



# Fall Employment Law Webinar

Employment & Executive Compensation Group

**SEPTEMBER 22, 2022**

## Today's agenda

1. State & local updates
2. Federal updates
3. Data privacy
4. Executive compensation trends
5. Covid-19 check in

# State & local updates

# The Chicago Human Rights Ordinance

### **REQUIREMENTS BEGINNING JULY 1, 2022**

- Annual 1-hour anti-harassment training for all employees + additional 1-hour for supervisors
- Annual 1-hour bystander training for all employees
- Anti-harassment policy
- Anti-harassment notice

*Applies to employers with one or more employees who (1) are required to have a business license issued by the City of Chicago, or (2) maintain a facility within the geographical boundaries of the City of Chicago.*

# The Chicago Human Rights Ordinance

### ***ANTI-HARASSMENT POLICY REQUIREMENTS:***

- Statement that harassment is against the law
- Definition of harassment and examples of prohibited conduct that constitute sexual harassment
- Requirement that all employees participate in sexual harassment prevention training annually
- Procedures for reporting harassment
- Legal services, including governmental, available to employees who may be victims of sexual harassment
- A statement that retaliation for reporting sexual harassment is illegal in Chicago

# Illinois Family Bereavement Leave Act

### **REQUIREMENTS BEGINNING JANUARY 1, 2023**

- Employees are entitled to 10 days of unpaid bereavement leave to:
  - Attend the funeral, make arrangements for, or grieve the death of a “covered family member” (a step/child, spouse, domestic partner, sibling, step/parent, parent-in-law, grandchild or grandparent)
  - Be absent from work due to fertility-related issues such as a miscarriage, unsuccessful round of assisted reproduction, failed adoption or surrogacy, or stillbirth
- Employees are entitled to up to a total of six weeks of unpaid bereavement leave in the event of two deaths of a covered family member in a twelve-month period

*Applies to employers who are covered by the federal Family and Medical Leave Act*

## State law trends: paid family leave

### Maryland

#### ***TIME TO CARE ACT***

- Begins October 1, 2023
- 12 weeks of job-protected paid leave
- Paid through employee payroll deductions
- Premiums split 50/50 between employer and employee
- Employers may opt to use private plan

### Colorado

#### ***PAID FAMILY AND MEDICAL LEAVE INSURANCE***

- Begins January 1, 2024
- 12 weeks of job-protected paid leave
- Paid through employee payroll deductions
- Premiums split 50/50 between employer and employee
- Employers may opt to use private plan



## State law trends: paid family leave

### Oregon

#### ***PAID FAMILY AND MEDICAL LEAVE ACT***

- Begins January 1, 2023
- 12 weeks of job-protected paid leave
- Paid through employee payroll deductions
- Premiums split 60/40 between employer and employee
- Employers may opt to use private plan

### Michigan

#### ***RETURN TO EARNED SICK TIME ACT***

- Michigan Court of Claims rules that Legislature's amendment to voters' ballot initiative unconstitutional
- Effective February 19, 2023 (unless overturned)
- 72 hours of paid sick leave (40 hours for employers with less than 10 employees)
- No exceptions for small employers or exempt employees
- Other employee-friendly changes





## Pay equity & pay transparency

States have been very active in implementing laws to try and end pay gaps.

