Breakout Sessions – Series 3

TEST YOUR KNOWLEDGE!

THE MULTI-STATE MISHMASH

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Introduction

Employing a workforce across multiple jurisdictions is fraught with traps and pitfalls. From varying paid sick leave requirements to predictive scheduling requirements for certain types of businesses, there is a dizzying array of local and state laws which impose drastically different burdens. This paper will highlight the topic of some of the major state and local laws that have proliferated across the country.

Marijuana in the Workplace

I. State and Federal Marijuana Law

Multistate employers may be finding it difficult to keep pace with the patchwork of state and local drug testing laws. In addition to legalizing medical and/or recreation marijuana, states are passing laws that directly impact the workplace by prohibiting discrimination against medical marijuana cardholders and recreational users or discrimination based solely on positive drug tests for marijuana.

At the federal level, marijuana is regulated by the Controlled Substances Act (21 U.S.C. § 811) (“CSA”). That law makes any use of marijuana illegal. Federal law characterizes marijuana as it does any other controlled substance, such as cocaine and heroin. The law places this drug on “Schedule I.” Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment. (21 U.S.C. § 812(b)(1).)

Only a few states have addressed how federal marijuana law impacts workplaces in states where marijuana is legal. In 2010, the Oregon Supreme Court determined that employers are not required to accommodate medical marijuana use because it is illegal under federal law. The Colorado Supreme Court made a similar determination in 2015, when it held that an employer can discharge an employee who is a medical marijuana user for a positive drug test because marijuana remains illegal under federal law. And, in 2016, a federal court in New Mexico determined that employers in that state are not required to accommodate medical marijuana use because it is illegal under the federal Controlled Substances Act. Therefore, the Sessions memorandum is unlikely to have any impact on the current status of employment protections for medical marijuana users in Oregon, Colorado, and New Mexico.

On the other hand, in 2017, the Massachusetts Supreme Judicial Court determined that an employer cannot rely on the fact that marijuana is illegal under federal law as a basis for an adverse employment action against a medical marijuana user where such action would violate state disability discrimination laws. A federal court in Connecticut also determined that federal law, including the Controlled Substances Act, does not preempt the anti-discrimination provision contained in that state’s medical marijuana law. So, in these states, individuals who are registered medical marijuana users and test positive for marijuana have certain job protections, even though marijuana is illegal under federal law. Thus, unless the Sessions memorandum eliminates medical marijuana altogether, it may not have an impact in Massachusetts or Connecticut.

In other states, however, the answer is not so clear: The 2017 court decisions in Massachusetts and Connecticut indicated the momentum may have been moving toward providing medical marijuana users with at least some employment protections, but whether the Sessions memorandum will reverse this momentum remains to be seen.
II. Medical Marijuana and the Workplace – Is There a Right to Be Stoned at Work?

An employer’s primary concern in hiring and employment is maintaining a safe and productive work environment. The use of drugs and alcohol, as well as the misuse of prescription drugs, can interfere with these legitimate concerns in obvious ways. So far, no laws have prohibited an employer from enforcing workplace rules prohibiting using, possessing, or being under the influence of alcohol and/or controlled substances, including marijuana while at work. Courts have issued various decisions thus far, demonstrating the contours of the lawful interaction between medical marijuana and the workplace.

A. Overview of ADA Analysis and EEOC Guidance

The use prescription drugs by employees, and the American Disabilities Act (ADA), is often the subject of complicated entanglements in the workplace. Though the use of prescription drugs alone is not a disability, prescription drugs are often used to treat injuries, illnesses, conditions, etc. that could qualify as a disability. For example, an individual may take prescription medical marijuana to treat chronic back pain, which, under many circumstances, would qualify as a disability. Prescription drug addiction (like alcohol addiction) likely constitutes a disability. Regardless of whether an individual is or is not legally disabled, that individual may be “regarded as” being disabled based on his or her prescription drug use.

The ADA’s prohibition against discrimination generally includes “medical examination and inquiries.” See 42 U.S.C. § 12112(d)(1). A disability-related inquiry includes any inquiry that will reveal whether an employee has a disability or the nature or severity of the disability. Prescription and over-the-counter drug inquiries are specifically addressed in the EEOC’s Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (published 7/27/2000). The EEOC Guidance states the following constitute disability-related inquiries: (1) asking an employee whether he or she is currently taking any prescription drugs or medications; (2) asking an employee whether he or she has taken any prescription drugs or medications in the past; and (3) monitoring an employee’s usage of prescription drugs medications. Courts have agreed that broadly asking about employees’ prescription drug regimens constitutes a disability-related inquiry. See Bates v. Dura Auto. Sys., 767 F.3d 566, 578 (6th Cir. 2014) (“Obviously, asking an employee whether he is taking prescription drugs or medication, or questions seek[ing] information about illnesses, mental conditions, or other impairments [an employee] has or had in the past[,] trigger the ADA’s … protections.”)

Such disability-related inquiries are permissible, however, if the employer can show the inquiries are both job-related and consistent with business necessity. Breaking down the EEOC Guidance, the EEOC has a three-part test to determine when an employer can require its employees to disclose prescription medications. To require disclosure of a prescription medicine, each of the three elements must be established by the employer: (1) the employer must be one that affects public safety; (2) the employee must be in a position affecting public safety; and (3) the nature of the medication required to be reported must be one that affects the employee’s ability to perform their essential functions, resulting in a direct threat.

