DECEMBER 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

TABLE OF CONTENTS

SCREENING COMPLIANCE UPDATE | DECEMBER 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.

PLEASE NOTE: Spellings of words in International articles such as those written in the British English format are native to the original author and differ from the spellings of words in the American English format.

EXECUTIVE SUMMARY

December 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: The U.S. Department of Labor (DOL) published a guide for employers on "skills-first" or "skills-based" hiring practices, which it defines as "the hiring or promotion of workers around skills, knowledge and abilities that workers can demonstrate they have, regardless of how or where they attained those skills."
- STATE DEVELOPMENTS: On January 1, 2025, Illinois will require greater transparency in both the job opportunities available in the state as well as the pay ranges for those jobs. Employers with 15 or more employees must disclose "pay scale and benefits" in all job postings.
- INTERNATIONAL DEVELOPMENTS: The Danish Ministry of Interior and Health has announced that the political parties have decided to permanently legalize treatment with medical cannabis in Denmark.

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 into 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

DOL Releases Employer Guide for "Skills-First" Hiring

This month, the U.S. Department of Labor published a guide for employers on "skills-first" or "skills-based" hiring practices, which it defines as "the hiring or promotion of workers around skills, knowledge and abilities that workers can demonstrate they have, regardless of how or where they attained those skills." The guide is intended to assist employers with hiring, promotion and management based on worker skills rather than degree qualifications, with suggestions that are summarized as follows (the guide contains more detail):

- Getting started. The DOL asserts that success requires early buy-in from leadership, hiring managers, human resources, and union representatives. Some considerations identified by the DOL include: understanding why you are using skills-based hiring (e.g. quicker hiring, improved performance, increased retention) and tracking/sharing results; identifying the right job with discrete skills and responsibilities; and creating benchmarks and timelines.
- Identifying a job's skillsets. The DOL suggests the first step is figuring out the "core" skills and "great-to-have" skills, which can be done by asking questions about the purpose, required skills for success, importance of each skill to success, and skills that can be learned on the job. The second step is to use public resources (and the DOL provides some links) to check for other relevant skills for the job. And the third step is to build a scoring tool for grading a candidate's skills.
- How to evaluate skills. The DOL emphasizes the need to perform evaluations consistently for each candidate. It proposes a first step of establishing how to screen for skills, by organizing a list of experiences or credentials that show relevant skills. The next step is picking how to evaluate candidates that make it through screening, using multiple methods such as interviewing (with structured questions), hands-on skills evaluations, simulations and role-playing, and written tests. The DOL also focuses on the need to make the evaluation accessible, in order to expand the talent pool and avoid miscommunications, such as by avoiding technical language, providing access for those of differing physical and technical abilities, diversifying review panelists, offering phone interviews, and sharing interview questions in advance. The third step is scoring skills in a rubric that is personalized to the workplace needs and relevant skills.
- Recruiting. The DOL asserts that job postings should be in plain language, state that skills take priority, invite applicants to share alternative learning experiences, and tell applicants what to expect.
- Hiring and onboarding. The DOL identifies "key considerations" to include focusing on the candidate's skills, valuing those skills in pay, and setting up success by creating inclusive workplaces.

What comes next? The DOL explains that, following the first skills-based hire, employers should think about what worked well and what could work better. It also cautions employers that seeing the benefits of this approach can take years.

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New Drug Hair Testing Guidelines Delayed Until May 2025

The U.S. Department of Health and Human Services has again pushed back its schedule for publishing revised mandatory guidelines for drug testing hair under testing programs used at federal agencies, including the Federal Motor Carrier Safety Administration. The revised guidelines, originally scheduled to be published in June 2023, have been delayed until May 2025, according to the Office of Management and Budget's fall regulatory agenda. The guidelines were pushed back twice previously, to November 2023 and again to October 2024.

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DOT to remove oral drug testing requirement as 'factual impossibility'

The Department of Transportation is revising a requirement that it calls an "inadvertent factual impossibility" from its drug testing procedures.

A provision from DOT's 2023 oral fluid drug testing rule requires oral fluid samples under specific scenarios—but, to this day, oral fluid testing is not possible for DOT. The department this month issued a notice of proposed

rulemaking to correct the drug testing provision that the department deemed "impossible to comply with."

The department officially sanctioned oral fluid testing in June 2023 when a final rule approved the method as an alternative to urinalysis. In that rule, most changes allowed employers the flexibility to choose between urinalysis or oral fluid testing—but one provision required exclusively oral fluid testing.

The provision, 40.67(g)(3), describes the direct observation of urine sample collection. For direct observation of a urine sample, the sample collector must be the same gender as the employee. If the testing facility cannot find a collector of the same gender—or in cases with nonbinary or transgender employees—the collector must instead conduct an oral fluid test.

However, oral fluid testing is still not implemented for transportation employees: the Department of Health and Human Services has never yet certified an oral fluid testing laboratory. The department would need to certify at least two labs to enable DOT oral fluid testing.

