

Hot Topics in Employment Law

February 6, 2019



NFIB Small Business Legal Center

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Agenda



- Cover developments in employment law across the country.
- Focus on trends we're seeing in the states.
- Issues to watch in 2019.

Focus on State and Local Regulation

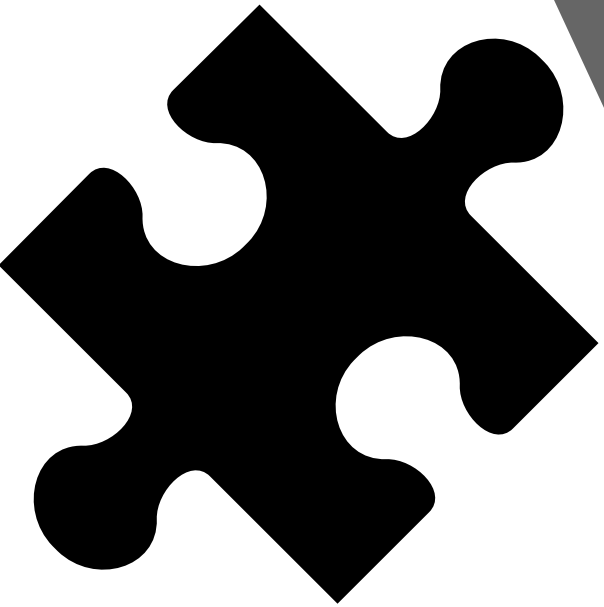
“[W]ith so much gridlock in Congress, we’ve seen more and more regulatory action at the state and local level over the past few decades, with legislators and regulators piling-on on top of already complicated federal requirements.”

<https://www.washingtontimes.com/news/2019/jan/22/why-legislators-must-protect-small-businesses-from/>

Newly Effective Laws in 2019

- Wage & hour update
- New paid leave laws
- Wage and salary history bans
- Newly effective #MeToo laws/Anti-Harassment Training
- Miscellaneous highlights

Wage & Hour Update



Wage & Hour Update: Raising Minimum Wage

- Federal minimum wage remains \$7.25.
- Minimum wage went up in nearly half of the country as of January, 2019.



Wage & Hour Update: Raising Minimum Wage

- Many states have enacted laws requiring gradual hikes until achieving a target statewide minimum wage.
- Other states have automatic annual hikes because minimum wage is tied to a consumer index or inflation.
- Some impose varying requirements based on: (i) the number of employees; (ii) annual gross revenue; (iii) contribution to healthcare; (iv) regional divisions within the state; or by (v) industry classification.

Wage & Hour Update: Raising Minimum Wage

State	New Minimum Wage	Effective
Alaska	5 cents increase → \$9.89	January 1, 2019
Montana	20 cents increase → \$8.50	January 1, 2019
Florida	21 cents increase → \$8.46	January 1, 2019
Minnesota	17-21 cents increase → \$8.04 – 9.86	January 1, 2019
Ohio	0-25 cents increase → \$7.25 – 8.55	January 1, 2019
South Dakota	25 cents increase → \$9.10	January 1, 2019
New Jersey	25 cents increase → \$8.85	January 1, 2019

Wage & Hour Update: Raising Minimum Wage

State	New Minimum Wage	Effective
Vermont	28 cents increase → \$10.78	January 1, 2019
Rhode Island	40 cents increase → \$10.50	January 1, 2019
Delaware	50 cent increase → \$8.75 50 cent increase → \$9.25	January 1, 2019 October 1, 2019

Wage & Hour Update: Raising Minimum Wage

State	2019 Increase	2019 Minimum	2020 Minimum	Effective Date(s)	Future
Michigan	20 cents	\$9.45	\$9.65	January, 1st	\$12.05 by 2030
Arizona	50 cents for large employers	\$11.00*	\$12.00*	January, 1st	
Oregon	50 cents	\$11.25*	\$12.00*	July, 1st	\$13.50 by 2022
Washington	50 cents	\$12.00	\$13.50	January, 1st	
Arkansas	75 cents	\$9.25	\$10.00	January, 1st	\$11.00 by 2021
Missouri	75 cents	\$8.60*	\$9.45	January, 1st	\$12.00 by 2023
D.C.	75 cents	\$14.00	\$15.00	July 1st	

