

Show Me the Money

Trending Issues in Employee Pay

Suzanne Decker, Stephanie Baron, Michelle Johnson | Hot Topics 2023 | April 25, 2023



This Presentation Will Cover



- Pay Transparency Laws
- Pay Equity Issues
- Independent Contractor Classification and Risks
- Other State Pay Issues



The Rise of Pay Transparency Laws

Hypothetical

Your company only has one office in Maryland and most of your employees work there. A consulting role opened and you are considering hiring a remote employee. You receive an application from Cousin Greg, who recently moved to Colorado after being kicked out of the family business.



Hypothetical, cont'd.

After you advise him he has been selected for an interview, Cousin Greg asks how much he will be paid if he is hired for the job. You don't usually share this information until an employee receives an offer, because the salary will vary based on location, experience and other market factors.



What do you do?

- A. Tell him the salary range because he asked.
- B. Tell him the salary range because the law requires that you disclose that information to applicants.
- C. Tell him that you are not able to disclose that information until after an offer is made.
- D. Tell him that you are not able to disclose that information because it depends on how he does in the interview.



What are pay transparency laws?



- Pay transparency laws require employers to disclose information about employee compensation
 - Some have affirmative disclosure obligations
 - Others require disclosure only upon request
- Intent of the law is to eliminate pay disparities

Laws may also:



- Require disclosure of benefit information;
- Prohibit asking about an applicant's salary history or relying on such information to set pay;
- Prohibit restricting employees from discussing their compensation with other employees.

Where do these laws exist?

Must provide information proactively in job postings	Must provide information during interview or upon request
<ul style="list-style-type: none"> • California • Colorado • Jersey City, NJ • New York • New York City • Ithaca, NY • Westchester, NY • Washington 	<ul style="list-style-type: none"> • Connecticut • Maryland • Kansas City, MO • Nevada • Cincinnati, OH • Toledo, OH • Rhode Island

*As of April 2023

What is required in Maryland?

- On request, employers must provide an applicant with the wage range for the position
 - The statute does not define "wage range"
 - Reasonable estimate with disclaimer
- Cannot prohibit employees from discussing salaries
- Cannot require employee to share previous salary

Sample of Other State Laws

- Colorado: must disclose compensation and benefits information in each posting for each job opening if position could be filled remotely; must describe the general nature of the benefits and what they provide
- California: must include pay scales for all job postings that could be filled by a resident in California
- Washington: must include in each posting for each job opening the wage scale or salary range and a general description of all of the benefits

Sample Job Posting

Position Name - The typical base pay range for this position at the start of employment is expected to be between **\$100,000 - \$150,000** per year. COMPANY has different base pay ranges for different work locations within the United States and base pay will vary based on experience.

You may be eligible for additional rewards, such as discretionary bonus and/or equity awards. These awards are provided based on individual performance and are not guaranteed. You may have access to healthcare benefits, a 401(k) plan, short-term and long-term disability coverage, life insurance, paid vacation time, paid sick time, and paid holidays.

Benefits listed here may vary depending on the nature of employment and the work location.

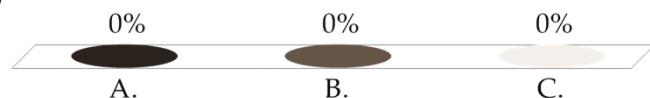
So back to Cousin Greg....

Your company is in Maryland but since you are considering remote employees, the job really could be performed anywhere, including California or Colorado. You're trying to determine what information you are required to disclose to Cousin Greg in response to his request.



What should you do?

- A. Follow MD law and only disclose the salary range since he asked.
- B. Follow CO law and provide him a salary range and brief description of benefits.
- C. Decide as a Company that you don't want to hire anyone in a state that requires salary disclosures. These rules are too complicated and you don't want everyone in the IT Department to know how much Cousin Greg will make!

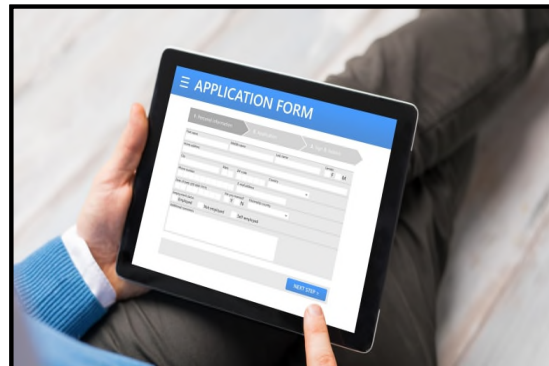


Remote Employees

- The law of the state where the remote employee will perform work is generally what applies
- Some states have set a threshold for the number of employees a company must employ in the state before the law applies
- Some states have found that the law applies even if the Company has no employees in the state (California, Colorado) but the position could be performed remotely in the state

Do I have to?!?!

- At least Colorado has taken the position that you can't specifically exclude Colorado applicants
- The list of excluded states could be getting long!



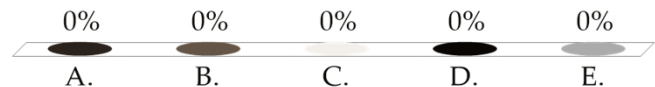
Pay Equity Issues

Hypothetical

You hire Cousin Greg at the higher end of your salary range. Cousin Greg's cousin Shiv, who lives in NYC, also applies and is hired for the same consulting role. Shiv is paid at the lower end of the salary range because her prior experience in politics is not relevant to the current role, for which she has limited experience. After she starts, Shiv talks with several other female employees in their department and discovers they also earn less than Greg.

