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## The Legal Landscape Rapidly Changes for D.C. Employers

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*District of Columbia employers now face and are soon to face a number of new laws affecting a wide range of issues, including wage payments, recording of hours worked, pregnancy accommodations, concealed weapons in the workplace, and the use of criminal background checks and drug testing during the hiring process. While most of the changes impose new requirements on employers, emergency legislation passed by the D.C. Council on February 3rd also contained a win for employers by changing existing D.C. law that had previously required that employers keep records of hours worked by both exempt and non-exempt employees. Employers must be aware of these new requirements, some of which require employers to change their current practices, and should carefully review their employee handbooks and other policies to ensure timely compliance.*

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### **The D.C. Wage Theft Prevention Amendment Act of 2014 and Revisions to It**

The D.C. Wage Theft Prevention Amendment Act of 2014, which is currently expected to become effective on February 26, 2015, following Congressional review, has already proven to be one of the most significant and controversial new laws affecting D.C. employers in recent memory. Fortunately, in response to urging by employer groups, on February 3, 2015, the D.C. Council took emergency action to scale back its most burdensome provisions.

The Amendment Act, in its original form, amended in a number of critical ways several of D.C.'s existing employment statutes, included the D.C. Wage Payment and Collection Act, the D.C. Minimum Wage Act, the D.C. Living Wage Act, and the D.C. Accrued Sick and Safe Leave Act. (Provisions of the Amendment Act which have been modified by the emergency action of the D.C. Council are in bold below.) In addition

to adding provisions relating to enforcement procedures for those laws, the Amendment Act included provisions:

- Barring employers from paying employees the lower federal minimum wage during their first 90 days of work.
- Requiring that employers provide every employee, within 90 days of the Act's effective date, a written notice containing the following information:
  - The name of the employer and any "doing business as" names used by the employer
  - The physical address of the employer's main office or principal place of business, and a mailing address, if different
  - The telephone number of the employer
  - The employee's rate of pay and the basis of that rate, including by the hour, shift, day, week, salary, piece, commission, any allowances claimed as part of the minimum wage, overtime rate of pay, exemptions from overtime pay, living wage, exemptions from the living wage, and the applicable prevailing wages
  - The employer's regular paydays
  - Any other information the Mayor considers to be material and necessary

These notices are to be provided to employees in both English **and in each employee's primary language**.

- Requiring that **all employees** be paid at least twice a month on designated paydays
- Requiring that all employees who have been discharged be paid all outstanding wages by the next day and all voluntarily departing employees be paid all outstanding wages within seven days or by the next regular payday, whichever is sooner
- Requiring that employers keep records for **all employees** of the "precise time worked each day and each workweek by each employee," rather than (as formerly required) just "the hours worked each day and each workweek"

D.C. employers objected to several of the provisions as burdensome and unnecessary for the protection of employees. In particular, many employers—and many exempt employees—were concerned about the requirement that employers keep records of the "precise hours worked" for all employees, as this would require professional, executive and other exempt employees to keep daily timesheets recording start and stop times for their work throughout the day. While records of the length of meal and other breaks may be relevant for non-exempt employees in determining total wages and overtime payments due, such precise time-tracking for exempt employees would impose a burden with no countervailing benefit.

Fortunately, the D.C. Council recognized the unnecessary burden the Amendment Act had placed on employers and, at the Mayor's request, passed on February 3, 2015, temporary legislation—both the Wage Theft Prevention Clarification Temporary Amendment Act of 2015 (Temporary Amendment Act) and the Wage Theft Prevention Clarification Emergency Amendment Act of 2015 (Emergency Amendment Act)—that modified key aspects of the Amendment Act:

- Employers will be required to record the "precise time worked each day and each workweek" only for non-exempt employees.

- Employers will be obligated to provide the mandatory written notices to employees in a second language other than English only if the Mayor has made available a sample template in that second language and either the employer knows that second language to be an employee's primary language or the employee requests the notice in that language.
- The obligation to provide the mandatory notice with respect to employees placed by temporary staffing forms will apply to the temporary staffing firm, not the client employer.
- Employers will only be required to pay exempt employees at least once per month.

The substantive provisions of the Temporary Amendment Act and the Emergency Amendment Act parallel each other. Any non-emergency legislation in D.C. requires Congressional review, however. The Emergency Amendment Act will remain in effect for 90 days following its still-to-be-determined effective date, which allows time for Congressional review of the Temporary Amendment Act. Following Congressional review, the Temporary Amendment Act will remain in effect for 225 days, giving the D.C. Council time to draft, pass, and submit for Congressional review a permanent version of these bills. As of the date of publication of this Client Alert, Mayor Muriel Bowser has not yet signed these bills, but she expressed support for them prior to the D.C. Council's February 3rd meeting.

Significantly, the emergency legislation not only lifts the timekeeping burden for exempt employees that the Amendment Act would have imposed, but also rescinds the already existing requirement that D.C. employers record the "hours worked" (but not the "precise time worked") for all employees, whether exempt or non-exempt. The D.C. Minimum Wage Law had, even prior to enactment of the Amendment Act, already included a provision, in D.C. Code § 32-1008(a)(1)(D), that required employers to "make, keep, and preserve" for at least three years a record of "the hours worked each day and each workweek by each employee," with no exclusion for salaried exempt employees. The Emergency and Temporary Amendment Acts replace the Subparagraph D provision with a requirement that employers record the "precise time worked ... except for employees who are exempt from the minimum wage and overtime requirements."

