

ahead of the curve

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



2021 Legislative & Regulatory Developments



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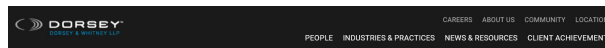
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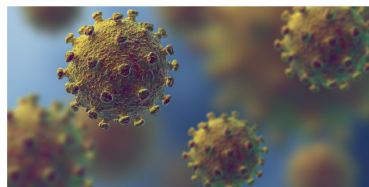
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Stay Updated about COVID-19 Rapid Changes Continue!



PUBLICATIONS



Coronavirus Resource Center

March 2020
As the 2019 Novel Coronavirus (COVID-19) outbreak continues to unfold governments, economies, businesses, and countries are being adversely affected. Many companies are therefore also facing significant and urgent business and legal challenges so we have created a resource center to provide information that may be helpful in decision making.

RELATED INDUSTRIES & PRACTICES

- China
- Class Action Litigation
- Commercial Litigation
- Construction & Design
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- Development & Infrastructure
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- Europe
- Food, Beverage & Agribusiness
- Government Contracts Counseling & Litigation
- Government Enforcement & Corporate Investigations
- Healthcare

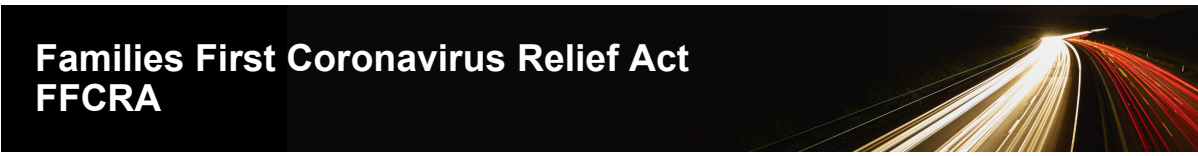
www.Dorsey.com/Coronavirus





Alphabet Soup: New(ish) Statutes to Know

- **Families First Coronavirus Response Act (“FFCRA”)**
 - Enacted March 18, 2020
 - Emergency Paid Sick Leave Act (“EPSLA”)
 - Emergency Family and Medical Leave Expansion Act (“EFMLEA”)
- **Coronavirus Aid, Relief, and Economic Security (“CARES”) Act**
 - Enacted March 27, 2020
- **Consolidated Appropriations Act of 2021 (“CAA”)**
 - Enacted December 27, 2020
- **American Rescue Plan Act (“ARPA”)**
 - Enacted March 11, 2021



Families First Coronavirus Relief Act FFCRA

- Hopefully you already know if FFCRA applies to you...
- If not, let's talk...

FFCRA Emergency Paid Sick Leave

- Applies to **all** employees, immediately (no waiting period)
- Up to two weeks of paid sick leave + corresponding tax credit
- Employee cannot work (or telework) due to a need for leave for **six** possible reasons:
 - Subject to a Federal, State, or local **quarantine or isolation order** related to COVID-19;
 - Advised by a health care provider to **self-quarantine** due to concerns related to COVID-19; or
 - Experiencing **symptoms** of COVID-19 **and seeking medical diagnosis**
 - **Caring for an individual** who is subject to a quarantine or isolation order, or who was advised by health care provider to self-quarantine due to COVID-19-related concerns;
 - **Caring for son or daughter** due to school or child care closures or unavailability; **or**
 - Experiencing a “**substantially similar condition**” as specified by the Secretary of Health and Human Services
 - Unclear what this means
- Cap for first three reasons: **100% of regular rate of pay, capped at \$511/day (\$5,110 aggregate)**
- Cap for last three reasons: **100% of regular rate of pay, capped at \$200/day (\$2,000 aggregate)**

FFCRA Emergency FMLA Expansion (EFMLEA)

- **Eligibility Requirement: Must be employed for 30 calendar days**
- **Waiting period: Two weeks of unpaid family leave; ten weeks paid (12 total)**
 - More on this later...
- **Adds one new reason for FMLA leave: Caring for son/daughter whose school / care is closed, or child care provider unavailable, due to COVID-19 related reasons**
- **2/3s of an employee’s regular rate of pay, capped at \$200 per day (\$10,000 aggregate)**

