

WORKPLACE FAIRNESS

PROGRESS IN THE STATES FOR EQUAL PAY

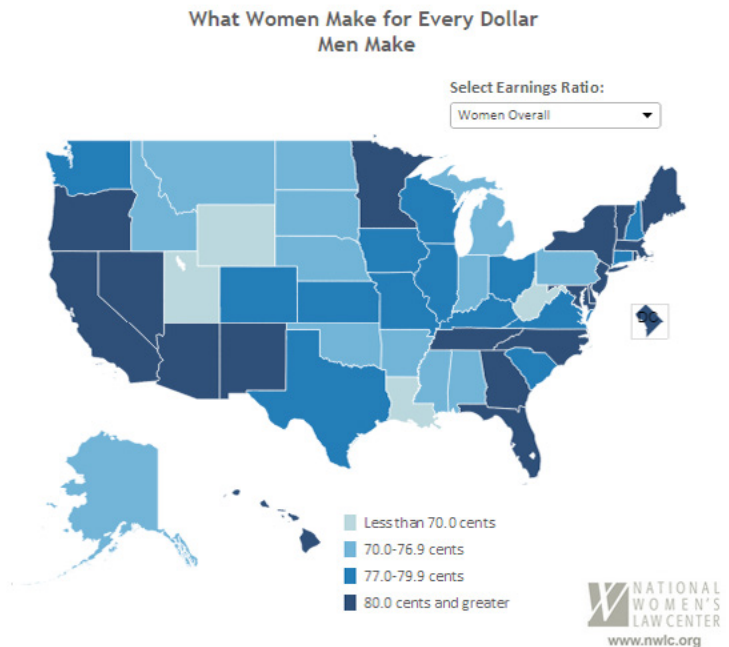
For over 50 years, federal law has required that male and female employees receive equal pay for equal work. Yet women typically make just 79 cents on every dollar earned by men for full-time, year-round work, a gap in wages that has barely budged over the last decade.

There is a growing movement to finally close the wage gap. In the past year, lawmakers have introduced legislation at the state and local levels to finally ensure that workers receive equal pay, no matter where they work. State efforts to close the wage gap not only lift the states' economies, but also make meaningful change for women's and families' economic security. This fact sheet looks at states that have enacted equal pay legislation in 2015, and notable state equal pay proposals to watch in 2016.

It has been more than 50 years since the Equal Pay Act was passed, and since then we have seen women make tremendous strides in the labor force. However, women continue to be paid less than their male counterparts for substantially similar work. Women working full time, year round typically make just 79 cents for every dollar paid to men working full time, year round.¹ And it's even worse for women of color. African American women are typically paid just 60 cents on every dollar paid to white, non-Hispanic men, and Hispanic women typically are paid only 55 cents for every dollar paid to their white, non-Hispanic male counterparts.

Among the states, women fare best in Washington, D.C., where women working full time, year round typically make 89.5 cents for every dollar their male counterparts make. New York and Hawaii follow Washington, D.C. with the ratio of women's to men's earnings above 85 percent in both states. Women fare the worst relative to men in Louisiana, where

women's earnings represented only 65.3 percent of men's earnings. Across the country though, states are making great strides towards improving the economic security of women and their families by strengthening equal pay laws and narrowing the wage gap.



Enacted Equal Pay Legislation – Prohibiting Retaliation for Pay Discussions

Pay secrecy policies and practices perpetuate pay discrimination by making it difficult for individuals to learn about unlawful pay disparities. In fact, the majority of private sector employers have policies prohibiting employees from discussing their compensation or discouraging employees from doing so. According to a survey by the Institute for Women's Policy Research, more than sixty percent of private sector workers reported that their employer either prohibits or discourages employees from discussing their wages.²



When workers fear retaliation for talking about their pay, any pay discrimination they face continues to grow, undiscovered, in the shadows. Making it clear that workers have the right to ask about, discuss, and disclose their pay without repercussions is a powerful tool for discovering and remedying unequal pay. Several states have enacted provisions to stop employers from retaliating against employees who discuss their wages with each other, or from outright prohibiting these discussions.

California: California enacted equal pay legislation this year that prohibits employers from retaliating against employees for disclosing their own pay, discussing the wages of others, asking about another employee's wages, or aiding or encouraging other employees to exercise their rights in these regards.³ The law notes that there is no obligation to disclose one's pay and that any employee who has faced retaliation, discharge, or discrimination for talking about pay can bring a civil action against the employer for lost wages and benefits, and equitable relief.

