The HR WIRE

ETC HR Employer Compliance News II ***Making Compliance Connections***

March 2024

SECTION I: Notices, Reminders & Alerts &

Workplace Labor Notice Updates

State Workplace Labor Notice Updates

- **ME** – Updated Veterans' Benefits and Services labor notice released
- **OR** – Updated OSHA "It's The Law" Notice**.** Updates include modifications to information regarding employees' rights during hazardous tasks, work-related exposure records, and injury logs. Furthermore, the address for registering complaints has been amended, and a QR Code has been incorporated to provide easy access to whistleblower rights information.
- **NYC** -
  - Workers' Bill of Rights
  - Know Your Rights at Work poster that employers must display in a conspicuous location in the workplace by July 1. The poster must also be distributed to all current New York City employees by July 1 and to new hires on or before their first day of work. Employers must also make the poster available on their intranet and/or mobile app if "such means are regularly used to communicate" with employees.

Updated State Handbook Addendums

- **OR** – Updated to reflect OFLA's expanded definition of *serious health condition*
- **MN** – Updated to remove Duluth Sick & Safe Policy as the city ordinance was repealed and replaced with the State-wide Sick & Safe Leave Regulations

Reminders & Alerts!

- **Attached Resources - 50 State Equal Pay Reference Guide 2024 & Pay Transparency Wage Range Disclosure Requirements by State**
- **Alert! Upcoming! CA Pay Data Reporting Is Due May 8, 2024 (Now With New Requirements) - See State Section**
- **Alert ! Upcoming! IL Equal Pay Act Registration Certification Filing Deadline March 23, 2024 - See State Section**

Alert! Upcoming! The 2023 EEO-1 Component 1 Data Collection June 4th Reporting Deadline

Yes, you read that correctly!

The **2023** EEO-1 Component 1 data collection will open on **Tuesday, April 30, 2024**.
The deadline to file the 2023 EEO-1 Component 1 report is **Tuesday, June 4, 2024**.

All updates about the 2023 EEO-1 Component 1 data collection, including the 2023 EEO-1 Component 1 Instruction Booklet and the 2023 EEO-1 Component 1 Data File Upload Specifications, will be posted to www.eeocdata.org/eeo1 as they become available. The EEOC anticipates posting the 2023 EEO-1 Component 1 Instruction Booklet and the 2023 Data File Upload Specifications by Tuesday, March 19, 2024.

The EEO-1 Component 1 report is a mandatory annual data collection that requires all private sector employers with 100 or more employees, and federal contractors with 50 or more employees meeting certain criteria, to submit workforce demographic data, including data by job category and sex and race or ethnicity, to the EEOC. The authorities under which EEO-1 Component 1 data are collected include: Section 709(c) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq., and Sections 1602.7-1602.14, Chapter XIV, Title 29 of the Code of Federal Regulations (CFR); Exec. Order No. 11246, 30 FR 12319 (Sept. 24, 1965) and 40 CFR 60-1.7(a).

Alert! Upcoming! 2023 RxDC Reporting Due to CMS by June 1, 2024 – ALL EMPLOYERS Offering Pharmacy Benefits as Part of their Health/Group Medical Benefit

The Consolidated Appropriations Act of 2021 (Transparency) requires all group health plans with pharmacy coverage to submit annually data and financials around their Rx programs either embedded in their medical or carved out separately. The 2023 reference year (calendar year) RxDC data report is due by **June 3, 2024**.

Although most fully-insured plan carriers have taken on this responsibility on behalf of employers, carriers/TPAs/PBMs will still need to collect a couple of financial details from the Employer that includes:

- Average Member Monthly Premium Paid by MEMBER
- Average Monthly Premiums Paid by EMPLOYER

The Centers for Medicare and Medicaid Services (CMS) published the 2023 reference year instructions. The key updates include:

1. Exclusion of certain products: Clarification that medical devices, nutritional supplements, and over-the-counter drugs are to be excluded from the prescription drug lists (sections D3, D4, D5, D7, and D8) unless the product's National Drug Code (NDC) is listed on the CMS Drug and Therapeutic Class Crosswalk.
2. Simplification of premium calculation: The method for calculating the average monthly premium has been simplified. Instead of calculating this on a per-member basis, the total annual premium is now divided by 12.
3. Modification of premium equivalents calculation: The calculation for premium equivalents has been simplified by removing the requirement to report on a cash basis and using paid claims rather than incurred claims.
4. Updates to benefit carve-out field: Instructions for filling out the benefit carve-out field in section P2 have been updated.
5. Clarification on reporting prior year and restated rebates: Additional details have been provided on how to report information in the prior year columns in section D5 and the restated rebate columns in sections D6, D7, and D8.
6. Guidance on retained rebates reporting: New instructions have been provided for reporting entities on how to report information on retained rebates when exact amounts are unknown.
7. Submission of large data files: Instructions on how to submit data when plan list or data files exceed the maximum allowable size limit in the Health Insurance Oversight System (HIOS) have been included.
8. Enforcement of aggregation restriction: The enforcement of the aggregation restriction has been announced, which pertains to how data are aggregated for reporting purposes.
9. Addition of enrollment column to D6: A new column to collect enrollment data has been added to section D6.

Read more on the CMS Prescription Drug Data Collection (RxDC) web page
Because these calculations are based on actual costs (not projected), the information will need to be collected from your accounting and/or payroll records. For self and level funded plan reporting obligations vary among health insurance carriers. Be on the lookout for more details from your Carrier and Broker regarding RxDC employer obligations. ETC can also provide guidance and assistance; please reach out with questions today!

Upcoming for Federal Contractors! OFCCP Affirmative Action Plan Submission Due July 1

On April 1st the Office of Federal Contract Compliance Programs (OFCCP) will open the Contractor Portal for the 2024 Affirmative Action Program (AAP) certification period: **April 1 – July 1, 2024**.

Employer Takeaway: Covered federal contractors are urged to begin certifying their AAP compliance through the portal today to meet the July 1, 2024, deadline. If you are in need out outsourced assistance with this compliance obligation, reach out to ETC HR today @HR_Help so that we can facilitate an introduction!

Learn More: Covered federal contractors and subcontractors must use the portal to certify, on an annual basis, whether they have developed and maintained an AAP for each establishment and/or functional/business unit, as applicable. New contractors have 120 days to develop their AAP(s) and must register and certify compliance through the Contractor Portal within 90 days of developing their AAP(s).

Visit OFCCP's Contractor Portal information page before starting the certification process to access Frequently Asked Questions and step-by-step How-To videos, along with User Guides and other pertinent information.
Contractors can refer to the pre-recorded webinar on the Contractor Portal information page that demonstrates how a contractor can enter its establishment and/or functional/business unit's AAP start date and certify compliance through the Contractor Portal.

Please submit your Contractor Portal questions to the Applications Technical help desk using the OFCCP Applications Technical Help Request Form or call the OFCCP help desk at 1-800-397-6251, press 1 for English or 2 for Spanish, then press 1 to reach technical support for assistance.

- Instructions for registering and certifying for the Contractor Portal
  - How-to Videos
  - User Guide
- Frequently Asked Questions

SECTION II: Noteworthy Compliance Happenings, Things to Consider & Points to Ponder

Webcast: Reasonable Accommodation: A Deeper Dive into the Interactive Process under the ADA and Title VII

This webcast takes a deeper look at the workings of reasonable accommodation and the interactive process. Many employers are getting "tripped up" on this process by not vetting additional options leading to adverse verdicts under the ADA. It will also address the potential unintended consequences of being overly accommodating, as well as the growth of requests for religious accommodations. Access the March 21st recording, click here

CDC Issues New COVID-Related Guidance

For the first time since 2021, the Center for Disease Control and Prevention (CDC) issued new guidance relaxing the quarantine requirements for COVID-19. The new guidance is the result of fewer COVID-related deaths and hospitalizations in the United States. For the first time since 2021, the Center for Disease Control and Prevention (CDC) issued new guidance relaxing the quarantine requirements for COVID-19. The new guidance is the result of fewer COVID-related deaths and hospitalizations in the United States.

Employer Takeaway: Employer Handbook with COVID-19 Protocols or Policy should be updated to reflect any outdated Guidance or requirements still being referenced.