Consolidated Appropriations Act CAA

- **CAA and FFCRA**
 - Extended tax credits available for FFCRA paid leave...
 - ...but **NOT** the mandate
 - January 1, 2021 through March 31, 2021
- **DOL FAQ 104**
 - Even if employee was eligible for paid leave in 2020, employer is no longer required to provide leave after December 31, 2020
 - But may do so voluntarily
 - No employee is entitled to FFCRA leave beyond December 31, 2020

American Rescue Plan Act ARPA

- **Signed by President Biden on March 11, 2021**
- **Some major changes to employers' paid leave obligations...**



ARPA Additional Covered Reasons – FFCRA

- **Another extension to available tax credits**
 - April 1, 2021 through September 30, 2021
 - No extension of the mandate (expired December 31, 2020)
- **Expands on the six reasons for paid sick leave in FFCRA**
- **Three new, additional reasons:**
 - (1) obtaining a COVID-19 immunization;
 - (2) recovering from an injury, disability, illness, or condition related to immunization;
 - (3) seeking or awaiting the result of a COVID-19 test or diagnosis when:
 - Employee was exposed to COVID-19 **OR**
 - Employer has requested the test or diagnosis

ARPA New Bank of FFCRA Time

- **Tax credits apply only to wages paid on or after April 1, 2021**
- **New bank of 10 days of paid sick leave**



ARPA Other EFMLEA Changes

- **Same extension**
 - April 1, 2021 through September 30, 2021
- **Removes two week waiting period**
 - Previously, unpaid
- **Increases cap on aggregate paid leave**
 - From \$10,000 to \$12,000

ARPA New Reasons for Paid Family Leave - EFMLEA

- **Before: ONLY to care for son or daughter**
- **Now: Also available for any of the six qualifying reasons provided for in the FFCRA and any the three new reasons under the ARPA**

(2) RULES OF APPLICATION.—For purposes of paragraph (1)(B), in determining whether an individual would be entitled to receive paid leave under the Emergency Family and Medical Leave Act—

(A) section 110(a)(2)(A) of the Family and Medical Leave Act of 1993 shall be applied by inserting “or any reason for leave described in section 5102(a) of the Families First Coronavirus Response Act, or the employee is seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, COVID–19 and such employee has been exposed to COVID–19 or is unable to work pending the results of such test or diagnosis, or the employee is obtaining immunization related to COVID–19 or recovering from any injury, disability, illness, or condition related to such immunization” after “public health emergency”, and

ARPA The Big Question (EPSL and EFMLEA)

- “Can we offer only paid sick leave, but not EFMLEA?”
 - Or vice versa?
- “Can we offer only paid leave to obtain the vaccine, but no other reasons?”
- “Can we offer only one day of leave instead of ten?”



ARPA The Big Question (EPSL and EFMLEA)

- No DOL guidance on these issues (yet)
- Keep checking Dorsey’s e-alerts and Coronavirus Resource Page
- As of today...
 - Employer may offer EPSL, EFMLEA, both, or neither
 - **BUT**
 - To obtain the tax credit, must offer entire menu within that election
 - All reasons
 - Maximum number of days of leave

ARPA Other Things to Know...

- **Additional Pandemic Emergency Unemployment Compensation**
 - Up to 53 weeks, through September 6, 2021
- **Additional Pandemic Unemployment Assistance**
 - Up to 79 weeks, through September 6, 2021
 - In certain states with high UE rates, up to 86 weeks
- **Federal Pandemic Unemployment Compensation**
 - Extends the \$300 reduced rate in the CAA
 - Through September 6, 2021
- **Tax Changes**
 - For individuals earning less than \$150,000, waiver on federal taxes for first \$10,200 in UE benefits received in 2020

ARPA Other Things to Know...

- **New non-discrimination requirements**
 - If found liable, lose tax credits
 - Avoid making distinctions based on...
 - FT v. part-time
 - High \$ employees v. low \$ employees
 - Seniority
 - Medical history/conditions
 - Employees with children

ARPA Other Things to Know...

