

## Labor and Employment 2019 Symposium

### Accelerating Change: Legislative Trends in Minnesota & Beyond

#### Speakers

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#### Materials

1. PowerPoint Presentation

# ahead of the curve

Workplace law trends for today and beyond.  
Come up to speed to stay ahead.



## Accelerating Change: Legislative Trends in Minnesota & Beyond

### Meet the Speakers:

Elise Diedrich, Sr. Policy Manager – Government Affairs, Target Corporation

Marilyn Clark, Partner, Dorsey & Whitney

Ryan Mick, Partner, Dorsey & Whitney

Molly Sigel, Legislative Affairs Director, Dorsey & Whitney

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## Agenda



### 1. The 2019 Legislative Session – An Inside View

### 2. National Trends & Minnesota Developments

- Sexual Harassment
- Paid Family Leave
- “Wage Theft”
- “Fair Scheduling”
- Paid Sick/Safe Leave

### 3. Prognostications!

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## Sexual Harassment: A National Priority

In October 2018, the EEOC shared preliminary data for its 2018 fiscal year (October 2017 – September 2018):

- Statistics show a **12 percent increase** in the number of sexual harassment complaints the agency has received in the year since the Weinstein scandal broke — this is the **first increase** in such charges the agency has seen in the last ten years
- The agency initiated **50% more** sexual harassment lawsuits in FY 2018 than it did in FY 2017
- The agency recovered approximately **\$70 million** for sexual harassment victims in FY 2018, compared with approximately \$47 million recovered in FY 2017

***Data + anecdotal claims + political incentives = strong drive to “do something”***

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## Sexual Harassment: 2018 Legislative Developments

### Prohibitions on non-disclosure terms in sexual harassment settlements

- Bills introduced in at least 16 states in 2018 to restrict the use by private employers of non-disclosure agreements in sexual harassment cases
- Laws passed in Arizona, Louisiana, Maryland, New York, Tennessee, Vermont, Washington, and – as of September 30 – California
- 2018 federal tax law prohibited federal tax deductions for sexual harassment settlements with confidentiality requirements

Starting to hear anecdotal resistance from some plaintiff’s lawyers

- ✓ Reduces value of settlement
- ✓ Many *claimants* want confidentiality

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## Sexual Harassment: 2018 Legislative Developments

### Bans/limitations on mandatory arbitration of sexual harassment claims

- Laws passed in Maryland, New York, Vermont, Washington
- Possible conflict with federal law, but trend of progressive employers dropping mandatory arbitration voluntarily provides political cover
  - ✓ Google
  - ✓ Facebook
  - ✓ eBay
  - ✓ Airbnb
  - ✓ Uber
  - ✓ Lyft

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## Sexual Harassment: 2018 Legislative Developments

### Mandatory sexual harassment prevention policies and training

- California, Connecticut, Delaware, Maine, Massachusetts, New York, Rhode Island, Vermont have/will have laws requiring written anti-harassment policies and/or training requirements
- Additional bills introduced in New York, Pennsylvania, Rhode Island, Virginia and NYC in 2018

### Mandatory reporting of harassment settlements

- Maryland

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## Sexual Harassment: 2018 Legislative Developments

### Changing the legal standard for sexual harassment claims

- **Minnesota** – bill would have eliminated the “severe or pervasive” standard
- **California** – SB 1300 (signed 10/1/18) included non-binding statements of legislative intent regarding sexual harassment cases
  - Rejected “stray remarks” doctrine
  - “Single Incident” sufficient
  - Summary judgment “rarely appropriate”

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## Sexual Harassment: 2019 Minnesota Legislative Session

### • H.F. 10

- **Identical to 2018 bill:**

“An intimidating, hostile, or offensive environment [for purposes of a sexual harassment claim] does not require the harassing conduct or communication to be severe or pervasive.”

- **Defines actionable sexual harassment as “conduct or communication of a sexual nature when . . . that conduct or communication has the . . . effect of . . . creating a ‘materially offensive’ employment . . . environment.”**

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## Sexual Harassment: 2019 Minnesota Legislative Session

- **S.F. 2295**

- Preserves “severe or pervasive” standard but (1) reaffirms that actionable harassment may arise from a single significant instance of harassing conduct or communication, or a series of less serious instances of harassing conduct or communications, and (2) instructs courts to disregard unreasonable federal precedent.
- Affirms that the MHRA is not a general civility code and establishes that employers that knew or should have known of an employee’s sexual harassment must not be liable if the employer exercised reasonable care to prevent or promptly correct sexual harassment or the employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer.

