

From Hello to Goodbye: Top 10 Employment Law and Executive Compensation Issues in 2019 and Beyond

Presented by:

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Portland (OR)
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Sacramento
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Issue One: “#Me Too” Movement

- 13.6% increase in sexual harassment charges at the EEOC in FY2018
- EEOC national training on investigating sexual harassment charges – expect more RFI and on-sites in Pittsburgh Region for sexual harassment allegations
- Some state legislative movement in response to #MeToo
- What to do as in-house counsel?
 - Review and strengthen policies
 - Formal training for leaders should be standard
 - Timeliness and initial response to allegations are critically important

Mandatory Sexual Harassment Training Laws



Updated 8-2019

This map is intended as a visual aid and should not be relied upon or construed as a substitute for legal advice.

Issue Two: What's Going on with the DOL?

- Answer: A lot of activity
- Proposed change to the white-collar exemption salary threshold (from \$23,660 to \$35,308/annually) sent to the OMB on or about August 12, 2019
- Proposed change to the regular rate of pay to clarify which payments must be included/excluded from the calculation
- Proposed change to “joint employer” standard under the FLSA
- Addition of modification of fluctuating workweek rule to regulatory agenda

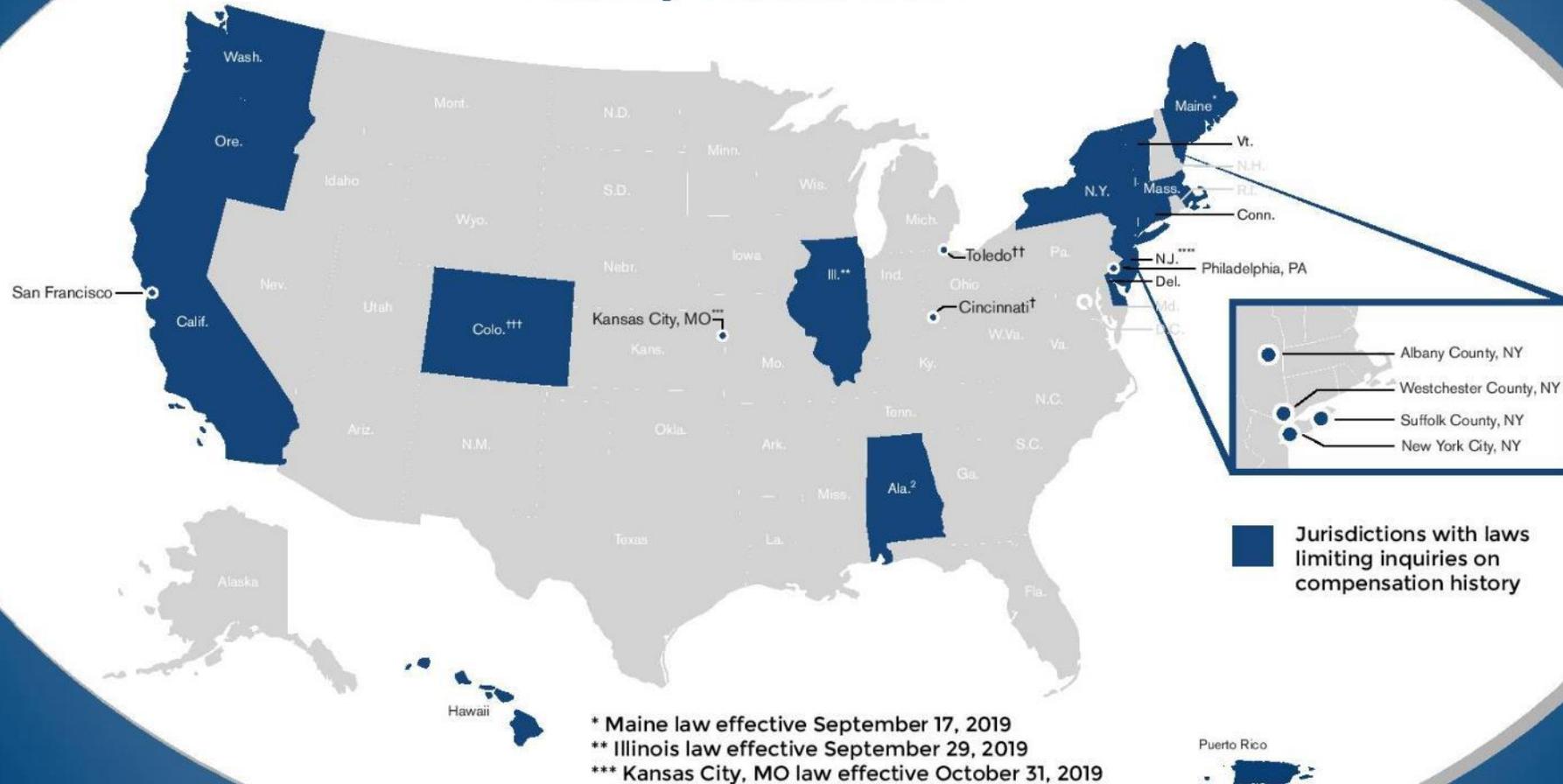
Issue Three: Arbitration Agreements

- Increasing employer adoption post-*Epic Systems*
- Pros/cons to arbitration agreements
 - Pros: class action waivers, no runaway juries, predictability, often quicker, more flexibility
 - Cons: can be more costly, “nightmare arbitrator”, satellite litigation, fewer summary judgment victories, limited appellate rights, AAA only real option in Pittsburgh area
- “#MeToo” movement and the impact on arbitration agreements
- Technical issues to be aware of

Issue Four: Pay Equity

- State pay equity legislative evolution (ex: California, Delaware, Massachusetts, Maryland, New York, Oregon, Washington)
- Pay equity audits – worth considering, but failure to properly complete can lead to additional issues
- What to do?
 - Train those who are making pay decisions
 - Develop guidelines on how to make effective and legally supportable decisions regarding pay
 - Develop guidelines and training for performance evaluation process – a major weakness for many employers

State and Local Salary History Limitations¹



¹ This map covers laws applicable to private employers. Public employers may be subject to additional laws.
² Ala. law does not bar employers from asking about salary history, but prohibits employers from refusing to interview or hire applicants who decline to provide such information.

* Maine law effective September 17, 2019
 ** Illinois law effective September 29, 2019
 *** Kansas City, MO law effective October 31, 2019
 **** New Jersey law effective January 2020
 † Cincinnati, OH law effective March 2020
 †† Toledo, OH law effective June 26, 2020
 ††† Colorado law effective January 1, 2021

