OCTOBER 2024

CLEARSTAR®

SCREENING COMPLIANCE UPDATE

CLEARSTAR OFFERS EEOC GUIDELINES COMPLIANCE ON CRIMINAL BACKGROUND CHECKS, GDPR & SOC TYPE 2 SECURITY CONTROL COMPLIANCE AND STAFFING COMPLIANCE.

Compliance is one of the most important parts of background screening, it involves following the rules and regulations set forth by the Fair Credit Reporting Act and local ordinances.

CLICK FOR PAST UPDATES

CLEARSTAR®

TABLE OF CONTENTS

SCREENING COMPLIANCE UPDATE | OCTOBER 2024

ClearStar is happy to share screening industry related articles written by subject matter experts and published on the internet in order to assist you in establishing and keeping a compliant background screening program.

EXECUTIVE SUMMARY

October 2024 Screening Compliance Update Executive Summary

The screening compliance landscape witnessed some major changes that have been documented in this month's SCREENING COMPLIANCE UPDATE. Below is an EXECUTIVE SUMMARY of some of the new developments at the FEDERAL, STATE, and INTERNATIONAL levels.

- FEDERAL DEVELOPMENTS: In October 2024, the Consumer Financial Protection Bureau (CFPB) issued guidance warning companies using third-party consumer reports, particularly surveillance-based "black box" or AI algorithmic scores, that they must follow the Fair Credit Reporting Act (FCRA).
- STATE DEVELOPMENTS: Several states such as Illinois, Maryland, Massachusetts, and New Jersey have passed or are trying to pass Pay Transparency laws to require employers in these states to disclose pay scale and benefits in all job postings, among other requirements.
- INTERNATIONAL DEVELOPMENTS: Countries such as Argentina, Canada, Hungary, Ireland, Peru, and Spain all have updates in the screening compliance landscape to report this month.

I hope you find this month's SCREENING COMPLIANCE UPDATE both informative and helpful in keeping up with establishing and maintaining a compliant background screening program.

Nicolas S. Dufour

ClearStar Executive Vice President, General Counsel & Corporate Secretary

Nicolas Dufour serves as EVP, General Counsel, corporate secretary, data privacy officer, and is a member of the executive management team for ClearStar. He is proficient in the FCRA, GLBA, Data Privacy Framework, and GDPR compliance, as well as other data privacy regimes. He is responsible for managing all legal functions to support the evolving needs of a fast-paced and rapidly changing industry. His position includes providing legal guidance and legal management best practices and operating standards related to the background screening industry, federal, state, and local laws and regulations, legal strategic matters, product development, and managing outside counsels. He represents the company in a broad range of corporate and commercial matters, including commercial transactions, M&A, licensing, regulatory compliance, litigation management, and corporate and board governance. He researches and evaluates all aspects of legal risks associated with growth in to different markets. He assists the management team in setting goals and objectives in the development, implementation, and marketing of new products and services. He also advises and supports management, Board of Directors, and operating personnel on corporate governance, company policies, and regulatory compliance.

FEDERAL DEVELOPMENTS

CFPB Warns Employers Regarding FCRA Rules for AI-Driven Worker Surveillance

On October 24, the CFPB issued Circular 2024-06, which warns companies using third-party consumer reports, particularly surveillance-based "black box" or AI algorithmic scores, that they must follow the Fair Credit Reporting Act with respect to the personal data of their workers. This guidance adds to the growing body of law that protects employees from potentially harmful use of AI.

The CFPB guidance notes employers' growing use of third-party consumer reports in employment decisions. These reports now go beyond traditional background checks and may include monitoring employee behavior through apps or other data sources, expanding the breadth and depth of worker tracking.

The Bureau states that background dossiers or reports that are compiled about consumers from databases collecting public records, employment history, collective-bargaining activity, reports that assess a consumer's risk level or performance, or other information about a consumer are "consumer reports" under the FCRA. Accordingly, employers that use such reports, both during hiring and for subsequent employment purposes, must comply with FCRA obligations, including the requirement to obtain a worker's permission to procure a consumer report, the obligation to provide notices before and upon taking adverse actions, and a prohibition on using consumer reports for purposes other than the permissible purposes described in the FCRA.

The Bureau identified some of the reports offered by background screening companies and consumer reporting agencies. It notes that some employers now use third parties to monitor workers' sales interactions, to track workers' driving habits, to measure the time that workers take to complete tasks, to record the number of messages workers send, and to calculate workers' time spent off-task through documenting their web browsing, taking screenshots of computers, and measuring keystroke frequency. In some cases, this information might be sold by "consumer reporting agencies" to prospective or current employers, implicating FCRA. In addition, some companies may analyze worker data in order to provide reports containing assessments or scores of worker productivity or risk to employers.

The CFPB circular highlights several key protections FCRA provides regarding the use of third-party consumer reports by employers:

- Consent: Employers must obtain workers' consent before purchasing these reports, ensuring that employees are informed about the use of their personal data.
- Transparency: Employers are required to provide detailed information to workers when reports lead to adverse actions, such as firings, denials of promotion, or demotions. More specifically, under Section 604(b), employers are required to provide notice to workers and a copy of their report before taking adverse action.
- Disputes: If workers dispute the information in a report, companies must correct or delete inaccurate or unverifiable data to prevent unfair penalties and set the record straight.
- Limits: Employers can only use the reports for lawful purposes and cannot use the data for unrelated activities like marketing or selling it.

"Consumer reporting agencies" that provide reports for employment purposes are also subject to additional obligations. For instance, upon request by a worker, consumer reporting agencies must disclose the identity of any party who has used the worker's consumer report for employment purposes in the two-year period preceding the date the request is made, which is longer than the one-year period used for other purposes.

One of the first laws to protect employees from the harmful use of AI was passed in New York City. NYC's Automated Employment Decision Tools (AEDT) law went into effect January 1, 2023 and set new standards for employers using AI tools in making employment decisions (for more see here). Since then, other laws have been passed and many others are pending to protect employees from potential AI harms. The EEOC has issued guidance as part of its Artificial Intelligence and Algorithmic Fairness Initiative. Among other things, the EEOC published a technical assistance document on these issues. It has also engaged in enforcement against an entity that used an AI hiring tool that produced a discriminatory result. Putting It Into Practice: While only a statement of policy, the Bureau's circular follows on the heels of its joint hearing with the Department of Labor on worker tracking as well as the White House's National Security Memorandum on AI, covering

some of the potentially harmful effects of AI. Federal and state regulators have made no secret that protecting consumers from potentially harmful implementations of the technology is a high priority (previously discussed here, here, here, and here). Notably, the Bureau has released this circular while we patiently await its revised rulemaking on the Fair Credit Reporting Act (which is expected this fall).

CLICK HERE FOR SOURCE ARTICLE

U.S. Department of Labor Issues Guidance on Avoiding Discrimination When Using AI in Hiring

AI in hiring: About 80% of U.S. and almost all Fortune 500 companies use AI-powered hiring software. AI may be used to target online advertising for job opportunities and to match candidates to jobs on employment platforms (*e.g.*, LinkedIn, Indeed). AI may also be used to reject or rank applicants using automated resume screening and chatbots based on knockout questions, keyword requirements, or specific qualifications or characteristics.

With the growing use of AI comes a growing concern by the government (and argument by plaintiffs) that AI tools present a risk of worsening workplace discrimination based on race, gender, disability, and other protected characteristics. AI tools are trained on vast amounts of data and make predictions based on patterns and correlations within that data. However, many of the tools used by employers are trained on data from the employer's own workforce and previous hiring practices, which, it is argued, may reflect institutional and systemic biases already present in the organization.

The Department of Labor responds to AI: If your company uses (or is thinking of using) AI in hiring, you need to be aware of the U.S. Department of Labor's ("DOL") recently issued "AI & Inclusive Hiring Framework." The Framework is designed to "help organizations advance their inclusive hiring policies and programs, specifically for people with disabilities, while managing the risks associated with deploying AI hiring technology." The Framework was published by the Partnership on Employment & Accessible Technology, which is funded by the DOL's Office of Disability Employment Policy.

The AI Framework includes ten focus areas designed to address five overarching themes:

1. Impact of procuring AI hiring technology

Employers utilizing AI in hiring technology should consider its impact on their DEIA (diversity, equity, inclusion, and accessibility) initiatives.

2. Advertising employment opportunities and recruiting inclusively

Employers utilizing AI in hiring should continue to consider the rights and user experiences of job seekers with disabilities and members of other protected classes.

3. Providing reasonable accommodations to job seekers

Employers must continue to provide reasonable accommodations to applicants and employees.

4. Selecting candidates and making employment offers responsibly

Utilizing AI in hiring does not absolve employers of the responsibility of ensuring that they are complying with applicable federal, state, and local laws in hiring.

5. Incorporating human assistance and minimizing risk

Employers should develop human oversight policies to address possible AI errors.

What this means for employers: Employers must continue to be mindful of anti-discrimination laws as they begin to integrate AI into the workplace. Employers should take the time to evaluate their AI practices and ensure that proper safeguards are in place to identify and rectify any discriminatory impact. This can be done through:

- Conducting AI audits. Employers need to know when and how AI is used in the hiring process. Employers should audit the AI tools and algorithms they use in hiring to identify potential bias or discrimination. This can be achieved by having third-party experts, like employment counsel, evaluate the data inputs and outputs.
- Ongoing monitoring. AI hiring bias compliance cannot be a one-time effort. Companies must implement ongoing monitoring programs to regularly reassess their tools as models are updated and new data is incorporated. To ensure full transparency, feedback loops that provide detailed hiring outcomes are essential.
- Do not forget the human factor. AI should not be allowed to make final hiring decisions autonomously, as its

effectiveness depends on the quality of the data it processes. We recommend that companies equip their HR teams/hiring managers with technical knowledge of AI systems to better manage and evaluate their use.

CLICK HERE FOR SOURCE ARTICLE

DOT proposes using e-forms for drug and alcohol testing

The Department of Transportation is accepting comment on a proposed rule that would allow the use of electronic forms and signatures for drug and alcohol testing.

Published Oct. 15, the proposal would "provide additional flexibility and reduced costs for the industry while maintaining the integrity and confidentiality requirements of the drug and alcohol testing regulations," DOT says.