Until HHS certifies enough laboratories to make oral fluid drug testing possible, DOT is proposing to modify the provision to rely on urinalysis. Under the proposed provision's gender scenario, collectors would need to continue using directly observed urine tests.

HHS is the main government entity blocking alternative DOT drug tests today. Many industry organizations and lawmakers have asked HHS to certify oral fluid labs and establish guidance for hair testing.

DOT is accepting comments on its proposed rule until January 8.

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STATE, CITY, COUNTY AND MUNICIPAL DEVELOPMENTS

Reminder for Massachusetts Employers About Wage Data Report Deadline on Feb. 1, 2025

Earlier this year, Massachusetts enacted a new law entitled an Act Relative to Salary Range Transparency (the "Act"). The Act contains numerous new requirements for Massachusetts employers, including pay range disclosure requirements in job postings and advertisements.

Under the Act, employers with 100 or more Massachusetts-based employees at any time during the prior calendar year are also required to submit a wage data report with the Secretary of the Commonwealth. The report must be submitted by or before Feb. 1, 2025, and before February 1st annually moving forward. The reporting obligations include aggregated wage data by race, ethnicity, sex, and job category. Covered Massachusetts employers should work with counsel to prepare and file the required wage data report by the upcoming deadline.

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Governor Murphy Signs NJ Pay Transparency Legislation

Seyfarth Synopsis*: *On November 18, 2024, Governor Murphy signed into law pay transparency legislation, Senate Bill 2310, which will require employers to include a pay range in job postings and provide notice of promotional opportunities to current employees. The law goes into effect June 1, 2025.

On November 18, 2024, New Jersey Governor Phil Murphy signed into law Senate Bill 2310. Once in effect, the law will require employers to:

1. Make reasonable efforts to announce, post, or otherwise make known advertised opportunities for promotion to all current employees in the affected department(s) of the employer's business prior to making a promotion decision; and
2. Disclose in each posting for new jobs and transfer opportunities the hourly wage or salary, or a range of the hourly wage or salary, and a general description of benefits and other compensation programs for which the selected candidate would be eligible.

The law will take effect on June 1, 2025.

Which Employers Are Covered Under the Law?
The law broadly defines a covered "employer" as any person, company, corporation, firm, labor organization, or association which has 10 or more employees in over 20 calendar weeks and does business, employs persons, or takes applications for employment within the State of New Jersey. Job placement, referral agencies, and other employment agencies are included in the definition of "employer".

What Must Employers Disclose and What Job Postings Are Covered?
The law addresses two distinct requirements. First, a "notice" requirement to internal employees in an impacted department for promotion decisions. Second, the disclosures that must be included in a job posting for a new job or transfer opportunity. Both requirements cover both internal and external advertisements.

First, where an employer advertises opportunities for a promotion either internally or externally, the employer must make "reasonable efforts" to announce, post, or otherwise make known such promotional opportunities to all current employees in the affected department or departments of the employer's business prior to making a promotion decision. The law defines promotion to mean "a change in job title and an increase in compensation." As written, the law's notification requirements are triggered when an employer advertises a promotional opportunity internally within the employer or externally on internet-based advertisements, postings, printed flyers, or other similar advertisements. The notification requirements would not apply if a current employee is awarded a promotion based on years of experience or performance. The language of the law is vague, but likely intends to exclude non-competitive "in-line" or progression promotions. The law also includes an exception for promotions on an "emergent basis due to an unforeseen event" – under those circumstances, no notice to current employees is required before making the promotion decision.

Second, the law covers the information that must be included in job postings for new jobs and transfer opportunities. In such postings, the employer must disclose the hourly wage or salary, or a range of the hourly wage or salary. The employer must also include a general description of benefits and other compensation programs for which the selected candidate would be eligible. The law specifies that an employer may offer an applicant higher wages, benefits, and other compensation than that indicated in the posting. Interestingly, "transfer opportunities" is not defined. Presumably, a transfer would only apply to internal employee job moves, and could include promotions. However, the term "promotions" was expressly excluded from the final version of Section 1(b) of the bill. Additional clarification regarding this provision from the Department of Labor and Workforce Development would be welcomed before the law's effective date, as employers will have practical challenges in implementing such a requirement.

Temporary Help Service and Consulting Firm Exception
The law includes an exception for temporary help service firms and consulting firms registered with the Division of Consumer Affairs in the Department of Law and Public Safety. For job postings that are posted for the purpose of identifying qualified applicants for potential future job openings – and not existing job openings – such firms are not required to include the standard pay and benefits disclosures. Such firms, however, must provide the pay and benefit information to an applicant for temporary employment when they are interviewed or hired for a specific job opening.

Enforcement and Potential Penalties
The law will be enforced by the Commissioner of Labor and Workforce Development in a summary proceeding. Employers found to have violated the law will be subject to civil penalties in the amount of $300 for a first violation, and $600 for each subsequent violation. The law does not contemplate a private right of action.

Under the law, an employer's failure to comply with the promotional opportunity notification requirements will be considered one violation for all listings of a particular promotion, even if that promotion is listed on multiple forums.

