

COVID – 19

Considerations for Employers

Presented by:

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COVID-Related Need for Leave

- Employee is sick with COVID
- Employee was exposed to COVID
- Employee has child who is unable to go to school/childcare because of COVID
- Employee is fearful of contracting COVID at work
- Employee lives with person who is high risk of COVID complications



Types of Available Leave

- FFCRA (only required for employers with 500 or fewer employees)
 - ▶ Expired at end of 2020
 - ▶ BUT:
 - Tax Credit through 3/31/21 for voluntary compliance
 - Extension and broadening under consideration in Congress
- PTO/sick leave/short-term disability/other forms of employer-provided leave
- FMLA
- Leave as an accommodation under the ADA
- State Leave laws



Additional Leave

Simon missed two weeks of work in November last year after his roommate contracted COVID. He received pay pursuant to the FFCRA for that time off. In January, he calls you to report that he again has been exposed to COVID, as his brother tested positive the day after they had spent time together.



- Should Simon be required to take two weeks of leave again?
- Does the leave need to be paid?
- What should you require of Simon before allowing him to return to work?

Termination While on Leave

Although he dodged a bullet the first two times, Simon has now contracted COVID himself and has been out of work for the last three weeks. Prior to him getting sick, Simon had been placed on a Performance Improvement Plan. While he is out, you realize that it is best for the company to terminate him and find a replacement.

Can you safely terminate Simon's employment?

COVID Accommodations

Before you can terminate him, Simon advises you that he is well enough to begin working again, but can only do so part-time for a few weeks and would prefer to work at home. Are you required to accommodate Simon?

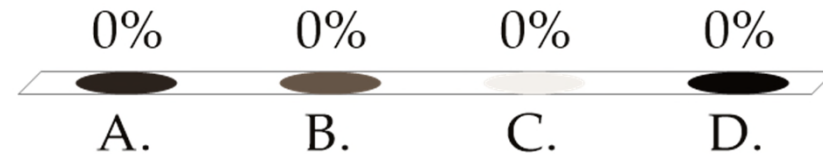
- Whether COVID-19 is a disability pursuant to the ADA is an open question.
- Likely, employers should treat it as one and engage in the interactive process to determine if there are accommodations that would assist the employee.

The Shot Heard 'Round the World – COVID-19 Vaccination



How is Your Workplace Handling Vaccinations?

- A. We are mandating vaccines
- B. We are leaving it up to the employee
- C. We are incentivizing employees to get vaccinated
- D. Still working on the plan...



Mandatory Vaccines - EEOC

EEOC has indicated that employers
MAY mandate the vaccine in order for employees
to work on site

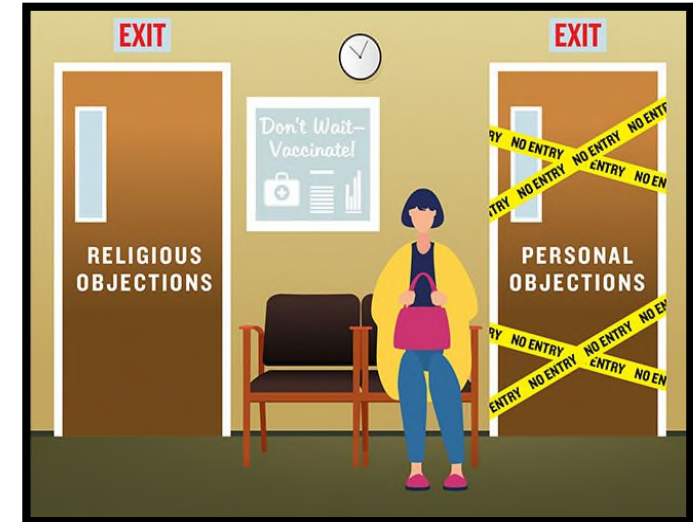
BUT...

Medical Accommodations

- ADA Accommodations for those who cannot be vaccinated due to a disability
 - ▶ Is there a reasonable accommodation
 - working from home
 - ▶ Is it an undue hardship
 - significant difficulty or expense – a high bar
 - ▶ Do they pose a direct threat?
- Don't forget about FMLA

Religious Accommodations

- Title VII - religious accommodations for those with a sincerely held religious practice or belief that precludes vaccination
 - ▶ Very broadly defined
 - the presence of a deity or deities is not necessary
 - can include unique beliefs held by a few or even one individual
 - ▶ Undue hardship = “more than de minimis” burden or cost to the employer



But wait, there's more...



- Pregnancy Accommodations
 - ▶ Normal pregnancy is not a disability, but many states have laws requiring accommodations for pregnancy similar to disability accommodations
- Watch out for state laws
 - ▶ Bills have been proposed in at least 23 states to ban employers from requiring workers to get vaccinated against COVID-19 or other infectious diseases.

Mandatory Vaccines – Emergency Use Authorization



- Emergency Use Authorization Statute provides:
 - ▶ Each individual must be informed “of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.”
- Wrongful discharge – contravention of public policy
- Legal off-duty conduct
- Public sector employers may be subject to different standard as government actors

Other Vaccination Issues

- Workers' Compensation
- Negligence not to mandate?
 - ▶ Customers/visitors/students/family members
 - ▶ Health and safety standards
- Do I need to pay for the time to get vaccinated?
- Can I require vaccines for some, but not all employees?



What does the future hold?

- Health and safety rules
 - ▶ Masks, social distancing
 - ▶ Quarantine/travel restrictions
 - ▶ State laws
- Recall rights – new legislation
- Is telework here to stay?
 - ▶ Policies, job descriptions will be critical



Incentivizing Vaccination

Can you incentivize vaccination?

- Yes, but doing it creates a *wellness program*.

Wellness Programs

Wellness programs are subject to—

- HIPAA
- ADA
- GINA
- . . . and possibly Title IV and the FLSA

Rules for health-contingent programs

- Annual opportunity to qualify
- Reward must not exceed 30% of total cost of coverage
- Reasonable design
- Uniform availability with *reasonable alternative*
- *Notice* requirement

Notice requirement

- Must disclose reasonable alternative
- Must include contact info for getting reasonable alternative, and statement that doctor's recommendations will be accommodated

ADA applies if you ask about disability.