Connecticut: Connecticut recently enacted a new law to allow employees to discuss wages without fear of retaliation.⁴ Specifically, the new law makes clear that employees may disclose or discuss their own wages, as well as the wages of another employee if that employee voluntarily disclosed their wages, and that employees may inquire about the wages of another employee. The law also prohibits employers from requiring employees to sign waivers or other documents that deny them the right to discuss, disclose, or ask about wages, and prohibits employers from discharging, disciplining, discriminating against, retaliating against, or otherwise penalizing any employee who engages in wage discussions, disclosures, or inquiries. The law also makes clear that it does not compel disclosures, and that employees may bring a civil action against employers for violations of the law.

New Hampshire: In the first month of 2015, New Hampshire's law prohibiting retaliation for pay discussions took effect.⁵ The law prohibits employers from requiring, as a condition of employment, that an employee refrain from disclosing the amount of her wages, or that an employee sign a waiver or other document that purports to deny her the right to disclose the amount of her wages, salary, or paid benefits. Moreover, no employer may discharge, formally discipline, or otherwise discriminate against an employee because the employee discloses the amount of her wages, salary, or paid benefits.

New York: New York's new equal pay law prohibits employers from taking actions against employees for inquiring about, discussing, or disclosing their wages or another employee's wages.⁶ The law does make clear that employers are, however, allowed to institute reasonable workplace and workday limitations on wage discussions, such as prohibiting an employee from discussing or disclosing another employee's wages without that employee's permission. Likewise, employees who have access to wage information as a part of their essential job functions (such as human resources professionals), are not covered by the law's protections unless their disclosure is in response to a complaint or charge, investigation, proceeding, hearing, or action. The law also does not compel any disclosure of wages.

Oregon: A new law in Oregon makes it unlawful for employers to discharge, demote or suspend, or discriminate or retaliate against employees in any terms or conditions of employment for engaging in pay discussions.⁷ This includes the employee's right to inquire about, discuss, or disclose in any manner their own wages or the wages of another employee, as well as the employee's right to make any sort of complaint or charge based on her disclosure of wage information. However, these protections do not apply to employees with access to wage information as part of their job functions (such as human resources professionals), unless the employee is making a disclosure in response to a charge, complaint, investigation, proceeding, hearing or action.

Enacted Equal Pay Legislation – Strengthening Equal Pay Provisions

Current federal law and most state laws prohibit employers from engaging in sex-based wage discrimination between men and women working in the “same establishment,” whose jobs require substantially equal skill, effort, and responsibility under similar working conditions. Unfortunately, some courts have interpreted this to allow an employer to pay a woman less than a man for doing the same work if the two employees are working in different facilities or offices. In 2015, several states took steps to fix this weakness in the prohibition against pay discrimination.

California: California's new law eliminates the “same establishment” requirement in the law's prohibition on sex-based pay discrimination.⁸ Previously, California prohibited employers from paying individuals at a wage rate less than it paid to employees of the opposite sex “in the same establishment for equal work on jobs” that require equal skill, effort, and responsibility. By eliminating the “same



establishment” requirement, California’s new law ensures that employers cannot get away with pay discrimination simply because they have multiple work sites. In addition, California now requires equal pay for “substantially similar work,” rather than “equal work,” ensuring that minor differences between jobs will not be sufficient to defeat a pay discrimination claim. These critical changes will help courts to better identify and rectify sex-based pay discrimination.

New York: New York’s new law expands the definition of “same establishment” in its prohibition on pay discrimination to include all of an employer’s workplaces located in a geographical region no larger than a county, to ensure that employers are held responsible for pay discrimination that takes place across worksites.⁹

Enacted Equal Pay Legislation – Tightening Employer Defenses

Current federal law and most state laws provide that a difference in pay will not be considered discriminatory where an employer can show that the differential was made pursuant to a seniority system; a merit system; a production system; or a differential based on any other factor other than sex. Many courts, however, have interpreted these exceptions broadly, creating legal loopholes in which employers can justify almost anything as a “factor other than sex” without much scrutiny from the courts.¹⁰ This makes it extremely difficult for workers to challenge their unfair pay. In 2015, several states took steps to fix their laws by limiting the employer defenses to claims of pay discrimination.

