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McKenzie.**

# Looking Ahead: Exploring the Key Themes and Recommendations for US and Global Employers in 2023

Annual Illinois Employer Update | January 12, 2023

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# Housekeeping



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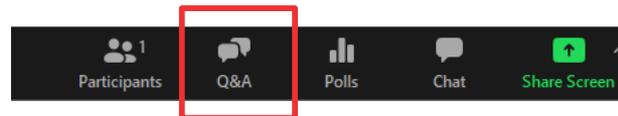
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# Agenda

## 1 Labor & Employment

- A. Protecting your trade secrets in the US and globally
  - B. Trends in salary disclosure laws in the US and abroad
  - C. The NLRB: Where things stand and what to expect in 2023
  - D. Employment Litigation trends for the year ahead
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## 2 Compensation

- A. Significant new developments affecting equity awards in 2023
  - B. Equity Compensation trends and best practices for public and private companies
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## 3 Global Immigration & Mobility

- A. Essential Immigration & Mobility update
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# Labor & Employment



A

# Protecting your trade secrets in the US and globally



# **US non-compete developments and trends**

# US developments and trends



## Restricted to sale of business-related transactions

- Several states including California, North Dakota, and Oklahoma only allow non-competes between the seller and the buyer in the sale of business goodwill, or between partners in the dissolution of a partnership or dissociation of one partner from a continuing partnership.



## Protecting lower wage employees from non-competes

- Multiple states have enacted legislation limiting the use of non-compete agreements for low-wage earners in recent years, including Illinois, Massachusetts, Washington, and Oregon.



## The FTC's proposed rule

- July 9, 2021 Executive Order on Promoting Competition in the American Economy encouraged the chair of the FTC to "curtail the unfair use" of non-competes.
- On January 5, 2023, the FTC took action, and proposed a rule declaring employer / employee non-compete clauses an "unfair method of competition."
- Legislation has also been introduced in Congress seeking to ban non-competes for lower-wage earners and non-exempt employees under the FLSA.

# New law to note – Washington, DC



## Washington, DC's non-compete law (effective October 1, 2022)

- No covered employer may require or request that a covered employee sign an agreement or comply with a workplace policy that includes a non-compete provision.
- Excludes highly compensated employees (\$150,000 in general or \$250,000 for medical specialists), casual babysitters in or about the residence of the employer, partners in a partnership, and DC and federal government employees are excluded from the non-compete ban.
- Exclusions from the definition of "non-compete" (and not banned) include non-competition provisions in the sale of business context, non-disclosure or confidentiality provisions, certain anti-moonlighting provisions, and provisions that provide a long-term incentive.
- Non-compete agreements must specify:
  - The functional scope of the competitive restriction
  - The geographical limits, and
  - The term (cannot exceed 730 calendar days for medical specialists and 365 calendar days for all other highly compensated employees).
- Employers must provide highly compensated employees with a written copy of the non-competition provision at least 14 days before the individual starts employment (or at least 14 days before the individual is required to sign if the individual is already an employee), and provide specific statutory notice language whenever a non-compete is proposed.



# New law to note – Colorado



## Colorado's House Bill 22-1317 (effective August 10, 2022)

- Non-competes are only enforceable against "highly compensated" workers (which an individual earning at, or in excess of, \$101,250).
- Customer non-solicitation covenants are only enforceable against workers who earn 60% of the "highly compensated" threshold (currently \$60,750). The law does not reference specific limitations on employee non-solicit covenants.
- Reasonable confidentiality and non-disclosure covenants remain valid. The new law expressly provides confidentiality and non-disclosure covenants are permitted as long as they do not prohibit the disclosure of: (i) information arising from the worker's general training, knowledge, skill, or experience; (ii) information that is readily ascertainable to the public; and (iii) information that the worker otherwise has a legal right to disclose.
- Employers must present the non-compete and its terms to prospective workers before the prospective worker accepts an offer of employment, and at least 14 days before the effective date for current workers.
  - The required notice must be in the language in which the worker and employer communicate, and must be signed by the worker.
  - The notice and signature must be on a document that is separate and apart from the document which contains the covenant restrictions.



# Illinois non-competes – a refresher

## Amendments to Illinois Freedom to Work Act



Effective January 1, 2022 – not retroactive.



Requires employers to provide time for review and to advise attorney consultation.



Non-compete agreements banned for employees making \$75,000 per year or less.



Defines meaning of "adequate consideration" (though it's still unclear) and "legitimate business interest."



Nonsolicitation agreements banned for employees making \$45,000 per year or less.



Scope of prohibited agreements unclear.



Excludes certain agreements from the definition of "covenants not to compete."



Provides for methods of enforcement – including attorneys' fees for employees if employers don't prevail.

# Other US jurisdictions to note

## New York

- A non-compete is only allowed and enforceable to the extent it (1) is necessary to protect the employer's legitimate interests, (2) does not impose an undue hardship on the employee, (3) does not harm the public, and (4) is reasonable in time period and geographic scope.
- An employer's legitimate interest may include protecting an employer's trade secrets and confidential information and preventing employees from taking specialized skills they gained on the job to a competitor. The restrictions must be no greater than necessary to protect the legitimate interests of the employer.

## California

- Non-competes are not permitted, with limited exceptions in connection with the sale of a business (including the sale of goodwill); dissolution of a partnership or dissociation of a partner from a partnership; and dissolution of or termination of an ownership interest in an LLC.

## Texas

- Non-competes are permitted if: (1) they are ancillary to or part of an otherwise enforceable agreement at the time the agreement is made, and (2) to the extent that the non-compete contains limitations as to time, geographical area and scope of activity to be restrained, it is reasonable and does not impose a greater restraint than is necessary to protect the employer's goodwill or other business interest.



