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The 2019 Employment Law Year in Review

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Agenda

- Looking Backwards
- Supreme Court Roundup
- Federal Legislation
- EEOC Developments
- NLRB Developments
- Department of Labor Developments
- Immigration
- State and Local Legislation
- Substance Abuse in the Workplace
- Looking Ahead

Five Issues to Monitor in 2019
How Did We Do?

2019 Issues to Monitor (as of 2/7/2019)

1. Additional decisions on sexual orientation and gender identity discrimination.
2. Pushback on ADA leave as a reasonable accommodation.
3. Additional states and cities enacting sexual harassment prevention legislation including employer training requirements.
4. New wave of litigation stemming from OIG investigations.
5. Additional local wage and hour litigations.

Supreme Court Roundup

Clear Consent to Arbitrate is Required

- In 2018, *Epic Systems* provided significant incentive to use class action waivers in arbitration agreements as a tool for limiting their exposure to potential collective claims from workers.
- 5-4 U.S. Supreme Court decision in *Lamps Plus, Inc. v. Varela*: “Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a class wide basis.”
- Even with a strong Federal Arbitration Act, “Class action arbitration is such a departure from ordinary, bilateral arbitration of individual disputes that courts may compel class action arbitration only where the parties expressly declare their intention to be bound by such actions in their arbitration agreement.”
- Arbitration agreements must clearly and unmistakably state that the parties agree to resolve class and collective actions through arbitration. Without such a clear agreement, a party cannot be compelled to class arbitration.

Dodd-Frank Whistleblowers - Revisited

- Unanimous Supreme Court in *Digital Realty Trust, Inc. v. Somers* found the Dodd-Frank anti-retaliation provision protects *only* those employees who complain directly to the SEC.
  - Potential danger for employers because external report now *must* occur (in addition to bounty provisions…)
- Bipartisan legislation passed in House and introduced in the U.S. Senate define "whistleblower" under Dodd-Frank's anti-retaliation provision as an individual who reports internally to certain categories of people (e.g., those with supervisory authority or authority to investigate misconduct).
  - Possible catch, Senate version would prohibit arbitration of Dodd-Frank whistleblower claims.

On the horizon…

Does Title VII cover sexual orientation and/or gender identity discrimination?

- Supreme Court heard oral arguments in October in a consolidated appeal of:
  - *Altitude Express Inc. v. Zarda*—skydiving company challenging a Second Circuit decision reviving a gay ex-instructor's unfair firing claims;
  - R*.G. & G.R. Harris Funeral Homes v. EEOC*—mortuary appealing funeral director claims of being fired after announcing her gender transition; and
  - *Bostock v. Clayton County—M*unicipal worker seeking to overturn loss after claiming he was fired after Clayton County found out he was part of a gay softball league.
- Is Justice Neil Gorsuch the "swing" vote?
- A decision is expected at the close of the Supreme Court term in June.

On the Horizon…

Whether DHS lawfully terminated the DACA policy enacted by President Obama via Executive Order?

- Supreme Court heard oral argument in November.
- Court's decision will affect more than 700,000 individuals and their families who came to the U.S. as children without proper documentation but who have been able to remain in the U.S. and work under DACA.
- A decision is expected at the close of the Supreme Court term in June.
- Until then, DACA recipients may continue to renew their DACA statuses.
- Congress could act to provide a safety net for Dreamers.

Federal Legislation

Federal Employee Paid Leave Act

- In the last weeks of 2019, Congress approved legislation that, if signed by President Trump as expected, will provide 12 weeks of paid parental leave to employees of the federal government.
- Federal employees will be eligible for paid leave only for birth, adoption and foster placement.
- Several different proposals, some with bipartisan support, have been discussed that would provide paid parental and/or family leave to employees of private employers.

Will Congress Act Regarding Discrimination Based on Sexual Orientation and/or Gender Identity?

- In May, the House mostly along party lines passed the Equality Act, which would amend various existing civil rights statutes to explicitly protect individuals from discrimination based on their sexual orientation or gender identity in various contexts, including employment, education, housing and public accommodations.
- Although the bill is going nowhere in the Senate, the SC ruling could stir the pot if it finds Title VII of the Civil Rights Act doesn't extend to either sexual orientation or gender identity.
- Although numerous states and municipalities have built LGBT protections into their own anti-discrimination laws and many businesses have internal protections in place, a ruling by the high court that Title VII doesn't cover sexual orientation or gender identity *could* put pressure on Congress to address the issue on a federal level.

Action on Non-Competes

- On March 7, 2019, a bipartisan group of senators sent a two-page letter to the GAO requesting that it “review ... the effects of non-competition (or non-compete) agreements on workers and on the economy as a whole.”
- Two U.S. Senators proposed a ban on all non-competes other than those entered into in connection with the sale of a business or dissolution of a partnership (Workforce Mobility Act of 2019).
- FTC public workshop January 1, 2020

Requiring Sexual Harassment Training

- Senate and House bills introduced in April that would require the EEOC to promulgate regulations to require appropriate employers, as determined by the EEOC, to provide in-person or other interactive training:
  - For each employee regarding discrimination and harassment in the workplace; and
  - Specifically designed for supervisors regarding the prevention of and response to discrimination and harassment in the workplace.