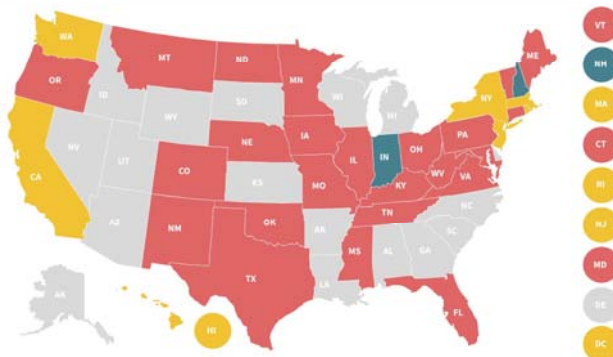
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## Paid Family Leave – National Trends

Which states are considering **paid family/medical leave programs in 2019?**

- State **introduced** paid family/medical leave legislation
- State has **passed** paid family/medical leave legislation in at least one chamber
- State has **existing** paid family and/or medical leave program



**National Trend**  
135 bills in 24 states  
in 2019

**MULTISTATE**

Data as of 3/29/2019. Existing paid family/leave program means the state has implemented or enacted legislation establishing a paid family/medical leave program.

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## Paid Family Leave – Nationals Trends

- This benefit is politically popular (Governor of California, presidential candidates, President Trump)
- Given gains by Democrats in state legislatures and governor seats in the 2018 elections, more states are pursuing paid leave legislation.
- Companies continue to announce paid family benefit plans.
- Proposals are a mix of state-run and insurance-based programs, voluntary and mandated.

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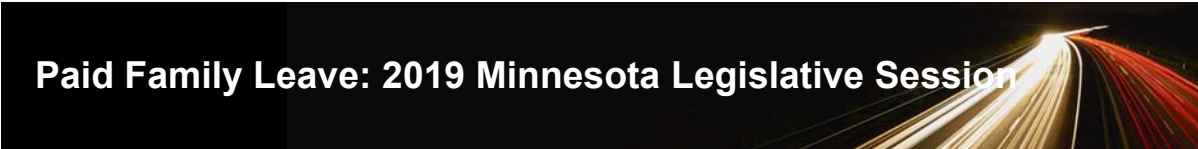
## Paid Family Leave: 2019 Minnesota Legislative Session

- **H.F. 5 - Would create a state Paid Family & Medical Leave Insurance Program**
  - Applies to all employers; self-employed and independent contractors can opt in.
  - Requires employers to provide paid leave for part-time and temporary employees.

“Ninety calendar days from the date of hire, an employee has a right to leave from employment for any day, or portion of a day, for which the employee would be eligible for benefits under this chapter...”
  - Premiums would be split 50/50 between employers and employees; employers must deduct and pay similar to workers compensation premiums. Premium amounts are based on what programs are chosen for participation.

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## Paid Family Leave: 2019 Minnesota Legislative Session

- **H.F. 5**

- Requires employers to provide up to 24 weeks of leave per year – e.g., if an employee has one situation involving serious health condition or pregnancy *and* one situation involving bonding, safety leave or family care.
- Prohibits employers from requiring employees to use available sick, vacation or PTO time in conjunction with leave – employees could use their 12/24 weeks of protected leave and still have vacation/PTO available.
- Creates new substantive leave rights – e.g., safety leave – under state law.
- Reinstatement requirements mostly track the FMLA, but not all exclusions are specifically called out.
- Imposes substantial notice and information requirements.

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## Paid Family Leave: 2019 Minnesota Legislative Session

- **H.F. 5**

- “Voids” waivers of rights under H.F. 5, meaning employers and employees cannot privately resolve disputes – i.e., per a private settlement or severance agreement.
- Creates private right of action for violations. Specifically authorizes class actions. Permits recovery of compensatory damages, consequential damages and attorneys’ fees.
- Would permit employers to opt out if they already provide comparable paid leave benefits, but virtually impossible to satisfy opt-out requirements. Employers that opt out would still pay “approval and oversight fee” of \$250 for employers with fewer than 50 employees, \$500 for employers with 50 to 499 employees, and \$1,000 for employers with 500 or more employees.