B. Practice Tips

Increased legalization of marijuana and the continued opioid abuse epidemic, will ensure that these issues will not go away anytime soon. Employers need to assess the effect that this will have on the workplace.
**Update Policies.** Employers should review and update policies in light of the new legal landscape. Policies should appropriately address prescription drug use and abuse. Policies should not, however, include blanket prohibitions and disclosure requirements related to the use of prescription medications. The policies should provide for individualized assessments for employees who may be impaired by the use of prescription drugs. Employers may want to clarify policies to expressly forbid the use or possession of marijuana at the workplace.

**Educate.** Employers will need to educate supervisors and employees regarding company policy relating to medical marijuana and prescription drugs.

**Drug Testing.** Employers may also want to revisit their drug testing policies. Companies may consider the propriety of pre-hire screening, random drug testing, reasonable suspicion testing, and post-accident testing. Drug testing laws vary in states. Employers should maintain a uniformly implemented pre-hire drug testing program. Random drug testing may be subject to greater scrutiny by the courts though some industry sectors, such as transportation, and certain government contractors, employers are obligated to test workers. Random testing of employees working in safety-sensitive positions is also commonly accepted.

**Safety.** Inevitably, when more workers experiment with recreational drug use, or take prescription drugs that effect motor skills, workplace accidents will increase. Renewed efforts to ensure workplace safety may become paramount, particularly in industrial settings. Worker efficiency, health, and well-being will be of no less concern. Although many employers routinely drug test employees after a workplace accident, this practice is under increasing scrutiny. Recently, the federal work safety agency, OSHA, has published standards relating to post-accident testing. The agency has taken the position that automatic post-accident testing may not be appropriate, because it may be perceived as punitive or retaliatory to the employee. According to the agency, this practice may discourage employees from reporting workplace injuries and illnesses. “Although drug testing of employees may be a reasonable workplace policy in some situations, it is often perceived as an invasion of privacy, so if an injury or illness is very unlikely to have been caused by employee drug use, or if the method of drug testing does not identify impairment but only use at some time in the recent past, requiring the employee to be drug tested may inappropriately deter reporting.” The agency states “To strike the appropriate balance here, drug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use. For example, it would likely not be reasonable to drug-test an employee who reports a bee sting, a repetitive strain injury, or an injury caused by a lack of machine guarding or a machine or tool malfunction. Such a policy is likely only to deter reporting without contributing to the employer’s understanding of why the injury occurred, or in any other way contributing to workplace safety.”

**EAP.** Many employers have instituted Employee Assistance Programs (EAPs) to help employees cope with a variety of problems, including prescription drug abuse. It may be time to consider whether additional resources may be needed to address an increase in drug abuse.

The nationwide social experiment legalizing marijuana will have far reaching effects in the workplace. Employers should evaluate options and take steps to ensure worker safety, productivity, and health.
Paid Sick Leave

Although paid sick leave statutes and ordinances have been adopted by state and local municipalities for years, many employers are only now realizing they are not compliant. Paid sick leave laws have continued to become effective this year and even more are in line to become effective soon. This paper should help employers to spot issues and craft compliant policies in a timely manner. The considerations raised herein, along with our most current handout on paid sick leave issues, will help you to better understand the details of specific provisions of each state and local law for your analysis, policy drafting, and overall compliance efforts.

I. Compliance Issues For Employers—Key Decisions

A. Accrual Over Time Versus Accrual in Advance (Frontloading)

One of the initial questions that must be resolved is whether to allow employees to accrue over time or to accrue in advance (i.e., frontload paid sick leave). The paid sick leave laws contemplate an accrual-over-time method whereby an employee may accrue hours of sick leave for working a certain number of hours. None of the statutes discussed herein definitively prohibit frontloaded accrual. Many employers wish to avoid tracking accrual by frontloading accrual. Those who do often place a waiting period on use so that newly hired employees are not immediately eligible for significant paid sick leave. Waiting periods are addressed further below.

B. Accrual Rates

The majority of jurisdictions require accrual of paid sick leave at 1 hour for every 30 hours worked. In a minority of jurisdictions, accrual rates vary. For instance, an accrual rate of 1 hour per 40 worked is required in Connecticut; Washington; Cook County, Illinois; Philadelphia, Pennsylvania; SeaTac, Washington; and Tacoma, Washington. Vermont requires accrual at 1 hour for every 52 hours worked. To further complicate matters, other jurisdictions require variable accrual rates based upon the size of the employer, although not the number of employees within the jurisdiction itself.

C. Accrual, Use, and Carryover “Caps”

Some paid sick leave ordinances identify an amount at which employers may “cap” additional accrual each year. Others identify an amount at which employers may “cap” use in a year. Finally, some allow employers to “cap” the amount carried over from one year to the next. Unfortunately, like accrual rates, the state and local laws are varied an often in conflict.

D. Limiting Accrual

Many jurisdictions allow employers to limit accrual annually. For instance, employers in Connecticut, Massachusetts, Vermont, Chicago and Cook County, Illinois, may limit accrual to 40 hours per year. In Los Angeles, California, and Minneapolis and St. Paul, Minnesota, a 48 hour annual cap applies. Some jurisdictions limit accrual not annually, but on a total accrual basis. For instance, accrual may be limited to 48 hours in California, and use may be limited to 24 hours a year. Similarly, in San Diego, California, employers may limit accrual at 80 hours, while use is limited annually to 40 hours. Some jurisdiction apply different annual accrual caps...
depending on employee or employer size. For instance, San Francisco and Oakland require employers with 10 or more employees to accrue up to 72 hours at any given time, whereas smaller employers may limit accrual to 40 hours at any given time.

