

PALEY ROTHMAN'S SEVENTH ANNUAL EMPLOYMENT LAW DAY

NEW YEAR, NEW CHALLENGES:
MANAGING IN AN EMPLOYEE'S MARKET

PRESENTED BY PALEY ROTHMAN'S EMPLOYMENT LAW GROUP

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HURDLES TO HIRING: CHANGING LAWS THAT AFFECT ON-BOARDING

PRESENTED BY S. HAYES EDWARDS
PRINCIPAL, EMPLOYMENT LAW

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PRESENTATION OVERVIEW

I. Non-Competes

- National: FTC's Proposed Ban
- District of Columbia: Non-Compete Restrictions (10/1/22)
- Maryland & Virginia: Non-Competes Restricted for Low-Wage Workers

II. Cannabis Law Updates

FEDERAL: FTC PROPOSAL TO BAN NON-COMPETES

- FTC proposed rule in January '23
 - Prohibition of covenants not to compete
 - Applies to all workers, whether employees, ICs, paid or unpaid, regardless of pay.
 - Existing Covenants would be rescinded.
 - Mandatory notice to workers of rescission
- Illegal for an employer to:
 - Enter into or attempt to enter into a non-compete with a worker;
 - Maintain a non-compete with a worker; or
 - Represent to a worker, under certain circumstances, that the worker is subject to a non-compete.
- FTC Chair Lina Khan: Non-compete clauses “block workers from freely switching jobs, depriving them of higher wages and better working conditions, and depriving businesses of a talent pool that they need to build and expand.”

DETAILS: FTC NON-COMPETE BAN

- **Scope:** Does not apply to non-solicitation or non-poaching terms.
 - “Functionality” test would determine whether covenant qualifies as “non-compete”
- **Penalties:** Civil penalties, restitution, damages, injunctive relief, orders of rescission or reformation of contracts. Potential for referral to DOJ for prosecution.
- **State Laws:** Would allow for more restrictive state laws, but not less-restrictive
- **Timeline:** Public Comment period closes 3/23/23.
 - If finalized, it would go into effect 60 days later, with a **180-day** waiting period for enforcement.

DISTRICT OF COLUMBIA: NON-COMPETE RESTRICTIONS (10/1/22)

- Non-competes prohibited for “covered employees”:
 - Not “highly compensated” (less than \$150k, or \$250k for medical specialist)*; **and**
 - Who spends more than **50%** of work time for the employer in D.C. (remote workers in D.C.); **or**
 - Whose employment is based in D.C. and regularly spends substantial portion of work time for that employer in another jurisdiction (remote workers outside of D.C.).
- Non-competes allowed for highly compensated employees who meet certain criteria
- Also allowed:
 - Non-compete in the sale of a business
 - NDA’s that restrict use or disclosure of confidential information
 - Anti-moonlighting provisions (under appropriate circumstances)+
- Pre-existing non-competes are not rescinded, BUT employers must provide copies of all restrictive covenants (whether agreements or policies) regarding confidentiality or non-competition by Oct. 31, 2022
 - Copies of policy or agreement also must be provided **(1)** within 30 days after the employee’s acceptance of employment, and **(2)** at any time that the policy changes

MARYLAND & VIRGINIA: NON-COMPETES RESTRICTED FOR LOW-WAGE WORKERS

- Maryland
 - Prohibits non-competition agreements for employees who earn equal to or less than \$15 per hour or \$31,200 annually.
- Virginia
 - Prohibition applies to workers who earn less than \$1,290 per week, or \$67,080 annually
 - Also protects independent contractors compensated at less than “the median hourly wage for the Commonwealth for all occupations as reported, for the preceding year, by the Bureau of Labor Statistics of the U.S. Department of Labor”
 - Recently this figure was \$22.69 per hour
 - Employers must post a copy of the law, or an approved summary in the workplace.
- Both permit non-solicitation and non-disclosure agreements.



MARYLAND: CANNABIS LAW UPDATES

- Recreational cannabis to be legalized, effective July 1, 2023
 - New law does not address workplace issues
- Impact on employers
 - No prohibition against drug testing, termination, or refusal to hire because of cannabis use, for any reason
- Anticipated legislation
 - As in other states, laws are expected that would limit employers' ability to test or take adverse action for legal use, in appropriate circumstances.

VIRGINIA: CANNABIS LAW UPDATES

- Unlawful to discharge, discipline, or discriminate against employees for lawful use of cannabis oil
 - Lawful use is limited to prescribed use by a medical practitioner, for treatment of a condition or disease.
 - Exceptions for adverse employment action for “work impairment”
 - Possession may be prohibited during work hours.
 - Employers are not required to violate any federal law, or loss of federal contract or funding.
 - Employers in “defense industrial base sector” may test and exclude candidates who test positive above a certain level



DISTRICT OF COLUMBIA: CANNABIS LAW UPDATES

- Cannabis Employment Protections Amendment Act of 2022 (7/1/23)
 - Prohibits adverse actions against employees or applicants based upon either use of cannabis, status as a medical cardholder, or failed test unless there is additional indicia of impairment
 - Post-accident or “reasonable suspicion” testing is allowed
 - Employees who are “impaired” at work are not protected
 - **Definitions:**
 - Significantly decreased performance
 - Interfering with employer’s obligation to provide safe workplace as required by law
 - Exemptions for “safety sensitive employees” & “federally exempt” employees
- Employers must notify workers that their positions are “safety-sensitive positions,” and provide details of alcohol and drug testing, (1) by August 30, (2) annually thereafter, and (3) upon each new hire. (Template to be provided)

QUESTIONS?



