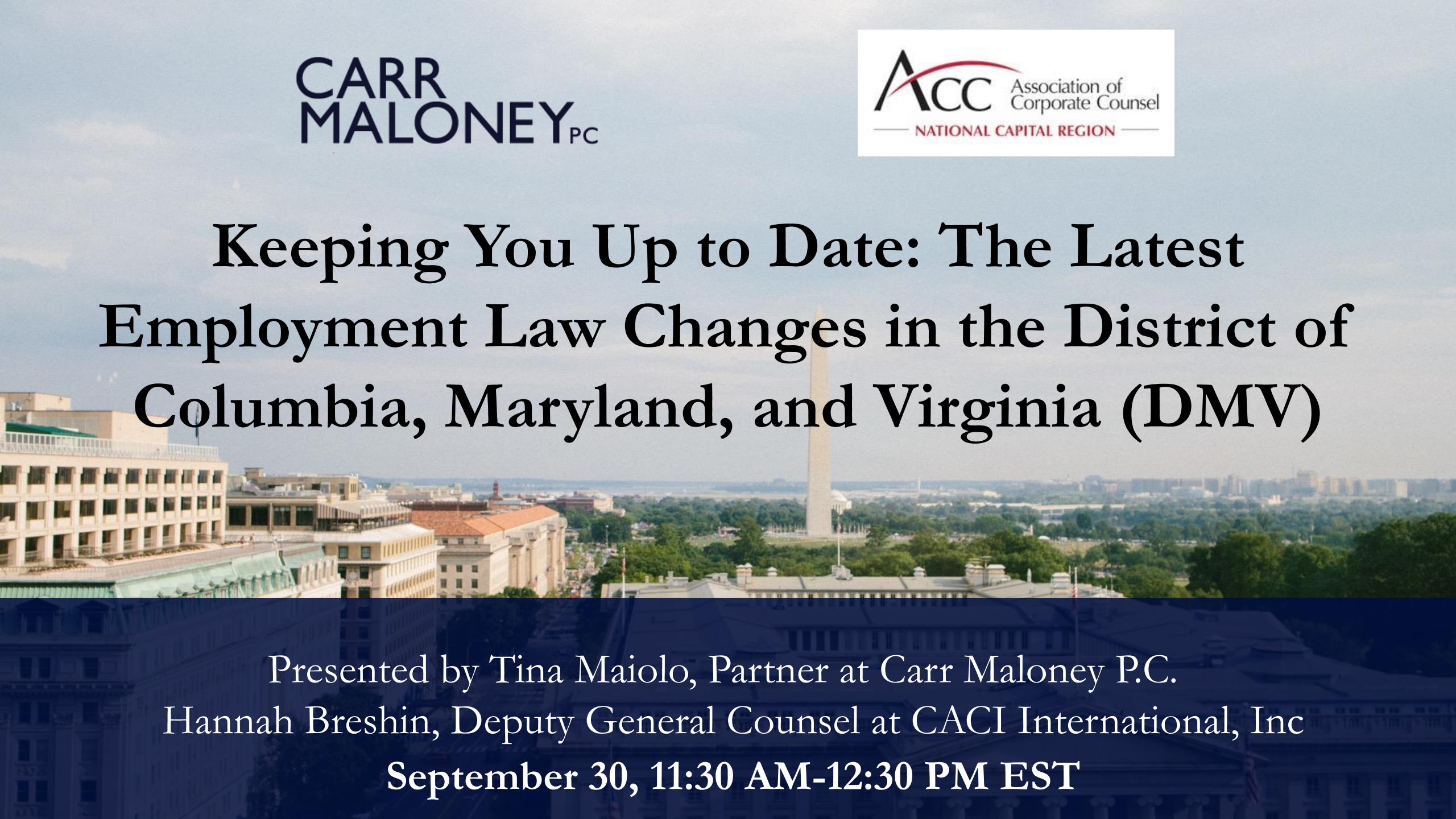

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Keeping You Up to Date: The Latest Employment Law Changes in the District of Columbia, Maryland, and Virginia (DMV)

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September 30, 11:30 AM-12:30 PM EST

Virginia Changes

Minimum Wage Increase: § 40.1-28.10.