# US developments and trends – Takeaways

## Practical tips for employers

Stay updated on non-compete laws in states where they have employees, given the continuing trend of states enacting or amending laws to further restrict non-competes.

Keep an eye out for action by the FTC in line with the Executive Order—but also expect legal challenges to FTC action. Also keep an eye out for legislation at the federal level.

Inventory and review non-compete agreements, ensure the agreements continue to comply with applicable law, and take any steps necessary to bring errant agreements back into compliance.



Consider the impact of any wide-spread rulemaking to how the organization manages employee-raiding/poaching, maintenance of trade secrets and confidential information and M&A.

Educate managers / executives involved in the hiring process.

For employers with multi-national workforces, re-evaluate the company's use of non-competes globally.



# **Global non-compete developments and trends**

# Global non-competes – Europe

- Non-competes are typically allowed to protect a company's legitimate business interests, with some exceptions, though approaches can vary.
- Preliminary Injunctions can be hard to come by in civil law countries where liquidated damages/penalty Clauses are often used.
- In the EU, consider the following factors to determine whether a restriction will be enforceable, based on the laws in the specific jurisdiction: (1) limitations on geographic scope; (2) limitations on duration (typically no longer than two years); (3) requirements of the legitimate business interest of the employer; and (4) support for ongoing compensation during the non-compete period.
- Several EU countries require separate, post-termination compensation in addition to any other termination payments.
- Some (including Spain and Italy) prohibit employers from unilaterally waiving a non-compete once it is signed.
- Nordic countries often require bespoke restrictions for each employee instead of "template agreements."



## Recent developments

A commission in the **UK** conducted a public consultation in early 2021 on the possibility of major reforms regarding post-termination non-competes, including taking the California approach. The results of the consultation has not yet been released.

# Global non-competes – Canada and Latin America

- Post-termination non-compete and customer nonsolicitation provisions in Latin America are typically unenforceable in actual practice and require extra effort on behalf of the employer.
- Employers in Latin America usually focus on trade secret misappropriation to challenge employee disloyalty and it is possible to leverage both the civil and criminal courts depending on the facts.



## Recent developments

**Canada** has shifted from being an employer-friendly jurisdiction to one where post-termination restraints are increasingly difficult to enforce.

- In Quebec, a non-compete is not enforceable against an employee terminated without cause.
- Ontario recently passed a law barring employers from entering into post-employment non-competes.
- Non-competes are otherwise generally permissible if they restrict the employee's activities as minimally as possible and go no further than necessary to protect the employer's legitimate business interests.

# Global non-competes – Asia Pacific

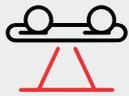
- Many countries permit post-termination non-compete agreements (with the notable exceptions of India and Malaysia).
- Some of the common factors for determining whether post-termination noncompetition and nonsolicitation covenants are enforceable are whether they are (1) reasonable in the light of the facts; (2) supported by adequate consideration; and (3) protecting a legitimate business interest.
- Separate, post-termination consideration during the restriction period is typically not required in Asia (with the exception of China).



## Recent developments

In **China**, the Supreme People's Court issued guidance to lower courts holding fast to the two-year maximum post-termination non-compete term.

# Global non-competes – Takeaways



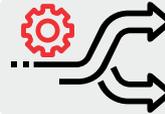
## Balance protection of company's rights against the employee's right to make a living

- Jurisdictions may prohibit / disfavor non-competes, require separate consideration, or limit duration, scope, or type of employee that can be limited.



## One size does not fit all. Be aware of hidden pitfalls

- Structure and terms vary significantly by jurisdiction.
- Imposing a non-compete agreement in a jurisdiction that requires payment can create a non-waivable obligation to pay for such non-compete obligation. Consider alternatives such as long notice periods and garden leaves.



## Keep non-competes separate from employee's global equity awards

- If structured correctly, the company can argue the equity is not part of local compensation, and should not be included in calculation of labor benefits, including severance.



## Non-competes can be difficult to enforce, but be serious about enforcement

- Localize restrictive covenants. A restriction that is unenforceable sends a message that the company is not serious about enforcement.



**B**

# Trends in salary disclosure laws in the US and abroad



# US trends

# Salary and pay range disclosure in job postings



## What we're seeing now across the US and what's trending

- Increase in state / local laws requiring that employers disclose the compensation rate or range for a position in the job posting (including California, Colorado, Washington, New York State and New York City).
  - Effective January 1, 2023, California employers with 15 or more employees must include the salary or hourly wage range that the employer reasonably expects to pay for the position in any job posting under SB 1162. "Pay scale" only includes base pay (not bonuses, equity, benefits, etc.).
  - Colorado's Equal Pay for Equal Work law (effective January 1, 2021) requires employers to list the hourly rate or salary (or range) for the position and a general description of the benefits and other compensation offered for the position for both internal and external job postings.
  - Effective November 1, 2022, it is an "unlawful discriminatory practice" under the New York City Human Rights Law for an employer with 4 or more employees (with at least one in New York City) to advertise a job, promotion, or transfer opportunity without stating the position's minimum and maximum salary in the job advertisement. Other Tri-State municipalities with salary and pay range disclosure laws: Westchester County, NY, Ithaca, NY and Jersey City, NJ.
  - On December 21, 2022 Governor Hochul signed into law S9427A, which will require salary range disclosures in job postings in New York State. The law, which is similar to New York City's salary disclosure law, will take effect 270 days after signature (September 17, 2023).