NOW YOU SEE IT: TRENDS IN WAGE TRANSPARENCY AND EQUAL PAY

PRESENTED BY JIM HAMMERSCHMIDT
CHAIR, EMPLOYMENT LAW

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PRESENTATION OVERVIEW

Four “Waves” Of Pay Equity Measures

- I. Setting the Stage
- II. Pay Discrimination Laws
- III. Salary History Bans
- IV. Pay Secrecy Bans
- V. Pay Transparency Law

UNDERSTAND THE PAY DISPARITY CONCEPTS

- **Pay Equity** is paying people equally for performing equal or substantially similar work, without taking into account gender or other protected characteristics (like race or ethnicity)
- **Pay Gap** is the difference in earnings between two groups of individuals. Men consistently earn more than women, but the gap is widest for women of color
- **Pay Discrimination** occurs when an employer pays an individual less *because of* that individual's protected characteristic

THE PROBLEM: PAY EQUITY STATISTICS

- Women earn about 83 cents for every dollar earned by a man (up from 60 cents in 1963)
- Black women earn 64 cents for every dollar earned by a white man
- Latina women earn 57 cents for every dollar earned by a white man
- According to the National Women's Law Center, women lose \$406,280 over the course of a 40-year career and Black women lose nearly \$1 million over a lifetime
- Worst state in America – **Wyoming** (according to *Fortune*)

WAVE 1: PAY DISCRIMINATION LAWS

- **Equal Pay Act of 1963** (amended the FLSA) - Signed into Law by President Kennedy on June 10, 1963
 - Sex/gender only
 - Jobs must require “equal skill, effort and responsibility, and which are performed under similar working conditions in the same establishment”
 - Created loopholes, inadequate remedies and adverse court ruling
 - Largely considered a failure
- **Title VII of the Civil Rights Act of 1964**
 - Bans discrimination, including pay, based on protected classes
- **Executive Order 11246** – Signed by President Johnson on September 24, 1965
 - Extends Title VII protections to federal government contractors & enforced by the OFCCP
- **Pregnancy Discrimination Act of 1978**
- **Lily Ledbetter Fair Pay Act of 2009**
 - Reduced time restrictions on wage discrimination lawsuit
 - Each paycheck is a separate violation
- 49 states have similar pay discrimination laws to the EPA and many have other laws as well
- Still - Nearly 60 years later, still no pay equity

MARYLAND: EQUAL PAY FOR EQUAL WORK ACT

- Became effective October 1, 2016
- Amended in 2019 to provide additional enforcement mechanisms
- Amended in 2020 to provide for greater wage transparency
 - Requires employers provide a wage range for a position to applicant's upon request
 - Creates a salary history ban



MARYLAND: EQUAL PAY FOR EQUAL WORK ACT

- The act **prohibits**:
 - Discrimination in pay to employees of one sex or gender identity at a rate less than the rate paid to other employees under certain circumstances
 - Providing “less favorable employment opportunities” based on sex and gender identity
- What are “less favorable” employment opportunities?
 - **Cannot** assign or direct employees into “less favorable” career tracks
 - **Cannot** fail to provide information about promotions or advancements in the full range of career tracks
 - **Cannot** limit or deprive an employee of employment opportunities that would otherwise be available but for the employee’s sex or identity

MARYLAND: EQUAL PAY FOR EQUAL WORK

- What is wage discrimination?
 - **Cannot** pay a wage to employees of one sex/gender at a rate less than rate paid to employees of opposite sex/gender if:
 - Both employees work at the same establishment; and
 - Perform work of comparable character; or
 - Work on the same operation, in the same business or of the same type
- Same “Establishment”: Same employer at workplaces located in the same county of the state

MARYLAND: EQUAL PAY FOR EQUAL WORK ACT

- Variation in pay/opportunities **may** be based upon:
 - Non-discriminatory seniority system
 - Non-discriminatory merit increase system
 - Jobs that require different abilities/skills
 - Jobs that regularly require different duties/services
 - Work performed on different shifts or at different times of day
 - Non-discriminatory system based on quantity/quality of production
 - *Bona fide* factors other than sex or gender, such as education, training or experience if job related and accounts for the entire differential

MARYLAND: EQUAL PAY FOR EQUAL WORK ACT

- Other important requirements:
 - Posting the law in a conspicuous place
 - Not allowed to reduce another employee's wage to comply
 - Employees can inquire about, discuss and disclose the wages of another employee
 - Employees can request that the employer justify any difference in wages
 - No waiver of employee's rights is allowed
 - No retaliation against an employee for exercising these rights or filing of a claim for discrimination
 - Employees maintain NLRA and other such rights

