

First & Foremosts

Legal Update

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Legal Update: FLSA

Biden Administration Issues Proposed Independent Contractor Regulation

- Return to the “Economic Realities Test” that evaluates each of the following 6 factors equally:
 - How much control the worker has over their job duties
 - The worker’s opportunities for profit or loss
 - Investments by the worker and the employer
 - The degree of permanence of the working relationship
 - The extent to which the work performed is an integral part of the employer’s business
 - The degree of skill and initiative exhibited by the worker

Legal Update: Equal Pay Laws

State & Local Pay Transparency Laws on the Rise

- The goal of these laws is to increase pay equity for women and minorities in the workplace by requiring employers to disclose compensation ranges to applicants and employees.
- The requirements of the disclosures to applicants and employees vary.
- These laws may apply to employers who have no presence in a state but are seeking to hire for a remote working position that *may* be in that state.

State & Local Pay Transparency Laws on the Rise

States with Pay Transparency Laws:

- Effective Jan 1, 2023:
 - **California** – for employers with 15 or more employees, pay scale required in job postings and to applicants/employees upon request; law does not address posting that could be filled by a worker in California
 - **Washington** – for employers with 15 or more employees, wage scale & a general description of benefits and other compensation must be in each job listing and to existing employees upon request; applies to work that *could* be performed by a worker in Washington
 - **Rhode Island** – employers with 1+ employee in Rhode Island *must* provide the wage range for a position to an applicant upon request and *should* provide it to an applicant before discussing compensation. Wage ranges *must* also be provided to employees at the time of hiring, when an employee moves into a new position and upon request.

State & Local Pay Transparency Laws on the Rise

States with Pay Transparency Laws:

- Currently in effect:
 - **New York City** – employers with 4 or more employees with at least one who works in NYC must provide good faith estimate of the position's min and max annual salary or hourly wage for positions that *can* or *will* be performed in New York City
 - **Colorado** – Employers must disclose hourly or salary compensation or range for a posted position together with a general description of all benefits and other compensation offered; applies to postings for positions that can be performed anywhere
 - **Connecticut** – Employers must disclose the pay range at the applicant's request or when making an offer with compensation; applies to employers in Connecticut but not those working for out-of-state employers
 - **Nevada** – Employers must provide the wage or salary range for a position to applicants who have completed an interview; employees who have applied, interviewed, or been offered a promotion or transfer, and upon request; does not apply to employment outside of Nevada.
 - **Maryland** – Maryland employers must provide the wage range for a position on an applicant's request
 - **Other local laws with similar requirements: Toledo, Cincinnati, Jersey City, Ithaca, Westchester Cty.**

State & Local Pay Transparency Laws on the Rise

States with Bans on Private Employers Inquiring into Wage History:

- Alabama
- California
- Colorado
- Connecticut
- Delaware
- Hawaii
- Illinois
- Maine
- Maryland
- Massachusetts
- Michigan
- Missouri
- Nevada
- New Jersey
- New York
- Ohio
- Oregon
- Pennsylvania
- Rhode Island
- South Carolina
- Vermont
- Washington

State laws and the federal National Labor Relations Act prohibit employers from restricting employee disclosure, discussion or comparisons of their own wages with other employees.

Legal Update: Anti-trust Actions

DOJ Antitrust actions designed to increase competition

- DOJ civil case alleging illegal wage fixing through competitors sharing wage information resulted in a consent decree
 - *U.S. v. Cargill Meat Solutions Corp., et al.*, No. 1:22-cv-01821 D. Md.
- DOJ criminal case alleging no-poach hiring agreement with competitor violated anti-trust law.
 - *USA v. Hee et al* , D. Nev., no. 2:21-cr-00098, 10/27/22
- [Antitrust Guidance for Human Resource Professionals](#)

Legal Update: Age Discrimination Laws

Increasing number of age discrimination cases based on comments by executives plans for recruitment of younger workers

- Employers who are engaging in recruitment focused on younger workers are subjecting themselves to age discrimination claims.
- These cases are often supported by age based comments being made by company executives regarding recruitment
- EEOC recently filed suit against Lilly USA alleging the employer violated the Age Discrimination in Employment Act after executives allegedly pledged to **add more “early career” professionals** to the company to the detriment of older workers.
 - *EEOC v. Lilly USA, LLC*, Case No 1:22-1882 (S.D. Ind. filed Sept 26, 2022)
- Instead, employers should specify the experience, skills and technological expertise the employer is looking for.

