

State And Local Law: Solutions For Multistate Employers

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Challenges Faced By Multistate Employers

- Complying with state/local laws that differ from federal laws
- Maintaining consistency in the way employees are treated from location to location
- Keeping employee files and documentation consistent
- Variations in rules and policies
- Variations in company culture



State And Local Law Challenges

- Predictive Scheduling
- Paid Sick Leave
- Non-Competition Agreements
- Marijuana Laws
- And More...



Predictive Scheduling

What is “predictive scheduling”?

- Also called “fair workweek,” “secure scheduling,” and “advance scheduling”
- Requires employers to provide employees with advance notice of their schedule
- Requires employers to pay employees extra wages if changes to schedule made within an allotted timeframe
- Targets employers in retail, hospitality and food service industries
- Addresses employee concerns over work schedule uncertainty



Predictive Scheduling (cont.)

What do predictive scheduling laws require employers to do?

- Provide good faith estimate of employee's expected hours/shifts per month
- Provide advance notice of work schedules (varies by law)
- If schedule changes are made without sufficient advance notice:
 - Allow employees to decline previously unscheduled hours; or
 - Pay employees a schedule change premium ("predictability pay")
- Provide sufficient rest periods between shifts (*e.g.*, employees scheduled to work both a closing and the next opening shift)
- Give part-time employees access to additional hours



Predictive Scheduling (cont.)

What are the benefits of predictive scheduling laws?

- Make it easier for employees to:
 - Arrange for childcare and schedule appointments
 - Make financial decisions based on predictable level of income
 - Engage in other professional and educational opportunities (*e.g.*, second job or college course)
- Reduce scheduling stress for managers
- Facilitate a more predictable payroll
- Reduce shift coverage gaps
- Reduce absenteeism
- Create an advantage in recruiting/hiring
- Improve employee satisfaction and retention



Predictive Scheduling (cont.)

What are the challenges of predictive scheduling laws?

- Ensuring sufficient employee coverage for all shifts
- Avoiding overstaffing
- Estimating customer volume
- Minimizing overtime costs
- Addressing employee absences and last minute changes
- Avoiding part-time employees being pushed into full-time category
- Ensuring compliance with different laws in different states/jurisdictions



Predictive Scheduling (cont.)

Where is it happening?

- Emeryville (July 1, 2017)
- San Francisco (October 3, 2015)
- New York City (November 26, 2017)
- Seattle (July 1, 2017)
- Oregon (July 1, 2018)

Where is it not happening (local level)?

- Arkansas
- Georgia
- Iowa
- Michigan*
- Missouri
- Ohio
- Tennessee



Paid Sick Leave

What do paid sick leave laws prescribe?

- Definition of covered employers and employees
- Amount of leave (accrual rates and accrual/use caps)
- Timing (for earning and using leave)
- Reasons for leave (often extends beyond illness or injury)
- Carryover amounts
- Rate of pay for leave hours taken
- Confirmation of reason for use of leave
- Payout at termination
- Notices and recordkeeping



Paid Sick Leave (cont.)

What are the challenges of paid sick leave laws?

- Managing accrual and usage caps
- Managing rates of accrual
- Managing carryover requirements
- Managing usage waiting periods
- Managing minimum increments of use
- Managing documentation and timing requirements
- Managing notices and recordkeeping requirements
- Managing transfers of employees from/to locations in different jurisdictions



Paid Sick Leave (cont.)

States with paid sick leave laws:

- Arizona, California, Connecticut, Maryland, Massachusetts, Michigan, New Jersey, Oregon, Rhode Island, Vermont, and Washington, plus the District of Columbia and Puerto Rico

Jurisdictions with paid sick leave laws:

- California: Berkeley, Emeryville, Long Beach, Los Angeles, Oakland, San Diego, San Francisco and Santa Monica
- Illinois: Chicago and Cook County
- Maryland: Montgomery County, and Prince George County
- Minnesota: Duluth, Minneapolis and St. Paul
- New Jersey: All preempted by state law
- New York: New York City
- Pennsylvania: Philadelphia and Pittsburgh (found invalid by court; appeal is pending)
- **Texas: Austin (currently stayed pending appeal) and San Antonio (effective August 1, 2019)**
- Washington: SeaTac, Seattle, Spokane and Tacoma



Non-Competition



Non-compete laws vary by state (statutory or common law)

- Likely need a different agreement for each state in which you do business
- What works in one state may not work in another
- Being in a “right to work” state does not mean non-competition agreements are unenforceable



Non-Competition (cont.)

- Important Variables
 - Consideration – what is adequate consideration?
 - Reformation – can the court amend or edit overbroad restrictions?
 - Termination without cause – will the court enforce restrictive covenants against employees terminated through no fault of their own?
 - Reasonableness – what restrictions in time, geography and scope are reasonable?
 - Timing of agreement – when does the agreement have to be signed to be enforceable (*e.g.*, the commencement of employment)



Non-Competition (cont.)

Massachusetts' New Non-Compete Law

- Signed into law on August 10, 2018
- Applies only to non-compete agreements executed on or after October 1, 2018
- Applies to Massachusetts employees and independent contractors
- Covers traditional non-compete agreements and “forfeiture for competition” agreements (*e.g.*, financial penalties for competing)
- Does not cover non-disclosure agreements, assignment of inventions provisions, non-solicitation/non-interference provisions, no-hire provisions, sale of business non-competes, and non-competes included in separation agreements (provided the employee is given 7 business days to rescind acceptance)



Non-Competition (cont.)