### ***TWO PRIMARY TYPES OF PROVISIONS***

- Disclosure & Pay Transparency Requirements
- Salary History Bans



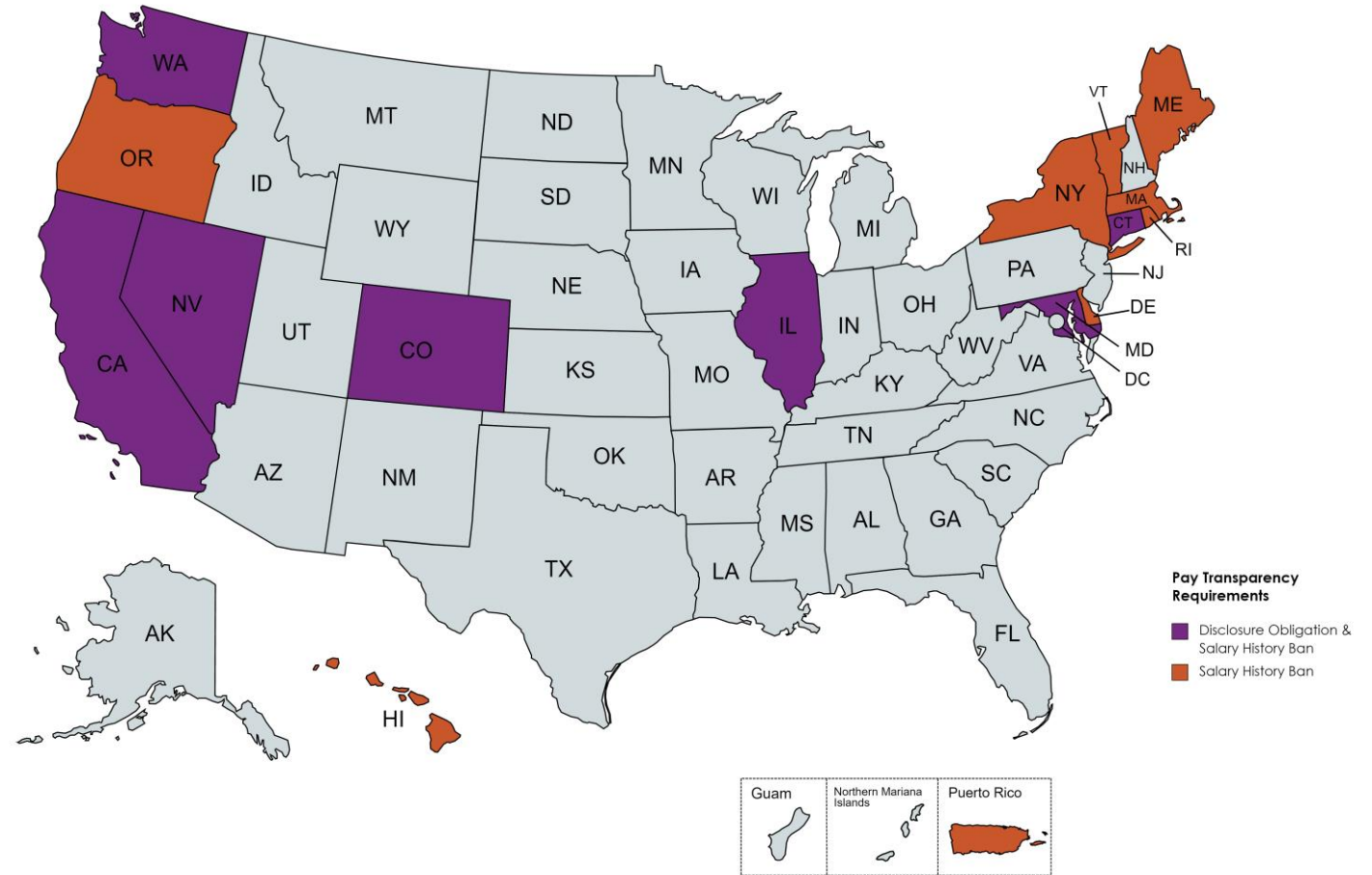
# Pay equity & pay transparency requirements

## Disclosure Obligation & Salary History Bans

California, Colorado, Connecticut, Illinois, Maryland, Nevada, Rhode Island (1/1/23), Washington

## Salary History Ban

Delaware, Hawaii, Maine, Massachusetts, New York, Oregon, Puerto Rico, Rhode Island, Vermont



## Pay equity & pay transparency requirements

# Colorado Equal Pay for Equal Work Act (1/1/2021)

- Applies to all employers with at least 1 employee in Colorado
- Requires inclusion of compensation information (including realistic pay range) in all job postings that could be performed in Colorado
- Requires notifying Colorado employees of all promotional opportunities (without regard to qualification or location)



## Pay equity & pay transparency requirements

# New York City Pay Transparency Law (11/1/2022)

- Applies to employers with 4+ employees/independent contractors
- Must include minimum and maximum annual salary/hourly compensation in all job, promotion and transfer advertisements
- Under amendment, applies unless job cannot/will not be performed in NYC
- Penalties of up to \$125k (\$250k if willful) – personal liability for individuals
- Amendment limits liability with cure period and provides that only current employees (not applicants) have private right of action.