For now, "employers and their service agents must use, sign and store paper documents exclusively, unless the employer is utilizing a laboratory's electronic Federal Drug Testing Custody and Control Form (electronic CCF) system that has been approved by the Department of Health and Human Services."

The proposal would allow for, but not require, e-forms and e-signatures for testing. "Many employers and their service agents have already instituted the use of electronic signatures, forms and records storage for the non-DOT regulated testing that they conduct," DOT says.

In August 2022, the department issued an advance notice of proposed rulemaking seeking comment on 14 specific questions, including those requesting feedback on the practical and economic impacts of authorizing a fully or partially electronic system.

Comments on the proposed rule are due Dec. 16.

CLICK HERE FOR SOURCE ARTICLE

FDIC's New Regulations Align with the Fair Hiring in Banking Act's Amendments to Section 19 of the Federal Deposit Insurance Act

On December 23, 2022, President Biden signed the "James M. Inhofe National Defense Authorization Act for Fiscal Year 2023" which, among many other things, amended Section 19 of the Federal Deposit Insurance Act, 12 U.S.C. Section 1829 (FDIA), to reduce hiring barriers across the financial services sector. As a result of this "Fair Hiring in Banking Act," the category of crimes for which a financial institution can outright reject a job applicant or terminate an employee has been significantly narrowed. More recently, and as expected, the Federal Deposit Insurance Corporation (FDIC) approved a final rule (2024 Final Rule), effective October 1, 2024, to update its Section 19 regulations to conform to the Fair Hiring in Banking Act's amendments.

Section 19 in a Nutshell

Section 19 prohibits, absent prior written consent of the FDIC, a person convicted of a crime involving dishonesty, breach of trust, or money laundering from (broadly speaking) working for or otherwise participating, directly or indirectly, in the conduct of the affairs of a FDIC-covered financial institution. Section 19's prohibition also covers anyone who has agreed to enter a pretrial diversion or similar program in connection with the prosecution of a crime involving dishonesty, breach of trust, or money laundering.

To ensure that a financial institution does not violate Section 19, it must engage in a "reasonable" inquiry of a person's criminal history to determine whether they have a disqualifying offense. The 2024 Final Rule now requires that financial institutions document that inquiry. What that looks like, however, is left to the discretion of the financial institution, although most order a criminal history background check or require the person to submit to a fingerprint check (or both).

The Amendments to Section 19 and the 2024 Final Rule

Here we discuss the 2024 Final Rule as it relates to the recent Amendments to Section 19:

What is a crime of "dishonesty" or "breach of trust"?
The amendment to Section 19 provides guidance to institutions in determining whether an offense is one of "dishonesty" by including a helpful definition of the term. Specifically, a "criminal offense involving dishonesty" means an offense where the person, directly or indirectly, cheats or defrauds, or wrongfully takes property belonging to another in violation of a criminal statute. It also includes an offense that federal, state, or local law defines as "dishonest," or for which dishonesty is an element of the offense. The term does not, however, include a misdemeanor criminal offense committed more than one year before the date on which a person files a waiver application, excluding any period of incarceration, or an offense involving the possession of controlled substances. According to the 2024 Final Rule, the one-year period runs from the date of the offense, not the date of disposition of the conviction or program entry. If there are multiple offenses, then the one-year period runs from the "last date of any of the underlying offenses."

Although the amendment to Section 19 does not include a definition of "breach of trust," the 2024 Final Rule does, stating that the term refers to "a wrongful act, use, misappropriation, or omission with respect to any property or fund that has been committed to a person in a fiduciary or official capacity, or the misuse of one's official or fiduciary position to engage in a wrong act, use, misappropriation, or omission."

Which older offenses no longer require an application?
The Section 19 amendment states that unless the conviction or program entry relates to an offense subject to the "minimum 10-year prohibition period" for certain offenses in 12 U.S.C. 1829(a)(2), an applicant or employee no longer needs a waiver application if:

- it has been seven years or more since the offense occurred (measured from the date of offense, not the date of disposition); or
- the person was incarcerated, and it has been five years or more since the person was released from incarceration; or
- the person committed the offense before age 21 and it has been more than 30 months since the sentencing occurred (which means the date the court imposed the sentence).

Did the 2024 Final Rule update the types of offenses that qualify for the de minimis exemption?
On July 24, 2020, the FDIC issued a Final Rule which, among other things, expanded the *de minimis* exemption in a number of ways (2020 Final Rule):

- It increased the number of minor *de minimis* offenses on a criminal record to qualify for the *de minimis* exception from one to two;
- It eliminated the five-year waiting period following a first *de minimis* offense and established a three-year waiting period following a second *de minimis* offense (or 18 months if the offense occurred when the person was 21 years of age or younger);
- It increased the threshold for small-dollar, simple theft from $500 to $1,000 (the same dollar threshold for bad or insufficient funds check offenses);
- It expanded the *de minimis* exemption for crimes involving the use of fake identification to circumvent age-based restrictions from only alcohol-related crimes to any such crimes related to purchases, activities, or premises entry.

Amended Section 19 permitted the FDIC to engage in rulemaking to expand the types of offenses that qualify as *de minimis*, and the 2024 Final Rule did so by:

- Increasing the requirement that the offense be punishable by a term of one year or less (excluding periods of pre-trial detention and restrictions on location during probation and parole) to three years or less.
- For "bad check criteria," increasing the aggregate total face value of all insufficient funds checks across all convictions or program entries related to insufficient funds checks from $1,000 or less to $2,000 or less.
- Excluding a new category of lesser offenses, including the use of a fake identification, shoplifting, trespassing, fare evasion, driving with an expired license or tag, if one year or more has passed since the applicable conviction or program entry.

What has not changed?
Section 19 still requires that there be a conviction of record or a pretrial diversion or similar program. It does not cover arrests or pending cases not brought to trial, unless there is a program entry. Section 19 does not cover acquittals or convictions that have been reversed on appeal, but does cover convictions that are currently being appealed or convictions that have been pardoned. In addition, an application is not required for expunged, dismissed, or sealed records or for youthful offender adjudications. Finally, convictions or program entries for a violation of 12 U.S.C. 1829(a)(2) (which relate to

certain federal offenses) can never qualify as *de minimis*.

Next Steps for Financial Institutions

As the penalties for non-compliance are substantial (including fines of $1,000,000 per day), FDIC-insured institutions should review their policies and practices to ensure consideration of Section 19 when assessing candidates' conviction and program entry history. Convictions and program entries that are no longer automatically disqualifying under Section 19 should be evaluated under other state and local so-called "fair chance" or "ban the box" laws and ordinances, along with the Equal Employment Opportunity Commission's "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act."

CLICK HERE FOR SOURCE ARTICLE

STATE, CITY, COUNTY AND MUNICIPAL DEVELOPMENTS

Prince George's County, MD Amends Criminal Background Check Law

The Prince George's, Maryland County Council recently enacted Bill CB-019-2024, amending the county's Fair Criminal Record Screening Standards. Effective September 16, 2024, the ordinance—renamed "Access to Employment for Returning Citizens"—significantly restricts employers' ability to conduct criminal background checks on job applicants. Changes to the law include a smaller threshold for employer coverage, expanded limitations on employer inquiries into applicant criminal histories, and expanded protections for employees.

Employer Coverage Threshold
The ordinance now applies to employers with 10 or more full-time employees in the county, a reduction from the previous threshold of 25 employees.

Expanded Limitations on Employer Inquiries of Applicant Criminal History
Under the amended ordinance, covered employers are prohibited from asking about or investigating a job applicant's criminal history until after the initial interview. Even after the initial interview, employers cannot inquire about or consider the following:

- *Nonviolent Felony Convictions*: If the applicant completed the sentence for a nonviolent felony more than five years (60 months) before submitting their application, such convictions cannot be considered.
- *Misdemeanor Convictions*: Misdemeanor convictions cannot be considered if the sentence was completed more than 30 months before the date of the application.
- *Arrests Without Convictions*: Employers cannot consider arrests that did not result in a conviction, no matter how old, except in cases of probation before judgment, which are treated as misdemeanors under the ordinance.
- *Marijuana-Related Offenses*: Arrests or convictions for possession of marijuana or cannabis-related paraphernalia cannot be considered, provided the sentence has been completed.

Expanded Definitions
The amended ordinance also includes broader definitions of key terms, which further limit employer's inquiries and consideration into an applicant's criminal background history. Key amended terms include:

- *Arrest*: This term now encompasses any apprehension, detention, or custody by a law enforcement or military authority, even if no charges are ultimately brought.
- *Conviction*: The term is expanded to include a guilty verdict or plea, including nolo contendere.
- *Nonviolent felony*: This term now is defined to include any felony that does not meet the state's definition of a violent crime.[1]

Comparison with Other Local Jurisdictions
Prince George's County's amended ordinance is more restrictive than the Maryland statewide Ban-the-Box law, which permits employers to inquire about an applicant's criminal history during the initial interview, whereas the county's ordinance permits inquiries only after the initial interview. Also, the county's coverage threshold is lower than that of the state law, which applies to employers with 15 or more full-time employees. The amended ordinance's coverage threshold of 10 employees or more now brings Prince George's County to the same threshold as that of the two other Maryland localities that have enacted ban-the-box ordinances: Montgomery County and Baltimore City. Similarly, these other two local ordinances contain the same restriction that limits employers from making inquiries until after the initial interview.

Recommended Employer Action Items
Covered Maryland employers should update their criminal background check procedures to ensure compliance with these new restrictions. This includes ensuring that inquiries into an applicant's criminal record are delayed until after the initial interview and conform to the limitations on nonviolent felonies, misdemeanors, and arrests. Employers should not merely assume they lawfully can consider a record in a background report because the ordinance regulates employers, not background check companies. Put another way, just because an employer sees a criminal record in a background report, that does not mean the record is fair game for the employer to use in the hiring process.

CLICK HERE FOR SOURCE ARTICLE

New Jersey Legislature Passes Pay Transparency Bill

New Jersey is now poised to join a growing list of states that have enacted pay transparency laws. On September 28, 2024, the New Jersey legislature passed a bill (S2310/A4151) after the Senate voted unanimously to approve the measure in June. It now goes before Governor Phil Murphy for his consideration. If enacted, the bill would require transparency as it relates to both compensation in employment listings as well as promotional opportunities.

