

# Labor and Employment 2022 Symposium

August 18, 2022

## The Escalating Challenges of Remote Work

### Speakers

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### Materials

PowerPoint Presentation

ahead of the curve

Workplace law trends for today and beyond.  
Come up to speed to stay ahead.



## The Escalating Challenges of Remote Work

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### Dorsey Speakers



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## Agenda

- Tax and benefit overview
- Employment law overview
- Wrap up and next steps
- **Note: this is not meant to be a 50-state survey, but an overview of things to consider as your remote workforce grows**

## Tax and Benefit Overview

- Payroll and taxes
- Corporate taxes
- Licensing
- ERISA
- Expense reimbursement rules
- State laws
- Reporting health coverage
- Retirement plan mandates
- **Post-*Dobbs* considerations**

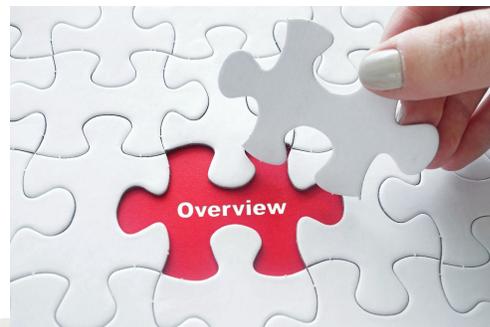


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## Employment Law Overview

- Unemployment insurance
- Workers compensation
- Wage and hour
- Employee leave
- Training and policy requirements (sexual harassment)
- Final paycheck and payout of unused PTO
- Prohibited inquiries on applications and in interviews
- Marijuana legalization
- Protected classes beyond federal law
- Post-*Dobbs* decision



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## Who Is A Remote Worker? (for purposes of this presentation)

- Remote worker for purposes of this presentation
  - Employee performing services in a state in which
    - (i) employer does not have its corporate headquarters,
    - (ii) employer does not have facilities, operations or connections, and (likely)
    - (iii) employer has a limited number of employees (employee may be only employee in state or one of limited number of employees in state)
- Not considered remote worker for purposes of this presentation
  - Employee working from home in same state where the employer is located or has operations
  - Employee working in another country
  - Independent contractor



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## Who Is A Remote Worker? (for purposes of this presentation)

- **Factors as to whether employee will be subject to laws of other state**
  - Purpose of presence (to perform services, attend a conference, etc.)
  - Length of presence (a day, a week, a month, etc.)
  - Frequency (once a month, once a year, etc.)
  - Type of job (major sporting league player, actor, salesperson, etc.)

## Payroll Income Taxes

- **Income taxes, tax withholding and reporting requirements vary by state**
  - Some states have no income tax
    - Examples: Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington, and Wyoming
  - Other states have income taxes
    - Some of these states do not tax income if employee in state for de minimis period of time or earns de minimis amount
- **States with income taxes have withholding and reporting requirements**
  - Even if employee only works part of year in state, employer may have withholding and reporting obligation
  - Further complication: Deferred compensation and equity awards
    - Example: Minnesota – If employee performs services for part of year in Minnesota and earns deferred compensation paid years later, Minnesota is likely due income tax on portion of deferred compensation earned from services performed in Minnesota

## Payroll Employment Taxes

- Employment taxes and employment tax withholding and reporting requirements vary by state
- Some states and localities have employment-related taxes
  - Example: Washington – Washington Cares Fund
  - Example: California – Paid family leave



## Corporate Taxes

- Corporate tax laws vary by state
- Allowing employee to work in state may create physical nexus for employer in that state, meaning employer may be subject to that state's and/or locality's corporate taxes
- Employer risks tax liability



## Wage and Hour Issues

- Exemptions, minimum wage, overtime
- Tests for determining whether a worker is properly classified as an independent contractor
- Pay transparency and disclosure
  - Colorado: Saying “open to anyone but Colorado applicants” doesn’t always work; enforcement is robust and active
  - New York: Recently passed law similar to Colorado
- Payout of accrued but unused PTO on termination
  - Usually governed by employee handbook
  - But watch out for California (even if employer has an unlimited PTO policy)
- Timing of last paycheck
  - Utah: If employee is fired, 24 hours; if employee quits, next regular payday
  - Iowa, Florida: No law, so next regular payday
  - Texas: If employee is fired, 6 calendar days; if employee quits, next regular payday

## Licensing

- Licensing requirements vary by state
  - If job requires license (such as medical professional or attorney, but there are many other positions), employer must assure employee is licensed in state where employee is performing services
  - Employer risks liability, including penalties for noncompliance with state licensing requirements
- Employment Contracts