- Proof of vaccine is *not* a disability-related inquiry.
- Asking why an employee didn't get vaccinated *is* a disability-related inquiry.

Two ways of complying

- Wellness program is *part of a group health plan*.
- Wellness program is *voluntary*.

Part of a group health plan

- Only offered to enrolled employees
- Offered by a vendor
- Term of coverage under the plan
- *Incentive is limited to premium reductions*

A wellness program is voluntary if—

- Reasonably designed to promote health
- Not a gateway to better benefits
- Reasonable accommodation
- Notice requirement
- *Limited incentives*

EEOC guidance is in flux.

- January 7, 2021: EEOC issued proposed regulations
- January 20, 2021: EEOC withdrew proposed regulations

GINA applies if—

- You request genetic information.
- Genetic information may be collected as part of vaccine intake.

Practical Considerations

Weighing the risk

- Less incentives = less risk = fewer vaccinations
- Some employers are taking the risk because overall benefits > legal risks

Practical Considerations

Consequences of noncompliance

- ADA discrimination: back pay, compensatory and punitive damages, attorney's fees
- HIPAA penalties: \$100 per employee per day

Range of Risk

Low

- Education
- PTO for all
- De minimis, e.g., water bottle

Medium

- PTO for vaccination
- Cost of vaccination
- Raffle prize

High

- Significant bonus, e.g., \$100

Best Practices

If you're going to do it—

- Outsource
- Provide a reasonable alternative
- Warn employees who provide proof of vaccine **not** to include genetic information

What to Expect Under the Biden Administration

Presented by:

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Marc Sloane

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EEOC - Current Composition

Commissioners

Charlotte Burrows (D), Chair, 7-1-23

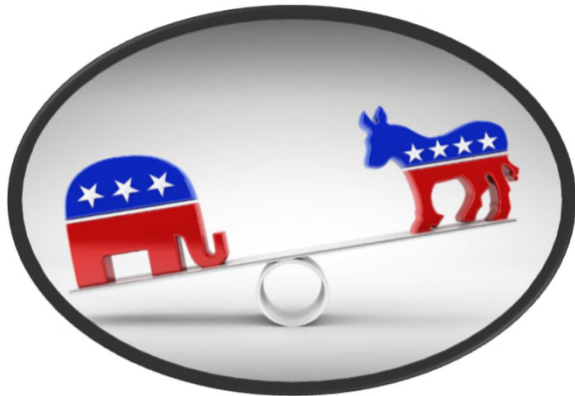
Jocelyn Samuels (D), Vice Chair, 7-1-21

Janet Dhillon (R), Outgoing Chair, 7-1-22

Keith Sonderling (R), 7-1-24

Andrea Lucas (R), 7-1-25

General Counsel*



EEOC – Changes to Look for

- Enforcement priorities reshuffle (expected mid-2022)
- Increase in systemic litigation and enforcement of anti-discrimination laws
- Shifting priorities from religious freedom to LGBTQ+ rights
- ADA reasonable accommodation guidance
- Revitalizing EEO-1 reporting requirements and pay equity data collection

Revised EEOC Guidance on Religious Discrimination

- Revisions issued by EEOC on 1-15-21 (first time since 2008) by 3-2 vote
- Clarifies protections for employers and employees under Title VII
- Influenced by SCOTUS decisions since 2008, including Burwell v. Hobby Lobby Stores, Inc. (2014) and Masterpiece Cakeshop, Ltd. (2018)
- Title VII protects “sincerely held” religious beliefs
- Undue hardship: Would require “more than a *de minimis* cost”
- Religious accommodations in the workplace include: (1) flexible scheduling; (2) voluntary substitutes or swaps of shifts and assignments; (3) lateral transfers or changes in job assignment; and (4) modifying workplace practices, policies, or procedures.
- Religious institutions exempt from Title VII’s general prohibition against religious discrimination
- EEOC likely to continue scrutinizing alleged encroachments on religious liberty, so employers should remain vigilant regarding religious bias and religious accommodation issues in the workplace

LGBTQ+ Rights

- **Biden administration will prioritize LGBTQ+ rights**
- **Executive Order 13988 (issued 1-20-21)**
 - ▶ Expands prohibited forms of sex discrimination under Title VII and other federal laws prohibiting sex discrimination to include discrimination on the basis of sexual orientation and gender identity
 - ▶ Directs EEOC and other federal agencies to review and revise existing orders, regulations, guidance documents, policies, etc., to be consistent with the Order and Supreme Court's 2018 Bostock decision
- **The Equality Act (H.R. 5)**
 - ▶ Passed by House of Representatives in 2019
 - ▶ Amends Title VII and other federal civil rights laws to expressly include discrimination on the basis of sexual orientation and gender identity as prohibited forms of sex discrimination
 - ▶ Would provide consistent and explicit non-discrimination protections for LGBTQ people in employment, housing, credit, education, jury service, public accommodations and federally funded programs and activities



What is a “Reasonable” Accommodation?

- **Little recent guidance from the EEOC**
 - ▶ EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA (last updated 2002): “reasonable” means “plausible” or “feasible” and must meet the needs of the individual by enabling them to perform the essential functions of their position
- **But Courts have been very active on this issue**
 - ▶ Yochim v. Carson, 935 F.3d 586 (7th Cir. 2019)
 - Employer need only provide an accommodation consistent with the employee’s doctor’s note, not the accommodation the employee requests or would prefer
 - Teleworking is not a reasonable accommodation on its face
 - ▶ Many Courts of Appeals take the approach that “reasonable” requires a cost/benefit analysis.

*EEOC may issue new or updated guidance on reasonableness standard in response to reported cases

Indefinite Leave – Reasonable Accommodation?

