

FYI[®] Roundup

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Labor and Employment Developments – 2018 in Review

This *FYI Roundup* recaps workplace issues that were front and center during 2018. The patchwork of state and local leave laws continued to grow. Momentum to decriminalize and legalize marijuana continued to build. State and local minimum wage rates continued to rise as employer pay practices faced increased scrutiny. Attention on workplace sexual harassment ramped up. California adopted a new standard for determining employee status, while the NLRB looked to change its joint employer standard. Employers saw new guidance on workplace policies and handbooks. The DOL formally rescinded the Obama-era persuader rule. The Supreme Court altered the legal landscape, upholding employment arbitration agreements with class waivers and striking down mandatory public union fees. All in all, another busy year.

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Ever-growing patchwork of state and local leave laws

Employers faced new obligations as states mandated paid sick leave benefits in Rhode Island and New Jersey, and paid family and medical leave benefits in Massachusetts.

New Jersey: 10th State to Require Paid Sick Leave

On May 2, Governor Phil Murphy signed the New Jersey Paid Sick Leave Act into law. When the new law goes into effect on October 29, it will preempt local paid sick leave ordinances in 13 New Jersey municipalities and will require employers throughout the state to annually provide up to 40 hours of paid sick leave to their employees. Moreover, it will prohibit New Jersey counties and municipalities from adopting any ordinance, law, or regulation regarding earned sick leave in the future. (See our [May 18, 2018 For Your Information](#).)

Rhode Island's Paid Sick Leave Law Goes into Effect July 1: Are You Ready?

When Rhode Island's Healthy and Safe Families and Workplaces Act took effect on July 1, it joined neighboring Connecticut and Massachusetts and seven other states — Arizona, California, Maryland, New Jersey, Oregon, Vermont, and Washington — in requiring businesses to provide paid sick leave. Employees will be able to earn and use up to a maximum of 24 hours of paid sick and safe leave in 2018, 32 hours in 2019, and 40 hours in 2020 and each subsequent year. Final regulations provide some clarity regarding the new mandate while placing additional compliance burdens on employers. (See our [June 29, 2018 For Your Information.](#))

Massachusetts Paid Family and Medical Leave on Tap

On June 28, Massachusetts Governor Charlie Baker signed into law a bill that provides the nation's most generous family and medical leave program to date. The program will be established and administered by a new Department of Family and Medical Leave within the Executive Office of Labor and Workforce Development. Beginning in 2021, Massachusetts workers will be entitled to up to 12 weeks of paid family leave and up to 20 weeks of paid medical leave for their own serious medical condition(s) in a benefit year, with a combined maximum of 26 weeks in any year. Benefits will be funded by a payroll tax of 0.63%, starting on July 1, 2019. (See our [July 25, 2018 For Your Information.](#))

New York Paid Family Leave Premium Rates and Benefits to Increase for 2019

New York State's Department of Financial Services has announced that the 2019 Paid Family Leave premium rate will be 0.153%, allowing maximum annual employee contributions of \$107.97. The maximum PFL benefit for 2019 will be 55% of the statewide average weekly wage for up to 10 weeks of qualifying leave. The increases impact New York employers' leave programs and payroll practices. (See our [September 24, 2018 For Your Information.](#))

New Jersey Proposes Paid Sick Leave Rules

The New Jersey Department of Labor and Workforce Development released proposed rules to implement the New Jersey Paid Sick Leave Act (Act). The proposed rules, which were not finalized before the Act went into effect on October 29, provide certain clarifications but also leave some open questions for New Jersey employers. (See our [October 11, 2018 For Your Information.](#))

Austin, Texas Paid Sick and Safe Leave Law Ruled Unconstitutional

In 2018, Austin became the first city in Texas to pass an ordinance requiring private employers to provide paid sick leave. On November 16, the Texas Court of Appeals for the Third District ruled that the ordinance violates the Texas Constitution because it is preempted by the Texas Minimum Wage Act. Originally scheduled to take effect October 1, the ordinance is on hold pending further legal proceedings. The outcome of those proceedings has broad potential ramifications for the viability of local sick leave mandates in the state. (See our [December 14, 2018 For Your Information.](#))

Localization of employment laws continues

The ongoing trend toward localizing employment laws placed new restrictions on NYC employers' scheduling practices.

NYC Employers Must Accommodate Employees' "Personal Events"

In 2017, New York City enacted the so-called Fair Workweek Law, a legislative package of five bills imposing varied worker scheduling limitations on retail and fast-food employers operating in the city. (See our [June 16, 2017 For Your Information](#).) In 2018, the city enacted a sixth bill, amending the Fair Workweek Law to give employees in all industries a right to flexible work arrangements for qualifying *personal events*, effective July 18, 2018. (See our [July 27, 2018 For Your Information](#).)