- While Virginia adopted incremental increases to the minimum wage set to reach $15 per hour by 2026, the first step-increase was delayed due to the pandemic. Effective May 1, 2021, the minimum wage increased to $9.50 per hour and is set to increase again effective January 1, 2022.
- Then – 11.00 in 1/1/22; 12 on 1/1/23; 13.50 on 1/1/25; 15.00 on 1/1/26.
- By October 1, 2026, and annually thereafter, the Commissioner shall establish the adjusted state hourly minimum wage that shall be in effect during the 12-month period commencing on the following January 1.

The Virginia Overtime Wage Act
Virginia Code §40.1-29.2

Unlike prior Virginia law, the new law provides for a private right of action under Virginia's wage payment statute (with enhanced remedies enacted last year).

- VOWA has its own calculation for regular rate. It changes (from the FLSA) how employers calculate overtime for nonexempt salaried employees—potentially causing higher overtime premiums for those employees. Virginia employers who pay regular bonuses and incentives need to reassess whether paying any nonexempt employees by salary—as opposed to by the hour—is still a good business decision.
- Damages under VOWA are greater than under FLSA.
- State collective action lawsuits are now allowed.

The Virginia Overtime Wage Act
Virginia Code §40.1-29.2

Exemptions:

The Act was amended in August 2021 to specifically incorporate exemptions under the FLSA: 29 U.S.C. § 213(a) and 29 U.S.C. § 213(b)(10)(A).

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Calculating The Regular Rate Under VOWA
Nonexempt Hourly Employees

- Under VOWA, nonexempt hourly employees are entitled to overtime for all hours worked in excess of 40 in any given work week.
- VOWA provides that the regular rate of pay is the hourly rate of pay plus any other non-overtime wages paid or allocated for that workweek, excluding any amounts that are allowed to be excluded by the FLSA, divided by the total hours worked that week.

Calculating The Regular Rate Under VOWA
Nonexempt Salaried Employees- Significant Change

- Under VOWA, nonexempt salaried employees are entitled to overtime for all hours worked in excess of 40 in any given work week.
- To calculate the regular rate for salaried non-exempt workers, divide all wages paid by **40 hours**.
- Therefore, unlike the calculation method for nonexempt hourly workers, salaried workers always divide their wages by the fixed 40 hours to determine regular rate.
- Under the FLSA, employers are permitted to use several different methods to calculate overtime premiums for salaried nonexempt employees that resulted in the overtime rate being lower the more hours the salaried employee worked. That is no longer the case in Virginia.

Calculating The Regular Rate Under VOWA
Nonexempt Salaried Employees- Significant Change

- According to the new law, employers cannot withhold any earned compensation other than for typical wage withholdings without written and signed authorization of the employee.
- "No employer shall require any employee, except executive personnel, to sign any contract or agreement which provides for the forfeiture of the employee's wages for time worked as a condition of employment or the continuance therein, except as otherwise provided by law," according to the new law.
- This means if an employee damages property or is short in the cash drawer, the company can't simply deduct this from the employee's pay.
- Other than certain agribusinesses, employers must provide all employees certain paystub disclosures.

Available Remedies

VOWA adopts the increased pay violation remedies passed in 2020, which include:

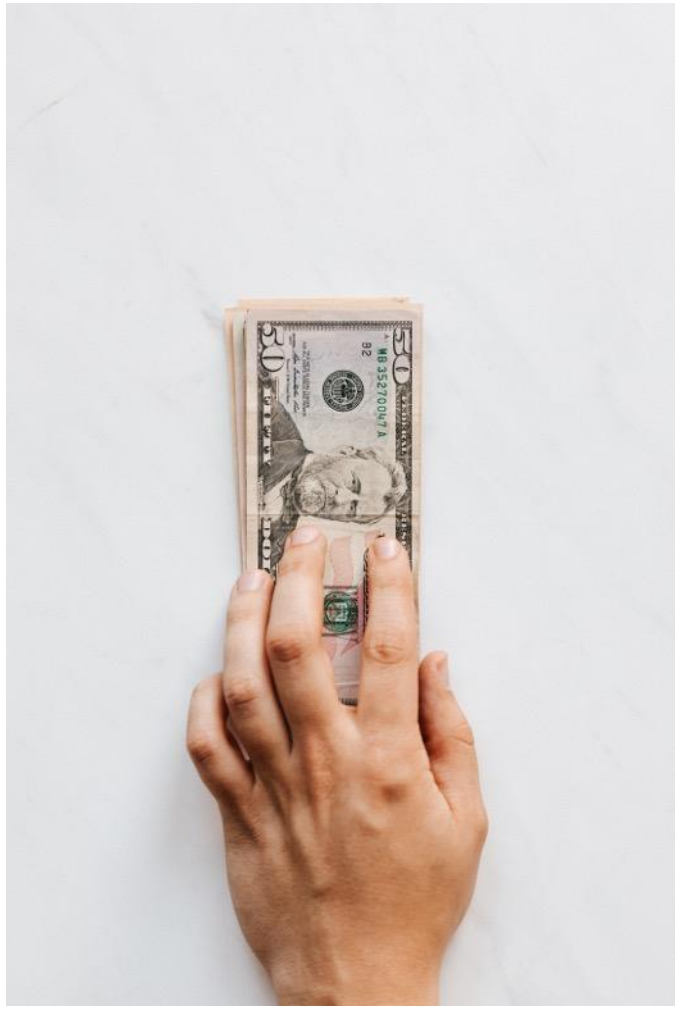
- Private cause of action (i.e., direct lawsuit by the employee).
- A three-year statute of limitations regardless of willfulness compared to the FLSA which applies a two-year statute of limitations generally and three-years only upon proof of willfulness.
- Liquidated damages (one times the wages owed) plus interest at the rate of 8% annually from the date the wages were due, whereas under the FLSA employers can present a good faith defense to liquidated damages, and interest is not a favored damage.

Available Remedies

- Treble damages for knowingly failing to comply with the Virginia payroll code, which damages are not available under the FLSA.
- Attorneys' fees (available under FLSA).
- Collective actions allowed (available under FLSA).
- Failure to properly pay wages can lead to fines, damages or jail.
- Employers can be guilty of a Class 1 misdemeanor if the value of the wage earned and not paid is less than $10,000, and if it is a second offense or the value is $10,000 or more, the employer can be guilty of a Class 6 felony.
- Businesses who violate the law also can be liable for liquidated damages, interest, and potentially a civil penalty of $1,000 per violation.

Practice Tip For VOWA

- Now, every Virginia employer must assess its pay policies under both state wage and hour law (VOWA and the Virginia Minimum Wage Act) as well as the FLSA.
- All employers must reassess employee categorizations under VOWA.



Don’t Forget 2020/19 Wage and Hour Changes

- [Minimum wage increases again in January 2022 to $11.00 per hour (currently $9.50)
  - Private cause of action for failure to pay wages
  - Wage retaliation claim
  - Pay Transparency (sharing of wages ok)
  - Misclassification of Independent Contractors
- [2019] Written pay statements required

General Contractor Safe Harbor

A Virginia statute that went into effect in 2020 provides an employee the mechanism to assert that a general contractor is jointly and severally liable if their subcontractor fails to pay wages. Va. Code § 11-4.6

- As of July 2021, GCs may request a payment certification from subcontractors. This certification is a "safe harbor" to protect the GCs from joint liability for unpaid wages.
- GCs need to get a certificate of payment from subcontractors each pay period to protect against claims for the payment of wage claims.
- GC's subcontracts should include a provision mandating this certificate for every pay period.

