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INSIDE

STATE LAW ROUNDUP

Part 2 of legislative roundup focuses on leave laws, employee protections, and wage payment

Nearly every state in the union made changes to their wage payment laws in 2016. Much like the previous issue of *Ideas & Trends* was dominated by changes to state minimum wage laws, so too will this issue be dominated by amendments and enactments of wage payment laws. In addition, however, we will also take a look at state legislative activity as it pertains to new and expanded employee leave laws, employee protections, employee misclassification, "right to work," and employee verification.

As for employee protections, 2016 brought with it the expansion of equal pay laws to include gender discrimination, as well as more gender identity antidiscrimination laws, including some "bathroom bills." And, Pennsylvania became the 32nd state to sign a memorandum of understanding with the Department of Labor's Wage and Hour division regarding employee misclassification. Four other states enacted or enhanced their employee misclassification laws in 2016.

Multiple states expanded employee leave protections. New York Governor Andrew M. Cuomo, for example, signed legislation in 2016 enacting a 12-week paid family leave policy. And California Governor Edmund G. Brown, Jr. signed landmark legislation that makes California the first state in the nation to commit to raising the minimum wage to $15 per hour statewide and phases in paid sick leave. We also saw states enact measures that provide leave to victims of violence.

As was stated in Part 1 of the legislative roundup, the impact of a new presidential administration on state laws remains to be seen. Keeping that in mind, we focus on the state laws as they currently stand. What is referenced here represents only a few of the legal issues state legislatures took up in 2016. Some of the major state legislative activity is highlighted below with the previous issue of *Ideas & Trends* having covered minimum wage laws, veterans' preference laws, military leave, "ban the box" laws, personnel files and recordkeeping laws, as well as equal pay laws.

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

FAIR EMPLOYMENT PRACTICES

State legislatures take action to keep workplaces fair for all employees

California. California has amended its Fair Employment and Housing Act (FEHA) regulations to require employers to have a policy to combat discrimination, harassment and retaliation in the workplace. The regulations follow a 2012 law (Ch. 46 (S. 1038)) that required employers to ensure a workplace free of sexual harassment by implementing a sexual harassment policy established by the Fair Employment and Housing Council or the employer. The amended regulations took effect April 1, 2016.

In addition, the California Department of Fair Employment and Housing (DFEH) issued new guidance for employers of transgender employees on complying with the Fair Employment and Housing Act. The guidance makes clear that employers must allow transgender employees access to restroom, shower, locker room and other such facilities that correspond with their gender identity. It also suggests that providing individual or unisex restrooms, where possible, can enhance privacy for all employees (*State of California, Department of Fair Employment and Housing News Release*, February 17, 2016).

Age discrimination. The state amended its Civil Code to prohibit a commercial online entertainment employment service provider that enters into a contractual agreement to provide specified employment services to an individual paid subscriber from publishing information about the subscriber's age in an online profile of the subscriber. The provider must, within five days, remove from public view in an online profile of the subscriber certain information regarding the subscriber's age on any companion Internet website under the provider's control, if requested by the subscriber.

Under the new law, a provider that permits the public to upload or modify content on its own Internet website or any Internet website under its control without prior review by that provider would not be in violation of these provisions unless the subscriber first requested the provider to remove age information (Ch. 555 (A. 1687), L. 2015, enacted September 24, 2016).

Sexual orientation discrimination. California enacted a law that will prohibit a state agency and the Legislature from requiring any of its employees, officers, or members to travel to, or approving a request for state-funded or state-sponsored travel to, any state that, after June 26, 2015, has enacted a law that voids or repeals, or has the effect of voiding or repealing, existing state or local protections against discrimination on the basis of sexual orientation, gender identity, or gender expression, or has enacted a law that authorizes or requires discrimination against same-sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression, subject to certain exceptions (Ch. 687 (A. 1887), L. 2015, enacted September 27, 2016).

Colorado. Governor John Hickenlooper signed into law a bill (H. 1438) that will require employers in the state to provide job applicants and employees with reasonable accommodations related to pregnancy and childbirth. The law was signed June 1st and took effect August 10th.

Specifically, H. 1438 will require employers to provide reasonable accommodations to perform the essential functions of the job to applicants and employees for health conditions related to pregnancy or physical recovery from childbirth, if the applicant or employee requests the reasonable accommodations, unless the accommodation will impose an undue hardship on the employer's business. Employers may require a note from a licensed healthcare provider stating the need for reasonable accommodation before providing one.

The law will prevent employers from forcing applicants or employees to accept reasonable accommodations they did not request or that are unnecessary to enable them to perform the essential job functions. Similarly, employers will not be able to mandate leave as a reasonable accommodation where the employer could provide another reasonable accommodation.

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"Reasonable accommodations" under the law include, but are not limited to, more frequent or longer break periods; more frequent restroom, food, and water breaks; light duty, if available; and modified work schedules (H. 1438, L. 2016, eff. August 10, 2016).

Delaware. The state enacted a law making it an unlawful employment practice for an employer to 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 of a reproductive health decision by the individual (Ch. 291 (H. 316), L. 2015, enacted June 30, 2016, eff. six months after the date of its enactment).

In other legislation, the state will require employees of institutions of higher education to report incidents of sexual assault perpetrated by or against a student to the law enforcement authorities or public safety officials serving the institution of the alleged assault within 24 hours. Victims must be informed of their rights and available confidential medical, counseling, and advocacy services. The law includes training requirements for employees, and the institution must also file an annual report (Ch. 294 (H. 1), L. 2015, enacted June 30, 2016, with varying effective dates).

District of Columbia. The district has declared the existence of an emergency with respect to the need to amend the Protecting Pregnant Workers Fairness Act of 2014 to require an employer to make a reasonable accommodation for an employee whose ability to perform the functions of the employee's job are affected by a pre-birth complication. The Protecting Pregnant Workers Fairness Amendment Act of 2016 (Bill 21-563) is under review by the Council of the District of Columbia (DC R 554, eff. February 2, 2016).

Florida. Effective July 1, 2016, an individual employed by a church or religious organization while acting in the scope of that employment 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 such action would cause the individual or entity to violate a sincerely held religious belief (Ch. 2016-50 (H. 43), L. 2016).

