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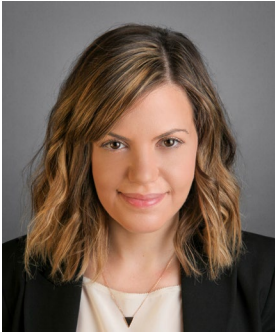
FEBRUARY 13, 2024

Employment Law CLE on the latest legal developments changing the workplace.

Covering restrictive covenant changes, wage & hour developments, DOL rules, paid leave laws, wage transparency and AI.



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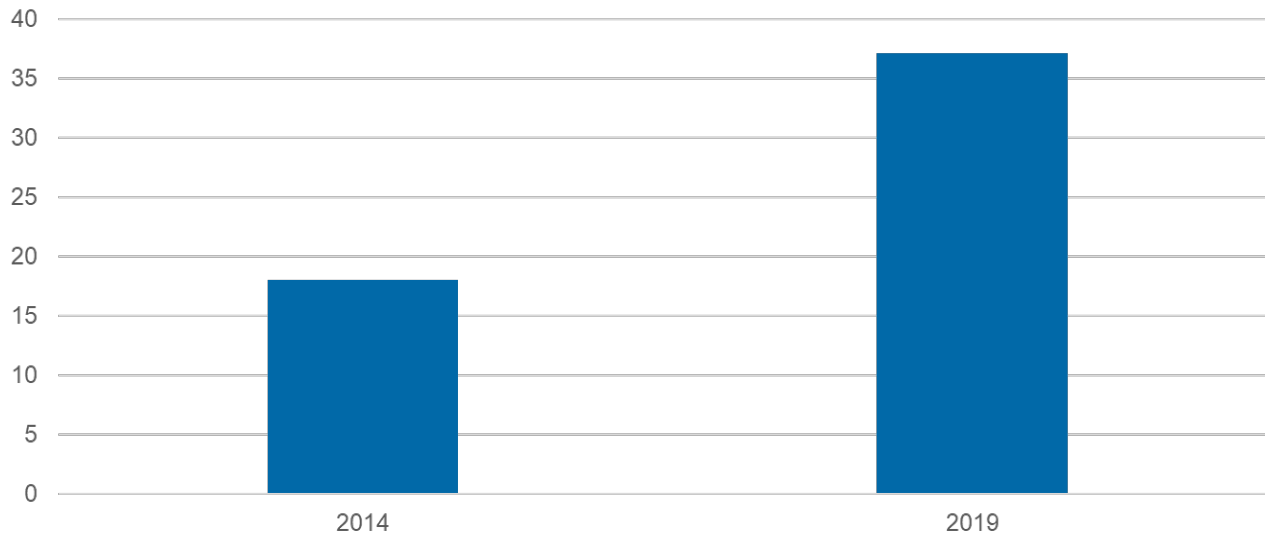
# Employment Law Update CLE

## Overview

- **Restrictive Covenant Developments**
- **Wage and Hour Update**
- **New Department of Labor Independent Contractor Rules**
- **New Pay Transparency Laws**
- **AI and Employees: A Changing Landscape**
- **Paid Leave Law Update**

# Restrictive Covenant Developments: Increased Use—Federal Government Takes Notice

Estimated Percentage of Private Sector Employees Bound by Non-Competes



## President Biden's Executive Order on Promoting Competition in the American Economy

### Proposed Federal Legislation

- Workforce Mobility Act
- Freedom to Compete Act

### NLRB

- On May 30, 2023, NLRB General Counsel Jennifer Abruzzo released a memo stating that overbroad non-compete agreements are unlawful due to chilling an employee's Section 7 rights under the NLRA.
- GC Abruzzo identified that some noncompete agreements may be lawful when they bind only individuals' managerial or ownership interests in a competing business, or under other specific circumstances.

### FTC

- Proposed rule on January 5, 2023
- Timeline: Public comment period extended to April 2023; FTC likely to vote on Proposed Rule by April 2024 (would go into effect 180 days later). Legal challenges to FTC authority are already signaled and are likely, which may affect the timeframe for compliance.