1. **Limiting Use**

   Most jurisdictions requiring accrual of paid sick leave allow employees to use all accrued paid sick leave in a year. Some jurisdictions allow use, but not accrual or carryover, to be limited. Use and carryover may be limited in Montgomery County, Maryland. Employees there may carryover 56 hours and use 80 hours each year. However, in California, both statewide and in San Diego, accrual and use may be limited. Under the California state statute, total accrual (as opposed to annual accrual) may be limited to 48 hours and use may be limited to 24 hours each year. In San Diego, total accrual may be limited to 80 hours and use may be limited to 40 each year.

2. **Limiting Carryover**

   Most jurisdictions requiring accrual and use of paid sick leave oblige carryover of unused paid sick leave from one benefit year to the next, often limited only by the annual or total accrual amount. As with limits on accrual or use, carryover limits may vary depending on the employer’s size. Many jurisdictions simply require carryover of a specified amount, often 40 hours. Others require a greater or lesser amount. For instance, Los Angeles, California, requires carryover of up to 72 hours; Montgomery County, Maryland, requires carryover of up to 56 hours.

   In Chicago and Cook County, Illinois, carryover requirements are more complicated. Many employees may carry forward half (½) of their unused paid sick time, up to a maximum of 20 hours, and subject to a 40 hour use limit each year. However, where employees are eligible for Family and Medical Leave Act (“FMLA”) leave, these employees may also carry forward up to an additional 40 hours of unused paid sick time for FMLA-qualifying absences.

   The most significant outlier is the Long Beach, California, ordinance, which requires that all unused paid sick leave be paid out annually. Fortunately, this ordinance is of limited jurisdiction since it applies only to hotel employees or employees of residential buildings used for public lodging with at least 100 guest rooms or suites in the City of Long Beach.

E. **“Frontloading” and Related Pitfalls**

   Many employers find accrual over time to be cumbersome, particularly when they operate in multiple jurisdictions with different accrual requirements. If the administrative burden is too great, or if your payroll vendor will not reasonably support accrual over time, accrual in advance or “frontloading” paid sick leave annually may be preferable. Fortunately, none of the current paid sick leave ordinances forbid frontloading. However, even frontloading accrual is not without potential pitfalls.

   Frontloading should be calculated to be within the relevant jurisdiction’s allowable accrual cap or more. Because accrual, use, and carryover caps vary, often depending upon employer size, implementing a uniform policy covering multiple jurisdictions may be problematic. Solutions for this problem are similar to those where an employer is grappling with accrual over time at different rates in different jurisdictions—i.e., you could: (1) frontload accrual in all jurisdictions at the amount required in the jurisdiction with the highest applicable accrual cap; (2) implement separate policies for all jurisdictions; (3) implement one policy for
all jurisdictions that uses different accrual caps in the relevant locations; or (4) if the majority of applicable locations allow similar accrual caps, create a “standard” policy with separate policies for outlying locations.

F. Waiting Periods

One potential problem in accrual over time involves waiting periods before which a recently hired employee can either accrue or use paid sick leave. As is often the case, these waiting periods are far from uniform or consistent, which makes multistate policy drafting difficult.

The vast majority of paid sick leave laws have no waiting period before an eligible employee can accrue paid sick leave. But most have at least a 90-day waiting period before an eligible employee can use accrued leave, whether it is accrued in increments over time or frontloaded upon initial hire. But there are exceptions. New York City has a 120-day waiting period for usage only. Similarly, the Chicago and Cook County, Illinois, ordinances allow for a 180-day waiting period for usage only. Connecticut’s waiting period for usage is 680 hours of employment, with no waiting period for accrual.

II. Eligibility For Taking Paid Sick Leave—Reasons For Leave

A. “Sick” Leave

The paid sick leave laws contain potentially significant differences as to when employees may use accrued paid sick leave. Each provides for leave when an employee or an employee’s immediate family member becomes sick, but there are differences, particularly regarding how the terms “sick leave” and “family member” are defined and whether family members extend beyond the employee, spouse or equivalent, and children.

B. Domestic Violence, Sexual Assault, and Stalking

Some paid sick leave laws provide for leave related to domestic violence, sexual harassment, and/or stalking. The California, Oregon, Vermont and Washington, D.C., laws require the provision of paid sick leave when the employee is a victim of domestic violence, sexual assault, or stalking. Many local ordinances provide for similar coverage. Connecticut’s statute, and the Chicago and Cook County, Illinois, ordinances, provide coverage only for domestic violence and sexual assault, whereas the Massachusetts and Washington statutes. However, many other local ordinances do not provide such coverage. Employers must consider whether to draft individualized policies or simply provide broadly worded coverage in a global paid sick leave policy.

C. Public Health Emergencies

Public health emergencies are protected under a limited subset of paid sick leave laws. The local ordinances that do provide such coverage allow use of paid sick leave where an employer is closed due to a public health emergency or where an employee’s child’s school or day care is closed due to a public health emergency. Some statutes go even further. For example, the Minnesota paid leave laws cover instances where an employee is quarantined or isolated due to an illness caused by bioterrorism or certain communicable diseases for up to 21 consecutive work days. Employers may resolve the differences in coverage between the state
and local paid sick leave laws by preparing a global policy that allows for usage over that required by the statute or ordinance, by drafting a “standard” policy with separate policies for outliers, or by drafting individual policies for each applicable jurisdiction.

