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INSIDE

STATE LAW ROUNDUP

Veterans' preference dominates state legislative activity in 2015; wage-theft comes in close second

In terms of sheer number of laws enacted in 2015, veterans' preference laws dominated all other state law activity. What remains to be seen is whether or not private employers will actually adopt these policies. In the meantime, several states—*i.e.,* New York and California—are increasing enforcement and implementing stiffer penalties for nonpayment of wages (aka "wage theft").

We also saw a lot of legislative activity and/or executive orders around so-called "religious freedom" laws thanks to a June decision by the United States Supreme Court. Saying the right to marry is a fundamental right inherent in the liberty of the person, a majority of the U.S. Supreme Court held that under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, couples of the same sex "may not be deprived of that right and that liberty." Same-sex couples may exercise the fundamental right to marry, and there is no lawful basis for states to refuse to recognize a lawful same-sex marriage performed in another state based on its same-sex character. Ruling 5-4, the Court invalidated the state laws challenged by the petitioners in these cases—in Michigan, Kentucky, Ohio, and Tennessee—to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. The majority found no reason to wait for "further legislation, litigation, and debate," citing Bowers v. Hardwick, which upheld a law "criminalizing same-sex intimacy" even though "the facts and principles necessary to a correct holding were known to the Bowers Court." A ruling against same-sex couples would have the same effect, concluded the majority—and, like Bowers, would be unjustified under the Fourteenth Amendment (*Obergefell v. Hodges*, June 26, 2015, Kennedy, A.).

These are just a few of the legal issues state legislatures took up in 2015. Some of the major 2015 state legislative activity is highlighted below. This summary is in two parts, with the next issue of *Ideas & Trends* set to report on minimum wage laws, the enactment of two (and amendment of one) medical marijuana laws, wage payment laws, and a collection of miscellaneous state law changes that may be of interest. Please note that this summary is not exhaustive, and generally covers only laws of broad application in the specified subject areas. It is important to keep in mind that state executive orders, rules and regulations, administrative agency actions, and case law also determine where states stand on some issues. The following summary focuses almost exclusively on statutory activity. ■

Wolters Kluwer

SOCIAL MEDIA PRIVACY

Six states expand social media privacy expectations in 2015

Connecticut. A new law enacted in Connecticut protects an employee's online privacy by prohibiting an employer from requiring that an employee or job applicant disclose his or her online user name and password as a condition of employment or continued employment, effective October 1, 2015 (P.A. 15-6 (S. 426), L. 2015).

Delaware. Governor Jack Markell gave his stamp of approval to legislation making it unlawful for employers, subject to certain exceptions, to require employees or job applicants to disclose passwords or account information permitting access to their personal social networking profile or accounts. The new law also prohibits employers from requiring or requesting that employees or applicants log into social networking site profiles or accounts in order to give the employer direct access (Ch. 146 (H. 109), L. 2015, eff. August 7, 2015).

Maine. The state enacted a social media privacy law, effective October 15, 2015.

The law, which applies to both private and public employers, prohibits an employer from doing any of the following:

- (1) Requiring or coercing an employee or applicant to disclose, or requesting that an employee or applicant disclose, the password or any other means for accessing a personal social media account;
- (2) Requiring or coercing an employee or applicant to access, or requesting that an employee or applicant access, a personal social media account in the presence of the employer or an agent of the employer;
- (3) Requiring or coercing an employee or applicant to disclose any personal social media account information;
- (4) Requiring or causing an employee or applicant to add anyone to the employee's or applicant's list of contacts associated with a personal social media account;
- (5) Requiring or causing an employee or applicant to alter, or requesting that an employee or applicant alter, settings that affect a third party's ability to view a personal social media account;
- (6) Discharging, disciplining or otherwise penalizing or threatening to discharge, discipline or otherwise penalize an employee for the employee's refusal to disclose or provide access to information as specified in items (1), (2) or (3) above or for refusal to add anyone to the employee's list of contacts associated with a personal social media account as specified in item (4) above or to alter the settings associated with a personal social media account as specified in item (5) above; or
- (7) Failing or refusing to hire an applicant as a result of the applicant's refusal to disclose or provide access to information specified in items (1), (2) or (3) above or refusal to add anyone to the applicant's list of contacts as specified in item (4) above or to alter the settings associated with a personal social media account as specified in item (5) above (Ch. 343 (H. 640), L. 2015).

Montana. The state enacted a law prohibiting an employer from requesting online passwords or usernames for an employee's or job applicant's personal social media account (H. 343, L. 2015, eff. April 23, 2015).

Oregon. The state enacted a law providing that it is an unlawful employment practice for an employer to require or request an employee or applicant for employment to establish or maintain a personal social media account. It is also an unlawful employment practice for an employer to require an employee or applicant to authorize the employer to advertise on the personal social media account of the employee or applicant (Ch. 229 (S. 185), L. 2015).

Virginia. Employers are prohibited from requiring a current or prospective employee to disclose the username and password to his or her social media account. The measure also prohibits an employer from requiring an employee to add an employee, a supervisor, or an administrator to the list of contacts associated with the employee's social media account (Ch. 576 (H. 2081), L. 2015, enacted March 23, 2015, eff. July 1, 2015). ■

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MISCLASSIFICATION

State law changes cut down on risk of employee misclassification

Alaska. The State of Alaska Department of Labor and Workforce Development signed Memorandums of Understanding (MOUs) with the Division of Insurance, Department of Revenue, and the U.S. Department of Labor in an effort to crack down on the misclassification of workers as independent contractors. Under the agreement, agencies may share information and coordinate law enforcement.

Alaska is the 25th state to sign an MOU with the federal government, joining:

- Alabama,
- California,
- Colorado,
- Connecticut,
- Florida,
- Hawaii,
- Illinois,
- Idaho,
- Iowa,
- Kentucky,
- Louisiana,
- Maryland,
- Massachusetts,
- Minnesota,
- Missouri,
- Montana,
- New Hampshire,
- New York,
- Rhode Island,
- Texas,
- Utah,
- Washington,
- Wisconsin and
- Wyoming.