Momentum to legalize marijuana builds

Voters in three states passed measures to legalize recreational or medical marijuana use.

Marijuana Ballot Measures Score High in Midterms

On November 6, Michigan voters approved a ballot measure legalizing cannabis as medical marijuana initiatives were passed in both Missouri and Utah. With the election of a number of pro-legalization governors and the shift of power in Congress, the momentum for decriminalizing and legalizing both the recreational and medical use of marijuana seems to be building. These developments can have significant implications for employers' existing drug and other employment policies. (See our [December 7, 2018 For Your Information](#).)

California employers face new challenges

The state's high court took aim at worker misclassification.

The Gig Is Up: California Supreme Court Rewrites Rules for Independent Contractors

On April 30, the California Supreme Court adopted a new, worker-friendly standard for determining whether workers are employees or independent contractors. The so-called ABC test, which presumes that all workers are employees for purposes of California wage orders unless the entity hiring them can establish otherwise, is expected to make it more difficult for businesses to classify workers as independent contractors for these purposes. The decision has significant implications for California employers, particularly those whose business model relies on a contractor workforce, and the gig economy generally. (See our [May 23, 2018 For Your Information](#).)

Pay equity protections

A 9th Circuit ruling took aim at the gender pay gap, placing new restrictions on employer pay practices in the states within its jurisdiction.

Reversing Course: 9th Circuit Holds Prior Salary Cannot Justify Pay Differentials

The San Francisco-based 9th Circuit Court of Appeals held that an employer cannot use prior salary history alone — or in combination with other factors — to justify a gender pay gap, overruling prior precedent. The ruling that prior salary can never be “a factor other than sex” in a pay system conflicts with decisions in sister circuits, but it bars employers in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, or Washington from relying in any way on prior pay in setting salaries to justify a wage differential between male and female employees. (See our [May 9, 2018 For Your Information.](#))

New York targets sexual harassment

Both New York City and New York state took aim at sexual harassment in the workplace, placing new obligations on employers.

NYC Employers Must Post Sexual Harassment Notice and Distribute Information Sheet by September 6

The Stop Sexual Harassment in NYC Act, a package of 11 bills targeting gender-based workplace harassment, was signed into law by Mayor Bill de Blasio on May 9. Among other things, the new law requires NYC employers to conspicuously display an anti-sexual harassment poster in their workplaces and distribute an information sheet to employees. Employers must display the city-approved poster and begin disseminating an information sheet to all new hires or incorporate it into their handbooks no later than September 6. (See our [August 29, 2018 For Your Information.](#))

New York Targets Workplace Sexual Harassment

Effective October 9, all New York employers must implement a written sexual harassment prevention policy and conduct annual anti-harassment training for employees. To satisfy these obligations, employers may either use the model policy and training module recently released by the state or develop their own policies and training that meet minimum standards. (See our [November 14, 2018 For Your Information.](#))

Courts clarify employer obligations

The Supreme Court tackled the lawfulness of agency fees for government workers and employment arbitration agreements, while California’s highest court weighed in on employers’ pay practices.

Supreme Court Gives Employers OK to Use Class Waivers

In 2012, the NLRB ruled in *D.R. Horton, Inc.* that arbitration agreements precluding employees from filing class or collective actions against their employers violate employees' section 7 rights under the National Labor Relations Act. Since then, appellate courts have disagreed whether such agreements are unlawful. In a highly anticipated decision, the Supreme Court held that employers can include class waivers in arbitration agreements that workers sign as a condition of employment, resolving the uncertainty over whether such waivers are lawful and enforceable. The decision is expected to significantly limit the number of employment-related class and collective actions employers face. (See our [May 25, 2018 For Your Information.](#))

Supreme Court Nixes Mandatory Public Union Fees

In a significant setback for public-sector unions, on June 27 the Supreme Court outlawed mandatory agency fees, holding that requiring public employees who are not members of a union to pay so-called "fair share" fees as a condition of employment violates their First Amendment free speech rights. It also ruled that a public employer cannot deduct such fees from a worker's paycheck without the worker's affirmative consent, making opt-out arrangements unlawful. (See our [July 11, 2018 For Your Information.](#))

California Supreme Court Rejects FLSA's *De Minimis* Rule Saying Every Minute May Count

On July 26, the California Supreme Court decided that the Fair Labor Standards Act's *de minimis* rule does not apply to wage claims brought under California law. The court concluded that neither the California Labor Code nor any Industrial Welfare Commission Wage Order had adopted the federal rule that allows employers to disregard insubstantial periods of off-the-clock work for pay purposes. Employers with operations in California should review and update their timekeeping policies and pay practices in light of the ruling. (See our [August 31, 2018 For Your Information.](#))

Wage rates and exemption thresholds increase

State and local minimum wages continued to rise, and thresholds for overtime exemptions increased.

