

West Virginia

Employment Law Workbook Addendum

(Update on legislation enacted from Jan. 1, 2015- Dec. 31, 2016)

Topics

I. Discrimination

A. West Virginia Pregnant Workers' Fairness Act Rules

West Virginia enacted the Pregnant Workers' Fairness Act in 2014. The Act requires employers to make reasonable accommodations for applicants and workers for known limitations due to pregnancy, childbirth, or related medical conditions. The West Virginia Human Rights Commission has issued new rules on reasonable accommodations for workers covered under the Act.

Private employers with 12 or more employees in the state for 20 or more calendar weeks in the calendar year are covered under the Act. The Act covers women who are pregnant or experiencing medical conditions related to a pregnancy that has ended.

The rules define "related medical conditions" as physical and mental symptoms or limitations relating to pregnancy, such as miscarriage, complications of pregnancy or childbirth, gestational diabetes, hypertension, after-effects of delivery, post-partum depression, and lactation. An elective abortion is not considered a related medical condition.

The new rules define "reasonable accommodation" to include making facilities usable by employees and job restructuring or reassignment. The rules provide examples of reasonable accommodations that can be made by employers:

- Bathroom breaks;
- Water breaks;
- Periodic rest;
- Assistance with manual labor;
- Time off for medical appointments;
- Modified work policies or procedures;
- Temporary transfers to less strenuous or hazardous work;
- More time to eat or more frequent food breaks;
- Breaks to take prescribed medication; and
- Access to existing facilities that are more convenient and usable by a woman affected by pregnancy.

W. Va. Code § 77-10-2 and W. Va. Code § 77-10-3 (Effective Date 07/20/2016).

B. National Guard Protections

West Virginia law ensures that members of the state National Guard are entitled to the same federal reemployment rights as members of the U.S. Armed Forces Reserve. The amendment extends this protection to West Virginia employees who are members of the National Guard of any state. The amendment also clarifies that the protected federal rights include the rights granted under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).

W. Va. Code § 15-1F-8 (Effective Date 06/08/2016).

II. Pre-Employment Inquiry Guidelines

West Virginia's fair employment practices law has been amended to allow an employer to grant preference in hiring to a veteran or disabled veteran. The amendments specify that the veteran must meet all of the knowledge, skills, and eligibility requirements of the job. The amendments define "veteran" as a person who has received an honorable discharge and has provided over 180 consecutive days of full-time, active-duty service in the United States Armed Services, Reserve, or National Guard, or has a service-connected disability rating fixed by the U.S. Department of Veterans Affairs.

W. Va. Code § 5-11-9 and W. Va. Code § 5-11-9a (Effective Date 06/11/2016).

III. Family and Medical Leave

No new laws or regulations enacted in 2015 or 2016.

IV. Wage and Hour Laws

A. Minimum Wages and Maximum Hours Standards Regulations

New amendments to West Virginia's minimum wages and maximum hours regulations make both substantive and non-substantive changes. Of most significance to employers, the regulations address: workweek establishment, covered employers, overtime exemptions, determination of compensable time, and employer tip credits.

Workweek Establishment

The amendments add provisions requiring employers to establish a workweek consisting of seven consecutive work days, totaling 168 consecutive hours. The workweek may begin on any day of the week and at any hour. An employer is required to provide one full pay period's notice to employees if the employer changes its established workweek.

Covered Employers and Exemptions

Sections 5 and 6 of the regulations set forth the criteria for determining which employers are subject to the minimum wage provisions of the Act and which are exempt. Employers are subject to the minimum wage provisions if the employer has six or more employees in any one location, and falls into one of the following categories:

- The State of West Virginia, its agencies, departments and all its political subdivisions;
- Any individual, partnership, association, public or private corporation; or
- Any person or group of persons acting directly or indirectly in the interest of any employer in relation to an employee.

However, the amendments add that when there is an investigation, the Division of Labor will determine whether an employer is subject to the regulations according to actual job duties performed by each employee, and the Division will give consideration to past decisions under state and federal law.

Employers are exempt from coverage if 80% or more of their employees are subject to any federal act relating to maximum hours and overtime compensation. Per the amendments to the regulations, the Division will also determine whether 80% of employees are subject to federal acts by considering whether the employer is a covered enterprise as defined in federal law, and if not, then by considering the actual job duties of each employee.

Overtime Exemptions

The amendments establish overtime exemptions for certain professionals, per diem employees of the Legislature, and seasonal white water rafting employees. Specifically, with respect to the professional exemption, the regulations differentiate the tests for an exempt learned professional and an exempt creative professional.