Alaska is also one of several states to establish worker misclassification task forces (*State of Alaska Department of Labor and Workforce Development, Commissioner's Office, Press Release No. 15-34*, August 13, 2015; *United States Department of Labor, WHD News Brief No. 15-1586-NAT*, August 13, 2015).

Idaho. Officials from the Idaho Department of Labor and the United States Department of Labor Wage and Hour Division signed a three-year Memorandum of Understanding intended to protect employees' rights by preventing their misclassification as independent contractors or other non-employee statuses. Under the agreement, both agencies may share information and coordinate law enforcement (*Idaho Department of Labor Press Release*, August 7, 2015; *U.S. Department of Labor, Wage and Hour Division, News Brief, Release No. 15-1557-NAT*, August 6, 2015).

Illinois. The Illinois Employee Classification Act was amended with regard to the method and due date for annual reporting requirements.

Any contractor for which either an individual, sole proprietor, or partnership is performing construction services in Illinois must report all payments made to that individual, sole proprietor, or partnership if the recipient of payment is not classified as an employee. The report is to be submitted electronically to the Illinois Department of Labor annually on or before April 30 following the taxable year in which the payment was made.

Reports must include: (1) the contractor name, address, and business identification number; (2) the individual, sole proprietor, or partnership name, address, and federal employer identification number; and (3) the total amount the contractor paid to the individual, sole proprietor, or partnership performing services in the taxable year, including payments for services and for any materials and equipment that was provided along with the services (P.A. 99-303 (S. 993), L. 2015, eff. August 6, 2015).

Indiana. A person who, with the intent to avoid the obligation of obtaining worker's compensation coverage, falsely classifies an employee as (1) an independent contractor, (2) a sole proprietor, (3) an owner, (4) a partner, (5) an officer, (6) or a member in a limited liability company commits worker's compensation fraud and is guilty of a Class A misdemeanor (P.L. 252 (H. 1019), L. 2015). ■

EQUAL PAY

One of six changes to equal pay laws catches eye of federal legislatures

California. Governor Edmund G. Brown Jr. signed legislation to help close the gender wage gap on October 6. The California Fair Pay Act (Ch. 546 (S. 358), L. 2015), amends the Labor Code to prohibit an employer from paying any of its employees at wages less than the rates paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.

The equal pay legislation is said to be among the strongest in the nation and, in the eyes of some federal lawmakers, a model for the U.S. Congress to follow.

S. 358 eliminates the law's current requirement that the wage differential be within the same establishment. The bill also revises the exceptions under the law, to provide that an exception is allowed if the employer affirmatively demonstrates that the wage differential is based upon one or more of the following factors:

- 1. A seniority system.
- 2. A merit system.
- 3. A system that measures earnings by quantity or quality of production.
- 4. A bona fide factor other than sex, such as education, training, or experience.

The amended law also requires that each factor relied upon is applied reasonably. It further specifies that the one or more factors relied upon must account for the entire wage differential.

In addition, the bill prohibits an employer from discharging, or in any manner discriminating or retaliating against, any employee because the employee took action to invoke or assist in the law's enforcement. An employee who is discharged or discriminated or retaliated against will be able to recover in a civil action reinstatement and reimbursement for lost wages and work benefits, as well as appropriate equitable relief.

Employers may not prohibit an employee from disclosing his or her own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise his or her rights under the law.

Civil actions for violations involving discharge/discrimination/retaliation or wage disclosure must be commenced no later than one year after the cause of action occurs. Employer recordkeeping requirements will be increased from two years to three years (*State of California, Office of the Governor, Press Release*, October 6, 2015; Ch. 546 (S. 358), L. 2015, eff. January 1, 2016.

Delaware. Large public contracts must include a nondiscrimination clause stating that the contractor agrees not to discriminate in terms of employment, to take positive steps to ensure that employees and applicants are treated fairly, and that all solicitations and advertisements for employees state that all qualified applicants will receive consideration for employment, without regard to race, creed, color, sex, sexual orientation, gender identity or national origin.

This clause was amended to also require that the contractor ensure employees receive equal pay for equal work, without regard to sex. Employee pay differential is acceptable if pursuant to a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or if the differential is based on any factor other than sex.

Contractors must post notice of the nondiscrimination clause in conspicuous places available to employees and job applicants. The contracting agency is to provide contractors with the required notice to be posted (Ch. 56 (H. 3), L. 2015).

Illinois. Governor Bruce Rauner signed House Bill 3619 on August 20 to expand the Equal Pay Act of 2003 to apply to all employers as of January 1, 2016. Currently, the law applies to those with four or more employees.

In addition, the civil penalties for violation of the law or any related rule will increase (P.A. 99-418 (H. 3619), L. 2015).

New York. The state enacted a law intended to truly prohibit employers from paying women less than men for performing the same work. The new legislation eliminates a loophole in current law that allows employers to prohibit employees from discussing their salaries under threat of termination or suspension. Specifically, the law will allow employees to discuss their wages with each other. Further, the law also increases the amount of damages available to an employee if an employer willfully violates the law (Ch. 362 (S. 1), L. 2015, eff. January 19, 2016).

North Dakota. The state's equal pay law was amended with respect to unpaid wages, penalties, and recordkeeping. Effective August 1, 2015, an employer subject to the equal pay law must make, keep and maintain records of the wages and wage rates, job classifications, and other terms and conditions of employment for each employee employed; must preserve such records for as long as the employee is employed and for two years after that; and must make such reports from the records as the Commissioner prescribes (H. 1257, L. 2015, enacted March 19, 2015).

Oregon. Contractors on public contracts are required to comply with the law prohibiting discrimination in terms of compensation, as covered under the equal pay for equal work requirements of Section 652.220.