More Flexibility to Select Employees to Work on Service Contracts

- Trump Administration revoked EO 13495, Nondisplacement of Qualified Workers Under Service Contracts
- EO 13495 required federal contractors awarded contracts covered by the SCA to offer employees working under predecessor contracts “a right of first refusal of employment,” with some limited exceptions
- Removed requirement for federal service contractors to offer employment to employees of predecessor contractors

EEOC Developments

Joint Employer Regs

- In 2019, the federal government made several efforts to narrow their tests for determining when two or more businesses qualify as joint employers.
- Push for consistency rather than different tests from different agencies and making joint employment questions more predictable.
- Equal Employment Opportunity Commission included a notice in its unified agenda of plans to soon clarify EEOC's stance on joint employment under the anti-discrimination laws it enforces

Sexual Harassment Training

- Hits on EEOC's sexual harassment page doubled in the wake of the Harry Weinstein allegations
- Charges alleging sexual harassment were up by 13.6% for Fiscal Year 2018
- Reasonable cause findings on harassment charges increased by 25% from 2017
- $70 million recovered overall – 47% increase
- Many states are now requiring sexual harassment training

Pay Equity

- EEOC will not collect Component 2 pay data in 2020
  - Accepted public comment through November 12, 2019
  - The burden imposed on employers outweighed the utility of the data in enforcement
- OFCCP reported it will not use 2017 or 2018 pay data contractors filed in 2019 for enforcement purposes

NLRB Developments

NLRB Composition

- At the end of 2019, three members (two short of capacity) and minimum number for quorum
  - Republicans John Ring, William Emanuel and Marvin Kaplan
  - Democrat Lauren McFerran's term ended December 16, 2019
- Kaplan's term ends August 27, 2020 and if McFerran is not replaced by then, the NLRB will be unable to issue decisions.

Weigh In On Independent Contractor Analysis

"Return the Independent Contractor Test to Its Traditional Common Law Roots"

NLRB applies a "common law agency test" for determining whether an individual is an employee under the NLRA. Same test also applies under numerous other federal laws, such as ERISA and the IRC, involves a balancing of multiple factors including:

1. The extent of an employer's control over the details of an individual's work;
2. Whether the individual is engaged in a distinct occupation or business;
3. The nature of the occupation;
4. The skill required;
5. Whether the worker supplies the instrumentalities, tools and place of work;
6. The length of the parties' relationship;
7. The method of payment;
8. Whether the work is part of the employer's regular business;
9. Whether the parties believe they are creating an employment relationship; and
10. Whether the worker is in business for him or herself.

Protecting the Right to Organize Act

- “PRO Act” would make significant changes to existing federal labor and employment laws in favor of unions and/or anti-employers who prevent workers organizing (via increase penalties).
- Hailed as creating a more level playing field between workers and employers. Sample quote from the National Employment Law Project.
  - "We know that membership in a union is the single most effective way to get a strong foothold in the middle class, and if passed, the PRO Act would make it much easier for workers to join unions and collectively bargain with their employers," she added. "This is the single most effective thing we could do to help grow the middle class."
- Make law a 2014 NLRB rule designed to speed up the union election process, including barring employers from holding meetings with workers on company time to "express its views on union issues."
- Would, effectively, eliminate state "right-to-work" laws
- Make the ABC independent contractor test federal law
- Ban class action waivers (overturning *Epic Systems v. Lewis)*

Inbound Joint Employer Regs

- The National Labor Relations Board proposed a rule in 2018 to undo its own standard from the Browning-Ferris case.
  - Under the Board's proposed rule, joint-employer status will be found only where two entities actually share or codetermine employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction (the pre-*Browning-Ferris* standard)
  - 2019 spent reviewing comments with expectation of near-term finalization.
  - a business is only a joint employer if it has "direct and immediate control" of another's workers.

Employer Work Rules

- At the end of 2019, NLRB restored an employer's right to control employee nonwork use of its information technology and email systems—with important exceptions—without violating the NLRA.
- NLRB held that employers may maintain and enforce rules requiring confidentiality for the duration of a workplace investigation.

Election Rules: the End of “Quickie” Elections?

- On December 13, 2019, the Board announced comprehensive changes to election procedures, largely revamping the Obama-era “quickie” election rules.
- The new rules will slow down the process greatly.
- Under the “quickie” rules, the median number of days from filing a petition to an election is 22 days in cases in which election details are agreed, and 36 days where a hearing and regional decision is needed.
- The Board eliminates that demanding time frame to allow the parties more leeway to litigate essential questions such as the composition of the bargaining unit, the eligibility of voters, and to determine issues of supervisory status.

Standards for NLRA Protection for Profane or Offensive Statements

- Decisions issued by the Obama Board have given employees wide latitude to use profanity and other offensive language in the workplace toward their supervisors and others if is used in the context of protected concerted activity. The NLRB has ordered the reinstatement of employees previously discharged under those circumstances.
- On September 5, 2019, the NLRB requested the public to file briefs in connection with the Board's reconsideration of the standards.
- Specifically the Board seeks to "address whether profane outbursts and offensive statements of a racial or sexual nature, made in the course of otherwise protected activity, lose the employee who utters them the protection of the Act."

Department of Labor Developments

The Feds Weigh In – DOL “Economic Realities”

- April 2019 DOL gig economy opinion letter
  - Applying the economic realities test to the employer at issue, the DOL characterized its business model as a referral service that "does not receive services from service providers, but empowers service providers to provide services to end-market consumers."
  - As a result, the DOL stated, "[it] is therefore inherently difficult to conceptualize service providers’ 'working relationship' with your client, because as a matter of economic reality, they are working for the consumer, not your client."
  - The opinion then examined each of the six primary factors in the economic realities analysis, focusing in detail on the employer’s exercise of control, concluding that "[the] service providers have complete autonomy to choose the hours of work that are most beneficial to them, may simultaneously work for competitors of your client without repercussions, and are subject to minimal, if any supervisions by your client. Accordingly this factor weighs heavily in favor of independent contractor status."