California: California’s new law tightens its employer defenses to pay discrimination claims by requiring that an employer’s stated justifications be applied reasonably and account for the entire wage differential, and by narrowing the “factor other than sex” defense.¹¹ These important requirements ensure that an employer is held accountable for any amount of an employee’s lower pay that is derived from sex discrimination; that any stated “factor other than sex” is job related to the position in question and is consistent with business necessity (and that it is the only reasonable option to meet that necessity); and that the “factor other than sex” is not derived from a sex-based differential in compensation. These critical changes to California’s equal pay laws will help courts better identify and rectify sex-based pay discrimination.

New York: New York’s new law closes the “factor other than sex” loophole in the employer defenses to a claim of pay discrimination.¹² It does so by requiring that the stated factor not be derived from a sex-based differential in compensation, and that it must be job-related with respect to the position in

question and consistent with business necessity. Moreover, the stated “bona fide factor other than sex” will not be a defense to pay discrimination where the employee can show that the employer uses a particular employment practice that causes a disparate impact on the basis of sex, and that an alternative employment practice exists that would serve the same business purpose without producing the differential, but the employer has refused to adopt it.

Enacted Equal Pay Legislation – Improving Workers’ Ability to Challenge Pay Discrimination

In some states, even if an employee manages to discover that she has been discriminated against in the payment of her wages due to her sex, she may be barred from challenging the discrimination under the state’s equal pay law and obtaining relief in court due to an unjust application of a state statute of limitations. As a result, some states have been considering laws similar to the federal Lilly Ledbetter Fair Pay Act that clarify what discriminatory events trigger the statutes of limitations for pay discrimination claims.

North Dakota: North Dakota recently strengthened its equal pay law¹³ by clarifying that an unlawful employment practice occurs whenever a discriminatory compensation decision or other practice is adopted; when an individual becomes subject to a discriminatory compensation decision or other practice; or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

Enacted Equal Pay Legislation – Requiring Record Keeping and Data Reporting

When employers collect and keep records and data on employee compensation and provide such data to state enforcement agencies, employers are better able to root out pay discrimination in their workplaces and state agencies are better able to focus investigation and enforcement resources toward employers likely to be engaged in pay discrimination.

North Dakota: North Dakota’s new equal pay law has important recordkeeping and reporting requirements.¹⁴ It requires employers to maintain records of the wages and wage rates, job classifications, and other terms and conditions of employment for individuals employed by the employer, and requires the employer to preserve these records for the length of the individual’s employment plus two additional years. Employers must also report on these records whenever the state inquires.



Enacted Equal Pay Legislation – Expanding Employers Covered by Equal Pay Law

Many equal pay laws apply only to employers with a minimum number of employees even though pay discrimination can happen in any size employer. Some states are enacting legislation to ensure that all employees are protected by state equal pay laws.

Illinois: Illinois recently enacted a new law to amend its Equal Pay Act previously passed in 2003.¹⁵ The new law expands the Equal Pay Act's coverage from employers with four or more employees to all employers in the state. Additionally, the new law increases the civil penalties employers may occur for violations under the equal pay law.

Enacted Equal Pay Legislation – Holding State Contractors Accountable

Employers who contract with the state are paid through public funds, and therefore have a special duty to address pay disparities. To ensure that the state does business with contractors who are following the laws, some states have enacted provisions to require contractors to certify that they are in compliance with state and federal equal pay laws.

Delaware: Delaware recently enacted a law that requires, as a condition of public works contracting, that employers must not discriminate against any applicant or employee, including by engaging in sex-based pay discrimination.¹⁶ Moreover, the new law requires contractors to ensure that employees receive equal pay for equal work, without regard to sex.

Minnesota: A recent law in Minnesota requires prospective contractors executing a contract for more than \$500,000 who have 40 or more employees must certify with state and metropolitan agencies in Minnesota that they are in compliance with the state and federal equal pay laws.¹⁷ Moreover, they must certify that the average compensation for its female employees is not consistently below the average compensation for its male employees; that they do not restrict employees of one sex to certain job classifications; that they make retention and promotion decisions without regard to sex; and that wage and benefit disparities are corrected when identified to ensure compliance with the laws. The compliance statement must also indicate how the company sets compensation and benefits for its employees. Contractors then receive Equal Pay Certificates which are valid for four years and may be revoked with consequences to the contractor's relationship with the state or municipality if the contractor is not making good faith efforts to comply with the law.