What claims could these employees have against the Company?

- A. Gender Discrimination under Title VII
- B. Equal Pay Act Claims
- C. State Equal Pay Claims
- D. Sexual Harassment
- E. A, B & C



Hypothetical



Shiv complains to Human Resources, which tells her that Cousin Greg earns more than these women because he was making more at his prior job, and they had to pay more to entice him to join the Company.

Is this reason legitimate?

- A. Yes, it's ok to pay people differently based on their prior salaries.
- B. No, prior salary cannot be the sole reason for pay disparity.
- C. Prior salary may be one of the many factors you can consider in setting pay.
- D. You should only pay people based on experience.



Factors Company Can Legally Consider When Setting Pay

- Location
- Education
- Experience
- Performance
- Tenure



BE AWARE – State Reporting Requirements



- Several states have recently passed laws mandating specific reporting requirements for employers with employees working in their state:
 - **California** – modification to Pay Equity Act (impacts employers with 100 or more total employees and at least one employee or labor contractor in CA) – deadline to file is May 10, 2023
 - **Illinois** – Equal Pay Registration Certificate (impacts employers with 100 or more employees in IL) requires filing of EEO-1 and certification of compliance with equal pay laws – deadline to file is March 24, 2024
- Know the laws in each state where you have employees!

Consider a Pay Equity Audit



- Valuable to determine if there are pay discrepancies based on gender and other protected categories
- Avoid discrimination lawsuits regarding pay
- Promotes morale and equity

Pay Equity Audit – How?



- Hire a statistician
- Determine if there is adverse impact
- Complete a cohort analysis
- Perform the audit under the cover of privilege

Business Expense Reimbursement

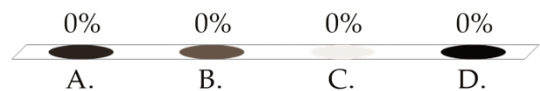
Hypothetical

Shiv, who has now moved to California, buys an iPhone 16 which she uses to take work calls and respond to email when she is away from her computer. She emails HR and says she read online that the Company must reimburse her for all business expenses now that she moved to California, so she expects the Company to reimburse her for the cost of the phone.



Do you have to pay for that?

- A. Yes, you are required by law to reimburse her for the full cost of the phone.
- B. No, she bought an outrageously expensive phone and uses it for personal reasons too.
- C. No, she could technically do all of her work from her company provided computer.
- D. Yes, if you know that she is taking work calls from her phone, you may need to pay her a reasonable percentage of the cost of the phone.



Expense Reimbursement



- California requires reimbursement for all “necessary” expenses incurred to perform an employee’s job duties, including those incurred at the employer’s direction
- Currently, there are similar laws in DC, IL, MT, NH, ND, SD, City of Seattle



Options for Compliance



- Varying guidance on how to comply
 - Stipend
 - Follow business expense reimbursement policy
- Must pay a “reasonable” percentage of cost where use is both personal and for company purposes

Independent Contractors

Hypothetical

It's just too much work to continue complying with these remote employee laws! Instead, the next time you have an opening, you recommend that the Company hire Kendall as an independent contractor. He is only going to work part-time, and he is excited about not having taxes withheld from his compensation. You give him a Company computer, agree to pay him hourly, and tell him you will reimburse him for travel and other business expenses.

Does this relationship create risk for the Company?

- A. No, because he is only working part time.
- B. No, because Kendall agreed he wanted to be an independent contractor.
- C. No, you no longer have to comply with remote employee laws or pay for benefits.
#bestdealever
- D. Yes, you are treating him like an employee.



Contractor Classification Red Flags

- Biggest issue – Control!
- Providing equipment
- Providing benefits and/or expense reimbursement
- Hourly pay v. invoicing or project based pay
- Requiring compliance with employee policies



Risks

- IRS/DOL Audit – fines and penalties
- State agency audits – fines, penalties, and unemployment claims
- Back pay for minimum wage/overtime
- Damages can include value of lost benefits



State Pay Issues

Paid Sick Leave

- Devising a policy to meet requirements of all applicable states can be difficult
- Alternative - create state-by-state policies
- Watch out for carry over and accrual requirements that vary by state
- Part-time employees sometimes eligible for leave under state law

Exemption Thresholds

- FLSA - DOL continues to state that they will be increasing the minimum threshold for exempt employees under federal law
- Regardless - many states and some cities have their own minimum thresholds for employees to be considered exempt that exceed federal law
- You must be aware of the exempt salary requirements in any state where you employ exempt employees!

State Exemption Variation Examples

- Federal - \$35,568
- CA - \$64,480
- CO - \$50,000
- ME - \$41,041
- NY varies by location- \$55,341 - \$58,511
- WA - \$57,293.60 - \$65,478.40

QUESTIONS?



Protecting Business Information in the Current Environment

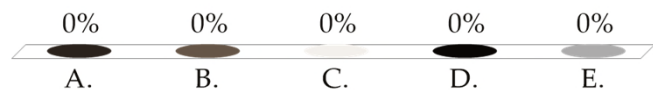
Kirsten M. Eriksson, Elisabeth K. Hall, Veronica D. Jackson, Rebecca A. Leaf | Hot Topics 2023 | April 25, 2023



Which of the following does your business use?