Employers Should Monitor Both Pro & Anti DEI Court Challenges & Legislation

Key Takeaways

- In the wake of the U.S. Supreme Court's 2023 decision on consideration of race in university admissions, litigants have begun to challenge some DEI training programs, alleging that they constitute racial discrimination and compelled speech, and/or cultivate a hostile work environment.
- State legislators on both sides of the aisle have passed bills and introduced others to either pare back or promote DEI initiatives.
- In light of the state regulations and intense public debates, DEI initiatives will likely continue to face challenges in court. Companies should look closely at their programming to ensure compliance with applicable and evolving laws and directives.

State Legislation Relating to DEI Initiatives

In addition to private court challenges to DEI trainings, several states have introduced or passed legislation that prohibits or restricts DEI offices and staff, mandatory DEI training, diversity statements and/or identity-based preferences for hiring and admissions. As of March 2024, nine of these bills have become law.

Most recently, on March 20, 2024, the governor of **Alabama** signed Senate Bill (SB) 129 into law, a sweeping measure that prohibits state agencies and schools from sponsoring DEI programs or requiring their employees or students to participate in them. Meanwhile, **Utah**'s governor signed into law House Bill (HB) 261, which prohibits public institutions from requiring DEI training or asking job applicants questions about initiatives that promote differential treatment based on personal identity characteristics. It also bans policies or programs with "diversity, equity, and inclusion" in their names.

Notably — and importantly, for private employers — while HB 261 passed quickly, a bill covering employers in the private sector, HB 111, did not fare as well. The measure, which would have prohibited such employers from mandating DEI trainings, passed the Utah House but was voted down in the Utah Senate in February 2024.

Florida, North Carolina, North Dakota, Tennessee and Texas have also enacted anti-DEI bills.

- **Texas** adopted SB 17, which bans DEI offices and faculty and staff diversity trainings at public institutions.
- **Tennessee** signed into law HB 158, which prohibits certain public institutions from mandating implicit bias training.

At the same time, other states have moved to require DEI initiatives.

- **Washington** SB 5462 would require school districts to adopt curricula that tell the perspectives of LGBTQ+ Washingtonians.
- And in **California**, SB 54 requires venture capital companies to report the diversity of the founding members of businesses in which they invest.

Pay Transparency (Ohio, Minnesota & DC Updates)

Employer Takeaway:

Pay transparency laws are in effect in 9 states: California, Colorado, Connecticut, Hawaii, Maryland, Nevada, New York, Rhode Island, and Washington. The District of Columbia and Illinois pay transparency laws are scheduled to go into effect on June 30, 2024, and January 1, 2025, respectively. Additionally, at least 7 local jurisdictions have pay transparency laws in effect, and proposed legislation is pending in many other state and local jurisdictions. As employers, it is essential to proactively adapt to the upcoming pay transparency legislation to ensure compliance and foster a fair and inclusive work environment. Start by familiarizing yourself and your team with the specific provisions of these laws, including any requirements related to salary history inquiries, disclosure of salary ranges in job postings, and prohibitions on screening applicants based on wage history.

Learn More: In the pursuit of fair and equitable compensation practices, jurisdictions worldwide are implementing new laws to promote pay transparency and combat wage disparities. These legislative initiatives aim to address historical inequalities by prohibiting employers from inquiring about an applicant's salary history, disclosing salary ranges in job postings, and restricting the use of pay history in determining compensation. As we delve into the overview of three jurisdictions' upcoming pay transparency laws set to take effect in 2024, we'll examine the specifics of these regulations and their implications for employers and job seekers alike.

Columbus, Ohio: Effective March 1, 2024, Columbus prohibits employers with 15 or more employees from inquiring about an applicant's salary history. Ordinance 0709-2023 extends to screening applicants based on past compensation and making hiring decisions solely on salary history. Employers are also prohibited from searching publicly available records to obtain salary history. It does not apply to internal transfers or promotions or to applicants rehired within three years of separation.
While employers can discuss salary expectations with applicants, as well as other monetary incentives the applicant would forfeit by resigning from their current employment, they are not required to share pay scales. Exceptions include federal, state, or local law mandates, voluntary disclosures by applicants, and internal transfers or promotions. Violating employers may face civil fines of up to $5,000.

Minnesota: Since January 1, 2024, Minnesota prohibits all employers, regardless of size, from inquiring into an applicant's pay history unless it is publicly available or voluntarily disclosed by the applicant. Employers may discuss salary expectations with applicants but cannot prompt pay history disclosure. Employers must offer salaries based on the current job market taking into consideration the applicant or employee qualifications, and not their former salary. The Wage Disclosure Protection law exempts certain federal, state, or local law provisions and voluntary disclosures by applicants.

Washington, D.C.: Scheduled for enactment on June 30, 2024, Washington, D.C.'s new Pay Scale and Benefits Disclosure Amendment Act of 2023, also known as the Wage Transparency Omnibus Amendment of 2023, mandates private employers, regardless of size, to disclose minimum and maximum salary ranges in internal and external job postings and advertisements. Screening job applicants based on wage history is forbidden. Employers must also disclose other benefits before the first interview and post notices informing employees of their rights. Violations may result in civil fines ranging from $1,000 to $20,000 per occurrence, with the attorney general empowered to investigate and seek remedies.

New! NLRB Blocked from Implementing Expansive Joint Employer Rule in Advance of the March 11th Effective Date

A federal district court recently vacated the National Labor Relations Board's 2023 joint employer rule (2023 Rule), which would have expanded the standard to hold separate companies joint employers based on indirect or reserved control, even if never actually exercised.
The district court's ruling preserves the National Labor Relations Board's (NLRB's or Board's) 2020 joint employer rule (2020 Rule), which requires "substantial direct and immediate control" to establish joint employer status.
The NLRB has several response options at this stage: (1) appeal the district court's ruling; (2) rescind the 2020 Rule, which will reinstate the pre-2020 joint employer standard, and then address future joint employer issues through case-by-case adjudication; or (3) issue a new and revised joint employer rule.

BACKGROUND
On March 8, 2024, the US District Court for the Eastern District of Texas vacated a 2023 rule issued by the NLRB, which would have vastly expanded the circumstances under which separate companies can be considered joint employers.[1] Joint employer status can have significant legal consequences, including obligations to recognize a union, bargain with that union, and be bound by a collective bargaining agreement; joint liability for unfair labor practices; and legal vulnerability to union picketing during labor disputes.
The district court's ruling preserves the NLRB's 2020 Rule on the joint employer standard, which the 2023 Rule sought to rescind and replace. Under the 2020 Rule, a company is deemed a joint employer of another company's employees only if it actually exercises "substantial direct and immediate control" over the employees' essential terms and conditions of employment—for example, wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.[2]

The 2023 Rule, which would have gone into effect on March 11, 2024, deems virtually any company that contracts for third-party labor as a joint employer. The 2023 Rule provided that a company would be a joint employer if it exercised control over (whether directly, indirectly, or both), or had the right to control (whether directly, indirectly, or both), one or

more of the employees' essential terms and conditions of employment—even if that control was only reserved and never actually exercised.[3]

The 2023 Rule also broadens the definition of "essential terms and conditions of employment" to include "work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline," and "working conditions related to the safety and health of employees."[4]
In its March 8 decision, the district court held the 2023 Rule contrary to the NLRB's authority because it exceeded the bounds of the common law definition of an employer.[5] The court also found that the Board failed to provide a sufficient justification for rescinding the 2020 Rule.

'Substantial Direct and Immediate Control' is the Operative Standard – For Now
Given the district court's ruling, the 2020 Rule's "substantial direct and immediate control" standard is the operative NLRB joint employer standard—at least for the time being. The district court's ruling is the latest development in an area of law that has been in flux for much of the last decade. The Board is likely to take action in response to the district court's decision, which may include one or more of the following:

- **Appeal District Court's Ruling to the US Court of Appeals for the Fifth Circuit:** A successful appeal by the NLRB could result in reinstatement of the expansive standard set forth in the 2023 Rule. Alternatively, if only the 2023 Rule's rescission of the 2020 Rule were to be upheld, the joint employer standard would revert to the Board's prior precedent in *Browning-Ferris,* which established an approach similar to—although not quite as expansive as—the 2023 Rule.[6] The Board may then choose to abandon rulemaking for the joint employer standard and establish future joint employer policy through case-by-case adjudication (see below).
- **Rescind 2020 Rule and Promulgate New Joint Employer Standard Through Adjudication:** The Board could engage in new rulemaking to rescind the 2020 Rule, which would require a lengthy notice and comment process. As noted above, a rescission of the 2020 Rule would restore the Board's prior precedent in *Browning-Ferris,*[7] which established an approach similar to the 2023 Rule. The Board could then decide future joint employer issues through case-by-case adjudication, which is how the Board addressed joint employer issues prior to the 2020 Rule.[8] The Board could adopt a new standard under this case adjudication approach that is very similar, if not identical, to the 2023 Rule without engaging in rulemaking.