MARYLAND: EQUAL PAY FOR EQUAL WORK ACT

- Causes of action and remedies:
 - Private cause of action or assignment to Maryland Commission on Civil Rights to pursue claims
 - Injunctive relief is available
 - Right to recover wage differential
 - Right to recover liquidated damages
 - Right to recover pre-judgment interest, attorney fees and costs
 - Class actions expressly authorized
- DLLR or a court may require an employer to pay a civil penalty equal to 10% of the amount of damages into the general fund of the State of Maryland if an employer:
 - Violates the statute two or more times
 - Within a 3-year period
- 3 year statute of limitations

WAVE 2: SALARY HISTORY BANS

- Salary history bans generally prohibit employers from:
 - Requesting salary history information from job applicants
 - Relying on a prospective employee's salary history when determining compensation
 - Retaliating against anyone who refuses to share their salary history or raises complaints
- Current tally:
 - **21** State-wide bans
 - **21** Local jurisdictional bans
- DMV
 - **State of Maryland** - All employers
 - **Montgomery County, Maryland** – County Gov't Only
 - **District of Columbia** – Agencies of the D.C. Gov't
 - **Virginia** – No laws

STATE SALARY HISTORY BAN CHART

State	Expressly Prohibits Inquiry Into Past Salary	Allows Consideration of Voluntary Disclosure	Expressly Applicable to Existing Employees	Expressly Prohibits Reliance on Past Salary	State	Expressly Prohibits Inquiry Into Past Salary	Allows Consideration of Voluntary Disclosure	Expressly Applicable to Existing Employees	Expressly Prohibits Reliance on Past Salary
AL	Prohibits retaliation only				MD	X	X		X
CA	X	X	NO	X	MA	X	X		
CO	X			X	NV	X			X
CT	X	X			NJ	X	X		X
DE	X				NY	X	X	YES	X
HI	X	X	NO	X	ORE	X		NO	X
IL	X	X		X	RI	X	X		X
ME	X	X		X	VT	X	X		
					WA	X	X		

MARYLAND SALARY HISTORY BAN (AMENDMENT TO EQUAL PAY FOR EQUAL WORK ACT)

- Became effective October 1, 2020
- Upon an applicant's request, an employer must provide the wage range for the position
- **Prohibits** an employer from relying on the wage history of an applicant in:
 - Screening or considering the applicant for employment
 - Seeking wage history of an applicant in writing, orally or through other means, including through a current or former employee or
 - Determining the wage of the applicant

MARYLAND SALARY HISTORY BAN

- An employer **may** rely on wage history information after an initial offer of employment with an offer of compensation is made if:
 - The applicant provided the wage history voluntarily to support a higher wage offer than initially offered by the employer
 - The employer sought to confirm the wage history voluntarily provided by the applicant to support a higher wage offer than initially offered by the employer
 - And, **only if** the higher wage does not create an unlawful pay differential based on protected status

MARYLAND SALARY HISTORY BAN

Anti-Retaliation Provisions

- An employer **may not** retaliate against an applicant or refuse to interview, hire or employ an applicant for employment because the applicant:
 - Did not provide wage history
 - Requested the wage range for the position for which the applicant applied in accordance with the law
- An employer **may not** discriminate against an employee for:
 - Making a complaint to an employer or the Commissioner
 - Bringing an action or proceeding relating to the law or
 - Testifying in a proceeding relating to the law
- An employee **may not** bring an action in bad faith

MARYLAND SALARY HISTORY BAN

- **No private cause of action!!!** (i.e., employees cannot sue employers)
- Enforcement is in the hands of the Commissioner of Labor and Industry
 - Bring an action for injunctive relief and damages
 - Shall issue an order compelling compliance
 - May, in its discretion:
 - **First violation:** Issue a letter compelling compliance
 - **Second violation:** Issue a civil penalty up to \$300 for each applicant
 - **Subsequent violations in a three-year period:** Issue a civil penalty up to \$600 for each applicant
- Gravity of violation, size of business, employer good faith and employer's history of violations

WAVE 3: BAN ON PAY SECRECY POLICIES

- Pay secrecy laws assist employees in discovering pay disparities by protecting discussions of compensation
- Nearly one-half of states (and OFCCP for federal contractors and subcontractors) have enacted some sort of protection, generally prohibiting:
 - Policies that preclude employees from disclosing or discussing pay
 - Retaliating against employees who inquire, disclose, or discuss pay
- Most if not all withhold protection from employees who have access to pay data as part of their job duties (*i.e.*, HR employees, managers)
- The National Labor Relations Act also provides that employers cannot ban the discussion of salary and working conditions among employees
- DMV
 - **Maryland** – New law effective October 1, 2020
 - **District of Columbia** – Law that was effective March 11, 2015
 - **Virginia** – No law

MARYLAND: NEW WAGE TRANSPARENCY PROVISIONS 2020 (AMENDMENT TO EQUAL PAY FOR EQUAL WORK ACT-INQUIRING ABOUT WAGES)

