

# USA - District of Columbia

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## STATE SNAPSHOT

### Key considerations

- 1 | Which issues would you most highlight to someone new to your state?

American law provides workers with a variety of legal protections from a variety of sources. D.C. law affords greater protections to workers than federal law alone, and recent additions to D.C.'s legal landscape suggest a continued push in that direction. For instance, the DC Human Rights Act (DCHRA) protects more groups than federal civil rights law and was recently updated to be even more expansive, D.C.'s new \$15.00 minimum wage is well above the federal minimum, and, as of the summer of 2020, D.C. is beginning to offer generous paid family leave.

- 2 | What do you consider unique to those doing business in your state?

D.C. stands out for its legal protections for workers. In its 2018 report, Oxfam America listed D.C. first on its list of Best States to Work, citing D.C.'s high minimum wage, significant worker protections, and ability of workers to organize. ([https://s3.amazonaws.com/oxfam-us/www/static/media/files/Best\\_States\\_to\\_Work\\_Index.pdf](https://s3.amazonaws.com/oxfam-us/www/static/media/files/Best_States_to_Work_Index.pdf))

- 3 | Is there any general advice you would give in the labor/employment area?

Employers should familiarize themselves with the significant worker protections afforded by D.C. law. They should also keep in mind that laws can vary significantly in the region around D.C. For instance, employment laws in Virginia, just across the Potomac River, are quite different from those in D.C.

### Emerging issues

- 4 | What are the emerging trends in employment law in your state, including the interplay with other areas of law, such as firearms legislation, legalization of marijuana and privacy?

Recent D.C. legislation indicates a continued move in favor of employees' rights. For instance, as of July 2020, D.C. will begin offering paid family leave under the Universal Paid Leave Act, which provides employees with up to eight weeks of paid leave to care for a new child, six weeks of paid leave to care for a sick family member, and two weeks of paid leave for a personal illness.

Additionally, beginning July 1, 2020, the minimum wage will increase to \$15.00 an hour, reflecting a series of increases pursuant to D.C. Code § 32-1003.

## Proposals for reform

- 5 | Are there any noteworthy proposals for reform in your state?

Marijuana: In 2019, D.C. council members heard two bills related to marijuana testing of employees. While possession and recreational use are legal in D.C., this has not affected drug tests in the employment context. Under the Prohibition of Marijuana Testing Act of 2019, marijuana testing would be eliminated as a condition of employment. Under the Medical Marijuana Program Patient Protection Amendment act of 2019, the DC government would be prohibited from discriminating from applicants and employees in the D.C. medical marijuana program.

Minimum Wage: Beginning July 1, 2020, the minimum wage will increase to \$15.00 an hour. After the July 2020 increase, the minimum wage will be adjusted each year based on cost-of-living changes.

Non-Compete Agreements: In 2019, council members introduced a bill (the Ban on Non-Compete Agreements Amendment Act of 2019) that would prohibit the use of non-compete provisions in employment contracts and workplace policies.

## EMPLOYMENT RELATIONSHIP

### State-specific laws

- 6 | What state-specific laws govern the employment relationship?

Title 32 of the D.C. Code covers Labor and includes the laws on wage payment, minimum wage, and overtime. The DC Human Rights Act (DCHRA), D.C. Code §§ 2-1401.01 to 2-1411.06, also governs the employment relationship.

- 7 | Who do these cover, including categories of workers?

D.C.'s wage payment, minimum wage, and overtime apply to all D.C. employers. Some employees are exempt from minimum wage and overtime, including executive, administrative, and professional employees.

The DCHRA also applies to all D.C. employers and prohibits discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, status as a victim of an intrafamily offense, place of residence or business, and status as a victim or family member of a victim of domestic violence, a sexual offense, or stalking.

## Misclassification

### 8 | Are there state-specific rules regarding employee/contractor misclassification?

D.C. does not have a set statutory definition of an independent contractor. Instead, common law tests are applied, with the outcome depending on the facts of the situation. Courts have emphasized the following four factors in determining whether an individual is an employee or independent contractor: "(1) the selection and engagement of the individual hired, (2) the payment of wages, (3) the power of the one who hires over the other whom he has hired, and (4) whether the service performed by the person hired is a part of the regular business of the one who hired." No single factor is determinative, and "the decisive test is whether the employer has the right to control and direct the [individual] in the performance of his work and the manner in which the work is to be done." Courts look to the actual relationship between the parties as well as the language of any agreements between them. *Hickey v. Bomers*, 28 A.3d 1119, 1123 (D.C. 2011).