Wage & Hour Update: Raising Minimum Wage

State	2019 Increase	2019 Minimum	2020 Minimum	Effective Date(s)	Future
Colorado	90 cents	\$11.10	\$12.00	January, 1 st	
New York	70 cents - \$1.00	\$11.10 \$12.75 (Fast food)	\$11.80 \$13.75 (Fast food)	December, 31 st ‡	\$12.50 - \$15.00 by 2021
Maine	\$1.00	\$11.00	\$12.00	January, 1 st	
Massachusetts	\$1.00	\$12.00	\$12.75	January, 1 st	\$15.00 by 2023
California	\$1.00	\$11.00 - \$12.00	\$12.00 - \$13.00	January, 1 st	\$15.00 by 2023

Wage & Hour Update: Raising Minimum Wage

- California, Massachusetts, District of Columbia, New York worst in the nation.
- Organized labor will continue to push for \$15.00 per hour in other jurisdictions.

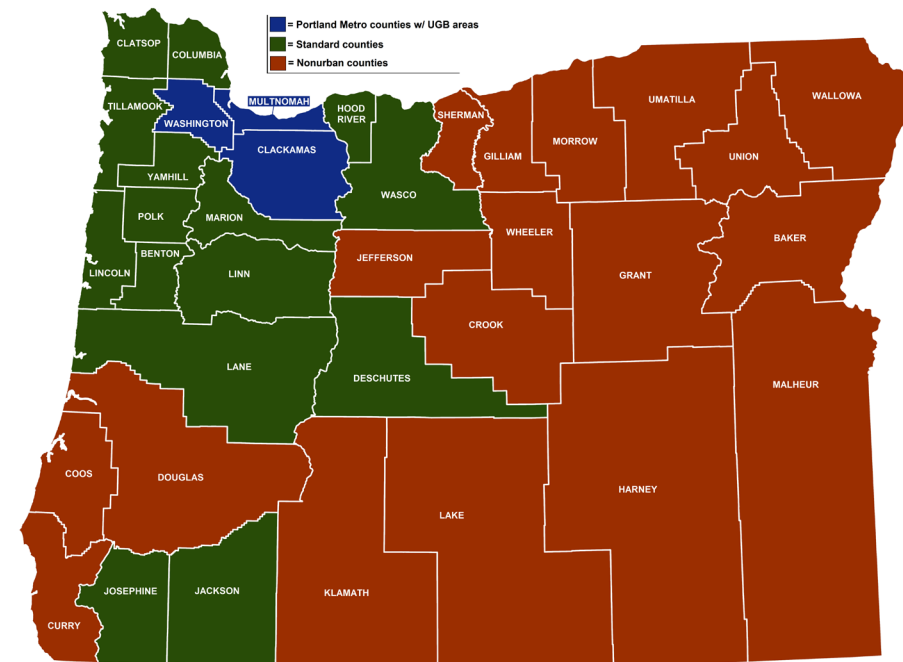


Wage & Hour Update: Raising Minimum Wage

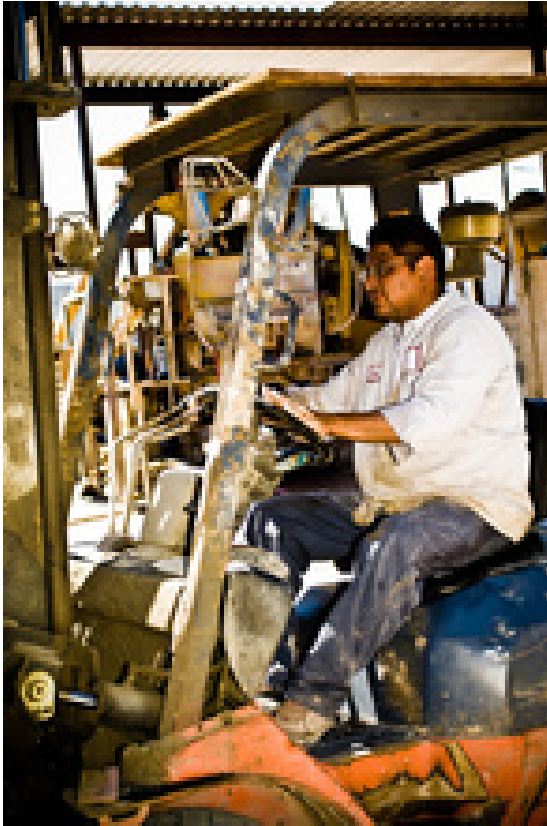
State	Large Employer	Small Employer	Large v. Small Defined
Minnesota	21 cents increase → \$9.86	17 cents increase → \$8.04	Above or below \$500,000 gross annual sales.
Ohio	25 cents increase → \$8.55	Federal Minimum: \$7.25	Above or below \$314,000 gross annual sales.
Arizona	50 cents increase → \$11.00	Federal Minimum: \$7.25	Above or below \$500,000 gross annual sales.
Missouri	75 cents increase → \$8.60	Federal Minimum: \$7.25	Excludes service and retail with less than \$500,000 gross annual sales.
California	\$1.00 increase → \$12.00	\$1.00 increase → \$11.00	Large employer is 26 or more employees.