Whatever approach or combination of approaches the Board ultimately decides to take, employers can expect that the current Board will continue to pursue an expansion of the joint employer standard because it creates additional leverage and impact for union organizing, collective bargaining, and labor law litigation. As a result, companies should continue to consider ways to structure their contractual relationships and draft contractual terms to minimize the risk of a joint employer finding to address potential application of a "reserved and indirect" control standard in the future. However, for the time being, the current Board's effort to adopt that standard is stalled. Original Morgan Lewis Lawflash dated March 27th. Access it HERE

Reminder: DOL Issues Independent Contractor Final Rule

On January 9, 2024, the U.S. Department of Labor (DOL) released a final rule, effective March 11, 2024, revising the agency's guidance on how to analyze who is an employee or independent contractor under the Fair Labor Standards Act (FLSA). This final rule rescinds the current independent contractor rule that was published on January 7, 2021, and mirrors the DOL's proposed rule.

Employer Takeaways:

- DOL's final rule rescinds the 2021 Independent Contractor Rule.
- It restores the multifactor, totality-of-the-circumstances when determining whether a worker is an employee or independent contractor under the FLSA.
- It requires entities to analyzes all 6 economic realities test factors without assigning a predetermined weight to a particular factor.
- It may result in classifying a greater number of workers as employees, not independent contractors.
- The DOL has released guidance to help employers comply with the final rule.

Learn More

Under the FLSA, employees are entitled to minimum wage, overtime pay and other benefits. Independent contractors are not entitled to these protections and benefits. According to the DOL, this final rule will reduce the risk of employees being misclassified as independent contractors while providing a consistent approach for businesses that engage with individuals who are in business for themselves.

The DOL published the 2021 Independent Contractor Rule on January 7, 2021. The 2021 rule reasserted the economic realities test (ERT) as the DOL's preferred method to determine whether a worker should be classified as an employee or independent contractor under the FLSA. In doing so, the 2021 rule focused on two core factors: the nature and degree of the worker's control over the work and the worker's opportunity for profit and loss based on initiative and/or investment. These factors carried more weight in determining the status of independent contractors.

The final rule rescinds the 2021 Independent Contractor Rule and returns to the pre-2021 rule precedent. In doing so, the final rule restores the multifactor, totality-of-the-circumstances analysis to assess whether a worker is an employee or an independent contractor under the FLSA. The final rule ensures that all ERT factors are analyzed equally without assigning a predetermined weight to a particular factor or set of factors. These six factors include the opportunity for profit or loss depending on managerial skill, investments by the worker and the potential employer, the degree of permanence of the work relationship, the nature and degree of control, the extent to which the work performed is an integral part of the potential employer's business, and the worker's skill and initiative.

SECTION III:
New & Upcoming! Noteworthy State/City Compliance Alerts

California

New! Cal/OSHA Issues Awaited Guidance & Model Workplace Violence Prevention Plan

As previously communicated, starting July 1, 2024, California employers across all industries must have a written Workplace Violence Prevention Plan ("WVPP") in place.

On March 18, 2024, California's Division of Occupational Safety and Health ("Cal/OSHA"), the agency responsible for enforcing the new law's requirements, announced the creation of its Cal/OSHA Workplace Violence Prevention Guidance and Resources webpage. The webpage contains guidance and educational materials on the new law and workplace violence prevention, a model WVPP, fact sheets, and other resources for employers and employees.

Employer Takeaway: Although the provided model WVPP reflects the procedures required by section 6401.9, employer likely need to customize to their industry and worksite-specifics to ensure compliance.

New! CA Supreme Court Clarifies Whether Employers Must Pay for Certain Pre-Shift Activities

In *Huerta v. CSI Electrical Contractors*, No. S275431 (March 25, 2024), the California Supreme Court issued an important decision relating to whether California employers must pay non-exempt employees for certain pre-shift activities, including time spent traveling on-premises before they begin productive work.

- First, the Court concluded that time spent by an employee waiting to undergo a vehicular search to enter the employer's premises is compensable, when that search includes a visual inspection of the employee's vehicle.
- Second, the Court held the time an employee spends traveling from an employer's security check to the jobsite is not compensable as "hours worked" (but might be compensable as "employer-mandated travel" for employers subject to Wage Order No. 16), notwithstanding that the employee may be subject to certain rules and restrictions while driving.

- Third, the Court held that Labor Code section 512(e)—which exempts employees in certain occupations (including construction) from state meal period requirements if they work under a labor agreement that meets specific requirements—does not allow employers to pay less than minimum wage for "on-duty" meal periods.

Employer Takeaways:

- Employers who have implemented mandatory screening procedures before employees may enter or leave the premises should read this decision carefully, particularly if the process involves visual scanning or searches by security personnel as the **Court concluded:**
  - **that when an employee is required to spend time on the employer's premises waiting to undergo an employer-mandated security procedure, that time is compensable**.
  - **that the time an employer prohibits an employee from leaving the employer's premises, which prevents the employee from engaging in otherwise feasible personal activities, is considered "hours worked" and is therefore compensable**.
- Employers should also consider whether the restrictions, if any, they place on employees while on the premises fall into the category of rules furthering safe, lawful, and orderly conduct, which *Huerta* said were insufficient to make on-site travel compensable.
- Last, employers should review their policies and procedures regarding meal periods and ensure they do not place restrictions on their employees' ability to perform personal activities during that time.

New! California Fast Food Minimum Wage Exemptions

The California Department of Industrial Relations initially updated its FAQs to indicate that the April 1 minimum wage increase for fast food workers will also increase the *minimum salary threshold* for exempt executive, administrative, and professional (EAP) employees in fast food restaurants.

The new minimum salary for these employees will be $83,200 per year. This increase is happening because under California law, EAP employees must earn a monthly salary of at least two times the *state minimum wage*, and the new $20 rate will function as the *state minimum wage* for fast food restaurant employees.

Impacted employers have two options:

1. Ensure that employees in EAP positions are paid $83,200 per year, or
2. Reclassify these employees as nonexempt and provide them with the rights and benefits that nonexempt employees are entitled to (overtime, breaks, lunches, and reporting time pay, to name a few)

Required Notice

Employers with covered employees are required to post a supplement to the minimum wage order in a place where employees will frequently see it.

Future Increases

The newly created Fast Food Council will have the authority to raise this minimum wage annually beginning January 1, 2025

Then with a mere seven days before the new minimum wage for employees of *fast food restaurants* is set to take effect in California, the legislature added new exemptions to the law. In addition to the original exemptions for certain bakeries and restaurants inside grocery stores, the law will **not** apply to restaurants that are any of the following:

- Located in an airport
- Connected to or operated in conjunction with a hotel, event center, theme park, museum, or gambling establishment
- Located in and operated in conjunction with a for-profit corporation's office building or campus, are primarily serving the corporation's employees or its affiliates, and are part of a concession or food service contract covering the building or campus
- Located on land owned by the government and operated pursuant to a concession or food service contract

Please note that each of these exemptions has a more detailed definition under the law, which you should make sure applies before considering your establishment exempt.

Due to the most recent change, the state's FAQs have not been updated yet, but we expect that they will be shortly.

New! LA County Fair Chance Ordinance Applicable to Unincorporated Areas of the County

At the end of February, the Los Angeles County Board of Supervisors passed an ordinance adding several compliance requirements to the California Fair Chance Act requirements for employers considering the criminal history of applicants and employees in making employment decisions.
The Fair Chance Ordinance (FCO) applies to employers with **5 or more employees** in **unincorporated areas of Los Angeles County**.
The ordinance takes effect **March 28, 2024**, and is operative **September 3, 2024**.
The ordinance's requirements impacts:

- Job Postings
- Background Checks
- Preliminary Notice and Notice of Adverse Action
- Recordkeeping

Impacted employer should access the March 13th Jakson Lewis publication HERE or the LA County government website HERE to learn more.

Update! CA Pay Data Reporting filing Deadline May 2024

California law requires private employers of 100 or more employees and/or 100 or more workers hired through labor contractors to annually report pay, demographic, and other workforce data to the Civil Rights Department (CRD).