Except as modified by the Temporary and Emergency Amendment Acts, the other provisions of the Amendment Act will become law—absent Congressional action—on February 26, 2015, and employers should take immediate steps to ensure timely compliance with the new requirements. For some employers, this may entail updating their current timekeeping rules and procedures so that their non-exempt employees can clock in and out when they start and stop work throughout the day.

### **The Wage Transparency Act of 2014**

Under the Wage Transparency Act of 2014, employers may not (1) prohibit employees from inquiring about, discussing, comparing, or otherwise discussing their wages or the wages of another employee, (2) discharge, discipline, interfere with, or otherwise retaliate against an employee who inquires about, discloses, compares, or otherwise discusses the employee's wages or the wages of another employee, or is believed by the employer to have done so; or (3) prohibit or attempt to prohibit an employee from lodging a complaint, or testifying, assisting, or participating in an investigation or proceeding, related to a violation of this Act. Employers may, however, prohibit an employee with regular access to information regarding the wages of other employees, such as an HR or payroll employee, from sharing such information, unless there is a legal obligation to furnish the information. This Act is expected to clear the 30-day congressional review period and become law on March 11, 2015. This new D.C. law is similar to President Obama's Executive Order 13665, which applies to federal contractors and subcontractors.

### **The Protecting Pregnant Workers Fairness Act of 2014**

The Protecting Pregnant Workers Fairness Act of 2014 requires D.C. employers to provide reasonable accommodations to employees whose ability to perform their job is affected by pregnancy, childbirth, breastfeeding or related medical conditions, unless such accommodations would work an undue hardship on the operation of the employer's business. The Act requires employers to engage in an interactive process with any employee requesting or needing an accommodation.

Employers are required to post and maintain in a conspicuous place a notice of rights in both English and Spanish, and provide written notice of an employee's right to a needed reasonable accommodation related to pregnancy, childbirth, related medical conditions or breastfeeding to: (1) new employees at the commencement of employment, (2) existing employees within 120 days after the effective date of the Act, and (3) an employee who notifies the employer of her pregnancy, or other condition covered by this act, within 10 days of notification. Translations need to be provided to any non-English- and non-Spanish-speaking employees.

The Mayor is required to issue rules and procedures, including guidance on when and how an employer can prove "undue hardship," within 60 days of the Act's effective date. The Mayor's office or the D.C. Department of Employment Services will also likely publish a template notice for employers to use.

This Act is expected to become effective on March 3, 2015.

### **The Fair Criminal Record Screening Amendment Act of 2014**

The Fair Criminal Record Screening Amendment Act of 2014 went into effect on December 17, 2014. This Act prohibits employers with 10 or more employees in D.C. from inquiring about an applicant's arrest record or criminal accusations made against an applicant that are not pending or that did not result in a conviction at any time.

In addition, employers may only inquire about an applicant's criminal convictions after making a conditional offer of employment (except in very limited circumstances, such as where another law requires consideration of the applicant's criminal history). Employers may withdraw a conditional offer or take an adverse employment action based upon criminal background information only if it is done for a legitimate business reason in light of the following factors:

- The specific duties and responsibilities of the position sought
- The bearing of the criminal offense on the applicants' fitness or ability to perform the duties and responsibilities of the position sought
- The amount of time that has passed since the criminal offense
- The age of the applicant at the time of the criminal offense
- The frequency and seriousness of the criminal offense
- Any information produced by or on behalf of the applicant demonstrating his or her rehabilitation and good conduct since the criminal offense

If an offer of employment is withdrawn, the Act permits an applicant to request that the employer provide a copy of all records obtained by the employer in consideration of the applicant and a notice advising the applicant of his or her opportunity to file an administrative complaint with the D.C. Office of Human Rights.

The D.C. Office of Human Rights has issued [guidance regarding this Act](#) and published a [Notice of the Right to File a Complaint](#). Notably, in this guidance, the D.C. Office of Human Rights advises that, if a job

offer is revoked or adverse action is taken, employers should provide the applicant with this Notice of Right to File a Complaint.

### Handguns in the Workplace

A new D.C. handgun law that went into effect in October 2014 provides that, after January 20, 2015, all private commercial property owners are presumed to permit a person holding a handgun license to enter the owner's property with their firearm unless the property is posted with "conspicuous signage prohibiting firearms" or the property owner "communicates such prohibition personally" to the licensee. D.C. employers who wish to ban firearms from their premises, therefore, should post signs at the entrance to their offices or building and should include the ban in their employee handbooks.

### Pre-Employment Marijuana Testing Temporary and Emergency Acts of 2014

The Pre-Employment Marijuana Testing Temporary and Emergency Acts of 2014 prohibit employers from testing a prospective employee for marijuana use prior to a conditional offer of employment, unless otherwise required by law. The emergency version of the Act went into effect immediately and will expire no later than March 18, 2015, and a temporary version of the Act will remain effective for 225 days after it takes effect (although it is unclear exactly when that will happen). The D.C. Council is currently considering a permanent version of this same Act.

This legislation follows the July 17, 2014, effective date of D.C.'s marijuana decriminalization bill, which removes all criminal penalties under D.C. law for possession of up to an ounce of marijuana and replaces them with a civil fine of \$25. Possession of marijuana remains a violation of federal criminal law, however.

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If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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