The amendments also create an exemption for computer professionals. An individual is exempt if:

- the individual's hourly rate of pay is not less than \$27.63;
- the individual is employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field; and
- the individual's primary duties consist of the following or a combination of the following:
 - the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
 - the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; or
 - the design, documentation, testing, creation or modification of computer programs related to machine operating systems.

Compensable Time

The amendments expressly prohibit an employer from having an employee "volunteer" his or her services in any activity that is a regular part of the employee's job.

Section 9 of the prior version of the regulations provided that the changing or washing of clothes was compensable time when indispensable to the employee's work or when required by law. Section 11 of the amended regulations provides that changing or washing clothes is compensable only when required by law or by the employer for safety, decontamination, or production reasons.

Employer Tip Credits

The amendments to the regulations incorporate the 2014 statutory amendments on employer tip credits, which changed from a 20% credit to the employer to a 70% credit. An employer can take a maximum tip credit of 70% of the minimum wage for all hours worked by a service employee or a dual job employee if the employee receives tips or gratuities equal to at least 70% of the minimum wage for all hours worked, but a tip credit cannot be taken for a non-service employee. A service employee is an individual who customarily receives tips or gratuities in connection with work; likewise, a non-service employee is one who does not customarily receive tips or gratuities. A dual job employee performs work as both a tipped service employee and a non-service employee for one employer.

When a service employee spends more than 20% of his or her time during a workweek performing non-tipped duties, the employer must pay the employee at least the full minimum wage, without taking a tip credit, for time spent performing such duties. Similarly, an employer must pay a dual job employee at least the full minimum wage, without taking a tip credit, for hours worked as a non-service employee.

If an employer takes a tip credit, it must include a written record of the tip credit in the employee's payroll and employment records. In addition, an employer must have written tip records completed by a service employee or a record of time worked by a dual job employee as a service employee.

If an employer taking a tip credit permits tip sharing or tip pooling, the employer must divide the shared or pooled tips among only service employees and dual-job employees working as service employees. The employer must ensure that the employees individually document the amount of tips paid out. The employer is not entitled to receive any shared or pooled tips.

W. Va. CSR § 42-8-1 through W. Va. CSR § 42-8-14 (Effective Date 05/01/2016).

B. West Virginia Wage Payment and Collection Rules

The wage payment and collection rules enacted under the West Virginia Wage Payment and Collection Act have been amended to incorporate several statutory amendments.

The rules require an employer to maintain written employment and payroll records for each employee. The records must include an employee's:

- full name or identifying symbol or number,
- home address,
- date of birth, if under 18,
- occupation, title, or job classification,
- regular rate of pay,
- hours worked for each workday and the total for each workweek, and
- documentation of his or her legal status or authorization to work.

The amendments removed a provision requiring that an employee's Social Security number be included in the employee's written employment record.

With respect to regular payday scheduling, the regulations specified that paydays were to occur every two weeks. The amendments bring the regulations in line with the Act, which

provides that paydays must occur twice per month with no more than 19 days between paydays.

The rule regarding an employee's claim for unpaid wages has been amended to remove the provision that a claimant is entitled to have the Director of the Wage and Hour Section review his or her claim. In addition, the amendments provide that an employer is entitled to a status conference upon request, during which the employer may review all records collected during the investigation. Within 20 days of the conclusion of the status conference, an employer may prepare and submit a written statement and/or evidence for consideration by the Division of Labor.

W. Va. CSR § 42-5-1 through W. Va. CSR § 42-5-10 (Effective Date 05/01/2016).

C. "Wages Due," Final Wages & Liquidated Damages

West Virginia has made further changes to its wage payment provisions. Specifically, the amendments impact the definition of "wages due" when, and in what form, final wages must / can be paid, and damages for final wage payment violations.

The definition of "wages due" has been amended so that they must include all wages earned up to and including the 12th day immediately preceding the regular payday. Before the amendment, it was the fifth day. The term "wages due" is used in the wage payment frequency statute, which was recently amended, and in the final wages statute.

The final wages statute has been amended to provide that direct deposits are an acceptable form of wage payment. This amendment brings the final wages statute in line with the wage payment frequency statute, which already permitted an employer to deposit regular wages into an employee's payroll card or bank account if certain conditions are satisfied.

Three changes have been made to the final wages statute's timing provisions. First, the amended statute requires that employees be paid "wages due" instead of "wages in full." Second, the amended statute provides that, regardless of whether an employee is fired, quits, or resigns, "wages due" must be paid on or before the next regular payday on which wages would otherwise be due and payable. Before the amendments, different standards applied depending on which party ended employment. Third, the amended statute includes new provisions about how "fringe benefits" must be paid. If fringe benefits (e.g., vacation, production incentive bonuses) are provided and due under an agreement between an employee and employer but, per the agreement's terms, are to be paid at a future date or upon additional conditions which are ascertainable, they must be paid per the agreement's terms and are not subject to the final wages statute's timing requirements.