Portal Opens: 2/2024
Filing Deadline: **5/8/24**

The CRD has published "important announcements" regarding changes to this year's reporting requirements, including the following (March 2024):

- **New data fields for remote workers**: Employers must now report information regarding the extent to which its workforce is remote during the "Snapshot Period" (i.e., a single pay period of the employer's choice between October 1 and December 31, 2023). Specifically, the CRD added three new reporting fields: (1) the number of remote employees located within California; (2) the number of remote employees located outside of California; and (3) the number of employees that do not work remotely. For purposes of this reporting, the CRD defines a "remote worker" as "[a] payroll or labor contractor employee who is entirely remote, teleworking, or home-based, and has no expectation to regularly report in person to a physical establishment to perform work duties." Therefore, hybrid employees are not considered "remote" for these purposes.
- **Race, ethnicity, sex for Labor Contractor Employee Reports**: Reporting "unknown" race/ethnicity or sex of a labor contractor employee is no longer permitted. According to the CRD, employee self-identification is the preferred method of identifying race/ethnicity and sex information; however, if an employee declines to state their sex or voluntarily provide their race/ethnicity, the employer should report using current employment records, other reliable records or information, or observer perception. When a reporting entity must rely on observer perception, the CRD encourages specifying this through clarifying remarks (e.g., "The race/ethnicity of [*number*] individuals in this grouping is being reported based on observer perception.").
- **Filing deadline**: Reports are due by May 8, 2024. Unlike last year's reporting period, it does not appear that the CRD will be accepting or granting any pay reporting submission deferral requests.

Employers are well-advised to use this year's reporting templates and consult the updated User Guide available here.
California employers also may wish to consult the CRD's Updated FAQs
See also ETC HR's February HR WIRE supplemental publication released Friday, February 9th for additional details and links to resources.

District of Columbia

Reminder: DC Enacts New Wage Transparency Requirements Effective June 30, 2024

On Jan. 12, 2024, the District of Columbia (the District) enacted the Wage Transparency Omnibus Amendment Act of 2023, amending the Wage Transparency Act of 2014. The amended law **requires pay and benefits disclosures, prohibits wage history inquiries and expands employee protections regarding compensation discussions**. The amended law takes effect on **June 30, 2024**, and applies to all nongovernmental employers with at least one employee in the District.

Required Pay and Benefits Disclosures

- Amended law **requires employers to include in all job postings the minimum and maximum salary or hourly pay that they believe, in good faith, they would pay for the position**.
- Pay ranges must be included in both external and internal postings, including those for internal promotions or transfer opportunities.
- Disclosure of health care benefits disclosed prior to each candidate's first interview

Prohibition on Wage History Inquiries

- Screening candidates based on their wage history; this includes requiring that their past compensation satisfy minimum or maximum criteria or requiring candidates to disclose their wage history as a condition of receiving an interview or offer of employment.
- Seeking a candidate's wage history from a former employer.

Expanded Protections for Compensation Discussions

The 2014 law prohibits employers from restricting employee discussions regarding monetary compensation or discharging, disciplining or otherwise retaliating against employees who engage in such discussions. The amended law expands the prohibition to include protections for discussions and inquiries regarding nonmonetary compensation (e.g., health care benefits).

Notice Requirements

- Post a notice of employee rights under the amended law in at least one conspicuous location where employees congregate. ETC will monitor & provide released workplace notices.

(DC B 194 was signed by the mayor on January 1, 2024)

Delaware

New! State's Family and Medical Leave Regulations Amended

On March 11, 2024, the following amendments to the Delaware Family and Medical Leave Act's regulations will take effect:

- Employees can't be required to use more than 75% of their earned, unused paid time off (PTO) before accessing their Paid Family and Medical Leave (PFML) benefits.
- Employees must be provided notice about their employer's PTO/PFML coordination policy.
- Employees may use PTO to supplement their wages (up to 100% of their average weekly wage) in an agreement with their employer.
- Employers must provide a written PMFL notice, provided by the state, to existing Delaware employees at least 30 days before the start of contributions on January 1, 2025. This notice must also be provided to employees upon hire, when they submit a leave request, or when the employer "acquires knowledge" that an employee's leave may qualify for PFML.
- All notices can be delivered by email.

(Delaware 1401 final rule)

Illinois

Reminder: State's Equal Pay Act Registration Certificate Filing Deadline Is March 23

Employer Takeaway: Employers who have not yet filed for an Illinois Equal Pay Act Registration Certificate (EPRC) must do so by March 23, 2024. This only applies to employers who have not filed for an EPRC in the past two years.

The Illinois Equal Pay Act requires employers with 100 or more employees in Illinois to obtain an Equal Pay Registration Certificate certifying the employer's compliance with laws prohibiting gender, race and other forms of discrimination based on wages.

In order to obtain the certificate, employers must file with the Illinois Department of Labor certain wage records, their most recent EEO-1 Report and an equal pay compliance statement signed by a corporate officer, legal counsel, or registered agent that certifies, among other things, statutory compliance with the Illinois Equal Pay Act and other state and federal equal opportunity laws, a lack of wage disparity between male, female and minority employees and that there are no sex-based personnel decisions.

Employers with less than 100 employees must file for an exemption by completing an Exemption-Business form and e-mail it to DOL.EPRC@illinois.gov. In order to determine whether an employer had less than 100 employees, the employer must have had less than 100 current employees on December 31, 2023. Employers who do not comply with the filing deadline or request an exemption are subject to a $10,000 fine.

Reminder: Chicago Delayed Start of New Paid Leave - July 2024

On December 13, 2023, the Chicago City Council voted to delay the implementation of the city's new paid leave and paid sick and safe leave ordinance from Jan. 1, 2024, to July 1, 2024. The council also amended the ordinance in other ways, some of which are helpful to employers. The city's existing paid sick leave ordinance will remain in effect until the new one takes effect in July.

Chicago Paid Leave and Paid Sick and Safe Leave Ordinance

On Nov. 9, 2023, Chicago passed an ordinance that significantly expanded the city's paid sick leave requirement, mandating up to 40 hours of paid leave **and** 40 hours of paid sick and safe leave annually. This leave entitlement was to apply to employees who perform two hours of work in Chicago in any two-week period. All Chicago employers are covered by the ordinance, which was to take effect Jan. 1, 2024.

Amendments to the Ordinance

The amendments delay the start of the ordinance to July 1, 2024, when accrual begins. Furthermore, now leave will apply only to employees who have worked **80 hours** in Chicago in any **120-day period**. Other key changes include that:

- Employers must provide written paid time off policies to each covered employee in the employee's primary language;
- Until July 1, 2026, employees must wait 16 days (or a payroll period) before filing a civil action against employers for violating the ordinance; and
- All employers with employees who work in Chicago must comply with the recordkeeping requirements of the ordinance.

The ordinance requires payout of paid leave on separation of employment or transfer outside Chicago for all but small employers, but it provides a temporary limit (16 hours of paid leave) for medium-sized employers with 51-100 employees. This limit now expires on July 1, 2025, extended from Dec. 31, 2024.

Maryland

New! FAQs Released - State's Paid Family and Medical Leave Insurance Program

The Maryland Department of Labor's Division of Family and Medical Leave Insurance (FAMLI) has released a detailed FAQ document addressing 59 questions surrounding the new paid family and medical leave system that is (now) slated to launch in 2026.

New Jersey

New! State Issues FAQs on Family Leave Act

Enacted in 1989, the NJFLA applies to private employers with 30 or more employees worldwide and to state and local government agencies.

The New Jersey Division on Civil Rights has published answers to frequently asked questions (FAQs) about the New Jersey Family Leave Act (NJFLA). According to the division, the guidance is intended to facilitate compliance with the NJFLA by clarifying and explaining the division's understanding of the law's requirements. The FAQs do not impose any new requirements, rights or obligations that are not included in the NJFLA.

New York

Reminder: State's Expanded Privacy and Wage Protections

The following changes to New York's employment laws apply to employers of all sizes.

PERSONAL ACCOUNT PRIVACY PROTECTIONS

Beginning **March 12, 2024**, employers will be prohibited from electronically accessing employees' and applicants' personal accounts.

What is a *personal account*, you ask?

A *personal account* is an electronic account used exclusively for personal purposes, where users can create or share their own content. Examples include social media accounts, podcasts, blogs, and instant messages.