Covered Employers
The pay transparency and promotional opportunity notice requirements would apply to employers with 10 or more employees over 20 calendar weeks who do business, employ persons, or take applications for employment within New Jersey. Coverage would also extend to job placement and referral agencies and employment agencies.

Required Job Posting Pay Disclosures
The bill would require that covered employers include in each posting for new jobs and transfer opportunities the hourly wage or salary, or the range of the hourly wage or salary, for the role, as well as a general description of benefits and other compensation programs for which the employee hired into the role would be eligible. The bill further provides, however, that "[n]othing [in the bill] shall be construed to prohibit an employer from increasing the wages, benefits, and compensation identified in the job opening posting at the time of making an offer for employment to an applicant."
Temporary help service firms and consulting firms would also be required to provide the same pay and benefit information to an applicant for temporary employment at the time of interview or hire for a specific job opening. However, such firms would not be required to include any such information in postings "that are posted for the purpose of identifying qualified applicants for potential future job openings and not for existing job openings."

Promotional Opportunity Notice Requirement
Covered employers also would be required to "make reasonable efforts to announce, post, or otherwise make known" opportunities for promotion that are advertised either externally or internally within the employer to all current employees in the affected department(s) prior to making a promotion decision. External postings for this purpose would include internet-based advertisements, postings, printed flyers, or other similar advertisements. However, any promotion for a current employee that is awarded on the basis of years of experience or performance would be excluded from the notice requirement. The bill also would not prohibit an employer from making a promotion "on an emergent basis due to an unforeseen event."

Remedies and Enforcement
Employers would face fines of up to $300 for the first violation and $600 for each subsequent violation of the proposed law. Failure to comply for all postings for one job opening or transfer opportunity or for one promotional opportunity would be considered a single violation, regardless of the number of postings or listings for the given opportunity. No private right of action would be available.

Takeaways
If signed by Governor Murphy, the bill would go into effect six months after signing. New Jersey employers should follow developments on this bill and prepare for possible upcoming changes around job posting obligations.

CLICK HERE FOR SOURCE ARTICLE

Pittsburgh to Limit Employers' Ability to Drug-Test Medical Marijuana Patients

The Pittsburgh City Council unanimously passed an ordinance prohibiting discrimination against medical marijuana patients in the workplace and limiting certain types of marijuana drug testing by employers as to these patients. Mayor Ed Gainey is expected to sign the measure and it will take effect immediately after signing.

Pennsylvania state law already protects medical marijuana users from employment discrimination.

The Pittsburgh Ordinance applies to any employer, employment agency, or labor organization that employs at least five employees. Employers excluded from coverage are religious, fraternal, charitable, and sectarian organizations not supported in whole or in part by any governmental appropriations.

The Pittsburgh Ordinance protects individuals who have a "serious medical condition, disability, or handicap such that qualifies them for medical marijuana use," as well as individuals who are certified under the Pennsylvania State Medical Marijuana Act of 2016 (Act 16) to access marijuana for a certified medical use.

Under the Pittsburgh Ordinance, an employer may not require pre-employment testing for marijuana or testing for marijuana during the course of employment as a condition of continued employment or prospective employment. However, exceptions include:

- Any position which is subject to drug testing due to regulations of the U.S. Department of Transportation or Pennsylvania Department of Transportation;
- Any position requiring the employee to carry a firearm; and
- Any applicants whose prospective employer is a party to a valid collective bargaining agreement that specifically addresses pre-employment drug testing.

Like under Act 16, the Pittsburgh Ordinance provides that medical marijuana patients may not operate or be in physical control of certain regulated chemicals, high-voltage electricity, or any other public utilities if they have more than 10 nanograms of active THC in their bloodstream. Medical marijuana patients also may not perform certain tasks or duties while under the influence of marijuana such as ones at heights or in confined spaces (for example, mining), any task deemed to be life-threatening to either the employee or employer, and any duty that could result in a public health or safety risk.

Pittsburgh employers may:

- Conduct marijuana drug testing when there is reasonable cause to suspect an employee is under the influence of a drug while at work or after a workplace accident.
- Take disciplinary action against a medical marijuana patient if the employee's conduct falls below the standard of care normally accepted for that position while under the influence in the workplace.

Moreover, employers do not have to allow use of medical marijuana on workplace premises or property. They also are permitted to conduct testing for illegal use of controlled substances. Employers located and operating in the Pittsburgh area should reevaluate their hiring policies and drug policies and ensure they are consistent with the Pittsburgh Ordinance, state law, and federal law.

CLICK HERE FOR SOURCE ARTICLE

Further Updates on Maryland's New Pay Transparency Law Effective October 1, 2024

Maryland recently enacted the Wage Range Transparency law, which went into effect on October 1, 2024. We previously provided a Legal Alert on this topic, however, the Maryland Department Labor has since provided more helpful insight here. As a brief overview of the key topics, the Wage Range Transparency law requires employers to provide the following for all job postings:

1. the pay range, including minimum and maximum; 2. a general description of the benefits (i.e.: employer provided insurance, retirement funds, and PTO policies); 3. any other compensation elements offered for the position (i.e.: compensatory overtime, bonuses, stock or stock options, and tips).

Importantly, employers are required to comply with these requirements for both internal and external job postings and the requirements apply whether the employer posts the position via a third party or directly.

The Maryland DOL provides a sample template employers can rely on in drafting their compensation disclosures. Using this template will ensure compliance with the new law, however, employers may craft their own narrative-form compensation disclosures as part of job postings, so long as all required information is included. The Maryland DOL also provided helpful examples of narrative disclosures in their updated materials.

If an employer fails to comply with the law, the Commissioner of Labor and Industry has the authority to assess civil penalties, which range from an order compelling compliance to a fee of $600 per applicant for whom the employer is not in compliance.

NEXT STEPS:
All employers should consider conducting the following due diligence:
1. Review job postings and advertisements to ensure compliance;
2. Consider conducting a pay equity audit to ensure that pay setting practices are compliant with all federal and state equal pay laws;
3. Evaluate your interviewing and hiring material;
4. Train all relevant personnel on the updated requirements.

CLICK HERE FOR SOURCE ARTICLE

Massachusetts Employers: Prepare for New Pay Transparency Requirements

The Massachusetts legislature recently took its first significant step to expand pay-related protections for job applicants since the state's 2016 Pay Equity Law. Beginning July 31, 2025, most employers will now be required to disclose pay ranges in their job postings and report demographic and pay data to the state.

Who must comply with the pay transparency requirements?
The pay transparency requirements concerning job postings apply to any employer that employs 25 or more employees in Massachusetts.

The data reporting requirements apply to any employer that employs 100 or more employees in Massachusetts and that is already required to file an applicable EEO report with the U.S. Equal Employment Opportunity Commission (EEOC).

What must covered employers do to comply?
Covered employers must disclose the pay range for the applicable position in each posting for that position. Employers must also disclose to employees offered a promotion or transfer the pay range of their new position. Finally, employers must provide a position's pay range upon request to a current employee in that position or to an applicant for that position.

"Pay range" includes both annual salary and hourly wage ranges. The range should be calculated based on the employer's reasonable and good faith pay expectations for the position at that time.

Covered employers who are required to file EEO-1, EEO-3, EEO-4, and/or EEO-5 data reports with the EEOC must now also submit them to the Secretary of the Commonwealth (the chief record-keeping, public information, securities regulator, and elections officer). EEO-1 reports for the prior year must be submitted annually. EEO-3 and EEO-5 reports for the most recent filing period must be submitted every odd-numbered year. EEO-4 reports for the most recent filing period must be submitted every even-numbered year.

What is a "posting?"
A posting is anything intended to recruit job applicants for a particular and specific position. This can include advertisements, job postings, direct recruiting, and indirect recruiting through a third party.

What are the punishments for failure to comply?
The law prohibits employers from retaliating or discriminating against individuals for exercising their rights under the new law.

There is, however, no private right of action. Instead, the Massachusetts Attorney General may impose punishments for violations. Covered employees found in violation of either requirement may be punished with:
- For a first violation, a warning.
- For a second violation, a fine of up to $500.
- For a third violation, a fine of up to $1,000.
- For a fourth violation and beyond, a fine of up to $25,000, authorized by a separate law.

For the first two years, starting July 31, 2025, and ending July 31, 2027, employers will have two business days after

learning of a violation to fix it before they can be fined.

Takeaways for Employers
States continue to enact pay transparency (job posting) requirements. For example, Minnesota's pay transparency law takes effect in January 2025. Massachusetts employers should review their current pay rates, hiring practices, and job postings in anticipation of the July 2025 effective date. Contact your Vorys lawyer with questions regarding Massachusetts' pay transparency requirements or similar requirements in other jurisdictions.

CLICK HERE FOR SOURCE ARTICLE

San Diego County Enacts Fair Chance Ordinance for Unincorporated Areas of the County

San Diego County recently passed its own Fair Chance Ordinance which takes effect on October 10, 2024. The ordinance applies to businesses operating in the unincorporated areas of San Diego County. Similar to the Los Angeles County ordinance, it requires employers to assess the risk presented by an applicant's criminal history in relation to the position sought.

Covered Employers
The ordinance covers employers with five or more employees, doing business in the unincorporated areas of San Diego County.

Covered Employees
The law applies to employees performing at least two hours of work on average each week within the unincorporated areas of the County.

The ordinance specifies that it includes remote work from a location within the unincorporated areas of the County.

Prohibitions Under Ordinance
Under the ordinance covered employers are prohibited from:

- Declaring in a job posting or similar listing any limitation due to a conviction or arrest unless required by law.
- Include in an application or similar document prior to a conditional offer of employment, any question that directly or indirectly asks about the individual's criminal history.
- Taking an adverse action against an applicant based on a criminal history information until after a conditional offer of employment is made.
- Inquire or consider certain items such as convictions that have been sealed, diversion programs, or arrests not followed by conviction.

Employer Obligations
Under the ordinance covered employers who intend to take adverse action in response to an applicant's criminal history shall make a written individualized assessment of whether the criminal history has a direct and adverse relationship with the specific duties of the job. If an employer decides to take adverse action based on an applicant's criminal history, they must provide the applicant with a written notice, a copy of the background check report, and an opportunity for the applicant to respond.