D. Other Outliers

A more recent trend in paid sick leave laws is to expand beyond the more common coverage for illnesses of the employee and employees’ family members. Emeryville, California’s ordinance requires use to provide care or aid for a guide dog, signal dog, or service dog. As recently amended, the San Francisco, California, ordinance requires use for bone marrow or organ donation purposes. Similarly, leave to care for an employee’s family member whose school or place of care has been closed due to inclement weather, loss of power, loss of heating, loss of water, or other unexpected closure is allowed in Minneapolis and St. Paul, Minnesota.

Background Checks

When it comes to conducting background checks, employers often feel as if they are between a rock and a hard place. On the one hand, employers face potential liability for claims like negligent hiring, negligent supervision. However, employers face scrutiny and potential liability from the EEOC, state agencies and private litigants—who may claim that the background checks are discriminatory and/or violate state and federal laws regulating the process and use of background checks. How can employers properly conduct background checks without running afoul of workplace non-discrimination statutes (state and federal), the federal Fair Credit Reporting Act (FCRA), state mini-FCRAs, and state and local Ban the Box statutes and ordinances?

I. 4 Basic Questions/Framework

Employers should consider the following four questions in designing a legally-compliant background check process:

1. May I and when should I conduct a background check?
2. What is the proper way to request a background check?
3. When/how may I consider and use background check information?
4. How should I communicate possible or actual adverse employment action based on a background check?

Interplay of state and federal statutes, including (a) the FCRA, (b) state mini-FCRAs, (c) Title VII (particularly the April 2012 EEOC Guidance), (d) state workplace discrimination laws (as applicable), and (e) state and local (including county and municipal) Ban the Box statutes.

II. May I And When Should I Conduct A Criminal Background Check?

Whether an employer can (or should) conduct background checks will depend on the nature of the workplace, available resources, state and federal law, and business policy. For some employers, particularly educational institutions, health care providers for children/vulnerable adults, and military contractors, background checks may be required by law
or relevant licensing/accreditation authorities. For other employers, it is a matter of well-considered business policy to conduct background checks. And, for some employers, it is a historic practice that has always been done without much thought. The “has always been done” reason should not be the sole basis for conducting a background check—employers should periodically re-examine their background check processes to evaluate and identify a business need for the process.

A. Federal Law—“Job-Related and Consistent with Business Necessity”

Under federal law, employers should ensure that any background check is job-related and consistent with business necessity. There should be a direct connection between the type of background check performed and the applicant/employee’s job duties. The background check process also must be consistent—the type of background check should be conducted for all applicants/employees in similar job positions unless there are specific reasons to limit the search to only some applicants/employees.

This job-related component is important to a defensible background check process. For example, while there would be a strong business justification to conduct a credit check on an accountant or CFO, it would be a larger leap to justify a credit check on a custodian or engineer. With its “no more background checks than absolutely necessary” philosophy, the EEOC is particularly focused on the job-related requirement.

B. State Law—Limiting Background Checks

1. Limitations on Conducting Credit Background Checks At All.

A number of states have restrictions on employers’ ability to request certain types of background checks at all. Currently, there are at least thirteen states (including DC) that limit employers’ ability to request credit background checks: California, Colorado, Connecticut, District of Columbia, Hawaii, Illinois, Maryland, Minnesota, Nevada, Oregon, Pennsylvania, Vermont, and Washington. (Minnesota, Ohio, and Pennsylvania have guidance or advice, not statutory prohibitions.) In addition, a handful of local governments—New York City, Chicago, Cook County, Illinois, and Philadelphia—also have passed laws limiting employers’ ability to conduct credit checks.

2. Limitations on Timing of Criminal Background Checks and “Ban the Box” Restrictions.

There is a movement among states and some municipalities to enact “Ban the Box” or comparable legislation. The term Ban the Box comes from banning the employment application “check box” associated with the traditional question inquiring about criminal history.

Depending on the jurisdiction, Ban the Box state statutes and local ordinances make it unlawful for an employer to (a) inquire about criminal history, (b) require completion of a background check consent form, and/or (c) actually conduct a background check—before a certain point in the application process. This section and the accompanying PowerPoint address state and local law limits in these three areas. State law restrictions on how an employer may use credit/criminal history information (i.e., restrictions on employer consideration and use of the information) are discussed below in another section.
III. What Is The Proper Way To Request A Background Check?

A. Disclosure & Authorization Form

1. General

A Disclosure and Authorization ("D&A") form consists of a federal disclosure, often separate state and additional disclosures, and a separate authorization. The federal disclosures should be in a separate, stand-alone document and not part of other employment forms, including an employment application. The federal disclosures should describe the various types of background check information being requested and/or reviewed – e.g., criminal history, credit, etc. The disclosures should be reviewed and an accompanying authorization should be signed by every applicant/employee for whom a background check will (or may) be requested.

2. Naming CRAs

Employers do not have to name the consumer reporting agency ("CRA") in the state law disclosures, except in a few states. To minimize the administrative upheaval caused when an employer changes CRAs, we recommend that employers not name the CRA in the state disclosures except in those few states where it is required to name the CRA.