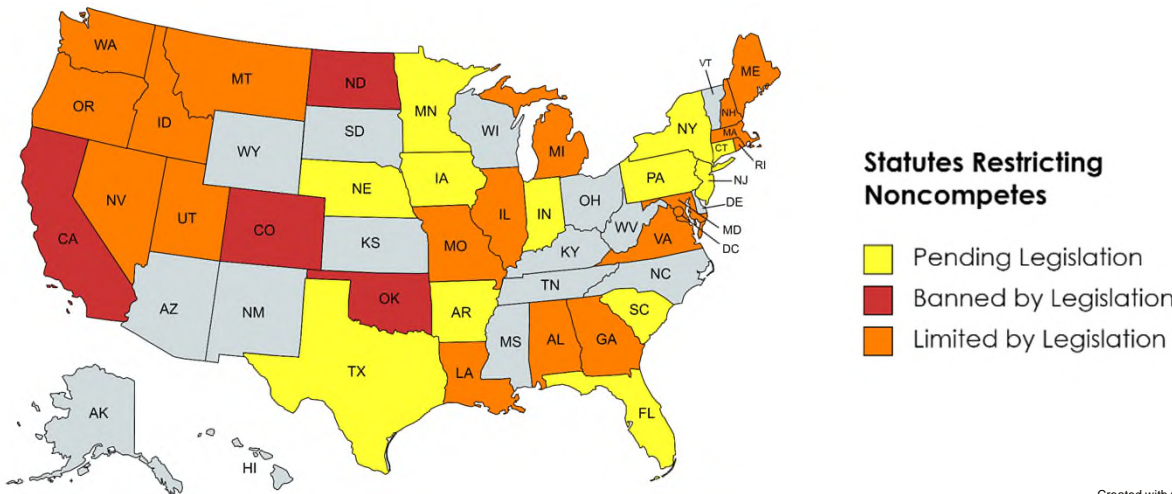
- A. Noncompetition Agreements
- B. Nonsolicitation Agreements
- C. Confidentiality Agreements
- D. 2 or more of the above
- E. None of the above



Agenda

- Noncompetes under attack at state and federal level
- NLRB limitations on confidentiality and non-disparagement clauses
- Increased regulation of business use of employee and consumer data and increased privacy protections
- Data privacy and protection of trade secrets

Statutory Restrictions of Noncompetes



Created with mapchart.net

Common Restrictions



- Salary threshold (range: \$14.50/hour - \$150,000/year)
- Duties threshold
- Time period (6 months – 2 years)
- Required to be presented in writing prior to beginning employment
- Payment during restricted period (less common)

FTC Proposed Ban on Noncompetes



- Use of noncompetes is a “widespread and often exploitative practice that suppresses wages, hampers innovation, and blocks entrepreneurs from starting new businesses”
- Without noncompetes, wages could increase by nearly \$300 billion per year

What Does the Proposed Rule Say?



- Prohibits noncompetes with employees
- Companies must formally rescind existing noncompete provisions AND send an individualized notice to employees
- Permissible in sale of business for owners with 25% interest in seller
- No exception for executive compensation, stock, bonuses, etc.

Is the Ban Only on Noncompetes?

- Prohibition is on contracts that prevent a worker “from seeking or accepting employment with a person, or operating a business” after termination
- So - nonsolicitation and nondisclosure covenants would still be permissible
- BUT - “functional test” to determine if clause operates as a “de facto” noncompete that would be impermissible under the rule
 - Example: training agreement to repay costs upon termination
 - What about clawbacks of bonuses or equity?

Will this happen? If so, when?

- Timeline:
 - FTC must review 26,000 comments submitted
 - After review, the FTC may: reopen the comment period; issue a new proposed rule; or issue a final rule
 - Final rule published in the Federal Register, and cannot be effective for at least 60 days after publication
- Roadblocks to Implementation:
 - Litigation almost certain
 - Congress could also call hearings, enact new legislation, or impose funding restrictions. Several federal bills of more limited scope are being proposed

What should employers do now?

- Identify existing noncompetes
- Review your current provisions and current practice – should you make changes?
- Consider alternate means to protect the business
 - Review policies and practices on confidential and trade secret information
 - Improve employee retention and loyalty



McLaren Macomb

- Cannot require broad waiver of employees' Section 7 rights
- Mere proffer of an agreement containing these terms is unlawful
- Even former employees have Section 7 rights
- Applies even if signing severance agreement is voluntary
- Nondisparagement and confidentiality clauses must be narrowly tailored...*but what does that mean?*

General Counsel Guidance

- GC 23-05 issued on March 22, 2023
- Guidance to the regional offices about how the GC will interpret McLaren Macomb
- GC's opinion, not the law

GC 23-05: Retroactive Effect



- Retroactive effect
- Possibility of continuing violations within 6-month statute of limitations period
- BUT...will not invalidate entire agreement

GC 23-05: Confidentiality

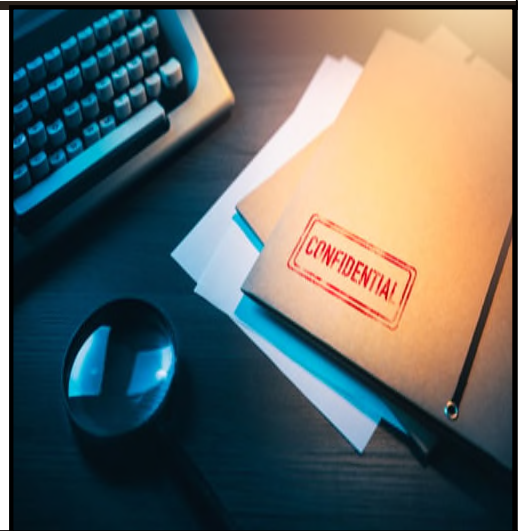


Employers may:

- Restrict the dissemination of proprietary and trade secret information based on legitimate business justifications
- Require that an employee keep the financial terms of the agreement confidential