State and Local Minimum Wages to Increase in 2019

As debate over raising the federal minimum wage continues, states and municipalities are hiking local wage rates. Many states and cities adjust their minimum wage rates annually, and additional increases are on the horizon for 2019. As minimum wage laws continue to change, employers need to review their pay practices to ensure compliance with the wage and hour rules that apply in each of the locations where they operate. (See our [December 27, 2018 FYI In-Depth.](#))

New Year, New Salary Thresholds for NY Overtime Exemptions and Higher Minimum Wage Rates

Effective December 31, 2018, New York state increased the salary thresholds for its administrative and executive exemptions from overtime pay, based on geographic location and employer size. Along with the higher thresholds, the state also increased minimum hourly wage rates for 2019. Employers will want to review their employee classifications and pay practices to ensure compliance. (See our [January 15, 2019 For Your information.](#))

Unpersuaded at last

The DOL took the final deregulatory action to rescind the controversial 2016 Persuader Rule.

DOL Persuader Rule: Going, Going, Gone

In 2016, a Texas District Court permanently blocked the DOL from implementing and enforcing the Obama administration's final "persuader" rule. The final rule would have required employers and their labor relations advisors to disclose publicly agreements and arrangements that had long been exempt from reporting under the Labor-Management Reporting and Disclosure Act. On July 18, the DOL formally rescinded the rule, leaving in place the reporting requirements as they previously existed. (See our [July 20, 2018 For Your Information.](#))

NLRB has a change of heart

The NLRB provided enforcement guidance on employer handbook provisions and sought clarity for joint-employer status.

Employer Handbooks: New NLRB Guidance Balances Employee Rights and Business Interests

An NLRB general counsel memorandum explained how regional directors should interpret and enforce the more employer-friendly handbook standard established by the board in last year's *Boeing* decision. The guidance provides a road map for employers to navigate the board's new approach on the lawfulness of workplace rules, policies, and handbook provisions, and gives employers more flexibility to communicate important rules without triggering unfair labor practice charges. (See our [June 21, 2018 For Your Information.](#))

It's Back: NLRB Reverts to Browning-Ferris Joint Employer Standard for Now

In *Browning-Ferris Industries of California* (2015), a sharply divided NLRB replaced its decades-old standard for determining joint employer status that rested on one entity's exercise of actual, direct, and immediate control over one or more essential employment terms and conditions of another entity's employees with a far more expansive one. In December 2017, the board overruled that decision in *Hy-Brand Industrial Contractors* but later vacated the decision. On May 9, the NLRB

announced that it would engage in rulemaking to set the standard for determining joint-employer status under the NLRA. (See our [May 10, 2018 For Your Information.](#))

NLRB Moves to Change its Joint-Employer Standard

Until 2015, the NLRB required a business to have and exercise direct and significant control over the essential terms and conditions of another entity's workers in order to be deemed a joint employer for collective bargaining, unfair labor practices, and other purposes. In *Browning-Ferris Industries of California, Inc.*, the Obama board adopted a new standard finding joint-employer status when a company has only indirect control over another entity's employees. On September 14, the NLRB began the rulemaking process, publishing a proposed rule that would overturn that test. (See our [September 14, 2018 FYI Alert.](#))

Appeals Court Upholds Obama-era Joint Employer Standard as NLRB Rulemaking Continues

In its 2015 *Browning-Ferris Industries of California* decision, a sharply divided NLRB held that entities having indirect or potential control over another company's employees may be deemed joint employers for collective bargaining, unfair labor practices, and other purposes, even if they never exercised control. Shortly after the NLRB proposed joint employer regulations grounded on direct and immediate control over another entity's workers, the U.S. Court of Appeals for the D.C. Circuit upheld the indirect control standard but not its application in *Browning-Ferris* and sent the case back to the NLRB for further proceedings consistent with its opinion. It remains to be seen what, if any, impact the court's ruling will have on the board's rulemaking, as uncertainty over the joint-employer standard continues. (See our [January 15, 2019 For Your Information.](#))

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