Specifically, employers can't ask, require, or pressure employees or applicants to disclose login credentials, access their personal accounts in the employer's presence, or reproduce information contained in their personal accounts.

The law contains some exceptions. For instance, employers are still allowed to make employees provide access information for nonpersonal accounts that provide access to the employer's internal computer or systems, or accounts that are used for business purposes (though, in some cases, prior notice may be required). Employers can also still view, access, and use information about employees and applicants that is publicly available or doesn't require special access.

Action Items

Make sure those involved in the hiring process, as well as all in supervisory roles, are aware of these prohibitions.

Check your social media and electronic device policies to make sure they're compliant.

WAGE PAYMENT PROTECTION CHANGES

As of **March 13, 2024**, the state's earnings threshold for the applicability of ***wage payment protections*** for those employed in a bona fide executive, administrative, or professional capacity will increase from $900 per week to $1,300 per week.

*This law does **not** change the minimum salary for exempt employees*—it simply extends certain longstanding wage payment rules to those who make $1,300 or less per week.

Action Items

Employers will now need to make sure these employees are:

- Paid wages at *least* semimonthly, have provided advance written consent for direct deposit, and are
- Paid any benefits or wage supplements (e.g., reimbursements for out-of-pocket business expenses) within 30 days of becoming due.

Oregon

Update! Oregon Updates Leave Regulations

On February 29, 2024, Oregon finalized regulations affecting the Oregon Family Leave Act (OFLA) and the Sick Time law—(BLI 9-2024)- took effect just a few days later on March 2, 2024. While many of the updates were technical adjustments to bring continuity and clarification to the state's various leave laws, there were some more substantive changes, and we've provided the highlights below.

The updated regulations:

- Allow employers to require that employees document the existence of an "affinity" relationship when using sick leave or OFLA leave to care for or grieve a family member and provide sample language.
- Eliminate the requirement, under both laws, that a domestic partner (as a type of family member) be of the same sex as the employee.
- Require employers to count any hours of protected leave the employee has taken when calculating an employee's average hours per week for OFLA eligibility purposes.
- Expand OFLA's definition of *serious health condition* to include disability resulting from the termination of a pregnancy and absences due to fertility or infertility treatments (reasons employees can take pregnancy disability leave).
- Allow employees who qualify for leave under both OFLA and Paid Leave Oregon (PLO) to use any available paid time off during that dual-coverage leave.

- Require employers that transition to a rolling-forward, one-year period to provide all eligible employees with a new, full leave bank at the beginning of the new OFLA leave year.
- Clarify that when an employer receives notice (from any source) that an employee has applied for PLO, they have sufficient information to temporarily designate the absence as OFLA leave.

Employer Takeaway: Update your leave policies to include these details if they are topics you have covered within those policies

Reminder & Resources: State's OFLA, PLO & Sick Time Changes

Oregon updated several aspects of the Oregon Family Leave Act (OFLA) to align with its new paid family and medical leave law, Paid Leave Oregon (PLO). The changes should assist employers in managing the overlap between these two benefits. PLO benefits became available on September 3, 2023, which is also when the new definition of "family member" under OFLA takes effect. Because Oregon Sick Time uses the same definition of family member as OFLA, the Sick Time law is effectively amended as well.

Definition of Family Member

The definition of ***family member*** under OFLA—and Oregon's Sick Time law—will match the PLO definition. The new definition expands the relationships that qualify as family. Family member will now include an employee's: Spouse, Domestic partner, Child, Parent, Grandparent, Grandchild, Sibling (which includes stepsiblings), Spouse or domestic partner of their child, parent, sibling, grandparent, or grandchild and any individual related by blood or affinity whose close association with a covered individual is the equivalent of a family relationship (e.g., a boyfriend or girlfriend, honorary aunts and uncles, best friends, or roommates)

Leaves Run Concurrently

OFLA must run concurrently with PLO—not in addition to it—when the leave reason qualifies under both laws.

Mandatory Forward-Looking OFLA Benefit Year in 2024

Beginning on July 1, 2024, employers will be required to use a forward-looking benefit year for purposes of calculating an employee's OFLA leave entitlement—the same method that's used to calculate an employee's eligibility for PLO. This method tracks the employee's 52-week benefit year beginning the Sunday before their first use of leave.

Employer Action Items

- If your OFLA or Oregon sick leave policies define family member, update the definition to comply with these changes or remove the detailed definition entirely. Updated OR State Handbook addendum forthcoming to include even more added "Family Member" clarification policy language February 2024.
- Ensure that you are running OFLA concurrently with PLO when the absence qualifies for both types of leave
- Implement a forward-looking benefit year for OFLA by July 1, 2024 (if you don't already use that method), and consider changing your FMLA benefit year to match

Resources:

- Family Leave Act (OFLA)
- Paid Leave Oregon (PLO)
- SB 1515

Utah

New! State Adds Military Protections

Utah has re-enacted and expanded its military protections—the Utah National Guard Amendments law was signed and took effect immediately on March 18, 2024. The law requires employers of **all sizes** to provide military leave and other employment rights.

Specifically, employers are required to:

- Provide up to five (5) years of leave to employees who are members of a reserve component of the U.S. Armed Forces when they are ordered to active duty (including for training), inactive duty training, or state active duty

- Provide employees who are called to service in the Utah National Guard or the Utah State Defense Force with the same rights and protections provided by federal law for employees that are called to federal military service
- Restore these employees to their job at the completion of their service with the seniority, status, rate of pay, and rate of vacation accrual that they would be entitled to under the Uniformed Services Employment and Reemployment Rights Act (USERRA)

Action Item
Review your Company's USERRA/Military Leave Policy to ensure no updates are needed.

ETC's USERRA/Military Leave Policy does not pose a compliance issue or conflict with state protected State Defense Force services, although employers may elect to add additional clarification language, if so inclined.
Below is Paragraph 1 extracted from ETC's USERRA/Military Leave Policy with policy clarification language added for review, consideration and possible inclusion in your own Policy:

> In compliance with the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), all employees are immediately eligible for an unpaid military leave of absence. A military leave will be granted if an employee is absent in order to serve in the uniformed services of the United States for a period of up to 5 years (not including certain involuntary extensions of service). Employees who perform and return from service in the Armed Forces, the Military Reserves, the National Guard, Federal Emergency Management Agency reserves, certain Public Health Service positions and/or any other category designated by the President in time of war or emergency, and/or State Defense Force or the like, when mandated by state regulations will retain certain rights with respect to reinstatement, seniority, layoffs, compensation, length of service promotions, and length of service pay increases as required by applicable federal or state law.

New! Utah Voids Confidentiality Pacts for Sexual Assault and Harassment

Under a new Utah law, House Bill (HB) 55, certain nondisclosure and nondisparagement (confidentiality) agreements related to sexual assault and harassment required as a condition of employment are rendered void and unenforceable. The new law is retroactive to Jan. 1, 2023. Enacted on Feb. 28, 2024, the law also prohibits employers from retaliating against an employee for alleging sexual misconduct or refusing to enter confidentiality agreements.

Unenforceable Agreements
Under HB 55, an agreement is deemed void and unenforceable if it is between an employee (or former employee) and employer (of any size) and either:

- Prevents, or has the effect of preventing, an employee from disclosing or discussing sexual assault, sexual harassment or allegations of sexual assault or harassment; or
- Prohibits, or has the effect of prohibiting, an employee from making a negative statement about the employer related to a claim of or dispute involving sexual assault or sexual harassment.

Permitted Agreements
Employers may still require an employee who has alleged sexual misconduct not to disclose the monetary amount of a settlement. In addition, employers may still require employees to sign post-employment restrictive covenants and agree not to disclose nonpublic trade secrets, proprietary data and confidential information that does not involve illegal acts.

Employer Takeaway:
If an employer attempts to enforce a confidentiality clause deemed void under the new law, the employer may not obtain monetary damages resulting from a breach of the clause and instead may be ordered to all costs, including reasonable attorney fees, resulting from the legal action.

Vermont

Reminder: State's Paid Leave Expansion

The Vermont Family and Medical Leave Insurance Plan (FMLI) program will be expanded to private employers this year, Vermont Governor Phil Scott announced. Beginning on Feb. 15, 2024, Vermont employers with at least two employees will have the opportunity to purchase FMLI benefit plans by a new offering from The Hartford. These plans will provide benefits to eligible employees beginning on July 1, 2024.