With respect to the pay and benefits disclosure requirements, an employer's failure to comply for all postings for a particular job opening or transfer opportunity will be considered one violation regardless of the number of postings that list, or forums that advertise, that job opening or transfer opportunity.

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Illinois Department of Labor Provides Guidance to Pay Transparency Requirements

***Seyfarth Synopsis**: On November 22, 2024, the Illinois Department of Labor (IDOL) posted long awaited guidance in the form of Frequently Asked Questions (FAQs) to respond to inquiries the Department has received regarding amendments to the Equal Pay Act. The FAQs seek to address questions that have puzzled employers seeking to comply with the amendments. The FAQs are located here, while the notable insights are summarized below.*

Background
As we previously reported, on January 1, 2025, Illinois will require greater transparency in both the job opportunities available in the state as well as the pay ranges for those jobs. Employers with 15 or more employees must disclose "pay scale and benefits" in all job postings. The required disclosures include the wage or salary, or wage or salary range, as well as a general description of benefits and other forms of compensation the employer expects to offer for the position. It will also require announcing, posting, or otherwise making known all opportunities for promotion to current employees no later than 14 calendar days after making an external job posting for the same position. Moreover, the amendments impose a five year record keeping requirement to maintain records of job postings for at least five years.

The Illinois Department of Labor is responsible for overseeing the enforcement of these amendments and is authorized to adopt rules necessary to administer and enforce provisions of the law. The recently issued FAQs provide much needed insight into how the IDOL, as the enforcement agency, will interpret and seek to enforce the amendments. To date, the FAQs are the only additional guidance available for employers as proposed rules have not yet been released.

Pay and Benefits Information
In its FAQs, IDOL detailed the acceptable form of pay disclosures. For instance, it is unacceptable, when providing a range, to include open-ended phrases such as positions will pay "$40,000 and up" or "up to $60,000." And common phrases like

"pay starts at $50,000 depending on experience" is likewise too vague to comply with the Act. Furthermore, if the pay scale is different for Illinois versus non-Illinois applicants, the posting must describe the relevant Illinois range. Further considering geography, the IDOL explained that if pay varies by local area within Illinois and "the employer has one or more sites in Illinois, the posted pay must be included for the site(s) in question."

As for the question of how to properly describe benefits, the Department explained only that employers must describe at least the "nature of the benefits and what they provide" but employers need not provide "specific details, terms and conditions, or dollar values." Also, the Department has clarified that a "general description of benefits that the employer *may* provide" to employees does not satisfy its requirements under the Act. The Department "intends to provide more guidance" in the coming months, but for now, encourages employers "to consider all possible benefits" in their disclosures.

Employers may meet their pay transparency obligations by directing applicants to hyperlinks or publicly available internet pages to disclose the pay scale and benefits as long as it specifies the relevant pay scale and benefits "for the particular position in question."

Postings Requiring Pay Transparency Disclosures
The guidance reiterates that the pay transparency requirements apply only to positions that (1) will be performed, at least in part, in Illinois, or (2) will be performed outside of Illinois if the hired employee will report to a supervisor, office or other work site in Illinois. No consideration will be made and no exceptions will be made for part-time employment opportunities; the Act will apply equally to both full-time and part-time job postings.

Furthermore, the Department clarified that the requirements will not apply to a business who "posts a 'Help Wanted' sign on its physical premises or website" because no specific position or job title is identified. Though, for candidates who request pay and benefit information despite there being no specific job posting, the employer must disclose the information upon request.

Of further note, the Department confirmed that the transparency requirements apply equally to internally and externally posted job opportunities. Even if a posting is only listed internally, an employer must still disclose the pay scale and benefits. This includes company-wide emails about a "particular position opening" or any "physical notice" posted.

Out-of-State Employers and Employees
As mentioned, the amendments require disclosures for positions that will be performed, at least in part, in Illinois. For employers without operations in Illinois, the Act will not apply unless they had a "reason to know or reasonably foresee at the time it made" the posting that the work would be done "at least in part, in Illinois."

Similarly, employers have expressed concern that even occasional or intermittent travel to Illinois would result in liability under the Act. However, the FAQs clarify that employers will not be subject to the pay transparency requirements due to a position's "occasional, intermittent, or sporadic visits to or contact with Illinois for work."

New Recordkeeping Requirements
The amendments require employers to retain records relating to the "pay scale and benefits for each position, the job posting for each position, and any other information the Director may by rule deem necessary and appropriate." In its FAQs, the IDOL provides a non-exhaustive list of records that would "likely" be important to make and retain for this purpose, including the following:

- If an employer engaged a third party, that it included pay and benefit information in the materials provided to the third party;
- when and by what means an employer (directly or via engaged third party) published a specific job posting, whether external or internal-only;
- when and by what means an employer that externally published a specific job posting (directly or via engaged third party) made the promotional opportunity known to its current employees;
- when and how an employer in good faith determined the pay/range and benefits used in a job posting; and
- the good-faith reason for the change if the employer ultimately offered different pay and benefits than those specified in the job posting.

