



GUNDERTSON DETTMER

EMPLOYMENT & LABOR PRACTICE

We represent *what's next*

2023 GD Employment & Labor Law Update

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New York Updates



- NYC Salary Transparency Law (Effective Nov. 1, 2022)
 - NYS Salary Transparency Law (Effective Sept. 17, 2023) - *Just signed Dec. 22, 2022*
 - NYC Artificial Intelligence in Hiring Law (Effective Jan. 1, 2023) - Enforcement begins April 15, 2023
 - NYS Hotline for Reporting Sexual Harassment (Launched July 2022)
 - Rollback of COVID-19 Measures
1. Lifting of the NYS indoor mask mandate (Feb. 2022)
 2. COVID-19 no longer qualifies for NY HERO Act designation (Mar. 2022)
 3. NYC private employee COVID-19 vaccine mandate ended (Nov. 2022)

Massachusetts Updates

Paid Family and Medical Leave (PFML) 2023 Updates:

- Increase in maximum weekly benefit to \$1,129.82 (an increase of \$45.51)
- Slight decrease in the total contribution rates
- In connection with the changes, the DFML published new rate sheets, posters and contribution amounts, which are available on line or from your GD employment team.
- Employers should be replacing the 2022 poster & notifying employees of the new rates and contributions making appropriate payroll adjustments

CROWN Act effective as of October 2022

- Prohibits discrimination based on natural or protective hairstyles, which include "braids, locks, twists, Bantu knots, hair coverings and other formations"
- Employers should add this concept to their anti-discrimination policies and should include this concept in their trainings

Minimum Wage Increase effective as of January 2023

- \$14.25 to \$15.00 - This increase is the result of a 2018 MA statute, known as the "Grand Bargain"



Massachusetts Updates Continued

Wage Act Shocker

- The Mass Wage Act requires an employer to pay an employee on the final date of employment in the event of an involuntary termination, and calls for mandatory treble damages for an employer's failure to pay wages in a timely fashion.
- *Reuther v. Methuen*
- It is EXTREMELY important that employers make timely wage payments, in particular, at the time of separating an employee. This includes regular pay, overtime, commissions, and earned bonuses.
- If an Employer is not ready to make the payment, the prudent course of action is to suspend the employee in contemplation of termination.

Recent Interpretations of MA Non-compete Statute

- The MA non-compete bar has been eagerly awaiting legislative amendments, which have not come, and court interpretations, which have started to trickle including in three 2022 cases:
 - *Carroll v. Mitsubishi*
 - *Lighthouse v. Lambert*
 - *Hilb Group v. LePage*



Non-Compete Law Update

New State & Local Laws:

Washington, D.C.



- Took effective on 10/01/22
- Ban on non-competes
- Not retroactive
- Ban on retaliation against complaints

Colorado



- Took effective on 8/10/22
- Ban on non-competes
- Ban on customer non-solicits
- Not retroactive
- Notice Requirements
- Penalties, attorneys' fees, and potential criminal liability against employers that present to a worker or try to enforce invalid noncompete.

Illinois



- Took effective on 01/01/22
- Ban on non-competes
- Ban on customer non-solicits
- Not retroactive
- Notice requirements

New Salary Thresholds for Non-Competes:

- Many States have adopted salary thresholds for non-competes. Employees making under a certain amount cannot be subject to a non-compete.
- Thresholds in some of these states change according to economic factors.

Federal Legislative & Executive Efforts

- Executive: Biden's 2021 Executive Order remains outstanding
- Legislative: Bill pending in the House to eliminate non-competes for non-exempt workers. No action to report on that bill at this time.
- FTC's Proposed Rule to Ban Non-Competes (*Announced Jan. 5, 2023*)

California Updates

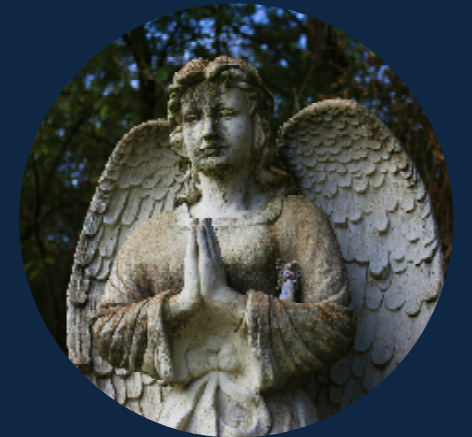


No More Employee Exemption Under the CCPA

California Privacy Rights and Enforcement Act (CPRA) amends CCPA and eliminates employer exemptions applicable to the use and collection of employee/applicant data.