***NOT LIMITED TO EMPLOYERS WITH NYC OPERATIONS!***

***– New York State has bill on Governor's desk that is very similar***



## Pay equity & pay transparency requirements

# Washington State Amendments (1/1/2023)

- Job postings must include wage scale/range and description of benefits
- Employers must have wage scale/range available for internal transfers who request it
- Applies to Washington employers with 15+ employees



## Pay equity & pay transparency requirements

# Illinois Equal Pay Act Amendments (1/1/2022)

- Applies to employers with more than 100 employees in Illinois
- Must apply for an “equal pay registration certificate” from the Illinois Department of Labor (IDOL)
  - Comprehensive certification regarding legal compliance, non-discriminatory practices, non-discriminatory results, and efforts to ensure equal pay
  - Submission of most recent EEO-1 and very detailed demographic and wage information
- Timing for submission
  - IDOL will give deadline for initial submission (bet 3/24/2022 and 3/24/2024), then every two years
  - Failure to receive date from IDOL isn’t a defense
- Employees will be able to request anonymized information about their role



## Pay equity & pay transparency requirements

Key steps for employers  
with **>100** Illinois  
employees to be prepared  
for reporting requirements.

- **MAKE SURE YOU KNOW HOW YOU'LL RESPOND TO THE EQUAL PAY REGISTRATION CERTIFICATE CERTIFICATIONS**
  - **WHAT STEPS ARE YOU TAKING TO ENSURE EQUAL PAY?**
  - **HOW IS PAY SET?**
  - **MAKE SURE YOU KNOW WHAT NUMBERS LOOK LIKE!**
- **CONFIRM PROPER EEO-1 SUBMISSIONS AND THAT YOU HAVE THE DATA YOU'LL BE REQUIRED TO SUBMIT**
- **KEEP AN EYE OUT FOR YOUR SUBMISSION NOTICE!**
- **CONSIDER INTERNAL AUDIT TO CONFIRM EQUITY**
- **CONSIDER INTERNAL MOVE TOWARD PAY TRANSPARENCY**





## Wage & hour update

# Other Wage & Hour Developments

- Department of Labor
  - Hiring of 100+ new wage & hour investigators, as well as more enforcement attorneys
  - Possible update to White Collar overtime regulations (had been expected in April 2022)
- Illinois subcontractor employees right of action against GCs for wages
- Sign-On & Retention Bonuses
  - Interaction with equal pay requirements
- Remote Work Challenges Continue





# Marijuana laws

## Marijuana Laws Continue to Expand:

- 37 states have approved medical marijuana, 18 of those plus D.C. have approved recreational marijuana
- Newer laws often expressly protect off-duty use (e.g. NY and NJ)
  - An effort to expand certain workplace protections in Illinois failed in March
- Testing:
  - NYC and Philadelphia prohibit pre-employment drug testing for marijuana in most cases.
  - NY DOL late last year said drug testing for marijuana is not permitted absent symptoms of impairment or satisfying other exceptions.
- Will Biden push for marijuana legislation before mid-terms? Re-institute DOJ memo?



## Non-Compete laws

# Reminder About New Illinois Requirements

- Amendments to Illinois Freedom to Work Act passed on August 13, 2021. Apply January 1, 2022. Not retroactive.
- Earnings requirements for non-solicits (>\$45k) and non-competes (>\$75k)
- Consideration: 2 years of employment or other consideration adequate to support agreement
- Employees must be advised to consult with an attorney
- Employees must be given 14 days to review restriction. Employees can choose to use some or all of time.
- Does not apply to confidentiality agreements, intellectual property agreements, sale of business covenants, garden-leave provisions