Oregon: Oregon recently enacted new requirements in public contracting for complying with pay equity laws.¹⁸ The new law requires prospective state contractors to certify that they understand the state's anti-discrimination laws, including laws that prohibit discrimination in compensation or wage payments. The new certification program must include curriculum for training prospective bidders in complying with the discrimination prohibitions (such as hypothetical situations, case studies, best practices, etc.), criteria for assessing whether prospective state contractors understand the prohibition and can successfully apply best practices to a hypothetical situation involving pay discrimination, and standards for successful completion of the curriculum and assessment that will result in issuance of a certificate.

Enacted Equal Pay Legislation – Empowering Employees to Report Violations

Equal pay laws can be most effective when employees are empowered and enabled to report violations to the relevant state agencies. In 2015, some states developed new initiatives for ensuring that equal pay violations do not remain unknown to those who can help.

Rhode Island: At the beginning of 2015, Rhode Island launched the RI Pay Equity Tip Line, "a telephone line allowing women and men to report employers who violate the Rhode Island law that bans gender-based wage discrimination."¹⁹ The tip line is operated by the state Department of Labor and Training. In addition to the tip line, employees can file a complaint on the Department's website.

Proposed Equal Pay Legislation in 2015

In 2015, the national conversation around pay equity gained increased traction, and 2016 holds the possibility of even more states enacting important policy solutions to the wage gap. Here is a sample of some of the exciting policy solutions percolating in the states.

California: The California legislature passed two bills in 2015 that were vetoed by Governor Brown. The first bill prohibited employers from seeking salary history information from employees.²⁰ This bill would have helped to ensure that individuals do not continue to face pay discrimination in a new job based on the rote use of previous salary affected by pay discrimination in setting a new employee's pay. The second bill would have affected state contractors.²¹ That bill would have required that, prior to becoming a contractor or subcontractor with the state, employers who have more than 100 employees and a contract of more than 30 days submit details of the company's nondiscrimination programs to the state and submit periodic reports of its compliance.



Florida: Florida recently introduced a bill that would empower the state's Department of Economic Opportunity and the Commission on Human Relations with the authority to take more of a proactive role in enforcing equal pay in the state,²² such as ensuring that state contractors are in compliance with antidiscrimination and affirmative action requirements; proactively investigating and prosecuting equal pay violations, especially systemic violations; collecting and disseminating information about women's pay and rights in the workplace, and more. The bill would also establish a Governor's Recognition Award for Pay Equity in the Workplace to be given annually to state employers who have engaged in activities to eliminate the barriers of equal pay for women.

Indiana: In the beginning of 2015, Indiana introduced two equal pay bills. One would establish an equal pay certification for businesses contracting with state agencies and would establish a Women and High Wage, High Demand, Nontraditional Occupation grant program.²³ The program would make grants to organizations for programs that encourage and assist women to enter high wage, high demand, nontraditional occupations, particularly in STEM fields. The other bill would have introduced provisions to strengthen the state's existing equal pay law and establish that the state's Civil Rights Commission has jurisdiction over equal pay complaints.²⁴

Louisiana: Louisiana, which is ranked last in the nation for sex-based pay equity,²⁵ introduced an equal pay bill in 2015 that passed through the Senate but stalled in the House.²⁶ The bill would have expanded equal pay protections from covering just state employers to all public and private employers who employ a certain number of individuals. The bill would also have strengthened its existing equal pay law by prohibiting sex-based pay discrimination in jobs with the same or substantially similar work that require equal "or comparable skill, effort, and responsibility, and involve the same or comparable working conditions." The bill would also have required that the "bona fide factor other than sex" defense to pay discrimination claims be consistent with business necessity.

Maryland: In the spring of 2015, Maryland introduced legislation to strengthen its equal pay laws.²⁷ The state's equal pay bill would tackle occupational segregation by prohibiting employers from providing less favorable employment opportunities based on sex or gender identity. In addition, the bill would tighten the "bona fide factor other than sex" employer defense by requiring the factor to be job related, consistent with business necessity, and not based on or derived from a gender-based differential in compensation.

The bill would also prohibit employers from taking any adverse employment actions against employees for inquiring about, disclosing, or discussing wages, or asking the employer for a reason for the employee's wages, with limited exceptions.