Illinois. The Health Care Right of Conscience Act was amended to require health care facilities to adopt written access to care and information protocols that are designed to ensure that conscience-based objections do not cause impairment of patients' health and that explain how conscience-based objections will be addressed in a timely manner to facilitate patient health care services. The protections of the Act only apply if conscience-based refusals occur in accordance with these protocols (P.A. 99-690 (S. 1564), L. 2015, enacted July 29, 2016).

Louisiana. Governor John Bel Edwards signed an executive order providing employment protections for state employees and employees of state contractors on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, political affiliation, disability, or age. This executive order (JBE 2016-11) also prohibits discrimination in services provided by state agencies, and recognizes an exemption for churches and religious organizations. The new order was signed and took effect on April 13, 2016.

Massachusetts. The Massachusetts Commission Against Discrimination (MCAD) released *Guidance Regarding Gender Identity*, which replaces the Commission's December 2015 Transgender Law Advisory. The new guidance explains the protections against discrimination based on gender identity that were enacted by Senate Bill 2407, an *Act relative to transgender anti-discrimination*, signed into law on July 6, 2016, by Massachusetts Governor Charles D. Baker.

The Commission said that the legislation affirms its longstanding recognition of gender identity rights previously enforced through sex discrimination claims. The guidance is aimed at providing clarity to businesses, employers, and landlords, and educating the public on how the MCAD will interpret and enforce the anti-discrimination laws pertaining to transgender individuals.

Mississippi. Governor Phil Bryant signed into law HB 1523, the Protecting Freedom of Conscience from Government Discrimination Act. The state is the latest to pass legislation that would insulate from liability religious organizations and persons not inclined to accept same-sex marriage as legitimate even in the wake of the U.S. Supreme Court's ruling in *Obergefell v. Hodges* that states may not "bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex." But this measure, HB 1523 as amended, goes further to ostensibly protect from "discriminatory action" by the government religious organizations and individuals who refuse to solemnize, celebrate, recognize, accommodate, or provide goods or services for a same-sex marriage or to same-sex oriented individuals because of a sincerely held religious belief, or moral conviction, that marriage, as well as sexual relations, should be limited to man-woman couples. Many are concerned that the measure is a not-so-transparent way to permit discrimination against LGBT individuals (H. 1523, L. 2016, eff. July 1, 2016).

Montana. On January 18, 2016, Montana Governor Steve Bullock issued an executive order prohibiting discrimination in state employment and contracts (E.O. 04-2016). Specifically, the E.O. prohibits discrimination based on race, color, sex, pregnancy, childbirth or medical conditions related to pregnancy or childbirth, political or religious affiliation or ideas, culture, creed, social origin or condition, genetic information, sexual orientation, gender identity or expression, national origin, ancestry, age, disability, military

service or veteran status, or marital status. This supersedes and rescinds Executive Order 41-2008, issued by Governor Brian Schweitzer on November 14, 2008.

New Hampshire. Governor Maggie Hassan issued an Executive Order (2016-04) prohibiting discrimination in state government on the basis of gender identity or gender expression. Specifically, the order "makes clear that gender identity and gender expression are protected in the State's anti-discrimination policies and provisions for employment in state government, the administration of state programs, and state contracts," according to a press statement from the governor's office.

In other legislation, the state enacted a law protecting employees from retaliation based solely on an employee's request for a flexible work schedule (Ch. 182 (S. 416), L. 2016, eff. September 1, 2016).

New York. On January 20, 2016, Governor Cuomo announced that the New York State Division of Human Rights has adopted new regulations that ban discrimination and harassment against transgender people in both public and private employment. The regs, effective January 20, 2016, affirm that transgender individuals are protected under the state's Human Rights Law.

The regs confirm that the Division of Human Rights will accept and process Human Rights Law complaints alleging discrimination because of gender identity, on the basis of the protected categories of both sex and disability, and provide important information to all New Yorkers regarding unlawful discrimination against transgender individuals (*Office of the Governor Press Release*, January 20, 2016).

New York City Human Rights Law – caregiver status. New York City Mayor Bill de Blasio signed legislation expanding the New York City Human Rights Law to include "caregiver status" as an additional protected category in employment. The City Human Rights Law protects several classes of persons from employment discrimination. Protected classes covered under the law include race, national origin, disability, sexual orientation, citizenship status, gender, age, and others. The addition of caregiver status to these categories by Int. No. 108-A means that an employee who is caring for a minor child or an individual with a disability cannot be terminated, demoted or denied a promotion because of his or her status or perceived status as a caregiver.

North Carolina. On March 23, 2016, North Carolina enacted a law that will bar and negate any state or local law extending antidiscrimination protections in employment and public accommodations to transgender individuals. The law makes the regulation of discriminatory practices in places of public accommodations an issue of general statewide concern and supersedes and preempts local ordinances and regulations pertaining to the regulation of discriminatory practices of employers in a place of public accommodation. Moreover, the law, which takes immediate effect, specifically requires that local boards of education and public agencies designate and require the use of single-sex multiple occupancy bathrooms and changing facilities based on an individual's biological sex as stated on that person's birth certificate. The bill goes further to limit employment discrimination protections currently based on "sex" to expressly mean "biological sex" (Session Law 2016-3 (H. 2), L. 2015, enacted and eff. March 23, 2016).

Note: In response to backlash over passage of H. 2, North Carolina Governor Pat McCrory issued Executive Order 93 on April 12 to clarify existing law and provide new protections on privacy and equality. Executive Order 93: (1) maintains common sense gender-specific restroom and locker room facilities in government buildings and schools; (2) affirms the private sector's right to establish its own restroom and locker room policies; (3) affirms the private sector and local governments' right to establish non-discrimination employment policies for its own employees; (4) expands the state's employment policy for state employees to cover sexual orientation and gender identity; and (5) seeks legislation to reinstate the right to sue in state court for discrimination (*State of North Carolina, Office of the Governor, Press Release*, April 12, 2016, http://governor.nc.gov/press-release/governor-mccrory-takes-action-protect-privacy-and-equality; Executive Order 93, http://governor.nc.gov/document/executive-order-no-93-protect-privacy-and-equality).