Employers may not:

- Prohibit an employee from sharing information about the agreement with third parties



GC 23-05: Nondisparagement

- “Disparage” must be defined in the agreement
- Defamation standard, i.e., prohibiting employees from making statements about the employer that are “maliciously untrue”
- Cannot require nondisparagement of the employer’s “parents, affiliated entities, officers, directors, employees, agents, representatives”

GC 23-05: Supervisors

- Supervisors are excluded from the Act’s coverage but:
 - Severance agreements proffered to supervisors may not interfere with a supervisor’s participation in a Board proceeding
 - Employer may not discipline a supervisor who refuses to proffer an unlawfully overbroad severance agreement to an employee on the employer’s behalf



GC 23-05: Broad Application

- Not limited to severance agreements – applies to any employer-employee communication that infringes on Section 7 rights
- GC identified other potentially problematic provisions:
 - Noncompete
 - No solicitation
 - No poaching
 - Broad liability releases and covenants not to sue
 - Certain cooperation requirements

GC 23-05: Savings Clause

Employees have the right to: (1) Organize a union to negotiate with an employer concerning their wages, hours, and other terms and conditions of employment; (2) form, join, or assist a union, such as by sharing employee contact information; (3) talk about or solicit for a union during nonwork time, such as before or after work or during break times, or distribute union literature during nonwork time, in nonwork areas, such as parking lots or break rooms; (4) discuss wages and other working conditions with coworkers or a union; (5) take action with one or more coworkers to improve working conditions by, among other means, raising work related complaints directly with the employer or with a government agency, or seeking help from a union; (6) strike and picket, depending on its purpose and means; (7) take photographs or other recordings in the workplace, together with coworkers, to document or improve working conditions, except where an overriding employer interest is present; (8) wear union hats, buttons, tshirts, and pins in the workplace, except under special circumstances; and (9) choose not to engage in any of these activities.

What should employers do now?



- Consider state law and federal labor law
- Weigh the need for broad confidentiality and nondisparagement language
- Consider maintaining two agreements:
 - Supervisors/high-level executives
 - Non-supervisory employees



What should employers do now?



Review all communications that may require waiver of Section 7 rights:

- Offer letters
- Employee handbook policies
- Employment agreements
- Restrictive covenant agreements



Common Law Employee Privacy Protections

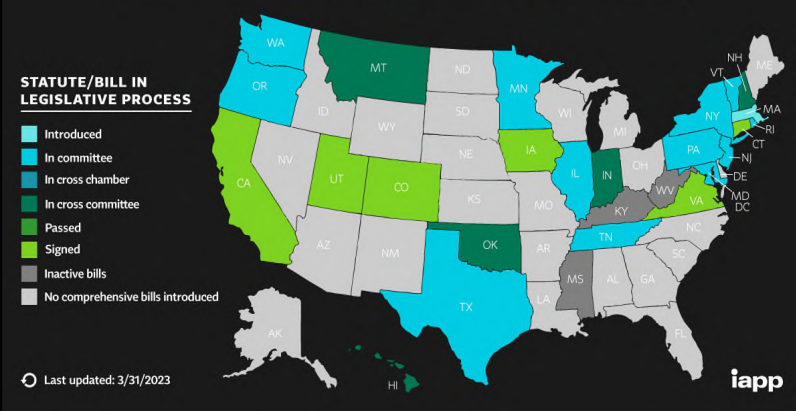


- Generally employees have little expectation of privacy while on company grounds or while using company equipment
- Employees do have the right to keep private facts about themselves confidential and the right to some degree of personal space
- Tort of Invasion of Privacy as recognized in most states consist of
 - Public disclosure of private facts
 - Intrusion upon seclusion
 - False light
 - Appropriation of name or likeness
- Each of these claims have been asserted in the employment context and courts need to determine if an employee had a reasonable expectation of privacy under the circumstances and does that expectation outweigh the employer's reasoning for seeking or disclosing certain information

Current Landscape



US State Privacy Legislation Tracker 2023



- Since 2018, 39 states considered comprehensive consumer privacy
- In 2021, 29 bills were considered compared to 60 in 2022. A 106% increase
- States with enacted comprehensive legislation regarding data privacy
 - California
 - Colorado
 - Connecticut
 - Virginia
 - Utah
 - Iowa

Source: IAPP Privacy Tracker Map

Taking the Charge: California Privacy Rights Act



- Became effective on January 1, 2023
- Eliminates the California Consumer Privacy Act exemption for employee information
- First state to enact comprehensive data legislation and first to cover employees
- Only a requirement for CA residents



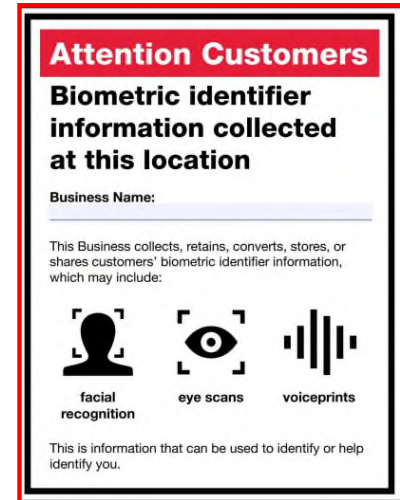
Taking the Charge: California Privacy Rights Act



- Covers CA resident employees, **but also** job applicants, independent contractors, beneficiaries, dependants and other workers
- Employer duties: Notice, privacy policy, respond to privacy right requests, and secure contractual commitments from 3rd parties
- Covered PII: employee's real name, alias, postal address, unique personal identifier, online identifier, Internet Protocol address, email address, account name, social security number, driver's license number, passport number, personality or aptitude assessments
- Sensitive PII: financial, race/ethnic origin, religion, sexuality, union membership, biometric information, geolocation data