Wage & Hour Update: Raising Minimum Wage

Oregon by Region	2019 Minimum Wage	After 2022
Standard State Minimum Wage	\$11.25 – Effective July 1 st	Tied to U.S. Consumer Price Index.
Portland Metro Minimum Wage	\$12.50 – Effective July 1 st	Standard minimum wage + \$1
Rural Oregon Minimum Wage	\$11.00 – Effective July 1 st	Standard minimum wage - \$1



Wage & Hour Update: Local Minimum Wage Laws



- Albuquerque, NM
- Chicago, IL
- Los Angeles, CA
- Minneapolis, MN
- Montgomery County, MD
- New York, NY
- San Diego, CA
- Santa Monica, CA
- Seattle, WA
- Tacoma, WA

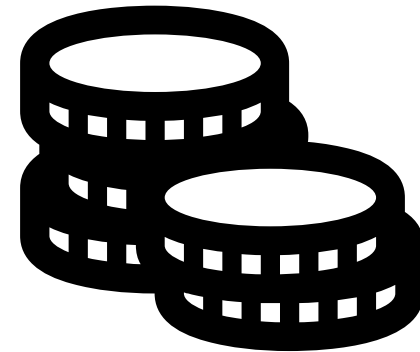
Wage & Hour Update: Local Minimum Wage Laws



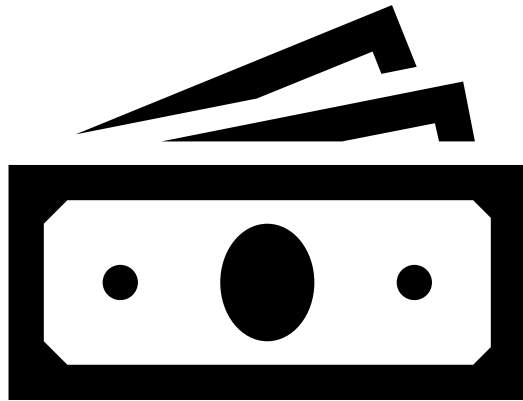
- For mobile employees: Either track hours spent within the city, or conform to heightened local requirements.
- Ordinance should specify how many hours must be worked before effective.

Wage & Hour Update: Tipped Employees

- Some states allow for a tip credit to count toward minimum wage, but with a cap.
- *E.g.*, Arizona allows a \$3.00 tip credit, meaning that tipped employees must earn at least \$8.00 per hour.

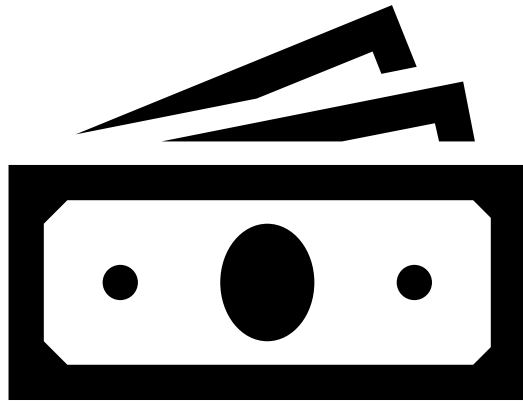


Wage & Hour Update: Other Issues to Watch



- Minimum wage hikes may trigger requirement to pay other employees more.
- E.g., Public contractors who must pay prevailing wage.
- E.g., California employers must pay salaried employees at least twice what they would make working minimum wage at 40 hours per week.