# Restrictive Covenant Developments: Trends in Use

## Employers are Responding to the Federal and State Action Against Noncompetes by:

- **Limiting** their use to highly skilled and/or highly compensated workers.
- **Specifying** the types of trade secrets that are protected under the noncompete agreement.
- **Identifying** the competitors that are barred under a noncompete.
- **Seeking** enforcement selectively.
- **Choosing** governing state law that is more friendly to noncompete agreements.

—Notably, California's recently passed AB1076 makes such efforts ineffective for CA employees, even when the employer only moved to CA after the fact.



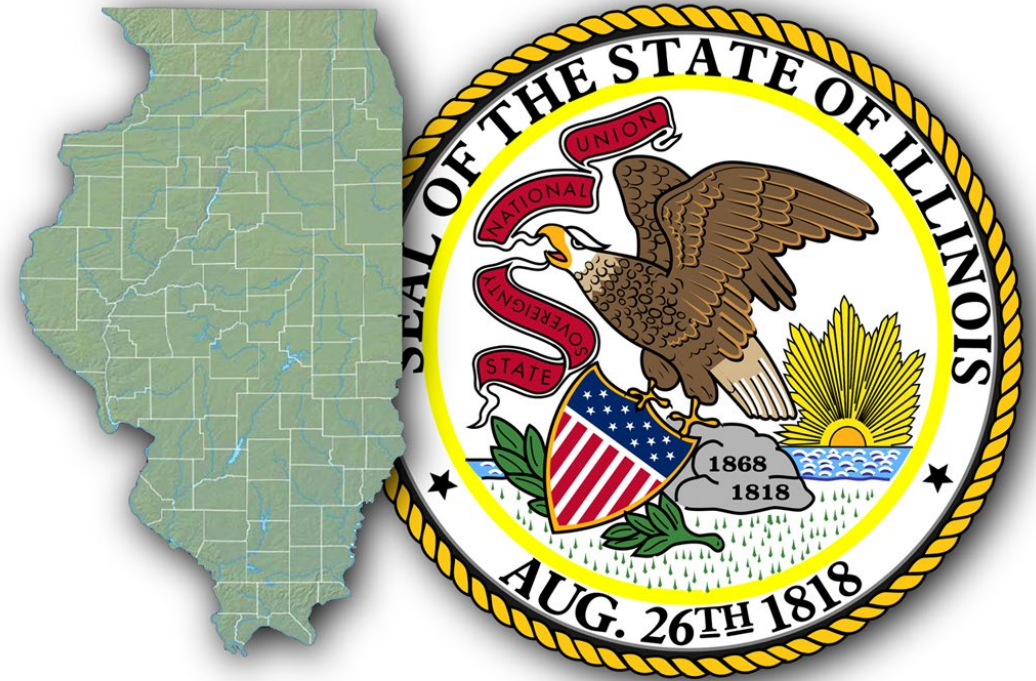
# Restrictive Covenant Developments: Illinois Thresholds

## Income Thresholds Under the Illinois Freedom to Work Act (IFWA):

- Over \$75,000 for noncompete.\*
- Over \$45,000 for non-solicits.\*

\*Income threshold are scheduled for periodic increases, with the next increase in 2027 and thereafter every 5 years.

The IFWA also bars noncompetes for most unionized workers and workers within the construction industry.



# Restrictive Covenant Developments: Illinois Requirements

## **A Valid Noncompete Under the IFWA Must:**

- Provide adequate consideration;
- Be made pursuant to an employment relationship;
- Be no greater than required to protect a legitimate business interest;
- Not impose an undue hardship;
- Not be injurious to the public;
- Advise the employee to consult an attorney; and
- Provide at least 14 days to review the agreement or be provided at least 14 days prior to commencing employment.



# Restrictive Covenant Developments: Consideration & Risks

## Adequate Consideration Includes:

- Two years of employment after signing (although this is not a bright line rule);
- “a period of employment plus additional professional or financial benefits”; or
- “merely professional or financial benefits adequate by themselves.”