Massachusetts: The Massachusetts Senate recently unanimously passed a bill that would make tremendous strides for equal pay in the state in several ways.²⁸ First, it clarifies that jobs are comparable for purposes of the pay discrimination prohibition based solely on substantially similar skill, effort, responsibility, and similar working conditions. Second, the bill prohibits employers from taking actions against employees who discuss, ask about, or disclose their own wages or coworkers' wages, and requires employers to post notices to this effect to increase employees' awareness of their rights. Third, the bill encourages employers to conduct self-evaluations of their pay practices. Lastly, the bill prohibits employers from seeking salary history information about a potential employee to screen job applicants or as a condition of being interviewed or continuing to be considered for an offer of employment. This important provision would help ensure that any pay discrimination an employee faced in a previous job does not follow her into her new job.

Michigan: Michigan has introduced a package of three equal pay bills recently. One bill creates an award for equal pay in the workplace.²⁹ This award would encourage and recognize employers who make progress in addressing sex-based pay inequality for comparable work. Another bill was introduced that would require companies contracting with the state to submit an equal pay certificate to certify their compliance with equal pay laws, where their contract is for more than \$500,000 and the company employs 40 or more employees.³⁰ The third bill would require employers with 50 or more employees to post information in a conspicuous place at a work site about workers' rights under the equal pay laws.³¹

Ohio: In the fall of 2015, Ohio introduced the Ohio Equal Pay Act, which would require state and local governments to evaluate employee pay for comparable work across job categories and eliminate occupational segregation in companies under public contracts.³² This includes requiring the contractor to explain the approach it uses to set compensation and benefits, to certify that it is in compliance with state and federal equal pay laws, and to certify that employees of any sex are not restricted to certain job classifications.



Pennsylvania: In the spring of 2015, Pennsylvania introduced legislation to strengthen its equal pay laws by only allowing an employer to invoke the “bona fide actor other than sex” defense if the factor is not based upon or derived from a sex-based differential in compensation, is job-related, and is consistent with business necessity.³³ The bill would also prohibit an employer from using the defense if an alternative employment practice exists that would serve the same business purpose without producing the differential and the employer has refused to adopt the alternative practice. Pennsylvania’s equal pay legislation also has strong pay transparency provisions that prohibit an employer from retaliating against an employee for asking about, discussing, or disclosing the wages of the employee or another employee. These provisions would also prohibit employers from conditioning employment on an employee refraining from inquiring about, discussing, or disclosing their wages or requiring employees to sign a waiver or other document relinquishing those rights. Finally, the Pennsylvania legislation would provide victims of pay discrimination with compensatory and punitive damages.

South Carolina: Just before the 2015 new year, South Carolina introduced the State Employee Equal Pay for Equal Work Act to prohibit pay discrimination for substantially similar work on jobs that require “equal skill, effort, education, and responsibility and that are performed under similar working

conditions, including time worked in the position.”³⁴ In addition to the exceptions of seniority, merit, and production systems, the bill would also include an exception if the employer identifies a “bona fide factor other than gender,” but the employer must show both that the factor is job-related and that no alternative practice would serve the same legitimate business purpose without producing a pay differential.

Washington: Washington introduced a strong equal pay bill, which passed the House in February 2015 but did not move forward in the Senate.³⁵ The bill tackles occupational segregation by prohibiting discrimination in employment opportunities, defined in the bill as “assigning or directing the employee into a less favorable career track or position based on gender,” and lists several factors to be considered when making this determination. The bill also tightens the employer defenses to pay discrimination by removing the “factor other than sex” defense altogether, and replaces it with “a bona fide job-related factor or factors, including education, training or experience, that is not based on gender.” Lastly, the bill also protects workers from retaliation who inquire about, disclose, compare, or discuss their pay, with the exception that an employer may prohibit a human resources manager from disclosing the wages of other employees unless doing so is required by law, and grants employees a cause of action if they have been wronged under this provision.

