The East Coast/West Coast Squeeze

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Agenda

- **East Coast**
  - Paid Sick Leave
  - Reproductive Health Rights
  - Emerging “Crown” Acts
  - New York Updates to the Salary History Ban & Fair Chance Act
- **Washington**
  - Non-Compete Agreements
  - Washington Paid Family and Medical Leave Act
  - General Observations on L&E
- **California**
  - Paid Sick Leave
  - ADA Website Lawsuits
  - Salary History Ban/ Equal Pay
  - Discrimination Issues: Crown Acts and More

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East Coast - Paid Sick Leave

- **Employees are entitled to receive no less than one hour of sick leave for every:**
  - **30 hours worked in Maryland, Massachusetts, New Jersey, New York**
  - **35 hours worked in Rhode Island**
  - **40 hours worked in Connecticut, Maine (for *any* reason)**
  - **52 hours worked in Vermont**
- **Additional Considerations:**
  - **Unpaid versus paid, accrual caps, and carryover may be dependent on the employer's size and income.**
  - **May frontload the full amount of required leave at the beginning of the calendar year.**
  - **Waiting periods: CT (680 hours), DC / MA / RI (90 days), MD (106 days), ME & NJ (120 days), VT (up to 1 year)**

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East Coast - Paid Sick Leave

- **Key permitted uses (CT, DC, MA, MD, ME, NJ, NY, RI, VT):**
  - An employee's/family member's mental or physical illness, injury or health condition;
  - Diagnosis, care, or treatment of an employee's/family member's mental or physical illness, injury or health condition;
  - Specified reasons related to domestic violence and human trafficking.
- **Additional permitted uses in New Jersey, New York City, Vermont:**
  - Employer's place of business or employee's child's school or child care provider is closed due to a declared public health emergency.

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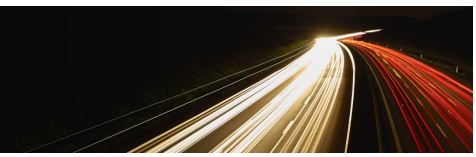
New York Reproductive Health Rights



- **New York State Labor Law Section 203-e defines "reproductive health decision making" as "including, but not limited to, the decision to use or access a particular drug, device or medical service."**
- **The law prohibits an employer from:**
  - Accessing an employee's personal information regarding reproductive health decisions, without the employee's prior informed affirmative written consent.
  - Discriminating or taking any retaliatory personnel action.
  - Requiring waivers that purports to deny employees the right to make their own reproductive health care decisions.
- **The law provides examples of services related to reproductive health decisions.**

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New York Reproductive Health Rights

Handbooks must be updated to include a notice of employees' rights and remedies. Recommended insert:

New York State law prohibits discrimination and retaliation in employment based on an employee's or an employee's dependent's reproductive health decision making, including but not limited to, the decision to use or access a particular drug, device or medical service (hereinafter "reproductive health decisions"). It is an unlawful employment practice for the Company to access an employee's personal information regarding their or their dependent's reproductive health decisions without the employee's prior informed affirmative written consent, or to require an employee to sign a waiver or other document which purports to deny an employee the right to make their own reproductive health decisions. Any employee who feels there has been a violation of this policy should report their concern to [fill in appropriate title/department]. The Company will investigate and take appropriate remedial action. An employee may also file a private legal action and can seek remedies to the extent available under applicable law. Discrimination and retaliation against employees who exercise rights under this policy is prohibited.

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Race Discrimination Based on Natural Hair or Hairstyle

"CROWN Acts" – (Creating a Respectful and Open World for Natural Hair):

- **New York: The definition of "race" in the NYSHRL has been amended to include "traits historically associated with race, including but not limited to, hair texture and protective hairstyles."**
- **"Protective Hairstyles" include hairstyles such as "braids, locks, and twists."**
- **Similar acts in California, Colorado, Maryland, New Jersey, Virginia, and Washington and in 20 major cities/counties in AZ, GA, FL, KY, LA, MI, MO, NM, NV, OH, PA, WI and WV.**
- **In 2020, 25 states considered related legislation. The United States House of Representatives passed the Crown Act in September 2020.**

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New York Salary History Ban

19 states have some form of salary history ban, but New York's ban is broader than most.

- **The 2017 (NYC) and 2020 (NY State) laws prohibit employers from, among other things, *inquiring about or relying upon* a job applicant's salary or wage history and benefits in setting compensation for the applicant.**
- **The law seeks to ensure pay equity and prevent pay differentials based on gender from being compounded over time.**
- **Employers may still inquire about an applicant's salary expectations.**
- **An employer can confirm salary if the applicant gives a pay history to support a higher salary when a job is offered.**

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New York Salary History Ban

Key New York State Parameters:

- **Employers are prohibited from directly asking candidates about their salary history, *as well as trying to obtain this information* by searching publicly available records or requesting it from the applicant's current or former employers.**
- **Prohibits employers from relying on salary history in determining whether to (i) interview, (ii) hire or (iii) promote an applicant or current employee.**
- **Permits an employer to verify salary history that is voluntarily disclosed only after an offer of employment with compensation has been extended. The City law permits verification upon voluntary disclosure.**

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New York Fair Chance Acts

- Generally an employer may only refuse to hire an applicant based on a criminal history inquiry if there is either:
  - a direct relationship between the criminal offense and the job sought or held by the individual; or
  - if the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.
- Must consider factors, including but not limited to, age at time of offense, time lapsed from offense, seriousness of offense, and specific duties and responsibilities necessarily related to the employment.
- Requires employers to engage in a detailed process before acting on criminal history information, including keep the position open during the applicant's response period.