- EEOC position is that “Indefinite leave ... will constitute an undue hardship, and so does not have to be provided as a reasonable accommodation.”
- Courts generally agree that indefinite leave, including repeated extensions of leave requests, is not “reasonable.”
 - ▶ BUT, at least two circuits have suggested that indefinite leave might sometimes be a reasonable accommodation:
 - Kachur v. Nav-Lvh, LLC, 2020 U.S. App. LEXIS 17893 (9th Cir. 2020) (failing to provide an “end date of his leave” is not “per se unreasonable”)
 - Cleveland v. Federal Express Corp., 2003 U.S. App. LEXIS 24786 (6th Cir. 2003) (indefinite leave could be a reasonable accommodation unless the employer can show that it causes an undue hardship)



*EEOC may revise its position on indefinite leave to be more employee friendly under Biden administration

Changing Supervisors – Reasonable Accommodation?

- EEOC and Courts generally take the position that a new supervisor is not a required reasonable accommodation.
- Likewise, employers are not required to *reassign* an employee to a different supervisor.
 - ▶ BUT, a supervisor might be required to change certain *supervisory methods* as a reasonable accommodation. See Bishop v. Georgia Department of Family and Children Services, 2006 U.S. App. LEXIS 5968 (11th Cir. 2006).

*EEOC may change its position on changing supervisors as a reasonable accommodation

Pay Equity Under the Biden Administration

- Prioritizing pay equity issues is a key part of Biden's agenda
- Reprioritize pay data collection
- Reintroduction of the Paycheck Fairness Act
- Will influence how federal agencies approach these issues

Employers should take steps now to assess and adjust their compensation and pay practices to ensure compliance with the coming requirements.



National Labor Relations Board

- Traditionally, three from party that holds White House, two from other party
- Appointed for five year term
- Case law
- Rule making



Current Composition

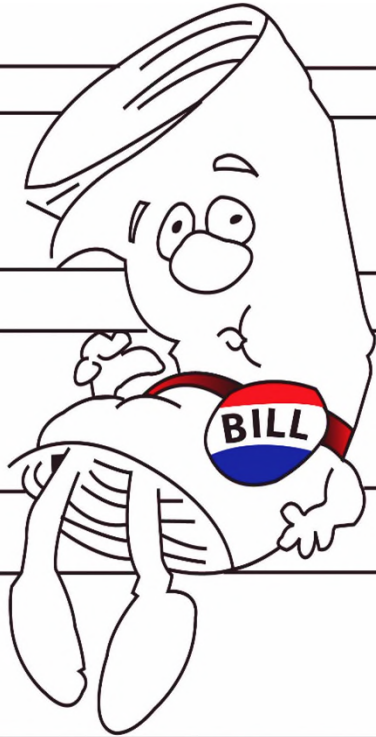
- William Emanuel (R) – August 2021
- John Ring (prior chair) (R) – December 2022
- Vacant – August 2023
 - ▶ Mark Gaston Pearce (D) – August 2018
- Lauren McFerran (chair) (D) – December 2024
 - ▶ Some control of cases
- Marvin Kaplan (R) – August 2025

General Counsel

- Broad discretion to shape agency policy
 - ▶ Main prosecutor
 - ▶ Agency's legal strategy
 - ▶ Oversee regional offices
- Fired GC Peter Robb and Deputy Alice Stock
- Appointed Peter Sung Ohr as Acting GC
 - ▶ Prior Chicago Regional Director
- Nominated Jennifer Abruzzo
 - ▶ Long-term NLRB employee
 - ▶ Currently special counsel for strategic initiatives with Communication Workers of America



Protecting the Right to Organize Act (PRO Act) of 2021



- Introduced in House in February 2021
- Similar bill passed House in February 2020, died in Senate
- Significant changes to the NLRA
- Union wish list

Broaden Coverage of Act



- Revise joint employer standard
 - ▶ Direct and indirect control
 - ▶ Reserved authority to control
- Broaden definition of employee
 - ▶ California ABC test
- Narrow the Definition of Supervisor
 - ▶ Engage in supervisory duties for majority of time
 - ▶ Removes from definition “assign work” and “direct employees responsibly”

Change Dynamics of Collective Bargaining

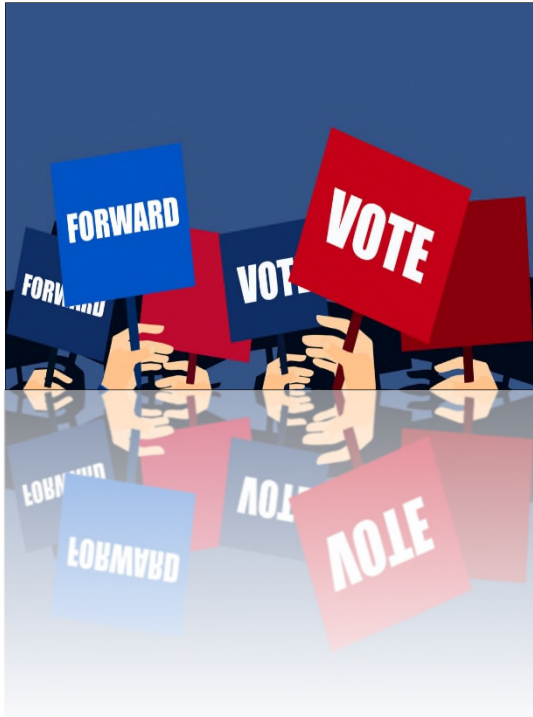
Sets a firm time line for completion of collective bargaining

- Must start within 10 days of demand
- If no agreement after 90 days, mandatory mediation
- If no agreement after 30 days of mediation, referred to binding interest arbitration
- 3 arbitrator panel - create 2 year CBA
 - ▶ Employer's financial status
 - ▶ Size and type of employer's business
 - ▶ Employees' cost of living
 - ▶ Employees' ability to sustain themselves and their families
 - ▶ Comparable employers in the area

Change Dynamics of Collective Bargaining (continued)