## Non-Compete laws

# Colorado's New Non-Compete Law (Aug 10, 2022)

- Prohibits non-compete and non-solicit agreements except in sale of business context or with certain workers depending on pay
  - Non-competes only for workers making \$101,250 or more (“highly compensated” workers) at time of entering into covenant *and* enforcement
  - Customer non-solicits only for workers making 60% of highly-compensation threshold or \$60,750
- Permits confidentiality/non-disclosure covenants
- Terms must be given to applicants before they accept employment. 14-day notice for current workers.
  - ***Notice must be clear and conspicuous and in separate document.***
- Only Colorado choice of law and venue permitted



## Non-Compete laws

# D.C. Amends Non-Compete Law

- Broad ban passed in December 2020 but City Council decided in March of this year that amendments were needed
- Amended law set to go into effect on October 1, 2022
- Non-competes only permitted for employees earning >\$150k. What about non-solicits?
- Covered employees those who spend >50% working in District or employment based in District and not more than 50% of time in another jurisdiction
- Fixed rules on moonlighting – OK to prohibit if will disclose confidential information or if conflict of interest



# Federal updates

# Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act

- Pre-dispute arbitration agreements and class action waivers not enforceable against plaintiffs with respect to sexual assault or sexual harassment claims
- Employee may still choose to arbitrate dispute or parties can mutually agree to arbitrate.
- Amendment applies to agreements, regardless of when it was signed, but only applies to claims that arise on or after **March 3, 2022**.
- Employers and employees may still agree to arbitrator *after* the dispute arises
- Applicability of law determine by court, not arbitrator



## Changing independent contractor standards

Standards for who can be treated as an independent contractor remain in flux.

### **DEPARTMENT OF LABOR PROPOSED RULE**

- Deals with Independent Contractor status under FLSA
- Sent to White House in July
- Anticipate public release of proposed rule this fall

### **NATIONAL LABOR RELATIONS BOARD**

- Issued a notice in late December sued a notice of proposed rulemaking and invited public participation in reconsidering the test for classifying independent contractors under the NLRA
- Has also invited inviting briefs (as part of *Atlanta Opera* case) on whether the NLRB should continue to follow the standard set out in a 2019 decision or return to the previous standard (either entirely or with modifications).



## Post-Roe workplace policies

Since the Supreme Court's decision in *Dobbs*, employers have been implementing policies to support employees' right to abortion access.

**RIGHT NOT TO TRAVEL TO RESTRICTIVE STATES DURING PREGNANCY**

**PAID TIME OFF FOR PROCEDURES, TRAVEL & RECOVERY**

**FINANCIAL SUPPORT FOR OUT-OF-STATE TRAVEL**





# Issues to Consider in Implementing Abortion Access Policies

### ***UNDERSTAND INTERPLAY WITH HEALTH INSURANCE PLAN***

- Can you amend current Plan to provide abortion-specific benefits?
- Does policy constitute a new Plan or change the characterization of an existing one?
  - If yes, creates new obligations (reporting, coverage, etc.)

### ***CONFIDENTIALITY OF INFORMATION***

- Covered by HIPAA?
- Ability of government agency to access to support claim against employee

### ***POTENTIAL LIABILITY***

- Violation of state restrictions on assisting another in obtaining an abortion
- Potential discrimination claims based on who and what is covered

# Data privacy



# Reminder: Biometric Information Privacy Act (BIPA)

### **REQUIREMENTS**

- BIPA requires any company, including any employer, to follow certain technical requirements prior to the collection of any biometric information
  - Policy describing retention and destruction
  - Notice of collection and policy
  - Signed, written consent
- Ongoing class action litigation against employers, frequently related to biometric timeclocks (fingerprints, hand scan technology)
- *Rosenbach v. Six Flags* (Ill. 2019) - Actual injury resulting from an alleged BIPA violation not required to be “aggrieved” by statutory violation

# Reminder: Biometric Information Privacy Act (BIPA)

### **UPCOMING ILLINOIS SUPREME COURT DECISIONS**

- *Cothron v. White Castle System, Inc.*: When and how do BIPA claims accrue?
  - Single accrual: Claims accrue one time at the first violation of BIPA
  - Per-Scan accrual: New violation each time biometric information is collected
- *Tims v. Black Horse Motor Carriers, Inc.*: Is the statute of limitations 1 year or 5 years?
- Decisions will have huge impact on nature of BIPA class action activity moving forward, and how expensive claims will be for business
- Federal courts have stayed BIPA cases pending Illinois Supreme Court decisions