Wage & Hour Update: Other Issues to Watch

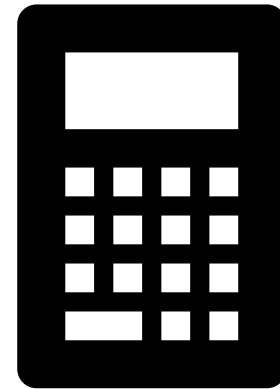


- Pay attention to state-level overtime rules in 2019.
- For example, Washington State and Pennsylvania are working on regulation that would require dramatically higher base salaries for exempt employees.

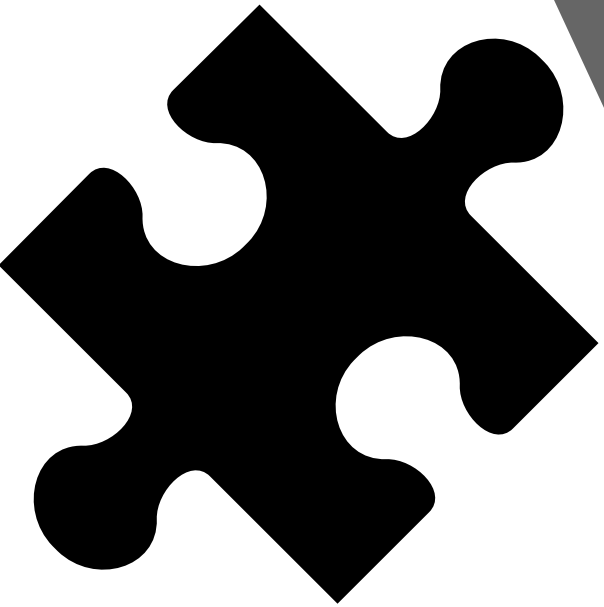
NOTE: Federal law provides that salaried employees must receive at least \$455 per week, or \$23,600 annually.

Wage & Hour Update: Federal Issues?

- U.S. DOL is still considering whether to raise salary requirements for exempt employees.
- Federal contractors are now required to pay a minimum wage of \$10.60 (or \$7.40 for tipped employees) under Executive Order 13658.



New Paid Leave Laws



New Paid Sick Leave Laws



State / Locality	Application	Accrual	Effective Date
Michigan	50+ employees	1 hour for every 35 worked.	March 4, 2019
Westchester County, NY	5+ employees	Generally: 1 hour for every 30 worked. Domestic workers: 1 hour for every 7 workdays.	April 10, 2019
San Antonio, TX*	1-14 employees; 15+ employees	1 hour for every 30 worked.	August 1, 2019
Duluth, MN	5+ employees	1 hour for every 50 worked.	January 1, 2020



NOTE: In 2018, NFIB filed suit and struck-down a municipal paid sick leave ordinance in Austin, TX.

Paid Sick Leave Laws: Common Issues



- Enactments vary in allocation methods.
- Employees may typically use to care for self, spouse, children, or parents when sick or dealing with a domestic abuse or stalking issue.
- Employers must typically provide notice.

Paid Sick Leave Laws: Common Issues



- Most ban retaliation and requirements for employee to find a replacement.
- Enactments vary greatly in what restrictions employers may impose.
- Enactments vary on roll-over rules from year to year.

Paid Sick Leave Laws: Common Issues



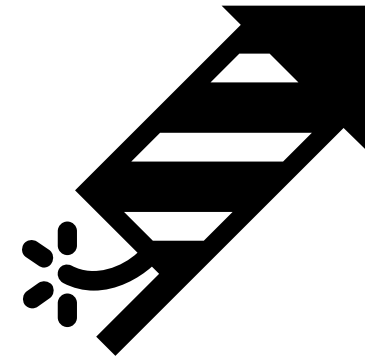
- Employers are not usually required to pay-out at termination.
- Enactments vary in dictating how long the worker must be employed to qualify.