Further, contractors may not prohibit employees from discussing wages, benefits and other forms of compensation with other employees.

Also, the Oregon Department of Administrative Services must establish a program to certify that a person who intends to submit a bid or proposal for a public contract understands the prohibition set forth in Sec. 652.220 prohibiting discrimination in the payment of wages, and in other laws or rules that prohibit discrimination in compensation or wage payments (S. 491, L. 2015, enacted June 16, 2015, and operative January 1, 2016). ■

BAN THE BOX

Five more states join the ranks of those banning the box

Georgia. Governor Nathan Deal signed an executive order implementing "ban the box" hiring policies in state government. On February 23, 2015, Georgia became the first state in the South to implement a fair hiring policy for applicants with criminal records with the signing of the order.

Ohio. Under a new "ban-the-box" policy directive, applicants for civil service jobs in Ohio are no longer required to disclose felony and other criminal convictions on job applications.

However, those who are considered candidates for positions will still be asked during the interview process whether they have any felony conviction or other relevant criminal history. And those who do will be given a chance to explain, if they are not otherwise disqualified under state or federal law or other federal restrictions (State of Ohio Administrative Policy HR-29, eff. May 15, 2015).

Oregon. The state enacted a "ban the box" law, effective January 1, 2016 (Ch. 559 (H. 3025), L. 2015).

Vermont. Governor Peter Shumlin on April 21, 2015, signed Executive Order No. 03-15 to implement a "ban the box" state hiring policy. The Order is intended to help people with criminal convictions find employment and build successful lives.

The "ban the box" Executive Order removes questions about criminal records from the very first part of job applications for state employment. Agencies will continue to conduct background checks, but only after an applicant has otherwise been found qualified for the position. The policy will prevent applicants from being immediately screened out of state jobs because of a criminal conviction. The policy will not apply to law enforcement, corrections, or other sensitive positions.

Virginia. Governor Terry McAuliffe signed Executive Order 41 (2015) on April 3, 2015, reforming state hiring practices by removing questions regarding criminal history from employment applications.

The "ban the box" order makes clear that criminal history shall not be a determining factor in employment decisions, unless an individual's criminal history bears specific relation to the job for which they are being considered. ■

LEAVE LAWS

Employee leave was a hot topic for state legislatures last year

Arkansas. The state enacted a law modifying the use of shared leave under the Uniform Attendance and Leave Policy Act pertaining to state employees (Act 389 (H. 1468), L. 2015, enacted March 12, 2015).

California. The state amended its Labor Code to include the addressing of a child care provider emergency or a school emergency and the finding, enrolling, or reenrolling of a child in a school or with a child care provider as activities for which a parent having child custody shall not be discriminated against or discharged by his or her employer.

The law defines "parent" for these purposes as a parent, guardian, stepparent, foster parent, or grandparent of, or a person who stands in loco parentis to, a child.

The state also amended its Kin Care Law in light of the Healthy Workplaces, Healthy Families Act of 2014, which took effect July 1, 2015. "Sick leave" is redefined and clarified (Ch. 802 (S. 579), L. 2015, eff. January 1, 2016).

Florida. Parental leave for a qualifying adoptive employee must be provided in accordance with the personnel policies and procedures of the employee's state agency employer. "Qualifying adoptive employee" means a full-time or part-time employee of a state agency who is paid from regular salary appropriations, or otherwise meets the state agency employer's definition of a regular rather than temporary employee, and who adopts a child within the child welfare system pursuant to Ch. 63 on or after July 1, 2015 (Ch. 2015-130 (H. 7013), L. 2015).

Maine. The state strengthened the right of a victim of sexual assault or domestic violence to take necessary leave from employment. Effective October 1, 2015, an employer who denies such leave may face a fine of up to $1,000 for each violation (Ch. 343 (H. 640), L. 2015).

Maryland. The state amended its state personnel law with respect to limits on the use of an employee's leave for the birth, adoption, foster placement or care of a child (Ch. 435 (H. 564), L. 2015).

Also, effective October 1, 2015, an agreement between an employer and employee to waive the employee's right to use flexible leave for the illness of the employee's immediate family will be void, and employers will be prohibited from taking or threatening to take adverse employment actions against an employee because the employee requests such flexible leave (Ch. 493 (H. 345), L. 2015).

Massachusetts. The state replaced its maternity leave law with a parental leave law, essentially extending leave provisions previously reserved for women only to men as well (Ch. 484 (S. 865), L. 2014, enacted January 7, 2015).

North Dakota. The state enacted a pair of laws relating to use of sick leave following the birth or adoption of a child by a state worker (H. 1387, L. 2015, enacted April 15, 2015; and H. 1244, L. 2015, enacted April 20, 2015).

In other news, employees of the state who are impacted by domestic violence, a sex offense, stalking, or terrorizing may use sick leave in order to deal with the consequences of such crimes (H. 1403, L. 2015).

Oregon. An employee who takes leave from work because he or she has been a victim of a crime may use any accrued sick leave or personal business leave in lieu of vacation leave.

Prior law specified only paid accrued vacation leave as being acceptable for crime victims' leave (Ch. 352 (S. 492), L. 2015).

The state also amended its family leave law as follows. If an employee is provided group health insurance, the employee is entitled to the continuation of group health insurance coverage during the period of family leave on the same terms as if the employee had continued to work. If family member coverage is provided to the employee, family member coverage must be maintained during the period of family leave. The employee must continue to make any regular contributions to the cost of the health insurance premiums (H. 2600, L. 2015).

Tennessee. The state's law relating to leave for state employees was amended to delete the provision limiting to 30 days the aggregate of sick leave used for maternity and paternity leave if both parents are state employees. The change took effect upon becoming law on April 6, 2015 (S. 950, L. 2015).

CA, Mass, and OR amend paid sick leave laws

California. Governor Edmund G. Brown, Jr., approved the so-called "fix" to the state's Healthy Workplaces, Healthy Families Act of 2014, which adds clarification about exactly which workers are covered, how paid time off accrues, and protections for employers that already provide paid sick leave to their employees.

