

Alert

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States of Flux — What Employers Need to Know About Election 2020 and New State Laws

With so much focus on the presidential election, there has been little mention of the meaningful changes to state laws approved by voters across the country. As noted below, many of these changes will have a significant impact on the workplace, and should be on the radar for employers doing business in these states.

Minimum Wage

Florida voted in the November election to raise the state's minimum wage to \$15 dollars per hour. This raise is to take effect incrementally. Currently, the state's minimum wage sits at \$8.56. On September 30, 2021, a \$10 dollar floor will be implemented and the minimum wage would thereafter increase by \$1 dollar each year until it hits \$15 dollars in 2026.

Federal minimum wage remains at \$7.25 per hour.

Drug Legalization/Non-Criminalization

The trend towards the legalization of marijuana picked up steam in the recent election cycle and some states went further, reducing criminal penalties on "hard drugs" like heroin and cocaine. This trend will, no doubt, impact employers striving to maintain drug free workplaces in these states.

Arizona

Proposition 207 (the Smart and Safe Arizona Act) legalizes possession and recreational use of limited amounts of marijuana for those 21 and older.

The law provides that it "does not restrict the rights of employers to maintain a drug-and-alcohol-free workplace or affect the ability of employers to have workplace policies restricting the use of marijuana by employees or prospective employees."

The proposition states that it will take effect when all votes have been counted and certified, to be followed by a proclamation by the governor to officially make the ballot measure law.

Montana

Constitutional Initiative No. 118 clears the way for the Montana legislature to set a legal age for recreational marijuana use, and Initiative No. 190 legalizes possession and recreational use of limited amounts of marijuana for those 21 and older.

Notably the law does not require an employer to permit or accommodate the use of marijuana in any workplace, prohibit an employer from disciplining an employee for violating a workplace drug policy, or prevent an employer from refusing to hire or taking adverse employment action against someone for violating a workplace drug policy.



David L. Barron

Member

dbarron@cozen.com
Phone: (713) 750-3132
Fax: (832) 214-3905



Joseph Quinn

Of Counsel

jfquinn@cozen.com
Phone: (412) 620-6514
Fax: (412) 275-2390



Jake Rubinstein

Member

jrubinstein@cozen.com
Phone: (720) 479-3872
Fax: (303) 625-4901



Di Addy Tang

Associate

dtang@cozen.com
Phone: (415) 262-8345
Fax: (415) 644-0978

These provisions are set to take effect January 1, 2021.

New Jersey

Public Question No. 1 approves an amendment of the New Jersey Constitution to legalize a controlled form of marijuana for those 21 and older.

Public Question No. 1 does not have any explicit provision related to employment or protections for employees who elect to use marijuana.

This provision is set to take effect on January 1, 2021.

South Dakota

Constitutional Amendment A legalizes possession and recreational use of limited amounts of marijuana for those 21 and older, and Initiated Measure 26 legalizes medical use of marijuana by qualifying patients, including minors.

While the constitutional amendment does not explicitly provide any protections for employees who use marijuana recreationally, Initiated Measure 26 provides that, “[a] registered qualifying patient may not be considered to be under the influence of cannabis solely because of the presence of metabolites or components of cannabis that appear in insufficient concentration to cause impairment.”

The South Dakota Department of Health has until October 29, 2021, to enact rules to implement the state’s medical marijuana program, whereas the constitutional amendment is set to take effect on July 1, 2021.

Mississippi

Initiative Measure 65 approves the medical use of marijuana by qualifying patients.

Although the measure says those who use medical marijuana as allowed by the law cannot be “subject to criminal or civil sanctions for the use of marijuana,” the law also states that it does not mandate employer “accommodation for the use of medical marijuana or require any onsite use of medical marijuana,” or interfere with any “existing drug testing laws, regulations, or rules.”

The law requires the medical marijuana to be operational by August 15, 2021.

Oregon

Measure 110 (the Drug Addiction Treatment and Recovery Act) drastically reduced criminal penalties for possession of small amounts of illegal drugs including heroin and cocaine (although it did not make it legal to sell the drugs), and Measure 109 (the Oregon Psilocybin Services Act) creates a regulatory program allowing the licensed manufacture, delivery, and administration of psilocybin (psychoactive substance from fungus) for medical purposes.

Measure 110 is set to take effect on February 21, 2021, and Measure 109 will become effective on or about December 3, 2020.

Paid Sick Leave and Family and Medical Leave

In Colorado, starting on January 1, 2021, under the Healthy Families and Workplaces Act, employers with 16+ employees (and starting in 2022 for all employers), must provide employees one hour of paid sick leave for each 30 hours worked. Paid sick leave may be used immediately upon accrual (no waiting period) and may be used for the employee’s own illness or medical appointments, or to care for an ill family member, or to accompany a family member to a medical appointment.

Also, after unsuccessful efforts in the legislature, Colorado voters in a binding referendum passed Proposition 118, creating a state-run paid family and medical leave program, which will take effect on January 1, 2024. The paid family leave will provide up to 12 weeks of paid leave for employees who have a child, receive medical treatment for sickness, or need time off to care for a close family



Peter J. Ennis

Member

pennis@cozen.com
Phone: (412) 620-6512
Fax: (412) 275-2390

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member. Unlike federal FMLA, which applies only to employers with 50+ employees, Colorado's paid family leave will extend to virtually all employees, and even self-employed individuals can "buy in." Employees will receive between 65 percent and 90 percent of their wages while on leave (capped at \$1,100 per week), depending on their income, with lower-paid employees receiving the higher percentages. The cost of the program will be split between employers (through payroll taxes) and employees (through paycheck deductions) that begin in 2023.

Independent Contractor Status

California voters passed Prop 22, which codified that certain "app-based" drivers are independent contractors under state law. This proposition was in response to previous legislation (AB 5 or California Labor Code Section 2750.3) that sought to characterize such persons as employees under state law. Under Prop 22, "app-based drivers" are independent contractors and not employees if their network company (a) does not unilaterally prescribe specific dates, times of the day, or a minimum number of hours during which drivers must be logged into the application, (b) does not require drivers to accept any specific ride or delivery request as a condition of maintaining access to the network, (c) does not restrict drivers from performing rideshare or delivery services for other network companies, and (d) does not restrict drivers from working other lawful jobs. Prop 22 does not affect the application of AB 5 to workers who are not app-based drivers.

Besides allowing gig companies to classify certain workers as independent contractors, Prop 22 also enacted requirements and policies that are specific to app-based drivers. Prop 22 requires app-based drivers be guaranteed a minimum earnings amount, provided a health care subsidy, and creates new protections from discrimination. Drivers must earn at least 120 percent of local minimum wage plus 30 cents a mile for "engaged time," which is the time between accepting a service request and completing the service request and excludes any waiting time. Companies must provide drivers who average at least 15 hours but less than 25 hours of engaged time per week with health care subsidies greater than or equal to 50 percent of the drivers' average monthly contributions under the Affordable Care Act, and provide drivers who average 25 hours or more of engaged time per week with health care subsidies greater than or equal to 100 percent of the drivers' average monthly contributions.

Employers impacted by these changes to state law should reach out to their legal counsel to determine what steps need to be taken to update policies and ensure compliance with these new developments.