- Eliminate the ability to permanently replace an economic striker
- Eliminate the ability to preemptively lock out employees
- Allows intermittent and secondary strikes
- Allows mandatory fair share payments even in right-to-work states

Campaigns and Elections



- Mandates that employees be able to use employer's electronic equipment to engage in organizing activity
- Codifies the availability of micro-units
 - ▶ Overwhelming community of interest
- Eliminates employer's standing to participate in representation proceeding

Campaigns and Elections (continued)

- Eliminates the ability to conduct captive audience meetings
- Codifies quickie elections
- Permits union to select form and location of election
- Allows the Board to certify a union (regardless of the outcome of the vote) if an employer violates the Act during campaign or interferes in the election
 - ▶ Majority cards within past year

New Remedies and Causes of Action

- Provides for civil damages for a violation of the Act that leads to a discharge or other serious economic harm
 - ▶ Back pay (without offset)
 - ▶ Front pay
 - ▶ Consequential damages
 - ▶ Liquidated damages (2X)

- Civil penalties for violations of the Act
 - ▶ \$50K – doubled for repeat offenders
 - ▶ Potential director and officer personal liability

New Remedies and Causes of Action (continued)

- Allows employee to bring civil action after 60 days
 - ▶ Back pay (without offset)
 - ▶ Front pay
 - ▶ Consequential damages
 - ▶ Liquidated damages (2X)
 - ▶ Punitive damages
 - ▶ Attorney's fees

- Bars class or collective action waivers



Priorities for Federal Contractors and Subcontractors

1. Wages

- Executive Order 14003 Protecting the Federal Workforce (1/22/21) – focus on raising minimum wage to \$15.00 (currently its 10.95)

2. Non-discrimination

- Executive Order 13985 Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (1/20/21): (i) revoked prohibition on diversity and inclusion training; (ii) equitable data working group; (iii) assess whether underserved communities face barriers
- Fair pay and safe workplaces: disclosure by contractor of violations of a number of employment laws (Title VII, FLSA, NLRA and state counterparts). Contemplated as a material factor in award of government contracts.

Specific Focus on Service Contract Act Employers

Expect reimplementaion of Obama Administration requirement regarding the replacement of workers on contracts. In certain circumstances successor on the project/contract must offer employment to the workers of the predecessor contractor.



Office of Federal Contract Compliance Programs (OFCCP)



Change in Leadership = Change in Focus

Craig Leen => Jenny Yang

Priorities at the OFCCP

- **Annual Submission of all AAPs**: would require contractors to complete AAPs on time and would require substantive thought into each to make certain no indicia of systemic discrimination
- **Compensation Analysis**: a focus on the compensation of female and minority employees will require analysis of your system and on going will power and adherence to guidelines for new hires and promotions
- **Enforcement**: longer and more contentious audits
- **Diversity**: competition with the EEOC on who is protecting against systemic and other forms of discrimination.

Department of Labor - Overview

- Department headed by Secretary of Labor
- Encompasses the Wage and Hour Division (WHD), the Occupational Safety and Health Administration (OSHA), and the Office of Federal Contract Compliance Programs (OFCCP)
- DOL Responsibilities
 - ▶ Investigating employers for illegal wage practices and worker-safety violations
 - ▶ Conducting statistical analysis
 - ▶ Facilitating job training programs
 - ▶ Overseeing unions and registered apprenticeship programs
 - ▶ Tracking changes in employment, prices, and other national economic measurements
 - ▶ Administering federal labor laws, including those that guarantee workers' rights to safe and healthful working conditions; a minimum hourly wage and overtime pay; freedom from employment discrimination; unemployment insurance; and other income support



Department of Labor in 2021

- Biden's Nom for Sec. of Labor: Martin ("Marty") Walsh
 - ▶ Mayor of Boston since 2014
 - ▶ Union President, Laborers' Union, Local 223
 - ▶ Strong labor support
- Some of Biden's new DOL hires will lead on a temporary basis, until he nominates, and the Senate approves, a full slate of permanent leaders

What to Expect From a Walsh-led DOL

- Enforcement Priorities Reshuffle
 - ▶ Walsh is generally expected to prioritize workers and return to policies experienced during the Obama Administration
- Pursuit of new administration's labor goals
 - ▶ Collaboration with OSHA to expand work place safety requirements
 - ▶ Expanding who qualifies for overtime pay
 - ▶ Boosting labor unions
 - ▶ Pressing Congress to raise the federal minimum wage to \$15/hour (Walsh supported 2018 law that will continue to raise MA's minimum wage to \$15 an hour by 2023)
 - ▶ Altering joint-employment and independent contractor rules
 - ▶ Implementation of strategies aimed at closing the gender pay gap

What to Expect Regarding Paid Leave

- No reinstatement for mandatory paid family and sick leave from 2020 COVID relief bill.
- Instead, employers can voluntarily provide it for a tax credit through October 1.
- But post-COVID, will there be federal paid sick and family leave?
 - ▶ Biden has indicated that his paid leave proposal would include provisions similar to those in the Family and Medical Insurance Leave Act (the FAMILY Act) (H.R. 1185/S. 463 from 2019-2020 session)
 - ▶ Paid through Social Security Administration - Up to 12 weeks of job-protected *paid* leave for an employee's serious health condition or the serious health condition of a child, parent, spouse or domestic partner; the birth or adoption of a child; and/or for certain military caregiving and leave purposes
 - ▶ Likely will be a partial income rate – 66% of one's monthly wages, up to a capped amount.
 - ▶ Could cover all workers, regardless of where they live, the nature of their job or the size of their employer. (i.e., including younger, part-time, lower-wage, contingent and self-employed workers).