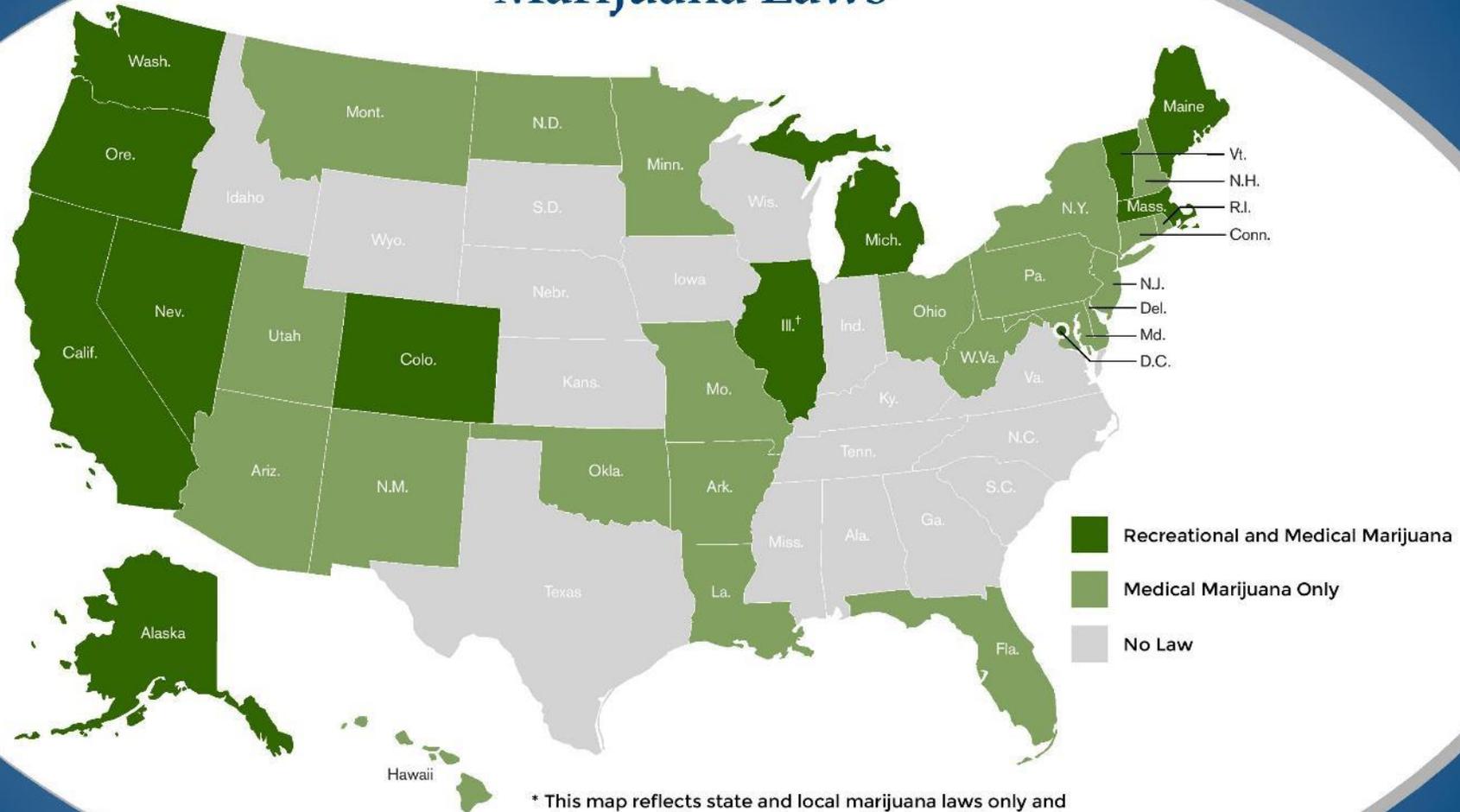
Updated 8-2019

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Issue Five: Medical Marijuana

- States continue to pass legislation legalizing marijuana use
- In Pennsylvania, the first Medical Marijuana Act lawsuits are beginning to be filed and litigated
- What to do?
 - Evaluate the need for testing for marijuana use
 - Ensure your human resources personnel are trained for how to handle medical marijuana cards
 - Consider treating like other prescription drugs
 - Review and enhance your policy documents
 - Don't forget about the overlay of the ADA and FMLA

Marijuana Laws*



* This map reflects state and local marijuana laws only and not laws permitting cannabidiol or other low-THC products. The sale, possession, and use of marijuana remains illegal under applicable federal law