- **Very briefly, but...**
- **Extension of Short-Time Compensation programs**
 - Through **September 6, 2021**
- **Extension of employee retention credits**
 - Through **December 31, 2021**
 - Expansion of scope to include *all* employees for 3Q and 4Q 2021 if “severely financially distressed”

Federal Developments – Benefits ARPA – COBRA Subsidy

- **COBRA for health, dental, and vision plans (ARPA § 9501)**
 - Employees who lost medical coverage due to involuntary termination or reduction in hours and elect COBRA are treated as having paid COBRA premiums for period of April through September 2021
 - Eligibility – Eligibility for subsidy ends earlier of:
 - September 31, 2021
 - End of COBRA coverage period
 - Eligibility for coverage under another group health plan
 - Election – Assistance eligible individuals must elect COBRA to receive subsidy
 - Notice – Employers to provide clear and understandable notice to assistance eligible individuals of eligibility between 15 to 45 days before subsidy expires
 - DOL to issue guidance by April 10, 2021
 - Employers to provide eligibility notice by May 31, 2021
 - Credit – Employers receive payroll tax credit for COBRA premiums

Federal Developments – Benefits ARPA – COBRA Subsidy

- **COBRA for health, dental, and vision plans – DOL guidance**
 - **FAQs**
 - FAQs About COBRA Premium Assistance Under the American Rescue Plan Act
 - <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/cobra-premium-assistance-under-arp.pdf>
 - **Model election notices**
 - Model for individuals who lost coverage and COBRA commenced before April 1, 2021
 - <https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/cobra/premium-subsidy/model-extended-election-periods-notice.pdf>
 - Model for individuals whose COBRA coverage commences April 1, 2021
 - <https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/cobra/premium-subsidy/model-general-and-election-notice.pdf>
 - Employers to provide eligibility notice by May 31, 2021
 - **Model end of assistance notice (end of the COBRA premium assistance period)**
 - <https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/cobra/premium-subsidy/notice-of-premium-assistance-expiration-premium.pdf>
 - Employers to provide at least 15 days before and not 45 days before end of assistance

Federal Developments – Benefits Joint Notice and EBSA Notice 2021-01

- **COBRA, HIPAA, and claims for health, dental, vision, and other group health plans**
- **Suspension of benefits deadlines**
 - **Joint notice from DOL and IRS (Federal Register, May 4, 2020)**
 - Suspends several benefit plan deadlines for period from March 1, 2020 until earlier of one year or 60 days after announced end of national emergency
 - COBRA election, COBRA premium payment, HIPAA special enrollment, ERISA claim and appeal deadlines
 - **EBSA Notice 2021-01**
 - States that where administrator reasonably should know “end of the relief period for an individual action is exposing a participant or beneficiary to a risk of losing protections, benefits, or rights” administrator “should consider affirmatively sending a notice regarding the end of the relief period”
 - Allows extended period for individuals

Federal Developments – Benefits IRS Notice 2021-15

- **Changes to health plan coverage for health plans**
 - Health plan coverage changes – Allows employer to amend plan to allow employees to make prospective elections with respect to health coverage (including dropping coverage)

Federal Developments – Benefits COVID-19 Treatment and Vaccinations

- **Benefits provided under health plan related to COVID-19**
 - Testing and treatment – Requires group health plans cover COVID-19 testing and treatment (CARES Act §§ 3201 and 3202; FFCRA § 6001)
 - Vaccination – Requires group health plans to cover COVID-19 vaccinations that meet certain requirements after CDC recommends them (CARES Act § 3203)
- **Vaccination incentives and programs**
 - If employer wants to offer incentives, employer needs to consider:
 - State privacy laws
 - GINA and ADA concerns
 - Taxation of incentives
 - If employer wants to vaccinate its employees, employer needs to consider:
 - ERISA
 - HIPAA and more

Federal Developments – Benefits CAA – Student Loans

- **Reimbursement of student loans (CAA § 120)**
 - Allows employer to reimburse employees on a pre-tax basis for educational loans for up to \$5,250 a year for years 2021 to 2025
 - Counts against tuition assistance limit under section 127 of \$5,250
 - Requires written plan and compliance with provisions of section 127

