

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

Presented by:

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Minneapolis
Morristown
Nashville
New Orleans
New York City
Oklahoma City
Orange County
Paris
Philadelphia
Phoenix
Pittsburgh
Portland (ME)
Portland (OR)
Raleigh
Richmond
Sacramento
San Antonio
San Diego
San Francisco
Seattle
St. Louis
St. Thomas
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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

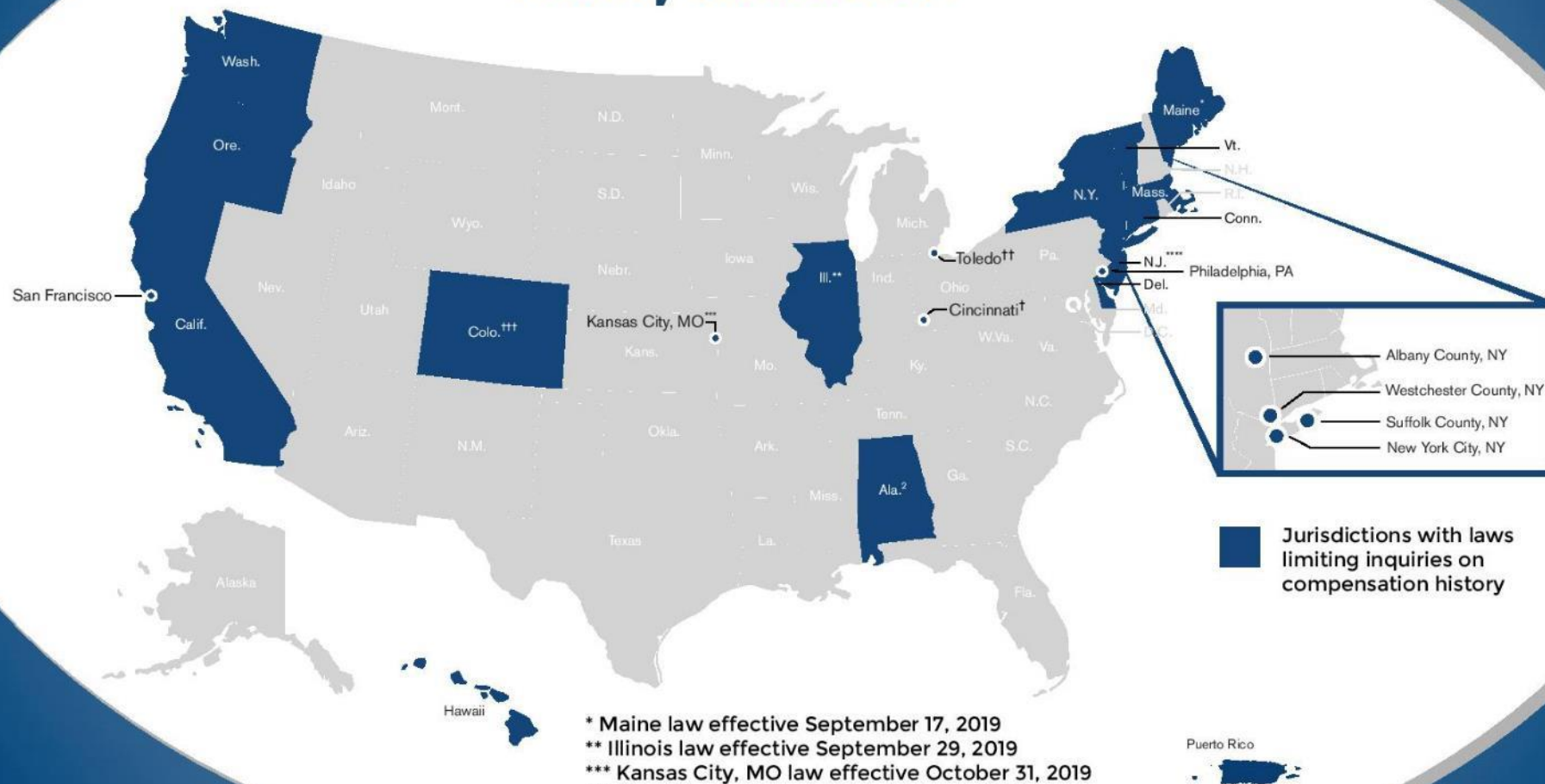
Issue Three: Arbitration Agreements

- 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



* 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

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.