† Illinois recreational marijuana law effective January 1, 2020

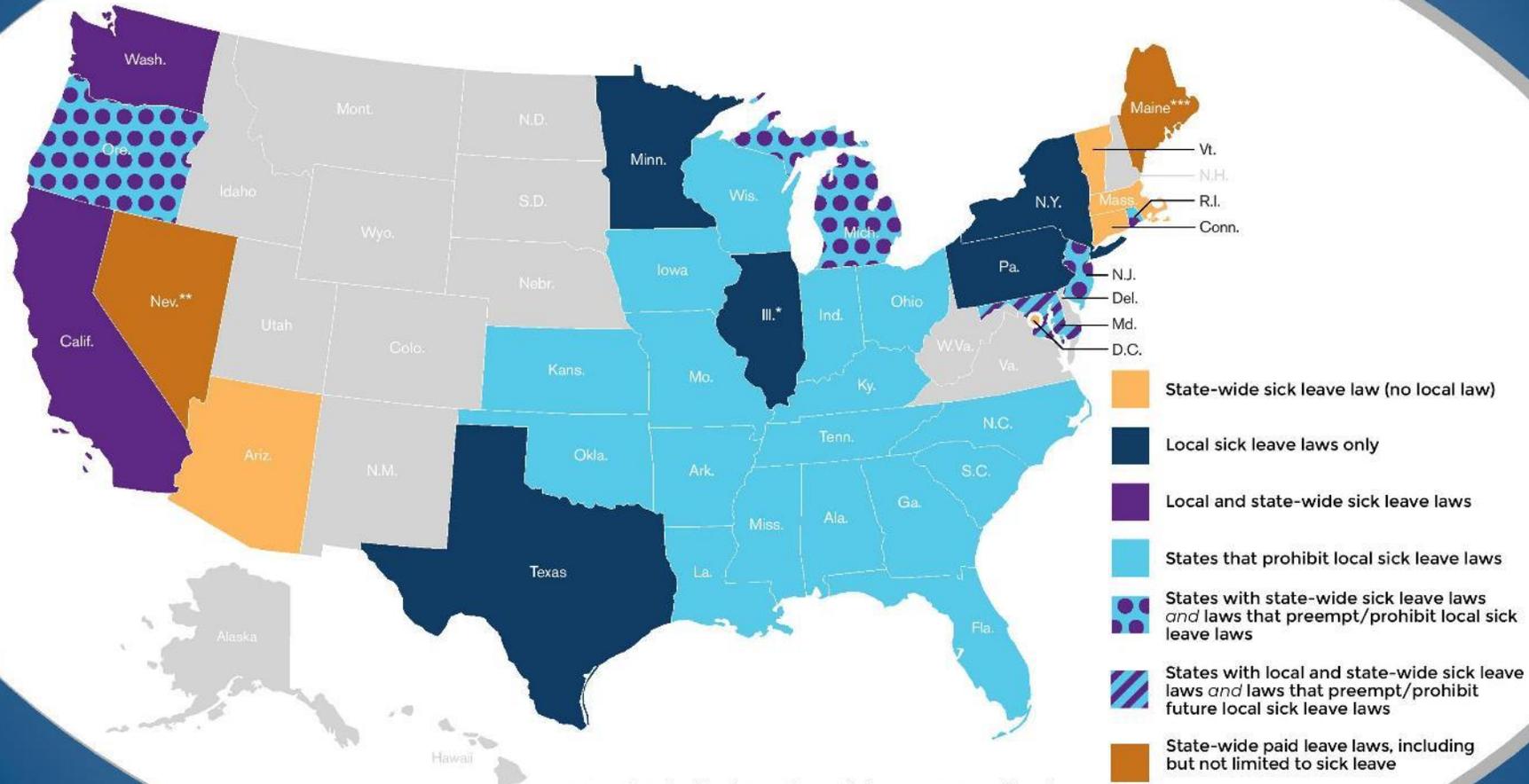
Updated 7-2019

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Issue Six: Leave and Accommodations

- FMLA, ADA, and workers' compensation – often called the “Bermuda’s Triangle”. Biggest headaches include:
 - Intermittent leave issues
 - Extended leave of absence issues – when is enough enough?
 - “Invisible disabilities” issues
 - Retaliation issues
- State and local governments continue to pass paid sick leave laws (including Pittsburgh* and Philadelphia)
- What to do?
 - Proper training of human resources is critical
 - From a legal standpoint, interaction and continuing the dialogue are key

State and Local Sick Leave Laws



*Note that the Illinois Employee Sick Leave Act requires that Illinois employers with paid sick leave policies permit a limited amount of employee use for a family member's illness.

**Nevada law effective January 1, 2020

***Maine law effective January 1, 2021

Updated 7-2019

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Issue Seven: Gig Economy/IC Issues

- Sharing economy, gig workers, “project” employees continue to expand
- But these workers generally do not fit into antiquated definitions of employees and independent contractors
- Class and collective action exposure means these issues are high-risk to organizations
- What to do?
 - Generally, it’s about control
 - Create distance between the organization and the worker – avoid having handbooks, supervisors, performance evaluations, etc.
 - BUT always investigate and address harassment/discrimination issues

Issue Eight: Emerging Technology-Driven Issues

- Many companies (>30%) are now incorporating AI into their HR processes, and/or increasingly using intelligent robotics in the workplace
