

Some states (and certain localities) recently passed or expanded their paid sick leave laws. Some of the new or expanded PSL laws are permanent and are triggered by public health emergencies, while others are tied to the current COVID-19 public health emergency.

Colorado

New Jersey

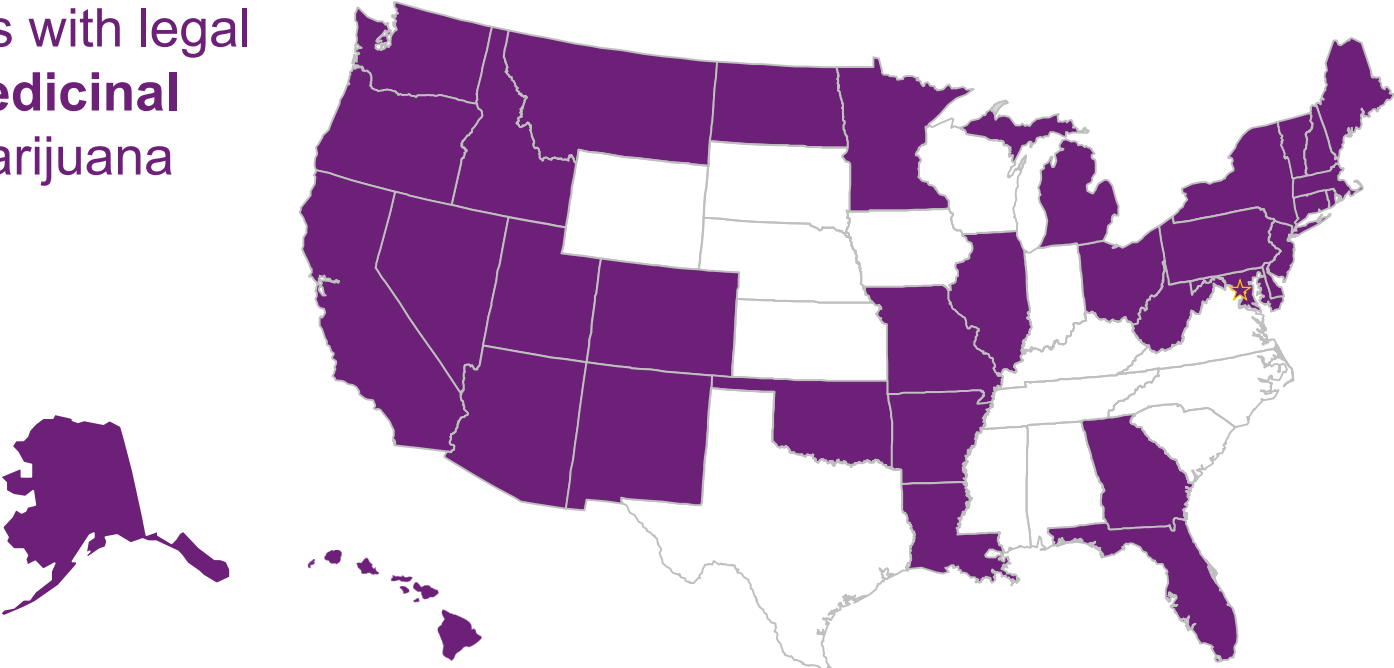
Oregon

Washington DC

Legalized Cannabis

Marijuana by any other name...

States with legal medicinal marijuana



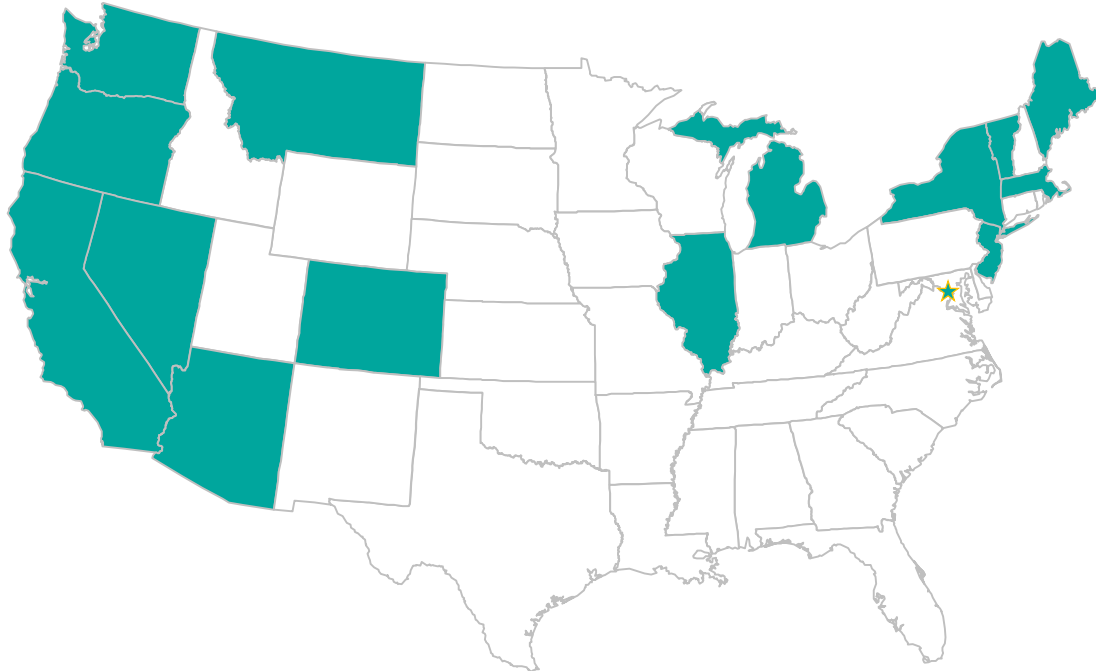
- Alaska
- Arizona
- Arkansas
- California
- Colorado
- Connecticut
- Delaware
- Florida
- Georgia
- Hawaii
- Illinois
- Louisiana
- Maine
- Maryland
- Massachusetts
- Michigan
- Minnesota
- Missouri
- Montana
- Nevada
- New Hampshire
- New Jersey
- New Mexico
- New York
- North Dakota
- Ohio
- Oklahoma
- Oregon
- Pennsylvania
- Rhode Island
- Utah, Vermont
- Washington
- West Virginia
- and Washington DC

Coming soon to: Mississippi (8/15/2021) and South Dakota (by 11/18/2021).

Legalized Cannabis (Cont.)

Marijuana by any other name...

States that have legalized or decriminalized recreational marijuana



- Alaska
- Arizona
- California
- Colorado
- Illinois
- Maine
- Massachusetts
- Michigan
- Montana (effective 1/1/2021)
- Nevada
- New Jersey (effective 1/1/2021)
- New York
- Oregon
- Vermont
- Washington and Washington DC

Coming soon to: South Dakota (7/1/2021)

Questions? Please let us know.



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