Determining "Active" Versus "Inactive" Job Postings
The financial penalties imposed on an employer for violating the Act differs based on whether the allegedly violative postings are active or inactive. The Department's FAQs specify that it will determine whether a posting is "active" or not by considering the "totality of the circumstances." Of note, the Department clarified it will look to:

- whether a position has been filled;
- the length of time a posting has been accessible to the public;
- the existence of a date range for which a given position is active, and
- whether the violating posting is for a position for which the employer is no longer accepting applications.

Job Postings Not Required
It's FAQs likewise remind employers that the amendments do not *require* job postings. Nor does the Act prevent an employer from recruiting or promoting a specific candidate or employee for employment or promotion without posting the opportunity. Rather, if an employer elects to post for an opportunity, the posting must include the required pay and benefits information and comply with the associated recordkeeping requirements.

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The Oregon Consumer Privacy Act ("OCPA"): What Businesses Need to Know

Oregon recently joined several other states that have heightened individual privacy rights when it enacted the Oregon Consumer Privacy Act ("OCPA"). The OCPA applies to all for-profit business immediately and to applicable charitable organizations as of July 1, 2025.

The OCPA introduces new rules relating to a business's collection, use, and sharing of personal data of Oregon residents. The OCPA provides Oregon residents with a number of new rights regarding their personal data, including the right to access a copy of their personal data, and the right to opt out of data collection. The OCPA also requires businesses to provide Oregon residents with clear notices and disclosures regarding how their personal data is collected, used, and shared and how Oregon residents can exercise their new OCPA rights regarding their personal data.

What businesses does the OCPA apply to?
The OCPA applies to any business that: (1) provides goods and services to Oregon residents and processes the personal data of 100,000 resident consumers or more per year; or (2) earns more than 25% of their annual gross revenue from the sale of personal data and processes the personal data of more than 25,000 Oregon resident consumers.

While the OCPA is similar to privacy laws in other states, it differs as follows in these material respects:

- Unlike the California Consumer Privacy Act (California CCPA) and a number of privacy laws of other states, the OCPA does not automatically exempt all nonprofit organizations; and
- The OCPA does not include data collected by employers from employees when measuring personal data (unlike the California CCPA).

Is your business exempt from the OCPA?
The following businesses are exempt from the OCPA:

- Nonprofit organizations established to detect and prevent fraudulent acts in connection with insurance;
- Financial institutions, insurers, insurance producers, or insurance consultants; and
- Government entities or public corporations.

While the OCPA does not exempt covered businesses regulated by HIPAA from an obligation to comply with the OCPA, the OCPA does exempt "protected health information" ("PHI") that is regulated by HIPAA. This means that HIPAA-covered entities must still comply with the OCPA with regard to any non-PHI personal data of an Oregon resident.

What notice and disclosures does your business have to make to Oregon residents under the OCPA?

- Provide notice and disclosures to Oregon residents under your privacy policy, including specifying the categories of personal data being collected, the purposes for collection, and the categories of third parties with which the personal data is being shared.
- Notify Oregon residents of their rights under the OCPA and provide information on how to exercise those

rights. Under the OCPA, Oregon residents have various rights, such as accessing their personal data, confirming whether their personal data has been processed, making corrections or requesting the deletion of their data, and obtaining a copy of their data in a portable format. They can also opt out of processing personal data for targeted advertising, the sale of personal data, and profiling based on their personal data

Why does my business need to worry about the OCPA?
The Oregon Attorney General has the right to enforce the OCPA and can take action against businesses that violate it, such as serving an investigative demand upon a business that possesses personal data, or bringing an action to seek a civil penalty of up to $7,500 per violation of the OCPA.

Recommended Next Steps for your business to comply with the OCPA.

- Update your privacy policy in order to comply with the new notices and disclosures to Oregon residents mandated by the OCPA (as noted above).
- Update your security measures, including internal policies and compliance programs regarding data security and breaches, to meet OCPA standards.
- Modify your third-party contracts regarding the sharing and use of any personal data of an Oregon resident. The OCPA requires processors and controllers to enter into agreements that set clear instructions on what personal data may be collected and how data is used or otherwise processed.

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COURT CASES

N.Y. Court Holds that the Federal Controlled Substances Act Did Not Preempt New York's Liberal Marijuana Laws/Regulations

Cannabis Impact Prevention Coalition, LLC v. Hochul, 2024 N.Y. Misc. LEXIS 14151 (Sept. 30, 2024), is a case where opponents of the New York State legalization of marijuana invoked the federal Controlled Substances Act (CSA) and the Food Drug and Cosmetics Act (FDCA) in an attempt to overturn state law. They lost in this to-be-published decision.

The New York law "allows for adults 21 years of age or older to use and possess marijuana in moderate amounts." Pursuant to that law, New York promulgated regulations that permit medical use of cannabis and affix various warnings to marijuana packaging/advertising, such as "cannabis can be addictive," "cannabis can impair concentration and coordination," and "there may be health risks associated with consumption of this product." Of course, as folks like to say in the comment sections, YMMV.