Paid Leave (continued)

- State law mosaic will still be relevant, even if there is a federal paid leave law.
 - ▶ 9 states, DC and San Francisco currently have PFML programs
- Considerations:
 - ▶ State and local law considerations
 - ▶ Distinguish wage replacement and job protection.
 - ▶ Whether FMLA and paid leave run concurrently?
 - ▶ Do your policies clarify how employer-provided leave interacts? (i.e., must run concurrently, cannot exceed 100% of pay)



Reasons for Use – PFL Laws Comparison

Reason for Use	Relevant PFL Locations
Bonding - Birth	All 11 Existing PFL Laws
Bonding - Adoption	All 11 Existing PFL Laws
Bonding – Foster Care Placement	All 11 Existing PFL Laws
Care of Family Member with Serious Health Condition	All 11 Existing PFL Laws
Own Serious Health Condition	CO, WA, DC, MA, CT, OR
Qualifying Military Exigency	CA, CO, CT, MA, NY, WA
Bone Marrow and Organ Donation	CT
Military Caregiver Leave	MA, CT
Safe Time	NJ, OR, CO
Certain Unpaid Leave Reasons	OR

Amount of Leave Benefits – PFL Laws Comparison

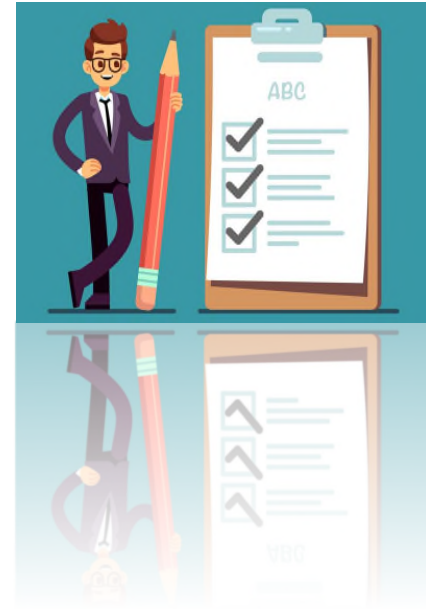
Weeks of PFL Benefits / Year	Relevant PFL Locations
2 Weeks	DC (for “medical leave” to care for employee's serious health condition)
4 Weeks	RI
6 Weeks	DC (for “family leave” to care for seriously ill family member)
8 Weeks	CA, San Fran, DC (for “parental leave” and combined family and medical leave)
12 Weeks	NJ; MA; NY; WA (single “family leave” or “medical leave” event); CT (as of 1/1/2022); CO (as of 1/1/2024); OR (for “family and medical leave”) (as of 1/1/2023)
14 Weeks	CT (for employee's serious health condition resulting in incapacitation during pregnancy) (as of 1/1/2022); OR (for limitations caused by pregnancy, child birth, or related medical condition, including lactation) (as of 1/1/2023); WA (for serious health condition that results in incapacity)
16 Weeks	WA (if multiple covered events per year); CO (for employee’s serious health condition related to pregnancy or childbirth complications) (as of 1/1/2024)
18 Weeks	OR (in certain limited situations) (as of 1/1/2023); WA (in certain limited situations)
20 Weeks	MA (for “medical leave” due to employee's serious health condition, which may include a substance abuse disorder if treated by a health care provider)
26 Weeks	MA (for combined family and medical leave and to care for a family member who is a covered service member); NJ (for “medical leave” due to employee disability); NY (for “medical leave” due to employee disability)
30 Weeks	RI (for “medical leave” due to employee disability)
52 Weeks	CA (for “medical leave” due to employee disability)

Amount of Pay – PFL Laws Comparison

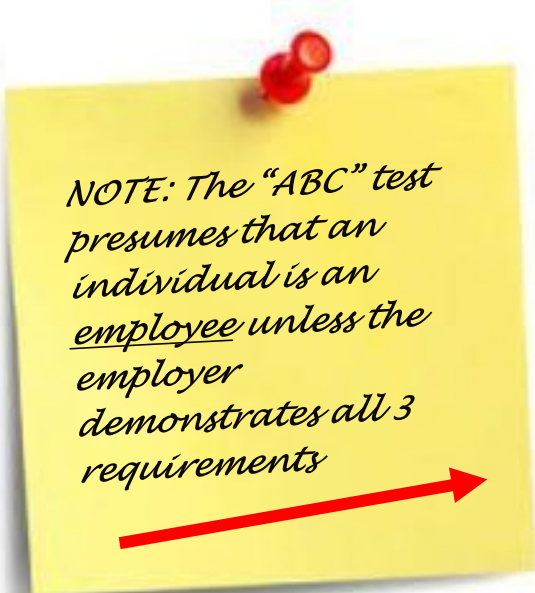
PFL Location	Amount of PFL Benefit Payments
California	-60-70% weekly wage replacement (depending on income) - <u>Max. Weekly Benefit Amt.:</u> \$50 - \$1,252
Colorado	- <u>2024:</u> 50% of employee's avg. weekly wages over 50% of state avg. weekly wage; 90% of employee's avg. weekly wages ≤ 50% of state avg. weekly wage - <u>Max. Weekly Benefit:</u> \$1,100 for leave before 1/1/2025; 90% of state avg. weekly wage for leave after 1/1/2025
Connecticut	- <u>2022:</u> 60% of employee's base weekly wages above 40x state min. wage; 95% of weekly wages up to 40x state min. wage - <u>Max. Weekly Benefit:</u> \$780 (60x state min. wage)
District of Columbia	-90% of avg. weekly wage or 90% of 150% of state min. wage x 40, <i>plus</i> 50% of amt. by which avg. weekly wage exceeds 150% of state min. wage x 40 (depending on income) - <u>Max. Weekly Benefit (before 10/1/2021):</u> \$1,000
Massachusetts	-80% of employee's avg. weekly wages ≤ 50% of state avg. weekly wage; 50% of employee's avg. weekly wages over 50% of state avg. weekly wage - <u>Max. Weekly Benefit:</u> \$850 (cap adjusted annually to 64% of state avg. weekly wage)
New Jersey	-85% of avg. weekly leave - <u>Max. Weekly Benefit:</u> \$859 (70% of state avg. weekly wage)
New York	-67% of avg. weekly wage - <u>Max. Weekly Benefit:</u> state avg. weekly wage (\$1,450.17 as of 3/2/2021) *COVID-19 Leave weekly benefit capped at \$840.70 for PFL
Oregon	- <u>2023:</u> 100% of employee's avg. weekly wage or 65% of state avg. weekly wage, plus 50% of employee's avg. weekly wage that is greater than 65% of state avg. weekly wage (depending on income) - <u>Max. Weekly Benefit:</u> 5-120% of state weekly avg.
Rhode Island	-4.62% of wages paid during employee's highest quarter of base period - <u>Max. Weekly Benefit:</u> \$98 - \$867
Washington	-90% of employee's avg. weekly wage or 90% of 50% of the state avg. weekly wage, plus 50% of the difference in the employee's weekly wage and state avg. weekly wage (depending on income) - <u>Max. Weekly Benefit (as of 2020):</u> \$100 - \$1,000 (adjusted annually to reflect 90% of state avg. weekly wage)
San Francisco, CA	-Requires supplemental compensation totaling 100% of employee's gross weekly wage (up to weekly max.) - <u>Max. Weekly Benefit (as of 2020):</u> \$2,167