Additionally, three changes have been made to the final wages statute's damages provision. First, the amount of liquidated damages potentially recoverable has decreased from three times to two times the amount of unpaid wages. Second, the amended provision expressly states it regulates the timing of final wage payment and not whether overtime is due. Third, it provides that liquidated damages are not available to employees claiming they were misclassified as overtime-exempt under state or federal wage and hour law.

W. Va. Code § 21-5-1 and W. Va. Code § 21-5-4 (Effective Date 06/11/2015).

D. Wage Payment Frequency

West Virginia has decreased how often wages must be paid from biweekly to semi-monthly with no more than 19 days separating paydays, unless the state labor department approves an employer's petition to establish different regular paydays.

W. Va. Code § 21-5-3 (Effective Date 06/12/2015).

V. Drug Testing

No new laws or regulations enacted in 2015 or 2016.

VI. Noncompete and Other Employment Agreements

West Virginia has adopted the Revised Uniform Arbitration Act ("Act"), which makes significant amendments to the state's law governing arbitration. In doing so, West Virginia has joined 18 other states that have adopted the provisions of the Uniform Arbitration Act created by the National Conference of Commissioners on Uniform State Laws. Prior to these amendments, West Virginia's laws governing arbitration provided no significant guidance to parties engaged in the process of arbitrating disputes.

The Act applies to all arbitration agreements made on or after July 1, 2015. Additionally, the Act also governs agreements to arbitrate made before July 1, 2015, if all the parties to the agreement or to the arbitration proceeding so agree in a "record." Such a "record" must be in a tangible medium, and may be made at any point. Finally, the Act applies to any agreement to arbitrate renewed or continued on or after July 1, 2015.

Significant provisions of the Act include:

- An agreement to arbitrate is irrevocable unless a legal or equitable reason for revocation exists.
- If a proceeding involves a claim that can be referred to arbitration under an alleged agreement, the court must stay any judicial proceeding that involves the claim until the court renders a final decision regarding arbitrability.
- If a court orders arbitration, the court must stay all proceedings involving that claim.
- An arbitration award cannot be set aside unless there are errors apparent upon its face or if it has been acquired by corruption or other undue means or mistake.
- Rehearing by arbitrators may be permitted at the discretion of a court.
- An arbitration award can be modified or corrected. In addition, the Act sets forth the circumstances under which modification or correction is warranted.
- An arbitration award is to be entered as a judgment or decree of the court unless good cause is shown as to why it should not be done.

W.V. Code § 55-10-1 *et seq.* (Effective Date 7/1/2015).

VII. Workplace Safety

No new laws or regulations enacted in 2015 or 2016.

VIII. Workers' Compensation

Various changes have been made to a workers' compensation statute governing an employee's injury or death that is self-inflicted or intentionally caused by an employer. Among other changes, the provisions discussed below apply to injuries occurring on or after July 1, 2015.

Tammy D. McCutchen, principal with Littler Mendelson PC, oversaw the firm's review and update of this state employment law workbook addendum.

The statute provides that employees or their dependents are not entitled to workers' compensation benefits if the employee's injury or death is caused by his or her intoxication. Under the amendments, if a blood test for intoxication, at the request of the employer or otherwise, is given following an accident, and if any of the following are true, the employee is deemed intoxicated and intoxication the proximate cause of the injury: 1) if a blood test is administered within two hours of the accident and evidence that there was, at that time, more than five hundredths of one percent, by weight, of alcohol in the employee's blood; or 2) if there was, at the time of the blood test, evidence of either on- or off-the-job use of a non-prescribed controlled substance.

In addition, an employee or, if s/he is found to be incompetent, his or her conservator or guardian, is the person permitted to file a cause of action against an employer for injuries caused by an employer's deliberate intent to injure or kill. Before the amendments, recovery could be sought by the employee, his or her widow, widower, child, or dependent. Additionally, the amendments provide that, if death results and a workers' compensation claim was filed, the representative of the employee's estate can recover from the employer any damages that exceed the amount received or receivable under the workers' compensation claim. Moreover, the amendments address the burden of proof for demonstrating: 1) an employer's actual knowledge; and 2) a serious compensable injury.