## Unemployment Insurance

- Check coverage requirements in each state of operation
  - **Georgia:** Employers must pay unemployment insurance for *any* services performed in state
  - **Colorado:** Any employer who pays \$1,500 or more in wages during current or preceding calendar year, or any employer who employs at least one individual for at least one day during 20 different weeks during current or preceding calendar year, must pay unemployment insurance
- Employees can **file** for unemployment in any state they choose; will be governed by law of state in which they worked
- Interstate Reciprocal Coverage Arrangement
  - Permits employers in multiple states to centralize payments in one jurisdiction, provided adequate notice is given to others
  - Must register with required state agencies

## Workers' Compensation

- Check coverage requirements in each state of operation
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## ERISA Preemption

- What is ERISA?
- What is ERISA-preemption?
- Exceptions to ERISA-preemption



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## ERISA Preemption

- ERISA covers many but not all benefit plans
- ERISA-covered plans
  - Retirement plans – 401(k) plans, defined benefit plans
  - Health and welfare plans – Health, dental, vision, life insurance, long-term disability, insured short-term disability, health flexible spending account
- Plans not covered by ERISA
  - Governmental plans
  - Church plans (non-electing church plans)
  - Health and welfare plans – Dependent care assistance, payroll continuation (short-term disability)

## ERISA Preemption

- For ERISA-covered plans, ERISA generally preempts state law, but there are several exceptions
- ERISA's preemption language reads (in part)
  - ERISA preempts state laws
    - 29 U.S.C. § 1144(a) (ERISA § 514(a))
  - However, ERISA does not preempt state insurance, banking, or securities laws
    - 29 U.S.C. § 1144(b)(2)(A) (ERISA § 514(b)(2)(A))
      - Self-insured health plans are not considered insurance
        - » 29 U.S.C. § 1144(b)(2)(B) (ERISA § 514(b)(2)(B))
  - And ERISA does not preempt generally applicable state criminal law
    - 29 U.S.C. § 1144(b)(4) (ERISA § 514(b)(4))

## ERISA Preemption

- ERISA does not preempt all state laws...
- States have become active in enacting laws that touch on benefit plans
- In addition, courts continue to review and work to interpret extent of ERISA preemption
  - Examples of cases
    - *Rutledge v. Pharmaceutical Care Management Ass'n*, 141 S.Ct. 474, 208 L.Ed.2d 327 (2020)
      - Preemption did not block state law regulating pharmacy benefit managers (PBMs)
    - *Gobeille v. Liberty Mutual Insurance Co.*, 577 U.S. 312, 136 S.Ct. 936, 194 L.Ed.2d 20 (2016)
      - Preemption did block state law requiring plans to report health claims
    - *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 115 S.Ct. 1671, 131 L. Ed.2d 695 (1995)
      - Preemption did not block state law requiring hospitals to collect surcharge from patients

## CLE Code for Attendees

*(Tip: The CLE code is different than the event code assigned by states)*

## State Laws Expense Reimbursement

- **Several states and D.C. require reimbursement for job expenses, including:**
  - **North Dakota:** “[A]ll the employee necessarily expends or loses in direct consequence of the discharge of the employee’s duties”
  - **Iowa:** Expenses authorized by employer within 30 days of an employee submitting claim for reimbursement
  - **South Dakota:** “[I]ndemnify an employee ... for all that the employee necessarily expends or loses in direct consequence of the discharge of the employee’s duties”
- **What is covered?**
  - Home internet
  - Furniture
  - Printing supplies

## State Laws

### Washington Long Term Services & Supports Act

- **State of Washington – Long Term Services and Supports Act (Washington Cares Fund) (RCW 50B.04)**
- **Effective: July 1, 2023 Purpose: To raise revenue to pay for long term care assistance expenses of residents of State of Washington**
  - **Payroll taxes**
    - Payroll tax rate of 0.58% of all wages, with no cap
    - Covered wages generally include commissions, bonuses, severance and other compensation
  - **Benefits**
    - Available to eligible individuals starting July 1, 2026

## State Laws

### Illinois Consumer Coverage Disclosure Act

- **State of Illinois – Consumer Coverage Disclosure Act (820 ILCS 46)**
- **Effective: August 27, 2021**
  - **Purpose: To require employers to disclose to employees how covered benefits under its employer’s health plan compares to essential health benefits required by State of Illinois**
  - **Notice: Employers to provide employees eligible for coverage notice that compares benefits in employer’s health plan to essential health benefits required under individual health insurance coverage regulated by Illinois**
    - Notice to be give (i) at hire, (ii) annually after hire, and (iii) upon request by employee
    - Notice to be provided by e-mail or on intranet website employee is able to regularly access
  - **Penalties for employer with 4+ employees:**
    - \$1,000 for first offense; \$3,000 for second offense; \$5,000 for third or subsequent offense