Continued Expansion of the Virginia Human Rights Act

Governor Northam signed H.B. 1848, which adds "disability" to the list of characteristics protected from discrimination under the Virginia Human Rights Act (VHRA). This addition comes after the VHRA was expanded last year to cover most Virginia employers. Notably, the new law requires employers to post information concerning an employee's rights to reasonable accommodation for disabilities in a conspicuous place and include the same in any employee handbook. This information must also be provided to new employees at hire and to any employee within 10 days of the employee providing notice of a disability.

Continued Expansion of the Virginia Human Rights Act

- The Virginia Human Rights Act now requires Virginia employers with more than five employees to provide reasonable accommodations to employees with physical or mental disabilities.

Additionally, Governor Northam also signed H.B. 1864, H.B. 2032, and S.B. 1310, which extend coverage of the VHRA, wage payment laws, and workplace safety protections to certain domestic workers. Those laws will take effect July 1, 2021.

Notice of Rights to Accommodation Under the VHRA

Employers with **more than 5** employees are required to provide **several** different types of notice to employees:

Notice of Rights to All Employees Upon Hire

- Provide new employees with a copy of their disability accommodation rights upon hire.

Posters

- Post notice of disability accommodation rights.
- The Virginia Division of Human Rights presumably will issue another poster for general disability rights.

Handbook Language

- Place notice of accommodation rights in company handbook.

Provide Another Copy of Accommodation Rights Upon Notice of Disability

- Include notice of accommodation rights within **10 days** of the employee providing notice that such employee has a disability.
- Employers should be cautious about not "regarding" employees as having a disability through this process.

New Office of Civil Rights within Office of the Attorney General

- In January 2021, Attorney General Mark Herring created the Office of Civil Rights within the Office of the Attorney General
- The Attorney General has indicated that the office's key areas of focus are (i) conducting pattern or practice investigations to identify and eliminate unconstitutional and illegal policing; (ii) combating discrimination in employment and places of public accommodation; (iii) combating housing discrimination; (iv) combating LGBTQ+ and gender-based discrimination; and (v) protecting the rights of expectant and new mothers.

Military Status

The VHRA removed the term status "as a veteran" and changed it to "military" status, with a full definition provided for military status which includes dependents. Handbooks that contain EEO statements based on "veteran" status need to be updated to include "military" status.

Legalization of Recreational Marijuana

Additionally, Governor Northam signed H.B. 1862, which, subject to certain exceptions, will prohibit employers from discharging, disciplining, or discriminating against an employee for the lawful use of cannabis oil pursuant to a valid written certification issued by a practitioner for treatment under Va. Code § 54.1-3408.3.

No Discrimination, Discipline or Discharge as of July 1, 2021

Va. § Code 40.1-27.4

- As of July 1, employers may not "discharge, discipline, or discriminate against an employee for the employee's lawful use of cannabis oil pursuant to a valid written certification issued by a practitioner… pursuant to [the medicinal cannabis certification process set forth in Va. Code § 54.1-3408.3.]"
- Employers may still take adverse action if an employee, during work hours: (i) possesses cannabis oil, or (ii) is impaired.
- This means that a positive drug test for applicants or current employees is not, in and of itself, grounds for failure to hire, discipline, or termination.

Exceptions

- Employers do not have to take any action that will cause them to violate federal law or lose a federal contract. Marijuana remains illegal under federal law, and federal contracts may require drug tests and prohibit workers who test positive from working on a project. Note that there may be some similar state law requirements, but the statute is silent as to state law conflicts.
  - Certain "defense" contractors do not have to hire applicants who test positive for THC.

Exceptions

- Federal Drug Free Workplace Act requires federal contractors to make a "good faith effort" to maintain a drug free workplace. But note that the Act does not require testing. Some employers test as part of the "good faith effort." However, at least one court has stated that the Act does not require testing, nor does it prohibit federal contractors from employing someone who uses illegal drugs outside of the workplace, much less an employee who uses medical marijuana outside the workplace in accordance with a program approved by state law. The court noted that a zero tolerance drug testing policy designed to maintain a drug free work environment does not mean that the policy was actually required by federal law or required to obtain federal funding.
- Employers may prohibit the use of medical marijuana if the job requires use of a CDL license, vehicles, or heavy equipment if such use is governed by DOT or other federal laws.