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Amendments to New York City Fair Chance Act – Effective July 28, 2021

- Applies to pending arrests or other pending criminal accusations.
- Applies to employers seeking to rescind a promotion or transfer, or to end the employment of, a current employee. Also applies to independent contractors and freelancers.
- Prohibition on inquiring about ***certain criminal history at any time.***
- Adjusts factors for assessing applicants and employee convictions and arrests.
- Expands applicant's/employee's time to respond from 3 to 5 days.
- An employee may be placed on a unpaid leave for a reasonable time when conducting a Fair Chance Process assessment.

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Washington Cracks Down on Non-Compete Agreements

RCW 49.62

- **Non-competes are "void and unenforceable":**
  - **Unless:**
    - **The terms of non-compete are disclosed before the employee accepts employment, OR**
    - **The non-compete is in exchange for an increase in compensation and the employer specifically discloses that the non-compete may be enforced in the future.**
  - **Unless the employee earns over $100,000 per year adjusted for inflation;**
  - **If the termination is a result of a layoff, employer must pay the employee's base salary over the duration of the non-compete;**
  - **Presumption that non-competes over 18 months long are unenforceable.**
    - **Proponent must prove by "clear and convincing evidence" that a non-compete over 18 months is necessary.**

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Washington Cracks Down on Non-Compete Agreements

- Provisions requiring Washington employees to litigate non-compete agreements outside of Washington are unenforceable.
- Provisions depriving Washington employees of the protections of Washington's non-compete statute are unenforceable.
- Employee's earning less than 2x the state minimum wage cannot be prohibited from taking an additional job.
  - Unless the second job raises safety issues or interferes with reasonable scheduling expectations of the employer.

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Washington Cracks Down on Non-Compete Agreements

- Potentially brutal penalties if a non-compete isn't enforced or is only partially enforced.
  - If a court determines that a non-compete violates RCW 49.62, the employers must pay the employee's attorney fees, plus the greater of $5,000 and the employee's actual damages.
  - If a court reforms, rewrites, modifies, or only partially enforces the non-compete, the employer must pay the employees attorney fees, plus the greater of $5,000 and the employer's actual damages.
- If the employee loses out on a job because of a non-compete, the former employer can be on the hook for the employee's lost wages.
- RCW 49.62 applies to all cases filed after January 1, 2020, regardless of when the non-compete was signed.

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Washington Paid Family and Medical Leave Act

- State administered Paid Family and Medical Leave, funded with employer and employee contributions.
- Up to 12 weeks of personal medical leave and up to 12 weeks of family leave, for a combined total of up to 16 weeks, plus an additional 2 weeks for pregnancy disability.
- Pays up to 90% of weekly wages for low income workers and up to $1,000 per week.

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Washington Paid Family and Medical Leave Act

- Family Leave
  - Employees can take up to 12 weeks of paid family leave in any given 52 week period.
  - Family leave can be used to care for a newborn or newly adopted child; or
  - A family member with a serious health condition – includes child, spouse, domestic partner, parent, parent-in-law, sibling, grandparent, or grandchild.
- Medical Leave
  - 12 weeks of paid medical leave for the employee's own serious health condition.
  - Plus an additional 2 weeks for pregnancy related complications.
- An employee may take up to 16 weeks of combined family and medical leave in a 52 week period, plus an additional 2 weeks for pregnancy for total of 18 weeks.

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Washington Paid Family and Medical Leave Act

- **Possible to string together a lot of leave.**
  - **Federal FMLA leave runs concurrent with WA PFML.**
  - **But, WA PFML does not run concurrently with Federal FMLA.**
  - **Employees can take 12 weeks of protected FMLA leave and then be entitled to another up to 18 weeks of WA PFML.**
- **Substantial delays in WA PFML payments from the Washington Employment Security Department.**
- **Has led to much employee frustration and employers scrambling to provide assistance to employees on supposedly paid leave.**

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Washington Paid Family and Medical Leave Act

- **Key Concept: Supplemental Benefits**
- **Employers may designate other forms of paid leave as "supplemental benefits."**
- **"Supplemental benefits" do not count as "earnings" for purposes of calculating an employees entitlement to paid leave.**
- **This allows an employer to pay the portion of an employee's pay during leave that WA PFML doesn't cover (top off WA PFML benefits).**
- **It's important for Washington employers to appropriately designate supplemental benefits, otherwise employees and employers will miss out on a paid leave system they have both already paid into.**

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General Observations On L&E in Washington