The governor approved the bill the same day it cleared the state legislature with an urgency provision (Ch. 67 (A. 304), L. 2015, eff. July 13, 2015).

Massachusetts. The state issued regulations to implement its Earned Sick Time Law, effective July 1, 2015. The regs include clarifications and adjustments to provisions regarding the accrual, use and payment of earned sick time, employer size, notice requirements, and rules for requiring medical documentation.

The regulations also clarify when employees can make up time instead of using it and how employers with existing leave policies can keep their own plans while complying with the law (*Office of the Attorney General Press Release*, June 30, 2015).

Posters. Employers must post notice of the state's Earned Sick Time Law in a conspicuous location accessible to employees in every establishment where covered employees work, and must also provide a copy to their employees.

Recordkeeping. Under the Massachusetts Earned Sick Time Law and regulations, employers are required to keep true and accurate records of the accrual and use of earned sick time. Such records must be maintained for a period of three years.

If an employer provides time off to employees under a paid time off, vacation or other policy that complies with the Earned Sick Time Law, the employer is not required to track and keep a separate record on accrual and use of earned sick time. Employers must, however, keep records of the time designated as earned sick time where the employer chooses to maintain separate policies under 940 CMR 33.07(7).

Oregon. On June 22, 2015, Oregon Governor Kate Brown signed into law a bill that will require employers in Oregon to provide employees with at least five days of sick time each year. Employers with at least 10 employees working in the state (only six employees if located in a city over 500,000) would have to pay employees for those sick days. However, employers with less than 10 employees in the state (less than six employees if located in a city over 500,000) would be required to provide only unpaid leave.

The law, which takes effect January 1, 2016, will not apply to employees who already get paid sick time under federal law (among other exclusions), and will not apply to federal employers (Ch. 537 (S. 454), L. 2015).

Leave for service-connected disabilities and reemployment protections expanded

California. The state enacted a law extending existing statutory employment protections to members of the National Guard of other states who are called to military services by their respective governor or by the President of the United States and who have left a position in private employment in the state (Ch. 183 (A. 583), L. 2015).

In other legislation, the California Wounded Warriors Transitional Leave Act will provide additional paid leave to state employee veterans with a service-connected disability for the purpose of undergoing medical treatment for such disability.

Specifically, in addition to any other entitlement for sick leave with pay, a state officer or employee hired on or after January 1, 2016, who is a military veteran with a military service-connected disability rated at 30 percent or more by the United States Department of Veterans Affairs shall be entitled to additional credit for sick leave with pay of up to 96 hours for the purpose of undergoing medical treatment for his or her military service-connected disability (Ch. 794 (S. 221), L. 2015, enacted October 11, 2015).

Illinois. The Service Member's Employment Tenure Act was amended to provide that "military service" includes any period of active duty by members of the National Guard who are called to active duty pursuant to an order of the governor of Illinois or an order of a governor of any other state as provided by law (P.A. 99-88 (H. 3721), L. 2015, eff. July 21, 2015).

Kansas. Military leave and reemployment protections were amended to extend protections to any person employed in Kansas called to state active duty.

A person called to state active duty by Kansas or any other state, who notifies the employer of such, upon release from such duty or recovery from disease or injury from such duty, under honorable conditions, is to be reinstated or restored to the position of employment held at the time the person was called to state active duty (H. 2154, L. 2015).

Montana. The Montana Military Service Employment Rights Act was amended to clarify duty status of Montana National Guard Members for leaves of absence from employment when called to "state military duty" (previously, state active duty) (H. 68, L. 2015, eff. April 13, 2015).

Nevada. The law relating to leaves of absence for public officers and employees who are members of the National Guard or a reserve component of the U.S. Armed Forces was amended to change the period during which such employees are eligible to take the specified leaves of absence for military duty each year from a calendar period to a 12-month period selected by the public employer.

Leave and compensation issues for public officers and employees whose work schedule includes Saturday or Sunday were also amended (Ch. 340 (A. 388), L. 2015, eff. July 1, 2015).

North Carolina. The state amended its military leave law to extend National Guard reemployment rights to members of the National Guards of other states, effective October 1, 2015 (Session Law 2015-161 (H. 254), L. 2015).

Oregon. A provision relating to compensation for public officers and employees while on military leaves of absence was amended.

While absent on leave, a public officer or employee may, but is not absolutely entitled to, receive the pay or other emolument of the office or position, and shall not become liable, as an officer or employee, on an official bond or otherwise, for the acts or omissions of any other person.

The state of Oregon, a county, a municipality or another political subdivision of the state may establish and administer a program that allows an officer or an employee who is absent on leave to receive an amount of pay or other emolument that supplements or exceeds any compensation received for performing military duty, provided the amount received by the officer or employee does not exceed the amount of the base salary the officer or employee was earning on the date the officer or employee began the leave of absence (Ch. 42 (H. 2763), L. 2015, eff. April 23, 2015).

South Carolina. Reemployment rights and protections granted to members of the South Carolina National Guard and South Carolina State Guard also apply to a person who is employed in South Carolina but who is a member of another state's national guard or state guard (Act 16 (H. 3547), L. 2015).

Texas. The state amended its Government Code with respect to providing notice of the availability of paid leave for military service to public officers and employees (H. 445, L. 2015, eff. September 1, 2015). ■

VETERANS' PREFERENCE

Private employers may prefer veterans in hiring practices

Alabama. The Voluntary Veterans' Preference Employment Policy Act will allow private employers to have a written, uniformly applied policy that gives preference in hiring, promotion or retention to a veteran over another qualified applicant or employee (Act 2015-314 (S. 269), L. 2015).

Arizona. The state enacted a law allowing private employers to adopt voluntary veterans' preference employment policies (Ch. 202 (H. 2094), L. 2015).