Employee Biometric Data - Notice

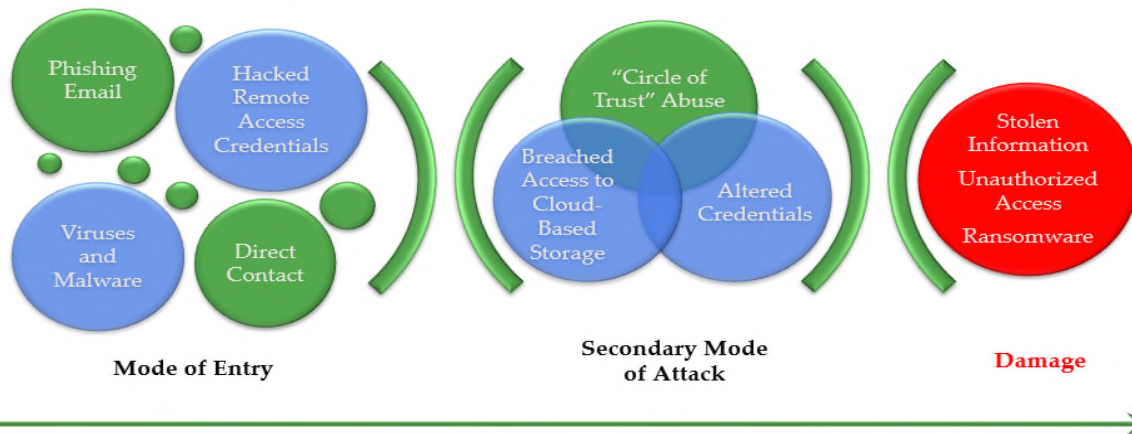
- Texas
 - Notice and consent; delete after one year
- Illinois
 - Notice, public written policy, and release (consent)
- New York City
 - Notice required in all commercial establishments
- California
 - Notice required under CPRA
- Washington's law likely does not apply use for timekeeping and security systems.
- Arizona, Hawaii, Maryland, Massachusetts, Missouri, New York, and Vermont have all introduced biometric laws in 2023



Warning: Artificial Intelligence

- What is AI?
 - The theory and development of computer systems able to perform tasks normally requiring human intelligence, such as visual perception, speech recognition, decision-making, and translation between languages
- Why is it important?
 - As AI develops employees may attempt to pass off work as their own. Example: ChatGPT
 - Can lead to performance problems
- NYC: Starting July 5, 2023 employers will be required to audit and notify candidates about the use of automated employment decision tools
- EEOC has published resources for employers using AI to assess job applicants and employees to ensure compliance with the ADA

Data Security: Life Cycle of a Hack



An Employee's Unique Position Within Data Security

- 3 out of 4 attacks by external actors
- 82% of studied breaches in 2022 were caused by human error
 - System Intrusion
 - Social Engineering
 - Errors and Credential Misuse
- System intrusion is most common, and is usually caused by phishing attacks and malware

Source: Verizon 2022 Data Breach Investigations Report

Employees as First Line of Defense

Tips to promote data security compliance and early reporting:

- Clear and accessible policies
- Data security hygiene: clean desks, complex passwords, and email awareness
- Regular Training- changed behavior is the goal
- Limited access
- “Click something, say something”
- Encryption, security patches, software updates, and all things tech you might be ignoring
- Remember, your employees are usually imperfect, but well intended actors

Threats to Trade Secrets in the Current Environment

- Shift to remote work
- Increase in the number and sophistication of data breaches
- High employee turnover
- Attack on confidentiality and noncompete agreements



Trade Secrets Defined (UTSA)

Trade secret means **information**, including a formula, pattern, compilation, program, device, method, technique, or process that:

1. Derives **independent economic value**, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
2. Is the subject of efforts that are **reasonable under the circumstances** to maintain its secrecy.

What is NOT a trade secret?



Information that is:

- "Generally known"
- General knowledge, skills and experience
- Acquired on the job
- Lacking in actual or potential "independent economic value"
- Not subject of reasonable efforts to maintain secrecy

1. Identify Potential Trade Secrets

- Extent information is known inside and outside the company
- Expenditure of time, effort, and money to acquire
- Extent and cost of measures taken to maintain its secrecy
- Value of the information to the company
- Competitors would benefit from learning the information
- Extent of damage the company would suffer if competitors acquired info
- Ease or difficulty for others to acquire or duplicate

2. Evaluate, choose, and implement “reasonable” protection measures

- Protections should be **reasonable under totality of the circumstances** to maintain their secrecy and value – *but* absolute secrecy is not required
- “Reasonable measures” does not mean “all possible measures”
- There is no one-size-fits-all approach – protection measures should be based on a number of factors unique to the business and information being protected

Types of Protection Measures

- Contracts
- Electronic and IT Security Measures
- **Policies, Procedures, and Records**
- **Training and Capacity Building**
- **Physical Controls**



Policies, Procedures, and Records

- Confidentiality marking requirements
- Document retention and access policies
- Human Resources policies and procedures
 - Electronic communications and social media policies
 - Remote work policies
 - Onboarding and offboarding procedures

****Remember - policies and procedures are not effective unless you actively use and enforce them!***

Training and Capacity Building

- Training for employees and third parties
 - Focused on safeguarding the employer's trade secrets and guarding against the improper receipt and use of the trade secrets of others
 - Consider modifying security and privacy awareness training to include trade secrets
- Awareness campaigns
- ALL employees must understand the value of trade secrets
 - But – level of exposure to trade secrets matters

Physical Controls



- Physical barriers
- Data and asset localization (if feasible)
- Physical segmentation/isolation
- “Black Box” approach

Final Points



- Protecting trade secrets is an ongoing, continuous process
- Trade secrets and control measures should be monitored, periodically assessed, and adjusted if needed when circumstances change
- The value of certain trade secrets, the risks they face, and the effectiveness of controls may all change over time
 - May lose protection when new products are released or a patent issues
 - Future technologies or market conditions may render a trade secret obsolete
 - May be impacted by changes in the workforce such as a shift to remote work
 - May be impacted by laws restricting or limiting existing protection measures

QUESTIONS?