# Employer obligations to report and maintain records



## What we're seeing now across the US and what's trending

- Heightened obligations for employers to report pay data and maintain records.
  - Under SB 1162, California's pay data reports must now include (in a searchable format) (i) the number of employees by race, ethnicity, and sex within each of 10 job categories **and** (ii) the number of employees by race, ethnicity and sex whose annual W2 earnings fall within each of the pay bands the US Bureau of Labor Statistics uses in the Occupational Employment Statistics survey. The report, which must be filed on or before May 10, 2023, must also include the median and mean hourly rate for each combination of race, ethnicity, and sex within each of the 10 job categories.
  - Effective September 17, 2023, New York State's new salary disclosure law will require employers to maintain a historical record of compensation ranges and job descriptions, if they exist, advertised for jobs, promotions, and transfers.
  - In Illinois, private employers with 100 or more employees in Illinois who are required to file an annual EEO-1 with the Equal Employment Opportunity Commission (EEOC) are required to regularly apply for an equal pay registration certificate with the Illinois Department of Labor (IDOL), which entails providing demographic and wage data, among other things.
  - Under Colorado's Equal Pay for Equal Work Act, Colorado employers must maintain job descriptions and wage-rate history for current employees and, for two years after the employment ends, for former employees.



# Practical takeaways

## Know and follow disclosure and record-keeping requirements



### Employers should take these steps:

- Know the applicable law where you have employees. Develop processes and controls to meet reporting and record-keeping obligations.
- Know the applicable law where jobs are posted.
- Consider both the internal and external market when determining the appropriate range to post.
- After some period of time, consider auditing starting pay versus posted ranges to ensure ranges disclosed reasonably track actual starting compensation.
- Proactively communicate with managers and employees to explain the details of your compensation program (e.g. what factors influence compensation).
- Train managers and supervisors on the company pay philosophy and requirements to provide pay ranges in job postings and upon request to avoid technical violations.
- Develop internal and external communication plans to address employee questions and to avoid (or address, if necessary) potential PR issues.





# Global trends

# Sample of OUS jurisdictions with pay transparency laws



## Americas

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Canada (Ontario, Quebec)  
Colombia  
Ecuador  
Guatemala  
Venezuela

## APAC

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Australia  
India  
Republic of Korea  
New Zealand  
Vietnam

## EMEA

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Austria  
Belarus  
Belgium  
Bulgaria  
Czech Republic  
Denmark  
Estonia  
Finland  
France  
Germany  
Ghana  
Greece  
Hungary  
Ireland  
Israel  
Italy  
Latvia  
Lithuania  
Netherlands  
Norway  
Morocco  
Portugal  
Romania  
Russian Federation  
Saudi Arabia  
Serbia  
Slovakia  
South Africa  
Spain  
Sweden  
Switzerland  
Türkiye  
Ukraine  
United Kingdom



# Recent updates

## Ireland's new gender pay gap reporting regulations (effective May 31, 2022)

- Companies are required to publish information in relation to employees' pay and bonus to demonstrate whether any differences in pay and bonus are tied to gender.
- The reporting requirements apply on a phased basis to employers with 250 employees (2022 reporting), 150-249 employees (2024 reporting), and 50-149 employees (2025 reporting). Employers with less than 50 employees have no reporting requirements.
- Employers reporting in 2022 were required to choose a "snapshot date" in June 2022 for the purpose of reporting, and were required to publish their gender pay gap report within six months from their "snapshot date" (by December 2022).
- Employers are required to publish on their website information in relation to the preceding 12 month period prior to their "snapshot date," as well as where gaps exist between male and female employees, a statement explaining the reasons for the pay gap and mitigating measures. Published information must include:
  - The mean and median hourly wage gap between men and women for full-time employees, part-time employees, and employees on temporary contracts;
  - the differences between both the mean and the median bonus remuneration of male and female employees;
  - the percentage of male and female employees who received bonuses and benefits-in-kind; and
  - the percentages of male and female employees in the lower, lower middle, upper middle and upper quartile pay bands.



# Recent updates



## France's new reporting requirement (effective March 1, 2022)

- Companies with at least 1,000 employees (for the third consecutive financial year) are required to publish differences in representation between women and men in executive management, as well as in governing bodies.
- The reference period is the 12 consecutive months corresponding to the accounting year.
- Going forward, publication must take place no later than March 1 on the company's website.
- From 2022, companies must submit their differences in representation, as well as the procedures for publishing these differences, to the administration and the Social and Economic Committee (CSE).
  - As of March 1, 2026, any corrective measures adopted must also be provided.
  - As of March 1, 2029, progress objectives and procedures for publishing progress objectives and the corrective measures adopted (if necessary) must also be provided.



# Recent updates



## Israel's Equal Pay Law amendment (effective June 1, 2022)

- Employers employing more than 518 employees (a "Covered Employer") and public companies traded in the Tel Aviv stock exchange (even if they employ less than 519 employees) must publish information about the average wage differentials between male and female employees on an annual basis.
- A Covered Employer must engage in the following three-step reporting obligation, on an annual basis:
  - Step 1: Prepare an internal report detailing employees' average wages for each employee group (as defined by the employer) and providing the average wage differentials between male and female employees, in percentages, for each group.
  - Step 2: Provide each employee with information about the employee group to which the employee belongs, including: (i) information about that employee group in terms of employee classifications, positions, and ranks that were included within the group; and (ii) the wage differentials in that group, as percentages.
  - Step 3: Publish a public report (including on its website, if applicable) including data (as percentages) regarding the average wage differentials among employees (broken down by employee segment and scope of employment and with reference to gender) as well as data regarding the percentages of employees whose wages fall below the workplace average, with reference to gender.
- Employers must also provide an employee with information, upon request, on salary and other remuneration levels of the employees employed by the employer according to categories of employees, categories of work, and categories of grades--but only to the extent required by law and not disclosing identity of employees.