Massachusetts' New Non-Compete Law

- Non-competes not enforceable against:
 - Non-exempt employees (possibly driven by Jimmy John's use of non-competes)
 - Undergraduate/graduate students employed as interns
 - Employees who are laid off or terminated "without cause"
 - Employees 18 years of age or under
- If entered into at hire:
 - Must be signed by both employer and employee
 - Agreement must state that employee has right to consult with counsel prior to signing
 - Must be provided to employee by the earlier of (1) formal offer of employment or (2) 10 business days prior to hire date



Non-Competition (cont.)

Massachusetts' New Non-Compete Law

- If entered into during employment:
 - Signed by both employer and employee
 - Agreement must state that employee has right to consult with counsel prior to signing
 - Must be provided with 10 business days' notice
 - Additional "fair and reasonable" consideration is required
- Other limitations/requirements:
 - Cannot exceed 12 months
 - Scope no broader than necessary to protect employer's trade secrets, confidential information and/or goodwill
 - Geographic scope must be reasonable
 - Must contain "garden leave" clause or "other mutually agreed upon consideration"
 - Continued employment alone is no longer sufficient consideration



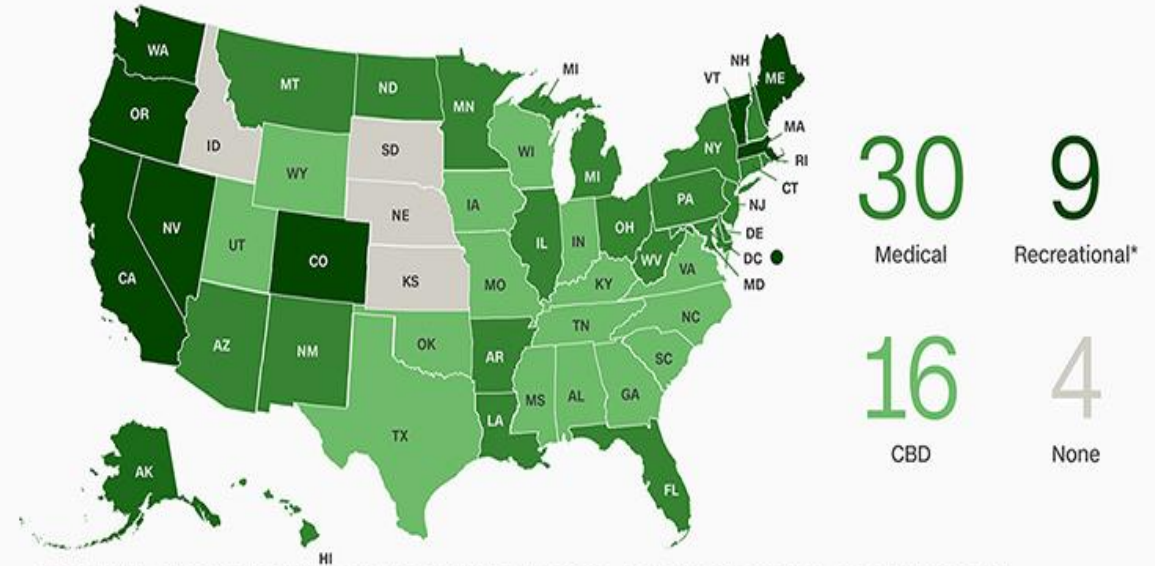
Marijuana Laws

Where is marijuana use legal?

- 30 States and the District of Columbia have laws legalizing marijuana in some form
 - This number is growing
- 9 States and the District of Columbia have laws legalizing recreational use
 - Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, Vermont, and Washington
- President Trump has made assurances that the federal government will not interfere with marijuana laws in Colorado and that he would back legislation protecting states' rights on legalized marijuana

United States of Marijuana

The state of the union is strong for marijuana, a \$9 billion industry. Recreational weed is legal in nine states and Washington, D.C. Medical marijuana is legal in 30 states, but it's still prohibited by the federal government.



Marijuana Laws (cont.)

Employer Issues

- Limitations on restrictions tied to off-the-job marijuana use
 - On-the-job/on-premises use still generally prohibited
 - However, some state laws are silent on this issue
- Drug testing
 - Limitations on right to terminate *solely* because of the presence of metabolites or components of cannabis in drug test results
 - Court challenges (federal v. state law)
- Accommodation concerns
 - Medical marijuana use
 - ADA and/or state law requirements
 - Working while impaired still prohibited



Other Laws

- Ban the Box
- Salary History Bans
- Minimum Wage
- Wage Garnishment
- Contractors/Interns
- Personnel File Access
- Human Rights



Takeaways

Be Prepared To:

- Spend more time and resources addressing state and local law changes
- Invest in seminars, newsletters, training, education and other resources to keep HR professionals up to date on legal changes
- Become familiar with laws of locations under consideration for business expansion (and ask yourself, “Is it worth it?”)
- Adopt more complex policies to address varying laws (*e.g.*, multiple handbooks, handbooks with location-specific addendums, etc.)
- Consult legal counsel, especially when entering new locations or facing new legal issues



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