Employee Safety, Health and Well-Being

Trending Issues

Veronica Jackson, Sasha Hodge-Wren, Paolo Pasicolan | Hot Topics 2023 | April 25, 2023



This Presentation Will Cover



- COVID Updates
- OSHA Updates
- New Federal Pregnancy And Lactation Accommodation Laws
- Cannabis
- Dobbs Considerations



End of COVID Emergency

COVID-19 Updates

On April 10, 2023, President Biden signed legislation ending the COVID-19 national emergency. Where does that leave employers?

Mandatory Vaccination Policies

Despite the federal national emergency ending, the following COVID19 requirements/prohibitions are still in effect:

- Federal mandate for health care workers to be vaccinated against COVID19, if subject to CMMS regulation
- Some state and local laws restricting private employer vaccine mandates
- Employers can still require COVID-19 vaccination **if** reasonable accommodations are considered/provided (ADA, religion)

Other COVID Policies

Employers may be rethinking:

- Mandatory masking
- Social distancing requirements
- Contact tracing
- Pre-visit questionnaires
- Hybrid work schedules



End of COVID Emergency



Actually, there are two emergencies:

- The “National Emergency” ended April 10, 2023
- The “Public Health Emergency” will end **May 11, 2023**



End of COVID Emergency



What does this mean?

- COVID Tests
 - Until May 11: Covered with no cost sharing, prior authorization, or medical management requirements, whether in- or out-of-network
 - After May 11: Standard limits may apply
- COVID Vaccines
 - Until May 11: Covered with no cost sharing, prior authorization, or medical management requirements, whether in- or out-of-network
 - After May 11: Covered in-network with no cost sharing; no out-of-network or cost sharing for out-of-network

End of COVID Emergency



Tolling of Benefit Deadlines ends July 10, 2023

- Certain deadlines (e.g., COBRA, HIPAA special enrollment, ERISA claims) are based on the earlier of one year after when they should have started or July 10, 2023
- For example, a former employee receives a COBRA notice May 1, 2023. The deadline to elect COBRA is September 8, 2023, i.e., 60 days after July 10— not May 1

OSHA's Got Its Groove Back



- More inspections
- Higher penalties
- Train your managers regarding OSHA inspections
- Review/revise safety plans
- Review recordkeeping practices

Top 10 Most Cited OSHA Safety Violations

Top 10 Most Cited OSHA Safety Violations

10	Machinery and Machine Guarding, general industry
9	Powered Industrial Trucks, general industry
8	Eye and Face Protection, construction
7	Control of Hazardous Energy (lockout/tagout), general industry
6	Fall Protection Training, construction

OSHA's 2021 Top 10 Most Frequently Cited Violations



Top 10 Most Cited OSHA Safety Violations

Top 10 Most Cited OSHA Safety Violations

5	Scaffolding, construction
4	Hazard Communication, general industry
3	Ladders, construction
2	Respiratory Protection, general industry
1	Fall Protection, construction

OSHA's 2021 Top 10 Most Frequently Cited Violations



Recordkeeping Citations

- Typically cited by OSHA as an other-than-serious violation
- May be cited as a willful violation, where an employer “knowingly failed to comply with a legal requirement (purposeful disregard) or acted with plain indifference to employee safety”
- Maximum penalty of \$156,259
- OSHA has discretion on how to cite, how to group citations (i.e., individual citations/occurrence versus one citation/issue)

Recordkeeping Requirements

Overview

- Illness and Injury Logs – OSHA Forms 300 and 301
 - Employers with more than 10 employees in the previous calendar year that are not in an industry exempt from the recordkeeping requirement must complete and retain
- Safety Data Sheets and Chemical Information
 - Relating to chemicals used in the workplace
- Safety Meetings
 - aka Toolbox talks

What is a Reportable Injury?

- An accident that results in:
 - Death
 - Loss of Consciousness
- An injury or accident that requires:
 - An employee to miss work
 - An employee transfer to another job or perform restricted duty
 - An employee to receive medical treatment beyond first aid
- A significant injury or illness diagnosed by a physician or other licensed healthcare professional
- Needle sticks or tuberculosis infection
- Hearing loss measured by routine hearing tests

New Penalties Announced in 2023

Type of Violation	Penalty Minimum	Penalty Maximum
Serious	\$1,116 per violation	\$15,625 per violation
Other-Than-Serious	\$0 per violation	\$15,625 per violation
Willful or Repeated	\$11,162 per violation	\$156,259 per violation
Posting Requirements	\$0 per violation	\$15,625 per violation
Failure to Abate	N/A	\$15,625 per day unabated beyond the abatement date [generally limited to 30 days maximum]

The cost-of-living adjustment multiplier for 2023, based on the Consumer Price Index for All Urban Consumers for October 2022 (not seasonally adjusted), is 1.07745 (up from 1.06222 in 2022). To compute the 2023 annual adjustment, the Department multiplied the most recent penalty amount for each applicable penalty by the multiplier, 1.07745, and rounded to the nearest dollar.

