

## **Alert** | Labor & Employment



November 2019

### **2019 Employment Law Snapshot: New Jersey, New York, and Pennsylvania**

In 2019, New Jersey, New York and Pennsylvania each enacted substantial legislation affecting companies that employ individuals in those states. Following is a brief summary of the most significant of these legislative changes. This quick reference guide will help employers stay abreast of the changes relevant to their businesses.

Please note that the laws described below extend protections to employees who work in the state and therefore can affect out-of-state employers.

#### **NEW JERSEY**

##### ***New Jersey Bans Waivers of Rights (Including Potentially Agreements to Arbitrate) in Employment Agreements and Limits Confidentiality Provisions in Settlement Agreements***

- A recently passed amendment to the New Jersey Law Against Discrimination (NJLAD) prohibits waivers of certain rights in “any employment contract” related to claims arising under NJLAD. As a result, jury trial waivers and arbitration agreements (other than pursuant to a collective bargaining agreement) may be unenforceable to the extent that they encompass discrimination, retaliation, or harassment claims.

- The law also makes confidentiality provisions in settlement agreements resolving claims of discrimination, retaliation, or harassment unenforceable to the extent they purport to cover underlying facts and allegations relating to harassment or discrimination.

### ***New Jersey Family Leave Act***

- Pursuant to a recently enacted amendment to the state’s family leave and benefits laws, the New Jersey Family Leave Act (NJFLA) now applies to New Jersey employers with at least 30 employees (down from 50 employees).
- As before, New Jersey employees who have worked for an employer for at least a year are permitted to take NJFLA leave (1) to care for a newly born or adopted child or (2) to care for a family member with a serious health condition. Under the amendment, eligible employees may now also take NJFLA leave if (1) an employee becomes a foster-care parent, (2) an employee introduces a new child into the family through a gestational carrier agreement, or (3) the employee or a family member is a victim of domestic or sexual violence.
- Additionally, the definition of “family member” under the law has expanded and now includes a child, parent, spouse, civil union partner, parent-in-law, sibling, grandparent, grandchild, domestic partner, “any other individual related by blood to the employee,” and “any other individual that the employee shows to have a close association with the employee which is the equivalent of a family relationship.” These final “catch-all” provisions have yet to be more precisely defined by the legislature or the state Department of Labor.

### ***New Jersey Wage Theft Law***

- The New Jersey Wage Theft Law (NJWTL), signed into law in August 2019, **significantly enhances employer penalties under state wage and hour laws** and makes client-employers and labor contractors jointly and severally liable for violations.
- The law increases the penalties, including potential prison time, for violations.
- The law expands the statute of limitations from two years to six years.
- In addition to recovered wages, employees may now recover attorneys’ fees and liquidated damages up to 200% of wages recovered.
- The law further establishes a rebuttable presumption of liability against employers who (1) fail to maintain records required by law or (2) take adverse actions against employees who raise complaints within 90 days of the employee’s filing of a complaint with the NJDOL or a court. The employer may rebut this presumption only through “clear and convincing” evidence of a non-retaliatory reason.
- The law increases the jurisdictional limit for the NJ Department of Labor and Workforce Development’s Wage Collection Section (WCS) from \$30,000 to \$50,000 and expands the WCS’s subject matter jurisdiction to include employee retaliation claims.

### ***New Jersey Compassionate Use Medical Cannabis Act***

- The Compassionate Use Medical Cannabis Act (CUMCA), signed into law in July 2019, expressly prohibits employers from taking adverse actions against employees if the adverse action is “based solely on the employee’s status” as a medical marijuana patient.

- However, the law does not “restrict an employer’s ability to prohibit or take adverse employment action for the possession or use of intoxicating substances during work hours or on workplace premises outside of work hours.”
- The law also permits employers to take adverse action against an employee where accommodation of medical marijuana use would “violate federal law or result in the loss of a federal contract or federal funding.”

### ***New Jersey Prohibits Inquiring About Salary History***

- Starting Jan. 1, 2020, New Jersey employers cannot request a job applicant’s salary or benefit history during the initial hiring process.
- An employer may not take adverse action based on an individual’s refusal to provide salary or benefit history.
- Notably, once an employer makes an employment offer, it may then request that the applicant provide the employer with a written authorization to confirm salary history.

### ***New Jersey Minimum Wage***

- Effective July 1, 2019, the minimum wage in New Jersey increased to \$10.00/hour from \$8.85. It will be \$11.00/hour starting Jan. 1, 2020.
- This rate will continue to increase by \$1.00/hour each Jan. 1 until it reaches \$15.00/hour on Jan. 1, 2024.