What does it mean for employers?

- Employers need to decide whether drug testing for THC still makes sense. Employers need to consider the following questions:
  - What is the justification for testing applicants for THC when medical cannabis and certain marijuana possession/usage is legal in Virginia?
  - Is it important to continue to test employees on a random basis for the presence of THC?
  - Is it important to test employees for reasonable suspicion or THC post-accident? Consider whether it is required for workers' compensation premium reduction. Consider whether you have sufficient evidence of impairment?

What does it mean for employers?

- Is it important to test employees for reasonable suspicion or THC post-accident? Consider whether it is required for workers' compensation premium reduction. Consider whether you have sufficient evidence of impairment?

- If any applicant/employee tests positive on a drug test, employers must determine if the employee has a valid cannabis certification.
- Employers must revise their substance abuse, drug testing, and disability accommodation process policies to reflect the prohibition against firing employees with a medicinal cannabis certification.
- Employers need to consider developing a process for determining "impairment," including sending supervisors to training to perform physical assessments.

Asking Marijuana Conviction on Job Applications

- Employers are still banned from inquiring about arrests, criminal charges or convictions for simple possession (1 oz. or less without intent to distribute) of marijuana on job applications.
- Employers may not use a third-party to inquire about such arrests/convictions.

District of Columbia Changes

Minimum Wage Increase

- **Minimum Wage Increase**: People who work in D.C. for minimum wage will get a small raise starting July 1. The minimum wage increases from $15 per hour to $15.20 per hour, regardless of the size of the employer. The base minimum wage for tipped employees will increase by a nickel, from $5 per hour to $5.05 per hour.

Coronavirus Support Emergency Act (CSEA)

- On May 27, 2020, the Mayor signed the Coronavirus Support Emergency Act (CSEA), D.C. Act 23-326, which replaced all previous Coronavirus-related legislation and in part temporarily amended the DCFMLA to create a new COVID-19 job-protected leave. **In addition to other subsequent legislation, on July 24, 2021, the Mayor signed emergency legislation, D.C. Act 24-125, extending COVID-19 leave through November 5, 2021**

Key Provisions of the CSEA

1. **COVID-19 Leave (D.C. Code § 32-502.01):** From March 11, 2020, through November 5, 2021, an employee who has worked for 30 days for an employer of any size may use up to 16 weeks of "COVID-19" Leave for one of the following reasons: Care for Self, Family or Household Member or Childcare Closure. The right to COVID-19 Leave terminates when the public health emergency has ended, even if an employee has not exhausted the 16-week entitlement.

Key Provisions of the CSEA

2. **Certification (D.C. Code § 32-502.01(c)):** For COVID-19 Leave, an employer may request certification of the need for leave, including a signed, dated letter from a healthcare provider, including a probable duration, or a statement by a childcare provider or a printed statement from the childcare provider's website.
3. **Penalties:** Violation of the COVID-19 Leave provision (D.C. Code § 32-502.01) could result in a civil penalty of $1000 per offense in addition to any damages outlined in D.C. Code § 32-509.

Key Provisions of the CSEA

4. **Effective Dates:** CSEA was signed by the Mayor on May 27, 2020, with retroactive coverage from March 11, 2020. The law is, therefore, **effective as of March 11, 2020, and is currently effective through November 5, 2021.**
5. **No Effect on Traditional Family and Medical Leave:** CSEA does not change the definitions of employer and employee or eligibility for traditional family and medical leave entitlements, i.e., the employee must have worked for one year without a break in service and at least 1,000 hours in the preceding twelve months, and only employers with 20 or more employees are covered. Guidance on traditional family and medical leave can be found at: ohr.dc.gov/page/OHRGuidance.