The Feds Weigh In On Independent Contractor Analysis – DOL “Economic Realities”

- Determine whether “as a matter of economic reality, the individual is dependent on the entity."
- Factors considered include:
  - (1) the extent to which the work performed is an integral part of the employer’s business;
  - (2) the worker’s opportunity for profit or loss depending on his or her managerial skill;
  - (3) the extent of the relative investments of the employer and the worker;
  - (4) whether the work performed requires special skills and initiative;
  - (5) the permanency of the relationship; and
  - (6) the degree of control exercised or retained by the employer.

Final Rule on Joint Employers

- New test focuses on whether the purported joint employer "exercises substantial control over the terms and conditions of the employee's work."
- Four-factor balancing test assessing whether the purported joint employer:
  - Hires or fires the employee;
  - Supervises and controls the employee's work schedules or conditions of employment;
  - Determines the employee's rate and method of payment; and
  - Maintains the employee's employment records
- Actual, not theoretical, exercise of control required

Overtime Exemption Regulations

- In September 2019, DOL issued a new Final Rule updating the minimum salary requirements for the white collar (executive, administrative and professional) overtime exemptions effective January 1, 2020 to $35,568, or $684 per week (a 50 percent increase from the former current level of $23,660 ($455 per week)).
- In addition, the annual minimum compensation for highly compensated employees increased from $100,000 to $107,432.
- Employers will be permitted to use nondiscretionary compensation, including commissions, to satisfy up to 10 percent of the new standard salary level.
  - Nondiscretionary compensation may be paid annually (rather than quarterly), providing employers with more flexibility in paying exempt employees nondiscretionary bonuses and commissions to satisfy the salary level requirement.
  - The new Final Rule also permits a catch-up payment at years-end, up to 10 percent of the standard salary level (i.e., $3,556.80), if the employee has not earned sufficient nondiscretionary pay to satisfy the required salary.

Final Rule on Calculating Regular Rate

- Can exclude:
  - “payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause”
  - payments for bona fide meal periods
  - payments to employees to reimburse for reasonable business expenses
  - “other similar payments to an employee which are not made as compensation for his or her hours of employment”
    - payments must not “depend on hours worked, services rendered, job performance, or other criteria that depend on the quality or quality of the employee’s work.”
  - Parking benefits (but not actual commuting costs)
  - “Show up” and call back pay
  - Predictability pay or schedule change premiums

The Fluctuating Work Week

- Under DOL regulations, if certain conditions are met, an employer may pay an employee who works fluctuating hours a fixed salary for all hours worked and then an additional half-time for all hours over 40, a number that decreases as the number of hours increases.
- In a NPRM issued in November 2019, the DOL seeks to clarify that employers may provide additional pay, such as bonuses or premiums, to employees subject to the fluctuating work week (FWW) method, even when the additional pay is tied to the number of hours worked, without jeopardizing the use of that pay method.
- In the NPRM, the DOL seeks to clarify that such bonuses, premiums and other compensation are, in fact, permitted when using the FWW pay method, regardless of whether such compensation is hours- or performance-based.
- Final rule is expected in 2020.

Proposed Changes to FMLA Forms

- DOL proposed changes to optional medical certification forms
- The revisions are supposed to make the forms easier to understand for employers, leave administrators, healthcare providers, and employees seeking leave
- Comment period closed October 4, 2019
- Stay Tuned…

Immigration

I-9 Audits and Raids

- Surge in No Match Letters sent to employers (Spring 2019)
- Surge in I-9 notices of investigation (3,000 sent to employers in July 2019)
- ICE received $65 million to hire new officers to staff various Homeland Security Investigation offices

Cap H-1B Electronic Registration

- Since 2017, during the first week of April, the U.S. Citizenship and Naturalization Service (Service) has conducted a lottery for the limited number of H-1B visas available.
- This March, for $10 each, employers or their attorneys will have to register online for the lottery by providing limited corporate and beneficiary information to the Service.
- Only if selected will the employers be able to file the full petition.

State and Local Legislation

Virginia Passed a Law…

"Nondisclosure or Confidentiality Agreements; Sexual Assault, Condition of Employment" (Va. Code § 40.1-28.01)

- Employers may not require job applicants or current employees to execute nondisclosure agreements that would conceal the details of any "sexual assault" claim an employee may have against the employer.
  - Any such agreement will be treated as against public policy and therefore, void and unenforceable.
  - "Sexual assault" is not defined. However, the statute applies to claims arising under Virginia laws on rape (Va. Code § 18.2-61), forcible sodomy (§ 18.2-67.1), aggravated sexual battery (§ 18.2-67.3), and sexual battery (§ 18.2-67.4).
- Does not restrict nondisclosure or confidentiality agreements with *former* employees. Therefore, nondisclosure and confidentially provisions in severance and settlement agreements, which typically are executed when an employee is no longer working for an employer, are not affected by the new law.

Virginia Passed a Law…

New Personnel Records Law (Va. Code § 8.01-413.1)

- Applies to all employers with employees working in VA
- Current and former employees, and their attorneys, may make written requests for certain employment records.
- Virginia employers must provide those records within 30 days of receipt of a written request.
- Not all employment records kept in personnel files are covered by this law.
  - Employment records reflecting dates of employment, wages or salary, job description and job title, and any injuries sustained by the employee during employment.
- The Virginia law does not create an obligation to keep particular records, or to keep personnel files for a particular length of time.