Independent Contractor - DOL Rules

- **Trump Administration Rule**
 - ▶ Economic Reality Test
 - ▶ Identifies two “core” factors in IC analysis plus add’l non-core factors
 - ▶ Published 1/7/2021; DOL froze rule implementation on 1/20/2021
- **Biden’s labor platform includes significant substantive changes to the law, including:**
 - ▶ Making independent contractor misclassification a substantive violation of the law, subject to fines
 - ▶ Banning arbitration agreements with class action waivers
 - ▶ Extending the right to bargain collectively to independent contractors
 - ▶ Increasing federal minimum wage to \$15/hour
 - ▶ Establishing a federal “ABC” test for determining whether a worker should be classified as an employee or independent contractor



ABC Test

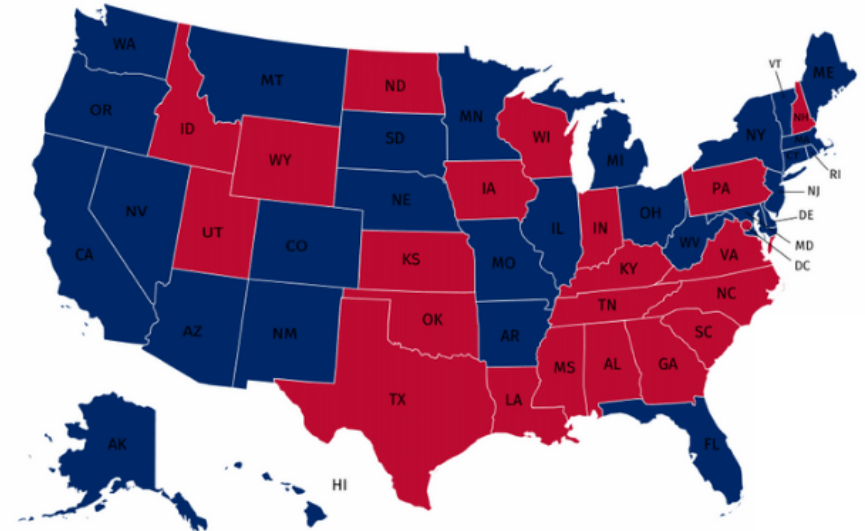


NOTE: The "ABC" test presumes that an individual is an employee unless the employer demonstrates all 3 requirements

- A) The worker must be *free from control and direction* of the hirer in relation to the performance of the work, both under contract and in fact.
- B) The worker must perform work that is *outside the usual course* of the hirer's business.
- C) The worker is *customarily engaged in an independently established trade, occupation, or business* of the same nature as the work performed for the hirer.

Minimum Wage

- Current: \$7.25 – last updated in 2009.
- Failed proposal to increase federal min. wage in the American Rescue Plan Act of 2021 (passed by House on 3/1/21)
 - ▶ Almost immediate increase to \$9.50/hour
 - ▶ Increase annually by \$1.50 per hour until reaching \$15 in 2025
 - ▶ After 2025, increases, if any would be indexed based on the median hourly wage of all employees for the prior year



US Minimum Wage in 2021

- Federal Minimum Wage
- Above the Federal Minimum Wage

Salary Threshold for White Collar Exemptions



- Current salary threshold since 1/1/20 = \$684.00 per week, \$35,568 yearly.
- Biden expected to ask DOL to increase the minimum salary threshold for exempt employees
 - ▶ This would result in more “white collar” employees being eligible for overtime pay.
- Increases will likely be similar to those the Obama Administration’s DOL tried to implement in 2016
 - ▶ Proposed \$23,660 to \$47,476, and further increased every 3 years.

DC, VA AND MD STATE EMPLOYMENT LAW UPDATES

Presented by:

Merrell Renaud

Kraig Long



New VA Laws Effective July 1, 2020



Virginia Values Act (VVA)

- Expands Scope of Virginia Human Rights Act (VHRA)
 - Adds:
 - ▶ gender identity
 - ▶ sexual orientation
 - ▶ marital and veterans status
- to the list of classes protected under the VHRA

Increased Applicability

- VVA makes the VHRA applicable to most Virginia employers
 - ▶ Previously VHRA only applied to small employers
 - more than 5 and up to 14 employees (or up to 20 employees for termination based upon age)
- VVA removes the upward cap
 - ▶ Except age related termination 6-19 employees
- Now every employer in Virginia with more than five employees is subject to the VHRA for covered claims of unlawful discrimination
 - ▶ Except age-related termination claim cap remains 6-19 employees



Increased Damages

- Repealed the damages provisions of the VHRA:
 - ▶ **Previously:**
 - 12 months of backpay and attorney's fees capped at 25% of backpay
 - ▶ **Now:**
 - No cap on compensatory damages (front and backpay)
 - No cap on attorney's fees
 - State cap on punitive damages
- The VVA increases claims that can be brought in state court, employers who can be sued in state court, and the value of state discrimination suits.



