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# COMPASS

INSIGHTS AND DIRECTION FOR EMPLOYERS

## WELCOME TO THE SUMMER EDITION OF COMPASS!

Jansen A. Ellis, *Editor in Chief*

This month marks the 55th anniversary of the Civil Rights Act of 1964. This monumental legislation, which was signed into law by President Lyndon B. Johnson on July 2, 1964, changed the course of history with its sweeping ban on employment discrimination based on race, color, religion, sex, or national origin.



Fifty-five years later, even more changes may be on the way, with the Supreme Court of the United States agreeing to decide whether Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sexual orientation or an individual's status as transgender (or transitioning).

The federal circuits are currently split on these issues. Oral arguments may be heard this fall, and a decision could be issued by early next year.

The Civil Rights Act of 1964 remains an incredibly important anti-discrimination law, and time will tell if its protections will be further expanded. For more on the impending Supreme Court decision, click [here](#).

I hope you have an enjoyable summer.

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by James J. Plunkett (Washington, D.C.)

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AN INSIDE LOOK  
AT KEY ISSUES  
FROM CAPITOL HILL



### DOL Musical Chairs

There have been several high-level personnel changes at the U.S. Department of Labor (DOL). On April 29, 2019, Cheryl M. Stanton was sworn in as administrator of the DOL's Wage and Hour Division (WHD). On May 14, 2019 Scott Mugno—who had been waiting since October 2017 to be confirmed as assistant secretary of labor for occupational safety and health—withdrew his nomination. Finally, effective June 1, 2019, DOL Chief of Staff Nicholas Geale was replaced by Deputy Chief of Staff and Acting Assistant Secretary for the Employment and Training Administration, Molly Conway. All of this matters, of course, because “personnel is policy” in Washington, D.C.

### EEO-1 Wage and Hour Reporting

Employers will have until September 30, 2019, to report [wage and hours worked data](#) to the Equal Employment Opportunity Commission (EEOC), [according to an order of the U.S. District Court for the District of Columbia](#) (Component 1 data was due by May 31, 2019). Additionally, because the court also ordered the EEOC to collect additional years of data from employers, the EEOC will also [require employers to submit 2017 pay data](#). On May 3, 2019, the Department of Justice filed a notice of appeal of the district court's decision.

### Wage/Hour Regulatory Proposals Advance

Three significant regulatory proposals in the WHD took significant steps forward in the rulemaking process. The public comment dockets have now closed on the WHD's proposed [changes to the overtime regulation](#) (May 21), [proposed changes to the definition of “regular rate”](#) for purposes of calculating overtime (June 12), and proposed changes to the Fair Labor Standards Act's [joint-employer regulation](#) (June 25). The WHD will likely work quickly to review the comments and publish final rules as soon as possible.

### LGBTQ News

On April 22, 2019, the [Supreme Court of the United States announced that it will hear three cases](#) concerning whether sexual orientation and gender identity are protected under Title VII of the Civil Rights Act of 1964. Further, on May 17, 2019, [the U.S. House of Representatives passed the Equality Act](#), which would prohibit LGBTQ discrimination in employment, housing, public accommodations, and other fundamental areas. Though the Equality Act enjoys the support of the larger business community, the bill will face tough odds in the U.S. Senate.

### USCIS Update

On June 10, 2019, United States Citizenship and Immigration Services (USCIS) [announced Kenneth T. Cuccinelli as the new acting director](#) of the agency. [USCIS has also announced](#) that by August 2019, it will (1) propose a fee requirement for H-1B registrations pursuant to its recently finalized electronic registration rule; and (2) propose revisions to the definitions of “specialty occupation,” “employment,” and the “employer-employee relationship,” as well as additional changes “designed to ensure employers pay appropriate wages to H-1B visa holders.” Finally, a proposal to remove employment authorization for certain H-4 spouses of H-1B nonimmigrants may be issued at any moment.

### EEOC Quorum Restored

On May 8, 2019, the U.S. Senate confirmed Janet Dhillon as chair of the EEOC. Dhillon—who has both private-sector in-house and law firm credentials—gives the Commission a functioning quorum for the first time since early this year, meaning that the EEOC can now lawfully engage in policymaking.

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## ALABAMA

On June 11, 2019, [Governor Kay Ivey signed House Bill 225](#), making Alabama the 49th state to adopt equal pay legislation. The new law prohibits an employer from paying an employee a lower wage rate than an employee of another race or sex for equal work in the same establishment, where job performance requires “equal skill, effort, education, experience, and responsibility” and occurs “under similar working conditions.”