In other legislation, the state's Equal Employment Practices Act was amended to restore the state tort claim for wrongful discharge (Session Law 2016-99 (H. 169), L. 2015, enacted July 18, 2016).

Pennsylvania. Governor Tom Wolf signed two executive orders on April 7, 2016, that expand protections from discrimination based on sexual orientation, gender expression or identity for state employees and also for employees of contractors doing business with the Commonwealth. Governor Wolf issued the orders as the Pennsylvania Fairness Act, which would apply these protections to all Pennsylvania workers, stalled in the General Assembly.

The purpose of these executive orders is to establish policy, procedures and responsibilities for the prohibition of discrimination and affirmation of equal employment opportunity in the commonwealth. Agencies under the Governor's jurisdiction, employees and applicants for employment in those agencies, and vendors are affected by these Executive Orders.

The first executive order—Executive Order 2016-04, Equal Opportunity—says that no agency under the Governor's

jurisdiction shall discriminate against any employee or applicant for employment on the basis of race, color, religious creed, ancestry, union membership, age, gender, sexual orientation, gender expression or identity, national origin, AIDS or HIV status, or disability. Executive Order 2003-10 will be rescinded and replaced by this executive order. Each agency under the Governor's jurisdiction will ensure fair and equal employment opportunities exist at every level of government.

The second executive order—Executive Order 2016-05, Contract Compliance—will ensure that all contracting processes of commonwealth agencies will be nondiscriminatory and that all businesses contracting with the commonwealth as well as all grantees should use nondiscriminatory practices in subcontracting, hiring, promoting, and other labor matters. Executive Order 2006-02 will be rescinded and replaced by the executive order (*Commonwealth of Pennsylvania, Office of the Governor, Press Release*, April 7, 2016).

Rhode Island. An employee would have a cause of action if the employee is discharged or retaliated against by his or her employer regarding compensation or other terms of employment because of a subpoena to attend court or other hearing before an administrative body or other entity authorized to issue a subpoena. An aggrieved employee must commence a cause of action within three years from the date of violation. The employer may be liable for damages, including actual damages, compensatory damages and reasonable attorneys' fees incurred by the employee. The right to a civil action does not prevent the employee from pursuing any other cause of action available under state or federal law (Ch. 51 (H. 7005), L. 2016, and Ch. 48 (S. 2423), L. 2016).

Rhode Island prohibits discrimination on state contracts. Public entities are prohibited from entering into contracts with a business to provide supplies, services, information technology or construction unless the contract includes a representation that the business is not engaged in a "boycott"—that is, blacklisting, divesting from, sanctions or otherwise refusing to do business with a person, firm or entity, or a public entity of a foreign state, when the action is based on race, color, religion, gender, or nationality (Ch. 477 (H. 7736), L. 2016).

Emergency service workers. The law protecting volunteer firefighters and volunteer emergency medical technicians who fail to report to work due to responding to an emergency as a volunteer member of a fire department or ambulance department has been added to Title 28, Chapter 6.13. Such employees are protected from discharge or other disciplinary actions when prompt notice is given to the employer. Upon request, the employee is to provide certification by submitting a statement signed by the chief of the appropriate department, showing the date and time the employee responded to and returned from the emergency.

The new law replaces a provision previously covered under Title 28, Chapter 5, as Section 28-5-43, which is now repealed (Ch. 114 (S. 2733), L. 2016, and Ch. 119 (H. 7328), L. 2016).

Tennessee. Saying that the "substance of this bill doesn't address a group, issue, or belief system," Tennessee Governor Bill Haslam on April 27 signed legislation that, as critics have pointed out, would let counselors and therapists in the state refuse to provide services to LGBT individuals based on "sincerely held principles." Many are concerned that the bill would legalize what would otherwise be unlawful discriminatory conduct.

The pressing question is exactly what are "sincerely held principles"—religious, moral, or perhaps just strong convictions? That question is answered in part by an amendment to the original bill, which would have permitted refusal to provide counseling or therapy services based only on "sincerely held religious beliefs," and which replaced that limitation with the very broad "sincerely held principle" language.

Specifically, S.B. 1556 amends the Tennessee Code Annotated by adding a new part under Title 63, Chapter 22, under which, "No counselor or therapist providing counseling or therapy services shall be required to counsel or serve a client as to goals, outcomes, or behaviors that conflict with the sincerely held principles of the counselor or therapist; provided, that the counselor or therapist coordinates a referral of the client to another counselor or therapist who will provide the counseling or therapy."

"Counseling or therapy services" under the legislation is defined to apply in a private practice setting. According to Haslam, S.B. 1556 "allows counselors—just as we allow other professionals like doctors and lawyers—to refer a client to another counselor when the goals or behaviors would violate a sincerely held principle. I believe it is reasonable to allow these professionals to determine if and when an individual would be better served by another counselor better suited to meet his or her needs" (Ch. 926 (S. 1556), L. 2015, enacted and eff. April 27, 2016).

Utah. State and local government employers and private employers with 15 or more employees must include in an employee handbook, or post in a conspicuous place in the employer's place of business, written notice on an employee's right to reasonable accommodation for pregnancy, childbirth, breastfeeding, or related conditions (S. 59, L. 2016, eff. May 10, 2016). ■

OTHER LAWS OF INTEREST

Louisiana and New Hampshire act on job reference liability laws

Louisiana. An employer, contractor, business owner or other third party would not be subject to a cause of action for negligent hiring or failing to adequately supervise an offender certified to be employed due to damages or injuries caused by that employee or independent contractor based solely on that individual's previous criminal conviction (Act 538 (H. 145), L. 2016, eff. August 1, 2016).

New Hampshire. A licensed health care provider facility shall, when acting in good faith, disclose employment information regarding misconduct and competency about a health care worker upon request of a prospective or current employer. The facility and its directors and employees who provide such information shall be immune from civil liability for providing the information or for any consequences that result from the disclosure of the information, unless it is alleged and proven that the information disclosed was false and disclosed with knowledge that such information was false (Ch. 284 (H. 628), L. 2016, eff. January 1, 2017). ■

EMPLOYEE MISCLASSIFICATION

Five states enact or expand employee misclassification legislation

Arizona. Effective August 6, 2016, an employing unit contracting with an independent contractor will have the option of proving the existence of an independent contractor relationship by means of the independent contractor executing a declaration of independent business status.