## Penalties Include:

- Employees who prevail in an action filed by the employer are entitled to recover all costs and reasonable attorney’s fees.
- The Illinois AG may also initiate or intervene in a civil action to obtain “appropriate relief.”
- The Illinois AG may also request a civil penalty not to exceed \$5,000 for each initial violation and not to exceed \$10,000 for each repeat violation.

# Wage & Hour Update: A Look Into 2023 Numbers

- Plaintiffs filed roughly 5,700 FLSA lawsuits in 2023—a slight decrease from the prior year.
- FLSA-based Motions for Class Certification received consideration more often than such motions in any other substantive area.
- Motions for Conditional Class Certification in FLSA matters had **a success rate of 75%**.
  - (125 of 167 granted; 42 of 167 denied)
- Motions for Decertification in FLSA matters had **a 44% success rate**, however, indicating that closer scrutiny of the underlying facts can yield benefits for defendants fighting certification.
  - (8 of 18 granted; 10 of 18 denied)

# Wage & Hour Update: Top 10 Settlements of 2023

The Top Ten most lucrative Wage and Hour class and collective action settlements totaled **\$742.55 million (top 10 total was \$574.55 million in 2022)**, including:

**\$185 million:** *Senne, et al. v. Kansas City Royals Baseball Corp.*, (N.D. Cal. Mar. 29, 2023) (final settlement approval granted in a class action for claims of failure to pay minimum wage and unpaid OT).

**\$155 million:** *California Correctional Employees Wage & Hour Cases*, (Cal. Super. Ct. Oct. 20, 2023) (final settlement approval granted for class action overtime claims involving over 10,000 California correctional system supervisors).

**\$105 million:** *Ludlow, et. Al v. Flowers Foods Inc.*, (S.D. Cal. Nov. 29, 2023) (preliminary settlement approval granted in Ind. Contractor misclassification case).

**\$72.5 million:** *Utne, et. Al v. Home Depot USA Inc.*, (N.D. Cal. July 18, 2023) (preliminary settlement approval granted in class action covering unpaid off-the-clock work).

# Wage & Hour Update: Class Certification Notices

## A New, Stricter Standard for Issuing Class Certification Notices?

### ***Clark v. A&L Homecare & Training Ctr., LLC*, (6th Cir. 2023).**

Abandons the *Lusardi* framework for conditional certification of class actions, which considers:

At the outset, whether a “modest factual showing” existed to show similar potential plaintiffs; and

Following completion of discovery, whether opt-in plaintiffs actually qualify as parties due to substantial similarity.

- *A&L Homecare* retains the two-step framework but exchanges the former “modest factual showing” standard under *Lusardi* for a “**strong likelihood**” standard.
- Named plaintiffs in the Sixth Circuit must now show that putative class action members are strongly likely to be “**in fact similarly situated**” when determining class certification notice recipients.
- *A&L Homecare* follows the Fifth Circuit’s abandonment of *Lusardi* for a one-step framework in *Swales v. KLLM Transport Services, L.L.C.*, (5th Cir. 2021).
- The one-step *Swales* framework was recently adopted by a district court in the Fourth Circuit in *Matthews v. USA Today Sports Media Group, LLC, et al.*, (E.D. Va. Apr. 14, 2023).

# Wage & Hour Update: Arbitration Developments

## And Strengthening of Arbitration Clauses?

- *A&L Homecare* not only changes the requirements for certification notices but also strengthens the use of arbitration clauses as a tool to prevent mass actions.
- Despite a 2-1 split on the issue of the proper preliminary standard for notice issuance, all three judges agreed that district courts should consider the existence of signed arbitration agreements when making notice determinations.
- The issuance of class certification notices to employees who have previously signed arbitration agreements has greatly contributed to the tactic of mass arbitration filings.
- The Sixth Circuit's directive to consider mandatory arbitration at the notice determination stage follows the Fifth Circuit's decision in *In re JPMorgan Chase & Co.* (5th Cir. 2019) and the Seventh Circuit's decision in *Bigger v. Facebook, Inc.* (7th Cir. 2020).
- *A&L Homecare* is unique, however, in placing the burden of showing similarity vis-à-vis arbitration agreements on the plaintiff.