W. Va. Code § 23-4-2 (Effective Date 06/12/2015).

IX. Miscellaneous

A. Employer Access to Social Media

West Virginia has joined the list of states that restrict employer access to employees' or applicants' social media accounts. The new law prohibits an employer from:

- Requesting, requiring or coercing an employee or a potential employee to disclose a username and password, password or any other authentication information that allows access to his or her personal account;
- Requesting, requiring or coercing an employee or a potential employee to access his or her social media account in the employer's presence; and
- Compelling an employee or potential employee to add the employer or an employment agency to his or her list of social media contacts in order to enable the contacts to access a personal account.

The new law also contains exceptions relating to investigations and compliance, employer devices and accounts, and the public domain:

- **Public Domain:** The law does not apply to information in the public domain.
- **Employer Devices and Accounts:** The law does not apply to electronic communication devices supplied by the employer or an account or service provided by the employer or used for business purposes.
- **Investigations and Compliance:** An employer may require or request an employee to disclose a username, password, or social media account reasonably believed to be relevant to an investigation. The employer may require an employee to share the content that has been reported to make a factual determination, if the employer has specific information about an

unauthorized transfer of the employer's proprietary information, confidential information or financial data, to the employee's personal account. An employer can request an employee share specific content regarding a personal account for the purposes of ensuring compliance with applicable laws, regulatory requirements or prohibitions against work-related employee misconduct.

If an employer unintentionally receives the username, password or other authentication information to gain access to an employee's social media account, the employer must delete the information as soon as practicable.

W. Va. Code § 21-5H-1 (Effective Date 06/11/2016).

B. Right to Work

West Virginia is now a "Right to Work" state. The legislation significantly modifies state law by, among other things, prohibiting employers and labor organizations from requiring employees to join, remain a member of, or financially support a labor organization as a condition of employment. The law does not impact an existing collective bargaining agreement (CBA) unless it is renewed, modified, or extended after July 1, 2016. Violation of the law will be a misdemeanor.

The law prohibits employers and unions from requiring, as a condition of obtaining or continuing employment, that any individual:

- Become or remain a member of a labor organization;
- Pay any dues, fees, assessments or other similar charges, however denominated, of any kind or amount to any labor organization; or
- Pay any charity or third party, in lieu of those payments, any amount that is equivalent to or a pro rata portion of dues, fees, assessments or other charges required of members of a labor organization.

W. Va. Code § 21-1A-3, W. Va. Code § 21-1A-4, W. Va. Code § 21-5G-1, W. Va. Code § 21-5G-2, W. Va. Code § 21-5G-3, W. Va. Code § 21-5G-4, W. Va. Code § 21-5G-5, W. Va. Code § 21-5G-6, W. Va. Code § 21-5G-7 and W. Va. Code § 21-5G-8 (Effective Date 05/05/2016).

C. Verifying the Legal Employment Status of Workers

The West Virginia Verifying Legal Employment Status of Workers Act ("Act") requires employers to verify the legal employment status of all employees and to report employees' employment status to the appropriate government agencies. The state has amended its administrative regulations implementing the Act.

The regulations provide that an employer must verify all employees' and prospective employees' legal status or authorization to work prior to their first day of employment or prior to entering into a contract for services with any individual. The amended regulations strengthen that provision by adding that an employer is prohibited from knowingly hiring or continuing to employ an unauthorized or undocumented worker.

The amended regulations change the procedure for inspection of an employer's employment status verification records. The regulations require an employer to verify an employee's legal status or authorization to work and to retain the documents submitted as proof of legal status for at least two years after the employee separates from employment. The Commissioner of

Labor may inspect the employer's records to ensure compliance with the Act. The amended regulations provide that in addition to inspecting an employer's records, the Commissioner may ask an employee's name and the name of his or her employer.

The regulations further provide that if employee records are not immediately available or if the records are kept at a place of employment other than the work site, or at a central records-keeping office other than the work site or place of employment, the Commissioner will issue a Notice to Produce Records or Documents to the employer or to the individual designated by the employer to be in charge of the work site. After receipt of the notice, the regulations provide that the employer must submit the required records within 72 hours. The amended regulations clarify that the time limit for producing records is 72 hours or three business days within receipt of the notice. The amended regulations define "business day" as any day other than a Saturday, Sunday, or legal holiday.

In addition, the amended regulations add a new provision allowing the Commissioner to issue a State of West Virginia Uniform Citation to an employer if the employer fails to produce the required records or documents or fails to respond to a Notice to Produce Records or Documents. If the Commissioner elects to issue a citation, the Commissioner must also promptly file a copy of the citation with a magistrate or circuit court in the county in which the employer's violation occurred.

W. Va. CSR § 42-31-1 through W. Va. CSR § 42-31-8 (Effective Date 07/01/2015).