Bereavement Leave (AB 1949)

California employers with 5 or more employees must provide 5 days of unpaid bereavement leave for the death of a family member.



California Updates Continued

New Salary Threshold for White Collar Professionals in California

Minimum exempt salary for white collar professionals will rise from \$58,240/year (for employers of less than 25 workers) or \$62,400 (for employers of 25 or more workers) in 2022 to \$64,480 for employers of all sizes in 2023.



Cannabis Use (AB 2188)

Prohibits employers from discriminating against employees for (1) their off-the-job use of cannabis and (2) drug screenings that reveal nonpsychoactive cannabis metabolites.

California Board Diversity Update

Laws Promoting Diversity on Board of Directors Overturned

- Senate Bill 826 (requiring publicly traded companies headquartered in California to appoint a minimum number of female directors) and Assembly Bill 979 (requiring appointment of a minimum number of directors from underrepresented communities) both ruled unconstitutional in Los Angeles County Superior Court.
- Both cases currently on appeal.



SALARY TRANSPARENCY: NYC

Salary Transparency in Job Advertisements (Eff. Nov. 1, 2022)



Applies to:

- Employers with 4 or more employees;
- Any job listing that an employer publicizes to a pool of applicants for a job, promotion or transfer opportunity that could be performed in (in whole or in part) in NYC;
- Any listing regardless of the method of publication, including postings on internal bulletin boards, internal advertisements, printed flyers distributed at job fairs and newspaper advertisements.

Contents of Listing:

- The minimum and maximum salary that the employer, at the time of posting, believes in good faith it is willing to pay for the position.
- The wage range does NOT include anything other than base pay (e.g., not bonuses, incentive or commission pay, equity, benefits or leave policies).

Not Required:

- To create an ad in order to hire, promote, or transfer an employee or potential employee;
- To create ad when engaging in one-on-one recruitment of a specific candidate for a particular role.

Enforcement:

- No penalty for initial violation if cured within 30 days. Civil penalties of up to \$250,000 for an uncured first violation, as well as for any subsequent violations may be assessed. Employees may sue in court.

SALARY TRANSPARENCY: CALIFORNIA

• Pay Scale Disclosures in Job Postings to Applicants and to Employees

- Employers with 15 or more employees must include a position's pay scale ("the salary or hourly rate an employer reasonably expects for the position") in any job posting.
- Employers must maintain records of employee's job titles and salary history during employment and for three years thereafter.
- Employers must provide the pay scale to current employees upon request.

• Enforcement

- California Labor Commissioner is authorized to order civil penalties ranging from \$100 to \$10,000 for violations. No penalty for the first violation if corrected.
- Private right of action to seek injunctive and "any other appropriate relief."

• Data Reporting Obligations Expanded

- All private employers with 100 or more employees must submit pay data reports, without regard to federal EEO-1 reporting status. Reports must break out the number of employees by race, ethnicity and sex in a series of job categories.

• Enforcement

- Fines of up to \$100 per employee for initial violations and up to \$200 per employee for subsequent violations plus the Department's costs associated with obtaining a court order to ensure compliance.



**Salary
Transparency
in Job
Postings (Eff.
Jan. 1, 2023)**

**Data
Reporting
(Eff. May
10, 2023)**

SALARY TRANSPARENCY: ACROSS U.S.

Other Jurisdictions

- Colorado
- Connecticut
- Maryland
- Nevada
- New Jersey
- New York
- Ohio
- Rhode Island
- Washington

Practical Implications

- Understand the requirements in any jurisdiction where you are posting new positions or promotional or transfer opportunities.
- Take a close look at what current employees are being paid - consider a broader pay review exercise.
- Train managers, HR, etc., on posting requirements and to be prepared with questions from current employees.
- Consider training employees on posting protocols, particularly if you offer recruitment bonuses or incentives for securing new hires. In some jurisdictions, employees posting on LinkedIn or other platforms may be captured by a pay transparency law.

Updated EEOC Guidance

COVID-19

- Mandatory Testing
- Return-to-Work After Having COVID-19
- Screening Applicants, Including High-Risk Applicants
- Mandatory Vaccination Programs
- Re-evaluate Your Policies: Changing Laws, Changing Health Guidance, Changing Business Needs.