Decriminalization of Marijuana (Va. Code § 18.2-250.1)

- **Decriminalization of Simple Possession of Marijuana**
 - ▶ Civil penalty of < \$25, no criminal conviction or jail.
- **Prohibition against Asking about Arrest or Conviction for Simple Marijuana Possession.**
 - ▶ Applicants can exclude information about simple possession of marijuana.



Misclassification of Employee as Independent Contractor (Va Code § 40.1-28.7:7)

- **Private Right of Action** for “knowing” misclassification of employee status.
- **Recovery** - wages, salary, reasonable attorney’s fees, costs and employment benefits (including costs that would have been covered by insurance.)
- **Presumption of Employee Status:** Effective July 1, 2021.
- **Public Enforcement and Debarment:**
- Upon two or more misclassifications,
 - ▶ debarment for contractors with government contracts with VA governmental entities for one year.
- **Anti-Retaliation**



Wage Protection, Pay Transparency and Pay Stubs. (Virginia Code 40.1-29)



- **Private Right of Action:** Able to sue employers directly for unpaid wages, including a collective action for similarly situated co-workers.
 - ▶ Alternatively, the Virginia Commissioner of Labor and Industry can investigate claims and institute proceedings on behalf of multiple employees.

- **Damages:** Courts can award unpaid wages owed plus an additional amount as liquidated damages, prejudgment interest and attorney’s fees and costs.
 - ▶ If an employer “knowingly” fails to pay wages, an employee can recover up to “triple the amount of wages due and reasonable attorneys’ fees and costs.”

Pay Transparency and Enforcement



- **No Retaliation**: Employers may not retaliate against employees who inquire about, discuss or disclose compensation information (expect employees who have access to wage information as part of their job).
- **Enforcement**: The Commissioner of Labor and Industry can impose a civil penalty of \$1,000 per violation.

Paystubs

- Each pay period pay stub must contains the following:
 - 1) Name and address of employer;
 - 2) Number of hours worked in the pay period (except for salaried exempt employees);
 - 3) Rate of pay;
 - 4) Gross wages;
 - 5) Amount and reason for deductions; and
 - 6) Sufficient information so employee can determine how gross and net pay were derived.

Sample Company Name 1234 Dick Buccanna St Laverne, TN 37086				EARNINGS STATEMENT		
EMPLOYEE NAME	SSN	EMPLOYEE ID	CHECK NO.	PAY PERIOD	PAY DATE	
Brandon Smith	XXX-XX-01234	1234	607221	12/22/17-12/28/17	12/29/17	
INCOME	RATE	HOURS	CURRENT TOTAL	DEDUCTIONS	CURRENT TOTAL	YEAR-TO-DATE
GROSS WAGES	18	40	720.00	FICA MED TAX	10.44	542.88
				FICA SS TAX	44.64	2,321.28
				FED TAX	92.40	4,804.75
PAY-STUBS.COM						
YTD GROSS	YTD DEDUCTIONS	YTD NET PAY	CURRENT TOTAL	CURRENT DEDUCTIONS	NET PAY	
37,440.00	9,783.31	27,656.69	720.00	188.14	531.86	

Whistleblower Protection (Va Code § 40.1-27.3)

- Protects employees for making an internal **or** external report of a violation of any federal or state law or regulation.
- Protected activities include:
 - ▶ An employee or someone on his/her behalf making a good faith report of a violation of a federal/ state law/regulation to any supervisor, governmental body or law-enforcement official.
 - ▶ Participation in an investigation, hearing, or inquiry at the request of a governmental body or law-enforcement official.



Whistleblower Protection (Va Code § 40.1-27.3) Continued

- Refusal to engage in a criminal act that would subject the employee to criminal liability;
- Refusal of an employer's order to perform an act that violates any federal or state law or regulation where the employee informs the employer that the order is being refused for that reason; or
- Providing information to, or testifying before, any governmental body or law-enforcement official conducting an investigation, hearing, or inquiry into any alleged violation by the employer of federal or state law or regulation.

Whistleblower Protection (Va Code § 40.1-27.3) Continued

- **Exceptions:** Conduct is not protected if the disclosure is false, in reckless disregard of the truth, if the employee discloses privileged information, or the employee's disclosure is illegal.
- **Direct Action and Damages:**
 - ▶ No need to file an administrative charge.
 - ▶ May obtain injunctive relief, reinstatement, lost wages, benefits, plus interest and reasonable attorney's fees and costs.

NEW LAWS IN MARYLAND



Ban on Salary History and Wage Range Disclosure

- Must provide an applicant with the wage range for an open position upon request.
- Cannot request or seek an applicant's wage history, either directly from the applicant or indirectly (e.g., a current or former employer).
- Cannot rely on the wage history of an applicant when screening or considering an applicant for employment or in determining initial wage offer.
- Once you make an initial offer of employment, you may rely on wage history if **voluntarily provided** by the applicant to increase the initial wage offer or to confirm the wage history to support a higher offer.

Expanded Anti-Retaliation Protections for Current Employees

Prohibits an employer from taking any adverse employment actions against an employee for:

- Inquiring about the **employee's wages** or another employee's wages
- Disclosing the employee's own wages
- Discussing another employee's wages if those wages have been disclosed voluntarily
- Asking the employer to provide a reason for the employee's wages
- Aiding or encouraging another employee's exercise of rights under the Equal Pay for Equal Work law

RIF Notice Requirements (Mini-WARN Act)



- Prior law: provided voluntary guidelines for employers who intended to lay off employees regarding the provision of notice to those employees
- New law: now requires Maryland employers with 50 or more employees to provide written notice at least 60 days prior to the start of any “reduction in operations”
- “Reduction in operations” is defined as:
 - ▶ the relocation of a part of an employer’s operation; or
 - ▶ the shutting down of a workplace or a portion of the operations of a workplace that reduces the number of employees by at least 25 percent or 15 employees, whichever is greater, over any three-month period.