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- Makes it illegal for a Maryland employers to prohibit their employees from asking about, discussing, or sharing the wages of themselves or other employees
- Employers **cannot** refuse an employee's request for a justification for their own wage amount
- **Prohibits** employers from asking employees to sign a waiver or other document (i.e. handbook, employee manual or NDA) stating they may not share or discuss their wages
- **Prohibits** retaliation against an employee for exercising any of the employee's statutory rights or encouraging another employee to do so

DISTRICT OF COLUMBIA: WAGE TRANSPARENCY ACT

- The act **prohibits** all private employers within the District from implementing workplace policies that forbid employees from discussing, disclosing or comparing their wages with coworkers
- It also **prohibits** employers from retaliating against any employee that has disclosed or is believed to have disclosed wages
- Employees are protected from retaliation for lodging a complaint, testifying, or participating in an investigation related to a violation of the act



DISTRICT OF COLUMBIA: WAGE TRANSPARENCY ACT

- The act not only **requires** that employees be allowed to discuss their *own* wages, it **requires** that employees be permitted to discuss the wages of *other* employees as well
- There is nothing in the law that limits an employee's right to discuss the wages of another employee, even when that information has been obtained improperly and without the permission of the employee whose wage information is being discussed
- There is no private cause of action, but there are civil penalties for employers who violate the Act's provisions:
 - a civil fine of \$1,000 for the **first violation**
 - \$5,000 for the **second violation**
 - \$20,000 for each **subsequent violation**

WAVE 4: PAY RANGE DISCLOSURE LAWS

- These laws **require** that employers affirmatively provide information about wage ranges to applicants and employees, particularly in job postings
- Generally – must disclose the range the employer believes “in good faith” that it will pay
 - Not necessarily binding on employer
 - **Current trend:** Employers using wide ranges (\$80-300K) that may have limited utility – wait to see gov’t reaction to this tactic
- Timing of required disclosure varies:
 - **In job advertisement:** Colorado, New York/NYC
 - **After interview:** Nevada
 - **At or before time of offer:** Connecticut, Rhode Island
 - **Upon request:** Maryland

NATION-WIDE TREND ON JOB POSTINGS

- Colorado – Effective January 2021
 - Applies to all employer who have at least 1 employee in CO
 - Applies “to work capable of being performed in Colorado, including remote work”
 - **Requires** the following to be in each job posting:
 - Rate or range of hourly or salary compensation
 - General description of any bonuses, commissions or other compensation
 - General description of all benefits offered for the position
 - **Requires** employers to notify current employees of promotion opportunities and to keep records of job descriptions and wage

NATION-WIDE TREND ON JOB POSTINGS

- New York City – Effective November, 2022
 - **Requires** a “good faith” pay range in all job advertisements
 - Applies to job that could be performed in NYC so long as at least one employee already works in NYC
- California – Effective January, 2023
 - Applies to employers with **at least 15 employees** so long as one employee is located in CA
 - Employers must include pay scale information in all job postings *if the position may ever be filled in California either in-person or remotely*
 - Upon request employers must provide current employees with pay scale information for jobs they hold

NATION-WIDE TREND ON JOB POSTINGS

- Washington State – Effective January 2023
 - Applies to employers with **at least 15 employees** so long as one employee is located in Washington
 - Remote work guidance:
 - “Employers must disclose wage scale or salary range and a general description of benefits and other compensation on postings for remote work that could be performed by a Washington employee
 - Includes commissions, profit-sharing, stock options, etc.
 - **AND** “an employer cannot avoid disclosing wage and salary information requirements by indicating within a posting that the employer will not accept Washington applicants.”
 - Law not applicable if the job will be performed entirely outside of Washington state

NATION-WIDE TREND ON JOB POSTINGS

- New York State – Effective September 2023
 - Applies to employers with **four or more employees**, as well as employment agencies
 - Applies when posting for a new job, a promotion or a transfer opportunity
 - Posting **must** include the compensation or range that the employer in “good faith” believes to be accurate at the time of the posting
 - Posting **must** include a job description



WHAT SHOULD EMPLOYERS BE DOING

- Remove any questions on applications about salary/wage histories
- Be sure that employees and agencies engaged in recruiting understand that they cannot require wage history as part of the initial interview and other limitations
- Review and clean up employee policy manuals with legacy provisions on confidentiality or sharing of compensation information
- Establish set wage ranges for all position
- Know whether your company must comply with out-of-state wage transparency laws particularly if hiring remote workers
- Check job postings
- Consider re-thinking issues around wage secrecy

SOURCES TO TRACK PAY TRANSPARENCY LAWS

Pay Transparency Tracking Map

<https://www.trycompa.com/pay-transparency-map>

The interactive map contains up-to-date legislative information about pay transparency at the state level and at the local level when appropriate. In addition to current state and local laws, the map also includes information on pending state legislation and identifies states without pay transparency laws. The tool categorizes the data into three areas: what employers must do, can do, and cannot do with regards to disclosing salary data.

SOURCES TO TRACK PAY TRANSPARENCY LAWS

Salary History Ban Tracker

<https://www.hrdive.com/news/salary-history-ban-states-list/516662/>

Tracks the states, cities and other jurisdictions that have passed such bans, and offers a brief description of each law's requirements, its effective date and a link to the original law.