Any declaration of independent business status must be signed and dated by the independent contractor, and the form must attest to the fact that the contractor is an independent contractor and meets certain criteria by stating and declaring certain facts. Compliance and the execution of a declaration of independent business status are not mandatory in order to establish the existence of an independent contractor relationship. This law does not apply to any employing unit that is licensed or is required to be licensed pursuant to title 32, chapter 10 unless the employing unit is contracting with an independent contractor to perform services that do not require a license pursuant to title 32, chapter 10 for or in connection with the employing unit (Ch. 231 (H. 2114), L. 2016).

Also, qualified marketplace contractors are to be treated as independent contractors for all purposes under state and local laws, regulations and ordinances, provided certain conditions are met.

"Qualified marketplace contractor" means any person or organization that enters into an agreement with a qualified marketplace platform to use the qualified marketplace platform's digital platform to provide services to third-party individuals or entities seeking those services. Qualified marketplace contractor does not include any contractor when the services performed consist of transporting freight, sealed and closed envelopes, boxes or parcels or other sealed and closed containers for compensation.

"Qualified marketplace platform" means an organization that both: (a) operates a digital website or digital smartphone application that facilitates the provision of services by qualified marketplace contractors to individuals or entities seeking such services; (b) accepts service requests from the public only through its digital website or digital smartphone application, and does not accept service requests by telephone, by facsimile or in person at physical retail locations. Qualified marketplace platform does not include any digital website or smartphone application where the services facilitated consist of transporting freight, sealed and closed envelopes, boxes or parcels or other sealed and closed containers for compensation (Ch. 210 (H. 2652), L. 2016, eff. August 6, 2016).

California. The Motor Carrier Employer Amnesty Program has been established to provide that, notwithstanding any law, a motor carrier performing drayage services may be relieved of liability for statutory or civil penalties associated with misclassification of commercial drivers as independent contractors if the motor carrier enters into a settlement agreement with the Labor Commissioner, with the cooperation and consent of the Employment Development Department, prior to January 1, 2017, whereby the motor carrier agrees to convert all of its commercial drivers to employees, and the settlement agreement contains prescribed components, including, but not limited to, an agreement by the motor carrier to pay all wages, benefits, and taxes owed, if any.

Also, a settlement agreement would be permitted to contain a provision authorizing the Labor Commissioner and the Employment Development Department to recover from the motor carrier the reasonable, actual costs of the Labor Commissioner and the Employment Development

Department for their respective review, approval, and compliance monitoring of that settlement agreement (Ch. 741 (A. 621), L. 2015).

Indiana. New law was enacted to clarify that a franchisor would not be an employer or co-employer of a franchisee or of any employee of the franchisee, unless the franchisor agrees in writing to assume such a role (Public Law 161 (H. 1218), L. 2016, eff. July 1, 2016).

New York. Governor Andrew M. Cuomo signed Executive Order No. 159 on July 20, 2016, "Establishing a Permanent Task Force to Fight Worker Exploitation and Employee Misclassification." The task force represents a merger of the Exploited Worker Task Force, the Nail Salon Industry Enforcement Task Force and the Joint Enforcement Task Force on Employee Misclassification, which will combine these comprehensive efforts and result in additional tools to assist state agencies in protecting vulnerable, low-wage workers.

The new executive order will expand its focus to examine a variety of ways in which workers are exploited such as unpaid wages, unpaid overtime, health and safety violations, and other instances of worker exploitation. The effort, which includes 13 state agency partners, spans 15 target industries, including: Airports, Car Washes, Childcare, Cleaning, Construction, Farming, Home Health Care, Janitorial Services, Landscaping, Laundry, Nail Salons, Restaurants, Retail, Supermarkets, Trucking and Waste Disposal.

The newly merged task force will bring together unemployment insurance investigators, wage investigators and workers compensation investigators with the investigators and personnel of task force agencies to comprehensively scrutinize employers engaged in the underground economy.

Pennsylvania. The U.S. Department of Labor's Wage and Hour Division and the Pennsylvania Department of Labor and Industry signed a three-year Memorandum of Understanding intended to protect employees' rights by preventing their misclassification as independent contractors or other non-employee statuses. The two agencies will provide clear, accurate and easy-to-access outreach to employers, employees and other stakeholders; share resources; and enhance enforcement by conducting coordinated investigations and sharing information consistent with applicable law. The division is working with the U.S. Internal Revenue Service and 31 other U.S. states to combat employee misclassification and to ensure that workers get the wages, benefits and protections to which they are entitled. Labeling employees as something they are not—such as independent contractors—can deny them basic rights such as minimum wage, overtime and other benefits. Misclassification also improperly lowers tax revenues to federal and state governments, and creates losses for state unemployment insurance and workers' compensation funds (*United States Department of Labor, Wage and Hour Division, News Brief No. 16-1603-NAT*, August 4, 2016; Pennsylvania Press Room, Labor and Industry Press Release, August 5, 2016). ■

RIGHT TO WORK

Three states ensure right to work not affected by union membership

Alabama. Although already on the books, an initiative on the ballot in Alabama sought to set the issue of right to work firmly into the state constitution during the 2016 General Election. The constitutional amendment was approved by voters in Alabama.

Statewide Amendment 8 (H. 37) amends the Constitution of Alabama to declare that it is the public policy that the right of persons to work may not be denied or abridged on account of membership or nonmembership in a labor union or labor organization; to prohibit an agreement to deny the right to work, or place conditions on prospective employment, on account of membership or nonmembership in a labor union or labor organization; to prohibit an employer from requiring its employees to abstain from union membership as a condition of employment; and to provide that an employer may not require a person, as a condition of employment or continuation of employment, to pay dues, fees, or other charges of any kind to any labor union or labor organization.

The amendment would not apply to any lawful contract in force on or before the date of ratification, but would apply to contracts entered into on or after that date, as well as to any renewal or extension of an existing contract.

Also, back in February, Alabama Governor Robert Bentley signed House Bill 174, the "Alabama Uniform Minimum Wage and Right to Work Act," to ban local government requirements on wages and hours and right to work, providing for the Act to retain the exclusive authority of the state through the Legislature to regulate collective bargaining under federal labor laws, and wages, leave, and benefits provided by an employer to employees, classes of employees, and independent contractors (Act 2016-18 (H. 174)).