The plaintiffs brought an action for a declaratory judgment and an injunction seeking to "put an end to Respondents' unconstitutional ultra vires venture in violation of federal law and to compel [respondents] to perform their executive duties in accordance with federal law." Here is how the plaintiffs summarized their theory: "Respondents are attempting to orchestrate a marijuana trafficking operation utilizing taxpayer funds and public employees and resources. Their blatant disregard of every major objective embodied in federal marijuana law directly conflicts with, and otherwise stands as an obstacle to, Congress's mandate that production, possession, and distribution of Schedule 1 drugs, including marijuana, be prohibited unless approved by federal law." That sounds less like a sober legal theory and more like a title card to the old Reefer Madness movie.

The plaintiffs invoked the Supremacy Clause in arguing that the New York regulations were preempted by federal law.

The respondents moved to dismiss the Governor because she was not a proper party to the action (granted) and moved to dismiss the action based on lack of standing (denied). Then we get to the respondents' motion to dismiss the action for failure to state a cause of action.

The issue boiled down to conflict preemption – a subject that has shown up in this blog every once in a while. The CSA's classification of marijuana as a Schedule 1 drug represents a finding that marijuana has "no currently accepted medical use at all" and has a "high potential for abuse." That classification renders the manufacture, distribution, or possession of marijuana as a criminal offense. (It might be high time to drop pot from schedule 1, but … politics. Here is a link to the DOJ's pending proposal to down-classify marijuana.)

At the same time, the CSA expressly is not preemptive of state law. It acknowledges the absence of Congressional intent "to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this sub chapter and that State law so that the two cannot consistently stand together."

Is there a conflict? The New York State court concluded that there was no such conflict. In particular, while the federal CSA has been held to regulate "medical practice insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood," it does not purport to regulate the practice of medicine generally. States have "great latitude" under their police powers to legislate protection of the health and safety of their citizens. Thus, the "structure and function of the CSA presume and rely upon a functioning medical profession regulated under the States' police powers." So far, so good – we guess. But so what?

Nothing in the CSA requires a state to criminalize marijuana. Nor could Congress force states to enforce the CSA. Moreover, neither the CSA nor the FDCA allow private rights of action. Most importantly for prescription medical product liability litigation is the holding that a plaintiff "may not circumvent a lack of a private right of action in one statute [the FDCA] by incorporating allegations of its violations into claims pleaded under another statute that does allow for a private right of action." Thus, the decision refuses to do to New York law what the California courts have done to California law — allow FDCA-based claims masquerading as 'state-law' claims. Since all of the plaintiffs' asserted state statutory claims argued

only violations of the CSA or FDCA, they were all dismissed.

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Federal Court Suspends Corporate Transparency Act Enforcement

On Tuesday, December 3, 2024, in the case of *Texas Top Cop Shop, Inc. v. Garland*, No. 4:24-cv-00478-ALM (E.D. Tex.), the U.S. District Court for the Eastern District of Texas issued a nationwide preliminary injunction against enforcement of the Corporate Transparency Act ("CTA"), and stayed the January 1, 2025 beneficial ownership information ("BOI") reporting deadline for entities formed prior to 2024. The Court did not specifically rule that the CTA is unconstitutional, but for purposes of issuing the injunction, concluded that the CTA and the final rule implementing the CTA (the "Reporting Rule") are likely unconstitutional because they exceed Congress' authority. (The decision can be read here.)

The Texas Top Cop Shop, Inc. decision was not the first time that a court had issued an injunction against enforcement of the CTA. In *Nat'l Small Bus. United v. Yellen*, the U.S. District Court for the Northern District of Alabama enjoined enforcement of the CTA but limited the scope of the injunction to the plaintiff in that case. The Court in the *Texas Top Cop Shop case*, however, did not limit its ruling to the plaintiff, instead extending application of the injunction nationwide. The Northern Alabama District Court decision in the *Nat'l Small Bus. United case* is under review by the U.S. Court of Appeals for the 11th Circuit and is expected to be decided this coming spring. The preliminary injunction issued in *Texas Top Cop Shop* would, if appealed, be subject to review by the U.S. Court of Appeals for the 5th Circuit. The Department of Justice (the "DOJ") will now have to decide whether to appeal that ruling, and whether to seek any immediate emergency relief from the 5th Circuit during the pendency of the appellate process. In the *Nat'l Small Bus. United case*, the DOJ did not seek emergency relief from the 11th Circuit pending appeal, perhaps because of the limited application to the plaintiff in that case. The DOJ's calculus may be different with respect to the Texas Court's ruling, given, among other factors, the broader scope of the injunction and the approaching transition to a new administration and new DOJ leadership in January 2025.

As a result of the *Texas Top Cop Shop* ruling, all reporting companies are not currently required to comply with the CTA's January 1, 2025 reporting deadline (or sooner, in the case of reporting companies formed in 2024 required to file within 90 days following formation) pending further orders from the district court or the outcome of an appeal.