Updated EEOC Guidance

EEOC's New Posting Requirement



- Types of Discrimination
- How to File a Charge
- QR Code to Assist with Online Filing of Charges
- Post in Traditional/Customary Locations in Workplace
- Posting on Company Website in Conspicuous Location
- Sharing Link with Remote Workers

Navigating Remote Work Issues



Having a remote workforce means compliance with laws specific to each state, including in these key areas:

- Pay Transparency – Being aware of the law when recruiting for remote positions.
- Non-Competes and Non-Solicitations – State-specific limits on enforceability
- Leave Entitlements – States and localities have enacted a broad range of protected leave entitlements that vary between states.
- Separation Agreements – Being sure to include correct release language and specific carve outs.
- Unemployment Notices – Providing state-required notices.

Remote workforce offers unique management obstacles for employers, including with respect to:

- Protection of IP and Company Property
- Company-identity and comradery

AB 51 Update & Ending Forced Arbitration of Sexual Assault & Sexual Harassment Act

Why Arbitration?

- More efficient and more confidential than litigation in courts.
- Avoid class, collective, or representative actions.
- Federal Arbitration Act (FAA) applies when arbitration agreements involve interstate commerce, and preempts any conflicting state or local laws that may otherwise invalidate arbitration agreements.
- States' attempts to ban arbitration of sexual harassment claims (see #MeToo), largely struck down as preempted by FAA.

California's AB 51

- 2019: CA passed AB 51, making it unlawful to require employees to sign arbitration agreements as a condition of employment.
- The Ninth Circuit upheld AB 51 in 2021, but that decision was later stayed pending SCOTUS' ruling in *Viking River Cruises*.
- Mandatory arbitration agreements remain enforceable in CA while we wait for the Ninth Circuit's rehearing *en banc*.

ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT (2022)

- Amends FAA to prohibit employers from enforcing pre-dispute arbitration agreements mandating arbitration of sexual assault and harassment claims
- Preserves right of litigants to bring collective actions for sexual assault and sexual harassment claims.

SPEAK OUT ACT

- Prohibits enforcement of pre-dispute agreements between employer and employee or independent contractor not to disclose sexual harassment or sexual assault.
- Applies to certain non-disclosure agreements and non-disparagement provisions.
- Does not apply to agreements and provisions that protect trade secrets and proprietary information.
- Signed December 7, 2022.

State of the Workplace

Summary of Recent Client Surveys

Across the Board:

- Few companies or fund managers require on-site attendance 5 days/week; **Most** are fully remote or use a hybrid model.
- Focus in the workplace has shifted from Covid-19 to the general economic uncertainty.
- To keep top talent, companies and fund managers are increasing compensation, remote work, & mental health resources.
- Focusing on efficiency, increasing the use of automation or other technology,

Companies

- Managing cash flow aggressively and, in some cases, slowing/freezing hiring or shifting work outside of the U.S
- Approx. **25%** say hiring challenges are impacting their business.
- **More than 60%** anticipate growing their workforce in the next 6 months, and one third anticipate remaining at the same level.
- [Read the full survey here.](#)

Fund Managers

- Increasing the use of temp or part-time workers.
- Less than 20% say hiring challenges are impacting business.
- More than 40% expect to grow their workforce in the next 6 months. 50% expect levels to stay the same.
- [Read the full survey here.](#)

Automated Employment Decision Making

Examples of Regulation of AI and Automated Decision-Making and Guidance

- NEW YORK CITY - Local Law 144 - effective Jan. 1, 2023 and enforcement begins April 15, 2023
- CALIFORNIA - California Privacy Rights Act (“CPRA”) comes into effect Jan. 1, 2023.
- AI Bill of Rights

Client Alert and Webinar

- December 2022



ESG: What Is It?



ENVIRONMENTAL

carbon emissions
raw material sourcing
climate change



SOCIAL

diversity, equity and inclusion (DEI)
human capital management
corporate board composition
anti-discrimination training
data protection
community relations



GOVERNANCE

company's leadership
executive pay
internal controls
board governance
ethics and code of conduct policies
shareholder rights
oversight mechanisms

ESG: What's Driving It?



VENTURE INVESTORS



CLIMATE CHANGE



PUBLIC REGULATION



CONSUMER OPINION

- Promote "speak up" culture
- Data privacy and cybersecurity
- Diversity, equity, and inclusion

Biden Administration & Independent Contractors

January 2021 - U.S. Department of Labor ("DOL") contractor test focused on two factors

October 11, 2022 - DOL released proposed rules --> "totality of the circumstances"

- *Opportunity for profit or loss depending on managerial skill*
- *Nature and degree of control*
- *Whether work is integral to business*
- *Investment by the worker and the employer*
- *Skills and initiative*
- *Degree of permanence*



Status: Not finalized

Questions? Please contact us:
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Thank you.