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## “Wage Theft” Protections – National Trends

- **2017-18 “Wage Theft Prevention and Wage Recovery Act” would have:**
  - Expanded information and notice requirements
  - Created straight-time wage claim under the FLSA
  - Created \$2,000 civil penalty for first time FLSA violations; \$10,000 civil penalty for repeated violations
  - Increased liquidated damages under the FLSA from 2x actual damages to 3x actual damages
  - Strengthened anti-retaliation protections
  - Added \$1,000/\$5,000 civil penalties for FLSA record-keeping violations
  - Extended statute of limitations for FLSA claims from 2 years to 4 years
  - Changed collective action procedure under FLSA from “opt-in” to “opt-out”

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## “Wage Theft” Protections – National Trends

- **State wage theft statutes**
  - California
  - Connecticut
  - Colorado
  - Delaware
  - Illinois
  - Maryland
  - Massachusetts
  - New York
  - Texas
- **Recent state legislative proposals**
  - Massachusetts
  - New Jersey
  - Washington
  - Wisconsin

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## Wage Theft – 2019 Minnesota Legislative Session

- **H.F. 6**

- **Eliminates “intent to defraud” requirement for wage theft**
  - Includes any failure to pay wages, including mistakes or good faith disputes
  - Includes retaliation for asserting statutory rights; retaliation *presumed* for any adverse action within 90 days of an assertion of rights
- **Adds new pay statement obligations for employers**
- **Requires 16 day-pay periods . . . but requires payment of earned wages within 10 days of the end of the pay period**

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## Wage Theft – 2019 Minnesota Legislative Session

- **H.F. 6**

- **Gives labor commissioner broad power to inspect premises and demand documents in specific formats**
  - \$10,000 penalty *per failure* for noncompliance
  - Any act that “delays” the commissioner, or any “refusal to admit” the commissioner is a misdemeanor
- **Authorizes commissioner to issue subpoenas**
  - Any failure to comply is automatic contempt of court

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## Wage Theft – 2019 Minnesota Legislative Session

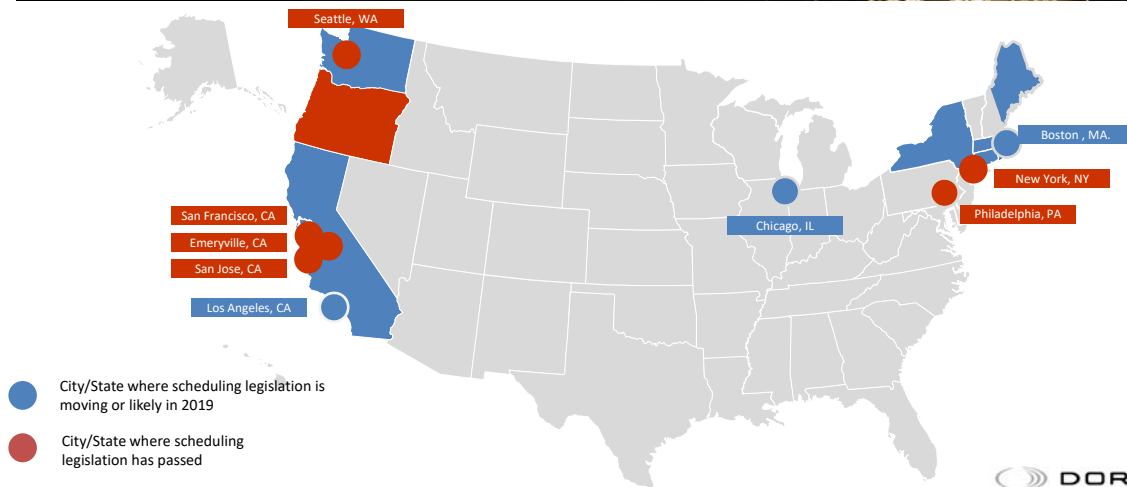
- **H.F. 6**

- Permits citations of up to **\$1,000 per employee, per pay period** for wage theft, including unintentional wage theft
- **Doubles late wage payment penalty**
- **Adds criminal penalties**
  - Any failure to pay wages or failure to provide adequate breaks is a misdemeanor, regardless of intent
  - Any failure to pay wages of **\$10,000 or more** in the aggregate is a gross misdemeanor, regardless of intent
  - Any intentional retaliation is a gross misdemeanor
  - Any intentional failure to pay wages > **\$35,000** is a felony
- **Disqualifies offenders from state contracts**