Virginia Passed a Law…

- Virginia Code § 40.1-29 amended to require employers to provide employees with a written statement, by paystub or online accounting, showing the following:
  - The name and address of the employer;
  - The number of hours worked during the pay period;
  - The rate of pay;
  - The gross wages earned by the employee during the pay period; and
  - The amount and purpose of any deductions.
- Applies to all employees, regardless of whether they are exempt or non-exempt

And Looks Like It May Be Passing More

- Recently proposed legislation:
  - Parental Leave for School Involvement
  - Paid Family and Medical Leave
  - Safe Days for Employees
  - Earned Sick Leave for Employees
  - Paid Family and Medical Leave Program
  - Pregnancy Accommodation
  - Add protections based on sexual orientation or gender identity
  - Increase minimum wage
  - Guidelines for disseminating tips

Maryland's Big Changes

- Became 6th state to adopt a minimum wage of $15.00 per hour
  - Overrode Republican Governor's veto on March 28, 2019
  - Increase to $11.00 on January 1, 2020
  - Annual increases until $15.00 minimum wage effective January 1, 2025 (employer with 15 or more employees) and July 1, 2026 (fewer than 15 employees)
- Changes to Maryland's workplace harassment laws took effect on October 1, 2019:
  - "Employee" includes independent contractors.
  - "Employer," for harassment claims only, now includes those with one (1) or more employees (vs. fifteen (15) or more employees previously).
  - Expressly defines "harassment" as being based on race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, gender identity, or disability.
  - Codified strict liability for employer for the harassment committed by a supervisor or if employer negligence led to the harassment or its continuation.
  - Quadrupled the filing period for an administrative complaint of harassment with the Maryland Commission on Civil Rights to two (2) years from the date of the alleged harassment (from six (6) months), and increased civil lawsuit statute of limitations to three (3) years (from two (2) years).

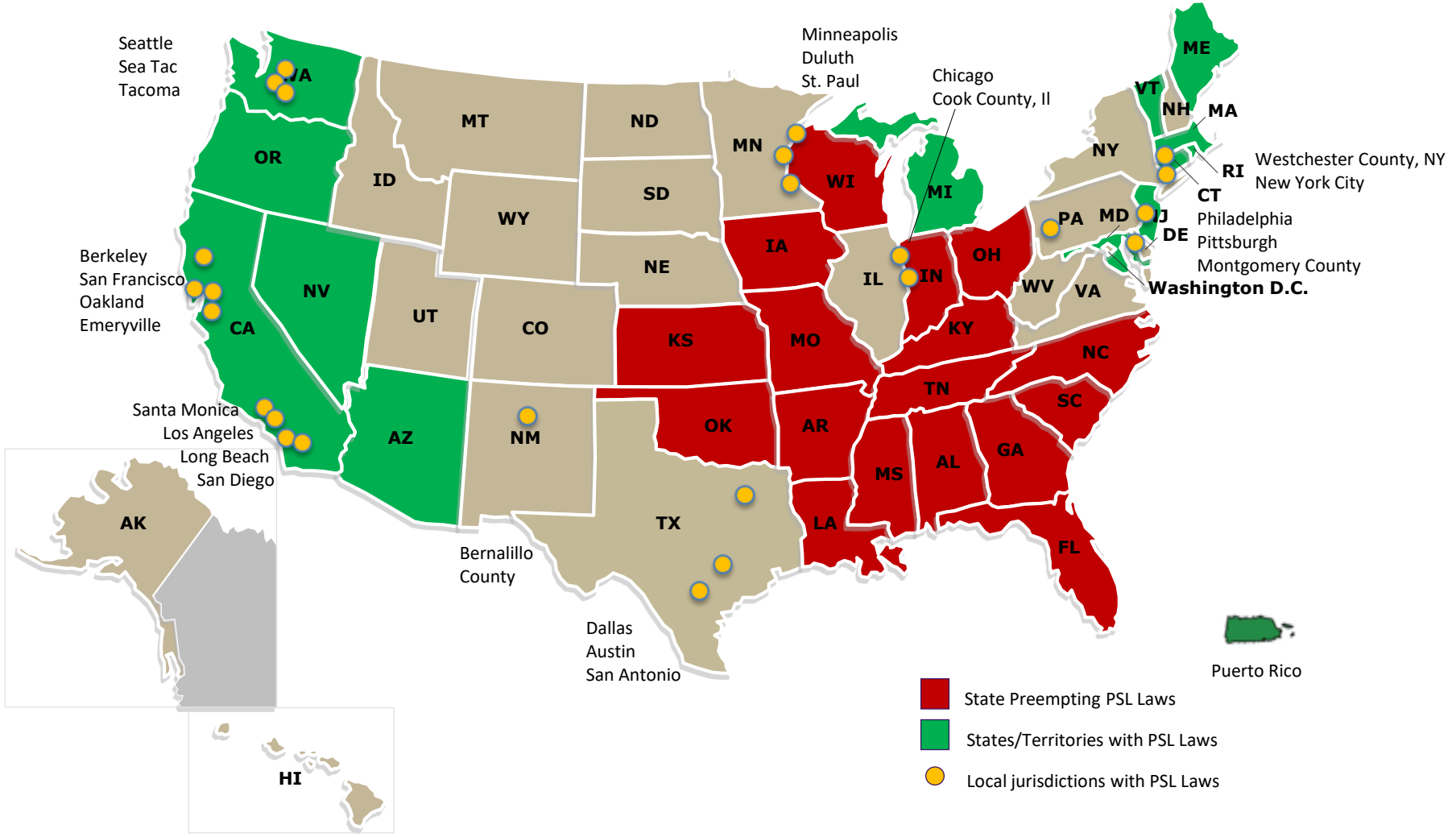
Maryland Organ Donor Leave

- Employers with at least 15 employees working in Maryland are required to provide eligible employees with:
  - up to 60 business days of unpaid leave (in any 12-month period) to serve as an organ donor, and
  - up to 30 business days of unpaid leave (in any 12-month period) to serve as a bone marrow donor.
- To be eligible, the employee must have worked for the employer for at least 12 months and at least 1,250 hours during the previous 12 months.