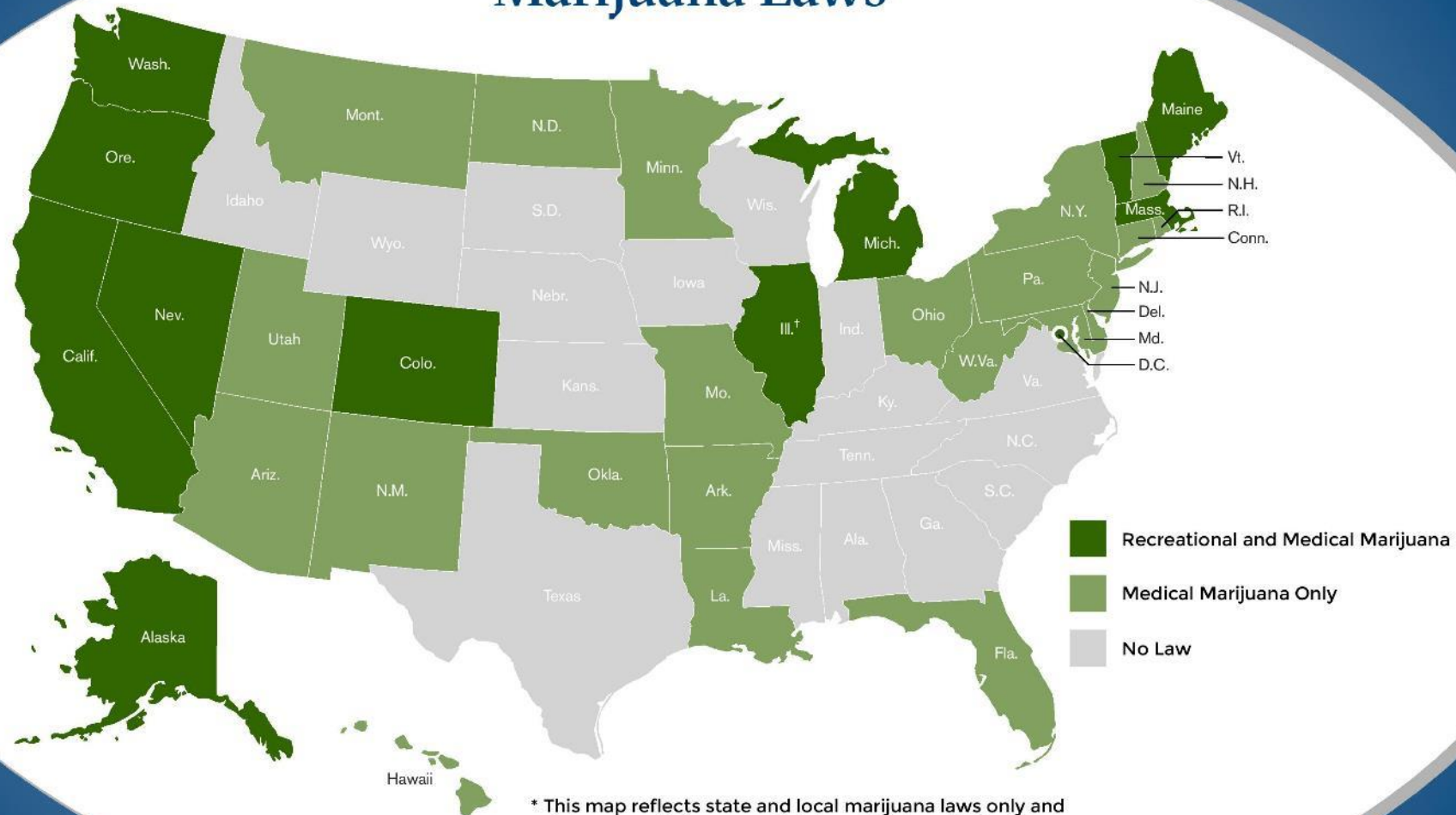
Updated 8-2019

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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