In the construction industry, D.C.'s Workplace Fraud Act requires employers to classify workers as employees, rather than independent contractors, in most circumstances. To classify a worker as an independent contractor, the employer must demonstrate that the worker is either "exempt" or meets the statutory exemption. A worker is "exempt" if they perform services in a personal capacity, free from direction and control over the means and manner of providing the services; furnish the necessary tools and equipment; and operate a business considered inseparable from the individual for tax purposes. D.C. Code § 32-1331.01. The statute also allows an employer to classify a worker as an independent contractor if the worker is free from the employer's direction and control over the performance of services, is customarily engaged in an independently established trade or occupation, and that their work is outside of the usual course of business of the employer. D.C. Code § 32-1331.04.

## Contracts

### 9 | Must an employment contract be in writing?

Not necessarily, though D.C. courts will not enforce employment contracts that violate the statute of frauds (i.e., oral employment contracts that cannot be performed in one year).

### 10 | Are any terms implied into employment contracts?

D.C. implies a duty of good faith and fair dealing into all contracts, meaning "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." A claim for breach of this duty cannot be sustained by an at-will employee because there is no contract to provide the basis for the duty. *Paul v. Howard Univ.*, 754 A.2d 297, 310 (D.C. 2000).

### 11 | Are mandatory arbitration agreements enforceable?

In the employment context, yes, though both parties must have "the distinct intention to be bound." Therefore, mere continuation of one's job after the employer issues an arbitration policy is not sufficient to indicate mutual assent, even where the employer requests signature of the agreement and states continued employment will evidence an intent to be bound. *Jin v. Parsons Corp.*, 366 F. Supp. 3d 104, 107 (D.D.C. 2019)

### 12 | How can employers make changes to existing employment agreements?

An employer may prospectively modify the terms of at-will employment, and an employee's continued service amounts to acceptance of the modification. See *Kauffman v. Int'l Bhd. of Teamsters*, 950 A.2d 44, 47 (D.C. 2008). In other employment circumstances, the parties may agree to contractual terms that set if or how the agreement may be modified.

## HIRING

### Advertising

#### 13 | What are the requirements relating to advertising open positions?

An employer may not publish an employment advertisement that indicates a preference or limitation based on race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, matriculation, genetic information, disability, political affiliation, status as a victim or family member of a victim of domestic violence, a sexual offense, or stalking, or credit information of any individual.

### Background checks

#### 14 | (a) Criminal records and arrests

Employers may not inquire about or require disclosure of an arrest or criminal accusation against an applicant that is not pending or did not result in conviction. An employer may not inquire about or require disclosure of a criminal conviction until after making a conditional offer of employment. Even then, the employer may only withdraw the conditional offer for a legitimate business reason. D.C. Code § 32-1342.

Background checks are mandatory in certain fields. For instance, certain health care facilities and childcare providers as well as the Department of Corrections must conduct criminal background checks of applicants or employees. D.C. Code Ann. §§ 4-1501.04, 24-211.41, 44-552.

#### 15 | (b) Medical history

Employers may make pre-employment inquiries into the medical history of applicants if based on a business necessity. D.C. Mun. Regs. tit. 4, § 514. Inquiries necessary for compliance with affirmative action requirements, that are remedial action to correct the effects of past discrimination, or that are voluntary action to overcome the effects of conditions that resulted in limited employment opportunities for a protected group are also legal. D.C. Mun. Regs. tit. 4, § 503. Employers may not require or request a genetic test as a condition of employment. D.C. Code § 2-1402.11; D.C. Mun. Regs. tit. 4, § 509.

#### 16 | (c) Drug screening

An employer may only test a prospective employee for marijuana use after a conditional offer of employment has been extended, unless otherwise required by law. D.C. Code § 32-931.

#### 17 | (d) Credit checks

Employers may not discriminate against applicants based on their credit history by requiring or requesting the submission of credit information or using or referring to credit information. D.C. Code § 2-1402.11.