# Wage & Hour Update: Compensable Time

## U.S. DOL Focus on Telework and Off-the-Clock Violations

- Short breaks by teleworkers of 20 minutes or less must be counted as compensable time no matter its location or its true purpose, including breaks for childcare, pet care, or home care duties.
- Longer breaks “**during which an employee is completely relieved from duty**” are not presumed compensable, although repeated work-related interruptions can make a longer break compensable.
- It is up to employers to “**exercise reasonable diligence**” to determine noncompliance with reporting procedures.
- DOL investigations into off-the-clock work have risen since release of the telework guidance.
- For worksite size determination purposes, **the size of a worksite is the size of the site a teleworker reports to or receives assignments from.**

# Wage & Hour Update: Changes to the Salary Basis Test

- In *Helix Energy Sols. Grp., Inc. v. Hewitt*, the Supreme Court held that flat day rate pay does not constitute a salary under the Salary Basis Test. 598 U.S. 39 (2023).
- An oil rig worker’s high daily wage, which amounted to over \$200,000 a year, was thus still entitled to overtime.
- Looking to the text of DOL FLSA regulations, Justice Kagan found that the pay structure, which was based on number of days worked during a pay period, did not constitute payment “on a salary basis.”
- One argument raised for the first time on appeal, and identified in Justice Kavanaugh’s dissent, may provide a path forward for employers.

That argument raised the position that the DOL’s regulations requiring “salary basis” payment for exemption under the FLSA may be inconsistent with the statutory exemptions.

# Wage & Hour Update: Proposed FLSA Exemption Rule

- On December 6, 2023, the Biden administration released its Fall 2023 Unified Agenda of Regulatory and Deregulatory Actions, which announced April 2024 as the release date for the DOL’s proposed FLSA exemption rules.
- Minimum salary for exempt white-collar employees would increase from \$684/week (\$35,568 per year) to \$1,059/week (\$55,068 per year).
- Threshold for “highly compensated employee” exemption would rise from \$103,432 per year to \$143,988 per year.
- The DOL seeks to automatically update these earning thresholds every three years to “accurately reflect current economic conditions.” To be pegged at the 35<sup>th</sup> percentile—accordingly, the final salary floors may actually be higher.

# Wage & Hour Update: Proposed FLSA Exemption Rule *cont.*

- The proposed rule does not revise the duties tests for any of the white-collar exemptions.
- The DOL estimates an additional ~3.4 million workers will become overtime eligible under the proposed rule.
- The comment period on the proposed changes closed November 7, 2023. There were more than 33,000 submissions.
- The effective date would likely be 60 days after publication. Legal challenges are expected.

## Criticism of the Proposed Rule Include :

- Disproportionate impact on employers in certain areas of the country and in certain industries.
- Harms part-time employees.
- Unjustified limits on the amount and type of compensation that can be credited towards the salary thresholds.

# DOL Independent Contractor Rule: Final Rule

New final rule issued on January 9, 2024, returning the DOL's independent contractor analysis to a “economic realities” test.

- **The “economic realities” test considers:**
  - Opportunities for profit or loss;
  - Relative investments by the worker and the potential employer;
  - Degree of permanence of the work relationship;
  - Nature and degree of control;
  - Extent to which work performed is integral to employer's business; and
  - The skill and initiative required for the work.
- “Totality-of-the-circumstances” approach to whether the contractor depends on the potential employer for continued employment/income or is operating an independent business.
- The Final Rule does away with the prior Trump administration standard, which focused on “core factors” of control and opportunity for profit or loss.



