



Maryland Employers Should Use This Summer To Prepare For Sweeping New Workplace Laws

Insights

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Maryland employers face a broad array of new workplace rules set to take effect on October 1, 2020. The new legislation will add protected characteristics to Maryland's anti-discrimination law, create new mandatory advance notice requirements in cases of mass layoffs, install new obligations and protections related to employee salaries and related inquiries, and prohibit non-consensual use of facial recognition services during the hiring process. October 1 will be here before you know it – what do you need to do this summer to prepare for these new obligations?

Expansion Of Anti-Discrimination Law To Include Hairstyles

Maryland will become the seventh state to prohibit discrimination on the basis of hairstyles associated with race, joining neighboring Virginia, as well as California, Colorado, New Jersey, New York, Washington, and the District of Columbia, in enacting its own version of what is commonly known as the "CROWN Act." The General Assembly amended the definition of "race" in the state anti-discrimination law to clarify that the term encompasses "traits associated with race, including hair texture, afro hairstyles, and protective hairstyles," the latter of which is defined to include "braids, twists, and locks."

Employer Action Steps:

- Review the wording of your employee appearance policies and remove references to specifically prohibited hairstyles;
- Apply policies equally to all employees regardless of race;
- Educate employees on all policies, including the appearance policy;
- Train managers on any changes in policies and on how to handle appearance policy infractions with sensitivity; and
- Train any individuals responsible for hiring not to comment on an applicant's appearance and on appropriate interview questions and comments.

New Mass Layoff Procedures

The General Assembly also amended Maryland's Economic Stabilization Act, known as a mini-WARN law, which will affect certain employee separation practices. Like the federal Workers Adjustment and Retraining Notification (WARN) Act, Maryland's mini-WARN law provides for 60 days' advance written notification of a mass layoff. Previously, notice requirements for Maryland

employers under the mini-WARN law had been voluntary. As amended, the notice requirements are now *mandatory* for covered employers.

Employer Action Steps:

- Once the new law takes effect, covered employers (those with at least 50 employees who have operated an industrial, commercial, or business enterprise in Maryland for at least one year) will be required to provide 60 days' written notice to employees affected by certain reductions in operations, recently hired employees and those working fewer than 20 hours per week, each union or representative agency with a presence at the workplace, the Maryland Dislocated Worker Unit, and all elected officials in the jurisdiction where the workplace is located.
- The written notice must contain, among other things, a statement of when the reduction in operations will begin, whether the reduction is expected to be temporary or permanent, and whether the workplace is expected to shut down, as well as contact information for an appropriate individual who may be reached for further information.
- If you anticipate reducing your workforce in Maryland in the coming months, you are encouraged to consult with your employment counsel to review the new mini-WARN requirements and develop an action plan for ensuring compliance

Salary History Ban And Salary Inquiry Protections

The General Assembly also amended Maryland's Equal Pay Act to address the gender wage gap that may stem from an applicant's salary history. The amendments create several new employer obligations and add applicant and employee protections relating to salaries, salary inquiries, and salary histories, including the following:

- Requiring an employer to provide the wage range for the position in question upon an applicant's request;
- Prohibiting an employer from seeking an applicant's wage history orally, in writing, through an employee or agent, or from a current or former employer;
- Prohibiting an employer from retaliating against, or refusing to interview, hire, or employ, an applicant because the applicant requested the wage range for the position in question or chose not to provide their wage history; and
- Prohibiting an employer from relying upon an applicant's wage history in screening or considering the applicant for employment or in determining wages.

However, the new legislation clarifies that an applicant may voluntarily provide their wage history and permits employers to confirm and rely on such history to support a wage offer higher than initially offered. However, this is only permitted as long as the higher wage does not create an unlawful pay differential based on sex or gender identity.

The General Assembly also amended the Maryland Equal Pay Act to prohibit an employer from

taking any adverse employment action against an employee for asking about their *own* wages. Prior to the amendment, the act made it unlawful to take adverse action only in response to inquiries about *another* employee's wages.

Employer Action Steps:

- You should eliminate questions relating to salary history from your interview protocol and job applications, training any and all managers participating in the hiring process about this new prohibition.
- Instead, you should consider revising your materials so that you request an applicant's salary expectations as a way to help negotiate a fair salary.
- You will also need to inform third-party reference check businesses operating at your command about changes in your practice.
- You should work with your counsel to conduct a privileged pay audit to determine if you have compensation gaps. If any are identified, you should work with your counsel to ascertain whether any are justifiable — perhaps because of differences in experience, education, ability, job performance, seniority, quality of work, quantity, or another job-related factor.

Prohibition On Using Facial Recognition In The Hiring Process

Finally, the General Assembly enacted legislation to prohibit employers from using a facial recognition service to create a facial template of applicants during job interviews without consent. The new legislation defines “facial recognition service” as any “technology that analyzes facial features and is used for recognition or persistent tracking of individuals in still or video images,” and defines “facial template” to mean “machine-interpretable pattern of facial features that is extracted from one or more images of an individual by a facial recognition service.”

Employer Action Steps:

- You are permitted to use facial recognition services as part of the hiring and interview process if the applicant provides express, written consent through a signed waiver that includes: (1) the applicant's name; (2) the date of the interview; (3) a statement that the applicant consents to the use of facial recognition during the interview; and (4) a statement that the applicant read the consent waiver.
- To the extent your organization implements such a process, you will want to develop a protocol to ensure you capture this information.

Conclusion

We will continue to monitor developments related to these new laws and their effect on Maryland employers. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney or any attorney in our Bethesda office.

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