Employers must retain records related to all employment applications and written assessments for one year following receipt.

CLICK HERE FOR SOURCE ARTICLE

Illinois Employers Take Note: New Pay Transparency Requirements Go into Effect in 2025

Effective January 1, 2025, amendments to the Illinois Equal Pay Act will require that Illinois employers with 15 or more employees disclose "pay scale and benefits" in all job postings. The amendments, which were signed by Governor J.B. Pritzker in 2023, apply to (1) jobs that will be physically performed, *at least in part*, in Illinois and (2) jobs performed

outside of Illinois if the employee reports to a supervisor, office, or other work site within Illinois. The amendments also introduce new requirements for internal promotion procedures.

Requirements: "Pay Scale" and "Benefits"

Employers are required to include the "good faith" range that the employer reasonably expects to offer for the position. Employers may use any of the following considerations in order to determine the "pay scale" for a job posting:

- The actual, applicable pay scale;
- The previously determined salary range for the position;
- The actual salary range of employees who currently hold the position; and/or
- The budgeted amount for the position.

In order to disclose "benefits" in accordance with the new requirements, employers should provide a general description of benefits and other forms of compensation, including bonuses, stock options, and other incentives. Employers do not need to disclose a range or amount for "benefits" and instead must simply list the benefits.

How to Disclose

The amendments allow employers flexibility in how this information is disclosed in job postings. First, employers can include pay scale and benefits in their own job postings. Employers also can provide a hyperlink to a page on the employer's website that shows the required information. If an employer uses a third party (such as an external recruiter or employment service provider) to make or list job postings, the employer is responsible for providing pay scale and benefits information to the third party, and the third party is then responsible for posting that information.

Notably, the amendments do not require that employers *make* job postings with this information if no such job postings exist. These requirements apply only to job postings that the employer chooses to post. In other words, if an employer chooses to create a job posting, *then* the employer must comply with these requirements. But, employers are not required to create job postings from scratch due to these new requirements.

Applicability to Employees in Illinois

As noted above, these requirements apply to all jobs that will be physically performed, at least in part, in Illinois, as well as jobs performed outside of Illinois where the employee reports to a supervisor, office, or other work site in Illinois.

Although this description of jobs "physically performed, at least in part, in Illinois" might seem intuitive at first glance, it raises questions about positions that might, only rarely, require some work performed in Illinois (such as, for example, coming into Illinois for a brief meeting and then leaving again). The Act itself does not provide a definitive answer as to what it means for a job to be "physically performed, at least in part, in Illinois." There is also no guidance from the Illinois Department of Labor on this question. However, similar laws in California, Colorado, New York, and Washington state generally provide that brief meetings, conferences, or commuting would not meet the requirements for those states' respective laws. In other words, it appears that most states do not take such an extreme, rigid interpretation that their pay transparency laws include work that involves occasional travel to the state.

Internal Promotion Requirements

Under the new amendments, employers are now required to announce, post, or otherwise make known all opportunities for promotion to current employees no later than 14 calendar days after making an external job posting for that same position. In other words, if an employer makes an external posting for a position, it must also post or announce the opportunity to all current employees no later than 14 calendar days after the external posting.

Recordkeeping, Retaliation, and Penalties

Recordkeeping. Employers covered by these new requirements must make and preserve records of the job posting, pay scale, and benefits for each position for no less than five (5) years.

Retaliation. Employers covered by these new requirements cannot refuse to interview, hire, promote, employ, or otherwise retaliate against an employee or applicant for exercising any rights under the Act. Employers may, however, ask a prospective employee's wage or salary expectations, so long as they do not screen applicants based on current/prior wage

history or request wage/salary history as a condition of application, offer, or employment.

Penalties. The Illinois Department of Labor will enforce these new requirements and provides a notice and cure period of 14 days for first offenses and seven (7) days for second offenses. Fines are applied either to a single posting or a batch of postings and differ depending on the number of offenses and whether the posting is active or inactive at the time of the offense. In order to determine whether a posting is "active," the Illinois Department of Labor will consider factors such as if the employer is still accepting applications, whether the position has been filled, and how long the posting has been accessible to the public.

For active job postings, the penalty scale is as follows:

- First Offense: A fine not to exceed $500 (if the violation is not remedied within the 14-day cure period)
- Second Offense: A fine up to $2,500 (if the violation is not remedied within the seven-day cure period)
- Third Offense and Subsequent Offenses: A fine up to $10,000 (no cure period)

For inactive job postings, the penalty scale is as follows:

- First Offense: A fine up to $250
- Second Offense: A fine up to $2,500
- Third Offense and Subsequent Offenses: A fine up to $10,000

Next Steps: What Should Illinois Employers Do Now?

Employers subject to these new requirements should review active job postings to ensure compliance with the new requirements before January 1, 2025. If employers use third parties to make or list job postings, they should ensure that the required disclosures are communicated to those third parties in advance of January 1, 2025.

CLICK HERE FOR SOURCE ARTICLE

Fayetteville (Arkansas) passes ordinance to cap rental application and background check fees

The city now has a limit on how much landlords can charge for rental applications and background checks.

The City Council on Tuesday voted to approve an ordinance capping the fees at $40, in a move that Council Member Sarah Moore hopes will help renters save some money.

Moore, who introduced the proposal, said the idea came after months of conversations with renters who have watched the costs add up when looking for a place to live. She said some renters reported spending hundreds, even thousands of dollars in application fees during their housing search.

Moore said many renters have had to apply to multiple properties, causing them to lose money that could have been saved for essential expenses like moving costs, deposits, and rent. With 60% of the city's households being renters, she said the issue affects a significant portion of the community.

"This really is a very initial small step to start to try to create some renter protections in the city of Fayetteville." said Moore.

Under the new law, landlords and property managers in Fayetteville will be limited to charging a combined total of $40 for rental applications and background checks. The ordinance also requires landlords to refund background check fees if no check is performed.

Moore's original proposal included a $50 cap on background checks and a $20 cap on application fees, along with a provision requiring landlords to accept background checks from other landlords for up to 90 days. However, after speaking with landlords and property managers, Moore suggested lowering the combined cap to $40 and eliminating the background check reuse requirement, which City Attorney Kit Williams called "legally iffy."

Moore said the $40 cap more closely aligns with the fees charged by some of the largest property management companies in Fayetteville, and would still cover the costs of background checks using widely accessible online platforms, like Zillow. While the ordinance received support from the majority of the council members, Berna voted against it, citing concerns that

it could have unintended negative consequences for renters. Berna argued that small landlords, who often pay higher fees for background checks than larger property management companies, might pass those costs on to renters in the form of higher rent. He also worried that the ordinance could attract unwanted attention from state legislators, who might push back against local efforts to regulate rental fees.

Moore said she understood Berna's concerns but argued the benefits of the ordinance outweighed those fears, and that it was a necessary step to reduce financial stress on renters in Fayetteville. She said some landlords might raise rents, but argued that renters would benefit from knowing their exact rent rather than being hit with additional, unpredictable fees during the rental process.

During public comment, 14 residents spoke, all in favor of the ordinance. They shared personal experiences and talked about how burdensome rental fees can be, particularly for low-income individuals, college students, and anyone struggling with the rising costs of housing. Several also said the ordinance aligns with the city's commitment to addressing the housing crisis.

The final vote was 5-2 to approve the ordinance. Those voting in favor include Moore, Bob Stafford, D'Andre Jones, Mike Wiederkehr and Sarah Bunch. Holly Hertzberg joined Berna in voting against. Council Member Teresa Turk left the meeting before the ordinance was discussed.

The new ordinance will take effect in 90 days, instead of the standard 31, which Moore said should give landlords time to adjust to the changes.

CLICK HERE FOR SOURCE ARTICLE

Lawmakers Introduce Criminal Information Protection Bill in Trenton NJ

A new bill introduced in the New Jersey legislature aims to update procedures for handling criminal background checks in the state, particularly focusing on individuals with pending expungement orders. The proposed law would amend P.L.1985, c.169, requiring the State Bureau of Identification (SBI) within the New Jersey State Police to verify and update criminal records before disseminating any background information.

The amendment mandates that before providing criminal history information, the SBI must check whether an individual has been granted an expungement order by the Superior Court that remains unprocessed. If an unprocessed order exists, the SBI must update its records to reflect the expungement before releasing any information to state, county, local government agencies, or authorized nongovernmental entities.

A key provision of the bill, which takes immediate effect upon passage, is intended to address potential issues arising from delays in expungement processing. "This bill would specify that prior to disseminating background information, the SBI is required to determine whether the person to whom the background information pertains has an unprocessed order of expungement," according to the legislative statement accompanying the bill.

Under current regulations, the SBI is authorized to disseminate criminal history records upon request, but the statute does not specifically address situations involving unprocessed expungement orders. The bill's authors highlighted that this lack of specification can lead to the release of outdated records, potentially affecting individuals seeking employment, volunteer positions, or licenses.

The bill also reinforces the SBI's authority to collect fees for processing background checks and fingerprint identification, with certain exemptions in cases involving volunteer applicants or prospective resource family parents. However, in such instances, state or local government departments overseeing volunteer programs may bear the cost of processing.

The amendment is designed to prevent errors in criminal background checks and ensure individuals are not unfairly precluded from opportunities due to delays in expungement processing.

CLICK HERE FOR SOURCE ARTICLE

COURT CASES

Massachusetts: Asking About Voluntarily Disclosed Arrest Records Violates Non-Discrimination Laws

As you may already know, Massachusetts law prohibits employers from directly asking a prospective or current employee about an arrest that it learns about through an outside source. But what if that prospective or current employee tells you about an arrest themselves, is it okay to ask them about it then?

Last week, a Massachusetts federal judge issued a decision regarding employers' inquiry into the arrest records of prospective employees. The Court answered the question of whether an employer can inquire about an arrest that did not result in a conviction when a prospective employee voluntarily discloses the arrest on their application. The Court answered this question in the negative, concluding that it was a violation of the Massachusetts non-discrimination laws to ask the applicant for additional information about the arrest.