# DOL Independent Contractor Rule: Proposed v. Final Rule

## The Final Rule differs from the Proposed Rule by clarifying that:

- **Profit/Loss Opportunity:** “[J]obs when paid a fixed rate per hour or per job, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor.”
- **Degree of Permanence:** Impermanence is not necessarily suggestive of independent contractor status “[w]here a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ.”
- **Control:** Compliance with laws or regulations does not necessarily constitute sufficient control unless “[a]ctions taken by the potential employer . . . go beyond compliance with a specific, applicable Federal, State, Tribal, or local law or regulation and instead serve the potential employer’s own compliance methods, safety, quality control, or contractual or customer service standards.”
- **Investments:** Relative investment of potential employer and contractor should be considered not only quantitatively but qualitatively and “should focus on whether the worker is making similar types of investments as the employer (albeit on a smaller scale) that would suggest that the worker is operating independently.”
- **Skill/Initiative:** Specialized skill is not required for independent contractor finding—rather, the question is whether a worker uses their skills in connection with business-like initiatives.

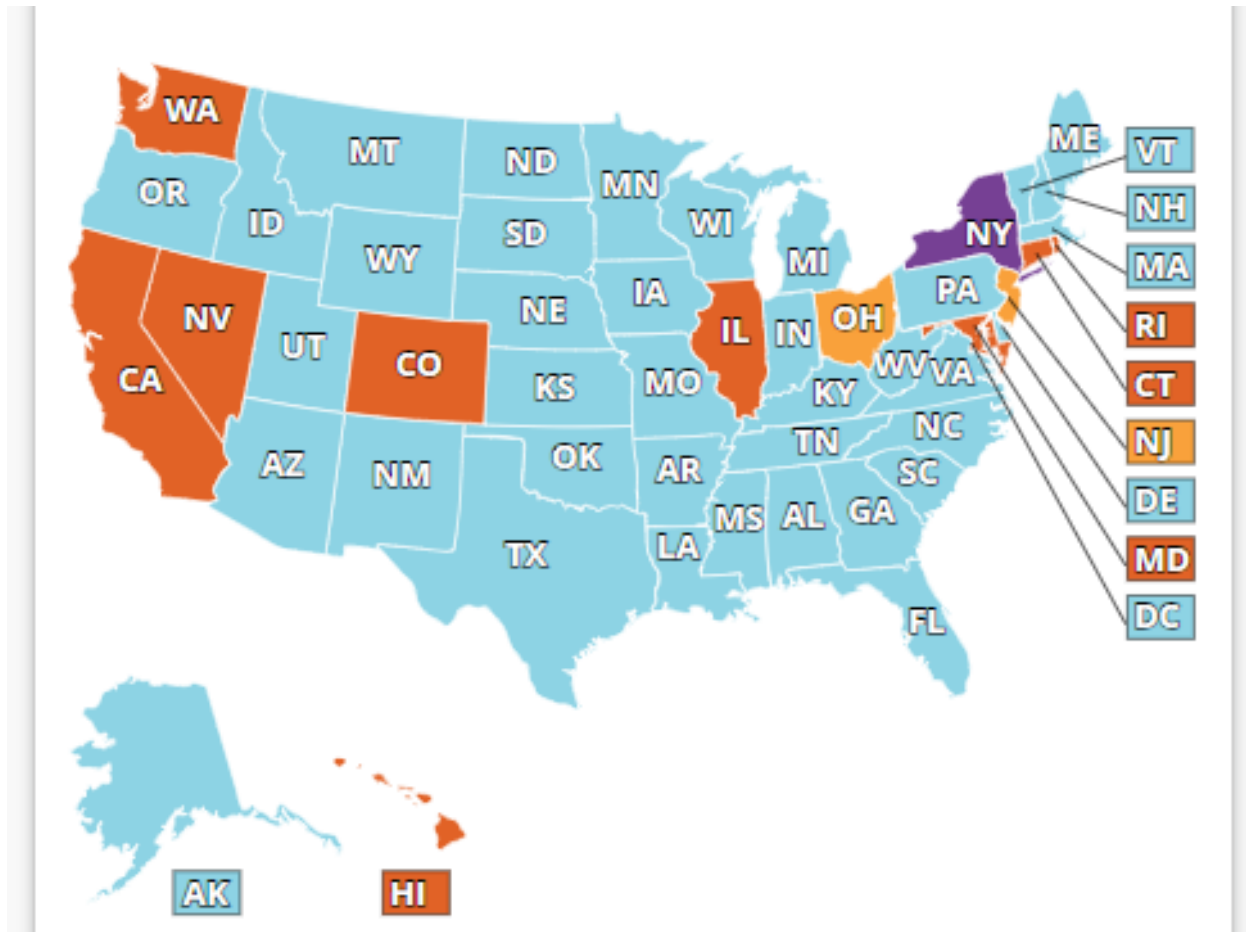
# DOL Independent Contractor Rule: Next Steps