Washington, D.C. Has Passed a Sweeping Ban on Non-Compete Agreements

Under D.C. Act 23-563, employers are prohibited from including non-compete provisions in any employment contracts and policies, with few exceptions. Additionally, the Act contains certain notice and anti-retaliation provisions. Importantly, it only applies prospectively; it *does not* affect existing non-compete agreements.

Washington, D.C. Has Passed a Sweeping Ban on Non-Compete Agreements

- Employers cannot require or request that any D.C. employee sign an agreement containing a non-compete provision (e.g., a provision prohibiting an employee from being employed or providing services elsewhere or operating the employee's own business).
- Employers cannot have a policy prohibiting employees from engaging in outside employment/providing services to others for pay, or from operating their own business (e.g., employers cannot have policies or agreements prohibiting moonlighting).

Washington, D.C. Has Passed a Sweeping Ban on Non-Compete Agreements

- Employers cannot retaliate against employees who refuse to agree to or do not comply with prohibited provisions and/or policies, or who raise questions or complaints about agreements/policies they believe violate the law.
- Employers must provide specified notice language to current employees within 90 days of the law's effective date, to new employees within 7 days of hire, and within 14 days upon request by an employee. (The required language is as follows: "No employer operating in the District of Columbia may request or require any employee working in the District of Columbia to agree to a non-compete policy or agreement, in accordance with the Ban on Non-Compete Agreements Amendment Act of 2020.")

Washington, D.C. Has Passed a Sweeping Ban on Non-Compete Agreements

- The restrictions apply to all employees except volunteers for educational, charitable, religious or non-profit organizations, babysitters and certain officials of religious organizations, as well as "medical specialists" (licensed physicians who have completed a residency and earn at least $250,000/year).
- Additionally, the law's restrictions do not apply to non-competes entered into in connection with the sale of a business, confidentiality/non-disclosure provisions, or non-solicitation provisions.

Washington, D.C. Has Passed a Sweeping Ban on Non-Compete Agreements

- Importantly, inclusion of a prohibited non-compete provision in an otherwise valid agreement will not invalidate the entire agreement; just the non-compete provision will be void and unenforceable. However, violations of the Act can result in civil liability and fines.

Practice Tips

1. Employers with employees in D.C. should (1) review their handbooks/policies and ensure any policies prohibiting moonlighting during employment are revised so as to not apply to employees in D.C., (2) ensure new agreements with employees in D.C. comply with the Act (e.g., do not contain the prohibited non-compete provisions) and (3) prepare and provide the required notice to employees and ensure new employees receive the notice upon hire.

Practice Tips

2. D.C. employees may take up to two hours of ***paid time off to vote***; employers may specify when the employee can take the leave, including by requiring the employee take the leave during any early voting period. Employees must notify the employer of the need for leave at least 48 hours in advance.

Practice Tips

3. D.C. has instituted new ***anti-harassment training, notice, and reporting requirements for employers of tipped employees***.

Practice Tips

4. D.C.'s ***Transportation Benefits Equity Amendment Act of 2020*** requires employers who offer a parking benefit to employees (with certain exceptions) to (a) offer those employees a Clean air Transportation Fringe Benefit in an amount equal to or more than the market value of the parking benefit, (b) pay a Clean Air Compliance fee of $100 per month for each employee who is offered parking benefits, (c) stop offering parking benefits, or (d) develop a compliant transportation demand management plan. The Act also contains a reporting requirement.

Maryland Changes

Minimum Wage- Fight for Fifteen (HB166/SB280)

For employers with 15 or more employees, the schedule of hourly rate increases is as follows:

- January 1, 2020: $11.00
- January 1, 2021: $11.60
- January 1, 2022: $12.20

Minimum Wage- Fight for Fifteen (HB166/SB280)

The law also permits an employer to pay a training wage at 85% of the State minimum wage rate for employees under the age of 18 years. The law does not change the required tipped wage for tipped employees (currently $3.63 per hour, with the employer able to take a tip credit for the difference between the tipped wage and the required minimum wage). The law does, however, provide that the Commissioner of Labor and Industry will adopt regulations to require employers to provide tipped employees with a written or electronic wage statement for each pay period showing the employee's effective hourly tip rate.