Virginia. Voters in the Commonwealth of Virginia rejected a constitutional right to work by 53.55 percent. Currently state law sections 40.1-58 through 40.1-69 provide that it is the public policy of Virginia that the right of persons to work

shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization.

West Virginia. West Virginia became the 26th right-to-work state on February 12, when its legislature overrode Governor Earl Ray Tomblin's veto of the measure. The bill, known as the West Virginia Workplace Freedom Act, cleared the state legislature on February 4, only to be vetoed by the governor on February 11. That veto was overridden the following day by a simple majority of 54-43 in the state house of delegates and 18-16 in the state senate.

The measure, Senate Bill 1, which is effective 90 days after passage, amends the Code of West Virginia to prohibit employment agreements that require membership in a labor organization as a condition of employment, or any requirement that a person either become or remain a union member as a condition of employment. The measure also bars any requirement that a person pay dues or other fees to a labor organization as a condition of employment, or that he or she contribute to a charity in lieu of paying dues or other fees to a labor organization.

The bill also declares unlawful, null, and void any agreement, contract, understanding, or practice between a labor organization and an employer or public body that excludes from employment any person because of membership in, affiliation with, resignation from, or refusal to join or affiliate with, any labor organization or employee organization of any kind (S. 1, L. 2016, effective 90 days from passage (Eff. May 4, 2016; Passed February 4, 2016; Veto override February 12, 2016). ■

LEAVE LAWS

Employees see leave laws expanded by state legislatures in 2016

Family medical leave and violence victims' leave

California. Governor Edmund G. Brown, Jr., signed a measure on April 11, 2016, to expand the state's paid family leave program by increasing the amount of pay available under the program for employees who take leave to care for an ill family member, a newborn baby, or newly adopted child. Currently, employees in the state are entitled to receive up to 55 percent of their regular pay while taking up to six weeks of family leave.

AB 908 increases that wage benefit to 70 percent of regular pay for the state's lowest-paid workers. Higher-earning employees will be entitled to 60 percent of their regular pay while on family leave. AB 908 also eliminated a seven-day waiting period before workers could be eligible for paid leave benefits under the program (Ch. 5 (A. 908), L. 2015).

In other legislation, the state amended its Labor Code to require employers to inform employees of their rights regarding employer retaliation because they are victims of certain crimes by providing that information in writing to new employees upon hire and to other employees upon request. The law requires the development of a form an employer may elect to use to comply with these requirements. This form must be posted on the Labor Commissioner's Internet website. The deadline for developing the form and posting it is July 1, 2017. Employers are not required to comply until the form is posted (Ch. 355 (A. 2337), L. 2015, enacted September 14, 2016).

Connecticut. The state amended its family leave law to provide that leave may be taken because of any qualifying exigency arising out of the fact that the spouse, son, daughter or parent of an employee is on active duty or has been notified of an impending call to duty in the armed forces (P.A. 16-195 (S. 262), L. 2016, eff. June 7, 2016).

Effective October 1, 2016, an advanced practice registered nurse may provide the written certification required prior to leave. Current law requires that only physicians may do so (P.A. 16-39 (S. 67), L. 2016).

Delaware. The state enacted a law making it an unlawful employment practice for an employer to discriminate against an employee because of the individual's family responsibilities. "Family responsibilities" means the obligations of an employee to care for any family member who would qualify as a covered family member under the federal Family and Medical Leave Act (Ch. 292 (H. 317), L. 2015, enacted June 30, 2016, eff. six months after the date of its enactment).

Illinois. The Victims' Economic Security and Safety Act has been amended effective January 1, 2017, to apply the Act to employers with one or more employees. Currently, the Act applies to employers with 15 or more employees.

The Act provides for employees to take unpaid leave from work when the employee is a victim of domestic or sexual violence or an employee has a family or household member who is a victim of domestic or sexual violence whose interests are not adverse to the employee as it relates to domestic or sexual violence, to seek medical attention, obtain services from a victim services organization, obtain psychological counseling, participate in safety planning, relocating or taking other actions to increase safety, or to seek legal assistance

and remedies including preparing or participating in a civil or criminal legal proceeding related to such violence.

An employee working for an employer with at least one but not more than 14 employees would be entitled to take a total of four workweeks during any 12-month period. Currently, the law allows for employees of employers with at least 50 employees to take a total of 12 workweeks and employees of employers with at least 15 but not more than 49 employees to take a total of eight workweeks in a 12-month period (P.A. 99-765 (H. 4036), L. 2015, enacted August 12, 2016).

Bereavement leave. The Child Bereavement Leave Act has been created to provide employees with up to two weeks (10 work days) of unpaid leave in order to: (1) attend the funeral or alternative to a funeral of a child; (2) make arrangements necessitated by the death of a child; or (3) grieve the death of a child. Additional leave of up to six weeks may be authorized if more than one child dies within a 12-month period. This does not create a right to take unpaid leave that exceeds the amount of leave provided for under the federal FMLA. Such leave must be completed within 60 days after the employee receives notice of the death of the child. Employees are to give their employer at least 48 hours' advance notice of the intent to take bereavement leave, unless to do so would not be reasonable and practicable. An employer is prohibited from retaliating or taking any adverse action against employees for exercising their rights under the Act. An employer who violates the law would be subject to a civil penalty of not more than $500 for a first violation and not more than $1,000 for a second or subsequent violation.

"Child" under the Act means the employee's son or daughter who is a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in the place of a parent (standing in loco parentis). Eligible "employee" and "employer" are as defined under the federal FMLA (29 U.S.C. 2601 et seq.) (Public Act 99-0703 (S. 2613), L. 2016, eff. July 29, 2016).

New York. Governor Andrew M. Cuomo signed legislation on April 4 enacting a 12-week paid family leave policy. The legislation was passed as part of the 2016-17 state budget, which includes the most comprehensive paid family leave program in the nation. When fully phased-in, employees will be eligible for 12 weeks of paid family leave when caring for an infant, a family member with a serious health condition or to relieve family pressures when someone is called to active military service. Benefits will be phased in beginning in 2018 at 50 percent of an employee's average weekly wage, capped to 50 percent of the statewide average weekly wage, and fully implemented in 2021 at 67 percent of their average weekly wage, capped to 67 percent of the statewide average weekly wage. This program will be funded entirely through a nominal payroll deduction on employees so it costs businesses—both big and small—nothing. Employees are eligible to participate after having worked for their employer for six months (Ch. 54 (S. 6406), L. 2015, enacted April 4, 2016).