Prospective firefighter rejected after disclosing domestic assault arrest on application form
In August 2019, a would-be firefighter submitted an employment application with the Fire Department in Everett, Massachusetts. On the form, he disclosed that he was charged with assaulting his former girlfriend in 2011 and that the charge was ultimately dismissed. He also listed the former girlfriend as a reference.

As a part of its application process, the Fire Department requested a background screening report for the applicant from an outside vendor, National P.I. Services, LLC. In its report, National P.I. confirmed that the applicant had been arrested and charged with assaulting his former girlfriend and violating a restraining order by police in Norfolk, Virginia, and that the charges were ultimately dismissed.

In preparing its report, National P.I. spoke with both the applicant and his former girlfriend in September 2019. National P.I. reported to the Fire Department that she recalled the incident; he claimed that he was never arrested.

In March 2021, the Fire Department decided against hiring the applicant, relying in part on his denial of the arrest that he himself had voluntarily disclosed on his application form.

National P.I. found in violation of non-discrimination laws
The applicant filed a complaint against National P.I. alleging, among other things, that National P.I. violated Chapter 151B. Chapter 151B prohibits "discriminat[ion] against any person by reason of his or her failure to furnish such information through a written application or oral inquiry or otherwise regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted." Chapter 151B further prohibits "an employer, himself or through his agent, in connection with an application for employment" from requesting any information regarding an arrest that did not result in a conviction.

No one disputed that National P.I. was acting as an agent of the Fire Department, or that National P.I. did ask the applicant about the circumstances of his 2011 arrest during their interview with him. But National P.I. nonetheless denied violating the law, arguing that they discovered the circumstances of the arrest during their conversation with the applicant's former girlfriend and that, in any event, he waived his rights under Chapter 151B when he disclosed the arrest on his employment application and listed his former girlfriend as a reference.

The Court summarily rejected National P.I.'s second argument, finding that National P.I. provided no legal support for its waiver argument.

Instead, the Court focused on National P.I.'s first argument. The judge agreed that National P.I. did not violate Chapter 151B when it asked the former girlfriend about the applicant's arrest or when it ran other criminal background checks on him. However, the Court did find that National P.I. violated Chapter 151B when it asked the applicant for additional information about the arrest during his interview. Further, the Court pointed out that the applicant's denials about being arrested contributed to the Fire Department's decision not to hire him.

Takeaways

The case, *Meuse v. National P.I. Services, LLC*, is important for employers to keep in mind when they find out about arrests for either prospective employees or current employees. While Chapter 151B does not prohibit employers from seeking information about the arrest of either a prospective or current employee from outside sources, questioning a prospective or current employee about an arrest could violate the law—especially if that arrest becomes the motivating factor for terminating a current employee or deciding not to offer employment to a prospective employee.

CLICK HERE FOR SOURCE ARTICLE

INTERNATIONAL DEVELOPMENTS

Peru: International Equal Pay Day

In brief
In recognition of International Equal Pay Day, here are some practical tips to help employers ensure their workplaces are free from wage discrimination and to avoid legal contingencies on this matter.

1. What are the main equal pay obligations for companies?
The main obligations for employers under current regulations (Law 30709 and Supreme Decree No. 002-2018-TR) are the following:

- Evaluating the jobs and preparing a table of categories and functions.
- Preparing a salary policy.
- Communicating the company's salary policy to personnel at the start of employment and whenever there are changes that could affect compensation.
- Managing personnel salaries without direct or indirect discrimination.

In case of noncompliance with any of these obligations, companies may receive fines of up to PEN 270,529.50. This is without prejudice to the risk of being sued for wage discrimination.

2. When is a good time to monitor compliance with equal pay obligations?
It is important to implement constant monitoring mechanisms to detect and correct any inconsistencies in the management of personnel compensation that could lead to discrimination. Additionally, we recommend an annual review to ensure that both the table of categories and functions, as well as the salary policy are aligned with the company's operations.

In addition, companies must verify compliance with these obligations more carefully in the following two key occasions:

- In the context of a personnel transfer process: The transfer of personnel from one company to another is always a complex process. In terms of compensation, the packages for different groups of employees must be harmonized. With this in mind, we recommend verifying (i) that the harmonization plan does not create a situation of salary inequity prohibited by law and (ii) whether it is necessary to update the legally required documentation.
- Prior to the start of a collective bargaining process: We recommend verifying that the company's documentation on equal pay covers all legally required points and ensures that any wage differentiation is justified by objective criteria. This will enable the company to share information on personnel salary management without incurring legal risks that could complicate collective bargaining.

3. What should you do if you failed to answer SUNAFIL's request for information regarding equal pay last July?
If you were unable to respond to SUNAFIL's request for information in July of this year, we recommend that you promptly review your company's documentation on equal pay (salary policy, table of categories and functions, and proof of communication of the policy) to ensure compliance with the legislation. The chances of SUNAFIL initiating an inspection procedure against your company in the coming months are comparatively higher.

If you are not yet compliant with the requirements regarding equal pay, we recommend that you implement them as soon as possible. This will reduce the likelihood of any administrative or judicial contingencies.

CLICK HERE FOR SOURCE ARTICLE

Argentina: The DPA published the 'Guide for Public and Private Entities on Transparency and Personal Data Protection for Responsible Artificial Intelligence'

In brief
On 17 September 2024, within the framework of the National Program for Transparency and Protection of Personal Data in the Use of Artificial Intelligence (AI), the Agency for Access to Public Information (DPA) published the preliminary version of the "Guide for Public and Private Entities on Transparency and Personal Data Protection for Responsible Artificial Intelligence" ("Guide").

In depth
The main purpose of the Guide is to set forth guidelines for entities from the public and private sectors incorporating transparency and protection of personal data ("Data") into those technological development projects that implement AI systems to guarantee that data subjects' rights are exercised effectively.

The main recommendations for transparency and protection of Data in the life cycle of AI systems are as follows:

- Implement impact assessments as a tool to identify and mitigate risks associated with the processing of Data in AI systems from the start, and implement security measures to prevent and mitigate these risks at all stages of the AI system's life cycle
- Respect the principles of protection by design and default, lawfulness, quality, and transparency, among others, to have an AI system that protects data subjects, limiting the collection and processing of Data to that which is strictly necessary (Likewise, the legality of the processing of Data must be guaranteed, and quality controls must be implemented by multidisciplinary teams, promoting the explainability of the systems and guaranteeing algorithmic transparency.)
- Evaluate the algorithm used to ensure that it is aligned with the preestablished values, principles and guidelines, aiming to identify biases, patterns and errors of the algorithmic model and results
- Comply with the information obligations toward data subjects (AI systems should have privacy policies whereby data subjects are provided with relevant information regarding the AI system.)
- Continuously monitor security, bias and transparency to mitigate risks and promote continuous improvement of the AI system
- Adopt a proactive and demonstrated accountability approach to ensure that the operation of the AI system is secure, ethical and compliant with privacy and Data protection regulations and standards

The Guide seeks to ensure that public and private entities can adopt and implement the standards, principles and detailed aspects to achieve a responsible AI system, with greater legitimacy and fewer risks, promoting the effective exercise of the subjects' rights and their trust in these entities.

CLICK HERE FOR SOURCE ARTICLE

Update on Gender Pay Gap Reporting - Ireland

The gender pay gap (GPG) is the difference in the average hourly wage of men and women across a workforce. The Gender Pay Gap Information Act was enacted in 2021. The Act requires organisations to report on their GPG across a range of metrics. Organisations with over 250 employees have been required to report annually on their GPG since December 2022. We previously wrote about the GPG reporting obligations under the Employment Equality Act 1998 (section 20A)(Gender Pay Gap Information) Regulations 2022 (the 2022 GPG Regulations).

The 2022 GPG Regulations were updated in May 2024 by the Employment Equality Act 1998 (section 20A) Gender Pay Gap Information (Amendment) Regulations 2024 (the 2024 GPG Regulations). The GPG reporting obligations have now been extended to employers which employ 150 employees or more. Relevant employers will be required to produce a GPG information report by a date in December 2024, six months after a snapshot date in June chosen by the employer.
GPG reporting obligations will be further extended next year (2025) to organisations which employ 50 employees or more.

Key changes

Other key changes introduced by the 2024 GPG Regulations include:

- Share options and interests in shares should no longer be treated as bonus remuneration. Instead, they should be included as benefits in kind. In theory, this should simplify calculations, as employers will only have to calculate the percentage of male and female employees who received these types of benefits in kind, and not assign a monetary value to these benefits in kind.
- There has been a slight change in the formula used to calculate the total number of working hours for employees whose working hours are not fixed or differ from week to week. This appears to reflect the fact that 2024 is a leap year.
- Helpfully, a new definition of “basic pay” has been introduced. This new definition clarifies that payments made to employees on maternity, paternity, adoptive and parent’s leave, including both the relevant State benefit and any

"top up" amount paid, should be included when calculating basic pay. The Government has published an updated FAQ document for employers on GPG reporting, which advises that where employers do not pay a top-up to employees, they should report on the State benefit that the employee is paid.

There is still a six-month deadline for organisations to report on GPG for 2024 after the snapshot date in June. However, from 2025 onwards, it is anticipated that there will be a five-month deadline to report after the snapshot date, i.e. a November 2025 reporting deadline.

Currently, GPG information must be published on the relevant organisation's website, or in some other manner that is accessible to all its employees and to the public, and for a period of at least three years. While there remain plans for an online, central reporting system to be developed by the Department for Children, Equality, Disability, Integration and Youth, this is unlikely to be in place for the 2024 reporting cycle.

Conclusion.

For employers reporting on their GPG for the first time in 2024, they should:

- Familiarise themselves with the 2022 and 2024 GPG Regulations
- Ensure they have the necessary internal systems in place to capture, analyse and report on their GPG
- Set aside sufficient time to collect the necessary data and carry out the relevant calculations

CLICK HERE FOR SOURCE ARTICLE

Spain: New EU Rules on Wage Gap

On 17 May 2007, the Official Journal of the European Union published Directive 2023/970. The new directive, which will soon be transposed in Spain, introduces new provisions to strengthen the principle of equal pay for men and women and to increase pay transparency. These include:

- Pre-employment salary transparency, ensuring that prospective employees have access to clear information about compensation before applying.
- Employers will no longer be permitted to ask candidates about their salary history, a common practice that will be prohibited under the new legislation.
- Companies will be required to ensure that job advertisements are gender-neutral and free from any form of discrimination.