QUESTIONS?



GETTING YOUR DUCKS IN A ROW: STEERING EMPLOYEE WAGES AND PERFORMANCE

PRESENTED BY SCOTT MIRSKY
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PRESENTATION OVERVIEW

I. Additional Wage-Hour Insights:

- Predictive Scheduling and Fair Work Week Laws
- 4-Day Workweek
- Tip Credit Elimination
- Update from US Department of Labor on FLSA
 - Independent Contractor Classification
 - White-Collar Exemption to Minimum Wage and Overtime Requirements

II. Performance Issues:

- Best Practices

WAGE & HOUR ISSUES: PREDICTIVE SCHEDULING AND FAIR WORK WEEK LAWS

Purpose is to address:

- Last minute schedule changes
- On-call scheduling which limits employee's ability to make alternative plans
- Requiring employees to work an opening shift after closing the night before (sometimes called "clopening")

WAGE & HOUR ISSUES: PREDICTIVE SCHEDULING AND FAIR WORK WEEK LAWS

Oregon (Statewide)

- Employer with over 500 employees in retail, hospitality, or food service
 - Written schedules provided **at least 14 days** in advance
 - Schedule changes will result in penalty / extra pay to employee
 - Schedule changes can be declined by employee
 - Standby employee is allowed, but employee can decline
 - **At least 10 hours** between shifts or pay 1.5x the hourly rate

WAGE & HOUR ISSUES: PREDICTIVE SCHEDULING AND FAIR WORK WEEK LAWS

- Some cities and municipalities are implementing similar rules
 - California—Berkeley, Emeryville, Los Angeles, San Francisco, San Jose
 - Illinois—Chicago
 - Pennsylvania—Philadelphia
 - Washington—Seattle
- Employee thresholds varies (10 employees is lowest - Berkeley, CA)
- Most have the 14-day rule and sufficient gap between shifts

WAGE & HOUR ISSUES: 4-DAY WORKWEEK

Maryland proposed legislation for a pilot program (~~WITHDRAWN on March 6, 2023~~):

- A business would be eligible for a state tax credit if
 - They have **at least 30 employees**
 - Transition to a 32-hour workweek
 - No reduction in pay or benefits
- Must stay in program for at least one year (no more than two years)
 - If passed, the program could start this July

WAGE & HOUR ISSUES: 4-DAY WORKWEEK

California introduced proposed legislation last year

- The notion was not passed
- To change definition of a work week from 5 eight-hour long days to 4 eight-hour long days from business with over 500 employees
 - Employees working over 32 hours will be entitled to overtime pay



WAGE & HOUR ISSUES: TIP-CREDIT

- In most States, employer can offset minimum wage obligations by taking a tip-credit

Maryland

Regular minimum wage (large employers):	\$13.25
Maximum tip credit:	\$9.62
Minimum cash wage:	\$3.63

Montgomery County

Regular minimum wage (large employers):	\$15.65
Maximum tip credit:	\$11.65
Minimum cash wage:	\$4.00

- New bill to eliminate tip credit by 2027 in Maryland

WAGE & HOUR ISSUES: TIP-CREDIT

District of Columbia

- Initiative 82 was passed by DC's voters last November
 - Fully eliminate tip credit by July 1, 2027
 - This will happen on a staggered-basis:

Date	Cash minimum wage paid to tipped workers
By May 1, 2023	\$6.00/per hour
By July 1, 2023	\$8.00/per hour
By July 1, 2024	\$10.00/per hour
By July 1, 2025	\$12.00/per hour
By July 1, 2026	\$14.00/per hour
By July 1, 2027	Non-tipped minimum wage

WAGE & HOUR ISSUES: UPDATE FROM THE U.S. DEPARTMENT OF LABOR ON FLSA

Independent Contractor Classification:

- During the Obama Administration, the Department of Labor (DOL) increased its emphasis on worker misclassification and took steps to clarify DOL “economic realities” test and made it easier for workers to be classified as employees
- Trump DOL withdrew its Obama-era Administrative Interpretation on independent contractors and introduced a more employer-friendly “economic realities” test
- In 2021, Biden shelved the Trump rule change – DOL stated Trump rule “was not fully aligned with the FLSA’s text or purpose”

WAGE & HOUR ISSUES: UPDATE FROM THE U.S. DEPARTMENT OF LABOR ON FLSA

2022 New Rule—Seven Factors (Similar to Obama-Era Rule)

- Worker’s opportunity for profit and loss depending on managerial skill
 - Investments by the worker and the employer
 - Degree of permanence of the work relationship
 - Nature and degree of control
 - Extent to which the work performed is an integral part of the employer’s business
 - Skill and initiative required for the work
 - Any additional factors which may indicate whether an individual is “economically dependent on this employer for work or in business for themselves”
- **Note of Caution:** Memorandum of Understanding for Employment Tax Referrals between the DOL and IRS

WAGE & HOUR ISSUES: UPDATE FROM THE U.S. DEPARTMENT OF LABOR ON FLSA

White-Collar Exemption to Minimum Wage and Overtime Requirements:

- Two part-test
 - Perform certain duties
 - Paid on a salary basis at a designated minimum weekly salary
 - Currently: \$684 per week (\$35,568 per year)
 - Agency plans to announce increase in May
 - Possibly \$900-\$1,000 per week (\$50,000 per year)

PERFORMANCE ISSUES: BEST PRACTICES

- Key tips
 - Document, document, document
 - Communicate expectations
 - Routine reviews and feedback
 - Be a good coach
 - Performance Improvement Plan (PIP)
 - Counsel employee



PERFORMANCE ISSUES: BEST PRACTICES

- When termination is not an option...
 - Coach
 - Train (in-person, on-line)
 - Set-up long-term goals
 - Avoid a toxic environment
 - Treat all employees fairly

QUESTIONS?



OH BABY! NAVIGATING THE NUANCES OF EMPLOYING PARENTS AND PARENTS TO BE

PRESENTED BY JESSICA SUMMERS
PRINCIPAL, EMPLOYMENT LAW

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PRESENTATION OVERVIEW

I. Pregnancy Discrimination and Accommodations

- Federal Law
- Maryland Law
- District of Columbia Law
- Virginia Law

II. Leave for Pregnant Employees and New Parents

- Federal
- Maryland
- District of Columbia
- Virginia

III. Lactation Breaks

PREGNANCY DISCRIMINATION & ACCOMMODATIONS: FEDERAL LAWS

- **Title VII**
 - Applicable to private-sector employers with 15 or more employees
- **Americans with Disabilities Act (ADA)**
 - Applicable to private-sector employers with 15 or more employees
- **Pregnant Workers Fairness Act [Effective June 27, 2023]**
 - Applicable to private-sector employers with 15 or more employees

FEDERAL LAWS: TITLE VII

As amended by the Pregnancy Discrimination Act, Title VII of the Civil Rights Act, prohibits sex discrimination, including pregnancy discrimination which includes discrimination based on:

- Current pregnancy,
- Past pregnancy,
- Potential pregnancy,
- Medical conditions related to pregnancy or childbirth, and
- Reproductive decisions including abortion or use of birth control.

FEDERAL LAWS: AMERICANS WITH DISABILITIES ACT

- While pregnancy itself is not a disability under the ADA, pregnancy-related conditions may qualify as a ADA covered short-term disability which must be accommodated under the ADA



FEDERAL LAWS: PREGNANT WORKERS FAIRNESS ACT

- Part of the 2023 Consolidated Appropriations Act
- Effective June 27, 2023
- Requires covered employers to provide reasonable accommodations for pregnancy, childbirth or related medical conditions the same way that they would for other disabilities

PREGNANCY DISCRIMINATION & ACCOMMODATIONS: MARYLAND

- **Maryland Human Relations Law**
 - Anti-discrimination provisions apply to employers with 15 or more employees working 20 or more calendar weeks in the current or preceding year
 - Anti-harassment provisions apply to any employer with one or more employee working 20 or more calendar weeks in the current or preceding year
- **Local Anti-Discrimination Laws**

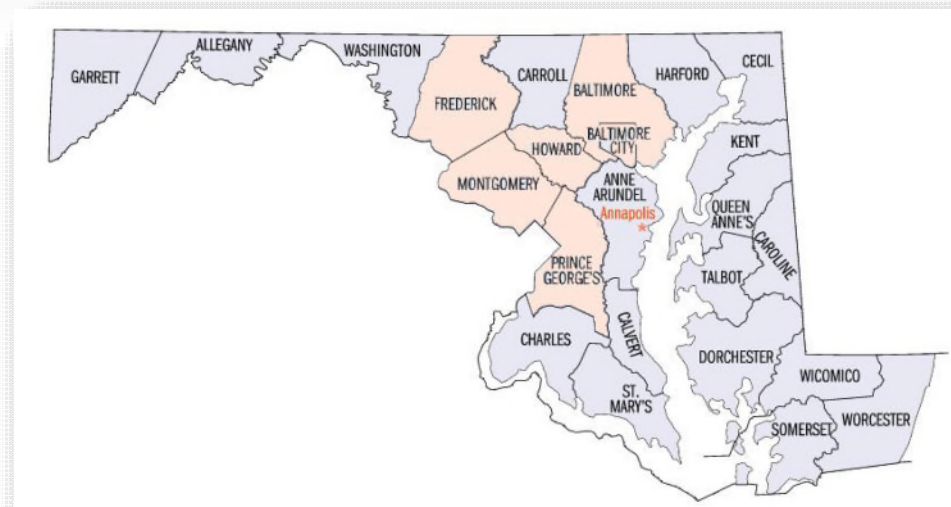
MARYLAND LAW: MARYLAND HUMAN RELATIONS LAW

- Prohibits sex-based employment discrimination and harassment
- Requires employers to **reasonably** accommodate disabilities caused or contributed to by pregnancy or childbirth and treat such disabilities in the same manner as other temporary disabilities
 - Accommodations may include changing the employee's job duties, work hours or work areas, providing mechanical or electrical aids, transferring the employee to a less strenuous or hazardous position or providing leave
 - Employers must post information about employees' right to reasonable accommodation for a pregnancy-related disability and include this information in any employee handbook