In other legislation, on July 21, 2016, Governor Cuomo signed legislation providing up to four hours' paid leave annually for prostate screenings to all public employees. Prior law allowed this leave for all public employers except for those who live in the City of New York (Governor's Press Release, July 21, 2016; Ch. 96 (S. 8107), L. 2015, enacted and eff. July 21, 2016).

Vermont. As Governor Peter Shumlin put his signature on a bill March 9 that cleared the state legislature, Vermont became the fifth state in America to guarantee paid sick days to its citizens. Specifically, H. 187 requires that employers provide earned sick time at the rate of at least one hour for every 52 hours worked. From January 1, 2017, until December 31, 2018, employers must provide employees with at least 24 hours (three days) of earned sick time in a 12-month period. For existing employees, employers may implement a waiting period of up to one year beginning January 1, 2017, during which employees earn but cannot use sick time.

After December 31, 2018, employers must give employees at least 40 hours (five days) of earned sick time in a 12-month period. Only an employer with five or fewer employees who are employed for an average of not less than 30 hours a week may implement a waiting period for existing employees of up to one year during which employees accrue but cannot use earned sick time.

The law applies to all employers, but there is an exemption for new employers that delays compliance until one year after the employer hires its first employee. The earned sick time requirements do not apply to federal employees, or employees that are under 18 years of age, have been employed for 20 weeks or fewer, or are employed on jobs that last 20 weeks or fewer, among other types of employees.

Paid sick leave

California. Governor Edmund G. Brown Jr. signed landmark legislation that makes California the first state in the nation to commit to raising the minimum wage to $15 per hour statewide. The new law also phases in paid sick leave for in-home supportive services workers with eight hours or one day paid sick leave beginning on July 1, 2018. Thereafter, sick days would be increased as minimum wage increases are phased in for employers with 26 or more employees to 16 hours or two days when the minimum wage is $13; and to 24 hours or three days when the minimum wage is $15. Paid sick days would be earned at the rate of one hour for every 30 hours worked (Ch. 4 (S. 3), L. 2015, enacted April 4, 2016).

Illinois. The Employee Sick Leave Act was signed into law on August 19, 2016, and will take effect January 1, 2017. The law provides that an employee may use personal sick leave benefits provided by the employer for absences due to an illness, injury, or medical appointment of the employee's child, spouse, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent, or stepparent, for reasonable periods of time as the employee's attendance may be necessary, on the same terms upon which the employee is able to use sick leave benefits for the employee's own illness or injury.

An employer may limit the use of personal sick leave benefits provided by the employer for absences due to an illness, injury, or medical appointment of the employee's child, spouse, domestic partner, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent, or stepparent to an amount not less than the personal sick leave that would be accrued during six months at the employee's then current rate of entitlement (P.A. 99-841 (H. 6162), L. 2016).

Organ and bone marrow donation leave

Wisconsin. Effective July 1, 2016, both private and public employees may take leave from employment in order to donate an organ or bone marrow. Prior law only makes provision for state (civil service) workers (Act 345 (S. 517), L. 2015, enacted April 1, 2016). ■

IMMIGRATION

CA, TN, and UT amend state employment verification laws

California. It is unlawful for an employer, in the course of satisfying the requirements of Section 1324a(b) of Title 8 of the United States Code, to do any of the following: (1) request more or different documents than are required under Section 1324a(b) of Title 8 of the United States Code; (2) refuse to honor documents tendered that on their face reasonably appear to be genuine; (3) refuse to honor documents or work authorization based upon the specific status or term of status that accompanies the authorization to work; (4) attempt to reinvestigate or reverify an incumbent employee's authorization to work using an unfair immigration-related practice. Any person who violates this provision shall be subject to a penalty imposed by the Labor Commissioner and liability for equitable relief.

An applicant for employment or an employee who is subject to an unlawful act that is prohibited by this provision, or a representative of that applicant for employment or employee, may file a complaint with the Division of Labor Standards Enforcement pursuant to Section 98.7. The penalty recoverable by the applicant or employee, or by the Labor Commissioner, for a violation of this section shall not exceed $10,000 per violation (Ch. 782 (S. 1001), L. 2016, eff. January 1, 2017).

Tennessee. The Tennessee Lawful Employment Act was amended to require employers with 50 or more employees to enroll in the E-Verify program beginning January 1, 2017. Penalty provisions have also been revised (Ch. 828 (S. 1965), L. 2015, enacted April 21, 2016, eff. July 1, 2016).

Utah. The implementation date of the Guestworker Program was extended, to provide that the program is to be implemented the sooner of (1) 120 days after the date on which the governor finds that the state has the one or more federal waivers, exemptions or authorizations needed to implement the program or (2) July 1, 2027.

The implementation date of the Utah Pilot Sponsored Resident Immigrant Program has been extended to provide that the program is to be implemented by the governor no later than July 1, 2027, and end operation of the program on June 30, 2032 (S. 237, L. 2016). ■

OTHER LAWS OF INTEREST

Noncompete agreement laws see legislative activity in 2016

Idaho. The state's noncompete agreement law was amended to provide that a rebuttable presumption of irreparable harm is established under certain circumstances (H. 487, L. 2016).

Illinois. The Illinois Freedom to Work Act was signed into law on August 19, 2016. The law provides that, effective January 1, 2017, no employer shall enter into a covenant not to compete with any of its low-wage employees. "Low-wage employee" is defined as an employee who earns the greater of (1) the hourly rate equal to the minimum wage required by the applicable federal, state, or local minimum wage law or (2) $13.00 per hour (P.A. 99-860 (S. 3163), L. 2015).

Utah. In addition to any requirements imposed under common law, for a post-employment restrictive covenant entered into on or after May 10, 2016, an employer and an employee may not enter into a post-employment restrictive covenant for a period of more than one year from the day on which the employee is no longer employed by the employer. A post-employment restrictive covenant that violates this provision is void.