In addition, companies will have to make their pay setting and pay progression policy available to their employees. Moreover, employees will also have a right to information about their level of pay. Companies with more than 100 employees are required to provide information on any existing pay gaps. Moreover, a pay review may be carried out with employee representatives if there is a gender pay gap of more than 5%.

CLICK HERE FOR SOURCE ARTICLE

Recreational Cannabis Use and Employment in Canada

The legalization of recreational cannabis in Canada in 2018, opened the door to a wave of new questions about how it fits into the workplace. Employees might feel empowered to use cannabis in their free time, but employers are increasingly concerned about its impact on safety, performance, and overall productivity.

So, how has the new legislation affected the rights of employees to use cannabis? Surprisingly, the passing of the Cannabis Act did very little to change the dynamics relating to permitted recreational cannabis use in the employment context. If anything, the rights of employees to use cannabis, recreationally, have been limited, not improved, by the legalization, and strict regulation, of cannabis.

Human Rights

It is important to note that there is a very clear line to be drawn between those who have a legitimate disability and are prescribed medical cannabis and those who use cannabis recreationally. In Ontario, section 5(1) of the Human Rights Code

(Code) states that employers cannot discriminate against employees for a legitimate disability. The bar on discrimination includes any negative treatment towards an employee who has a disability that requires medical cannabis for treatment of their condition, or an employee who is addicted to cannabis. Section 17(2) of the Code also states that if someone's disability (or related cannabis use) negatively affects their work, an employer must accommodate that employee by altering their work duties, unless the accommodation equates to undue hardship for the employer. In some rare cases, this may even include allowing an employee to use cannabis while at work. Effectively, these protections allow employees to use cannabis without repercussions as long as they have a prescription for cannabis, and their use does not significantly impact their work.

Occupational Health and Safety

However, the case law has stipulated that discriminating against someone, including not accommodating their disability, is reasonable if the employer can show that the discrimination is required because the employee cannot meet a pre-established bona fide occupational requirement due to their disability. This is especially true if the employee works in a safety-sensitive environment. Furthermore, sections 25-28 of the Occupational Health and Safety Act (OHSA) make it clear that employers, employees, and all those on a work site, must ensure that the workplace is safe at all times. This includes not allowing someone's impairment, or side-effects of cannabis use, to affect the safety of themselves or others. Therefore, accommodating someone's disability is secondary to the safety of everyone in the workplace. In addition to these safeguards, employers may create strict workplace policies relating to cannabis use in safety-sensitive industries, and for cannabis users generally. These policies can make not using cannabis during or after work a bona fide occupational requirement, require individuals to disclose their addictions and accept treatment, and drug test employees at will in safety-sensitive industries. If employees willingly break these policies, employers may terminate their employment with potentially minimal recourse from the law.

Recreational Users

So, if the protections for those who require medical cannabis, and those who are living with cannabis addiction, have many caveats and restrictions, where does this leave recreational cannabis users? Unfortunately, the protections for this population are almost non-existent.

In addition to the ability of employers to create strict policies for safety-sensitive industries, and cannabis users generally, Ontario legislation identifies multiple industries with zero-tolerance policies for cannabis use and possession. One of the most severe zero-tolerance sanctions is for individuals who are employed as commercial motor vehicle drivers. Recent amendments to the Highway Traffic Act (HTA), notably the sections under 48.0.4, have made it illegal for anyone who is a commercial motor vehicle operator to have any presence of cannabis in their system. If they test positive for any cannabis, whatsoever, commercial vehicle operators face a license suspension and fine without the ability to contest. If the same operator has a prescription for medical cannabis, and the assessing officer determines that the operator is not too impaired to drive, they may get away without sanction. Recreational cannabis users do not have this added protection.

The OHSA regulations also identify three other industries with similar zero-tolerance policies to cannabis use, and additionally cannabis possession. OHSA Regulations 854, 855, and 629 state that employees in mining operations, oil and gas operations, and diving operations, respectively, cannot have any presence of cannabis in their system. Additionally, regulations 854 and 855 state that an employee in mining operations, and oil and gas operations, respectively, cannot "carry" a drug on their person while at work. These regulations also have protections built in for those prescribed medical cannabis.

Key Employment Law Concerns

- Many concerns encompass employee rights to cannabis, but only three are discussed here. One is the ability of employers to create strict cannabis policies, the second is the testing used to assess an employee's cannabis use, and the third is the strict stance on possessing cannabis in certain industries. With respect to the first issue of strict cannabis policies, due to media coverage of recreational cannabis legalization, employers became overly concerned about an intoxicated workforce. This led to incredibly strict workplace policies that instilled a heightened level of mistrust into Canada's already sensitive employment dynamic.
- On the second point of testing, if you have a prescription for cannabis, notwithstanding the above caveats, you are permitted to have some cannabis in your system within any strict employer policy or even in a zero-tolerance industry. However, if you are a recreational user, within these same environments, any presence of cannabis in your system could cost you your job. It is well-known that the testing instruments used to measure the level of THC (the psychoactive ingredient in cannabis) in someone's body are generally flawed and not nearly as accurate as a breathalyzer is for alcohol. Many studies, such as this, highlight that a person can test positive for cannabis weeks,

or even months, after consumption. This is highly problematic for recreational cannabis users who happen to work for employers with strict cannabis policies and/or in zero-tolerance industries. For example, if you are a commercial motor vehicle driver who smoked a non-prescribed joint on Saturday, you could have your license suspended, and potentially lose your job, on Monday a week or two later, without any further cannabis use after the one initial joint. This is because the testing instruments are often far too sensitive to detect actual intoxication versus merely the presence of THC in your body. Of course, testing instruments, such as those linked here, have become much more accurate. However, any testing instruments are still arguably not sensitive enough to assess active intoxication versus past passive use, and there is always the concern of whether an employer is using the most up-to-date instruments.

- Finally, on the third issue of possession in certain industries; if you work in mining operations, or oil and gas, and you happen to leave some (perfectly legal), albeit not prescribed, cannabis in your pocket while you are at work you may be at risk of contravening OHSA regulations.

Take Away

It is clear that the legalization of recreational cannabis did not create absolute immunity for cannabis use in the workplace, especially for employees who are recreational users. There are many restrictions on cannabis use, even for those who have a medical requirement to use the substance. Furthermore, those who use cannabis recreationally have almost no rights when it comes to cannabis use and their employment. Therefore, employees should be aware of the repercussions they may face within, and outside, their workplace if they use cannabis. Additionally, employers need to be explicit when outlining their workplace policies, and the applicable legal standards, to ensure that their employees are fully informed of the specific workplace standards relating to cannabis use.

CLICK HERE FOR SOURCE ARTICLE

Q&A: The Data Protection Legal Framework in Hungary

Law and the regulatory authority

Data protection authority

Which authority is responsible for overseeing the data protection law? What is the extent of its investigative powers?

The authority responsible for overseeing the data protection law is the National Authority for Data Protection and Freedom of Information (the Authority). The Authority has the following investigative powers:

- it may ask for information and request the client to make statements;
- it may take testimony from witnesses (including conducting interviews);
- it may access all PI and information that is necessary for the performance of its tasks;
- it may also ask for copies of PI and other information;
- it may make on-site visits and request access to equipment used in the course of the data processing; and
- it may ask for expert opinions.

Cooperation with other data protection authorities

Are there legal obligations on the data protection authority to cooperate with other data protection authorities, or is there a mechanism to resolve different approaches?

The Authority is a member of the European Data Protection Board (EDPB), which publishes guidelines to ensure consistency across member states in GDPR interpretation. Regarding issues that are covered by guidelines of the EDPB or article 29 of the Data Protection Working Party (the predecessor of the EDPB), the Authority follows those guidelines.
In the case of cross-border data processing, the Authority suspends the proceedings until the lead supervisory authority makes its statements on taking over the case based on the GDPR's one-stop-shop mechanism. In such cases, the lead supervisory authority and the Authority must cooperate to find a mutually acceptable solution. If they cannot, the consistency mechanism applies, in which the EDPB may have the final word.

Breaches of data protection law

Can breaches of data protection law lead to administrative sanctions or orders, or criminal penalties? How would such breaches be handled?

Breaches may lead to sanctions, which depend on the type of breach. The most feared sanction is the administrative fine for breaching the GDPR, which may reach €20 million or 4 per cent of the organisation's annual turnover (whichever is higher).

The Authority may also impose corrective measures set out under the GDPR, such as:

- issuing reprimands to a controller or a processor where processing operations have infringed provisions of the GDPR;
- ordering the controller or the processor to comply with the data subject's request to exercise his or her rights;
- ordering the controller or processor to make their processing operations comply with the provisions of the GDPR;
- ordering the controller to communicate a personal data breach to the data subject;
- imposing a temporary or definitive limitation (a ban on processing);
- ordering the rectification or erasure of PI or restriction of processing;
- ordering the suspension of data flows to a recipient in a third country or an international organisation; and
- withdrawing a certification or ordering the certification body to withdraw a certification.

A breach of data protection laws may also lead to criminal penalties if such a breach is committed for financial gain or if it causes significant detriment to individuals. Criminal penalties may include financial penalties, confinement or imprisonment for up to one, two (if the crime is committed in relation to sensitive or criminal record data) or even three years (if the crime is committed by state officials abusing their powers).

The Authority has two kinds of procedures to handle breaches:

- Investigation: the Authority may start an investigation based on a complaint (which may be made by anyone) or ex officio. At the end of the investigation, the Authority may call on the data controller to remedy the situation. The controller shall remedy the situation within 30 days of receiving the call. In the investigation procedure, the Authority imposes neither a fine nor other corrective measures.
- Administrative procedure: the administrative procedure may be launched based on a complaint (only the concerned data subject may make a complaint) or ex officio. The Authority must launch the administrative procedure ex officio only if in the investigation phase the Authority had imposed an order, but the controller did not remedy the situation within the deadline, or in the investigation phase, the Authority concluded that unlawful processing occurred and based on GDPR rules a fine may be imposed.

Scope

Exempt sectors and institutions

Does the data protection law cover all sectors and types of organisation or are some areas of activity outside its scope?