3. “Check the Box” States

California, Minnesota, and Oklahoma also have a “check the box” requirement that, if checked by the employee/applicant, requires the consumer reporting agency to send a copy of the background check report to the applicant/employee within a certain time period.

4. Must Consist Solely of the Disclosure

Under the FCRA, the disclosures must consist “solely” of the disclosures. In our review of employers’ disclosures, we often see a “release of liability” or “liability waiver” sentence—in which the employee/applicant releases the company, the consumer reporting agency, and often others that have anything to do with the background check process, from any liability. The Federal Trade Commission (“FTC”), an entity tasked with enforcing the FCRA, and courts have opined that a “release of liability” sentence makes the disclosures unlawful because it adds more to the disclosures than is statutorily allowable.

Under the federal FCRA, the disclosure and authorization sections may be on the same form/screen, as long as the authorization is fairly bare-bones. There are several pro-employer authorization provisions (e.g., evergreen authorization, sharing (information with others) authorization, etc.) that arguably go beyond a bare-bones authorization. Also, many states’ mini-FCRA strongly suggest that the “disclosure” section of the D&A be separate from the “authorization” section. Because of these factors, we generally recommend a separate (with a page break/on a different screen) disclosure section from the authorization section, particularly for employers that use a more fulsome authorization and/or accept applications from (and thus conduct background checks on) individuals physically located in or applying to work (or already working) in New Jersey.
5. **Must Be “Clear and Conspicuous”**

The FCRA requires the disclosures to be clear and conspicuous. This has not been the basis for many class action claims but is ripe for exploitation by the plaintiffs’ bar. Meanwhile, a new litigation trend is a claim against consumer reporting agencies and sometimes employers alleging failure to satisfy very technical FCRA certification requirements. The FCRA requires the employer to provide certain certifications to a CRA in order for the CRA to provide a background check to the employer. The employer must certify as follows:

- It will comply with **adverse action requirements**
- It will not **use** background check information unlawfully
- It has complied with **disclosure & authorization** requirements

6. **State Notices**

In addition to federal requirements, several states and one locality require state- and locality-specific disclosures to be included in the set of D&A forms. These states and locality include: California Colorado, Connecticut, Maryland, Massachusetts, Minnesota, Montana, New Jersey, New York, Oklahoma, Oregon, Vermont, and Washington.

B. **State and Local Restrictions**

In addition to the EEOC’s Guidance on Title VII, several states and localities have requirements and restrictions on consideration and use of arrest and conviction data. Among states that have adopted such laws are California, Colorado, Hawaii, Idaho, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Montana, New York, South Dakota, Washington, West Virginia, and Wisconsin. Meanwhile, some localities that have adopted such restrictions include Los Angeles, San Francisco, Philadelphia, Seattle, and many more. Further, many of these state and local laws require justifications beyond (a) generic job-relatedness/business necessity language or (b) a mere repetition of the 3 EEOC Green factors.

IV. **Communicating Adverse (Or Possibly Adverse) Employment Action Based On A Background Check?**

A. **Pre-Adverse Action Letter**

A Pre-Adverse Action Letter is required under the FCRA and must be sent when there is a potential for taking adverse action against an employee based on a background check – *i.e.*, when you are "intending" adverse action. At this stage, the decision to take an adverse action has not been made, but the possibility of taking an adverse action exists. Pursuant to the FCRA, employers must attach to the Pre-Adverse Action Letter (a) the FCRA “A Summary of Your Rights” form and (b) the background check report received from the consumer reporting agency.

B. **Reasonable Waiting Period**

After a Pre-Adverse Action Letter is sent, employers must wait a reasonable amount of time before taking any adverse action. Under the FCRA, this reasonable waiting period was designed to allow the applicant/employee to dispute the report. Pursuant to the EEOC’s Guidance, this time allows employers to conduct the Individualized Assessment outlined above. This is one place where the FCRA and the EEOC’s Guidance match up pretty well in giving
employers the opportunity to comply with both. The requirement is to wait a “reasonable” time; however, there is no statutory indication as to what is reasonable. Five business days is the least amount of time that has been deemed to be a reasonable waiting period. The EEOC’s Title VII individualized assessment process (i.e., period) may be used to satisfy the FCRA’s reasonable waiting period.

C. **Adverse Action Letter**

Under the FCRA, after an employer has conducted an individualized assessment and determined that adverse action is warranted, the employer must send an Adverse Action Letter. The Adverse Action Letter has more requirements than the Pre-Adverse Action Letter. Under the FCRA, an Adverse Action Letter should include the following:

- Name, address, and telephone number of the consumer reporting agency (CRA) that furnished the report;
- Applicant or employee may obtain a free copy of the consumer report from the CRA within 60 days of the adverse action;
- CRA did not make the decision to take the adverse action and is unable to provide the individual the specific reasons why the adverse action was taken; and
- Individual may dispute with the CRA the accuracy or completeness of any information in a consumer report.

FCRA damages depend on whether the violation is willful or merely negligent. Damages for a negligent FCRA violation include actual damages – which are arguably zero for an unlawful disclosure or authorization. Damages for a willful FCRA violation include damages of $100 to $1,000 per background check conducted—which makes willful claims more attractive for class action treatment. Both willful and negligent FCRA violations provide for attorneys’ fees.