The FMLI program was rolled out in 2023 for state workers and will be making its scheduled expansion to the private sector. The next and final step in the roll-out of this program, beginning in 2025, will allow individual employees and self-employed workers to become able to purchase individual coverage if their employers do not offer it.
The FMLI program is voluntary in the private sector and will provide Vermont workers with 60-percent wage replacement for up to six weeks of work in a 12-month period if they take time off for qualified events. Vermont employers can access more information concerning the program and design a plan through their employee benefits broker or by visiting The Hartford's website.

Employees who work for businesses electing to participate in the voluntary program or who obtain coverage individually will be able to utilize the paid leave benefits for qualified events, including:

- The birth of a child and to care for the newborn child within one year of birth;
- An employee's adoption of a child or foster care placement and to care for the newly placed child within one year of placement;
- Caring for the employee's spouse, child, stepchild, foster child, ward who lives with the employee, parent, or parent of the employee's spouse who has a serious health condition;
- A serious health condition that makes the employee unable to perform the essential functions of their job; or
- Any qualifying exigency arising out of the fact that the employee's spouse, child, or parent is a covered military member on "covered active duty," or to care for a covered servicemember with a serious injury or illness if the eligible employee is the servicemember's spouse, son, daughter, parent, or next of kin (i.e., "military caregiver leave").

Washington

New! State Law Expands and Clarifies Non-Compete Statute

On March 13, 2024, Governor Jay Inslee signed into law Substitute Senate Bill 5935 (S.B. 5935), amending Washington's 2019 non-compete statute (RCW 49.62) and expanding the already significant restrictions it places on employers doing business in Washington. The bill will become effective on June 6, 2024. Employers with Washington operations that have (or want) non-compete or non-servicing agreements with their employees, or that are considering hiring individuals who have entered into such agreements with other employers, need to understand the implications of these changes. Access Littler's March 27th Publication HERE to learn more

SECTION IV:
Reminders: Previously Reported Regulatory Matters

Workplace Notices Updates

- **Model CHIP Notice Updated by DOL**
  The U.S. Department of Labor (DOL), through its Employee Benefits Security Administration (EBSA), has released a new model Employer CHIP Notice with information current as of **Jan. 31, 2024**.
  An employer is subject to this annual notice requirement if its group health plan covers participants who reside in a state that provides a premium assistance subsidy, regardless of the employer's location

State Workplace Notices

- **KY** – Updated Safety & Health on the Job Notice released
- **HI** – Updated Minimum Wage Notice, Unemployment Insurance, Discrimination, Disability Compensation, Dislocated Workers, and OSHA Notices. Updated Notice accessible HERE
- **WI** – Updated Unemployment Benefits Notice
- **DE- R**evised **Workers' Compensation Notice** with notable changes. The language has been refined to offer better clarity regarding the responsibilities of both employers and employees. Additionally, an email contact for the Office of Workers' Compensation has been added to facilitate smoother communication and information. Finally, we have added the recommended Delaware Sexual Harassment Notice to the poster.

Reminder: OSHA Form 300A Deadline
Posted by February 1 & Electronically Submitted March 2, if applicable

ETC published on January 17th an e-Alert compliance reminder pertaining to OSHA Form 300A. Be sure you are aware of the applicability of any OSHA recordkeeping and filings to your organization.

Reminder: ACA Reporting Deadlines

Employers subject to Affordable Care Act (ACA) reporting under Internal Revenue Code Sections 6055 or 6056. For the 2023 calendar year, covered employers must:

- Furnish statements to individuals by **March 1, 2024** (an alternative method of furnishing statements to covered individuals is available in certain situations); and
- File paper returns with the IRS by **Feb. 28, 2024**, or **April 1, 2024**, if filing electronically.
- ***Beginning in 2024, employers that file **at least 10 returns** during the calendar year must file electronically.

Penalties may apply if employers are subject to ACA reporting and fail to file returns and furnish statements by the applicable deadlines.

New! IRS Releases ACA Pay-or-Play Penalties for 2025

On Feb. 12, 2024, the IRS released updated penalty amounts for 2025 related to the employer shared responsibility (pay-or-play) rules under the Affordable Care Act (ACA). The 2025 penalty amounts apply for failures to offer affordable, MV coverage during the 2025 calendar year.

For calendar year 2025, the adjusted $2,000 penalty amount is **$2,900,** and the adjusted $3,000 penalty amount is **$4,350**. This is a decrease from the penalty amounts for the 2024 calendar year, which are $2,970 and $4,460, respectively.

The IRS provides a variety of resources on the pay-or-play provisions that provide more information on calculating the penalty. Employers can use the following IRS web pages for more details:

- Employer Shared Responsibility Provisions
- Types of Employer Payments and How They Are Calculated

NLRB's General Counsel Says Employers Cannot Bar Outside Employment

Employer Takeaway: If you have a policy strictly prohibiting all outside employment., it may be time to review and update that policy.

Learn More: The National Labor Relations Board (NLRB) is chipping away at employment agreements and other restrictive covenants one clause at a time. In a recent memorandum, the General Counsel said she believes restricting employees from holding outside or secondary employment violates federal labor law, and she intends to urge the NLRB's Democratic-appointee-controlled Board to reach the same conclusion.

The General Counsel said she believes any rule or agreement interfering with an employee's right to moonlight or access other employment is unlawful. Because this provision prevented employees from being an "employee" of another entity, it could be read as prohibiting secondary employment and would be unlawful. The company's rule, she added, implicitly prohibits "salting" – that is, the tactic of union agents acquiring jobs in particular workplaces for the sole purpose of unionizing that business – in violation of the National Labor Relations Act.

Out of Work: Union Strike Activity Surged in 2023

Employer Takeaway: Given the rise in strike activity over the last two years, any employers who have expiring labor agreements coming up would be well-suited to dust off their contingency plans and start getting a game plan in place to address the numerous issues that may arise.

Learn More: Unions continued to dominate headlines in late 2023, with the Starbucks saga continuing to unfold and the United Auto Workers (UAW) – for the first time in its history – coordinating a simultaneous strike at the "Big Three" automakers in Detroit.

The UAW's historic strike against American auto manufacturers was not an outlier. According to a recent article in U.S. News & World Report, "It was called the 'summer of strikes' or 'hot strike summer' – only the movement continued into fall and winter, too. More than half a million workers staged nearly 400 strikes during the first 11 months of 2023, according to Cornell University's Labor Action Tracker."

What drove the increased strike activity? The article notes that many labor agreements were up for renewal in 2023, which is part of the equation. It further, explains, however, "Workers felt empowered by other highly visible and successful strikes (or threats to strike) and a tight labor market, emboldening them to ask for higher pay and other benefits…"

The confluence of more media attention, perceived labor wins after high-profile strikes (such as with the UAW at the Big Three) and the tight labor market all likely contributed to this uptick. It is also notable that this surge in strike activity comes on the heels of an increase in 2022 as well.

A myriad labor law and other legal issues come into play for employers when workers decide to go on strike.

For example:

- If workers strike, they generally cannot be disciplined or terminated – but they may be able to be permanently replaced, depending on the nature of, and circumstances giving rise to, the strike
- In the event union-represented workers sabotage or leave a company's property, equipment, etc., in an unsafe state that results in damage, employers may be able to initiate litigation to recoup damages based on a recent change to labor law
- Unions and employees generally have a right to picket peacefully on public property outside and adjacent to an employer's property. Employers may not engage in surveillance – or even create the impression of surveillance – of lawful picketing activity. Companies often trip up, for instance, by setting up new video cameras to record picketing activity before any illegal conduct occurs.
- In some states, employees on strike get unemployment benefits in certain circumstances and in others they do not
- Most – but not all – benefit plans provide that employees on strike are not eligible for benefits and must elect COBRA, which typically is very costly, to continue coverage

Countless other legal issues come into play as well.

-National Law Review: Thursday, January 25, 2024, BARNES & THORNBURG LLP

HR WORK BREAK PODCAST: HR Work Break: Keeping Employees Engaged

Listen HERE

Recent research at Gallup shows that employee engagement continues to decline, in spite of many efforts to revitalize company culture: only 36% of the workforce was engaged in 2020, and it's dropped to a low 32% in 2022. Low levels of employee engagement have a negative effect on productivity, retention, wellbeing, and more. So, what can leaders do to keep their workforce engaged? Shannon Gabriel, Vice President of Leadership Solutions at TBM Consulting, shares her advice and best practices. HR Work Break Podcast Guest: Shannon Gabriel, Vice President of Leadership Solutions at TBM Consulting

FCRA Summary & Employer Obligation Changes

Employer Take-away: Employers utilizing credit reports to deny employment MUST ensure the 3rd Party conducting Background Investigations are adhering to this employer obligation.