Delaware. Effective January 1, 2016, with respect to the State Merit System of Personnel Administration, a preference in employment shall be given to veterans of the armed forces of the United States who served as an active member of the armed forces and were terminated honorably. Preference shall also be given to active and honorably discharged members with at least 20 years of service in either the Delaware National Guard or a reserve unit located within Delaware. Prior law did not include the Guard, and required that a veteran must have served during wartime to get the preference (Ch. 188 (H. 88), L. 2015).

Georgia. The Voluntary Veterans' Preference Employment Policy Act allows private employers to create and use a veterans' preference employment policy without violating any local or state equal employment opportunity law (Act 92 (H. 443), L. 2015).

Illinois. The state enacted a law (Veterans' Preference in Private Employment Act) that allows private employers to adopt and apply a written voluntary veterans' preference employment policy. The policy must be posted publicly at the place of employment or on any website maintained by the employer. The employer's job application forms must inform all applicants about the policy, and the policy must be applied uniformly (P.A. 99-152 (H. 3122), L. 2015).

The state also enacted legislation which specifically provides that its Human Rights Act does not prohibit an employer from participating in a bona fide recruiting incentive program, sponsored by a branch of the U.S. Armed Forces, a reserve component of such forces, or any National Guard or Naval Militia, where participation in the program is limited by the sponsoring branch based upon the service member's discharge status (P.A. 99-165 (S. 1610), L. 2015, eff. July 28, 2015).

Indiana. The state enacted a law allowing private employers to have a veterans' preference policy (S. 298, L. 2015, eff. July 1, 2015).

Kansas. The state established a permissive preference in private employment for a veteran who meets the requirements of a vacant position. The policy must be in writing and consistently applied (H. 2154, L. 2015, eff. July 1, 2015).

Kentucky. The state enacted a law allowing private employers to have a voluntary veterans' preference employment policy (H. 164, L. 2015).

Michigan. Governor Rick Snyder signed into law a bill authorizing private employers to adopt and apply a veterans' preference employment policy.

The law, which defines a "private employer" as a sole proprietor, corporation, partnership, limited liability company, or other private entity with one or more employees, provides that a veterans' preference employment policy shall be in writing and shall be applied uniformly to employment decisions regarding the hiring or promotion of veterans or the retention of veterans during a reduction in the workforce (P.A. 508 (H. 5418), L. 2014, enacted and eff. January 14, 2015).

Montana. The state enacted a law authorizing private employers to adopt hiring preferences for veterans (S. 196, L. 2015).

Nebraska. The state enacted a law allowing private employers to adopt a voluntary veterans' preference policy (L.B. 272, L. 2015, enacted March 12, 2015).

North Dakota. The state enacted a law amending provisions relating to the public employment preference for veterans in specified positions (H. 1131, L. 2015, enacted March 16, 2015).

Oklahoma. Effective November 1, 2015, the Voluntary Veterans' Preference Employment Policy Act authorizes private employers to give a hiring preference to veterans. The granting of such preference shall not be deemed to violate any local or state equal employment opportunity law or regulation (S. 195, L. 2015).

Also effective November 1, 2015, the Disabled Veteran Business Enterprise Act requires preferences for service-disabled veteran businesses in the awarding of public contracts (H. 1353, L. 2015).

South Dakota. The state revised its veterans' preference law to remove the requirement that a person must be a resident of the state in order to receive the hiring preference (S. 32, L. 2015). In separate legislation, the state amended the veterans' preference law to require school

districts to provide veterans a preference in employment (S. 90, L. 2015). Both laws took effect July 1, 2015.

Texas. The Military Veterans' Full Employment Act (S. 805, L. 2015, enacted May 28, 2015, and eff. September 1, 2015), amends existing public employment veterans' preference requirements and also enacts voluntary private employment veterans' preference provisions.

Utah. Effective May 12, 2015, private employers are allowed to create voluntary, written veterans' employment preference programs (H. 232, L. 2015). ■

BREASTFEEDING

Five states expand nursing in the workplace protections

New York. Effective January 1, 2016, the Breastfeeding Mothers' Bill of Rights was amended to include a provision regarding the right to take unpaid breaks for up to three years following childbirth for the purpose of expressing or pumping breast milk (Ch. 446 (A. 7202), L. 2015, enacted November 21, 2015).

In separate legislation, another new provision was added to the Breastfeeding Mothers' Bill of Rights protecting a woman's right to breastfeed her baby at her place of employment or child day care center in an environment that does not discourage such activity. The law took effect upon enactment (Ch. 469 (S. 1528), L. 2015, enacted November 20, 2015).

South Dakota. The state enacted a law providing that a mother may breastfeed her child in any location, public or private, where the mother and child are otherwise authorized to be present as long as the mother is in compliance with all other state and municipal laws. However, no municipality may outright ban breastfeeding in public places (S. 77, L. 2015).

Texas. Effective September 1, 2015, public employers must (1) provide a reasonable amount of break time for an employee to express breast milk each time the employee has a need and (2) provide a place, other than a multiple user bathroom, that is shielded from view and free from intrusion from other employees and the public where the employee can express breast milk.

The public employer must establish a written policy stating that it shall (1) support the expression of breast milk and (2) make reasonable accommodation for the needs of employees who express breast milk. Employees are protected from suspension, termination or other forms of discrimination for exercising their rights under the law.

A covered "public employer" means (1) a county, municipality or other state political subdivision, including a school district, or (2) a board, commission, office, department, or another agency in the executive, judicial, or legislative branch of state government, including an institution of higher education (H. 786, L. 2015).

Utah. The Utah Antidiscrimination Act was amended to specify that "pregnancy, childbirth, or pregnancy-related conditions" includes breastfeeding or medical conditions related to breastfeeding (H. 105, L. 2015).