Proposed in March 2021 with the EU Council agreeing on the position on December 6, 2021, and the EU Parliament agreeing on December 15, 2022, the directive would reinforce the entitlement to equal pay for men and women for the same work, or work of equal value.

# EU pay transparency directive

## Proposed regulation



Political agreement reached December 15, 2022 between the European Parliament and the Council on the Directive on pay transparency measures. The agreement is now subject to formal approval by the co-legislators, and if approved, the Directive will enter into force 20 days after publication in the Official Journal and Member States will then need to transpose the new elements of the Directive into national law **within three years**.



If adopted, the rules would:

- Apply to employers with 250+ employees.
- Require measures to ensure employers pay the same work, or work of equal value, equally.
- Require employers to provide **initial salary (or salary range) information** to job applicants, pre-interview.
- Prohibit employers from asking job applicants about **salary history**.
- Create a right for a worker to request information about their own pay level and **average pay levels** (broken down by gender and categories of workers doing the same work / work of equal value).
- Require **gender pay gap (GPG) reporting** for employers with 250+ employees.
- Create joint pay assessments if GPG is 5%+ for any category of workers doing the same work or work of equal value, and employer has not justified the GPG.

# EU pay transparency directive

## Reporting



The proposed new rules will be a significant development in the many EU jurisdictions that do not currently have GPG reporting, but for those jurisdictions that do already have reporting rules (for example, Spain, Italy, France and Belgium), the proposed new rules would create a common standard throughout the union.

# Practical takeaways

## Proactively get ahead of pay gaps and reporting violations

Conduct annual compensation audits.

Ensure all audits are conducted across all jurisdictions.

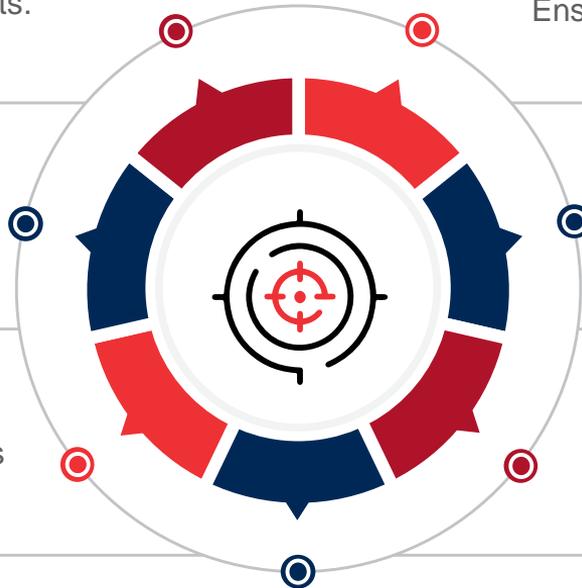
Consider more frequent "mini" audits of populations that may be historically more impacted / at issue.

Audit incumbents compared to new hires when hiring to make sure the incumbents are being paid what the market demands.

Conduct performance ratings review audits.

Keep on top of and comply with local / country requirements and adjust policies / practices and reviews according to jurisdiction.

Train managers / supervisors / HR regarding any applicable requirements or restrictions.





# The NLRB: Where things stand and what to expect in 2023

# NLRB General Counsel's Memo



## GC Memo 21-04: What to Expect

- In August 2021, the new NLRB General Counsel, Jennifer Abruzzo, issued [GC Memo 21-04](#) noting that the Board's numerous adjustments to the law—including wide doctrinal shifts—in the prior several years should be examined, as well as other issues that should be considered to determine whether current law ensures employees can freely exercise their Section 7 rights.
- Highlights areas where Board recently shifted from prior Board precedent, and other areas of examination, including:
  - Employer handbook rules
  - *Weingarten* rights
  - Confidentiality provisions / separation agreements and instructions
  - What constitutes protected concerted activity
  - Remedial issues
  - Union access to employer's property
  - Union dues
  - Employee v. independent contractor status
  - Employer's duty to recognize and / or bargain
  - Employees' Section 7 right to strike / picket



# Recent decisions

## *Thryv, Inc.* (December 13, 2022): NLRB includes "all direct or foreseeable pecuniary harms" in standard make-whole relief

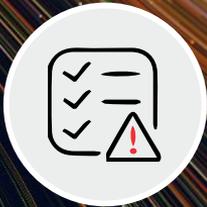
- The Board decided "to revisit and clarify" the proper scope of the Board's make whole relief under Section 10(c) of the Act.
- Now, in all cases in which the Board's standard remedy would include an order for make-whole relief, the Board will expressly order that the employer compensate affected employees for **all direct or foreseeable pecuniary harms** suffered as a result of the employer's unfair labor practice.
- **Practical takeaways:**
  - Employers should always document each step of their interactions and bargaining with unions, but given this expansion of make-whole relief, accurate documentation will be imperative to ensure employers can better defend against claims of direct or foreseeable pecuniary harm flowing from allegations of unfair labor practices.
  - Train managers, supervisors and HR on the new standard and put policies in place requiring adequate documentation of any correspondence or activity with union leadership or members, as well as prompt communication with management to notify management of any issues.