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3rd Circuit Declines to Find Employment-Related Cause of Action in New Jersey's Marijuana Laws

The decision is significant for employers who are currently facing CREAMMA actions in federal court. A binding 3rd Circuit decision would likely extinguish any current claims arising out of a failure to hire for a positive marijuana test. With respect to pending or future claims in New Jersey state court, this opinion will provide helpful guidance and analysis, but state courts are free to ignore opinions from federal courts that address questions of state law. Therefore, although the 3rd Circuit declined to certify this question, this issue very well may still make its way through the New Jersey courts and up to the New Jersey Supreme Court.

For more details, please click on the link:

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INTERNATIONAL DEVELOPMENTS

Denmark to permanently legalize medical cannabis

The Danish Ministry of Interior and Health has announced that the political parties have decided to permanently legalize treatment with medical cannabis in Denmark. When the Danish Pilot Program expires in December 2025, the Danish Parliament will enact legislation to ensure the permanent legalization of medical cannabis treatment for patients.

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Ontario eyes giving credit bureaus access to LTB orders for renters with history of arrears

A proposal to make Landlord and Tenant Board (LTB) orders accessible to consumer credit bureaus for tenants with a history of rent arrears would make it easier to weed out bad prospective renters, London, Ont., landlords say.

Renters' advocacy groups worry it could hurt low-income tenants who fall behind by damaging their credit scores and unfairly penalize tenants who withheld rent for negligent maintenance or other issues.

The Ford government revealed the plan in a media backgrounder issued Wednesday as it tabled the Cutting Red Tape, Building Ontario Act as part of a larger omnibus package.

"Ontario is exploring the feasibility of arrangements with one or more registered consumer reporting agencies to facilitate access to Landlord and Tenant Board orders where tenants have a history of missed payments," it reads.

It would also "enhance online information about rights and responsibilities" of consumer reporting and collection agencies. Unless submitted by a landlord following an eviction, credit reporting agencies don't have a direct way to access LTB orders, said Harry Fine, a paralegal and former LTB adjudicator. LTB orders may not be included by default in credit checks landlords perform.

The agencies can access LTB orders posted to CanLII, a website run by the Canadian Legal Information Institute, but Fine said decisions are often significantly delayed, and coverage is incomplete, something the website itself notes.

Landlords can submit LTB orders to credit reporting agencies, but only if they have a membership in one, Fine said. Alternatively, they can upload them to websites such as Openroom.

Rent payments can also be submitted by landlords through services like FrontLobby, which are shared with the Landlord Credit Bureau and Equifax. The tenant has to consent for on-time payments to be submitted if they do not owe money.

Most LTB cases involve rent arrears, but most eviction applications for non-payment don't end with an eviction, even if granted, Fine said, so orders may paint an incomplete picture.

"If the tenant pays following the decision, the tenant stays. The province doesn't know who's evicted. The province … only knows who's been ordered to pay."

Details on the proposal remain murky, and no further information has been made available.

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Ontario Canada updates rules on job postings

Ontario has announced effective dates and supporting regulations for a number of workplace legislation changes adopted earlier this year. Most importantly, Ontario has clarified that new job posting rules will come into force on January 1, 2026. Earlier this year, the Ontario legislature passed two workplace law amendment bills – Bill 149, *Working for Workers Four Act, 2024 and Bill 190, Working for Workers Five Act, 2024.* These two bills amended several employment-related statutes.

For a summary of each bill, see our earlier updates:

- Ontario's Working for Workers Four Act receives royal assent
- Ontario's Working for Workers Five Act receives royal assent

Some of these changes were delayed until a date to be proclaimed by the government. The government has now announced these dates for several amendments.

Job postings

Bill 149 and Bill 190 created a new Part III.1 in the *Employment Standards Act, 2000* (ESA). Part III.1 contains five new rules related to how employers go about advertising jobs and hiring new employees. Ontario has set the effective date for Part III.1 as January 1, 2026.

Ontario has also issued regulations clarifying the scope of the new Part III.1 requirements. The information below is what we now know about the new job posting requirements.

Affected job postings. A "publicly advertised job posting" will mean an external job posting that an employer or a person acting on behalf of an employer advertises to the general public in any manner but will not include,

- a general recruitment campaign that does not advertise a specific position,
- a general help wanted sign that does not advertise a specific position,
- a posting for a position that is restricted to existing employees of the employer, or
- a posting for a position for which work is to be,
    - performed outside Ontario, or
    - performed outside Ontario and in Ontario and the work performed outside Ontario is not a continuation of work performed in Ontario

Record retention. Employers will be required to retain or arrange for some other person to retain copies of every publicly advertised job posting within the meaning of Part III.1 and any associated application form for three years after access to the posting by the general public is removed.

Excluded employers. Part III.1 job posting requirements will not apply to employers who have fewer than 25 employees on the day a publicly advertised job posting is posted.

Clarified job posting requirements. Taking the new regulations into account, these are the job posting rules that will come into effect on January 1, 2026:

- Pay transparency. Job postings must include information about the expected compensation for the position or the range of expected compensation for the position.