The state also enacted a law requiring public employers to provide reasonable break periods for a public employee who is breastfeeding, for up to one year following the birth of the public employee's child, in order for the employee to breast feed or express milk. The employee must also be given access to a room with privacy in order to breastfeed or express milk and a refrigerator for storage of breast milk. Public employers must also adopt written policies in support of breastfeeding that identify the ways in which the employer will comply with the law. Further, the law specifically prohibits discrimination against an employee who is breastfeeding in the workplace (H. 242, L. 2015).

Virginia. The state enacted a law providing that a mother may breastfeed in any place where the mother is lawfully present, including any location where she would otherwise be allowed on property that is owned, leased, or controlled by the Commonwealth (S. 1427 and H. 1499, L. 2014, enacted March 10, 2015). ■

FAIR EMPLOYMENT PRACTICES

State laws expand employees' right to a fair workplace

Arkansas. Governor Asa Hutchinson signed the state's Religious Freedom Restoration Act (RFRA) into law on April 2, 2015. The new law conforms closely to its federal counterpart, providing that government action may not substantially burden a person's right to exercise of religion, even where the substantial burden results from a rule of general applicability, unless applying the substantial burden to the person's exercise of religion in the particular instance (1) is in furtherance of a

compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest (S. 975, L. 2015, eff. April 2, 2015).

Also, the Public Employees' Political Freedom Act of 1999 was amended to make it unlawful for a public employer to discipline, to threaten to discipline, to reprimand either orally or in writing, to place any notation in a public employee's personnel file disciplining or reprimanding the employee, or to otherwise discriminate against the employee because the employee exercised the right to communicate with an elected public official or exercised a right or privilege under the state's Freedom of Information Act (Act 102 (H. 1163), L. 2015).

In other news, the state adopted the Intrastate Commerce Improvement Act to improve intrastate commerce by ensuring that businesses, organizations, and employers doing business in the state are subject to uniform nondiscrimination laws and obligations, regardless of the counties, municipalities, or other political subdivisions they may be located in or engage in business or commercial activity. The Act prohibits local jurisdictions from adopting or enforcing an ordinance, resolution, rule or policy that creates a protected classification or prohibits discrimination on a basis not covered under state law, except where such rule or policy pertains only to employees of that county, municipality or political subdivision (Act 137 (S. 202), L. 2015).

California. *Immigration.* The state enacted a law extending the protections of the Unruh Civil Rights Act to persons regardless of citizenship, primary language, or immigration status (Ch. 282 (S. 600), L. 2015).

Accommodations for religion, disability. California increased its state law protections should an employer discriminate or retaliate against an individual who seeks an accommodation of his or her disability or religious beliefs under a new law approved by the governor July 16, 2015. A.B. 987 specifically provides that a request for accommodation based on religion or disability is protected activity under state law. And even though federal law affords similar protection, the drafters of the California legislation wanted to ensure that protections for persons making requests for accommodation for disability or religion were specifically addressed.

Accordingly, the legislation prohibits an employer or other covered entity from retaliating or otherwise discriminating against a person for requesting accommodation of his or her disability or religious beliefs, regardless of whether the accommodation request was granted.

The legislative findings specifically cite *Rope v. Auto-Chlor System of Washington, Inc.* "(1) to make clear that a request for reasonable accommodation on the basis of religion or disability is a protected activity, and (2) by enacting paragraph (2) of subdivision (m) and paragraph (4) of subdivision (l) of Section 12940, to provide protection against retaliation when an individual makes a request for reasonable accommodation under these sections, regardless of whether the request was granted."

With the exception of its holding on that issue, the *Rope* decision remains good law, the statute says. The law will become effective January 1, 2016 (Ch. 122 (A. 987), L. 2015).

Cheerleaders. The state has also enacted a law declaring that a cheerleader who is utilized by a California-based professional sports team directly or through a labor contractor during its exhibitions, events, or games, is an employee for purposes of the California Fair Employment and Housing Act (Ch. 102 (A. 202), L. 2015, eff. January 1, 2016).

Sexual orientation violence. The Unruh Civil Rights Act was amended to allow a person who has been subject to sexual orientation violence to bring a civil action for damages against any responsible party under provisions identical to those for gender violence (Ch. 202 (A. 830), L. 2015, eff. January 1, 2016).

Protected conduct (family members). The state amended its Labor Code to extend the protections against discharge, discrimination, retaliation, or taking any adverse action against an employee or applicant because the individual engages in protected conduct to an employee who is a family member of such an individual who engaged in, or was perceived to engage in, the protected conduct (Ch. 792 (A. 1509), L. 2015).

Gender identity discrimination (public contractors). In addition, the state has amended its Public Contract Code to prohibit a state agency from entering into contracts for the acquisition of goods or services of $100,000 or more with a contractor that, in the provision of benefits, discriminates between employees on the basis of gender identity (Ch. 578 (S. 703), L. 2015).

Connecticut. Employers are now prohibited from discharging, disciplining, discriminating against, retaliating against or otherwise penalizing an employee who discloses or discusses the amount of his or her wages or the wages of another employee, provided such wages were voluntarily disclosed by such other employee. Employers are also prohibited from discharging, disciplining, discriminating against, retaliating against or otherwise penalizing an employee who inquires about the wages of another employee (P.A. 15-916 (H. 6850), L. 2015, eff. July 1, 2015).

Also, the state amended its Human Rights and Opportunities Act with respect to domestic service and discriminatory practice complaints (P.A. 15-249 (S. 446), L. 2015).

Delaware. The state amended its Discrimination in Employment Act to make it an unlawful employment practice for an employer to:

(1) fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect

to compensation, terms, conditions, or privileges of employment because the individual was the victim of domestic violence, a sexual offense, or stalking; or

(2) fail or refuse to make reasonable accommodations to the limitations known to the employer and related to domestic violence, a sexual offense, or stalking, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such employer (Ch. 57 (H. 4), L. 2015, enacted June 30, 2015).