The new law defines "post-employment restrictive covenant," also known as a "covenant not to compete" or "noncompete agreement," as an agreement, written or oral, between an employer and employee under which the employee agrees that he or she, either alone or as an employee of another person, will not compete with the employer in providing products, processes, or services that are similar to the employer's products, processes, or services.

Exceptions to the law may be allowed for severance agreements and the sale of a business (H. 251, L. 2016, enacted March 22, 2016). ■

WAGE PAYMENT

Wage payment laws receive state legislative focus in 2016

Arizona. Arizona law relating to payment of wages has been amended to: (1) define minimum wage as the nondiscretionary minimum compensation given to an employee, including commissions but excluding tips and gratuities; (2) add "nonwage" compensation to the list of employee regulations that are of statewide concern and not subject to further regulation by any city, town or political subdivision of the state; (3) authorize a political subdivision to establish a minimum wage equivalent to the statutory requirements of the Minimum Wage Act; (4) designate nonwage compensation as: fringe benefits, welfare benefits, child/adult care plans, sick pay, vacation pay, severance pay, commissions, bonuses, retirement plan/pension contributions, other federal employment benefits, other amounts more than the minimum compensation due to an employee; (5) remove from the definition of wages "sick pay, vacation pay, severance pay, commissions, bonuses and other amounts promised by the employer who has a policy or practice of making such payments"; and (6) require the Arizona Department of Labor to investigate all nonwage claims, if they are timely filed (Ch. 203 (H. 2579), L. 2016, eff. August 6, 2016).

Also, cities, towns and counties may not adopt an ordinance, resolution or other regulation that requires an employer to alter or adjust scheduling, unless such alteration or adjustment is required by state or federal law. This would not prohibit scheduling requirements by such local government for employees of such city, county or town (H. 2191, L. 2016, eff. retroactively to December 31, 2015).

California. California's Probate Code provides that at any time after an employee dies, the surviving spouse or the guardian or conservator of the estate of the surviving spouse may collect salary or other compensation owed by an employer for services of the deceased spouse, including compensation for unused vacation, not to exceed $15,000 net. California law was amended to provide that a "spouse" includes a domestic partner (Ch. 50 (S. 1005), L. 2016, eff. January 1, 2017).

The California Labor Code generally requires that an employee of a temporary services employer be paid on a weekly basis. This law was amended to make, with certain exceptions, the weekly pay requirement applicable to a security guard employed by a private patrol operator who is a temporary services employer (Ch. 61 (A. 1311), L. 2016, eff. July 22, 2016).

The California Labor Code requires employers to provide employees with itemized wage statements, in writing, either semimonthly or at the time the employer pays the employees their wages. This wage statement information requirement includes showing the total hours worked by an employee, unless the employee is paid on a salary basis and is exempt from payment of overtime. This law was amended effective January 1, 2017, to also exempt from showing the total hours worked on the itemized wage statement if an employee is exempt from payment of minimum wage and overtime by statute or any applicable order of the Industrial Welfare Commission (Ch. 77 (A. 2535), L. 2016, enacted July 22, 2016).

Connecticut. Employers must pay weekly, *or once every two weeks*, all moneys due each employee on a regular pay day, designated in advance by the employer. Upon application, the Commissioner may waive these provisions and may permit an employer to pay employees less frequently than once every two weeks, provided each employee is paid in full at least once each calendar month on a regularly established schedule (P.A. 16-169 (S. 220), L. 2016, eff. June 6, 2016).

Effective October 1, 2016, employers may pay employees by means of a payroll card, provided that (1) each employee has the option to receive wages, salary or other compensation by direct deposit and by negotiable check; and (2) the employee voluntarily and expressly authorizes payment by means of a payroll card account. Payment by means of a payroll card account may not be required as a condition of employment or as a condition for the receipt of any benefit or other form of remuneration (P.A. 16-125 (S. 211), L. 2016).

Also, employers are required to provide in writing a wage statement to each employee every time wages are paid that reflects hours worked, gross earnings showing straight time and overtime (unless exempt), itemized wage deductions, and net earnings. Effective October 1, 2016, such statement may be provided in writing or, with the employee's explicit consent, electronically. If provided electronically, the employer must provide a secure and private means for the employee to conveniently access and print such record (P.A. 16-125 (S. 211), L. 2016).

Delaware. It is an unlawful employment practice for an employer to (1) require as a condition of employment that an employee refrain from inquiring about, discussing, or disclosing his or her wages or the wages of another employee; (2) require an employee to sign a waiver or other document which purports to deny an employee the right to disclose or discuss his or her wages; (3) discharge, formally discipline, or otherwise discriminate against an employee for inquiring about, discussing, or disclosing his or her wages or the wages of another employee. This provision does not create an obligation for an employer or employee to disclose wages (Ch. 290 (H. 314), L. 2016).

District of Columbia. Temporary emergency amendments have been made to the "Wage Theft Prevention Amendment Act of 2014" (DC Law 20-157; 61 DCR 10157) to clarify who may bring an action on behalf of an employee; covering the issue of joint liability of contractors/subcontractors and temporary staffing firms; to revise criminal penalties; and to authorize the Mayor to issue rules to implement the provisions of the Act. Other temporary legislation provides for bona fide professional, executive and administrative employees to be paid at least once per month and clarifies posting and recordkeeping requirements.

In addition, the issue of bona fide collective bargaining agreements was addressed on a permanent basis in the Fiscal Year 2017 Budget Support Act of 2016, effective October 8, 2016 (DC Law 21-160 (Act 21-488; B21-669), 63 DCR 10775).

Georgia. The "Protecting Georgia Small Business Act" clarifies that neither a franchise nor a franchise's employee would be considered an "employee" of a franchisor for any purpose. However, this would not apply to the state's workers' compensation law (Title 34, Chapter 9) (Act 526 (S. 277), L. 2016, enacted May 3, 2016, eff. January 1, 2017).