**Predictable Scheduling**

Known by various names such as “just-in-time” scheduling, on-call shifts or unpredictable work shifts, such flexible or unstable scheduling practices have been a workplace practice for a number of years in many industries, but these practices are particularly prevalent in retail and service industries. Essentially, unstable scheduling practices occur when employers make short-term, sometimes at the last minute, decisions on staffing levels and work schedules based upon a variety of factors such as orders for production or to fulfill, customer traffic information, patient counts, and other benchmarks indicating workflow or work requirements.

These unpredictable scheduling and on-call practices have come under growing criticism for a number of reasons in recent years. These criticisms focus on the resulting unpredictability or fluctuations in wages earned by employees impacted by these practices, the challenges these employees may encounter in scheduling childcare and transportation for work, or the hardships experienced by these employees in their ability to commit to a second job or enroll in adult education courses. These criticisms have begun to gain ground with elected leaders on the state and local levels, as well as the national level.
I. **Spread of Predictable Scheduling Laws**

The list of major metropolitan areas that are proposing predictable scheduling ordinances continues to grow. Recently, New York City (NYC) passed its own version of a predictable scheduling law when it added a “Fair Work Practices” chapter to title 20 of the City’s administrative code. The NYC law requires retailers with 20 or more employees to:

- Provide employees with a written work schedule at least 72 hours of advance notice;
- Give employees at least 72 hours before scheduling or canceling a shift, while allowing employees who want to work more hours to consent to a new shift;
- Notify employees of any schedule changes as opposed to requiring employees to call-in or log-in to check their schedules for changes; and
- Maintain work schedules for 3 years.

The NYC law applies different requirements to fast food establishments of a chain, defined as an established with more than 30 locations nationally regardless of whether they are franchises. These requirements include:

- Giving new employees written, good faith estimates of their work schedules which would include dates, times, location, and duration of employment;
- Providing employees with their work schedule at least fourteen (14) days in advance;
- Paying a “schedule change premium” of $10 to $75 that varies with the amount of advance notice provided (the more notice the less the premium);
- Establishing a $100 payment for employees who work a “clopening shift,” defined as closing shift followed by an opening shift within eleven (11) hours; and
- Offering current employees the opportunity to work additional shifts before transferring employees from other locations or hiring new employees.

II. **Consequences**

At this juncture it is not clear just how significant the predictable scheduling movement may become in labor and employment law, but it is an issue that is gaining momentum and support. This is an issue that employers should track on a state and local level because it is doubtful at this juncture that Congress will pass any federal legislation. As for localities where predictable scheduling is effective, some employers have cut back on the use of part-time employees, have reduced their staffing levels per shift, and are evaluating self-service automation where feasible. Also, employers are looking at various programs for communicating with employees in order to comply with the mandates of a predictable scheduling law.

**Minimum Wage**

While some efforts to change labor and employment laws and regulation in general have happened on a federal level, more efforts in particular have occurred at the state and local government levels. In fact, there has been more success to pass new wage and hour laws and regulations at the state and local government levels than at the federal level. The proliferation of state and local governments that have passed laws or ordinances mandating a minimum wage that is higher than the federal wage of $7.25 is numerous and multiplying. There are approximately 29 states and the District of Columbia which have a higher minimum.
The greater challenge is to track the number of local governments, especially municipalities, which have passed minimum wage ordinances. Such ordinances are difficult to monitor and often are passed with little publicity until after the fact. Currently, over fourteen localities have imposed a minimum wage over $10.00 per hour, including San Francisco, Oakland, Seattle, Chicago, New York City, Washington D.C.

**Pay Equity**

Almost all states have passed some type of equal pay law that forbids discrimination in compensation based on sex, and almost all of these state laws make it unlawful to retaliate against an employee who pursues such a claim. Hence, equal pay advocates are pushing new laws at the state level. For example, some eighteen (18) states, including Colorado, Maryland, Massachusetts and New Hampshire, have already passed laws that prohibit employers from discriminating or retaliating against employees who voluntarily discuss their wage information. Some of those laws are similar to or were prompted by Executive Order 13665, Non-Retaliation for Disclosure of Compensation Information, which President Obama signed on Equal Pay Day in 2014, April 8. Another equal pay initiative at the state level is legislation requiring employers to disclose a salary range in job openings that it advertises, regardless of the medium used. Finally, some state and local governments are promoting another type of ordinance which would prohibit employers from asking prospective employees about their compensation histories; a few states like Delaware, Massachusetts, and Oregon have passed such legislation.

**“Wage Theft”**

Wage theft has been a recurring problem for decades and hence a cause célèbre of progressives in their efforts to promote economic progress. In a nutshell, wage theft is the failure to pay an employee the full wages to which they legally are entitled, but it can occur in many ways. For example, some employers may pay non-exempt employees less than the minimum wage rate or they may not pay non-exempt employees time and one-half for overtime hours worked in a workweek. Wage theft also can take the form of “off-the-clock” work which may occur when employers instruct their non-exempt employees to work either: (1) before they clock-in for work at the start of their work day; (2) after they have clocked out for work at the end of their work day; or (3) through unpaid meal breaks. Employees also may suffer wage theft by misclassification as an exempt employee or as an independent contractor. Other examples include when the time records of non-exempt employees are altered so that their hours worked are underreported or when an employer takes impermissible deductions from the wages of non-exempt employees. Tipped employees suffer wage theft because they also receive tips in addition to their cash wage and some employers take advantage of the tips.