## State Laws

# California Consumer Privacy Act

- **State of California – California Consumer Privacy Act**  
(CA Civil Code 1798.100 *et. seq*)
- **Effective: January 1, 2020 (January 1, 2023 with respect to employee information)**
  - **Purpose: To protect consumers’ (including employees) private information**
    - “Personal information” means information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with particular consumer or household – in other words, nearly everything
  - **Individual (employee) rights: List of rights**
  - **Protections for employees**
    - Employers to protect employee data (employee data exempt from many requirements, but not data protection)
    - Employers to provide to employees data employer collects and its use (such as benefits)
    - Sign CPRA-compliant contracts with vendors that handle employee information

## Reporting Health Coverage

- **State health coverage reporting**
  - **Several states and D.C. mandate that residents maintain health coverage and require reporting on health coverage for residents**
    - **D.C.** (D.C. Code §§ 47-5101 to 5109): Form 1094-C and Form 1095-C
    - **California** (2019 Ch. 38, SB 78): Form 1094-C and Form 1095-C
    - **Massachusetts**: Note filing is Form MA 1099-HC (not Form 1095-C or Form 1095-B)
    - **New Jersey** (N.J. Stat. § 54A:11): Form 1094-C and Form 1095-C
    - **Rhode Island** (R.I. Stat. 27-18.5 (2019 Ch. 88, HB 5151 Art. 11)): Form 1094-C and Form 1095-C
    - **Vermont** (32 V.S.A. Ch. 244 (2019 Act 63, HB 524)): Form 1094-C and Form 1095-C (reporting requirement does not apply so long as federal reporting is required)
  - **Considerations**
    - **Concern: Danger in sending Forms 1095-C for individuals not residents of jurisdiction**
    - **Concern: Are vendors handling state reporting for employer**

## Leave Laws

- **Voting, jury duty, domestic violence, school activities, organ or blood donation, holidays**
- **Pregnancy disability leave**
  - **Minnesota:** Individual must have been employed for year (and met other criteria)
  - **Iowa:** Eligible regardless of how long they have been employed
- **Family and medical leave (similar to and different from FMLA)**
- **Earned Sick Time**
  - **Minneapolis:** Employers with 6+ employees must provide paid sick and safe time. Employers with 5 or fewer employees must provide sick and safe time but it can be unpaid. Good example of paying attention to local ordinances, not just state law
  - **Arizona:** Employees earn 1 hour of sick time for every 30 hours worked
  - **Nevada:** Employers with at least 50 employees must provide employees with paid sick leave at rate of at least 0.01923 hours for each hour of work performed
  - Additional details regarding accrual rate, maximum accrual, payout on termination, acceptable use, etc.

## Retirement Plan Mandates

- **State retirement plan mandates**
  - More than 13 states and cities have passed laws (or ordinances) requiring employers to enroll employees in state retirement plan if employer does not offer retirement plan
  - Three states (California, Illinois, and Oregon) have plans in operation and cumulatively have over \$400 million in assets and more than 240,000 accounts
    - Georgetown University Center for Retirement Initiatives
      - <https://cri.georgetown.edu/states/state-data/>

## Retirement Plan Mandates

- **Legislation (for employees who do not have access to employer retirement plan)**

State (City)	Enacted	Implemented	Form	Man / Vol	Assets 12/31/21	Accounts 12/31/21
• California	2016	2020 in waves	State IRA	Mandatory	\$173,022,007	217,892
• Colorado	2020	2022 anticipated	State IRA	Mandatory		
• Connecticut	2016	2022 in waves	State IRA	Mandatory		
• Delaware	2022	2025 anticipated	State IRA	Mandatory		
• Hawaii	2022	To be determined	State IRA	Mandatory		
• Illinois	2015	2021 in waves	State IRA	Mandatory	\$84,871,970	99,082
• Maine	2021	2023 anticipated	State IRA	Mandatory		
• Maryland	2016	2022 anticipated	State IRA	Mandatory		
• Massachusetts	2012	2017	MEP	Voluntary (for small nonprofits)		
• New Jersey	2016	2022 anticipated	Marketplace	Voluntary		
• New Mexico	2020	2024 anticipated	Marketplace	Voluntary		
• New York	2018	2022	State IRA	Mandatory		
• New York (NY City)	2021	Uncertain	State IRA	Mandatory (to be discontinued if NY state starts)		
• Oregon	2015	2017 in waves	State IRA	Mandatory	\$150,010,539	112,689
• Virginia	2021	2023 anticipated	State IRA	Mandatory		
• Vermont	2017	2022 anticipated	MEP	Voluntary		
• Washington	2017	2020	Marketplace	Voluntary		
• Washington (Seattle)	2017	Uncertain	State IRA	Mandatory		