On March 20, 2023, the Consumer Financial Protection Bureau (CFPB) issued a final rule which, among other things, updates their Summary of Your Rights Under the Fair Credit Reporting Act (FCRA) and replaces the 2018 version. The summary details the major rights guaranteed under the act. Employers that use a credit report to deny employment must provide the applicant with the name, address, and phone number of the agency that provided the credit report information. Although the final rule is effective April 19, 2023, but the mandatory compliance date is **March 20, 2024**.

IRS Limit Updates Annual Benefit Maximums for Health Flexible Spending Accounts & More

Employer Take-away: Ensure limits are updated and reflective in your Payroll System

Each year in the fall, the IRS announces new limits for several types of benefits that have maximums subject to annual indexing. You can find the full list of the latest released amounts for 2024 in IRS Revenue Procedure 2023-34, but we've outlined the most common items employers ask us about.

Health Flexible Spending Account (HFSA): For plan years beginning in 2024, the maximum HFSA contribution limit is $3,200. For HFSAs that include a carryover feature, the maximum carryover is $640.

The **dependent care FSA** contribution maximum is not subject to annual indexing and remains $5,000 (or $2,500 each if the employee and spouse file separate income tax returns) for calendar year 2024.

The limits for **health savings accounts (HSAs) and high deductible health plans (HDHPs)** limits vary based on whether an individual has self-only or family coverage under an HDHP; the 2024 limits are as follows:

Annual HSA Contribution Limit	Self-only: $4,150 Family: $8,300 Catch-up: $1,000 (age 55 or older)
Minimum Annual HDHP Deductible	Self-only: $1,600 Family: $3,200
Maximum HDHP Out of Pocket	Self-only: $8,050 Family: $16,100

DOL Proposed Rule - Raising Salary Threshold for Exempt Employees

The United States Department of Labor (DOL) announced recently that it is proposing a rule to raise the salary threshold required for an employee to be exempt from the Fair Labor Standards Act's overtime requirements. An overview of the key provisions of the proposed rule, together with some suggestions for how best to prepare for this rule, are set forth below.

- The proposed rule would raise the threshold to $1,059 per week or about $55,000 per year, from its current rate of $684 per week or about $35,568 per year, with automatic updates to this earning threshold every three years.
- The proposed rule would also increase the highly compensated employee total annual compensation requirement to $143,988 per year from its current rate of $107,432 per year, with automatic updates to this earning threshold every three years.
- The proposed rule does not change the duties tests required for an employee to be exempt; employers will still bear the burden of establishing that an employee is exempt by proving that the employee meets both the salary basis test and the duties test.

Once the proposed rule is officially published in the Federal Register, there will be a time for input and comments concerning the proposed changes before the DOL issues a final rule.

Proposed changes in the law often provide a special opportunity for revisiting a host of wage and hour considerations within the context of an employer's business model. ETC HR will continue to monitor and provide updates regarding the proposed changes become effective

IRS Announces 2024 Standard Mileage Rates Effective Jan 1, 2024

On Dec. 14, 2023, the IRS announced the 2024 optional standard mileage rates, which are used to calculate the deductible costs of operating an automobile for business, charitable, medical or moving purposes.
The 2024 standard mileage rates for the use of a car (also vans, pickups or panel trucks) will be:

- 67 cents per mile driven for business use, up 1 ½ cents from the rate for 2023;
- 21 cents per mile driven for medical purposes or for moving purposes for qualified active duty members of the Armed Forces, down one cent from the rate for 2023; and
- 14 cents per mile driven in service of charitable organizations. The rate is set by statute and remains unchanged from 2023.

Under the Tax Cuts and Jobs Act, taxpayers **cannot** claim a miscellaneous itemized deduction for unreimbursed employee travel expenses. Taxpayers also **cannot** claim a deduction for moving expenses, unless they are members of the Armed Forces on active duty moving under orders to a permanent change of station.
Taxpayers always have the option of calculating the actual costs of using their vehicle rather than using the standard mileage rates.

Taxpayers can use the standard mileage rate, but they must opt to use it in the first year the car is available for business use. Then, in later years, they can choose either the standard mileage rate or actual expenses. Leased vehicles must use the standard mileage rate method for the entire lease period (including renewals) if the standard mileage rate is chosen.

DOL Exchange Notice Updated

The Affordable Care Act (ACA) requires employers to notify all workers, regardless of their benefits eligibility status, about the availability of the Health Insurance Marketplaces. All employers, with limited exceptions, are required to distribute the notice to new employees within 14 days of hire. The Department of Labor (DOL) provides customizable model notices to inform workers of their health insurance coverage options. Updated model notices for employers that offer a health plan and that do not offer a health plan are available on the DOL website in English and Spanish. The model notices have an expiration date of December 31, 2026. The previous versions expired on July 31, 2023, August 31, 2023, September 30, 2023, October 31, 2023, and November 30, 2023.

Updated State Handbook Addendums

Employers should review their policies concerning the subject matters below and edit to ensure compliance.

On January 23, 2024, ETC released the updated State Handbook Addendums for the below States with many regulatory enactments effective 1/1/24.

- California
- Colorado
- Georgia
- Illinois
- Minnesota
- Nevada
- New York
- North Carolina
- Oregon

Alabama

AL Employer Reporting Obligations Coming in January 2024

The new state tax law places mandatory reporting requirements on Alabama employers. Employers are required to report for the tax year beginning January 1, 2023, the total amount received by full-time hourly wage-paid employees as compensation for work performed in excess of 40 hours in a week and the total number of employees for which it was paid. **Employers are required to report this information to the Alabama Department of Revenue by January**

31, 2024. Second, starting with the tax year beginning on January 1, 2024, Alabama employers must supplement their initial report on either a **monthly or quarterly basis.**

California

Employers Must Notify California Employees of Void Non-Competes

Employer Takeaway: Deadline for employers to give their California employees a notice that any non-compete agreements are void was February 14, 2024. (Employers who fail to give the notice could face $2,500 per violation plus sanctions.)

Learn More:
Employee non-compete agreements have long been unlawful in California. Effective this year, California broadened its already expansive prohibitions on employee non-compete agreements by adding new language to the Business & Profession Code 16600 via Senate Bill 699 and Assembly Bill 1076. Generally, any agreement which restrains someone "from engaging in a lawful profession, trade, or business" is against public policy and statutorily void. This explicitly includes non-competes, but courts have also extended the application to employee non-solicitation agreements. There are only narrow exceptions to this prohibition, where a noncompete relates to the sale of a business or dissolution of a partnership.

The recent California amendments require that employers notify any current employees and former employees who were employed on or after January 1, 2022, who signed a non-compete agreement, that the non-compete is void. The required notice must be in an individualized writing to the affected employee and delivered via mail and email. Importantly, violating the new statute by implementing non-compete agreements or failing to provide the required notice now supports a civil claim by employees, which could expose employers to liability and attorney fees.

Reminder: New Workplace Violence Prevention Mandate

On September 30, 2023, California Governor Gavin Newsom signed SB 553 into law, creating a new layer to California employers' existing injury and illness prevention programs (IIPP). Under SB 553, employers are required to implement a workplace violence prevention plan (WVPP) no later than July 1, 2024, to provide training to employees regarding the WVPP and to keep records of workplace violence incidents. As of January 1, 2025, the law also expands employers' and employee representatives' rights to obtain restraining orders on behalf of employees affected by threats of workplace violence. To learn more, access a recent McDermott, Will & Emery Legal White Paper & Special Report HERE

CA Labor Notice Reminders

Updated § 2810.5 Notice
Effective January 1, 2024, employees must receive information about whether a federal or state emergency or disaster declaration applies to where they will work, issued within 30 days before their first day of work, that may affect their health and safety during employment. The notice must be provided upon hire and is part of a notice already required under California Labor Code § 2810.5. An updated, state-provided template will be available by March 1, 2024. The current notice is located HERE. (CA AB 636 was signed by the governor on October 8, 2023)

New Notice Requirement for New Hires
All employers need to provide new employees with notice about any federal or state emergency or disaster declaration that applies to any county where the employee will perform work and that may affect their health and safety on the job, if the declaration was issued in the 30 days prior to their start date. Employees generally excluded from having to receive this notice include those employed by the state (or any subdivision such as city or county), those covered by a collective bargaining agreement, and those exempt from overtime. The Department of Industrial Relations has already updated its NOTICE TO EMPLOYEE template.