# Recent decisions

## **American Steel Construction, Inc. (December 14, 2022): NLRB returns to Specialty Healthcare framework for appropriate bargaining unit standard**

- The Board modified the test used to determine whether additional employees must be included in a petitioned-for unit to render it an appropriate bargaining unit. The decision returns the Board to its prior test in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), overruling *PCC Structurals*, 365 NLRB No. 160 (2017), and *The Boeing Co.*, 368 NLRB No. 67 (2019) (*PCC-Boeing*).
- The Board reaffirmed that employees in the petitioned-for unit must be "readily identifiable as a group" and share a "community of interest." However, where a party argues that a proposed unit meeting these criteria must include additional employees, the Board reaffirmed that the burden is on that party to show that the excluded employees share an "overwhelming community of interest" to mandate their inclusion in the bargaining unit.
- **Practical takeaways:**
  - Employers should maintain updated, detailed and accurate job descriptions for each employee role, being careful to describe job classifications, departments, functions, work locations, and skills. This can help demonstrate differences between positions if necessary during unionization efforts.



# Recent decisions



## *Sunbelt Rentals, Inc.* (December 15, 2022): NLRB reaffirms its approach to protecting employees from coercion when interviewed by employers preparing for unfair labor practice proceedings

- The Board reaffirmed its "bright line" approach under *Johnnie's Poultry*, 146 NLRB 770 (1964), to protect employees from coercion when they are interviewed by employers preparing for unfair labor practice proceedings before the Board.
- Under the *Johnnie's Poultry* standard, the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis.
- **Practical takeaways:**
  - Employers who interview employees in preparation for unfair labor practice proceedings should work with counsel and ensure the *Johnnie's Poultry* standard is followed, as well as create and maintain documentation of adherence to the steps required under the *Johnnie's Poultry* standard.
  - Any HR, managers or supervisors who are involved in the interviewing process should be trained on the *Johnnie's Poultry* standard and required steps.

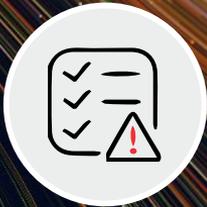


# Recent decisions



## ***Bexar County Performing Arts Center d/b/a Tobin Center for the Performing Arts and Local 23 (December 16, 2022): NLRB limits exclusion of contractor's employees from owner's property***

- The Board ruled a property owner may lawfully exclude off-duty workers who are employed by a third party and are exercising Section 7 rights only where the property owner can demonstrate that the contractor employees' Section 7 activities "significantly interfere" with the use of the property, or where the owner has "another legitimate business reason" to remove them.
- The Board reinstated the standard previously articulated in its 2011 decision *in New York New York Hotel & Casino*, finding that the standard ensures that third-party employees can exercise Section 7 rights in the place where they work, while property owners do not have to permit activity that causes a "significant interference" with their property rights or in situations in which they have legitimate business reasons to prohibit the activity.
- The Board noted that legitimate business reasons include, but are not limited to, the need to maintain production and discipline.
- **Practical takeaways:**
  - The Board provided in its decision that a property owner could negotiate contractual terms with its contractor to require the contractor to quickly intervene if the contractor's employees engaged in off-duty Section 7 activities on the property. Employers should ensure contracts contain these terms.
  - HR, managers or supervisors should be trained on the new standard and any applicable contractual terms to ensure compliance.





# Employment litigation trends for the year ahead

# Trends to watch



## Wage and hour

- **In 2022:** Class / collective litigation regarding compensable time violations, exempt / non-exempt misclassification issues, and increased enforcement by the Department of Labor (DOL).
- **For 2023:** Continued employee claims regarding compensable time and misclassification issues related to hybrid / remote working, and an uptick in independent contractor audits and litigation (and DOL's proposed independent contractor (IC) rule making it harder for businesses to classify workers as ICs).
- **Practical takeaways:**
  - Conduct internal audits frequently to ensure correct classification.
  - Train supervisors / managers on correct timekeeping policies.
  - Keep an eye on DOL developments.



# Trends to watch



## Restrictive covenants

- **In 2022:** New laws in Washington, DC, Colorado and Illinois, with trends toward restricting non-competes for lower wage workers, requiring notice to workers signing, and penalty provisions to deter employer violations. The Department of Justice (DOJ) has increased its focus on non-competes as well as no-poach violations.
- **For 2023:** Continued / increased civil prosecution by federal agencies, and employers focusing on enforcement as remote / hybrid work and the labor market may make violating restrictive covenants more tempting for employees.
- **Practical takeaways:**
  - Stay on top of laws where you have employees to ensure compliance.
  - Review and modify form agreements with restrictive covenants to ensure local compliance.
  - Monitor DOJ activity and applicable court decisions regarding restrictive covenants.



# Trends to watch



## Data security and workplace privacy

- **In 2022:** Connecticut and Utah passed consumer privacy laws and California's was amended, creating broad protections for employees around personal information. Electronic monitoring became necessary given continued work from home, but also restricted in New York. Employees continued to file claims alleging violations of Illinois' Biometric Information Privacy Act (BIPA) alleging failure to provide required notice, or to properly destroy collected information.
- **For 2023:** Expect to see more biometric privacy laws, and electronic monitoring laws as working from home continues.
- **Practical takeaways:**
  - Stay on top of new developments, including new laws.
  - Follow enforcement of New York's electronic monitoring law (effective May 2022), BIPA developments (including a pending Illinois Supreme Court case regarding whether companies could be liable under BIPA each time a plaintiff is scanned for their fingerprint or other biometric information, or just the first instance), and consumer privacy laws.
  - Be sure to comply with any requirements, including notice and information / deletion requirements.