Paid Family Leave in Washington

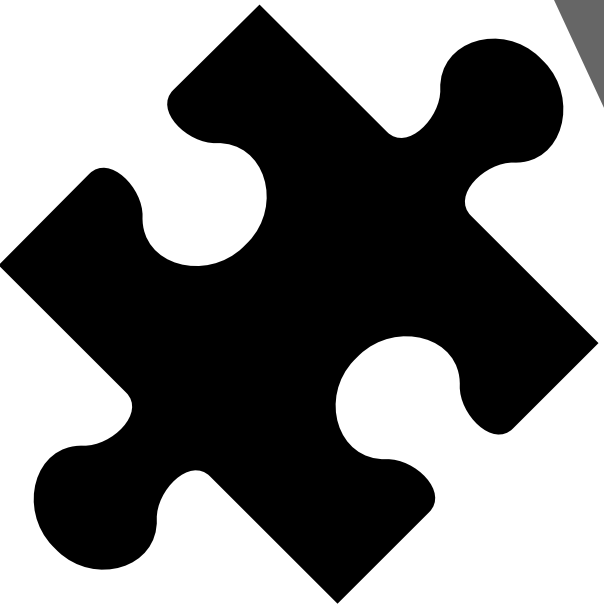
- Washington became 5th state to provide paid family and medical leave.
- Businesses with 50+ employees contribute approximately 37% of costs; smaller businesses exempt.
- All workers will be eligible to take 12-18 weeks paid family or medical leave annually beginning January 1, 2020.

Other New Leave Laws

- Massachusetts now requires employers to grant leave (whether paid or unpaid) to veterans on Memorial Day and Veterans Day.



Wage and Salary History Bans



Wage and Salary History Bans

- These laws generally prohibit employers from seeking out information on an applicants wages, salary or benefits history.
- Most enactments are explicit in prohibiting use of wage or salary history; however, some allow for exceptions where the information is disclosed voluntarily, or after an offer has been made.



Wage and Salary History Bans

State / Territory	Effective Date
Delaware	2017
Oregon	2017
Puerto Rico	2017
California	2018
Massachusetts	2018
Vermont	2018

State / Territory	Effective Date
Connecticut	January 1, 2019
Hawaii	January 1, 2019



Wage and Salary History Bans

Municipal Enactments	County Enactments
New York, NY	Albany County, NY
Philadelphia, PA (Litigation pending)	Suffolk County, NY (Effective: June 30, 2019)
San Francisco, CA	Westchester County, NY

NOTE: Keep a eye on jurisdictions like New Jersey, Pennsylvania and Chicago that have already imposed wage and salary history bans on public employers.

Wage and Salary History Bans

- Each jurisdiction has its own unique wrinkle.
- E.g., San Francisco prohibits businesses from disclosing salary or wage history to prospective employers.
- E.g., Oregon prohibits use of wage/salary history, except with regard to current employees.



Wage and Salary History Bans

- California just amended its statute to clarify that it is permissible to ask an applicant about their preferred salary range.
- California employers must provide their contemplated salary range (upon request) to any applicant who completes an interview.

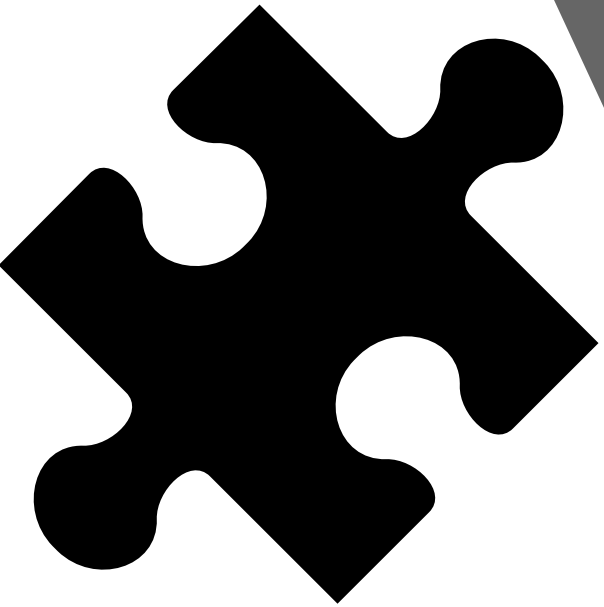
Wage and Salary History Bans

Related Note: Be sure that you are compliant with any state or local equal pay laws. The specific rules vary; however, employers must generally ensure that pay differentials are justified by legitimate business factors such as (1) quality of work and or productivity; (2) education or certifications; (3) seniority, or (4) other non-discriminatory factors.