DC Paid Leave

- The District of Columbia Universal Paid Leave Amendment Act of 2016 began collecting payments via an additional 0.62 percent employer payroll tax on July 1, 2019.
  - Zealous pursuit of payment *and* penalties
- Employees will be eligible to take designated paid family and medical leave starting on July 1, 2020.
- Notice is out. All DC employers are required to post by February 1, 2020.
- *In addition*, must be provided in electronic or physical form to:
  - All employees at least once between February 1, 2020 and February 1, 2021 and at least once a year every following year;
  - All new employees hired after February 1, 2020 at the time of hire; and
  - Individual employees when the employer receives direct notice after February 1, 2020 of the employee's need for leave for an event that could qualify for PFL benefits.

Paid Sick Leave



Jurisdictions with Paid Sick/Safe Leave Laws

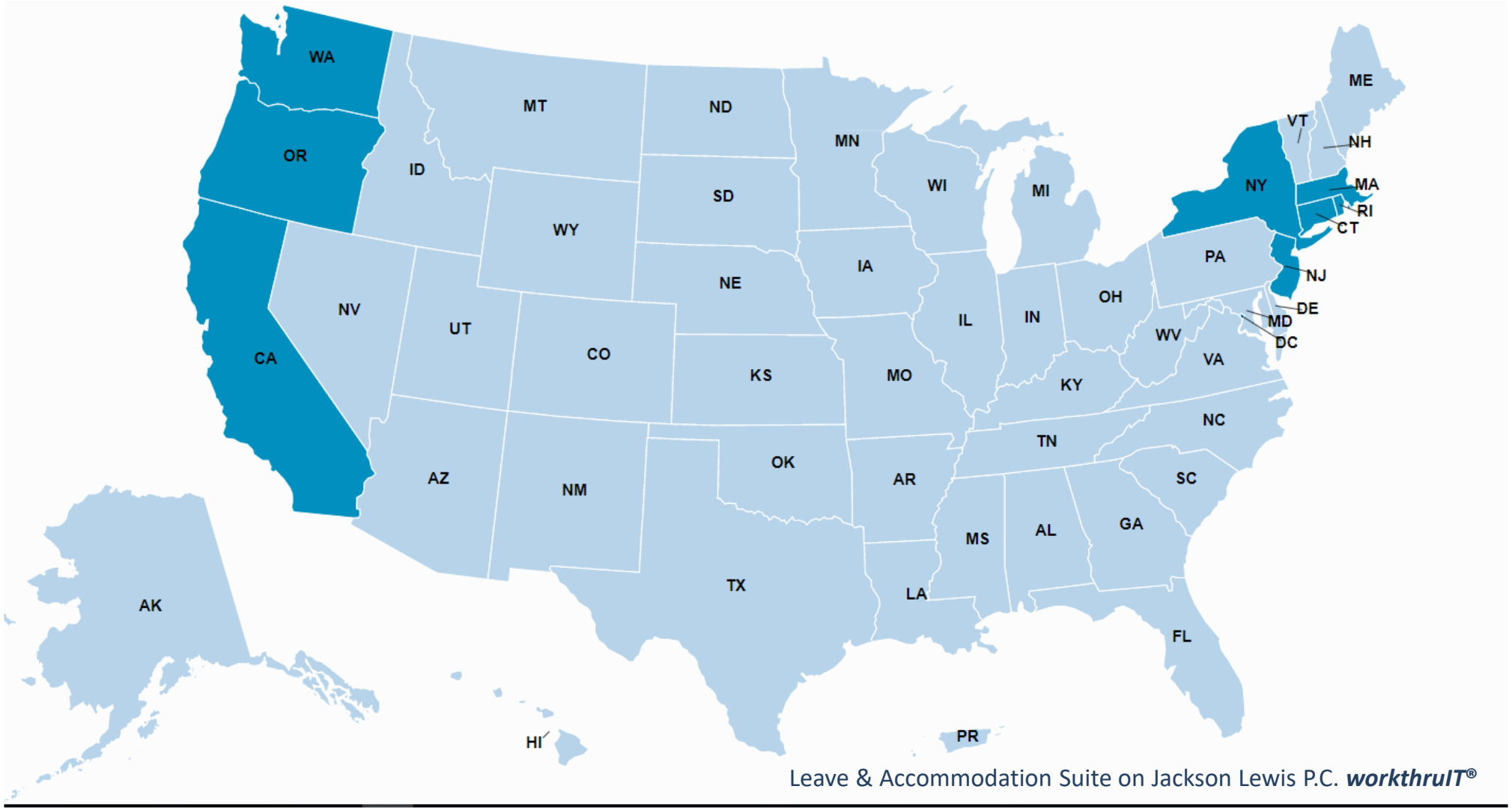
State Laws

- California
- Connecticut
- Maine (January 1, 2021) / Any reason
- Maryland
- Massachusetts
- Michigan
- Nevada (January 1, 2020) / Any reason
- New Jersey
- Oregon
- Rhode Island
- Vermont
- Washington
- Washington D.C.
- Puerto Rico

Local Laws

- Berkley, Emeryville, Los Angeles, Long Beach, San Diego, San Francisco, Santa Monica, Oakland (CA)
- Chicago, Cook County (IL)
- Montgomery County (MD)
- Minneapolis, St. Paul, Duluth (January 2020) (MN)
- New York City (NY)
- Westchester County (NY)
- Philadelphia (PA)
- Austin (pending legal challenges), San Antonio (December 1, 2019) & Dallas (August 1, 2019) (TX)
- SeaTec, Seattle, Tacoma (WA)
- Bernalillo County, NM (July 1, 2020) / Any reason
- Pittsburgh, PA (effective date TBD)

Jurisdictions with Paid Family Leave



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Independent Contractors

- California Supreme Court decision with strong implications for the gig economy (*Dynamex Operations West Inc. v. The Superior Court of Los Angeles County*).
- Three-pronged standard — called the ABC test — that *presumes* workers are employees (not independent contractors) and ditched the more flexible classification test that had been in use for almost three decades.
- To overcome the employee presumption, test makes businesses show workers:
  - free from supervision;
  - perform work that is outside the usual course or place of business; and
  - work "in an independently established trade, occupation, or business of the same nature" as the work they do for the entity that is hiring them.