**18 | (e) Immigration status**

No applicable law.

**19 | (f) Social media**

No applicable law.

**20 | (g) Other**

The background check protections found in D.C. law are in addition to the federal protections found in laws like the Fair Credit Reporting Act ("FCRA").

## WAGE AND HOUR

**Pay****21 | What are the main sources of wage and hour laws in your state?**

Labor laws are found in Title 32 of the D.C. Code, which includes laws governing: leave, minimum wage, payment and collection of wages, wage transparency, and workers' compensation. The DCHRA, which includes an equal pay provision, is found in Title 2, Chapter 14 of the Code.

**22 | What is the minimum hourly wage?**

As of July 1, 2019, the minimum hourly wage required to be paid to an employee by an employer is \$14.00. On July 1, 2020, the minimum hourly wage will increase to \$15.00.

**23 | What are the rules applicable to final pay and deductions from wages?**

An employee who is discharged or who resigns or quits must be paid by the next working day following the termination, unless a collective bargaining agreement states otherwise, the employee handled the employer's money (in which case the employer has four days from the termination date to pay the employee's wages), or there was no written employment contract for other 30 days (in which case the employer must pay wages on the next regular payday or within seven days of the termination date). See D.C. Code § 32-1303.

If an employee makes at least the minimum wage, an employer may make deductions for housing costs and up to two meals a day. An employer may not deduct from wages if doing so would bring the employee's pay below the minimum wage.

**Hours and overtime****24 | What are the requirements for meal and rest breaks?**

D.C. does not require meal or rest breaks.

**25 | What are the maximum hour rules?**

No employer shall employ any employee for a workweek that is longer than 40 hours, unless the employee receives compensation for employment in excess of 40 hours at a rate not less than one-and-a-half times the regular rate at which the employee is employed.

**26 | How should overtime be calculated?**

Overtime wages must be at least one-and-a-half times the employee's regular rate.

**27 | What exemptions are there from overtime?**

D.C.'s overtime provisions do not apply to employees:

- employed in a bona fide executive, administrative, or professional capacity;
- employed in the capacity of outside salesman;
- engaged in the delivery of newspapers to consumer's homes;
- who are seamen;
- who are railroad employees;
- who are salesmen, partsmen, or mechanics primarily engaged in selling or servicing automobiles, trailers, or trucks, if employed by a non-manufacturing establishment primarily engaged in the business of selling these vehicles to ultimate purchasers;
- employed by a carrier by air who voluntarily exchanges workdays with another employee for the primary purpose of utilizing air travel benefits available to these employees;
- employed as a private household worker who lives on the premises of the employer; and
- employed as a companion for the aged or infirm.

**Record keeping****28 | What payroll and payment records must be maintained?**

Employers must keep records of the "precise time worked" each day and workweek by non-exempt employees. For at least three years, an employer must keep wage records that include an employee's information, the rate and amount paid each pay period to each employee, the precise times worked each day and workweek by each employee, as well as the basis on which wages are paid, total gross and net wages paid each pay period with any deductions listed, and the date of payment and pay period covered by the payment. D.C. Code § 32-1008(a); D.C. Mun. Regs. tit. 7, § 911.1.

Wage statements must be itemized and indicate the wage payment date; the gross wages paid, with regular and overtime earnings separated; net wages paid; itemized deductions and additions to wages; the pay rate; the hours worked during the pay period; the employee's tip declaration form; and, if applicable, commission and non-commission earnings.

## DISCRIMINATION, HARASSMENT AND FAMILY LEAVE

**What is the state law in relation to:**

### PRIVACY IN THE WORKPLACE

**Privacy and monitoring****29 | What are employees' rights with regard to privacy and monitoring?**

Employers may not "intercept" wire or oral communications, including Internet communications, of employees. D.C. Code § 23-542. However, D.C. is a single-party consent jurisdiction: one party to a conversation may record it or give consent for its recording, unless there is criminal intent or intent to commit any other injurious act.

Employers also may not administer or use the results of lie detector tests in connection with employment. D.C. Code § 32-902.

**30 | Are there state rules protecting social media passwords in the employment context and/or on employer monitoring of employee social media accounts?**

No.

**Bring your own device**

31 | What is the latest position in relation to bring your own device?