### ***New Jersey Mandatory Paid Sick Leave***

- As a **reminder**, the New Jersey Earned Sick Leave Law (which was effective as of October 2018 and preempts various municipal sick leave ordinances passed in recent years), requires all New Jersey employers regardless of size to provide paid “sick” leave to employees for absences due to (i) an employee’s own physical or mental illness, (ii) the physical or mental illness of family members, or (iii) tending to preventative care. Notably, certain reasons unrelated to illness including, for example, absences due to parent-teacher conferences or domestic or sexual violence, are also covered.
- Under the law, employees accrue one hour of earned sick leave for every 30 hours worked, up to a required minimum of 40 hours.
- Employees must have worked for at least 120 days to accrue sick leave.
- Employers are not required to allow employees to accrue more than 40 hours of leave per year, or carry unused leave that exceeds 40 hours forward to the next year.

## **NEW YORK STATE**

### ***New York State Lowers Bar for Harassment Claims, Bars Mandatory Arbitration Agreements and Confidentiality Provisions in Settlement Agreements***

- **Under sweeping legislation enacted in August 2019**, employees no longer need to demonstrate that conduct is “severe or pervasive” to sustain a claim for hostile work environment harassment. Instead, employees merely need to show that the alleged harassment rises above the level of “petty slights and trivial inconveniences.”

- Additionally, employees claiming discrimination are not required to identify a “comparator” (i.e., an employee outside the protected class who was treated more favorably).
- Employers may no longer rely upon an employee’s failure to use the employer’s internal harassment reporting process as a defense against a harassment claim. Put differently, New York eliminated the long-established *Faragher-Ellerth* defense.
- The law prohibits agreements that require mandatory arbitration to resolve any kind of discrimination or harassment claim (the ban previously applied only to sexual harassment claims).
- Additionally, provisions in settlement agreements that “prevent disclosure of the underlying facts and circumstances to the claim or action” are prohibited, unless the employee elects to maintain confidentiality. Employees must also be afforded a full, non-waivable 21 days to consider any confidentiality clause before signing a settlement agreement and a seven-day period after signing during which they may revoke their agreement to the clause.

***New York Paid Family Leave Increases***

- Starting Jan. 1, 2019, New York employees are eligible to take up to 10 weeks of leave annually under the New York State Paid Family Leave Law, and can receive 55% of their average weekly wage, up to a maximum of 55% of the statewide average weekly wage (\$1,357.11).
- These benefits will increase to 10 weeks/60% average weekly wage/60% statewide average weekly wage on Jan. 1, 2020, and will increase to 12 weeks/67% average weekly wage/67% statewide average weekly wage on Jan. 1, 2021.

***New York Sexual Harassment Annual Training***

- **New York employers are now required** to annually train their employees on sexual harassment prevention, and have until Oct. 9, 2020, to complete the annual training.

***New York Prohibits Discrimination Based on Gender Identity/Expression***

- The New York State Human Rights Law now expressly prohibits discrimination based on gender identity or expression.

***New York Extends Sexual Harassment Protections to Independent Contractors***

- The New York State Human Rights Law now expressly prohibits discrimination against independent contractors.

***New York State/City Minimum Wage***

- The minimum wage requirement for New York employers excluding New York City and Westchester/Nassau/Suffolk counties is currently \$11.10/hour. The minimum wage will increase as follows:

<b>LOCATION</b>	<b>12/31/2019</b>	<b>12/31/2020</b>	<b>12/31/2021</b>
NYC 10+ employees	\$15.00/hour	\$15.00/hour	\$15.00/hour
NYC < 10 employees	\$15.00/hour	\$15.00/hour	\$15.00/hour
Westchester/Nassau/Suffolk	\$13.00/hour	\$14.00/hour	\$15.00/hour

Remainder of New York	\$11.80/hour	\$12.50/hour	(TBD by NYS Division of Budget)
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**NEW YORK CITY**

***New York City “Ban the Box” (Fair Chance Act)***

- Employers with four or more employees in New York City are prohibited from inquiring about the criminal records of candidates before making a conditional job offer, and are not permitted to refer to criminal history in job postings, applications, or during the interview process.

***New York City Sexual Harassment Annual Training***

- New York City employers are required to annually train their employees on sexual harassment prevention. This requirement mirrors the state training requirement.

***New York City Extends Protections to Independent Contractors***

- As of Jan. 11, 2020, the anti-discrimination and anti-retaliation provisions of the New York City Human Rights Law will apply to freelancers and independent contractors.

***New York City Lactation Room Requirement***

- As of March 2019, New York City employers must provide a lactation room upon request and must distribute a written lactation room policy to their employees.

***New York City Issues Guidance Prohibiting Race Discrimination on the Basis of Hair***

- In **February 2019**, the NYC Commission on Human Rights issued guidance explaining that the NYC Human Rights Law prohibits discrimination based on “natural hair or hairstyles that are closely associated with their racial, ethnic, or cultural identities.”
- This prohibition applies regardless of health and safety concerns or customer preference; employers with health/safety concerns must consider alternatives prior to imposing a ban.