Federal Developments – Benefits CAA – Defined Contribution Plan Relief

- **CAA allows (does not require) the following plan changes**
 - **Qualified disaster distribution (CAA, Div. EE, § 302(a))**
 - Allows distribution due to disaster of up to \$100,000, taxed or repaid over three years
 - Disasters from December 28, 2019 to December 27, 2020, declared by President from January 1, 2020 through February 25, 2021
 - **Qualified disaster loan relief (CAA, Div. EE, § 302(c))**
 - Expands loan amount and repayment relief similar to CARES Act through June 25, 2021
 - **Return of hardship for home construction or purchase (CAA, Div. EE, § 302(b))**
 - Allows re-contribution of hardship distribution not used due to a qualified disaster provided hardship distribution was received no more than 180 days before and within 30 days after disaster, and repaid by the repayment must be made no later than June 25, 2021
 - **Partial plan termination relief (CAA, Div. EE, § 209)**
 - Provides relief in certain situations if a partial plan termination would have occurred but for relief in period between March 13, 2020 through March 31, 2021
 - **Money purchase pension plans (CAA, Div. N, § 280)**
 - Extends coronavirus distributions to money purchase pension plans

Federal Developments – Benefits ARPA and CAA – Pension Relief

- **CAA and ARPA provide relief (check with plan actuary on relief)**
 - **Single employer defined benefit plan relief (CAA)**
 - Allows for temporary reversal of section 420 transfers (CAA, Div. N § 285)
 - **Single employer defined benefit plan relief (ARPA)**
 - Extends amortization period to 15 years for funding shortfall and also sets all prior shortfall amounts to zero for plan years beginning after December 31, 2021 (ARPA § 9705)
 - Provides relief under the funding stabilization rules for funding (ARPA § 9706)
 - **Multiemployer defined benefit plan relief (CAA)**
 - Allows plans covering employees in building and construction industry to reduce early retirement age to 55 (if participant before April 30, 2013) subject to conditions (CAA, Div. EE, § 208)
 - **Multiemployer defined benefit plan relief (ARPA)**
 - Increases PBGC premiums starting in 2031 (ARPA § 9704(c))
 - Provides for amortization relief for plan years ending on or after February 29, 2020 over a 30-year period (instead of 15 years or less) (ARPA § 9703)
 - Provides Pension Benefit Guaranty Corporation (PBGC) may make grants to financially troubled multiemployer pension plans subject to conditions (ARPA § 9704)

Federal Developments – Benefits ARPA – Dependent Care Limit

- **Dependent care assistance relief (ARPA § 9632)**
 - **Increases excludible dependent care assistance for 2021 (and only 2021)**
 - \$10,500 from \$5,000 for married filing jointly
 - \$5,250 from \$2,500 for single filing
 - **Allows employers to amend dependent care FSA to increase limit**
 - **Reduces likelihood employees will have income if employee uses carryover or grace period to reimburse amounts above section 129 limit**
 - Form 2441
 - IRS to provide guidance

Federal Developments – Benefits CAA – FSA Relief

- **Flexible spending accounts – FSAs (CAA § 214)**
 - Allows carryover of unused health FSA and dependent care FSA from 2020 to 2021, and from 2021 to 2022
 - Allows extension of grace period for health FSA and dependent care FSA for unused 2020 amount for entirety of 2021, and unused 2021 amount for entirety of 2022
 - Provides for special rules for situations where dependent attained age 13 in 2020
 - Allows prospective changes in employee contributions for health FSA and dependent care FSA during 2021
- **Notice 2021-15 addresses changes**
 - For example: Form W-2 reporting – Clarifies that amount to be reported is amount elected by participant not amount available for reimbursement

Minnesota Developments – Benefits – Legislature Dependent Care FSAs and Tax Conformity

- **Proposed legislation would require all Minnesota employers that have a dependent care FSA to amend to carryover unused (unspent amounts)**
 - See H.F. 821
 - See S.F. 1082
 - Dependent FSAs are not subject to ERISA and not protected by ERISA preemption
 - Expands and is more invasive than enacted federal legislation which allows employers to offer carryover of unused amounts but does not mandate that employers offer carryover of unused amounts
- **Tax conformity**
 - Minnesota has not yet acted to conform state tax law to changes made after December 31, 2018 (see Minn. Stat. § 290, Subd. 31)

Minnesota Developments – 2021 Legislature

- **Minnesota is still the only divided legislature in the country**
 - DFL Governor Walz
 - DFL Controlled House 70-64
 - Republican Controlled Senate 34-31-2
- **Legislating in a Pandemic**
 - Minnesota House remote 100% (Except floor votes)
 - Senate working in a hybrid model
 - Lobbyists/public watching the process on Zoom
- **Scope of work seems unchanged**
 - Combined 5000 bills introduced already
 - Requirement to pass a balanced budget by May 17