- **Social justice considerations are paramount.**
  - If you are perceived as a cruel, uncaring employer, courts and investigators will find a way to make you lose.
- **Public relations concerns continue to overtake legal liability as a primary concerns.**
  - Customers don't want to purchase from and business partners don't want to be associated with perceived bad actors.
- **Recent unprecedented events (COVID-19, Summer protests) have made concepts like "good faith" paramount.**
  - In the absence of precedent, our legal system—and human nature—resorts to concepts like "good faith."
- **The concept of "at-will" employment is becoming theoretical.**

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Sick Leave Law

- **California**
  - **California Heathy Workplace Act (all employers) 1 hours of paid sick leave for every 30 hours worked capped at 3 days / 24 hours (see local ordinance.)**
  - **2021 Cal Supplemental Paid Sick Leave (COVID) (Employees of 25 or More.)**
    - **Must provide notice on paystubs in first payroll period after 3/29/2021.**
    - **Retroactive to 01/01/2021; expires 09/30/2021.**
    - **80 hours for full time employees; number of hours worked for a two week period.**
    - **Capped at $511 per day $5,110 aggregate.**

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Paid Family Leave

- **Extends Paid Family Leave benefit from six weeks to eight weeks, including for new parents.**
- **Does not affect separate State Disability Insurance Benefit.**
- **Effective July 1, 2020.**
- **Other states with PFL: New Jersey, New York, Massachusetts, Rhode Island, Washington, and District of Columbia.**
- **Consider increase relating to paid parental plans and coordination of benefits.**

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Sick Leave Law

- **Colorado**
  - Since January 1, 2021, employers with 16 or more employees – one hour of paid sick leave per 30 hours worked up to a 48 hours annually.
    - Employees own condition.
    - Need to care for a family member or obtain treatment for a family member.
    - Absences related to being the victim of domestic abuse, sexual assault or harassment.
    - Public Order closing school or place of care.
  - Carryover of up to 48 hours.
  - Public Health Emergency Supplemental 80 hour rule.

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Website Accessibility

- **California**

  ***Robles v. Domino's Pizza* (2019)**

  - Website connected customers to the physical location and allowed pizza orders / deliveries.
  - ADA applies to Domino's Website and App.
  - Absence of clear Website accessibility regulations from the DOJ did not violate due process rights.
  - To be a "public accommodation," an online business must have a nexus to an actual physical space.

  (Third, Fifth, Sixth and Ninth Circuit agree)

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Website Accessibility

- **Colorado**
  - No rulings but David Katt has filed at least 52 lawsuits against companies operating in Colorado since December 2020.
- **Illinois**
  - No nexus to a physical location required.

  (Seventh Circuit – Illinois, Indiana, Wisconsin)

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Website Accessibility

- **Alabama, Florida, Georgia (11th Circuit)**

  Gil v. Winn-Dixie **(April 7, 2021)**
  - "Websites are not places of public accommodation."
  - Plaintiff's inability to access the website does not violate Title III of the ADA.
  - Does not constitute an intangible barrier to access and enjoy equally the goods, services, facilities, privileges, advantages or accommodations "because it had limited functionality and was not a point of sale."

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Salary History Ban / Equal Pay

Expanded Reporting Requirements

- **California**
  - **Labor Code Section 432.3.**
    - **May not seek or rely on salary history.**
    - **Must provide pay scale (salary or hourly wage for this position, not bonus or equity.)**

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Salary History Ban / Equal Pay

Expanded Reporting Requirements

- **Illinois**
  - **Private employers with 100 employees in Illinois must obtain an equal pay registration certificate by March 23, 2024 or within 3 years of commencing operations.**
  - **Recertify every 2 years.**
  - **To obtain: (1) Pay a filing fee; (2) submit an "equal pay compliance statement;" (3) if required to submit an EEO-01, add a list of employees separated by gender, race and ethnicity and reporting total wages**
  - **Penalty is 1% of gross profits.**

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Salary History Ban / Equal Pay

- **Illinois**
  - May not consider even voluntary disclosed salary history.
- **Compare: Michigan and Wisconsin where local governments may not enforce laws or restrictions restricting employers ability to ask about salary history**
  - Can ask about salary expectations.
  - Prior salary can never be used to justify a pay differential except for current employees if the differential is justified by seniority system, merit system or other bona fide factor other than sex, race or ethnicity.

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Equal Pay

- ***Rizo v. Yovino*** **(Vacated) U.S. Supreme Court / 9th Circuit**
  - Prior salary cannot be used to justify a gender wage differential in an Equal Pay Act Claim.
  - Just perpetuates the wage gap ad infinitum.

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Pay Data Reporting Requirements

- SB 973 requires private employers of 100 or more employees with at least one employee in California to report by March 31, 2021
  - Pay
  - Hours worked by EEO category
  - Sex
  - Race
  - Ethnicity
- See www.dfeh.ca.gov Pay Data Reporting
  Cal Gov't Code §12999
- Data will not be publically available but will be used by DFEH for enforcement purposes

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Thank you!

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