Legal Update: Title VII

EEOC Releases Updated Know Your Rights Poster

- Employers with 15 or more employees are required by federal law to display the poster at their worksites.
- Poster must be placed in a conspicuous location in the workplace
- Employers also encouraged to post this digitally on their websites in a conspicuous location
- For employers without a physical location or for employees who work remotely a digital posting may be the only posting
- New Poster now includes a QR code for access to the webpage on how to file a charge
- <https://content.govdelivery.com/accounts/USEEOC/bulletins/333137d>

Immigration Discrimination Claims

- Employers cannot require specific work authorization documents from newly-hired non-US citizens to prove permission to work in the US
- Federal law allows workers to choose which valid, legally acceptable documentation to present to demonstrate their identity and permission to work, regardless of citizenship status.
- Employers should allow workers to present whatever acceptable documentation the workers choose and cannot reject valid documentation that reasonably appears to be genuine.

Congress Passes the SPEAK Out Act

- Under the act, victims of sexual harassment and sexual assault are able to speak publicly about the harassment or assault
- As the Act invalidates nondisclosure agreements designed to prohibit such disclosures.

Legal Update: Americans with Disabilities Act

A reminder to include all essential functions in job descriptions

- The 11th Circuit recently held that a duty that a disabled worker could not perform was not an essential function because it was not listed as such on the job description and involved no more than 20% of the employee's time.
- *Brown v. Advanced Concept Innovations, LLC*, 2022 U.S. App. LEXIS 29956 (11th Cir. 2022)(unpublished)

A reminder to document when essential functions not being performed

- The 8th Circuit recently held that an employer failed to show that a disabled employee was unable to perform the essential functions of his job through his proposed accommodation of teleworking while experiencing flare-ups of his medical condition.
- Employee had been permitted to work remotely on a consistent basis and received positive performance reviews reflecting that he was performing his job duties despite working remotely.
- *Mobley v. St. Luke's Health System, Inc.*, 2022 U.S. App. LEXIS 31585 (8th Cir. 2022)

Legal Update: New State and Local Laws

Opt-In Paid Leave Model Presents Growing Alternatives to Government Mandated Paid Family Leave

- Virginia became the first state to authorize paid family leave insurance for employers to add to employee benefits packages
- The law does not mandate that employers provide the leave or guarantee employee's access to paid time off
- Growing alternative to state mandated paid family leave laws

Are you ready for the District of Columbia's Transportation Benefits Equity Law? (And can you say that 5 times fast?)

- By January 15th, employers who offer a parking benefit to employees in DC must offer one of the Clean Air Transportation Benefit Options to Employees:
 - Fringe benefits in an amount equal to or greater than the monthly market value of the parking benefit for mass transit pass, bicycle commuting reimbursement or transportation in a commuter highway vehicle
 - A Transportation Demand Management Plan submitted to the District's DOT to reduce by 10% from the prior year the number of commuter trips employees make by car until 25% or less are made by car
 - Pay a fee of \$100 per month for each employee who is offered a parking benefit
- Employers must submit a report by January 15, 2023 and every two years after with the number of employees, employees offered and using a parking benefit or one of the three alternatives, the market value of the fringe benefit and applications of any exceptions

Maryland Passes Recreational Marijuana Law

- Beginning on July 1, 2023 recreational marijuana use and possession by those 21 and older is permitted under state law.
- Employers can still test and take adverse action for Maryland applicant or employee off-duty recreational marijuana use.

California Landmark Worker Privacy Right Law Effective January 1, 2023

- Effective January 1, 2023 the California Privacy Rights Act will no longer exempt from coverage data pertaining to employees, applicants, and independent contractors of companies doing business in California
- California's Privacy Rights Act applies to for-profit employers doing business in California and collecting personal information of California residents and meet size thresholds.
- The Act requires employers to post a detailed privacy policy about how the organization handles human resources data, comply with requirement that the employee may delete, correct, or obtain a copy of personal information, and include the Act's provisions in contracts with vendors holding human resources data.
- Other states (Virginia, Colorado, Connecticut, Utah) have privacy rights laws that apply to consumer data only; not employee data.

About the Presenter



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Employment attorney **Julie Reddig** helps employers build and maintain productive workplaces by navigating the many federal, state, and local laws protecting employees in the workforce. She counsels management on avoiding and defending against employment claims before administrative agencies and local, state, and federal courts in Maryland and the District of Columbia.