California Updates Criminal History Regulations

California's Fair Employment and Housing Act (FEHA) regulations were updated as of October 1, 2023. The updated regulations govern how employers with five or more employees can use criminal history information when making employment decisions. Here are highlights of the changes:

- The definition of "applicant" will now include existing employees that have applied for or expressed interest in a different position with the employer or whose criminal histories are reviewed because of a change in ownership, management, policy, or practice.
- Employers can't say in job postings, on applications, or in other hiring materials that individuals with criminal histories won't be hired. This includes statements like "no felons" or "must have a clean record."
- If an applicant voluntarily discloses their criminal history, employers can't consider that information until after a conditional job offer is made (assuming the record can be considered at all).
- The fact that a licensing, regulatory, or government agency board has licensed an applicant—despite their criminal history—should be considered strong evidence that their criminal history is not grounds for disqualification from that type of job.
- Employers can, but don't have to, use the sample notices provided by the California Civil Rights Department when communicating with applicants about employment decisions based on criminal history.

If you are required by law to conduct criminal background checks, or if you regularly use criminal history information in making employment decisions, we recommend that you review the changes in full on the state's Civil Rights Department website, HERE.

Colorado

Updates to Pay Transparency Law

The state now requires employers to **notify employees about all job opportunities** (not including career development or progressions) in advance of filling them. Previously, notice was only required for promotional opportunities. The notification needs to include the rate or range of pay, a general description of other benefits or compensation, and the date the application window is expected to close.

For employers with no physical location in Colorado and 14 or fewer remote employees in the state, only remote job opportunities must be shared.

Employers also have new post-selection notice responsibilities.

Within 30 days of the selected candidate starting the job, employers must communicate the following information to the employees that will regularly work with that individual:

- The name of the person who filled the position
- The person's title
- The person's prior title with the employer, if applicable
- How and where employees can express interest in similar job opportunities

Finally**, all eligible employees must be notified of a position's requirements for career progression** when it's regular or automatic and based on time or other objective metrics; for example, when a junior stylist is automatically promoted to senior stylist after one year in the role. Employees must also be told the pay, benefits, full- or part-time status, duties, and access to advancement.

Illinois

Independent Contractors Included in IL New Hire Reporting Requirements

Effective January 1, 2024, employers must include independent contractors in their new hire reporting.

All employers must report new employees to their state's New Hire Directory within 20 days of their first day on the payroll with directory-specified information. (2023 IL HB 3301)

Employers Liable for Gender-Related Violence

Effective January 1, 2024, employers are liable if their employees or agents commit gender-related violence at work that results in harm. (2023 IL HB 1363)

However, employers will only be liable if they:

- Failed to supervise, train, or monitor the employee or agent who caused harm; or

- Failed to investigate complaints or reports (to a supervisor, manager, etc.) about the employee or agent who caused harm and didn't try to fix the problem.

Workplaces covered by these protections include:

- Employer premises, including any building, property, and parking area under the employer's control, or any location used by an employee while they're working; and
- Off-premises activities at employer-sponsored events when the employee isn't working.

Personnel Record Copies & Employer-Provided Notices' Changes

Effective June 1, 2024, the following Illinois laws will be amended as follows:

- The Illinois Personnel Record Review Act will allow employers to mail or email a copy of requested records and charge a fee limited to the actual cost of duplicating the requested record.
- The Illinois Minimum Wage Law, the Equal Pay Act (EPA), the Illinois Wage Payment and Collection Act, and the Child Labor Law will require employers to provide notices to remote employees via email or by posting on their website. . (IL HB 3733)

Updated State EEO Data Filing Obligations

Additionally, businesses required to file an annual Employer Information Report (EEO-1) with the federal Equal Employment Opportunity Commission will **no longer be required** to submit it to the Illinois Director of Labor. However, they must continue to provide the director with a list of all employees during the past calendar year, separated by gender and race and ethnicity categories as reported in their EEO-1, along with other information as mandated by the state's EPA. (IL HB 3733)

Cook County Transportation Benefits Program Act

Effective January 1, 2024, the Transportation Benefits Program Act (TBPA) will require that Illinois employers in 38 designated transit zones with 50 or employees at an address within one mile of a fixed-route transit service, and within designated transit zones to provide transit benefits to certain covered employees. Covered employees under the TBPA are full-time employees of a covered employer who work an average of at least 35 hours per week for compensation.

Under the TBPA, covered employers must provide a pre-tax commuter benefit to covered employees. The benefit must allow employees to use pre-tax dollars for the purchase of a transit pass via payroll deduction, so that the costs for transit pass purchases may be deducted from the employee's taxable compensation up to the maximum amount permitted by Internal Revenue Code Section 132(f).

Michigan

Michigan Expands Antidiscrimination Protections

As of February 13, 2024, Michigan has expanded its antidiscrimination law to prohibit discrimination against employees and applicants on two fronts. This law applies to employers of **all sizes**.

- Expanded the definition of "sex" to include *all* terminations of pregnancy and related medical conditions.
- State added **sexual orientation** and **gender identity or expression** as protected categories under the statute.

Employer Take Away:

Double check your Equal Employment Opportunity (EEO) policy, and any other policies that include protected classes, to ensure sexual orientation and gender identity or expression are included. If they're not included be sure to update it.

Minnesota

Minnesota Employers Must Provide Paid Sick Leave in 2024

Effective Jan. 1, 2024, nearly all Minnesota employers are required to provide their workers with paid earned sick and safe time (ESST). Employees are eligible for ESST if they work at least 80 hours in a year in Minnesota. Leave accrues at a rate of one hour of ESST for every 30 hours worked, up to a maximum of 48 hours per year. Employers must give notice to all employees that they are entitled to ESST, and any employee handbooks must include a notice of employee rights and remedies.

Texas

Texas Bans COVID-19 Vaccines Effective Feb 7, 2024

The Texas Legislature is in special session and decided to enact a law, which Governor Greg Abbott is promising to sign, that bans the use of COVID-19 vaccine requirements by private employers.

The law, **Senate Bill 7**, takes effect February 7, 2024, and prohibits private employers from taking adverse action against contractors or workers who decline to be vaccinated. Violators will be fined $50,000, although it's unclear whether that is per employee or overall. The Texas Workforce Commission (TWC) will take complaints from employees who assert the law is being violated. The attorney general's office will file suit for violations. There's no private claim, so individuals can't sue their employers under the law.

Virginia

Eligible Employers Must Register for RetirePath by Feb. 15, 2024

Employers that are required to participate in Virginia's state-facilitated individual retirement account (IRA) savings program—known as RetirePath Virginia—must register or certify an exemption for the program before **Feb. 15, 2024**. Businesses that fail to act before the registration deadline may face an annual penalty of up to **$200** per eligible employee.

Covered Employers

Employers in Virginia must participate in RetirePath if they:

- Are a nongovernmental business, industry, trade, profession or other enterprise—whether conducted on a **for-profit or nonprofit basis**;
- Have **25 or more** eligible employees (i.e., those who are employed at least 30 hours per week);
- Have been in operation for **at least two years** prior to the program's implementation; and
- **Do not offer** a qualified retirement plan to their employees.

Eligible employees are automatically enrolled in RetirePath unless they elect not to participate.

Registration Information

RetirePath Virginia, which opened in 2023, sends a series of emails or letters to eligible employers when it is time to register. These communications include a unique access code, registration deadline and instructions. Employers that are unable to find the access code that was previously sent can request one here.

At registration, employers self-certify their eligibility for RetirePath. Employers that already offer a qualified plan or are otherwise exempt can certify an exemption. More details are available here.

Employer Responsibilities

- **Register** (or certify an exemption) with their employer identification number and unique RetirePath access code by **Feb. 15, 2024**;
- **Upload** payroll information and submit employees' contributions; and
- **Keep employee records up to date.** Payroll details must be submitted each pay period.

Employer Resources

RetirePath provides a webpage dedicated to resources for employers, which includes an employer help center, videos and a registration checklist. FAQs are also available.

The WIRE is for informational purposes only and should not be construed as legal advice.