This requirement will not apply to job postings for a position that has expected compensation equivalent to more than $200,000 annually, or a range of expected compensation that exceeds $200,000 annually. The maximum range of expected compensation that a job posting may include is $50,000.

"Compensation" will defined to mean "wages." Under the ESA, the definition of wages is very broad, and includes all monetary remuneration for work. In determining whether a position is above or below the $200,000 cutoff, employers should consider not only annual salary, but also non-discretionary bonuses or other monetary compensation the employee is likely to earn.

- AI disclosure. Job postings must disclose whether the employer uses artificial intelligence (AI) to screen, assess or select applications for the position.

"Artificial intelligence" will be defined as "a machine-based system that, for explicit or implicit objectives, infers from the input it receives in order to generate outputs such as predictions, content, recommendations or decisions that can influence physical or virtual environments."

- Canadian experience. Job postings and application forms must not include any job requirements related to Canadian experience.
- Vacancy. Job postings must include a statement disclosing whether the posting is for an existing vacancy or not.
- Follow up with interviewees. An employer who interviews an applicant for a publicly advertised job posting must,

within 45 days of the interview (or within 45 days of the last interview, if there is more than one), inform the interviewee as to whether a hiring decision has been for the job posting. This information may be provided in person, in writing or using technology.

Employers will also be required to retain or arrange for some other person to retain copies of the information provided to interviewees for three years after the day the information was provided to the applicant.

For the purposes of this follow-up requirement, "Interview" will be defined as "a meeting in person or a meeting using technology, including but not limited to teleconference and videoconference technology, between an applicant who has applied to a publicly advertised job posting and an employer or a person acting on behalf of an employer where questions are asked and answers are given to assess the applicant's suitability for the position, but does not include preliminary screening before the selection of applicants for such a meeting."

Information about employment
As of July 1, 2025, employers will be required to provide employees with information about employment before their first day of work, or, if that is not practicable, as soon as reasonably possible. This requirement will not apply to:

- Employers who employ fewer than 25 employees on the employee's first day of work.
- Employees who are assignment employees (i.e. workers engaged through a temporary help agency).

The information that must be provided is:

- The legal name of the employer, as well as any operating or business name of the employer if different from the legal name.
- Contact information for the employer, including address, telephone number and one or more contact names.
- A general description of where it is anticipated that the employee will initially perform work.
- The employee's starting hourly or other wage rate or commission, as applicable.
- The pay period and pay day established by the employer.
- A general description of the employee's initial anticipated hours of work.

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MISCELLANEOUS DEVELOPMENTS

Whistleblowing in India

In India, there has been a notable surge in corporate investigations, accompanied by substantive legal reforms and enforcement measures. Whistleblowing has emerged as a vital tool in fostering transparency, accountability and integrity within organisations, both domestically and internationally. The heightened focus on whistleblowing in recent years can be attributed to its pivotal role in uncovering instances of corruption, fraud, unethical and illegal conduct, and corporate vulnerabilities. Today, organisations lacking the requisite mindset and tools to navigate whistleblowing complaints are more susceptible to risks such as regulatory sanctions, criminal prosecution, fines, reputational damage, employee disenchantment and litigation.

The power of whistleblowing

In 2018, a whistleblower complaint surfaced against a major bank, alleging loan irregularities and conflicts of interests involving its CEO. This resulted in investigations by both enforcement and regulatory agencies as well as the board of the bank, resulting in the CEO's resignation and a review of internal controls and corporate governance practices. During the same period, another prominent bank encountered a significant fraud revealed by a whistleblower's disclosure, prompting extensive investigation by law enforcement agencies. This led to arrests and legal proceedings against the perpetrators of the fraud, including those within the bank. The fraud entailed unauthorised transactions worth billions of rupees, exposing vulnerabilities in internal controls.

The following year, 2019, witnessed whistleblower allegations against a tech company, prompting internal and regulatory inquiries, highlighting governance and transparency concerns in the industry. Likewise, a complaint at a stock exchange raised issues of market integrity and regulatory oversight, leading to reforms to ensure fairness. Then in 2020, allegations against a housing finance company triggered regulatory investigations, emphasising the importance of transparency and accountability in the financial sector.

All these cases highlight the crucial role whistleblowers play in uncovering fraud/misconduct and driving accountability within organisations.

Navigating the legal terrain

In India, statutory protections for whistleblowers are outlined in various laws.

The Whistleblower Protection Act 2014, the primary legislation governing whistleblowing, establishes a legal mechanism for receiving complaints related to allegations of corruption or misuse of power by public servants and ensures safeguards against victimisation. Despite its enactment a decade ago, the Act has not been brought into force yet. Notably, it exclusively addresses concerns within the public sector, omitting protection for corporate whistleblowers, and does not permit anonymous complaints, raising apprehensions about safeguarding whistleblowers' identities. The absence of this central legislation underscores the need for its implementation to ensure robust legal safeguards for whistleblowers. Also, a 2018 amendment to the Prevention of Corruption Act 1988 introduced an 'adequate procedures in place' defence to an allegation of bribery involving corporate entities. While specific guidelines are yet to be prescribed, they are likely to include an effective whistleblower mechanism.