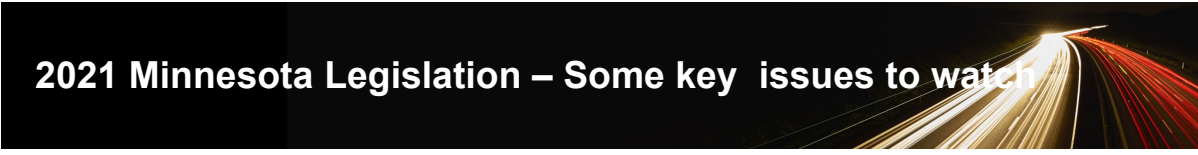
Employment Developments – 2021 Legislature

- **Leadership priorities are not aligned**
 - House promoting a number of prescriptive benefit mandates & hiring practices bolstered by the pandemic
 - Paid family medical leave
 - Sick & safe time
 - Prohibition on consideration of pay history
 - Pregnancy accommodations & lactation breaks
 - Emergency rehire & retention requirements
 - Retroactive leave payments for essential workers
 - Senate is very cautious about employer mandates especially in a pandemic
 - Considering a version of the pregnancy accommodations & lactation breaks
 - Modifications to the 2019 wage theft law



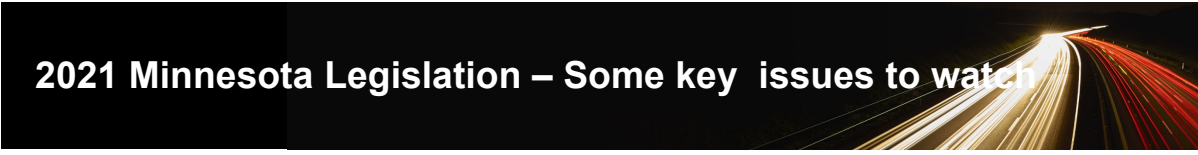
What's Next in the process?

- **The House is expected to pass all of the comprehensive policy reforms contained in their Jobs & Economic Growth Omnibus Bill**
- **The Senate will pass their “policy” light scaled back version**
- **Conference Committees will be appointed to hammer out the differences between these two bills – will require administrative input**
- **Constitutionally required adjournment on May 17**
- **Cross your fingers!!**



2021 Minnesota Legislation – Some key issues to watch

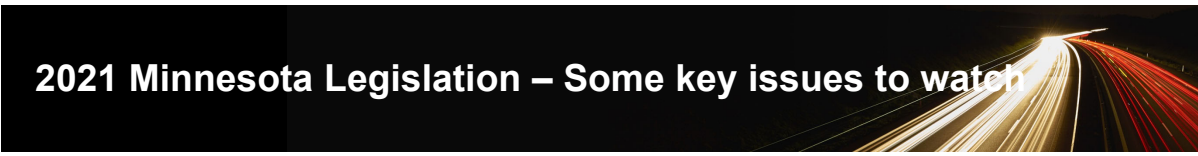
- **Prohibition on consideration of pay history**
 - **Employers “shall not inquire into, consider or require disclosure” of pay history**
 - **Applicants may “voluntarily and without prompting” disclose pay history**
 - **Creates a rebuttable presumption of discrimination if employer considers pay history (even if voluntarily disclosed by employee)**
 - **Employers may engage in discussions about applicant’s expectations or requests with respect to compensation and benefits**



2021 Minnesota Legislation – Some key issues to watch

- **Pregnancy accommodations & lactation breaks**

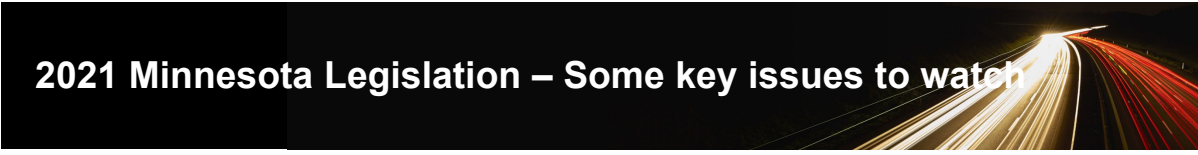
- Expands pregnancy & parenting leave entitlements under Minn. Stat. 181.941 to small employers *and* eliminate the 12-month employment requirement for eligibility (90 days only)
- Expands current pregnancy accommodation requirements under Minn. Stat. 181.9414 to small employers
- Requires paid lactation breaks
 - May not permit employers to require use of existing paid break time
 - May not include exception for “undue disruption” to the business of the employer