Leave with Pay- Bereavement Leave
HB 56/SB 473 (Chapters 573 and 574)- effective 10/1/21

Maryland's Flexible Leave Act, which applies to employers of 15 or more employees, permits employees to use any employer-provided "leave with pay" to cover an absence occasioned by the illness of a child, spouse or parent. The new law expands the Flexible Leave Act by allowing employees to also use their earned paid leave for bereavement following the death of a child, spouse or parent. Significantly, while most employers limit paid bereavement leave to a week or less, there is no limit on the amount of an employee's accrued paid leave that can be used for bereavement purposes under this law.

Leave with Pay- Bereavement Leave
HB 56/SB 473 (Chapters 573 and 574)- effective 10/1/21

Employers are prohibited from retaliating against an employee who exercises this right to bereavement leave or against an employee who files a complaint or testifies against or assists in an action brought against an employer for a violation of this statute.

Leave with Pay- Bereavement Leave
HB 56/SB 473 (Chapters 573 and 574)- effective 10/1/21

Practice Pointer: Employers that currently provide paid bereavement leave should examine their practices in light of this law. In particular, employers must decide whether to continue offering the separate paid bereavement benefit in light of the law. In addition, if the employer's existing policy allows paid leave following the death of persons other than a parent, spouse or child, the employer must consider whether to allow the expanded leave rights to apply to such persons.

Employment Discrimination- Time for Filing Complaints

HB 290/SB 455(Chapters 201 and 202)- effective 10/1/21

This law increases the time that an individual can file a complaint with the Maryland Commission on Civil Rights (MCCR) alleging any unlawful employment practices **other than harassment**. Currently, employees have only six months to file a complaint with the MCCR. Under the amended law, employees will have up to 300 days to file a complaint. Employees have up to 300 days to file a complaint with the U.S. Equal Employment Opportunity Commission and most claims filed with one agency are cross-filed with the other. The amendment will bring the filing deadline for the state and federal agencies in line with each other.

Employment Discrimination- Time for Filing Complaints

HB 290/SB 455(Chapters 201 and 202)- effective 10/1/21

In 2019, in response to the national #MeToo movement and complaints of harassment within the Maryland legislature, the General Assembly extended the time to file complaints alleging harassment from six months to two years.

Employment Discrimination- Time for Filing Complaints

HB 290/SB 455(Chapters 201 and 202)- effective 10/1/21

Practice Pointer: Employers should ensure that they are maintaining personnel records, including complaints of discrimination and any investigations of such complaints, for at least three years. These documents are essential to any successful defense of an employer's conduct in front of the MCCR. Human resource professional and managers should review their company's record retention procedures to ensure vital documents are maintained.