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## “Fair Scheduling” – National Trends



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## “Fair Scheduling” Legislative Elements

**Advance Notice of Scheduling – usually 14 days**

**Penalties for Schedule Changes (Predictability Pay) – ranges from 1-4 hours of pay, or dollar amount**

**Guaranteed Access to Hours**

**Right to Rest - “clopening” – restrictions on working “clopening” shifts, penalties**

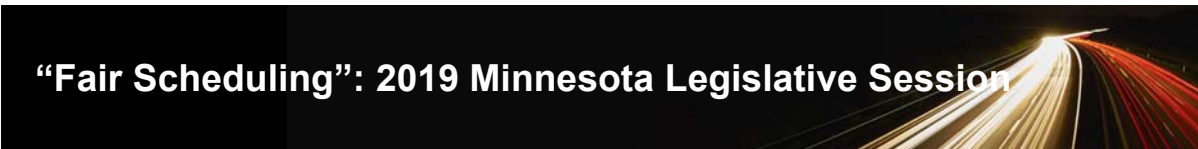
**On-Call Restrictions**

**Good Faith Estimate of Work Hours**

**Remedies/Violations – Private right of action and allowing third parties to sue**

**Benefit Parity and Retention Pay (SF & Mpls)**

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## “Fair Scheduling”: 2019 Minnesota Legislative Session

### **SF 736**

- **Not moving this session**
- **Lifted provisions from the 2015 Minneapolis bill**
  - **21 day notice, Employer Statement upon hire and annually, penalty pay, pay rate and leave parity**
- **Legislators are focused on other priorities (wage theft, paid leave, sexual harassment)**
- **Likely to be passed by a city before the state, but if Democrats win the Senate in 2020, we could see it at the state level.**

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## Paid Sick/Safe Leave – National Trends

- **Eleven states\*** and many more cities and counties have paid sick leave laws in place.
- **Critical issue – inconsistency between jurisdictions**
  - Total days/hours accrued
  - Accrual rates
  - Carry-over
  - Use rights
  - Pay rates
  - Record keeping

\* Arizona, California, Connecticut, Maryland, Massachusetts, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington

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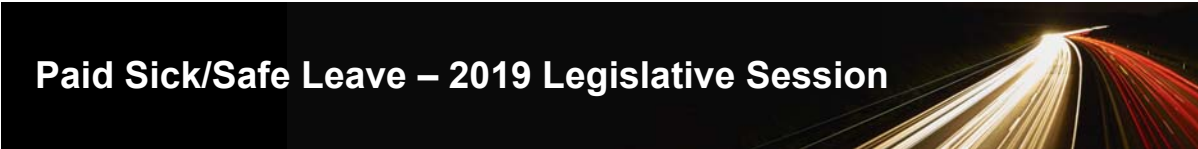


## Paid Sick/Safe Leave – 2019 Legislative Session

- **Largely similar to Minneapolis/St. Paul ordinances, except:**
  - Unclear rate of pay requirement – “paid at the same hourly rate as an employee earns from employment”
  - No exception for small/micro employers
  - In addition to broad definition of “family member” (“any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship”) employees could designate an additional individual per year to be treated as a “family member”

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## Paid Sick/Safe Leave – 2019 Legislative Session

- **Largely similar to Minneapolis/St. Paul ordinances, except:**
  - Retaliation broadly defined - includes “any form of” intimidation, threat, reprisal, discrimination or adverse employment action
  - Front loading not expressly authorized
  - Requires reinstatement of sick/safe balances if an employee is rehired up to 180 days after termination
  - Authorizes civil actions for damages, including consequential damages, plus civil penalties and attorneys’ fees

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## Prognostications!

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**Thank you!**

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