Pro Tip: It may be prudent to perform a self-audit. This is especially true for employers in the west because the Ninth Circuit now holds that employers cannot justify pay discrepancies for existing employees on the basis of their wage or salary history.



Newly Effective #Metoo Laws



Newly Effective #MeToo Laws



- In 2018, California enacted a whole host of new laws inspired by the #MeToo movement.
- In 2019, we can expect that other states and localities will look to California as a model.

Newly Effective #Metoo Laws

- **Sexual Harassment Claims.**

- Harassment claim may be based on a single comment.
- Plaintiff need only show alleged harassing conduct affected "emotional tranquility."
- Statute of limitations extended to 10 years.

- **Harassment from Third Parties.**

- CA law now imposes a duty on employers to protect employees from all forms of discrimination from contractors, customers and others.

Newly Effective #Metoo Laws

- **Employment Contracts.**

- Illegal to require CA employees to sign anything preventing them from disclosing unlawful acts in the workplace, or waiving right to sue or file claim with state agency.
- Exception for a *voluntary* “negotiated settlement” where a complaint has already been filed.

- **Non-Disclosure in Settlement Agreements.**

- May no longer prevent disclosure of factual information relating to sexual assault or harassment, or employer’s alleged failure to prevent harassment or retaliation.*

Anti-Harassment Training



- Primarily seeing action at the state level here.
- States vary in mandating which employees must participate, how long the training must run, specific issues that must be addressed, etc.

Best Practice: Make training interactive.

Anti-Harassment Training: California as an Example

- Anti-harassment training is now mandatory for companies with 5+ employees, so long as any single employee works in California.
- Operative question: Did the company have 5 or more employees for 20 consecutive weeks this year or last?

NOTE: This counts anyone who receives a W2, including many employers.

Anti-Harassment Training: California as an Example

- Anyone managing employees in California must receive 2 hours of interactive training; all other California employees must receive 1 hour of interactive training.
- Training must occur in 2019, and every two years thereafter. [Yes – Even for managers trained in 2018].
- New hires must receive training within 30 days, or 100 hours worked.

Anti-Harassment Training: California as an Example

- Only employment law attorneys, qualified HR professionals, and certain professors may provide training.
- Must cover various topics, including:
 - Harassment, discrimination; retaliation;
 - Gender identity, gender expression, sexual orientation;
 - Workplace strategies to prevent or address harassment;
 - Duties for managers and others in the company, etc.

Anti-Harassment Training: Newly Effective Rules

State / Locality	Affected Companies	Covers
California	5+ employees	All CA employees.
Connecticut	15+ employees	All CT employees.
Delaware	50+ employees	All DE employees.
Maine	15+ employees	All ME employees.
New York City	All employees	All NY employees, and any other employee working even a day in NY.

NOTE: Beginning in April, New York City will impose additional training requirements for companies with 15+ employees.

Anti-Harassment Training: Newly Effective Rules

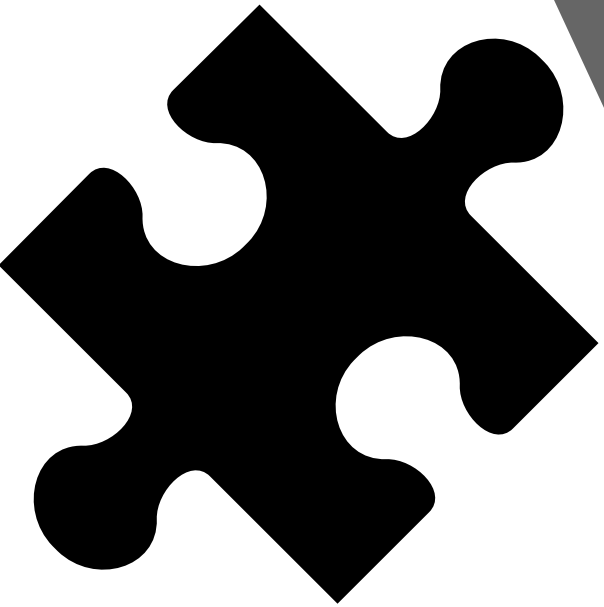
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NOTE: Beginning in April, New York City will impose additional training requirements for companies with 15+ employees.