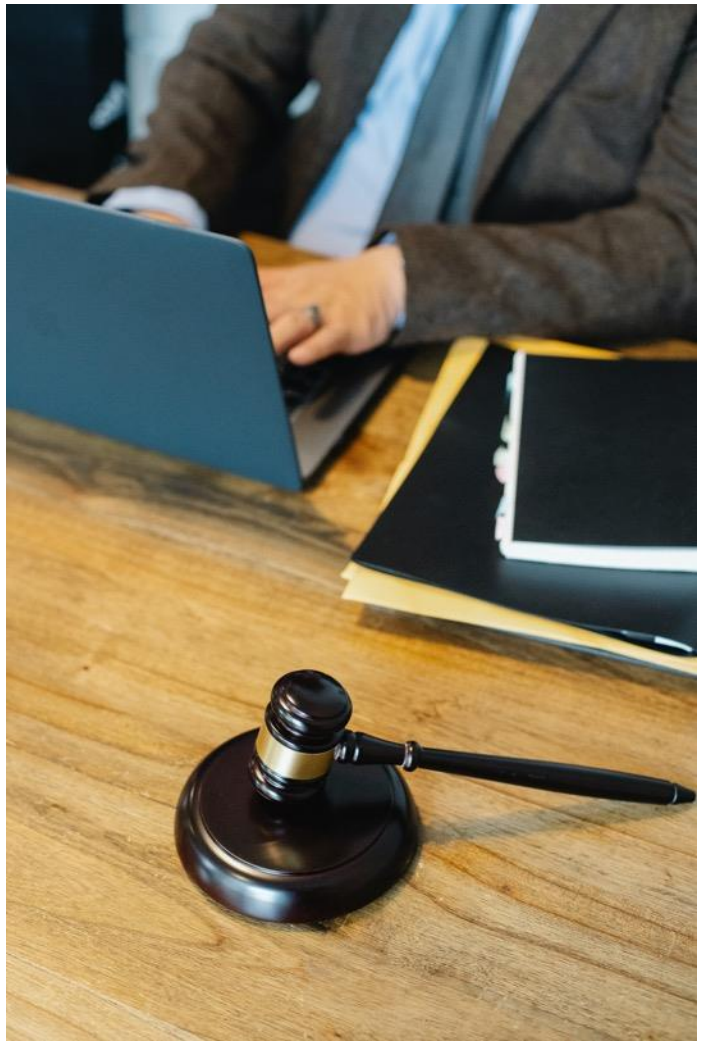
Don’t Forget Maryland’s “mini-WARN” Law

- As of October 1, 2020, employers are required to give advance notice of significant layoffs.

- The provisions included in the Economic Stabilization Act **(S.B. 780)** make notice requirements mandatory and much tougher on employers.

Coverage

- The requirements apply to employers with *50 or more employees* operating industrial, commercial, or business enterprises in the state.
- Similar to the federal WARN Act but with some differences, Maryland's mini-WARN law excludes for the purposes of determining "employer" coverage and "reduction in operations" employees who (1) average fewer than 20 hours per week or (2) have worked for the employer for less than 6 of the preceding 12 months.



Reduction in Operations

Covered employers must provide 60 days' advance written notice before initiating a "reduction in operations." Maryland's mini-WARN law defines a "reduction in operations" as:

- "the relocation of a part of an employer's operation from one workplace to another existing or proposed site"; or
- the shutdown of either:
  - a workplace; or
  - a portion of the operations of a workplace that reduces the number of employees by the greater of (1) at least 25 percent or (2) at least 15 employees, over any 3-month period.

Reduction in Operations

Maryland's new mandatory law thus has a lower threshold to trigger notice requirements than the federal WARN Act (i.e., under Maryland mini-WARN law, a reduction of at least 25 percent or 15 employees, whichever is greater, versus 33 percent and 50 employees under federal law).

Maryland's mini-WARN law also captures more employers within its scope: the federal WARN Act covers employers with 100 or more employees; Maryland's mini-WARN law covers employers with only 50 employees. Additionally, there does not appear to be either a minimum geographic distance requirement or a minimum number of reduced employees, to trigger the "relocation" prong of Maryland's mini-WARN law.

Notice Requirements

Written notice must be given to:

- all employees at the workplace subject to the reduction;
- any exclusive representative or bargaining agency (e.g., a union) of the affected employees;
- state agencies (such as the Maryland Department of Labor's Division of Workforce Development and Adult Learning's Dislocated Worker Unit); and
- all elected local officials in the area of the affected workplace.

Notice Requirements

The notice must include:

- the name and address of the workplace where the reduction will occur;
- a supervisor's contact information (name, telephone number, and email address) for those seeking further information;
- a statement explaining whether the reduction is permanent or temporary and whether the workplace is expected to shut down; and
- the date when the reduction in operations is expected to begin.

Civil Penalties

Maryland's mini-WARN law includes a civil penalty of up to $10,000 per day, to be assessed by the Maryland Secretary of Labor, for failure to provide the required notices to all required parties.

If you have any additional questions, please contact Tina at the contact information below

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