***New York City Prohibits Pre-Employment Marijuana/THC Testing***

- As of May 2020, New York City employers will be prohibited from requiring job applicants to submit to pre-employment drug testing for the presence of marijuana or tetrahydrocannabinols (THC) as a condition of employment.
- The law restricts only the testing of prospective employees, so it will have no effect on employer drug-testing programs for current employees.
- The law contains an exception for health care workers whose position requires the supervision or care of children, medical patients, or vulnerable persons, and positions that “significantly impact the health or safety of employees or members of the public.”

***New York State “Ban-the-Box”***

- While certain municipalities (including New York City) have “ban the box laws,” New York state still has not adopted a statewide “ban the box” law.

- However, as a reminder, New York prohibits employers from discriminating against both (1) persons with prior arrest records that were favorably resolved or resulted in sealed convictions and (2) persons with prior criminal conviction records.

## **WESTCHESTER COUNTY**

### ***Westchester County “Ban the Box”***

- In 2019, Westchester County joined New York City in prohibiting employers with four or more employees in Westchester County from asking questions about criminal records on an initial job application or prior to extension of a conditional offer of employment.

### ***Westchester County Paid Sick Leave***

- Westchester County employers with five or more employees are required to provide paid sick leave to all employees who work more than 80 hours per calendar year in the county.
- Employees may take sick leave for several reasons related to their own or a family member’s mental or physical illness, including treatment or preventative care.
- The law provides a minimum of 40 hours of paid sick leave per year, with employees accruing, upon hire, one hour of paid leave per every 30 hours worked.
- Employers may impose a 90-day waiting period before a new hire can use sick leave. Unused leave may be carried over to the following year, but employers may cap the amount of paid sick leave that can be taken per year at 40 hours.

### ***Westchester County “Safe Time” Leave Law***

- As of October 2019, all Westchester County employers (no minimum number of employees) are required to provide eligible employees who are victims of domestic violence or human trafficking with up to 40 hours of paid leave in a calendar year to attend criminal and civil court proceedings and/or relocate to a safe house.
- This “safe time” leave can only be used in full-day increments.

## **PENNSYLVANIA**

### ***Philadelphia “Ban the Box” Law***

- Although Pennsylvania does not have a state-wide “ban the box” law, employers with at least one employee in Philadelphia are prohibited from inquiring about the criminal records of candidates or running a criminal background check before making a conditional job offer.

### ***Pennsylvania Medical Marijuana Act Impact on Employers***

- As a reminder, the Pennsylvania Medical Marijuana Act (MMA) (originally passed in April 2016) prohibits employers from discriminating or taking an adverse action against an employee on the basis of the employee’s status as an individual certified to use medical marijuana.
- Employers are not required, however, to accommodate an employee’s possession or use of marijuana on the employer’s premises.

### ***Pennsylvania Supreme Court Revives Pittsburgh Sick Leave Law***

- In July 2019, the Pennsylvania Supreme Court reversed two lower courts and declared valid Pittsburgh's Paid Sick Days Act, which was originally enacted in August 2015.
- The Act requires all employers with at least one employee in Pittsburgh to provide Pittsburgh employees with sick leave, accruing at one hour per 35 hours worked to a minimum of 24 hours per year for workplaces with less than 15 employees and 40 hours per year for workplaces with 15 or more employees.

### ***Pennsylvania Minimum Wage***

- The minimum wage in Pennsylvania is \$7.25/hour – the same as the federal minimum wage for nonexempt employees.

## **CITY OF PHILADELPHIA**

### ***Philadelphia Prohibits Employers from Asking About Salary History***

- Employers with one or more employees in Philadelphia are prohibited from requiring job applicants to disclose their wage history, conditioning employment or consideration for employment on the disclosure of wage history, retaliating against an applicant for failing to disclose wage history, or relying on wage history to determine future compensation.

### ***Philadelphia Fair Workweek***

- As of Jan. 1, 2020, employers in the retail, hospitality, and food industries with 250 or more employees and more than 30 locations nationally will be required to provide reasonable notice of work schedules, which must contain: (1) the average number of work hours the employee can expect to work each week over a typical 90-day period; (2) whether the employee can expect to work on-call shifts; and (3) a subset of days and times the employee can typically expect to work.
- Employers must physically or electronically post all work schedules of covered employees at least 10 days prior to the start of the scheduled period, to increase to 14 days prior to the start of the scheduled period as of Jan. 1, 2021.
- If an employee does not work scheduled hours because hours are subtracted from a regular/on-call shift or cancelled, the employer is required to pay “no less than one-half times” the employee's regular hourly rate for the missed hours.
- Employers must also provide written notice of available work shifts for at least 72 hours and must offer new work shifts to existing employees before hiring through temporary services or staffing agencies.

### ***Philadelphia “21st Century Minimum Wage Ordinance”***

- As of July 1, 2019, the minimum wage for Philadelphia government workers, contractors, and subcontractors increased to \$13.25/hour.
- That rate will increase to \$13.75/hour on July 1, 2020, \$14.25/hour on July 1, 2021, and \$15.00/hour on July 1, 2022, with future increases based on the Consumer Price Index.

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