MARYLAND LAW: LOCAL ANTI-DISCRIMINATION LAWS

- The following localities have their own anti-discrimination laws that prohibit sex discrimination in employment and that also apply to employers below the federal and state thresholds:

- Baltimore City
- Baltimore County
- Howard County
- Frederick County
- Montgomery County
- Prince George's County



PREGNANCY DISCRIMINATION & ACCOMMODATIONS: DC

- **DC Human Rights Act**
 - Applicable to all DC employers
- **Protecting Pregnant Workers Fairness Act**
 - Applicable to all DC employers

DISTRICT OF COLUMBIA LAW: DC HUMAN RIGHTS ACT

- Prohibits sex-based employment discrimination and harassment



DISTRICT OF COLUMBIA LAW: PROTECTING PREGNANT WORKERS FAIRNESS ACT

- DC employers must **reasonably** accommodate employees whose ability to perform job duties is limited because of pregnancy, childbirth, breastfeeding, or a related medical condition
- Accommodations can include – breaks; leave; transfer; providing supportive equipment; modified work schedule or light duty; relocating the work area; permitting the employee to refrain from heavy lifting and providing lactation breaks
- The notice of rights in English and Spanish must be posted in the workplace and provided to new employees and to employees who notify the employer of their pregnancy or pregnancy related condition (within 10 days of the notice)

PREGNANCY DISCRIMINATION & ACCOMMODATIONS: VIRGINIA LAWS

- **Virginia Human Rights Act**
 - Applies to employers with **15 or more employees** working 20 or more calendar weeks in the current or preceding year or **5 or more employees** for claims of unlawful discharge
- **Pregnant Workers Fairness Act**
 - Applies to employers with 5 or more employees

VIRGINIA LAW: VIRGINIA HUMAN RIGHTS ACT

- Prohibits employment discrimination and harassment based on sex, pregnancy, childbirth or related medical conditions



VIRGINIA LAW: PREGNANT WORKERS FAIRNESS ACT

- Requires employers to reasonably accommodate employees with known limitations related to pregnancy, childbirth or a related medical condition, unless the employer can demonstrate that the accommodation would impose an undue hardship on the employer
- Notice of employees' rights must be posted and included in any employee handbook and directly provided to new hires and employees within 10 days of the employee notifying the employer that she is pregnant

LEAVE FOR PREGNANT EMPLOYEES AND NEW PARENTS

- **Federal**
 - Family Medical Leave Act (FMLA)
 - Americans with Disabilities Act (ADA)
- **Maryland**
 - Maryland Parental Leave Act
 - Time to Care Act of 2022
 - Montgomery County Sick and Safe Leave
- **D.C.**
 - DC FMLA
 - DC Paid Family Leave Fund
- **Virginia**
 - Short-Term Disability Maternity Requirement

FEDERAL FMLA LEAVE: ELIGIBILITY

- To be eligible for FMLA leave the employee must:
 - Work for a covered employer at a location that has **at least 50 employees** within 75 miles
 - Have worked for employer for **at least 12 months** (not necessarily consecutively) and
 - Have worked **at least 1,250 hours** during the 12 months immediately before taking FMLA leave

FEDERAL FMLA LEAVE: BASICS

- Eligible employees may take **up to 12 weeks** of unpaid leave per year:
 - For the birth of a child and to care for the child within one year of birth
 - For the placement with the employee of a child for adoption or foster care and to care for the child within one year of placement
 - To care for an immediate family member (spouse, child, or parent) with a serious health condition
 - To take medical leave when the employee is unable to work because of a serious health condition
 - For a qualifying exigency arising out of the fact that the employee's immediate family member is a covered military member on active duty
- Eligible employees may also take FMLA leave to care for injured service members

FEDERAL FMLA LEAVE: REINSTATEMENT RIGHTS

- Under the Federal FMLA an employee is entitled to be reinstated to the same or an equivalent position at the end of FMLA leave
- Exceptions to Reinstatement:
 - Employee would not otherwise have been employed at the time of reinstatement
 - Employee is a key salaried employee and denial is necessary to prevent substantial and grievous injury to employer's operations
 - Employee is unable to perform an essential function of the position because of a physical or mental condition

ADA/PWFA LEAVE: THE BASICS

- Reasonable accommodations under the ADA (and the Pregnant Workers Fairness Act when it goes into effect) may include allowing the employee to work on a reduced schedule or allowing the employee to take leave
- The EEOC has taken the position that, under the ADA, the employee is entitled to return to the same position unless the employer demonstrates that holding the job open would impose an undue hardship

MARYLAND: PARENTAL LEAVE ACT

- Applies to employers with **15-49 employees**
- Requires employers to provide employees with **up to 6 weeks** of unpaid leave in the event of a birth, adoption or foster placement
- To be eligible an employee must have been employed for the employer for **at least 12 months** and worked **at least 1250 hours** during the previous 12 months
- With certain limited exceptions, employees have a right to reinstatement to the same or an equivalent position