- The Final Rule has an effective date of **March 11, 2024**.
- However, challenges to the rule are ongoing.
- Employers should be prepared for implementation of the Final Rule, including reviewing and revising independent contractor agreements.

# Practical Tips for Independent Contractors

- Provide independent contractors with arbitration agreements that include collective action/class waivers.
- Ensure independent contractor and employee work do not overlap.
- Ensure independent contractors are performing services different from essential aspects of the business.
- Allow independent contractors to set their own schedules.
- Allow independent contractors to hire their own subcontractors when necessary.
- Do not provide tools, equipment, and/or supplied to independent contractors and clarify that independent contractors are to provide those materials themselves.
- Ensure that the independent contractor alone controls how the work will be performed.

# Pay Transparency Laws: State Developments



- Pay Transparency laws are spreading throughout the country.
- Generally, these laws require job postings to include the pay scale, benefits and/or other compensation for a position in any postings of that position.
- Additionally, these laws often include requirements that promotional opportunities be posted internally.
- A significant recent development with pay transparency laws has been a tendency for the laws to have extraterritorial effect.

# Pay Transparency Laws: New Compliance Requirements

State	Covered Employer	Covered Jobs	Posting Requirement	Penalties
California	≥ 15 employees	“any job posting”	“ <u>pay scale</u> ” = salary or hourly wage the employer <i>reasonably expects to pay</i> for the position	\$100 - \$10,000 Safe harbor if all job postings updated with scale
Colorado	≥ 1 employee	<u>Non-promotion positions</u> : all employees & applicants  <u>Promotion opportunities</u> : all employees <i>except</i> those located entirely outside CO  *Remote work included	Hourly or salary compensation or a range developed in good faith <u>and</u> a “general description” of all benefits and other compensation	\$500 - \$10,000
New York	≥ 4 employees	Any job, promotion, or transfer opportunity that can or will be performed, at least in part, in New York	Compensation range (good faith minimum and maximum annual salary or hourly range at time of posting) <u>and</u> job description	\$1,000 - \$3,000 depending on violation & totality of circumstances
Washington	≥ 15 employees	All new jobs or internal transfers to a new position or promotion	Wage scale or salary range <u>and</u> general description of all benefits and other compensation	Up to \$500 for first violation Up to \$1,000 or 10% of damages for repeat violations



# Pay Transparency Laws: HB 3129

- On August 13, 2023, Gov. Pritzker signed into law HB 3129, which applies to Illinois employers with “15 or more employees.” **Takes effect January 1, 2025.**
- The Amendment applies to positions that “will be physically performed, at least in part, in Illinois” and also to positions performed outside the state that require employees to report to “a supervisor, office, or other work site in Illinois.”
- HB 3129’s disclosure requirements extend to third party listings that “announce, post, publish, or otherwise make known a job posting.”
- Pay scale, benefits and compensation information can be provided in job listings by employers or third parties **via hyperlink.**
- Penalties range from \$250 to \$10,000 depending on the number of offenses and whether the noncompliant job listing involves an inactive listing.