# Trends to watch



## Artificial intelligence in hiring and recruitment

- **In 2022:** Companies turned to AI to assist in recruiting / hiring the best talent. US jurisdictions with laws and regulations regarding AI in employment include Illinois, Maryland, and San Francisco. As of January 1, 2023, New York City requires employers to limit their use of AI tools that might replace human decisions about prospective candidates, and requires an annual "bias audit." Changes on the federal front include the EEOC's and DOJ's guidance on disability discrimination in connection with the use of AI tools to assess job applicants and employees, and the White House's "Blueprint for an AI Bill of Rights." Litigation stemming from use of AI in recruitment and hiring has increased, with claims including gender discrimination where there was bias in training and gender and skin tone biases in AI tools using facial recognition.
- **For 2023:** Expect to see more laws and regulations restricting the use of AI in employment, as well as increased litigation as employers increasingly use AI in their recruitment / hiring processes.
- **Practical takeaways:**
  - Closely monitor the use and implementation of AI tools in recruitment and hiring each step of the way to ensure results are not biased.
  - Conduct a risk assessment of AI tools in order to correctly manage the regulatory compliance, use, audit and reporting requirements.



# Trends to watch



## Employee leaves and accommodations

- **In 2022:** Employees continued to request medical and religious-based reasonable accommodations (including working from home) from mandatory vaccination policies or other COVID-19-related reasons—and employee claims of discrimination when requests were denied. The EEOC clarified that employees with long COVID-19 may be covered under the Americans with Disabilities Act (ADA) in certain situations. Delaware, Maryland and Oregon passed paid family leave laws, and California extended its COVID-19 Supplemental Paid Sick Leave through 2022.
- **For 2023:** California has new leave entitlements for employees effective January 1, 2023, and the trend in new leave entitlements is expected to grow given post-pandemic employee caretaking responsibilities and mental and physical health challenges.
- **Practical takeaways:**
  - Review and modify leave policies to comply with new laws.
  - Train managers, supervisors and HR on new policies.
  - Ensure stakeholders are trained in proper engagement in the interactive process for accommodation requests.



# Trends to watch



## Pay equity

- **In 2022:** States expanded equal pay reporting requirements and salary and pay range disclosure requirements, including following Colorado's lead and requiring them in job postings. There was an increase in pay disparity litigation, both at the class and individual level.
- **For 2023:** Expanded salary and pay range disclosure requirements are likely to fuel an even greater uptick in pay disparity litigation.
- **Practical takeaways:**
  - Timely file accurate pay data reports.
  - Determine which jurisdictions have salary and pay range disclosure laws affecting your company's job postings—and whether you have to include pay ranges in postings for positions outside of those jurisdictions, including remote positions.
  - Determine what pay range information is required to be included in job postings.
  - Implement best practices for choosing pay ranges for posting.
  - Communicate changes to your workforce.



# Trends to watch



## Reductions in Force

- **Early pandemic:** The economic impact of shutdowns meant employers had to move quickly for economic reasons, so we saw employers engaging in cost-cutting measures like furloughs, shortened workweeks, salary reductions, and delayed start dates as they waited for COVID-19 numbers to decline and things to return to normal.
- **For 2023:** Employers may have a little more planning time look at how a recession might impact their business in the near future and down the line, resulting in not only cost-cutting but layoffs.
- **Practical takeaways:**
  - Budget enough time for a layoff (including enough time to conduct an adverse impact analysis).
  - Understand and comply with local law requirements. State mini-WARN requirements, final pay rules, specific release provisions, and required notices vary from jurisdiction to jurisdiction.
  - Carefully construct OWBPA disclosures.
  - Address new challenges employers need to consider, including how cost-cutting impacts DEI on a company-wide level, COVID-19-related protected leaves, and remote workers.



# Trends to watch



## Class actions

### ▪ Settlements

- The value of **wage and hour** settlements in 2022's ten largest class action deals in employment-related cases dropped slightly from 2021, from \$641m in 2022 to \$575m in 2021.
- On the other hand, the value of **discrimination** settlements rose significantly, from \$323m in 2021 to \$597m in 2022.
- **For 2023:** "Big ticket" settlements from 2021 and 2022 are likely to pave the way for more class litigation.

### ▪ Certification rates

- In 2022, plaintiffs' attorneys secured class certification in 53% of employment discrimination cases, and conditional certification in 82% of Fair Labor Standards Act (FLSA) suits.
- **For 2023:** These rates represent a status quo from 2021, and we expect more of the same in 2023.

### ▪ Practical takeaways:

- Given the trend in high class certification rates and high value settlements, expenditure in corporate compliance (as opposed to defending against litigation) is likely money well-spent.





2

# Compensation



A

# Significant new developments affecting equity awards in 2023

# Agenda

## Subtitle

### 1 Global Share Plan Updates:



**Asia Pacific**

- Australia
- India
- Philippines



**EMEA**

- Russia



**Americas**

- Canada

### 2 Trending Topics.



# Australia



## Changes to Securities Exemptions

- **Background**
  - Grant of share-based awards subject to licensing and prospectus disclosure requirements unless exemption applies.
    - Several exemptions available, but certain compliance action items required for some of the exemptions.
    - Exemptions more limited for RSUs.
    - Class Order exemption requirements differ for listed and unlisted companies – much more complex to rely on for unlisted companies.



# Australia



## Changes to Securities Exemptions

- Update
  - New securities law regime came into effect on October 1, 2022.
    - Offers not requiring payment (e.g., RSUs) can be made without the need for a financial services license or prospectus disclosure.
      - Such offers must state that they are being made under the new regime.
    - Offers requiring monetary payment must either fall under statutory exemption or new ESS exemption which requires:
      - Offer must be accompanied by an "Employee Share Scheme (ESS) offer document" containing prescribed information.
      - Employees cannot acquire interest until at least 14 days after receiving the ESS offer document.
      - Additional requirements apply for ESPPs.
      - Payroll deductions must be held in separate account.
      - Withdrawal must be permitted at any time.



