

New Year, New Congress: Policy changes to keep an eye on

November's 2022 midterms will leave us with a Democrat-controlled Senate and Republican-controlled House in 2023. That means a split Congress will make it more difficult for legislation to pass in 2023. Because of that, no drastic changes are expected in the upcoming years, according to counsel at McMahon Berger, P.C. in St. Louis. But that doesn't mean it's smooth sailing for employers.

Counsel at the firm, Stephen B. Maule and Timothy W. Bubenik, outlined several election-night outcomes in individual states that employers should be aware of. In addition, they took a look at policy suggestions for employers on marijuana, abortion, minimum wage, the right to bear arms, collective bargaining rights, and minimum wage increases. In such matters, it's best to keep ahead of the trends instead of playing catch up.

Marijuana legalization

Recreational marijuana is now legal in 21 states. Over the next year or two, that number will stand at a little over half, said Maule, who discussed the passage of Missouri Amendment 3, which legalizes the cultivation, sale, and use of recreational marijuana.

Maule pointed out that Amendment 3 includes the express prohibition against employment discrimination. "An employer may not discriminate against an individual who owns a medical marijuana registration card with respect to hire, termination and any term or condition of employment," according to the amendment.

Prohibition against discrimination does not apply if:

- The employer is a federal contractor or subcontractor or otherwise would lose a monetary or licensing-related benefit under federal law.
- The individual is under the influence at work, violating company policy.
- The individual tests positive for marijuana, and the employer establishes they used, possessed, or were under the influence on the employer's premises during working hours.
- The individual holds a position such that the use of marijuana "affects in any manner" their ability to safely perform their job responsibilities or the safety of others, or such use conflicts with a bona fide occupational qualification that is reasonably related to their employment.

Guidelines for employers: Maule pointed out that the amendment does not define the meaning of "under the influence." This varies from person to person, and testing is not definitive in determining whether someone is under the influence. "Train managers/supervisors on how to detect a person's status," said Maule. "This includes recognition and documentation of behaviors."

Missouri's legislation offers a look at what is happening in a particular state should similar laws spread to others. But as is the case with any employment issue, always check your state laws to ensure you comply.

Policy suggestions: Marijuana

The firm offers some advice for employers regarding marijuana, but again, different states have varying testing policies, making it crucial to always check your state requirements. www.nationaldrugscreening.com is one source to locate testing policies in each state.

- Prohibit the use of any alcohol, illegal drugs, other controlled substances, or intoxicants of any kind, whether legal or illegal, on company property, in company vehicles, or while using company equipment.
- Prohibit illegal or unauthorized use of prescription drugs.
- Prohibit intentional misuse or abuse of prescription medications.
- Prohibit any employee from being under the influence of alcohol, marijuana, or other intoxicants, drugs, and controlled substances during working hours, including breaks and lunch periods.
- Describe reasonable suspicion drug-testing procedures.
- Require that managers/supervisors be trained to recognize and document objective signs that create reasonable suspicion. Notify HR or a more senior management official if someone will be sent for a reasonable suspicion test.

Abortion

While Kentucky voters said no to including the right to abortion in the state constitution, California, Michigan, and Vermont voted yes. The key point for employers to remember, said Bubenik, is “do not treat abortions and pregnancies differently.”

Policy suggestions: Abortion

- Review employment policies, including leave policies, to ensure they are administered consistently regardless of whether they’re used to obtain an abortion. Understand that employees living in states with more strict abortion laws may travel to other states to seek abortions.
- Consider “privacy policies” to shield employees from being required to disclose pregnancies.
- Develop guidelines for supervisors and managers to ensure that the type of reproductive care chosen by an employee is not considered in making employer determinations.
- Review insurance policies to ensure that all pregnant employees receive the same level of care regardless of how the pregnancy ends.



Collective bargaining agreements

Tennessee voted yes to a right-to-work amendment to the state constitution, strengthening an existing statute. In a right-to-work state, employers cannot refuse to employ an individual for declining to join a labor organization. Tennessee joins eight other states with such language in their constitutions.

In Illinois, voters said yes to adding the right to collectively bargain to the state constitution.

“Employers conducting business in Illinois should recognize that employees have some of the strongest protections for unionization in the country,” said Maule.

In addition to federal labor laws, employers must comply with the state’s requirements.

Collective bargaining takeaways

The firm gives the following advice to employers when it comes to collective bargaining rights:

- Always review state laws to ensure compliance with right-to-work requirements/restrictions.
- Employers with facilities in multiple states should draft policies individually based on the states in which they operate.
- Union membership may be compulsory for positions in one state but not for the same positions in other states.

Minimum wage

While the federal minimum wage stays at \$7.25/hour (since 2009) and is not expected to increase soon, Nebraska, Nevada, and the District of Columbia voted for wage increases on election night.

Bubenik said the Nebraska decision to raise the wage from \$9/hour to \$15/hour by 2026 was particularly noteworthy: “This is a big jump for a state with a low cost of living.” No matter what state you do business in, he added, “If you’re trying to attract employees, paying minimum wage is not your best option.”

Policy suggestions: Minimum wage

Maule and Bubenik recommend the following for employers regarding minimum wage:

- Monitor state minimum wage changes and adjust wage rates accordingly.
- Limit restrictions on employee discussions about wages (particularly if employees earn minimum wage) to ensure legal compliance with all implicated laws.
- Understand when setting wage rates that given the current worker shortage, minimum wages may not attract the best employees/applicants.
- Consider the probable effect on other workers’ wage rates. In other words, “a rising tide lifts all boats.”

The right to bear arms

Iowa voters approved amending the state constitution to include the right to bear arms, which limits the ability of state and local governments to enact restrictions on the right to own guns. Regardless of what happens on any election night, Bubenik said it is crucial to update workplace violence/gun ownership policies continually. “It’s really important to have a good policy because some employees don’t know what to do if they feel threatened,” he said.

He also pointed out that different states have varying legal requirements for owning, transporting, and storing guns, so check state laws. Some states allow employees to store legal weapons in their vehicles, even if parked

in an employer-owned lot.

Policy suggestions: The right to bear arms

Perhaps more beneficial than a “gun” policy is a workplace violence prevention policy that assists in identifying, avoiding, and reacting to violence or threats of violence in the workplace.

It is highly likely that any employee legally carrying a firearm knows their rights related to carrying a firearm, so ensure that state laws are followed. Even in states with broad right-to-bear-arms laws, employees must store those arms in their locked vehicles, generally unloaded.

Employers can and should have a rule against bringing weapons into the workplace.

Final takeaway

While a split Congress means the likelihood of substantial federal legislation passing is low, that doesn’t mean all is well for employers. Most changes at the federal level impacting employers will come through the rulemaking process. For example, the Department of Labor is expected to announce changes to the overtime rules shortly. In addition, states and cities continue to pass new laws that employers must follow in those jurisdictions.