Illinois. The Illinois Wage Payment and Collection Act was amended by adding a new statute to provide for the Department of Labor to recover unpaid wages, wage supplements or final compensation from an employer that has violated the Act. The Department is to conduct a good faith search to find the aggrieved employee and, if the Department is unable to do so, to deposit the money collected in the Department of Labor Special Trust Fund. An aggrieved employee may make a request to the Department to recover unpaid wages, wage supplements or final compensation from the Fund (P.A. 99-762 (H. 3554), L. 2015, enacted August 12, 2016, eff. January 1, 2017).

Michigan. To the extent allocation of employer responsibilities between a franchisor and a franchisee is permitted by law, the franchisee is considered the "sole employer" of workers for whom it provides a benefit plan or pays wages, except as specifically provided in a franchise agreement (Act 266 (S. 492), L. 2015, eff. March 22, 2016).

Also, the law regulating the time and manner of payment of wages and fringe benefits to employees has been amended with respect to covered employers, to provide that, except as specifically provided in a franchise agreement, between a franchisee and a franchisor, the franchisee is considered the sole employer of workers for whom the franchisee pays wages or provides a benefit plan (P. A. 18 (H. 5071), L. 2016).

New Hampshire. New Hampshire's payment of wages law requires that employees who report to work at an employer's request must be paid not less than two hours' pay at the employee's regular rate. Effective November 1, 2016, this provision requiring call-in pay does not apply to ski and snowboard instructional employees at ski resorts, provided that these employees receive other compensation that is at least equal to their rate of pay (Ch. 316 (H. 1339), L. 2016).

Also, an administrative rule of the Department of Labor was readopted with amendments. The rule sets out the employer's responsibilities relating to the notification and payment of wages along with recordkeeping requirements, including the frequency and method of the payment of wages. The rule provides clarification of prorating salaried employees' pay, as well as exemptions from the term "employee", identifies circumstances when an employee may be paid less than two hours' pay, adds definitions, and sets out requirements for the application procedure when applying for a special authorization from the Department for students participating in non-paid practical experience, and, based on an addition to the law, added requirements for non-paid practical experience/training programs for individuals with disabilities.

In addition, Rule Lab 804, the application procedure for a subminimum wage rate, was repealed based on the repeal of RSA 279:22.

New York. The New York Business Corporation law was amended relating to shareholder liability for wages due laborers, servants, or employees for certain foreign corporations. The amendment treats New York and foreign corporations alike in terms of liability for unpaid wages of employees when the services were performed in New York. Currently, such liability is imposed only on New York corporations (Ch. 421 (A. 737), L. 2015, eff. January 19, 2016).

The New York Department of Labor adopted new regulations to provide clarification and specifications as to permissible methods of the payment of wages, including payroll debit cards. Notice of final rulemaking was published in the September 7, 2016, New York State Register, eff. March 7, 2017.

Oregon. Employer wage statement requirements were amended to provide that, effective January 1, 2017, employers must provide employees with a written, itemized wage statement on regular paydays, and at other times payment of wages, salary or commission is made.

An employer may provide such statements to employees in electronic format, provided that the statement contains the above information; the employee expressly agrees to receive the statement in electronic form, and the employee has the ability to print or store the statement at the time of receipt (Ch. 115 (S. 1587), L. 2016).

Pennsylvania. Employers may pay wages, salaries and commissions by method of electronic funds transfer, including the use of payroll cards, by credit to a financial institution, provided the employee has authorized the method of payment in writing or electronically. When an employer pays wages by payroll card, they must provide an employee with a written or electronic statement of earnings and deductions each pay period in accordance with applicable law.

The payroll card account must be established at a financial institution whose funds are insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration. No employer may make the payment of wages, salary, commissions or other compensation by means of a payroll card account a condition of employment or a condition for the receipt of any benefit for any employee (Act 2016-161 (S. 1265), L. 2015, eff. November 4, 2016).

Rhode Island. The state enacted a law to increase penalties for nonpayment of wages and to improve access to the justice system for aggrieved employees to file claims against employers for nonpayment of wages.

This law was amended to provide that an employer who does not pay wages and fines within 30 days of a final decision and after notification by the Department of Labor and Training, may have its business license revoked until such wages and fines are paid in full or until a payment agreement is entered into and the employer stays in compliance with the agreement.

Also, with regard to filing a wage claim, the law has been amended to provide that all claims for wages due *may* be filed with the director within three years from time of service rendered by an employee to the employer. An aggrieved person who alleges a violation may bring a civil action in a court of law for appropriate injunctive relief or actual damages (two times the wages owed for a first offense) or both within three years after the occurrence of the alleged violation. Attorneys' fees, including litigation expenses, may be granted to a prevailing plaintiff (Ch. 435 (H. 7628) and Ch. 436 (S. 2475), L. 2016, eff. July 12, 2016).

In addition, employers are prohibited from deducting from employee wages any monies not authorized under state or federal law or by court order without first getting the employee's written or electronic approval. In addition to any other penalty or enforcement provisions under the wage payment law, an employer who violates this law will also be subject to treble damages, payable to the employee, of the amount not authorized to be deducted or withheld (Ch. 501 (H. 7254), L. 2016).

Utah. The wage payment law was amended to adopt federal definitions for "franchisee" and "franchisor", and to clarify that a franchisor is not considered to be an employer of a franchisee or of a franchisee's employees with respect to a specific claim for relief under the Act made by a franchisee or the franchisee's employee. However this does not apply to a franchisor under a franchise that exercises a type or degree of control over the franchisee or the franchisee's employees not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademark and brand.

The law was also amended to address federal executive branch rulings in determining whether two or more persons are joint employers, providing that such an administrative ruling may not be considered a generally applicable law unless the ruling is determined to be so by a court of law or adopted by statute or rule (H. 116, L. 2016).

Virginia. A provision of the law imposing a penalty for willfully failing to pay wages was amended to clarify that wages owed to more than one employee may be aggregated in determining if an employer's willful failure to pay wages is a misdemeanor or a felony (Ch. 593 (H. 1150), L. 2016, eff. July 1, 2016).

Wisconsin. A new law was enacted to exclude a franchisor as an employer of a franchisee or an employee of a franchisee unless (a) the franchisor has agreed in writing to assume that role or (b) the franchisor has been found to have exercised a type or degree of control over the franchisee or the franchisee's employees that is not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademark and brand (Act 203 (S. 422), L. 2015, enacted March 1, 2016, eff. March 3, 2016). ■