



# Federal-State Employment Law Divide Reveals Systemic Flaw

Insights

2.28.20

In the not-so-distant past, federal laws dominated the employment landscape. They created more restrictions on employers and more protections for employees than the state laws in the majority of states.

But recently, there has been a wave of state and city laws and ordinances that have surpassed the reach of many federal laws, including those that have raised the minimum wage, created protections for LGBT workers, legalized marijuana use, and mandated paid sick and family leave, among other protections. The visible momentum behind the coordinated social movements underlying these efforts indicates that they are only gaining steam, with new state laws and local ordinances popping up every year.

At the same time, proposed federal legislation in these areas has all but died a slow and quiet death. In this way, Congress has essentially ceded authority when it comes to employment law issues, and we are witnessing a proverbial passing of the baton from Congress to state and local governments in the race to regulate employee working conditions.

However, this lack of synchrony between the two governments should be concerning not only because it tests the limits of our federal democracy, but also because it has the potential to crack the system in ways that may not be easily repaired.

## Local Laws Changing The Landscape

Less than eight years after the start of the global movement to raise the minimum wage known as the Fight for \$15, there are now at least 27 states that have a minimum wage above the federal minimum wage of \$7.25, with many states legislatively committed to reaching or exceeding the \$15 minimum wage by at least 2024. Despite the flurry of legislation at the state level, the federal minimum wage has remained unchanged for the last 10 years.

Another area where local governments are surpassing federal law in regulating employee working conditions is with the enactment of laws and ordinances providing for paid sick and family leave. While the federal Family and Medical Leave Act has been providing employees with job-protected leave for over two decades, the leave mandated by the FMLA is unpaid for the most part. Despite former President Barack Obama's public calls to Congress in 2015 to enact federal legislation providing employees of private employers with some form of paid sick and family leave, those efforts

were unsuccessful.

Since then, states and cities have been steadily enacting laws mandating that employers provide a minimum number of paid sick days to employees. In fact, there are currently over 14 states with paid sick leave laws on their books, along with a steadily increasing number of city and county ordinances mandating paid sick leave.

A handful of states also provide for some level of paid parental or family leave. Given the successes of the various social movements currently underway, it is only a matter of time before we see a surge in state-mandated paid parental leave for both male and female workers.

The dichotomy between state and federal legislation is perhaps most striking in the area of marijuana legislation. The slow trickle of state laws legalizing marijuana over the last 10 years has resulted in 42 states decriminalizing the use of marijuana or cannabis products in some fashion. Because marijuana remains an illegal drug under federal law, this poses not only an interesting constitutional question but also creates a level of uncertainty for both employers and employees living and working in states that have legalized marijuana use.

### **Implications For Employers**

While a federal slowdown of workplace regulations would seem beneficial to employers, the passing of this responsibility to local governments is not ideal for those businesses with multistate operations. This leaves national employers to scour the state statutes and city ordinances, and set employee wages and workplace policies for what is becoming a very fluid workforce.

With the advances in technology and the increasing popularity of telecommuting and work-from-home arrangements, employers could unwittingly be violating these laws when applying their normal policies and procedures to their workforce across the board.

Unless employers adopt a policy of applying the most employee-friendly statutes and ordinances in all states in which they have workers, the administrative headache of meeting these differing standards in each location is painful. There is also an employee morale consideration, as their workers may not understand why their coworkers in other locations are receiving different pay and benefits for performing the exact same work.

The legalization of marijuana in what is now the majority of states does not, on its face, appear to be an employer issue. Instead, however, it has profound effects on employers in the areas of drug testing and disability accommodation.

Even though employers in most states that have legalized marijuana are not prohibited from terminating or disciplining individuals who test positive, employers are now questioning whether it is worth losing valued workers for engaging in lawful conduct on the weekend or after work. The fact that the majority of states have legalized marijuana and cannabis products sends mixed messages to workers about what consequences they will face for using these products.

Moreover, the disability accommodation questions that arise in the medical marijuana context require careful consideration and evaluation from national employers. The consistent position has been that employers are not required to accommodate medical marijuana use under the Americans with Disabilities Act because marijuana is still an illegal drug under federal law.

However, an increasing number of states are requiring such an accommodation under state disability laws when dealing with medical marijuana. Until these conflicting positions by the state and federal governments make their way up to the U.S. Supreme Court, employers are left on their own to make the difficult decisions.

Regardless of one's viewpoint on the pros and cons associated with these new local laws, the lack of a unified standard across the various states means that employers will have to be vigilant about ensuring that their policies and procedures comply with the requirements of each state, city and even county in which they have operations. Gone are the days when employers could rely on meeting the federal employment standards and safely assume that they are not running afoul of local laws.

### **How Did We Get Here and Where Are We Headed?**

There can be no doubt that our present fiercely divided federal government has contributed to the atrophy that we are seeing with federal legislation. This atrophy has pushed the local governments to fill the gap at the insistence of their constituents.

For the federal and state governments to be so out of sync with one another suggests a flaw in our system. After all, the constituencies are the same under both systems and yet we have, in the case of marijuana laws, for example, diametrically opposed federal and state legislation.

The steadily rising voices of the current social movements and local legislative initiatives may soon force Congress to either catch up or get out of the race entirely. If the most recent election results are any indication of the path forward, it is possible that we will soon see Congress get its second wind.

*For more information, contact the author at [HReiminger@fisherphillips.com](mailto:HReiminger@fisherphillips.com) or 713.292.5607. This article first appeared on [Law360.com](http://Law360.com).*

### **Service Focus**

Employee Leaves and Accommodations

Employment Discrimination and Harassment

Litigation and Trials

Wage and Hour