District of Columbia. The District of Columbia enacted a law to ensure that individuals are protected from discrimination by an employer, employment agency, or labor organization, based on an individual's or dependent's reproductive health decisions. The Reproductive Health Non-Discrimination Amendment Act of 2014 (Act 593 (B. 790), enacted January 23, 2015) expands the district's Human Rights Act provision that currently prohibits discrimination against employees on the basis of pregnancy, childbirth, related medical conditions, or breastfeeding.

Under the new law, "reproductive health decision" is defined to include a decision by an employee, an employee's dependent, or an employee's spouse related to the use or intended use of a particular drug, device, or medical service, including the use or intended use of contraception or fertility control or the planned or intended initiation or termination of a pregnancy.

Florida. Governor Rick Scott gave his stamp of approval to legislation that amends current state law to add pregnancy as a prohibited basis of discrimination. Employers within the state are specifically prohibited from discrimination based on pregnancy. It is not unlawful for an employer to take or fail to take any action based on condition of pregnancy when it is "a bona fide occupational qualification reasonably necessary for the performance of the particular employment to which such action or inaction is related" (Ch. 2015-68 (S.B. 982), L. 2015, eff. July 1, 2015).

Indiana. On March 26, 2015, Governor Mike Pence signed the Religious Freedom Restoration Act (RFRA) (Public Law 3-2015 (S. 101)) into law. Indiana's RFRA provides that a governmental entity may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability.

A governmental entity may substantially burden a person's exercise of religion only if the governmental entity demonstrates that application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

The law's enactment sparked an apparently unanticipated firestorm from opponents who claim that it would be used to discriminate against the LGBT community.

On April 2, 2015, Governor Pence signed Public Law 4-2015 (S. 50) to clarify that the state's freshly minted broad religious freedom bill cannot be used to discriminate against lesbian, gay, bisexual, and transgender individuals. Indeed, the "fix" makes clear that none of its provisions authorize businesses to discriminate based on sexual orientation or gender identity.

Specifically, S. 50 provides that the provisions of the new law do not authorize providers to "refuse to offer or provide services, facilities, use of public accommodations, goods, employment, or housing to any member or members of the general public on the basis of race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity, or United States military service."

The "fix" also expressly states that the new chapter does not establish a defense to a civil action or criminal prosecution for any of those same actions. Nor does the chapter "negate any rights available" under the state constitution.

Like the Indiana religious freedom law itself, the "fix" is effective July 1, 2015.

In other news, the state now prohibits an employer from terminating an employee based on a protective order (H. 1159, L. 2015, eff. July 1, 2015).

Kansas. Executive Order 15-02 discourages discrimination based on race, color, gender, religion, national origin, ancestry, disability or age. It further establishes that state entities are to implement employment management practices for veterans and disabled individuals that include outreach, hiring, support, mentoring, development, rewards and recognition for achievement. The order also states that employment management practices should include a system that incorporates and acknowledges preference in hiring, retention and promotion for veterans and for individuals with physical, cognitive and mental disabilities in accordance with any guidelines issued by the Secretary of Administration. Executive Order 15-02 was signed by Governor Sam Brownback on February 10, 2015, and took effect immediately.

In addition, Governor Brownback signed an executive order rescinding certain executive orders from past administrations, including prior Governor Kathleen Sebelius' E.O. 07-24, which established protected class rights for state employees, specifically for sexual orientation and gender identity (Executive Order 15-01, signed and eff. February 10, 2015).

On July 7, 2015, Governor Brownback issued an executive order (EO 15-05) to protect religious officials and organizations who refuse to participate in same-sex marriage ceremonies. The executive order was expressly attributed in part to the U.S. Supreme Court's ruling in *Obergefell v. Hodges* that same-sex couples may not be deprived of the fundamental right to marry that is inherent in the liberty of the person.

The question is whether the measure would also permit discrimination based on sexual orientation. Louisiana Governor Bobby Jindal issued a similar executive order in May that has drawn an ACLU lawsuit (*Kansas Office of the Governor Media Release*, July 7, 2015; Kansas Executive Order No. 15-05).

Kentucky. The state enacted a law requiring the Human Rights Commission to make reasonable accommodations to assist persons with disabilities in filing written sworn employment discrimination complaints (Act 40 (S. 47), L. 2015, enacted March 20, 2015).

Louisiana. Governor Bobby Jindal signed an executive order (EO BJ 15-8, effective May 19, 2015) that all departments, commissions, boards, agencies, and political subdivisions of the state of Louisiana "are authorized and directed to take cognizance of the definition of 'person' contained" in other state law (La.R.S. 1:10) when complying with the Preservation of Religious Freedom Act (PRFA), as well as the federal definition that was applied in the U.S. Supreme Court's *Burwell v. Hobby Lobby Stores, Inc.*, ruling, which held that "the federal government is prohibited from requiring a 'person' to act in contravention of a sincerely held religious belief, and that the definition of 'person' includes individuals, non-profit, or for-profit corporations."

The same government entities "are authorized and directed to comply with" the PRFA's restrictions on government action. Specifically, based on a person's action in "accordance with his religious belief that marriage is or should be recognized as the union of one man and one woman," government entities shall take no adverse action to:

- Deny or revoke that person's exemption from taxation pursuant to La. R.S. 47:287.501.
- Disallow that person's deduction for state tax purposes of any charitable contribution.
- Deny or exclude that person from receiving any state grant, contract, cooperative agreement, loan, professional license, certification, accreditation, employment, or other similar position or status.
- Deny or withhold from that person any benefit under a state benefit program.
- Deny, revoke, or suspend the accreditation, licensing, or certification of any person that would be accredited, licensed, or certified for purposes of Louisiana law, but for a determination against the person based on actions in accordance with his or her own religious belief.

Maryland. Governor Larry Hogan signed into law a bill (S. 604) that extends employment discrimination protections to interns and applicants for internships in the state. The new law, effective October 1, 2015, prohibits employers from discriminating and harassing interns and applicants for internships based on their race, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, or disability (Ch. 43 (S. 604), L. 2015).