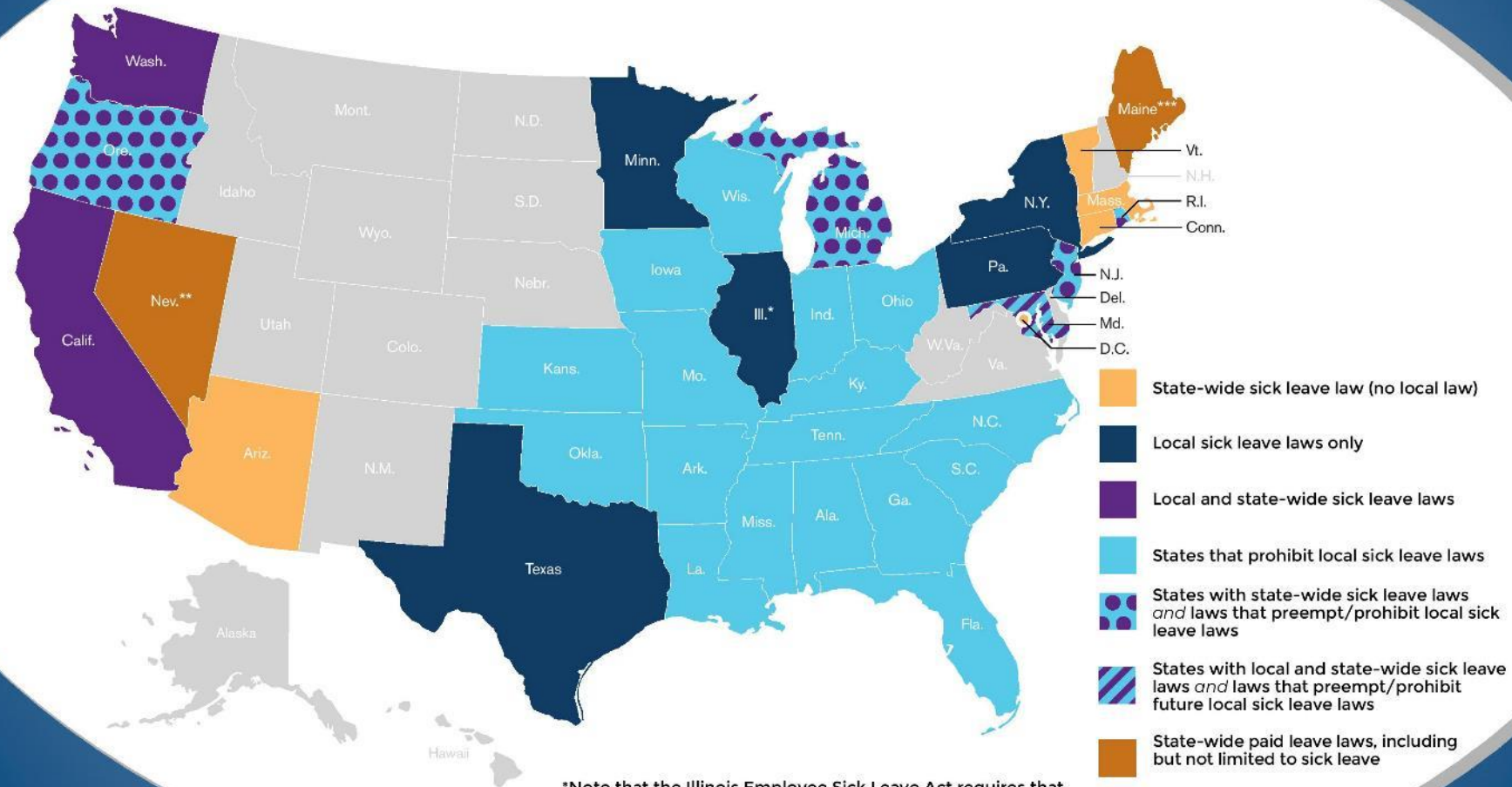
Updated 7-2019

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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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