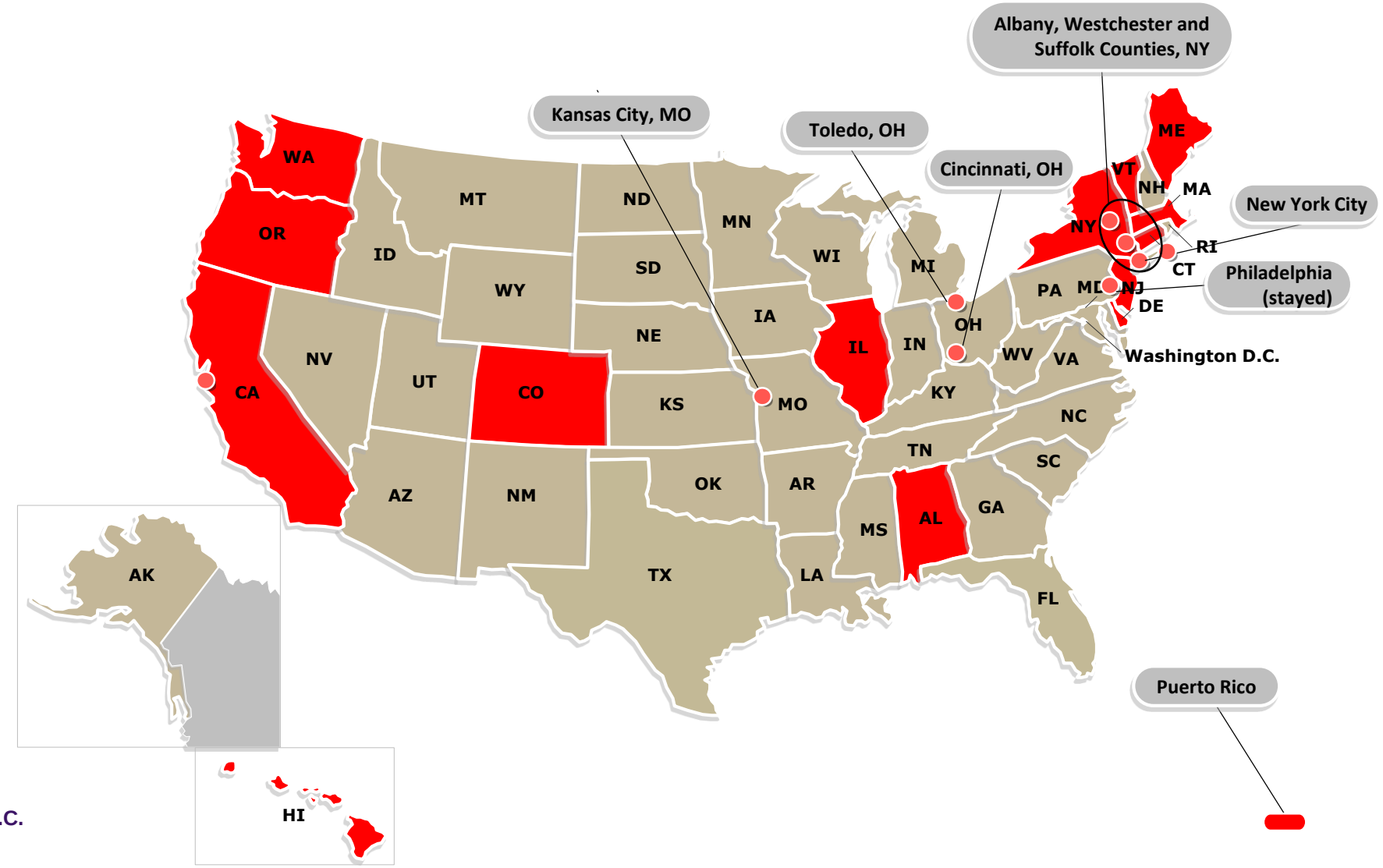
California Made it a Law

- California's A.B. 5's asserted aim is at the "gig" economy and alleged misclassification of individuals who perform work for their companies as independent contractors but impact is much more wide spread
- Codified and expanded the three-prong ABC test from *Dynamex*
- Under the test, an employer can only classify workers as independent contractors if it shows each of three things:
  - that the workers are free from their hiring entity's control,
  - work outside its "usual business" and
  - "customarily" do the work they do for their alleged employer as part of an "independent business"

California Consumer Privacy Act

- Effective January 1, 2020, the CCPA places limitations on the collection and sale of a consumer's personal information and provides consumers certain rights with respect to their personal information.
- Law requires a notice to employees, applicants, and other workforce members at the collection of covered personal information, as well as reasonable safeguards for their personal information.

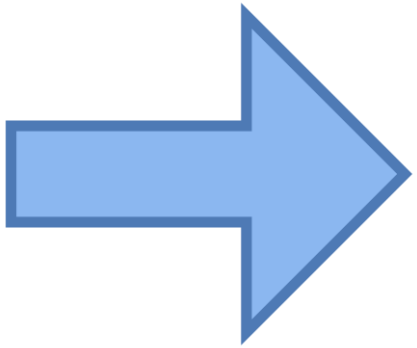
“State” of Play: Salary History Bans



State Fair Pay Laws - Themes

Equal Pay Act

Equal Pay for Equal Work



State Laws

Equal Pay for "substantially similar" or "comparable" work

What's the Effect?