Montana. The state's law that provides employment protections for members of Montana's National Guard now applies to members of the National Guard in other states who are employed in Montana (S. 195, L. 2015).

Nebraska. Governor Pete Ricketts signed into law a measure that adds, among other things, substantial protections for pregnant women in the state. Those protections include the addition of a separate category of discrimination based on pregnancy as well as reasonable accommodation requirements for conditions related to pregnancy, childbirth, and related conditions. The law also identifies certain incidents of discrimination, such as requiring a woman affected by pregnancy to accept an accommodation she chooses not to accept.

The new law, L.B. 627, amends Nebraska law to make it an unlawful employment practice for a covered entity to "discriminate against an individual who is pregnant, who has given birth, or who has a related medical condition in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

The law also bars pre-employment medical examinations and inquiries of job applicants as to whether the applicant is pregnant, has given birth, or has a related medical condition (L.B. 627, L. 2015).

Nevada. The state enacted a law allowing an employer to determine whether it is reasonable to allow an employee to keep a service animal that is a miniature horse at the place of employment (Ch. 63 (A. 157), L. 2015).

New York. The state amended its Human Rights Law as follows. Effective January 19, 2016:

- (1) It will be an unlawful employment practice to discriminate on the basis of familial status (Ch. 365 (S. 4), L. 2015).
- (2) All employers will be covered employers in the case of an action for discrimination based on sexual harassment (the term "employer" generally applies only to employers with four or more employees) (Ch. 363 (S. 2), L. 2015).
- (3) "Reasonable accommodation" must be made to protect employees and prospective employees with "a pregnancy-related condition" (Ch. 369 (S. 8), L. 2015).

Also effective January 19, 2016, the Human Rights Law will be amended with respect to the provision of attorney's fees in cases of employment discrimination (Ch. 364 (S. 3), L. 2015).

North Dakota. The state enacted a law requiring each state agency, department, and institution to adopt and enforce a policy on employee harassment, including sexual harassment. The policy must clearly define harassment and

specify the responsibilities of the employee, supervisor, and the agency, department, or institution (H. 1428, L. 2015).

The state also enacted a law making it a discriminatory practice for an employer to fail or refuse to make reasonable accommodations for an otherwise qualified individual because that individual is pregnant. An employer is not required to provide an accommodation that would disrupt or interfere with the employer's normal business operations; threaten an individual's health or safety; contradict a business necessity of the employer; or impose an undue hardship on the employer, taking into consideration the size of the employer's business, the type of business, the financial resources of the employer, and the estimated cost and extent of the accommodation (H. 1463, L. 2015).

Oregon. The state enacted a law making it an unlawful employment practice for an employer to discharge, demote or suspend, or to discriminate or retaliate against, an employee with regard to promotion, compensation or other terms, conditions or privileges of employment benefits because the employee has inquired about, discussed or disclosed the wages of the employee or of another employee (H. 2007, L. 2015).

Rhode Island. The state enacted a law prohibiting an employer from terminating an employee for failing to report to regularly scheduled work when the cause for such failure was the employee's official response to an emergency in his or her capacity as a volunteer firefighter or ambulance technician (H. 5315, L. 2015).

The state also amended its fair employment practices law to prohibit employers from discriminating against, and failing to provide reasonable accommodations for, employees due to pregnancy or medical conditions related to pregnancy or childbirth (Ch. 129 (S. 276), L. 2015).

Texas. Effective September 1, 2015, Texas' fair employment practices law includes sexual harassment protection for unpaid interns (H. 1151, L. 2015).

Also effective September 1, 2015, Texas' Stolen Valor Act allows an employer to discharge an employee, regardless of whether the employee is employed under an employment contract, if the employer determines, based on a reasonable factual basis, that the employee, in obtaining employment or any benefit relating to employment, falsified or otherwise misrepresented any information regarding the employee's military record in a manner that would constitute an offense under the state's Penal Code (S. 664, L. 2015).

In other legislation, a public employer may not suspend or terminate the employment of, or otherwise discriminate against, an employee because the employee has asserted the employee's rights under Government Code Title 6, Subtitle A, Ch. 619 (Right to Express Breast Milk in the Workplace) (H. 786, L. 2015, effective September 1, 2015).

Additionally, a religious organization, an organization supervised or controlled by or in connection with a religious organization, an individual employed by a religious organization while acting in the scope of that employment, or a clergy or minister may not be required to solemnize any marriage or provide services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, or celebration of any marriage if the action would cause the organization or individual to violate a sincerely held religious belief (S. 2065, L. 2015, eff. June 11, 2015).

Utah. On March 12, 2015, Governor Gary Herbert signed a bill that balances antidiscrimination protections for LGBT individuals with legitimate religious objections and concerns that may come into play along with those protections. The new law adds protections against discrimination based on gender identity and sexual orientation, as well as measures that preserve rights to reasonably express religious and moral beliefs in an employment setting. The bill, S.B. 296, which took effect May 12, 2015, modifies the Utah Antidiscrimination Act and the Utah Fair Housing Act to address both discrimination and religious freedoms.

The state also amended its antidiscrimination law to define "pregnancy, childbirth, or pregnancy-related conditions" to include breastfeeding or medical conditions related to breastfeeding (H. 105, L. 2015, enacted March 20, 2015).

Virginia. Virginia law prohibits employers from requiring an employee or job applicant to pay the cost of furnishing any medical records required by the employer as a condition of employment. Employers who violate this law are subject to a civil penalty not to exceed $100 for each violation. Effective July 1, 2015, the Commissioner of Labor is required to notify any employer alleged to have violated the law by certified mail or overnight delivery service, with such notice to contain a description of the alleged violation. The employer may request an informal conference contesting the violation within 21 days of receipt of such notice. Any decision resulting from such informal conference is appealable to the appropriate circuit court only with 30 days of receipt of notice of such decision (Ch. 285 (S. 896), L. 2015). ■