# AI and Employees: Federal Government Action

**No Federal Legislation passed (so far)**

**However, there has been increased state action and executive action in the form of Biden Administration's recent:**

**“Blueprint for an AI Bill of Rights” & “Executive Order on the Safe, Secure, and Trustworthy Development and Use of AI”**



Safe and Effective  
Systems



Algorithmic  
Discrimination  
Protections



Data Privacy



Notice and  
Explanation



Human Alternatives,  
Consideration, and  
Fallback

# AI and Employees: Departmental Guidance

## ADA – EEOC Guidance:

- Investigate
- Communicate
- Fine Tune

## Title VII – EEOC Guidance:

- Recommendations
  - Ask
  - Self-Analyze
- “Four-Fifths Rule”

Selection Rate for Male Applicants	Selection Rate for Female Applicants	Ratio	Compare
60%	30%	$30 / 60 = 50\%$	$50\% < 80\%$

# AI and Employees: State and Local Developments

## PASSED

- New York City, NY
- Illinois
- Maryland
- California (via executive order)

## RECENTLY PROPOSED

- Washington, D.C.
- Massachusetts
- New Jersey
- Pennsylvania
- Vermont

## RECENT CASELAW

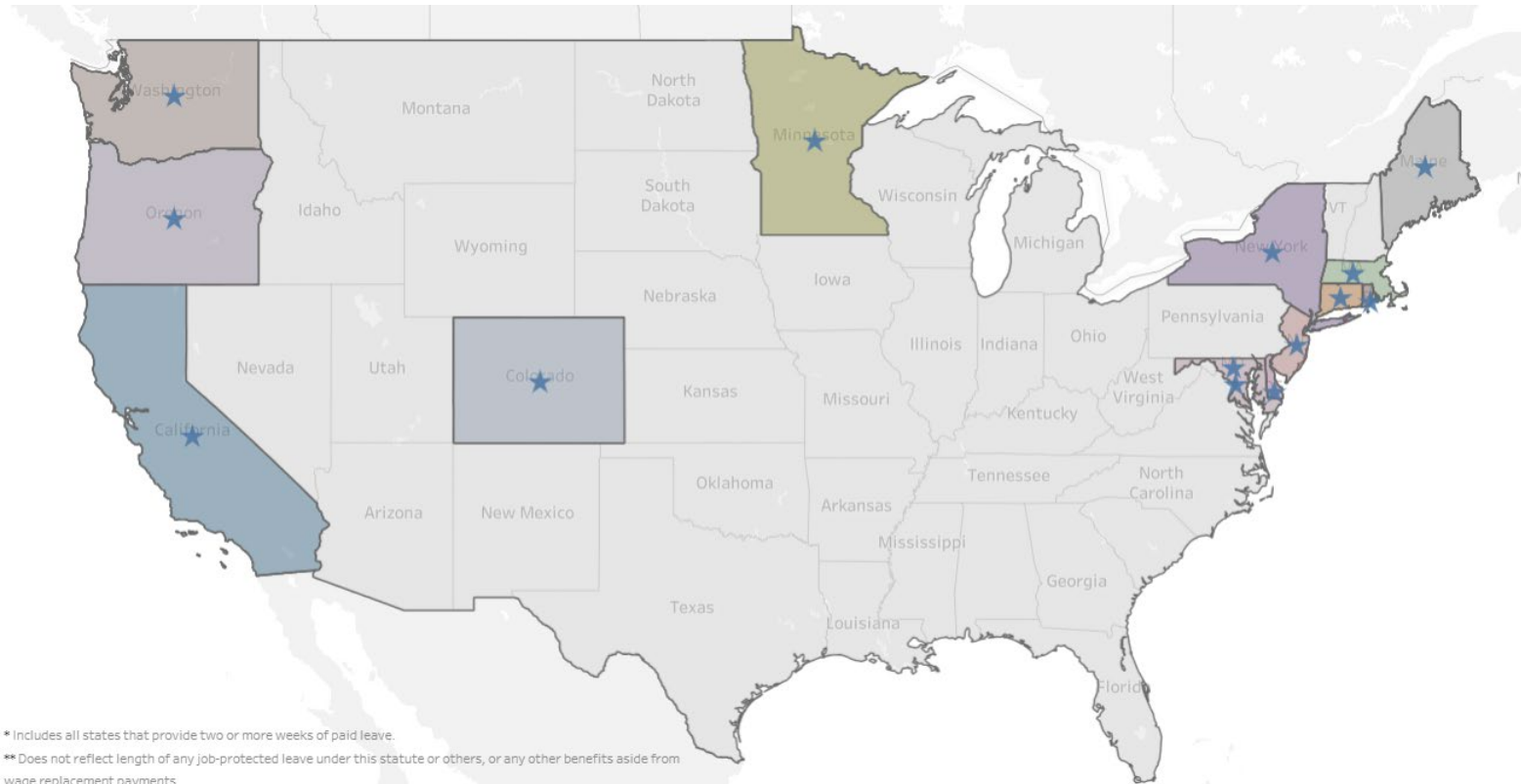
- *Raines v. U.S. Healthworks Med. Grp.*, 15 Cal. 5th 268 (2023).  
—Also extends definition of employer for CA FEHA claims to employer's agents.