## MAINE

On May 28, 2019, [Governor Janet Mills signed L.D. 369](#), making Maine the first state to require that private employers provide earned paid leave—not just sick leave—to employees. The bill requires private employers that employ 10 or more employees for more than 120 days in a calendar year to provide 1 hour of paid leave for every 40 hours worked, up to a maximum of 40 hours of paid leave per year. The new law will take effect on January 1, 2021.



## MINNESOTA

The [Minnesota Legislature recently passed legislation](#) that includes new notice and recordkeeping mandates for Minnesota employers and creates new civil and criminal penalties for “wage theft.” In addition, it grants more authority to the Minnesota Department of Labor and Industry to enforce compliance with the new statute. Governor Tim Walz signed the bill, which took effect July 1, 2019, for some provisions and August 1, 2019, for certain criminal penalties.



## CALIFORNIA

On June 27, 2019, Governor Gavin Newsom signed into law Senate Bill 83. Beginning on July 1, 2020, the legislation will “provide for wage replacement benefits for up to 8 weeks [increased from 6 weeks] to workers who take time off work to care for a seriously ill family member or to bond with a minor child within one year of birth or placement.” The benefits are provided as part of the state’s [paid family leave program](#).



## MARYLAND

[Governor Larry Hogan recently approved a series of amendments to the Maryland Personal Information Protection Act](#). The amendments, effective October 1, 2019, impact data breach obligations imposed on businesses that “maintain” computerized data containing personal information.



## NEW MEXICO

[Governor Michelle Lujan Grisham recently signed into law two bills related to criminal background checks](#) that may affect employers operating in the state. The first is a ban-the-box law that prohibits private employers from inquiring about an applicant’s criminal history on an employment application. The second allows certain individuals to petition the court for expungement of criminal records.



## COLORADO

On May 22, 2019, [Governor Jared Polis signed sweeping equal pay legislation into law](#). The law, which goes into effect January 1, 2021, allows employees who believe they are being paid less because of their gender to file a lawsuit against their employer. Also in May 2019, [Governor Polis signed into law the Colorado Chance to Compete Act](#), more commonly known as “ban the box” legislation, which takes effect September 2019.



## MASSACHUSETTS

On June 18, 2019, the [Massachusetts Department of Family and Medical Leave \(DFML\) issued final regulations](#) regarding the Massachusetts Paid Family and Medical Leave Law. The final regulations maintain most of the language of the draft version but also incorporate significant changes. The DFML has also issued new template notices on its [website](#).



## OREGON

On May 22, 2019, [Governor Kate Brown signed House Bill 2341](#). The purpose of the new law, which takes effect January 1, 2020, is to ensure that employees have reasonable accommodations for known limitations related to pregnancy, childbirth, or related medical conditions, and to prevent workplace discrimination based upon the need for such accommodations.



## CONNECTICUT

On May 28, 2019, [Governor Ned Lamont signed House Bill No. 5004](#). The bill, entitled “An Act Increasing the Minimum Fair Wage,” increases Connecticut’s minimum wage to \$15.00 an hour over the next approximately four years.



## MEXICO

To comply with current legislation, the [Mexican Ministry of Labor and Social Welfare recently developed the Official Mexican Norm: NOM-035-STPS-2018](#) “Psychosocial Risk Factors at Work – Identification, Analysis and Prevention.” Its main objective is to “identify, analyze and prevent psychosocial risk factors, as well as to promote a favorable organizational environment at workplaces.”



## TEXAS

The Texas Legislature recently failed to pass a law preempting the type of paid sick leave ordinances enacted in Austin, San Antonio, and Dallas. While a Texas court of appeal enjoined implementation of Austin’s paid sick leave ordinance and later ruled it unconstitutional, no litigation has been filed concerning the [San Antonio and Dallas ordinances](#). Accordingly, the ordinances in San Antonio and Dallas will take effect for most employers on August 1, 2019.



## TOP TIPS: SERVICE AND EMOTIONAL SUPPORT ANIMALS AS ACCOMMODATIONS

by David Raizman (Los Angeles) and James M. Paul (St. Louis)



Many employers have been experiencing an increase in the number of requests to bring service and emotional support animals to work as a reasonable accommodation under the Americans with Disabilities Act (ADA). Although Title I of the ADA, which governs the employment relationship, does not specifically reference animals as an accommodation, they may be required in a number of circumstances. In addition to animals that actually perform active tasks, Title I may require employers to allow animals that perform no specific task, such as emotional support animals, as an accommodation.