Expanded Definition of “Family Member”

- The definition of “family member” under Maryland Healthy Working Families Act now include the employee’s legal ward, legal guardian or the legal ward of the employee’s spouse.



Natural Hairstyles Protected (Crown Act)

- Expands definition of race under existing state anti-discrimination laws
- “Race” is now defined as including traits associated with race, including hair texture, afro hairstyles, and protective hairstyles.
- Bans discrimination in employment, public accommodations and housing.



Heat Stress

- Requires the Maryland Department of Labor's develop and adopt regulations that require employers to protect employees from heat-related illness caused by heat stress.
- The Maryland DOL has until October 1, 2022, to adopt the regulations.



Facial Recognition in the Hiring Process



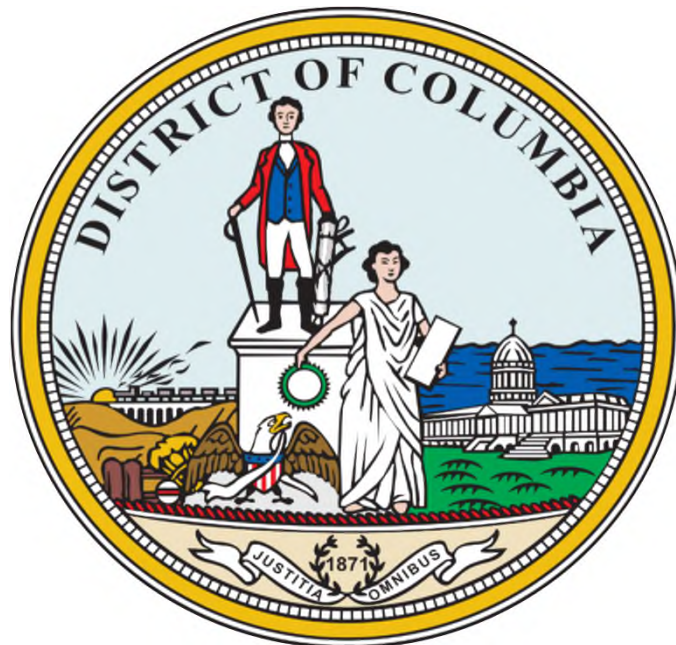
- Bans use of facial recognition technology during job interviews without consent of applicant.
- Applicant consent must be obtained from a signed waiver prior to start of interview.
- Took effect May 11, 2020

Ban the Box – Montgomery County



- New law prohibits employers with at least **one employee** (not limited to F/T) in Mont. Co. from conducting criminal background check, or asking applicants about arrests or conviction, *before a conditional offer of employment has been made.*
- Cannot base a hiring or promotion decision on:
 - ▶ Arrests that did not result in a conviction
 - ▶ First conviction for trespass, disturbance of peace, 2nd degree assault
 - ▶ Misdemeanor where at least 3 years have passed
 - ▶ Juvenile or expunged record.
- Takes effect on February 19, 2021

New Laws in the District of Columbia



DC Paid Family Leave



- Provides paid leave for employees who spend more than 50% of their work time in DC, including:
 - ▶ Parental Leave – up to 8 weeks (within 52 weeks of birth, adoption, or foster care placement)
 - ▶ Family Leave – up to 6 weeks (care for a covered family member with “serious health condition”)
 - ▶ Medical Leave – up to 2 weeks (care for employee’s own “serious health condition”)

- Took effect July 1, 2020

DC Transportation Benefits Equity Amendment Act of 2020



- Applies to DC employers who offer “parking benefits” to employees
- Employers must take measures to reduce number of employees who commute into the city by private vehicle, including:
 - ▶ Providing mass transportation for employees directly (e.g., shuttle service);
 - ▶ Giving employees a mass transit commuter pass (e.g., Metro, MARC, VRE, Amtrak); or
 - ▶ Reimbursing employees for the purchase, maintenance and storage of a bicycle.
- Alternatively, employers can pay a \$100 fee per employee per month or develop a transportation demand management plan

Tipped Wage Workers Fairness Amendment Act

- Employers with tipped employees must provide a sexual-harassment prevention training course for all employees
- Each employee must receive training no later than 90 days after hire
- Employees hired before the law becomes effective have two years from the effective date to attend training either in person or online.
- Managers, owners and business operators must attend training at least once every two years.
- Managers must attend in-person training.




Leave to Vote Amendment Act of 2020



- Gives all DC employees two (2) hours of paid leave to vote in person
- Employee must provide reasonable notice
- Employers can specify the hours an employee may take voting leave, including early voting
- If employee is ineligible to vote in DC, employees get 2 hours of paid leave to vote in their jurisdiction

Ban on Non-Compete Agreements in the DMV



“Employee agrees that for a period of three (3) years after the Employee is no longer employed by the Company, the Employee will not directly or indirectly own, manage, control, participate in, consult with, render services for, or in any other manner engage in any business, or invest in or lend money to any business, which is competitive with any business conducted by the Company.”

**NON-COMPETE
AGREEMENT**



	Maryland	Virginia	District of Columbia
Bans Non-Compete Covered Employees	Yes	Yes	Yes
	Employees who earn equal to or less than \$15.00/hour or \$31,200/year	Employees or independent contractors (if paid by the hour) whose average weekly earnings are less than the average weekly wage in Virginia (currently, \$1,137/week or \$59,124/year)	All employees
Bans NDAs or Confidentiality Agreements?	No	No	No
Bans Non-Solicitation Agreements?	?	?	?
Impact on Agreements Prior to Effective Date	None	None	None
Right to Sue/Penalty for Noncompliance	No	Yes	Yes, fines
Effective Date	October 1, 2019	July 1, 2020	March 19, 2021

Thank you from your presenters

Covid-19 Considerations for Employers



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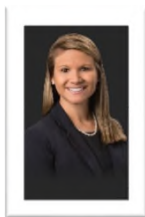


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DC, VA and MD State Employment Law Updates

What to Expect Under the Biden Administration



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