MARYLAND: TIME TO CARE ACT OF 2022

- Will establish a state fund (funded by employer and employee payroll taxes) to provide paid leave benefits for qualifying employees

Required contributions will start – October 1, 2023

Benefits eligibility will start – January 1, 2025

- Applies to all employers with **at least one employee** in Maryland. Only those with **15 or more employees** are required to contribute to the fund

MARYLAND: TIME TO CARE ACT OF 2022 (CONT)

- A qualifying employee in Maryland will be eligible for **up to 12 weeks** of paid leave in a 12 week period for any of the following reasons:
 - The birth, adoption, or foster care placement of a child (within the first year)
 - To care for a family member with a serious health condition
 - To address their own serious health condition that prevents them from performing their job
 - To care for a next kin with serious health condition resulting from military service; and
 - To attend to “qualifying exigencies” arising out of a family member’s deployment to military service
- An employee will be able to take **up to 24 weeks** of leave in a 12 month period in the event that the employee has both a birth, adoption or foster placement and a serious health condition in the same 12 month period

MARYLAND: TIME TO CARE ACT OF 2022 (CONT)

- Employees will be eligible for paid leave under the new law after they have worked **at least 680 hours** (either for a single employer or multiple employers in Maryland) in the 12 month period immediately preceding the commencement of the leave
- Employers may **only** terminate employees out on paid family leave in specific circumstances and **must** restore employees to their position at the end of the leave
- Employees **must** exhaust any paid leave voluntarily provided by their employer (such as vacation or PTO) before they will be able to claim benefits
- Employers that voluntarily offer benefits that are equivalent to or that exceed the benefits under the new law can opt out and the employee and employer will not be required to contribute to the fund

MARYLAND: MONTGOMERY COUNTY SICK AND SAFE LEAVE ACT

- Employees who have accrued sick leave in compliance with the Montgomery County Sick and Safe Leave Act must be permitted to use that leave for a birth, adoption or foster placement
- The Maryland Health Working Families Act **does not** include the same type of provision for the use of paid sick and safe leave accrued under that law

DISTRICT OF COLUMBIA: DC FMLA

- Applies to employers with **20 or more employees**
- Entitles eligible employees with **up to 16 weeks** of unpaid leave in a 24 month period for:
 - The birth, adoption or foster placement of a child
 - To care for a family member with a serious health condition or
 - For the employee's own serious health condition
- To be eligible an employee must have been employed for the employer for at least one year and worked for **at least 1,000 hours** during the preceding 12 month period
- With certain limited exceptions, employees have a right to reinstatement to the same or an equivalent position

DISTRICT OF COLUMBIA: DC PAID FAMILY LEAVE (PFL) FUND

- Funded by payroll taxes, the DC PFL provides employees with wage replacement benefits for up to:
 - **Two weeks** to care for their own pregnancy
 - **12 weeks** to bond with a new child
 - **12 weeks** to care for their own or a family member's serious health condition
- Employees are who spend **more than 50%** of their work time or who are based in and regularly work in DC and don't spend **more than 50%** of their work time in other jurisdictions are covered and eligible for benefits
- Any business performing services in DC, that also pays unemployment insurance taxes for its employees, will be required to contribute to the fund

LEAVE: VIRGINIA

- Under Virginia law, short-term disability insurance plans issued after July 1, 2021, must include coverage for **at least 12 weeks** of time to recover from birth
- In 2022, Virginia also passed a law to permit employers to voluntarily purchase insurance policies to provide family leave benefits to employees that would include coverage in the event of a birth, adoption or foster placement



VOLUNTARY EMPLOYER-PROVIDED PARENTAL LEAVE

- Items to consider and address in any written policy:
 - Will the leave be paid or unpaid?
 - Who will be eligible for the leave?
 - How will the leave interact with other benefits that the employee may be eligible for, such as STD benefits or compensation under a state-administered paid leave fund?
 - How long will the employee have to take the leave?
 - Will the employee have to use the leave consecutively or can it be used intermittently or in separate blocks?
 - Will the employee be required to exhaust other forms of paid leave (vacation, PTO, etc.) before being eligible?

VOLUNTARY EMPLOYER-PROVIDED PARENTAL LEAVE

- Notes of caution:
 - If the employer is providing the birth-parent with more leave than the non-birth parent, the additional leave amount shouldn't exceed the amount of time reasonably required to physically recover from birth
 - The parental leave policy **should not** distinguish between the gender of the non-birth parent or the marital status of the parents

LACTATION BREAKS

- **Federal Pump for Nursing Mothers Act** – Requires employers to provide employees with reasonable lactation breaks for up to a year after their child's birth and to designate a private place that is not a bathroom where the employee may use to take these breaks free from intrusion from their coworkers or others
- **DC Human Rights Act** – Requires employers to provide break time and a private location for lactation breaks and maintain and post a policy on these breaks
- **Virginia Pregnant Workers Fairness Act** – Requires employers to make reasonable accommodations for lactating workers, including more frequent breaks to express breast milk and access to a private location to do so

QUESTIONS?