Hungarian data protection laws cover all types of organisations. An exemption applies in the case of individuals processing personal information (PI) for household purposes, but otherwise, any organisation that processes PI will be under the scope of Hungarian data protection laws.

Even when the EU General Data Protection Regulation (GDPR) does not apply (eg, the processing of PI by national security entities or courts), the provisions of Act No. CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information (the Data Protection Act) still apply. In such a case, the National Authority for Data Protection and Freedom of Information (the Authority) will remain the supervisory authority with a limited corrective power to impose a fine of up to 20 million forints. In the case of PI processing by the courts, the processing will be supervised by the courts (not the Authority).

As these exemptions are rare, this chapter focuses only on the processes that fall under the scope of the GDPR.

Interception of communications and surveillance laws

Does the data protection law cover interception of communications, electronic marketing or monitoring and surveillance of individuals?

Specific Hungarian national legislation covers these areas, such as:

- communications interception: Act XC of 2017 on Criminal Procedure and Act C of 2003 on Electronic

Communications;
- electronic marketing: Act XLVIII of 2008 on Commercial Advertisement and Act CVIII of 2001 on Electronic Commerce; and
- the monitoring and surveillance of individuals: Act XC of 2017 on Criminal Procedure and Act CXXXIII of 2005 on Private Security and the Activities of Private Investigators, and numerous other acts depending on which locale the surveillance of individuals takes place (eg, in streets, stadia or vehicles).

Other laws
Are there any further laws or regulations that provide specific data protection rules for related areas?

Apart from the general data protection framework, there is separate legislation for sector-based data protection rules, including in areas such as marketing, the financial sector, e-commerce, employment, healthcare and research. In April 2019, the Hungarian parliament adopted a GDPR implementation package amending 86 sector-based laws.

PI formats
What categories and types of PI are covered by the law?

Under the scope of the GDPR, practically all data that provides information about, or in relation to, an identified or identifiable natural person constitutes PI. In addition to the processing of personal data by automated means, Act No. CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information (the Data Protection Act) extends the GDPR's application protection also to manual processing, even where personal data is not stored or intended to be stored in a filing system.

Extraterritoriality
Is the reach of the law limited to PI owners and processors physically established or operating in your jurisdiction, or does the law have extraterritorial effect?

The reach of law is not limited to PI owners and processors physically established in Hungary. It may also have extraterritorial effect. The Hungarian data protection law applies either:
- when the controller's main establishment is located in Hungary, or the controller's only place of business is in Hungary; or
- when the controller's main establishment is not located in Hungary or the controller's only place of business is not in Hungary, but the controller's or its processor's data processing operation relate to:
    - the offering of goods or services to data subjects located in Hungary, irrespective of whether a payment of the data subject is required; or
    - the monitoring of data subjects' behaviour that occurs in Hungary.

Covered uses of PI
Is all processing or use of PI covered? Is a distinction made between those who control or own PI and those who provide PI processing services to owners? Do owners', controllers' and processors' duties differ?

All processing (except processing by individuals for household purposes) and all operations on the PI (eg, collection, storage and disclosure) are covered by Hungarian data protection laws.

A distinction is made between the controller who determines the purpose and the means of the data processing and the processor who merely executes the decisions of the controller and processes the PI on behalf of the controller. The processor is not entitled to make any decision on the merits of the data processing.

The controller is primarily responsible for the lawfulness of data processing. However, some obligations directly apply to processors (eg, taking appropriate data security measures) and they may be directly liable if they breach such obligations.

CLICK HERE FOR SOURCE ARTICLE

MISCELLANEOUS DEVELOPMENTS

California Eliminates Employers' Ability to Require Employees to Use Vacation Before They Receive State Paid Family Leave Benefits

- Employers will no longer be able to require employees to use up to two weeks of vacation before they receive paid family leave insurance benefits.
- Employees will have access sooner to paid family leave insurance benefits.
- Changes can have a knock-on effect concerning substitution of paid leave under federal FMLA and California CFRA, but should not impact San Francisco PPLO compliance.

On September 29, 2024, California's governor signed into law AB 2123. Beginning on January 1, 2025, AB 2123 will eliminate employers' ability to require employees to use up to two weeks of company-provided vacation *before* they start receiving paid family leave (PFL) insurance benefits paid by the state (or their employer, if the company has an approved voluntary plan that applies in lieu of the state program). AB 2123 represents the latest piecemeal change California has made to its PFL[1] program in recent years, following prior amendments that, *e.g.*, removed the ceiling on taxable wages for employee contribution purposes, increased the monetary benefits an individual might receive, extended from six to eight weeks the amount of time PFL benefits might be available, and expanded covered uses to include qualifying military exigencies.

Why Even Require Two Weeks of Vacation Before an Employee Can Receive Benefits?
For some employers – and the state – there could be perceived benefits to requiring employees to use up to two weeks of vacation before an employee could begin collecting PFL benefits.

For the state, it could mean *not* having to pay out the full benefit (up to eight weeks of benefits in a 52-week period) to individuals who take time off from work for the following reasons:

- Care for a seriously ill family member (child, grandchild, grandparent, parent, sibling, spouse or domestic partner)[2];
- Bond with a minor child within one year of the child's birth or placement (foster care or adoption); or
- Participate in a qualifying exigency related to the covered active duty or call to covered active duty of the individual's spouse, domestic partner, child, or parent in the U.S. Armed Forces.

Not every need for leave will require eight weeks off work, so if the individual must use company-provided vacation for up to two weeks, that eliminates the state's need to pay for benefits during those two weeks, and, in some instances, an individual might need no more than two weeks off, completely relieving the state from having to pay *any* benefits.

For employers, requiring employees to use company-provided vacation before they receive state benefits might help reduce the odds of down-the-road disputes involving employees who, shortly after they return to work from an extended absence, want to use their banked vacation to go on an actual vacation, increasing the percentage of the year that an employee is *not* working. It might also be the employer's only opportunity to require an employee to use company benefits provided specifically to be away from work when an employee is not working for multiple weeks (possibly months). That is because both the federal Family and Medical Leave Act (FMLA) and California Family Right Act (CFRA) potentially limit an employer's ability to require employees to use paid time off benefits, e.g., vacation, sick leave, or PTO, when an employee is receiving payment – even if only partial – under a disability plan or program during a qualifying FMLA or CFRA absence.

Options Available to Employers after the Changes Take Effect
Although removing the ability to require employees to use up to two weeks of vacation before they receive California PFL benefits might appear like an option is being *taken away from* employers, the change might also present *new opportunities for* employers.

For example, during a covered absence both the FMLA and CFRA require employers to maintain the same level of employee benefits, like healthcare, but if employees contribute to those benefits both laws also allow employers to require employees to continue making contributions to sustain coverage. Normally employee contributions are made via payroll deductions. If an employee is not working during an absence, however, they are not receiving a paycheck. Moreover, the state does not deduct from California PFL benefit payments it makes and send a portion to the employer to cover employee contributions.

Accordingly, employers face a challenge.

Do they wait until the employee returns to work (assuming that happens) then collect the money the employee owes via future paychecks or do they make arrangements for the employee to periodically send the company money to cover the contributions throughout the absence? Neither is a perfect solution nor administratively easy, particularly if an employer does not receive advance notice that an employee will be absent before their leave begins.

But, if an employee uses their company-provided vacation benefits to "top off" or supplement their California PFL benefits – which for many employees will only provide partial wage replacement – during an absence, an employee would be receiving one or more paychecks so an employer could deduct from vacation pay an employee receives to cover the employee's contributions wholly or partially. California PFL allows employees to "top up" their state benefits with company-provided benefits so long as the amount the employee receives from both sources does not exceed their normal pay.

For employers that must comply with San Francisco's Paid Parental Leave Ordinance (PPLO), which requires supplementing pay[3] for employees when they receive California PFL benefits for new child bonding purposes, the up to two weeks of vacation that can no longer be used *before* an employee receives California PFL benefits could be used to help satisfy an employer's obligation to provide PPLO supplemental compensation *during* the period of time that the employee is receiving state benefits. That is because the San Francisco PPLO allows employers to apply up to two weeks of vacation that an employee has when their absence begins to help meet the employer's PPLO supplemental compensation obligations. Before the state law changes, had an employer required an employee to use vacation before they received California PFL benefits, the employee might not have had much – or any – vacation available by the time they started receiving state benefits, meaning an employer would be entirely responsible for supplementing the employee's benefits. After the amendments take effect, however, the odds increase of an employee having vacation available when the San Francisco PPLO supplemental compensation obligation kicks in, which could help offset the amount of compensation supplementing an employer might need to do.

Next Steps
With only a few months before this change takes effect, now is an opportune time for employers to review their policies concerning extended leaves of absence, vacation (or PTO), and employee contributions for benefits to see whether and how changes made by AB 2123 might affect operations in 2025 and future years. Additionally, for companies that condition entitlement to company-provided paid family-medical leave benefits on an employee applying for state benefits, or exhausting short-term company-provided benefits before they qualify for long-term company-provided benefits, AB 2123's changes might provide the motivation to do a policy review that had been left on the back burner.

CLICK HERE FOR SOURCE ARTICLE

An Employee Is Not Entitled to Remote Work in Lieu of FMLA to Care for a Child.

The Family and Medical Leave Act provides leave, and not other accommodations, to care for a child, as the U.S. Court of Appeals for the Second Circuit recently confirmed.

In *Kemp v. Regeneron Pharmaceuticals, Inc.*, following several other medical leaves for herself and for caring for her child, who had a serious medical condition, the employee spent most of a month working remotely while caring for her child. When she returned, her managers expressed concern about the amount of time the employee had spent out of the office, and she was limited to working remotely only one day per week, even though others regularly worked from home. She was also encouraged to speak to Human Resources about using paid time off or intermittent FMLA leave in place of remote work for her time away from the office. The employee subsequently retired. She then sued, alleging that the Company had violated her FMLA rights, among other things. The federal district court granted summary judgment for the employer, finding that employee's claims failed as a matter of law.