# Australia



## Changes to Securities Exemptions

- **Update**
  - New securities law regime came into effect on October 1, 2022.
    - Removal of 3-month listing requirement for relying on ESS exemption.
    - Unlisted companies may grant awards that require monetary payment (e.g., options, ESPP), subject to monetary cap of AUD 30,000 per participant in any 12-month period (plus certain other requirements) – additional disclosures also apply to unlisted companies.
    - Offers to independent contractors are treated in the same way as offers to employees.
    - Transitional rules extend existing Class Order exemptions until January 1, 2023.
- **Take-Away**
  - Companies should review which exemption they have been relying on and which exemption they will rely on for offers made on/after January 1, 2023 and update award documentation accordingly.



# India



## Revised Exchange Control Requirements

### ▪ Background

- Employees in India could acquire / hold shares issued under a foreign company stock plan without approval from the Reserve Bank of India (RBI), provided an exemption applied, e.g.
  - "Cashless" awards where there is no remittance of funds out of India (e.g., RSUs, cashless exercise options).
  - "General permission" which required, among others, annual reporting to RBI through Authorized Dealer (AD).

### ▪ Update

- Exemption for cashless awards is eliminated so general permission is only alternative.
- Enhanced, bi-annual reporting is required for general permission (due Nov 29<sup>th</sup> for half-year ending Sept 30<sup>th</sup> and May 29<sup>th</sup> for half-year ending March 31<sup>st</sup>).
- Employee repatriation requirements amended to harmonize deadlines.

### ▪ Take-Away

- Companies should work with AD bank to confirm requirements, establish process to submit reports and update employee disclosures (if any).



# Philippines



## Changes to Tax Treatment

- **Background**
  - There was previously a distinction between "rank-and-file" and "non-rank-and-file" employees for local entities that reimbursed the parent company for the cost of equity awards or that disclosed the cost of equity awards in their audited financial statements in a certain manner.
    - Equity awards to "non-rank-and-file" employees were treated as a fringe benefit and employer paid fringe benefits tax applied.
    - Equity awards to "rank-and-file" employees are subject to income/social tax and withholding.
- **Update**
  - As of October 29, 2022, the "rank-and-file" and "non-rank-and-file" distinction has been eliminated and all employees subject to income/social tax and withholding (if reimbursement or local expensing of award).
- **Take-Away**
  - Companies should ensure payroll team is aware of and implements change and update employee tax disclosures (if any).



# Russia



## Sanctions Impacting Bank Accounts and Securities

- **Background**
  - Russian invasion of Ukraine led to global sanctions against Russia.
  - Russia also enacted numerous sanctions that impact global share plans.
- **Update**
  - Russian residents (citizens and foreign nationals holding a Russian permanent residency permit) may acquire securities in "unfriendly" countries (US, European countries, etc.) provided that the individuals properly report their foreign bank/brokerage accounts and sanctioned banks are not used for transferring funds.
  - ESPP remains challenging due to restrictions on remittance of payroll deductions, although companies could explore feasibility of intercompany offsets.
- **Take-Away**
  - Ensure employee disclosures are up to date and monitor developments.



# Canada (Quebec)



## French Language Requirements in Quebec

- **Background**
  - Certain French language requirements applied but for equity award documentation from foreign parent company, it was generally possible to obtain a waiver.
- **Update**
  - For offers made on/after June 1, 2022, documents considered to be part of the conditions of employment and any contract of adhesion **must be provided in French language**.
- **Take-Away**
  - Companies should translate plan documents and award agreements (and consider translating other documentation related to awards) for awards offered on/after June 1, 2022.
  - Companies may also need to translate documentation for awards granted prior to such date, if requested by employees.





**B**

# **Equity Compensation trends and best practices for public and private companies**

# Trending Topics

## ➤ Employees engaged via Professional Employer Organization (PEO) or third party Employer of Record (EOR)

- Equity award considerations may differ from those that apply to direct employees (need to check plan eligibility provisions, as well as regulatory and tax treatment).

## ➤ Increase in all-employee grants and ESPPs

- Additional compliance may be required, e.g., if new countries come into play or thresholds for filings are exceeded.

## ➤ Reductions in force

- Companies frequently providing special treatment for equity awards, such as next tranche of vesting or vesting during notice period that does not otherwise apply (need to check plan and award agreement provisions and obtain appropriate corporate approvals).

## ➤ New data privacy laws

- Countries continue to implement new data privacy laws, often mimicking the EU GDPR (need to review provisions in equity award documents and/or other data privacy notices to ensure they reflect new laws).





3

# Global Immigration & Mobility



A

# Essential Immigration & Mobility update

# Essential Immigration & Mobility update



## Impact of equal pay transparency laws on PERM / H-1B

- Salary and pay range disclosure requirements may impact an employer's PERM program, specifically labor market testing activities.
- Some laws may require additional disclosure of compensation in H-1B LCA Notice of Postings.



## Practical Takeaway

- Given the overlapping salary disclosure requirements, it is important for employers to work with immigration counsel to consider how to comply with both immigration regulations and salary and pay range disclosure laws.

# Essential Immigration & Mobility update



## Discriminatory Online Job Postings

- Online job posting content could expose employers to discrimination allegations, even when there is no intent to be discriminatory.



## Practical Takeaway

- Closely review language, drop-down menus and default settings in job postings, particularly if an employer states whether the employer will consider the position open for visa sponsorship or indicates a preference for citizenship.

# Essential Immigration & Mobility update



## COVID-19-related updates

- Negative COVID-19 test are now required for passengers entering US from China. Other countries have imposed similar requirements.
- Though many US consulates and embassies are open, backlogs for visa appointments remain.
- The Department of Homeland Security (DHS) extended I-9 flexibilities for remote workers until July 31, 2023.
- China and HK have lifted COVID-19 related travel restrictions.