# Paid Leave Update: Rapid Growth

- *Significant* nationwide growth in paid sick leave, family leave and general leave.
- These new laws have been primarily on the state level but also are growing on the county and municipal levels.
- These leaves are increasingly applicable to employers, **even those with a limited footprint in relevant jurisdictions.**
- The complexity of these leaves has grown, with increased compliance burdens related to leave usage, payout, accrual, rollover and notice requirements.

# Paid Leave Update: Family Leave



## States Providing Paid Family Leave:

- Thirteen states currently, including Hawaii, and the District of Columbia, insurance.

## Voluntary Family Leave Programs:

- Additionally, New Hampshire, Vermont, and Virginia have voluntary programs that allow some workers to purchase private family leave insurance.

## Latest Additions:

- The Illinois Paid Leave for All Workers Act provides a newer model that allows paid leave for family-related purposes, in addition to other reasons.



# Paid Leave Update: Sick Leave

## PROPOSED LAWS IN 2023

- Arizona
- Florida
- Hawaii
- Illinois
- Indiana
- Iowa
- Kentucky
- Missouri
- New Mexico
- Oklahoma
- Pennsylvania
- South Carolina
- South Dakota
- Tennessee
- West Virginia
- Wisconsin

# Paid Leave Update: Paid Leave for All Workers

- One of the biggest innovations in paid leave laws is the rise of paid leave that may be used “for any reason.”
- Nevada and Maine paid leave for any reason laws went into effect in 2020 and 2021, respectively.
- Starting this January 1, 2024, Illinois’s Paid Leave for All Workers Act went into effect. The Act also provides paid leave “for any reason.”
- These new laws create new policy drafting requirements and interact uniquely with PTO payout laws.

# Paid Leave Update: Illinois State Requirements

- Became effective January 1, 2024.
- All Illinois workers are guaranteed at least 40 hours of paid leave over a 12-month period.
- **Leave may be used for any reason** – no purpose or documentation needed.
- Employers may require up to seven calendar days' notice of foreseeable leave if they have a written policy provided to employees outlining notice requirements and procedures.
- Employees are eligible to begin taking leave 90 days after January 1st or 90 days of employment.

# Paid Leave Update: Chicago Ordinance

- Multiple Leaves: provides both Paid Leave for any reason and Paid Sick Leave.
- Fast accrual: each leave accrues at a rate of one hour for every 35 hours worked.
- Required payout: at separation OR at “*transferral outside of the geographic boundaries of the city.*”
- Complex carryover: up to 16 hours of paid leave & up to 80 hours of paid sick leave.
- Steep penalties: mandatory fines of \$500 to \$3,000 for violations. Two or more settlements with the DOL or IDOL can lead to a loss of one’s Chicago business license, if a violation is found.

# Paid Leave Update: Revising Workplace Policies

Employers will need to begin revising workplace policies now, if they have not done so.

When revising workplace policies to include new leaves, employers should consider whether:

- existing accrual rates capture latest requirements;
- payout policies meet latest requirements;
- no call no show provisions are properly calibrated;
- stated notice requirements are still compliant; and
- employee travel may bring certain employees under a state's paid leave laws.

# Questions