## State law trends: data privacy

# Data Privacy Trends



### **LOOK OUT FOR NEW STATE DEVELOPMENTS**

- California: California Privacy Rights Act effective **January 1, 2023**
  - New requirements for handling personnel information
  - Gives employees specific rights related to their data
  - Employer requirements for notices/responding to employee requests
- Colorado Privacy Act & Virginia's Consumer Data Protection Act effective **2023**
  - Requirements for companies that control or process personal data of 100,000+ residents
  - Unlike CPRA, do not apply to employee data
- New York: Required notices for electronic monitoring effective **May 7, 2022**
  - NY employers should update Employee handbooks and BYOD policies

# Executive compensation updates and traps

# SEC pay vs. performance disclosures

## Pay Versus Performance Beginning Implementation with 2023 Proxy

PAY VERSUS PERFORMANCE								
Year (a)	Summary Compensation Table Total for PEO (b)	Compensation Actually Paid to PEO (c)	Average Summary Compensation Table Total for Non-PEO Named Executive Officers (d)	Average Compensation Actually Paid to Non-PEO Named Executive Officers (e)	Value of Initial Fixed \$100 Investment Based On:		Net Income (h)	*[Company- Selected Measure] (i)
					Total Shareholder Return (f)	*Peer Group Total Shareholder Return (g)		
Y1								
Y2								
Y3								
*Y4								
*Y5								

*\*Small Reporting Company – Phase in or exemption from – less than \$250M in equity or less than \$100M revenue and less than \$700M in equity*

## Carried Interest Rule that was NOT

### Common incentive for partnerships (and LLCs) is a profits interest

- Issued for services, not guaranteed or certain payments, and holds for 3 years. The major benefit of profits interest is the long-term capital gain (LTCG) tax treatment on sale
- Inflation Reduction Act of 2022 (IRA) initially proposed an increase in the holding period to 5 years for LTCG tax
- Never fear: The 5-year requirement was stripped from the final IRA bill





# Bonus / Commissions Common Foot-Faults

- Formulaic bonuses and commissions should be in writing (discretionary bonuses could benefit too)
- Should be adopted early in the year:
  - To avoid arguments on prior year terms; and
  - To allow greater flexibility for elective deferrals in non-qualified deferred compensation

## Deferred Compensation Arrangements

# Unidentified Deferred Compensation Arrangements

- Adverse tax consequences significant for violations – full income inclusion, 20% penalty tax, and interest penalty tax (approx. 3-5%)
- Deferred compensation can be found in:

• Employment agreements	• Severance agreements	• Change in control agreements	• Incentive compensation	• Commissions
• Non-qualified defined benefit plan	• Non-qualified defined contribution plan	• Discounted options/ SARs	• Deferred RSUs/ phantom equity	• SERP/ Excess benefit retirement plans

## Issuing too much equity to executives in start-ups

# Equity dilution can be concerning

- Tension between lack of cash and recruiting skilled employees
- Equity Plan share pool reserve depletes quickly, and not enough shares to recruit new employees
- Increasing Plan share pool reserve reduces founder ownership and risks loss of control



# COVID-19 policies

## COVID-19 developments

### We're done with COVID, right?

- June 30, 2022, OSHA extended Revised National Emphasis Program for COVID. Applies to workers in high-hazard industries, such as healthcare and meat and poultry processing. 1,200 coronavirus-related citations and penalties of \$7.2 million
- OSHA withdrew Emergency Temporary Standard (ETS) on vaccination and testing after Supreme Court decision
- Still waiting on permanent COVID-19 standard from OSHA. Effort at U.S. Court of Appeals for D.C. Circuit to force OSHA to act on stand for healthcare workers was defeated on August 26, 2022