Expands pool of comparators – increased risk

Different across states

Differences in location of comparators

State Fair Pay Laws - Themes

- Prohibits reliance on salary history
- Limits the reasons acceptable to explain pay differences – e.g., market defenses
- Requires “dollar for dollar” explanation of pay gap
- Expands recoverable damages available
- Allows broad disclosures of pay bands
- Protects employees against retaliation
- Encourages self-analysis

What Explanations are Sufficient?

- Seniority system/Tenure
- Geographic location in which a job is performed
- Education, if job-related
- Experience, but clearly defined with pay steps and limited discretion
- Significant differences in job duties and levels of responsibility

Pay Equity Laws

Several states have recently amended their Equal Pay Laws:

- Massachusetts
- California
- Maryland
- Nebraska
- Connecticut
- New York
- New Jersey
- Washington

Starting Pay…Continues to Rise!

- State Minimum Wage
  - 17 states + D.C., minimum wage is or will be $10/hr. or higher in 2020
  - 4 additional states (Michigan, Missouri, Nevada, New Mexico) scheduled to exceed $10/hr. in coming years
  - 7 states currently scheduled to reach $15/hr. in coming years

State	Current	Future
Alaska	$10.19	TBD
Arizona	$12.00	TBD
Arkansas	$10.00	$11.00 by 2021
California	$13.00	$15.00 by 2022
Colorado	$12.00	TBD
Connecticut	$11.00	$15.00 by 2023
D.C.	$14.00	$15.00 in 2020*
Hawaii	$10.10	TBD
Illinois	$10.00*	$15.00 by 2025
Maine	$11.00	$15.00 by 2025
Massachusetts	$12.75	$15.00 by 2023
Minnesota	$10.00	TBD
New Jersey	$11.00	$15.00 by 2024
New York	$11.80	$12.50 in 2020**
Oregon	$11.25	$13.50 by 2022
Rhode Island	$10.50	TBD
Vermont	$10.96	TBD
Washington	$13.50	TBD

*Effective 7/1/2020
**Effective 12/31/2020

Source: NCSL

Restrictive Covenants Under Assault

- Increase in non-compete legislation and proposals for broad non-compete bans and limiting the use of non-competes with respect to low-wage workers.
  - In 2019, restrictive covenant laws enacted and/or amended in **Connecticut**, **Maine**, **Maryland**, **New Hampshire**, **Oregon**, **Rhode Island**, **Utah** and **Washington**.
- State attorneys general joined fight against allegedly unreasonable and abusive non-competes.
- Legislatures continue to pursue non-compete reform initiatives in **New Jersey**, **New Hampshire**, **Pennsylvania** and **Vermont**.

Use of Confidentiality, Non-Disclosure, and Arbitration Agreements

- Several states have passed laws to address sexual harassment concerns raised by the #MeToo movement.
- Many of these laws bolster employees' right to sue for sexual harassment and forbid the use of confidentiality provisions and non-disclosure agreements in cases involving allegations of sexual harassment.
- Going further, some state laws — such as those in Illinois, Maryland, New Jersey, New York, Vermont and Washington — purport to invalidate arbitration agreements that prevent employees from filing sexual harassment claims in court.

Training Requirements

- States have also been introducing new, mandatory sexual harassment training requirements for employers.
  - California
  - Connecticut (2019)
  - Delaware (2019)
  - District of Columbia
  - Illinois (2019)
  - Maine
  - New York
  - Vermont
  - Washington (2019)
- In 2019, bills were also introduced in four new states.