## Mandatory Policies and Training – Sexual Harassment

- **Some states have laws requiring certain employee handbook policies/disclosures related to sexual harassment**
- **Some also require sexual harassment training**
- **Employee threshold**
- **Hour threshold**
- **Content threshold**
- **States that have some kind of requirements related to sexual harassment in the workplace:**
  - California
  - Connecticut
  - Illinois
  - Maine
  - Massachusetts
  - Michigan
  - New York

## Other Employment Law Considerations

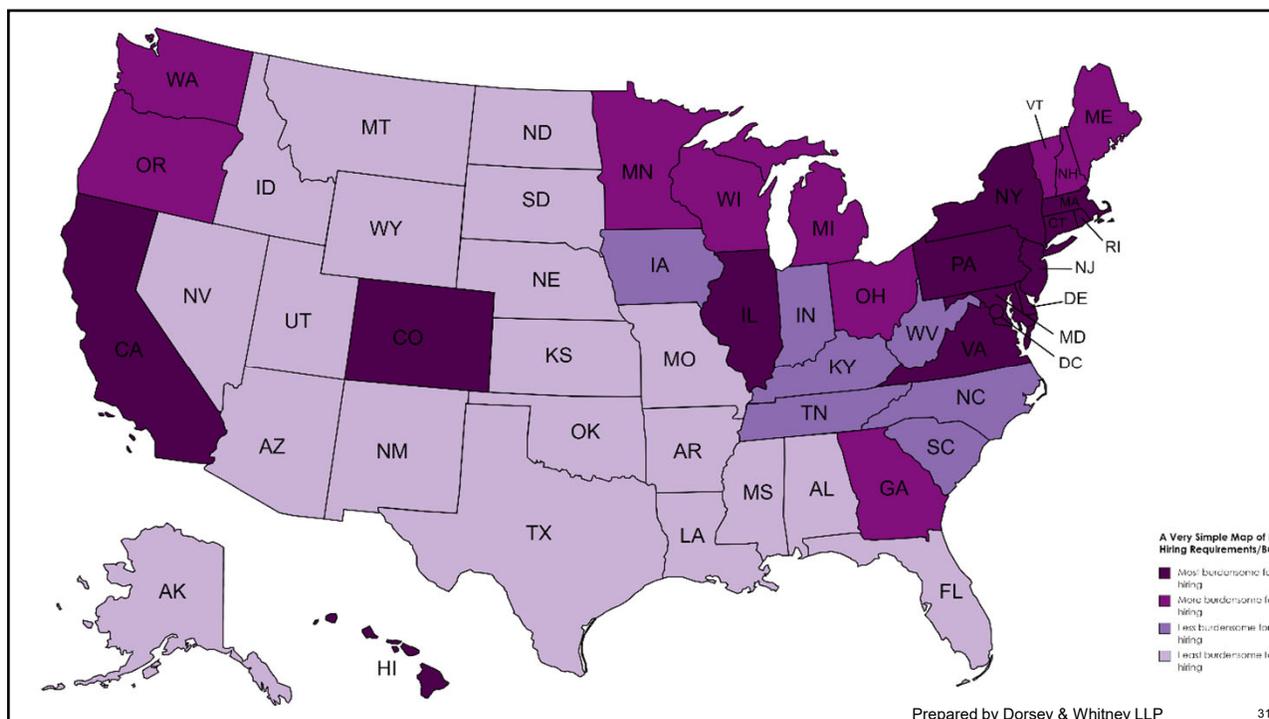
- **Prohibited inquiries**
  - Criminal history
  - Pay expectations
- **Marijuana legalization**
  - Can complicate company-wide drug testing policies
- **Protected classes beyond federal law**
  - In some states, an age discrimination claim can be brought by those 18 and older (rather than 40 and older)
  - Some states prohibit employers for taking action based on legal drug use



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## Risk Assessment

- **Are there certain states in which you want to have remote workers**
  - Have your employees expressed an interest in certain states
  - Do you have an interest in certain states
  - What are you looking for
    - States that have employee friendly laws; states that have employer-friendly laws
    - States that have socially progressive laws; states that are more conservative
    - State laws regarding abortion (protections or restrictions)
- **Are there certain states that require greatest amount of effort to be in compliance with state laws**
  - Examples: California, Colorado, New York



## Next Steps

- Pick the states in which you'll allow remote workers (ensure compliance with states laws if workers are already remote)
- Complete foreign corporation registration, if necessary
- Complete unemployment insurance paperwork, if necessary
- Secure state-compliant workers' compensation insurance, if necessary
- Prepare remote work policy and other state-specific policies, notices, disclosures, etc.

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