Bring Your Own Device (BYOD) policies are common in D.C., but there is no law regulating their use.

**Off-duty**

32 | To what extent can employers regulate off-duty conduct?

Employers may regulate employees' tobacco use by setting restrictions that are bona fide occupational qualifications as well as setting workplace smoking restrictions. D.C. Code § 7-1703.03.

Employers should be careful about attempting to regulate or discipline off-duty conduct that may relate to an employee's status in a protected group under the DCHRA. See *McCaskill v. Gallaudet Univ.*, 36 F. Supp. 3d 145, 149 (D.D.C. 2014) (finding employee-school officer failed to state claims for religious, racial, and political affiliation discrimination in case where employee was placed on administrative leave after signing a petition to ban same-sex marriage).

**Gun rights**

33 | Are there state rules protecting gun rights in the employment context?

No.

**TRADE SECRETS AND RESTRICTIVE COVENANTS****Intellectual Property**

34 | Who owns IP rights created by employees during the course of their employment?

Generally, the author of the work is the owner of its rights. However, where work is "work made for hire," the employer owns the rights to the work. To demonstrate that work is "work made for hire," the employer must demonstrate the work was the kind the employee was employed to perform, it occurred substantially within the authorized time and space limits, and it was actuated, at least in part, by a purpose to serve the employer. *Roestlin v. D.C.*, 921 F. Supp. 793, 798 (D.D.C. 1995)

**Restrictive covenants**

35 | What types of restrictive covenants are recognized and enforceable?

Contracts may not unreasonably restrain trade. D.C. Code § 28-4502. Nevertheless, D.C. enforces reasonable non-compete, non-solicitation, and non-disclosure agreements.

In evaluating restrictive covenants, D.C. courts find a restraint unreasonable if the restraint is greater than necessary to protect the promisee's legitimate interest or if the promisee's need is outweighed by a hardship to the promisor and the likely injury to the public. Courts use the "rule of reason" to determine enforceability, requiring a fact intensive inquiry that depends on the totality of the circumstances. See *Deutsch v. Barsky*, 795 A.2d 669, 677 (D.C. 2002).

**Non-compete**

36 | Are there any special rules on non-competes for particular classes of employee?

Yes. Under the D.C. Rules of Professional Conduct, lawyers may not participate in offering or making restrictive covenants involving another lawyer. DC R RPC Rule 5.6

**LABOR RELATIONS****Right to work**

37 | Is the state a "right to work" state?

No, D.C. does not have a "right to work" law.

**Unions and layoffs**

38 | Is the state (or a particular area) known to be heavily unionized?

No. According to the Bureau of Labor, approximately 9 per cent of D.C. employees are members of unions. This is close to the national rate of 10.3 per cent.

39 | What rules apply to layoffs? Are there particular rules for plant closures/mass layoffs?

D.C. does not have its own variant of the federal Worker Adjustment and Retraining Notification Act (WARN Act).

**DISCIPLINE AND TERMINATION****State procedures**

40 | Are there state-specific laws on the procedures employers must follow with regard to discipline and grievance procedures?

No.

**At-will or notice**

41 | At-will status and/or notice period?

D.C. is an at-will jurisdiction. Therefore, generally speaking, neither an employer nor employee must provide notice for ending the employment relationship at any time for any reason.

42 | What restrictions apply to the above?

Employers may not terminate employees for:

- discriminatory or retaliatory reasons under the DCHRA, D.C. Code §§ 2-1402.11, 2-1402.61;
- claiming or attempting to claim workers' compensation, D.C. Code § 32-1542;
- having their wages garnished to pay a judgment, D.C. Code § 16-584;
- receiving or responding to a summons, serving as a juror, or attending court for prospective jury service, D.C. Code § 11-1913;
- taking family and medical or sick leave, D.C. Code §§ 32-507, 32-531.08; and
- refusing to violate the law at the employer's direction, *Adams v. George W. Cochran & Co.*, 597 A.2d 28, 30 (D.C.1991).

**Final paychecks**

43 | Are there state-specific rules on when final paychecks are due after termination?

Yes. If an employee is terminated, the employer must pay the employee's wages not later than the next working day following the termination. Where the employee terminated was responsible for handling the employer's money, the employer has four days from the termination date to pay the former employee's wages.