NOTE: Check state specific rules to see if out-of-state managers are covered, and to confirm other training requirements.



Miscellaneous Highlights and Other Issues to Watch



Miscellaneous



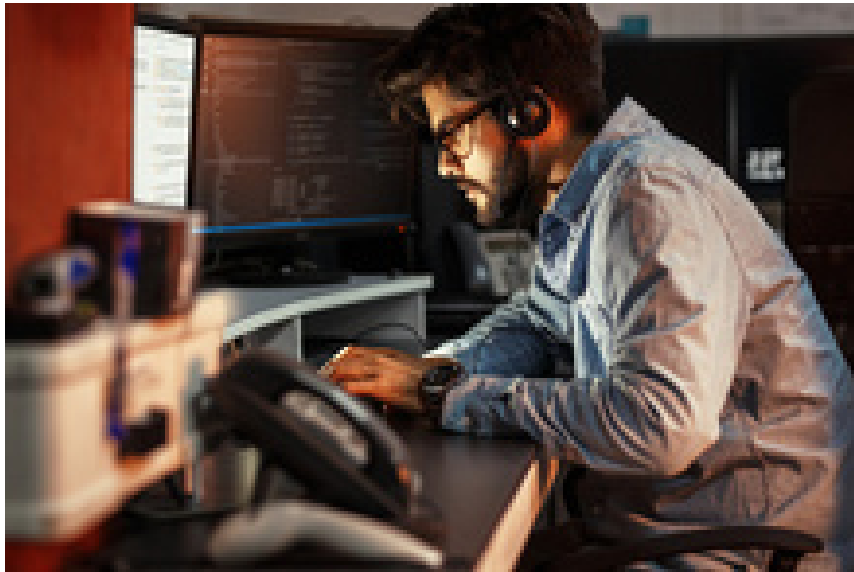
- **Connecticut** – Employers without workplace-based retirement plans must enroll in state sponsored IRAs.
- **Delaware** – New youth training wage for first 90 days. (50 cents less than minimum wage).
- **Illinois** – Employers must reimburse for all necessary expenditures.

Miscellaneous



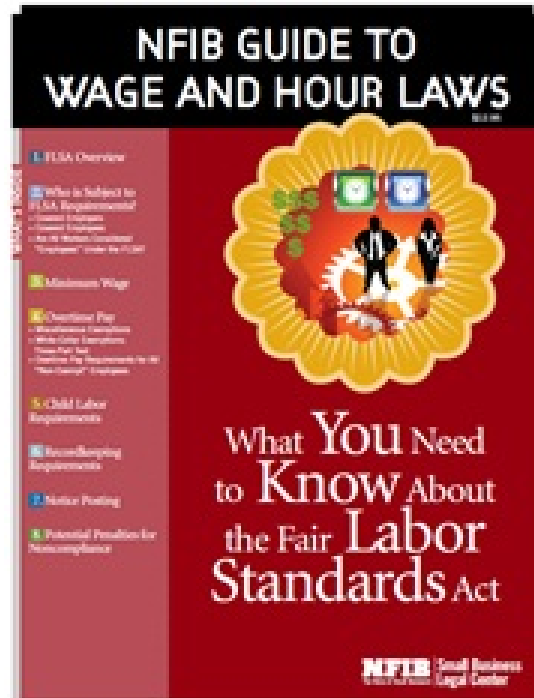
- **Illinois** – New protections for employees called for military leave.
- **Ohio** – Provides safe harbor to businesses meeting industry standards for digital security.

Other Issues to Watch in 2019



- Predictive scheduling
- Ban the box
- Medical marijuana
- Pregnancy accommodation

Free Help is Available



- NFIB Guide to Wage and Hour Law
- FREE www.nfib.com/legal-center

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Thank you!