## Practical Takeaway

- Plan ahead for employees who are traveling from China and will require a negative COVID-19 test.
- Plan ahead for employees who are traveling and may require a visa stamp.
- Keep an eye on I-9 flexibilities, and be prepared for a possible rescission of flexibilities after July 31, 2023.
- Check COVID-19 related requirements prior to travel.



# Essential Immigration & Mobility update



## Remote work / mobile workforce

- Employers risk violating the terms of an employee's current H-1B, H-1B1 or E-3 status if they work outside of the Metropolitan Statistical Area (MSA) designated in their certified Labor Condition Application.
- A growing number of countries have introduced digital nomad visas that allow travelers to work remotely for a temporary period as long as they remain employed abroad and meet other basic requirements (i.e. proof of employment/income, health insurance, background check).

## Practical Takeaway

- As employers define parameters around hybrid or flexible remote work, the impacts on visa holders should not be overlooked. A change in work location may require that an employer file a petition with USCIS before the employee commences work in the new location. Amendments must be made to public access records required by the Department of Labor.
- Address potential tax and social security issues related to digital nomads before the employee / the business decide to agree to the temporary arrangement.



# Essential Immigration & Mobility update



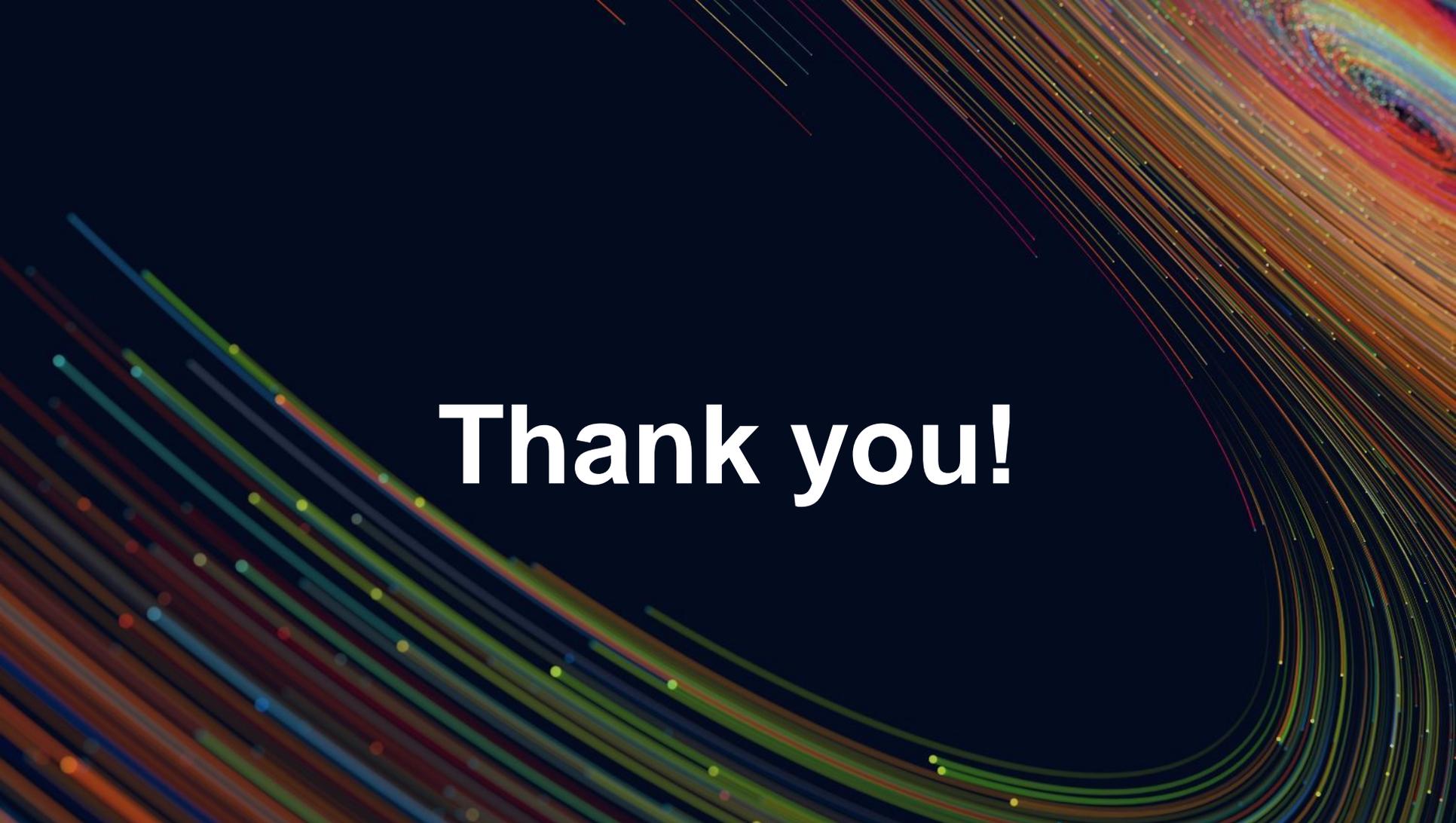
## Planning for economic headwinds

- Additional requirements may apply when terminating an employee who is not a US citizen, including written notice to USCIS, withdrawal of the LCA, and the cost of transportation to the employee's country of last residence. Other countries may require notification to the local authorities to cancel and/or return the permit as part of a deregistration process.



## Practical Takeaway

- Consult with immigration counsel regarding employees who are on employer-sponsored visas or permits when restructuring or conducting reductions in force to ensure compliance with requirements and consider recommended actions.

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**Thank you!**

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