On appeal, the Second Circuit affirmed judgment for the employer. The Second Circuit held "that an employer can violate the FMLA merely by interfering with the employee's benefits under the FMLA without actually denying the employee's request for those benefits." In this case, however, the employee argued that the Company substantially limited her ability to work remotely and punished her for doing so. But, as the Second Circuit noted, the FMLA protects an employee's ability

to take leave, but "does not entitle employees to work remotely or make it unlawful for an employer to punish an employee who works remotely." The Second Circuit further observed that "[r]emote work may be another form of accommodation, but it is not 'leave' within the meaning of the [FMLA]."

The good news for employers is that employees do not have a right under FMLA to work remotely. Of course, an employee may be entitled to remote work as a reasonable accommodation for their own disability under the Americans with Disabilities Act, and an employer will need to engage in the interactive discussion to determine if that is so. But the ADA does not provide reasonable accommodations to care for a family member.

CLICK HERE FOR SOURCE ARTICLE

Guide for US Employers Terminating a Canadian Employee

In Canada, firing someone means more than just showing them the door—you'll probably also be holding it open, offering them severance, and making sure you're nice about it to avoid bad faith damages.

For U.S. employers with a Canadian workforce, there are several key differences in employment law, especially when it comes to terminating employees. In Canada, termination rules are much more protective of employees compared to the U.S., where at-will employment is common. Below are the key differences that U.S. employers should be aware of when terminating employees in Canada. See our past blogs here and here for past posts for our US employers.

Terminations in an Anti-At-Will Environment
Unlike most U.S. states, Canada does not have at-will employment. In the U.S., employers can terminate an employee for almost any reason, as long as it's not discriminatory. However, in Canada, even in the absence of a written contract, employees are still protected under what's known as "implied contract" law. This means employers cannot terminate an employee without notice or pay in lieu of notice unless they have just cause, a threshold that is very difficult to meet. Just cause generally applies to situations where an employee has committed serious misconduct, such as theft or fraud. Minor performance issues or even repeated mistakes usually won't qualify as just cause. As a result, firing someone without offering compensation or a notice period is extremely risky. Most employers, when terminating an employee, will have to provide a significant severance package or risk a likely threat of legal action.

How to Fire Nicely
Terminating an employee in Canada requires a more delicate approach than in the U.S. Employees are entitled to fairness and dignity, and how the termination is handled can affect potential legal claims. In cases where there is no just cause, employers must provide reasonable notice or pay in lieu of notice. Courts determine "reasonable notice" based on several factors, such as the employee's age, length of service, and position. Without a properly written employment contract that limits termination pay obligations, employers may have to provide lengthy notice periods—often leading to substantial costs.

Unlike in the U.S., severance packages in Canada tend to be much larger. It's not uncommon for employees to receive months of pay upon termination, depending on their tenure and seniority. Employers will want to prepare for these termination costs when employing Canadian workers, as they can significantly exceed what is typical in the U.S.

The Hairiest Differences:

Exempt vs Non-Exempt
In the U.S., employees are often classified as either exempt or non-exempt under the Fair Labor Standards Act (FLSA), which determines their overtime eligibility. In Canada, this classification system doesn't exist in the same way. Whether your employee is part-time, salaried, hourly, etc is irrelevant. Rather, most Canadian employees are entitled to overtime pay unless they fall into a narrow set of managerial or professional roles exempt under employment standards legislation.

Overtime
Canadian laws on overtime are generally stricter. While U.S. overtime laws vary by state, most Canadian employees are entitled to 1.5 times their regular wage for every hour worked over 44 hours a week (this threshold varies in some provinces). In most Canadian jurisdictions, if the employee works overtime, they are entitled to overtime pay unless their contract

specifically requires managerial approval first.

Parental Leave
Another significant difference is Canada's generous parental leave policies. Canadian employees are entitled to up to 18 months of job-protected leave, depending on the province, for maternity and parental leave. This is much longer than what is typically offered in the U.S., where parental leave is often unpaid and much shorter. In Canada, these leaves are largely covered by the federally managed Employment Insurance (EI) system, but U.S. employers must be prepared to manage long-term absences and maintain positions for returning employees.

Termination Costs in Canada
Perhaps the biggest shock for U.S. employers is the cost of terminating employees in Canada. Without clear termination provisions in the contract, employers may owe employees large termination payments under common law (ie judge-made case law). Reasonable notice periods, as interpreted by Canadian courts, can be lengthy—sometimes up to 24 months for long-service employees. Even for short-term employees, termination entitlements can be much higher than what is typical in the U.S.

Additionally, employers often need to provide benefits continuation during the notice period, which adds further costs. Courts will typically require an employer to make the employee whole during the notice period, which may include bonuses, commissions, equity vesting cliffs and other variable compensation beyond base salary and group benefits.

Take-Aways
U.S. employers with Canadian employees need to approach terminations with care, given the stark differences in employment laws. Unlike the at-will environment in the U.S., Canadian employees are entitled to notice or pay in lieu of notice, and just cause is difficult to prove. Add in stricter overtime rules, more generous parental leave, and potentially hefty termination costs, and it's clear that managing a Canadian workforce requires careful legal planning and a solid understanding of Canadian employment law.

CLICK HERE FOR SOURCE ARTICLE

Employee termination law in the Nevada

Discipline and termination

State procedures

Are there state-specific laws on the procedures employers must follow with regard to discipline and grievance procedures?
If an employer has an established discipline procedure and policy, it must be followed (*Beales v. Hillhaven*, 825 P.2d 212 (1992)).

At-will or notice

At-will status and/or notice period?
Nevada is an at-will state.

What restrictions apply to the above?
The at-will status can be modified by an express or implied contract.

An employer's written materials, including employee handbooks and personnel policies, as well as oral representation made by the hiring authority or management, may constitute an implied employment contract (*Am. Bank Stationery v. Farmer*, 799 P.2d 1100 (Nev. 1990)). However, an employer can avoid the inference of an implied contract by including an express disclaimer that the employee handbook or policies do not establish an express or implied contract (*D'Angelo v. Gardner*, 819 P.2d 206 (Nev. 1991)).

In addition, Nevada recognizes a public policy exception to the at-will employment relationship in certain circumstances,

such as when an employee is terminated for:

- filing a workers' compensation claim (*Hansen v. Harrah's*, 675 P.2d 394, 396-97 (Nev. 1984));
- performing jury duty (Nev. Rev. Stat. § 6.190);
- refusing to engage in illegal conduct (*Allum v. Valley Bank of Nevada*, 970 P.2d 1062, 1068 (Nev. 1998));
- refusing to work in unreasonably dangerous conditions (*D'Angelo v. Gardner* (*Western States v. Jones*), 819 P.2d 206, 216 (Nev. 1991)); and
- exposing the illegal activities of the employer to the appropriate government agency (i.e., whistleblowing) (*Wiltsie v. Baby Grand Corp*., 774 P.2d 432, 433 (Nev. 1989)).

Final paychecks

Are there state-specific rules on when final paychecks are due after termination?
An employee who is fired or placed on a "nonworking status" must be paid all earned wages immediately (Nev. Rev. Stat. § 608.020). "Nonworking status" means a temporary layoff during which the employee remains employed and may be called back to work at some point in the future. "Nonworking status" does not include circumstances where: (i) the employer places the employee on an investigatory or disciplinary suspension; (ii) the employer places the employee "on call"; or (iii) the employee is on an approved leave of absence. When an employee resigns or quits his or her employment, the wages and compensation earned must be paid no later than the day on which the employee would have regularly been paid, or seven days after resignation, whichever is earlier (Nev. Rev. Stat. §§ 608.020; 608.030). Waiting time penalties may apply where final wages are not paid in a timely manner (Nev. Rev. Stat. §§608.040, 608.050).

CLICK HERE FOR SOURCE ARTICLE

Reassignment as a Reasonable Accommodation

The U.S. Equal Employment Opportunity Commission (EEOC) has referred to the reassignment or transfer of an employee as a reasonable accommodation under the Americans with Disabilities Act (ADA) as a last resort. Reassignment may be an option to consider if the only other option is termination, especially if the employee suggests it or is open to the option.

Employers must first try to provide reasonable accommodations to employees in their current positions. However, reassignment may be an option if reasonable accommodations do not allow employees to perform the essential functions of their jobs or if reasonable accommodations create an undue burden on the employer. All too often, employers fail to consider reassignment and move directly to termination if it would be an undue hardship to keep a position open while an employee is on a medical leave of absence.

Reassignment May Avoid Employer Liability
Transfer also may help employers avoid the liability that might occur if they terminate the employee. Failing to provide reasonable accommodations to an employee in their current position, even when doing so is feasible, can lead to employer liability. Likewise, terminating an employee while on leave when a vacant position for which the employee was qualified could have been held open for them can lead to liability for the employer.

Nonetheless, there currently is a split among the circuit courts on whether an employer must give a disabled employee the vacant position for which they are qualified or make the employee compete for the position with others. Since the ADA limits what an employer can tell other employees about an employee's accommodation, explaining to other employees why the disabled individual was selected for the position can be challenging.

Examining the Scope of Reassignment
An employer should look company-wide for potential reassignments for the disabled employee unless doing so would constitute an undue hardship. However, the employer should first ask the employee whether they would be willing to relocate. For instance, if the employee is willing to relocate, but only to certain locations. In that case, the employer should get that response in writing and limit the search for reassignment accordingly.

Employers should keep in mind that they are not required to create a job for a disabled employee, remove another employee from their current position, or promote another employee to create an appropriate vacancy. Transfers violating a collective bargaining agreement's (CBA's) seniority system are also presumptively unreasonable. However, if the employer has

commonly made past exceptions to the CBA's seniority system, then the transfer may be reasonable.

Reassignment to a lower-level position also may be an option if no equivalent position is feasible.

Employers also should limit the reassignment search to a "reasonable" time. A search of a few weeks or months could be reasonable, but a search of six months, according to the EEOC, is unreasonable. If the employer can identify no appropriate job reassignment within a reasonable timeframe, the employer can terminate the employee.

Most importantly, while identifying reasonable accommodations and potential options for reassignment, employers should document every aspect of the process thoroughly. For instance, employers should document all accommodations and positions considered, the employee's response to all options, and why the options would or would not be reasonable and effective. Assigning an HR professional to go through all potential options with the employee can make this process go more smoothly and result in more solutions that support employee retention.

CLICK HERE FOR SOURCE ARTICLE