OSHA's Severe Violator Enforcement Program ("SVEP")



The U.S. Department of Labor recently announced changes to the Severe Violator Enforcement Program, to strengthen enforcement efforts and improve compliance.

- Criteria include violations of all hazards and OSHA standards (rather than select standards)
- Will continue to focus on willful, repeat, and failure-to-abate offenders in all industries
- Purpose: broaden the program's scope with the possibility that additional industries will fall within its parameter

Workplace Violence



OSHA and MOSH Liability

- OSHA provides workers with a right to a safe workplace, requiring employers to provide their employees with safe and healthful workplaces
- Silent on how to mitigate risk workplace violence

Tort-Based Liability

- Respondent Superior
- Negligent Hiring and Retention
- Common Law Duty to Provide a Safe Workplace

Work Environments at High Risk for Violence



- Exchanging money with the public
- Delivery drivers
- Healthcare professionals
- Public service workers
- Law enforcement
- Working alone or in small groups



Workplace Violence – Best Practices



- Review Violence in the Workplace policies
 - Address threats of violence immediately and be proactive during high stress situations (i.e., terminations, domestic violence)
- Be aware of impact other policies may have in preventing violence and harassment, such as electronic communications or social media policies, USERRA, the ADA, and weapon carry law
- New Maryland law (2021) - Employer-petitioned peace orders
 - If an employee suffers an enumerated act — such as assault, harassment, or stalking — at the workplace
 - Employer has 30 days to petition for peace order
- Contact local law enforcement and/or hire private security

Federal Pregnancy and Lactation Accommodation Laws

Pregnant Workers Fairness Act

Effective June 27, 2023

- Requires covered employers to provide “reasonable accommodations” to a worker’s known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an “undue hardship”
- Only applies to accommodations. Existing EEO laws such as Title VII continue to make it illegal to fire or otherwise discriminate against employees on the basis of pregnancy, childbirth, or related medical conditions

Pregnant Workers Fairness Act



Who is covered?

- The PWFA covers **all** private employers in the U.S. with 15 or more employees. It also protects employees who work for Congress and federal agencies, as well as part-time, temporary and seasonal workers and job applicants

Pregnant Workers Fairness Act



Reasonable Accommodations – How is this Different than the ADA?

- With the passage of the PWFA, pregnant workers will now have the right to reasonable accommodations, similar to the right provided under the ADA
- Specifically, the PWFA requires employers subject to Title VII to provide employees with reasonable accommodations necessitated by pregnancy, childbirth or related medical conditions unless doing so would impose an undue hardship on the employer
- Unlike the ADA, however, a pregnant or postpartum worker does not need to have a pregnancy related-disability to receive an accommodation

Pregnant Workers Fairness Act

- Undue Hardship – Factors to Consider
 - Employer’s size
 - Financial resources
 - The type and/or form of accommodation requested by the employee
- In all cases undue hardship will vary based on these and other factors specific to the employer and the requested accommodation
- Accommodation requests should be examined on a case-by-case basis

The PUMP Act

Providing Urgent Maternal Protections for Nursing Mothers Act

- Expands upon the requirements set forth in the Break Time for Nursing Mothers provision of the Fair Labor Standards Act (“FLSA”)
 - This provision requires employers to provide nonexempt nursing mothers reasonable break time to “pump” or otherwise express breast milk and a private place to do so (other than a bathroom) for at least one year after giving birth
- Must now provide reasonable pumping breaks for exempt employees
 - Exempt employees must still be paid their full weekly salary as the law requires, whether or not they take breaks to express breast milk

The PUMP Act

Paid Time for Multi-Tasking

- Break time for nonexempt employees may be unpaid, unless the employee expresses breast milk during an otherwise paid break period
- Nonexempt employees should be completely relieved of their duties for the entire break period; otherwise, they must be paid for that time



The PUMP Act



Who's Covered?

- All US Employers
 - However, if compliance with the PUMP Act would impose an undue hardship on an employer with fewer than 50 employees the employer does not have to comply with the Act

Cannabis

Marijuana Legalization

Federal – Democrats have tried

- **BUT STILL ILLEGAL**

State – Decriminalized or Legalized

- 37 states & D.C. – legalized for medical marijuana; 21 states have now legalized for recreational use

Maryland Recreational Cannabis Legalization

Previously, with respect to medical marijuana, the Maryland Medical Cannabis Provision advised:

- *Maryland law does not prevent an employer from testing for use of cannabis (for any reason) or taking action against an employee who tests positive for use of cannabis (for any reason)*



Maryland Recreational Cannabis Legalization

The General Assembly got to work and proposed law stating:

(F) NOTHING IN THIS SECTION MAY BE CONSTRUED TO PREVENT OR PROHIBIT ANY EMPLOYER FROM DENYING EMPLOYMENT OR A CONTRACT TO AN INDIVIDUAL OR DISCIPLINING AN EMPLOYEE OR A CONTRACTOR FOR TESTING POSITIVE FOR THE PRESENCE OF CANNABINOIDS OR CANNABINOID METABOLITES IN THE URINE, BLOOD, SALIVA, BREATH, HAIR, OR OTHER TISSUE OR FLUID OF THE EMPLOYEE'S OR CONTRACTOR'S BODY, IF THE TEST WAS CONDUCTED IN ACCORDANCE WITH THE EMPLOYER'S ESTABLISHED DRUG TESTING POLICY.