- Some states (e.g., Illinois) are passing legislation addressing these issues, But, for the most part, the problem of old laws/new tech is creating significant uncertainty in this space with respect to labor and employment risks
- Increase in “misappropriation” and theft issues when employees leave the workplace
- What to do?
 - Evaluate vendor agreements closely
 - Ensure legal and human resources are involved in decision making
 - Run through employment-related risk analysis before implementing new software
 - Look closely at your policies to ensure you have created a “culture of confidentiality” with respect to corporate trade secrets

Issue Nine: Executive Compensation Considerations When Entering into an Executive Agreement

- Be conscious of restrictions on employment/use of information from prior employer
- Plan ahead for severance to qualify for an exception to Section 409A (or 457(f) for non-profits)
- Be mindful of internal pay equity
- Consider effects of “#MeToo” movement and definition of “cause” in executive agreement

Issue Ten: Executive Compensation Considerations When Terminating an Executive

- Be mindful of corporate governance issues and who the parties/players to the decision should be
- Review and consider all relevant documents (e.g., employment agreement, offer letter, restrictive covenant agreement, change-in control agreements, bonus plans, nonqualified deferred comp plans, equity plans, health/welfare plans, qualified retirement plans, loan agreements, indemnification agreements, etc.)
- Evaluate base line benefit package as well as alternative benefits, enhancements, forfeitures, and clawbacks – all in the context of Section 409A
- Consider communication strategy and characterization
- Be prepared to deal with post-termination issues

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