## COVID-19 developments

# We're done with COVID, right?

- EEOC Updated Screening, Testing, and Mandatory Vaccination Guidance on July 12, 2022.
  - Mandatory viral tests must be “job-related and consistent with business necessity.” Compliance with CDC, FDA, and/or state/local public health authorities is sufficient
  - Antibody testing does not meet “business necessity” standard and is prohibited
  - May screen applicant post-offer if done for all in same type of job. May screen pre-offer if applicant will be in workplace as part of application process and other visitors are screened
  - Medical documentation for employees returning to work may be required by employers, but employers should follow CDC guidelines and consider other practical ways to determine safety of return
  - PPE may be required subject to reasonable accommodations
  - Mandatory vaccination policies still permitted subject to reasonable accommodations



## COVID-19 developments

# Revised CDC Guidelines as of August 11, 2022

- Isolate if you have COVID or if you are sick and suspect you have it but do not yet have test results
- If you test positive, stay home for at least 5 days
- May end isolation after day 5 if no symptoms or symptoms improving and fever-free for 24 hours
- Those with moderate illness (experienced shortness of breath or difficulty breathing) or severe illness/weakened immune system isolate through day 10
- Even after isolation ends, through day 11 wear mask and stay away from high-risk individuals. Alternative is to remove mask after 2 negative antigen tests 48 hours apart
- Isolation and exposure calculator/chatbot on CDC website

## COVID-19 developments

# NorthShore University Health System Settlement

- First settlement of its kind of class-action lawsuit
- 523 current and former healthcare workers will be paid \$10,337,500. Employees claimed they were denied religious accommodations to mandatory vaccination policy
- An estimated 269 resigned or were fired after religious accommodations denied. 204 chose to get vaccinated. Those fired or forced to resign will get approximately \$25k. Those vaccinated under duress to keep their jobs will get approximately \$3k
- NorthShore also changing policy to accommodate religious accommodation requests and rehiring former employees who were fired or forced to resign because exemption requests were denied





# Employer Liability for COVID Infections

- There are still a variety of open issues relating to COVID infections: Are such infections covered by workers' compensation laws? Can an employer be liable to family members of workers if those family members get sick due to a workplace outbreak?
- Ninth Circuit recently certified two questions to California Supreme Court in *Kuciemba v. Victory Woodworks*
- In the underlying action, the employee and his spouse alleged the company's negligence and lack of safety precautions led to the employee contracting COVID-19 and unknowingly infecting his wife
- A federal district court said no duty of care was owed to the wife under California law

## The Covid-19 hangover

As workers return to the office, some COVID-19 focused policies have continued to be relevant.

- **REMOTE WORK**
  - **REASONABLE ACCOMMODATION**
  - **GENERAL FLEXIBILITY**
  - **COMPLIANCE WITH STATE & LOCAL LAWS**
- **DISCOURAGING WORKING WHILE ILL**
- **REIMBURSEMENT FOR WORK FROM HOME & HOME OFFICE EXPENSES**
- **INCREASED USE OF FLEXIBLE TIME OFF RATHER THAN TRADITIONAL ACCRUED VACATION \ PTO PROGRAMS**
- **INCENTIVES TO COME TO OFFICE**



# Any questions?

Ask us anything. We're happy to answer now,  
or connect with us later if you prefer.

## Connect with us



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# Purpose in practice

We cultivate deep business relationships that last and have seen our clients thrive beyond their expectations.

## Who we are

*We've always seen ourselves as much more than a law firm. Since 1999, we've been focused on a single purpose: helping our clients achieve amazing things.*



## Our services

Across service areas, we've structured our team to offer knowledge, experience, and creative thinking that puts our clients' goals within reach.

- **REAL ESTATE**
- **CORPORATE**
- **TRUSTS AND ESTATES**
- **LABOR AND EMPLOYMENT**
- **INTELLECTUAL PROPERTY**
- **FINANCIAL SERVICES AND RESTRUCTURING**
- **COMMUNITY ASSOCIATION**
- **TAX PLANNING AND LITIGATION**
- **LITIGATION**



## Our services

# Employment & Executive Compensation

We routinely advise employers on compliance with the full range of federal, state, and local employment laws, and assist companies in implementing sound policies, practices, and programs to avoid problems in the future. We have experience handling virtually every type of employment matter and the know-how to help you effectively resolve even the most complicated issues.