# PERSPECTIVES



### Animals as Workplace Accommodations

When an employee requests to bring an animal into the workplace as an accommodation, employers should engage in the interactive process just as they would do for other accommodation requests, and should follow the same standards and practices that they would otherwise use during the interactive process, including:

- requiring documentation from a healthcare provider that a disability exists, if it is not obvious;
- requiring documentation on how the animal will help the individual perform the job (again, unless it is obvious);
- objectively evaluating the request for undue hardship regardless of the employee's claimed disability or the type of animal requested;
- if the initial request would present an undue hardship, exploring whether there are other options that will accommodate the employee's disability;
- considering safety and health concerns or threats, including those that affect other employees, customers, and guests in the workplace; and
- documenting all stages of the interactive process.

If it is determined that the animal should be allowed as an accommodation, the employer may set standards and expectations about the animal's presence in the workplace. These standards should be documented and agreed upon in writing by the employee, and may include:

- the areas of the workplace that the animal may be present;
- expectations about odor and potty-training;
- appropriate behavior, including the expectation that the animal not engage in menacing or disruptive behavior or otherwise endanger the health or safety of anyone in the workplace; and
- employee supervision and control of the animal at all times.

Like all accommodations, the employer should continue to monitor both the effectiveness of the accommodation and the impact on the workplace. After a trial period, if the animal's presence creates problems for coworkers or office decorum, steps may be taken to modify, refine, or discontinue the accommodation.



### Service Animals in Private Businesses or Organizations

There has also been an increase in the number and types of requests by customers or others to bring service animals into public accommodations (private businesses or organizations into which the public is invited). Many states have laws affecting these issues that go beyond what Title III of the ADA requires. Under federal law, the only service animals that may be covered are dogs and miniature horses—and emotional support animals (of any species) are not protected. Where a person seeks to bring a service animal into a public accommodation, the owner may ask only the following questions:

- Is this a service animal that is required because of a disability?
- What work or task has the animal been trained to assist with?

Unless required by state law, service animals in public accommodations need not be identified with a vest or other item. As with workplace accommodations, these accommodations can be denied where the animal presents a direct threat to the health or safety of others or the animal fails to maintain behavior appropriate to the setting.

# NAVIGATIONAL TOOLS



## SALARY HISTORY BAN BONANZA: KEEPING UP WITH THE LATEST LIMITATIONS

by Lara C. de Leon (San Antonio/Orange County) and Liz S. Washko (Nashville)

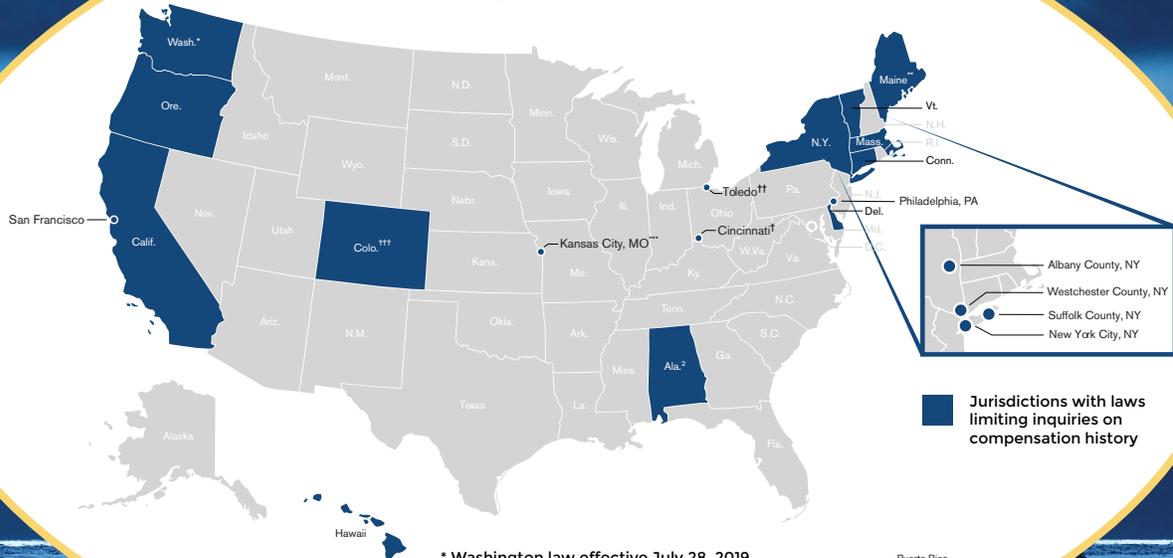


Pay equity continues to be an important topic on employers' radars, and state and local limitations on inquiries into salary history are popping up at a rapid pace all over the United States. In general, these laws are intended to help equalize wages paid to women and men possessing the same levels of education and experience by prohibiting employers from inquiring about a job applicant's salary history and using that salary history to set his or her compensation in the new position. Employers may want to consider the following steps to prepare for (or respond to) these new laws in the applicable jurisdictions:

- \$ Ensure applicants are not asked to disclose their salary history on an application, in an interview, or otherwise.
- \$ Review hiring policies and practices to ensure compliance with applicable laws.
- \$ Inform any personnel who are assigned to interview or interact with applicants not to ask about prior wages or salaries.

The map below shows jurisdictions with salary history limitations currently in effect (including a few laws that do not go into effect until a later date). Stay up to date with the latest changes on our [pay equity blog](#), and listen to a recent podcast on salary history bans [here](#). Updated information on salary history information also is available in the firm's *O-D Comply: Employment Applications* subscription materials, which are updated and provided to *O-D Comply* subscribers as the law changes.

### State and Local Salary History Limitations<sup>1</sup>



<sup>1</sup> This map covers laws applicable to private employers. Public employers may be subject to additional laws.

<sup>2</sup> Alabama law does not bar employers from asking about salary history, but it prohibits employers from refusing to interview or hire applicants who decline to provide such information.

\* Washington law effective July 28, 2019  
 \*\* Maine law effective September 17, 2019  
 \*\*\* Kansas City, MO law effective October 31, 2019  
 † Cincinnati, OH law effective March 2020  
 †† Toledo, OH law effective June 26, 2020  
 ††† Colorado law effective January 1, 2021

This map is intended as a visual aid and should not be relied upon or construed as a substitute for legal advice.



# IN THE RADAR

## SUMMER IS HERE: ARE YOU PREPARED TO PROTECT YOUR EMPLOYEES FROM THE HEAT?

by Shontell Powell (Atlanta)



The heat of summer has arrived, which means potentially dangerous work conditions. Warm and humid weather can increase the risk to workers both indoors and outdoors. As a result, the Occupational Safety and Health Administration (OSHA) has launched a number of initiatives aimed at keeping workers safe.

On May 31, 2019, National Heat Awareness Day, OSHA and the National Weather Service (NWS) teamed up to encourage employers and workers to recognize the warning signs for heat illness. OSHA also recently kicked off its annual heat illness prevention campaign: “Water. Rest. Shade.” As part of this campaign, OSHA outlines the dangers of working in the heat, details employers’ responsibilities to protect workers, and provides educational and training materials for employers. The campaign’s website also offers instructional videos and graphics that are free for employers to use in their publications and social media campaigns. OSHA and the National Institute for Occupational Safety and Health (NIOSH) have also worked together to create the Heat Safety Tool smartphone app, which provides heat safety information. Learn more about OSHA’s heat illness prevention campaign and the Heat Safety Tool app on the agency’s website at <https://www.osha.gov/heat/>.

OSHA recommends that heat-related illness prevention include “engineering controls, such as air conditioning and ventilation, that make the work environment cooler, and work practices such as work/rest cycles, drinking water often, and providing an opportunity for workers to build up a level of tolerance to working in the heat.” The agency also places a great deal of emphasis on training so that employers know and look for symptoms of heat-related illness and are prepared for an emergency.

OSHA does not have a specific standard for exposure to heat and relies on the General Duty Clause under the Occupational Safety and Health Act to cite employers for heat-related hazards. According to OSHA, courts have interpreted the General Duty Clause to mean that employers are required to provide a workplace free of heat-related hazards that are likely to cause death or serious bodily harm. But California does have a specific heat illness prevention standard with which employers with operations in the state must comply. The California standard contains specific requirements for water, shade, and rest periods.

As the summer heats up, employers should consider implementing the following recommendations:



### Water Consumption

Employers should consider using bottled water, as opposed to a container of potable water—to make it easier to track how much to bring and how much employees consume.



### Cool/Shady Area

When working outside, OSHA seems to favor canvas shades—many of which are easy to assemble and provide plenty of room for employees—or air conditioning, such as in a running vehicle.