Some local governments have enacted ordinances against wage theft. For example, the St. Petersburg, Florida City Council passed several amendments to its wage theft ordinance to add three (3) new requirements. Specifically, employers will be required to provide: (1) written notice to employees at time of hire that will include a template issued by the City summarizing an employee’s rights; (2) written notice of changes in pay; and (3) to post a poster that the City will make available. There is also a $500.00 “per violation” penalty for an employer’s failure to adhere to any part of the ordinance.

**Preemption**

States have responded to these efforts and are beginning to consider and even pass some “preemption” statutes either to block local laws from becoming effective or to nullify an
existing ordinance. Most of these preemption proposals do not include proposed statewide wage and hour standards for uniform application across the state; rather, they usurp the authority of local governments from passing local wage and hour standards. The net effect of these preemption statutes is to rescind local wage increases or remove other standards that are more protective of employees than either a state law or the FLSA provides.

Notwithstanding the proliferation of these state preemption law proposals, unions, other employer advocacy groups, and non-profit organizations are stepping up their efforts to oppose such preemption laws that do not include statewide standards. Also, they are focusing on raising the minimum wage for public sector employees and using local contracting authorities to include pro-employee provisions on their contract solicitations.

**Conclusion**

As you can see, employing a workforce across multiple jurisdictions is fraught with traps and pitfalls. For employers practicing in multiple jurisdictions, it is important to make a conscientious decision and formulate a strategy concerning how your organization will comply with this dizzying array of local and state laws which might impose drastically different burdens on your organization. Key to this is ensuring you are kept up to date on the ever-changing hodge-podge of state and local laws, whether it is through dedicated research, through a subscription service such as OD Comply, or another method. However, if your organization takes these steps, then you will be able to successfully navigate the Multi-State Mishmash.
Jurisdictions that prohibit private employers from seeking information regarding an applicant’s criminal background history at the application stage of the hiring process (commonly referred to as “ban-the-box” legislation)

*New Mexico law effective June 14, 2019*

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This map is intended as a visual aid and should not be relied upon or construed as a substitute for legal advice.
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Marijuana Laws*

* This map reflects state and local laws only. The sale, possession, and use of marijuana remains illegal under applicable federal law.

Updated 4-2019
Minimum Wage Laws

State Minimum
- Alaska
- Ariz.
- Ark.
- Calif.
- Colo.
- Conn.
- Del.
- D.C.
- Fla.
- Ga.
- Hawaii
- Idaho
- Ill.
- Ind.
- Iowa
- Kans.
- Ky.
- La.
- Me.
- Md.
- Mass.
- Mich.
- Minn.
- Mo.
- Mont.
- NE.
- Nev.
- N.J.
- N.M.
- N.Y.
- N.C.
- N.D.
- Ohio
- Okla.
- Ore.
- Pa.
- R.I.
- S.C.
- S.D.
- Tenn.
- Tex.
- Utah
- Wash.
- W.Va.
- Va.
- Wyo.

Minimum Wage May Increase Based on Municipality and/or Employer Size

Federal Minimum

Updated 1-2019

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State and Local Salary History Limitations¹

Jurisdictions with state or local laws limiting inquiries on compensation history

* Cincinnati, OH law effective March 2020
** Suffolk County, NY law effective June 30, 2019
*** Maine law effective September 17, 2019

¹ This map covers laws applicable to private employers. Public employers may be subject to additional laws.
State and Local Sick Leave Laws

*Note that the Illinois Employee Sick Leave Act requires that Illinois employers with paid sick leave policies permit a limited amount of employee use for a family member's illness.

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Test Your Knowledge! The Multi-State Mishmash

Presenters
Diane M. Saunders (Boston) and Michael J. Sexton (Orange County)

Moderator
Gregg M. Lemley (St. Louis)

National Employers – Local Puzzles
Topics of State and Local Laws

- Marijuana Use
- Background Checks
- Paid Sick Leave
- Minimum Wage
- Pay Equity
- Domestic Violence Leave
- Paid Family Medical Leave
- Predictive Scheduling
- Preemption of Local Laws

Pitfalls for Multi-State Employers

- Non-compliance in one or more “secondary” jurisdiction
- Over-cumbersome policies applying to all jurisdictions
- Policies that “give away” much more than is required in some jurisdictions
Marijuana in the Workplace

Marijuana Laws*

* This map reflects state and local laws only. The sale, possession, and use of marijuana remain illegal under applicable Federal law.
Marijuana Regulation & the Workplace

- Federal Prohibition (1937 to Present)
  - Controlled Substances Act (1970)
- Medical Use (1996 to Present)
  - Some states allow employers to enforce drug-free workplace policies
  - Some states have anti-discrimination provisions
- Recreational Use
  - CA, CO, WA, OR, AK, CA, MA, ME, MI, NV, VT, and DC
  - 1 in 4 Americans live in a state where legal without a doctor’s note

Medical Marijuana and the ADA

- *Barbuto v. Advantage Sales & Mktg.*
  (Massachusetts Supreme Judicial Court, July 2017)
  - Plaintiff claimed handicap discrimination due to status as medical marijuana cardholder
  - Court held that employer must engage in an interactive process
Anti-Discrimination Laws

- Most medical marijuana laws provide that employers are not required to accommodate intoxication, use, or possession in the workplace.
- AR, AZ, CT, DE, IL, ME, MN, NV, NY, PA, RI, and OK have express job protections or anti-discrimination provisions. For example:
  - IL: Employers may not penalize a person solely for his or her status as a registered qualifying patient or a registered designated caregiver.
  - BUT, Employers may enforce policies on drug testing, zero-tolerance, or a drug free workplace provide policy is applied in a nondiscriminatory manner.