- 1 National Women’s Law Center calculations based on U.S. Census Bureau, Current Population Survey, Historical Data, Table P-38: Full-Time, Year-Round Workers by Median Earnings and Sex, *available at* <http://www.census.gov/hhes/www/income/data/historical/people/>. Median earnings are in 2014 dollars.
- 2 INST. FOR WOMEN’S POLICY RESEARCH, PAY SECRECY AND WAGE DISCRIMINATION (2014), *available at* http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination-1/at_download/file (revealing that 60 percent of private sector male employees and 62 percent of private sector female employees report that their employers either prohibit or discourage the discussion of wages).
- 3 S. 358, 2015 Reg. Sess. (Cal. 2015) (amending CAL. LAB. CODE § 1197.5 (West 2015)).
- 4 H.B. 6850, 2015 Gen. Assemb. (Conn. 2015).
- 5 N.H. Rev. Stat. Ann. § 275:41-b (2015).
- 6 S. 1, 2015 Gen. Assemb. (N.Y. 2015) (amending N.Y. LAB. LAW §§ 194, 198 (Consol. 2015)).
- 7 H.B. 2007, 74th Leg. Assemb. (Or. 2007) (amending OR. REV. STAT §§ 107.615, 192.842, 205.320, 409.300, 432.005, 432.235, 432.405, 432.408 (2007)).
- 8 S.B. 358, 2015 Reg. Sess. (Cal. 2015) (amending CAL. LAB. CODE § 1197.5 (West 2015)).
- 9 S. 1, 2015 Gen. Assemb. (N.Y. 2015) (amending N.Y. LAB. LAW §§ 194, 198 (Consol. 2015)).
- 10 For more information on the “factor other than sex” loophole, see <http://nwlc.org/resources/paycheck-fairness-closing-factor-other-sex-gap-equal-pay-act/>.
- 11 S.B. 358, 2015 Reg. Sess. (Cal. 2015) (amending CAL. LAB. CODE § 1197.5 (West 2015)).
- 12 S. 1, 2015 Gen. Assemb. (N.Y. 2015) (amending N.Y. Lab. Law §§ 194, 198 (Consol. 2015)).
- 13 H.B. 1257, 64th Gen. Assemb. (N.D. 2015) (amending N.D. CENT. CODE ANN. §§34-06.1-03, 34-06.1-05- 34-06.1-07 (2015)).
- 14 H.B. 1257, 64th Gen. Assemb. (N.D. 2015) (amending N.D. CENT. CODE ANN. §§34-06.1-03, 34-06.1-05- 34-06.1-07 (2015)).
- 15 H.B. 3619, 99th Gen. Assem. (Ill. 2015) (amending 820 ILL. COMP. STAT. ANN. 112 § (West 2015)).
- 16 H.B. 3, 148th Gen. Assemb. (Del. 2015) (amending 29 Del. C. § 6962 (2015)).
- 17 Minn. Stat. Ann. § 363A.44 (2014).
- 18 S.B. 491, 76th Leg. Assemb. (Or. 2011) (amending OR. REV. STAT. §§ 86.745, 86.755, 90.300, 105.124, 105.126 (2011)).
- 19 *Raimondo Launches Pay Equity Tip Line, Website*, RI.gov (Feb. 10, 2015), <http://www.ri.gov/press/view/24002> (last visited Jan. 28, 2016).
- 20 A.B. 1017, 2015 Reg. Sess. (Cal. 2015).
- 21 A.B. 1354, 2015 Reg. Sess. (Cal. 2015).
- 22 S.B. 454, 2016 Reg. Sess. (Fla. 2016).
- 23 H.R. 1172, 119th Gen. Assemb. 1st Reg. Sess. (Ind. 2015).
- 24 S.B. 44, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015).



- 25 NAT'L WOMEN'S LAW CTR., WAGE GAP: STATE RANKINGS 2014 (2015), available at <http://www.nwlc.org/resource/wage-gap-state-women-overall-2014> (showing that the typical women in Louisiana makes just 65.3 cents to the dollar of their male counterparts for full-time, year-round work, which translates to a wage gap of 37.7 cents, which is the largest wage gap among the 50 states and District of Columbia).
- 26 S.B. 219, 2015 Reg. Sess. (La. 2015).
- 27 S.B. 424, 2015 Reg. Sess. (Md. 2015).
- 28 S. 2107, 189th Gen. Assemb., Reg. Sess. (Mass. 2016).
- 29 H.B. 4485, 2015 Reg. Sess. (Mich. 2015).
- 30 H.B. 4488, 2015 Reg. Sess. (Mich. 2015).
- 31 H.B. 4459, 2015 Reg. Sess. (Mich. 2015).
- 32 H.B. 330, 131st Gen. Assemb. Reg. Sess. (Ohio 2015).
- 33 H.B. 1160, 2015-2016 Reg. Sess. (Pa. 2015) (amending P.L. 1913, No. 694).
- 34 H. 3253, 121st Gen. Assemb., Reg. Sess. (S.C. 2015).
- 35 H.B. 1646, 2015 3d Spec. Sess. (Wash. 2015).