2021 Minnesota Legislation – Some key issues to watch

- **Paid Family Medical Leave**

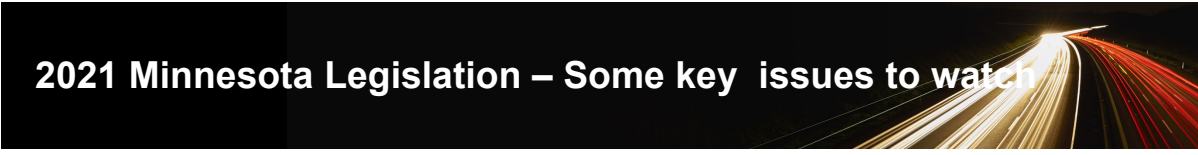
- California/Washington-style paid leave insurance program
- Applies to all employers & reaches out to some employment outside the state
- Premiums to be withheld by employers – employers may withhold 50% from employees
- Coverage would extend to most workers *including* most traditional independent contractors
- New notice, recordkeeping and reporting obligations



2021 Minnesota Legislation – Some key issues to watch

- **Paid Family Medical Leave (cont'd)**

- Permits 12 weeks protected paid leave for employee's own serious health condition or pregnancy *plus* 12 weeks protected paid leave for safety leave or family care
 - Additional protected time off for military service-related leave
 - Could create additional protected leave entitlements because of eligibility inconsistencies between FMLA and Minnesota law
- Expanded substantive leave rights for Minnesota employees – employees entitled to protected leave even if they do not apply for benefits
 - Safety leave
 - Expanded definition of “family member” – includes grandparents and “member of the employee's household”
 - Broader definition of “serious health condition” than FMLA



2021 Minnesota Legislation – Some key issues to watch

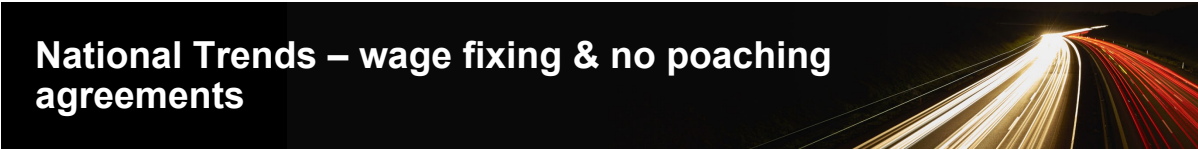
- **Statewide sick & safe time entitlement**

- Would apply Minneapolis/St. Paul-style entitlements at the state level
- No state preemption



National Trends – Potential Federal Developments

- **Increased salary basis threshold for exempt status**
- **Independent contractor misclassification**
 - Return to Obama-era guidance . . .
 - . . . or a federal ABC test?
- **Expanded joint employer status**
- **Pay equity**
 - Eliminate “factor other than sex” defense; require reference to *bona fide* objective factors (i.e., education, training, experience)
- **Restrictions on noncompetes**
- **Restrictions on mandatory arbitration and class action waivers**



National Trends – wage fixing & no poaching agreements

- **Department of Justice**
 - Pursuing criminal enforcement against wage fixing and no-poaching agreements in multiple cases

National Trends – Recent State Legislation

- **Paid Family Leave / Paid Sick-Safe Leave**
 - California, Colorado, Connecticut, Maine, Massachusetts, New York
- **Restrictions on exempt status**
 - Colorado
- **Pay Equity**
 - Colorado
- **COVID paid leave**
 - California & Colorado
 - Up to 80 hours of paid sick leave for FFCRA reasons
 - Employers need to post and provide notice to employees
 - Local laws – Several California cities also have COVID paid leave laws

National Trends – Other State-Level Trends

- **Other Trends**
 - Noncompete restrictions
 - Independent contractor misclassification
 - Predictive Scheduling
 - Marijuana legalization

ahead of the curve

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Thank you!