Practice Pointers

- Legalization ≠ accommodation
- Duty to provide safe workplace paramount
  - Beware “lawful off-duty conduct” litigation
- Establish and communicate clear drug policies
  - Employers may enforce policies to exclude employees from impairment or using at worksite
  - Beware ADA risks in drug tests positive for Rx drugs
  - Drug testing policies must be uniformly enforced to avoid discrimination claims
Paid Sick Leave

Countless Variations Amongst States

- Accrual
  - 1 Hr/30 Worked (Majority); 1 Hr/40 Worked (WA, IL, others); 1 HR/52 Worked (VT)
- Caps
  - Capping Accrual → 24 to 48 hrs. per year
  - Capping Use → 24 hr. per year to unlimited
  - Capping Carryover → generally 40 Hrs. to unlimited
- Waiting Periods to Accrue
  - Range from No Waiting Period to 180 Days
Reasons for Paid Leave Vary

• Each state has own specific language on what is a covered occurrence enabling employees to take paid leave.
  • “Sick Leave” – Self, Immediate Family, Other?
    • E.G. – Chicago includes legal guardians or wards, domestic partners, grandparents, grandchildren, siblings, and “any other individual related by blood or whose close association with the employee is the equivalent of a family relationship.”
  • Domestic Violence, Sexual Assault, and Stalking
    • E.G. – California law requires paid leave when the employee is a victim of domestic violence, sexual assault, or stalking.
  • Public Health Emergencies
    • Paid leave may be available when a public health emergency closes the workplace or the school or daycare of that employee’s child.

Mobile Workforce and Telecommuting

• Employers with a mobile workforce are particularly susceptible to Multi-state “gotchas”!
  • Whether a particular jurisdiction’s Paid Leave Law applies will depend on the language of that specific ordinance/law
  • E.G. – An employee who works in California for at least 30 days a year may accrue leave under CA law
Background Checks

Applicable Laws

- Laws that may impact permissibility of background checks
  - Federal Fair Credit Reporting Act
  - Title VII
  - State Mini-FCRAs
  - Local (City/County) Ordinances
- Ban the Box
  - Growing number of states and localities prevent employers from requesting a prospective employee’s criminal history
- EEOC Regulations – The *Green Factors*
The Green Factors

• Current EEOC guidance on whether a pre-employment background check may be used in hiring:
  • **The nature and gravity of the offense or conduct**
    • Seriousness of the offense and pattern/persistency of issues
  • **The time that has passed since the offense, conduct and/or completion of the sentence**
    • Employers are encouraged to look at any pattern in wider context
  • **The nature of the job held or sought**
    • Whether the job creates an opportunity or a specific kind of crime.

Adverse Actions Under the FCRA

• Pre-Adverse Action Letter
  • Must issue when intending to take an adverse action
  • Good place to include invitation to initiate individualized assessment as required by EEOC guidance and Title VII
  • Some states require state law summaries
  • “Reasonable Waiting Period”
    • No statutory guidance here; 5 business days is the least amount of time that has been deemed a “reasonable waiting period”
• Adverse Action Letter
  • Must include: Name, address, phone number of CRA who performed check
  • Applicant may obtain free copy of report from CRA within 60 days
  • Applicant may dispute accuracy or completeness
Minimum Wage

• 29 states have increased their minimum wages in the past decade.
  • **However**, many local ordinances adopting higher minimum wages in that time frame (Chicago, NYC, Seattle, Santa Fe, various CA, and many more!)
• Some disparity between FLSA and State Wage & Hour Laws
  • E.G. – No specific “computer employee” exemption in certain states
• Increasing numbers of “Predictable Scheduling” ordinances
  • Only Oregon has passed on state-wide level
Pay Equity

- Currently 14 States + D.C. have passed “pay secrecy” laws which prohibit such retaliation.
  - Generally protected under the NLRA as well
  - Many have also passed laws prohibiting employers from inquiring into an applicant’s salary history.
- Almost all states have passed some type of equal pay law
  - However, some states’ laws are more vigorous than others.
  - E.G. – California
    - Equal pay for employees who perform “substantially similar work” based on skill, effort, and responsibility vs. more common standard of “equal work”
Wage Theft

• Employers are increasingly getting “tagged” for wage theft
  • “Wage Theft” refers to any underpayments made to an employee
  • Examples include: Non-payment for “off-the-clock work,” misclassification, time record inaccuracies, tipped employee inaccuracies
• Most associate these issues with FLSA
  • BUT also implicates Davis-Bacon Act & Tax Law at Federal level
  • AND Half of states have enacted laws that address wage theft
    • E.G. – Connecticut law requires employers to “(1) advise employees in writing, at the time of hiring, of the rate of pay, hours of employment and wage payment schedules, and (2) make available to employees ... any employment practices and policies or changes with regard to wages, vacation pay, sick leave, health and welfare benefits and comparable matters.”

Control Over the Workplace
Issues With Workplace Rules

• Often, workplace rules designed with the proper intent of maintaining hygiene, professionalism, wellness, etc., attract discrimination lawsuits
  • Regulation of hairstyles & grooming might be “lightning rod” for racial, national origin, and religion discrimination charges.
  • Most are aware of religious pitfalls of work-dress regulation
    • BUT ALSO might also raise issues of gender/gender identity (in some jurisdictions)

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