Substance Abuse in the Workplace: Medical Marijuana and Beyond

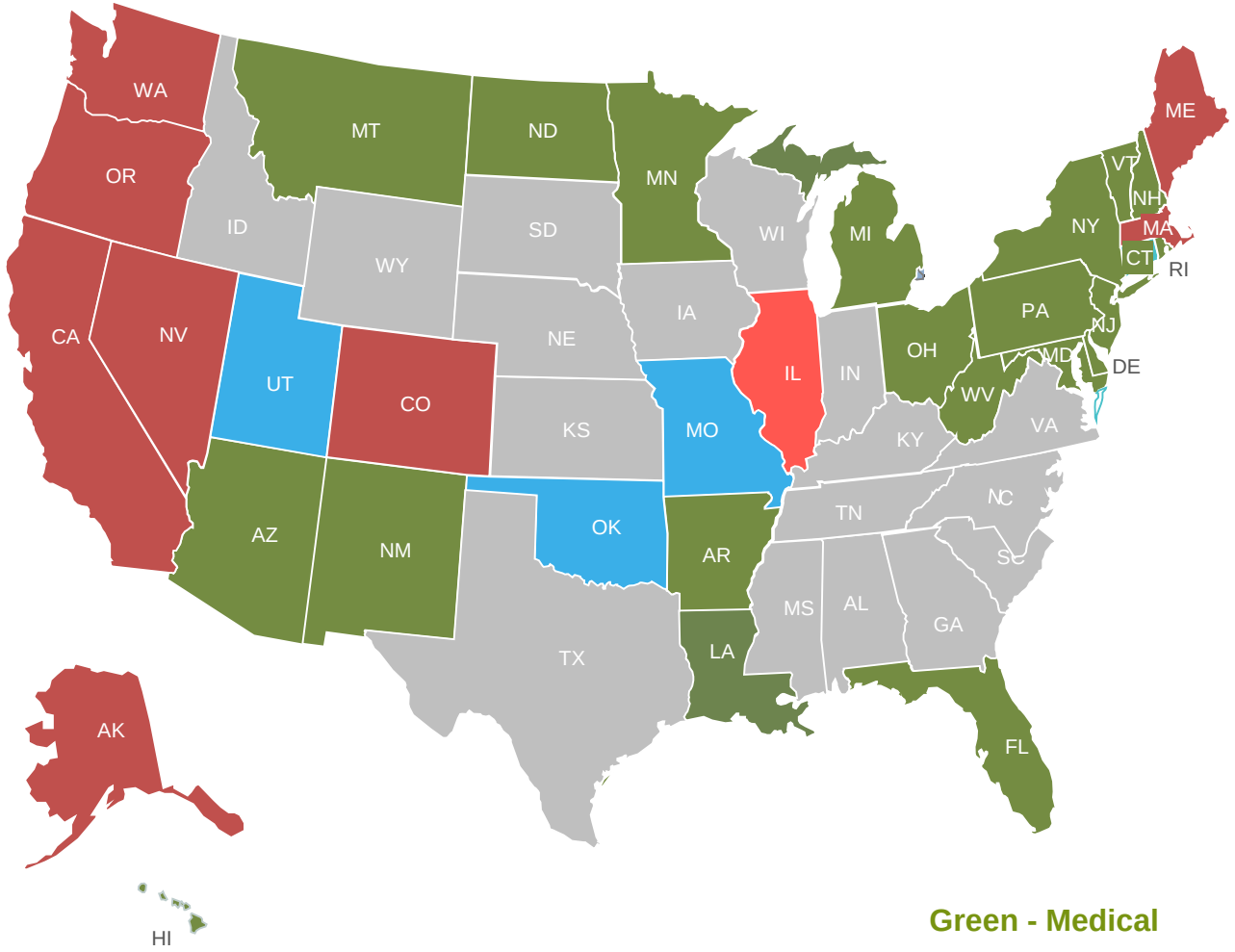
Drug Testing Update

- Positive drug tests reached a 14-year high, according to a April 2019 Quest Diagnostics report (based on 2018 drug testing results).
  - Increase in positive marijuana tests across nearly all employee testing categories, including an increase of almost 5 percent for the federally mandated, safety-sensitive workforce.
  - Decreases in the positivity rates for heroin and cocaine.
  - A sharp increase of more than 51 percent in post-accident testing rates among federally mandated safety-sensitive employees appears to be linked to the January 1, 2018 addition of four semi-synthetic opiates (hydrocodone, hydromorphone, oxycodone and oxymorphone) to the DOT drug testing panel.

Virginia Update

- No legislation that allows for the “legal” medical use or possession of cannabis
- Rather, an “affirmative defense” exists for patients who use or possess certain cannabis oils under the permission of a doctor
- If a Virginia resident can obtain a physician’s written permission to use cannabis oil for a certain condition, they *may* be afforded protection from criminal prosecution.
- Senate bill to decriminalize marijuana possession
  - Proposals to decriminalize marijuana possession died in both the House and state Senate Courts of Justice committees in the last General Assembly session.

Marijuana Laws by State



Green - Medical

Red - Recreational

33 states have a comprehensive **medical** marijuana law.

Some of these expressly prohibit discrimination against medical marijuana users.

11 jurisdictions have also legalized **recreational** marijuana: AK, CA, CO, DC, IL, OR, ME, MA, NV, VT, WA.

Marijuana – *Still* Illegal, Right…

- Marijuana is still *illegal* under federal law, but on November 20, 2019, a committee of the U.S. House of Representatives approved H.R. 3884 that would legalize marijuana and remove it from the federal Controlled Substances Act. The bill is expected to be approved by the full House, but it is unclear whether it will pass in the Senate.
- CBD (cannabidiol) is everywhere, but FDA has still only approved one prescription drug made from (CBD), a component of marijuana
- As of December 31, 2019, only *two* states (Idaho and South Dakota) have not yet legalized/decriminalized CBD products or some other form of marijuana.
- Recreational marijuana now is legal in 11 states and the District of Columbia, with Illinois passing a recreational marijuana law in 2019.

Medical Marijuana – Court trends

- New England (RI, MA, CT)
  - No preemption (*Noffsinger*).
- Arizona (*Whitmire*):
  - Urinalysis unable to support finding employee “impaired at work.”
  - The presence of metabolized THC in the Plaintiff's body was no indication of being under the influence of cannabis psychoactive effects, and therefore the employer improperly fired the medical marijuana card holder.
- Delaware (*Chance v. Kraft Heinz Foods Co.*):
  - Medical marijuana, post accident test
  - Court determined federal Controlled Substances Act (CSA) prohibits marijuana use but does not make it illegal to employ an individual who uses marijuana.
  - Employer *could* comply with the anti-discrimination requirements of the DMMA and the CSA.

Managing the Risk – ADA and Others

- In the states with anti-discrimination provisions, when analyzing accommodation requests, consider:
  - Can the applicant/employee really perform the essential functions of the job with or without a reasonable accommodation? (Consider nature of the illness; when and how frequently must he/she use medical marijuana).
    - Engaging in the “interactive dialogue” (even if accommodation of medical marijuana use is not likely to be granted).
  - Is the job “safety-sensitive”? If yes, the applicant/employee may pose a “direct threat” to the health and safety of himself/herself and/or others.
  - What is your tolerance for risk? How important is it to have one nationwide policy with regard to marijuana use?

2020: Five Issues to Monitor

2020 Issues to Monitor

1. Decision on sexual orientation and gender identity discrimination
2. Continued uncertainty regarding worker classification
3. States continue to act
   - New paid leave statutes
   - Action in Virginia
   - Non-compete reform and efforts to curb no-poach agreements
   - Continuing responses to #MeToo (carve out in agreements, criminal laws)
   - More data privacy laws

JacksonLewis

Thank you.