### Rest Periods

While many affected employers implement mandatory rest periods depending on the temperature (with stop work orders when the temperature becomes dangerously high), each employee acclimates to the heat differently. One employee may only need a few minutes of rest every few hours; another may need 10 to 15 minutes every hour. Employers may want to implement a buddy system to encourage employees who work together to watch for and quickly spot the first signs of heat illness in their coworkers.

## ALONG THE ROAD

## ROAD

STATS  
AND  
TRENDS

In the last quarter, the U.S. Equal Employment Opportunity Commission (EEOC) issued its [Fiscal Year \(FY\) 2018 Enforcement and Litigation Data report](#), featuring “detailed breakdowns for the 76,418 charges of workplace discrimination the agency received” last year.

Here are seven noteworthy items.

**1.** The number of workplace discrimination charges filed with the EEOC in FY 2018 declined from the previous year, continuing a recent downward trend in filings. The annual number of EEOC charges filed against employers has decreased every year since 2016.



**2.** The 76,418 discrimination charges filed in FY 2018 represented a decrease of 9.3 percent from the number of filings in FY 2017 (84,254). Since 2010, the annual number of charges filed with the EEOC has averaged 91,483.

**3.** The number of workplace discrimination charges declined to the lowest level since FY 2006.



**4.** Perhaps due to a greater awareness of the issues raised by the [#MeToo movement](#), the number of [charges alleging sexual harassment](#) (7,609) increased by 13.6 percent from FY 2017. The number of sexual harassment lawsuits that the agency filed also increased.



**5.** The number of sexual harassment charges filed in FY 2018 represented the highest annual number of such filings since FY 2011—a year in which the EEOC received significantly more charges (99,947) than it did in FY 2018.

**6.** For charges alleging harassment, reasonable cause findings increased by 23.6 percent to nearly 1,200 in FY 2018.



**7.** The EEOC conciliated 498 charges alleging harassment, a 43 percent increase from FY 2017.

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**July**

- July 11      **Webinar**      [Reporting on Reform: What Employers in Mexico Need to Know](#)
- July 16      **Webinar**      [Update for Dallas and San Antonio Employers: Prepare Now for Paid Sick Leave](#)
- July 17      **Webinar**      [Focus on France: Gender Pay Equality Requirements for Employers](#)
- July 25      Birmingham    [Benefits That Will Attract and Retain Talent from All Generations](#)
- July 30      **Webinar**      [Step by Step: OSHA Reporting and Recordkeeping Requirements, Part II](#)

**August**

- Aug 7        **Webinar**      [Navigating the EEO-1 Pay Data Requirements](#)
- Aug 15      Cleveland      [Managing a Workforce in 2020](#)
- Aug 16      Atlanta        [Investigations in the Workplace Workshop](#)
- Aug 22      Las Vegas     [Stay Connected: Part Two—2019 Nevada Legislative Session Review](#)
- Aug 23      Birmingham   [Dude, Where’s My Workforce? Recruiting and Retaining Top Talent in a Tight Labor Market](#)

**September**

- Sep 4        San Marcos, TX    [Employment Law Seminar](#)
- Sep 6        Phoenix        [Securing Your Foreign National Workforce](#)
- Sep 11      Philadelphia    [Employment Law Briefing](#)
- Sep 12      Carmel, IN      [Managing a Workforce in 2020](#)
- Sep 17      Tampa         [OD Works! The Bermuda Triangle of Leave Laws: Just When You Thought It Was Safe to Go Back in the Water](#)
- Sept 26-27   Austin        [Immigration Symposium](#)

**October**

- Oct 2        Tampa         [Managing a Workforce in 2020](#)
- Oct 11      Scottsdale, AZ   [Managing a Workforce in 2020](#)
- Oct 16      Overland Park, KS [Managing a Workforce in 2020](#)
- Oct 17      St. Louis      [Managing a Workforce in 2020](#)
- Oct 18      Austin         [17<sup>th</sup> Annual Labor and Employment Law Update](#)
- Oct 24      Birmingham, MI [Employment Law Briefing](#)
- Oct 30-31   Kohler, WI      [Managing a Workforce in 2020](#)

**November**

- Nov 8        Englewood, CO   [Managing a Workforce in 2020](#)
- Nov 13-16   New Orleans    [Labor and Employment Counsel Exclusive](#)

**December**

- Dec 4-6     New Orleans    [Workplace Safety Symposium](#)
- Dec 4-6     Nashville       [Labor Law Solutions](#)