Maryland Recreational Cannabis Legalization

The current bill:

~~(F) NOTHING IN THIS SECTION MAY BE CONSTRUED TO PREVENT OR PROHIBIT ANY EMPLOYER FROM DENYING EMPLOYMENT OR A CONTRACT TO AN INDIVIDUAL OR DISCIPLINING AN EMPLOYEE OR A CONTRACTOR FOR TESTING POSITIVE FOR THE PRESENCE OF CANNABINOIDS OR CANNABINOID METABOLITES IN THE URINE, BLOOD, SALIVA, BREATH, HAIR, OR OTHER TISSUE OR FLUID OF THE EMPLOYEE'S OR CONTRACTOR'S BODY, IF THE TEST WAS CONDUCTED IN ACCORDANCE WITH THE EMPLOYER'S ESTABLISHED DRUG TESTING POLICY.~~

What does this mean for employers?

Maryland Recreational Cannabis Legalization

We don't know!

- Regulations/guidance still needed
- May no longer be able to deny or discipline employees based on drug testing
- Employers with a multi-state workforce should be mindful that adverse hiring decisions and employee discipline based on cannabis testing results may already be prohibited in states with strong employment protections for users of recreational cannabis



Recreational Cannabis in the DMV

D.C. – Legalized

- Adults 21 or older may possess, use, purchase, or transport up to two ounces of marijuana and grow up to six marijuana plants at home, three of which may be mature

Maryland – Legalized

- Adults 21 or older may possess and consume up to 1.5 ounces of cannabis flower, 12 grams of concentrated cannabis, or a total amount of cannabis products that does not exceed 750 mg THC

Virginia – Legalized

- Adults 21 or older may possess up to one ounce of marijuana and cultivate up to two adult and two immature marijuana plants for personal use, provided they are tagged with identifying information

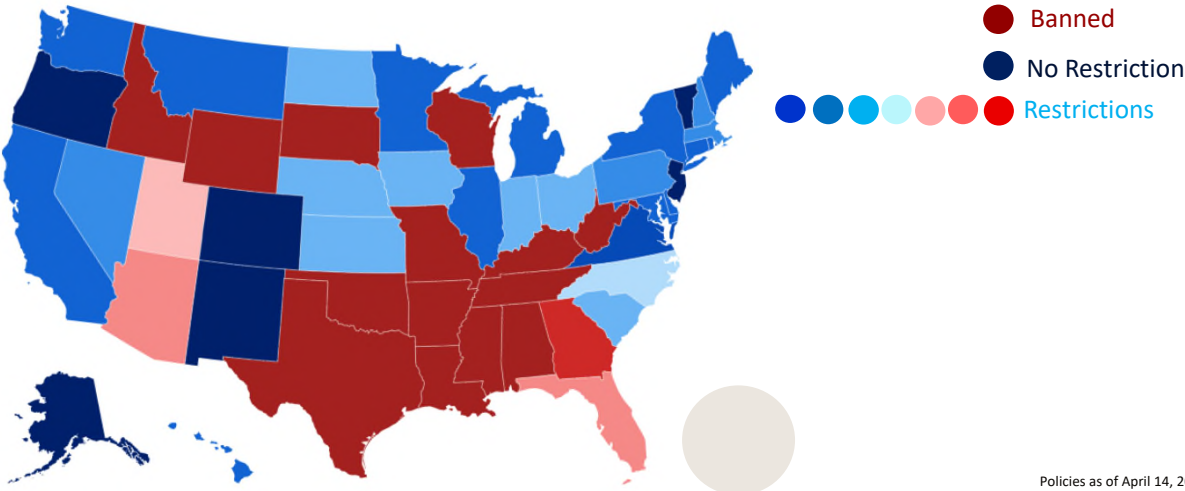
Notes for Employers



- Ensure drug testing policies are consistent with state law
- Ensure adverse employment decisions relating to cannabis use are consistent with state law
- Check ban the box laws in your jurisdiction(s)

Abortion Travel Reimbursement

Abortion Laws by State



Abortion Travel Reimbursement

How employers reimburse travel for abortion

- Existing health plan
- Adding an HRA
- Wellness program
- Reimbursement program



Existing Health Plan

How it's done

- Self-funded plans: Ask your TPA
- Fully insured plans: Add an "integrated HRA"



Existing Health Plan

Pros

- Administered by TPA
- Confidential
- Tax free up to certain limits
- ERISA protects against liability

Cons

- Some TPAs can't administer
- Not available to all employees
- Full reimbursement not available
- Compliance with law on mental health parity?

Adding an HRA

Two kinds of HRA

- Integrated HRA
- Excepted Benefits HRA



Adding an HRA

Pros

- Administered by TPA
- Confidential
- Tax free up to certain limits
- ERISA protects against liability

Cons

- Some TPAs can't administer
- Not available to all employees
- EBHRA limit: \$1,950 for 2023
- Interaction between HRA, HSA, and FSA is complicated

Wellness Program

How it's done

- Remember last year's presentation about vaccine incentives?



Wellness Program

Pros

- Confidential if administered by TPA
- ERISA protects against liability
- Excepted from HIPAA requirements

Cons

- Should be administered by TPA
- Some TPAs can't administer
- Legality is unclear

Reimbursement Program

How it's done

- Do any of you have taxable reimbursement programs?



Reimbursement Program



Pros

- Easy and flexible
- Can be administered in-house
- Can be confidential
- Can cover all employees

Cons

- Taxable as wages
- Potential for abuse
- May not be confidential
- No ERISA protection from liability

Reimbursement Program



What not to do



QUESTIONS?