Certain categories of companies in India, as mandated by the Companies Act 2013 (CA 2013), are required to institute a vigil mechanism and adopt a whistleblower policy. This mechanism serves the purpose of reporting concerns related to unethical conduct, suspected or actual fraud, or violations of the company’s code of conduct or ethics policy. It also provides safeguards against victimisation. Moreover, under CA 2013, auditors are required to report fraud detected in companies audited by them. Non-compliance could result in disqualification from auditing any company for up to five years. Auditors may also be implicated in the fraud, subjecting them to investigation, criminal trial and potential punishment if found culpable.

Furthermore, in 2020, the Companies (Auditor’s Report) Order (CARO) mandated companies to disclose all whistleblower complaints to auditors, thereby enhancing due diligence and transparency in disclosures. CARO also requires statutory auditors to include specific information in their reports, such as whether they have considered whistleblower complaints

and the company's actions in response.

While the Reserve Bank of India and the Securities and Exchange Board of India (SEBI) have taken measures to safeguard whistleblowers from victimisation, retaliation and harassment, this protection extends solely to the entities they regulate, such as banks and listed entities. However, in a recent development, SEBI issued a mandate requiring all asset management companies (AMCs), whether listed or not, to adopt a uniform whistleblower policy, with a specific focus on combating market abuse. Furthermore, the whistleblower policy of AMCs must establish procedures to ensure adequate protection for whistleblowers.

In addition to the above, the Right to Information Act 2005 also empowers citizens to access information held by public authorities, thereby enabling them to expose wrongdoing.

However, there remains a gap in legislation addressing whistleblower protection for private, unlisted entities and their employees, resulting in a predominantly discretionary and policy-driven whistleblowing regime.

International insights and the impact of whistleblowing

While comprehensive data on whistleblowing in India is limited, international studies offer insights into its prevalence and impact. According to a report by the Association of Certified Fraud Examiners, whistleblowing remains one of the most effective methods for detecting fraud, with tip-offs being the most common initial detection method. Furthermore, research conducted by Transparency International suggests that countries with strong whistleblower protection mechanisms tend to have lower levels of corruption. Globally, the presence of whistleblowing programmes has resulted in a 50 per cent reduction in the value of fraud loss. International bodies and initiatives, such as the United Nations Convention against Corruption and the Whistleblower Protection Directive in the European Union, further emphasise the importance of whistleblowing in combating corruption and promoting good governance practices on a global scale.

Challenges faced by whistleblowers in India

Whistleblowers, whether operating within private or public sectors, play a critical role in uncovering wrongdoing. In both spheres, efficient handling of whistleblower concerns yields numerous benefits, including cost savings, reputation protection, risk management and upholding governance standards. However, whistleblowers in India continue to face significant challenges that inhibit them from disclosing misconduct. Fear of reprisal, limited clarity on what issues can be reported, lack of trust and the absence of robust protection mechanisms pose significant roadblocks. Furthermore, social stigma and the risk of career repercussions serve as additional deterrents.

Recent statistics from the 2024 Global Integrity Report (India edition) highlight top whistleblowing concerns such as lack of confidence in issue resolution (52 per cent), loyalty to the organisation (50 per cent), pressure from management to stay silent (38 per cent), loyalty to colleagues (33 per cent) and a lack of responsibility to address issues (29 per cent). Fear is amplified by media stories of whistleblowing failures. Sadly, more than half of respondents (51 per cent) reported experiencing or witnessing retaliation against whistleblowers within their organisations. Similarly, according to a 2023 report by Transparency International, only 35 per cent of whistleblowers reported feeling adequately protected by existing laws and mechanisms.

When whistleblowers lack confidence in their organisation's procedures, they are more likely to seek alternative avenues to voice their concerns. Such occurrences may draw the attention of regulators and stakeholders, potentially leading to reputational harm through media scrutiny. A recent incident at a prominent IT company exemplifies this trend - the employee faced suspension after reporting a security incident within the company via a post on Reddit. It was disclosed that the employee's manager had allegedly instructed staff to use personal laptops and share login credentials, a direct violation of company policy. Despite the existence of a whistleblower protection policy, the employee received no support from HR or managers due to strained relations.

Similar cases have been observed in the past where individuals who exposed misconduct faced retaliation. There have been instances where whistleblowers were subjected to intimidation tactics, including legal threats and career setbacks. Some have experienced hostile treatment from peers and superiors, discrimination and harassment, while others faced unjust denial of promotions or opportunities. Additionally, there have been reports of sabotage in seeking new employment, such as blacklisting, and even cases of termination or demotion. These examples highlight the multifaceted challenges whistleblowers may confront when speaking out against corruption and wrongdoing.

Strengthening whistleblowing mechanisms: strategies for organisations

Managing whistleblower complaints effectively stands at the forefront of concerns for companies operating in India. Proper handling of whistleblower reports is a critical skill that all well-managed companies must possess. Conversely, the mishandling of such matters frequently is a cause of serious regulatory sanctions, criminal prosecution, reputational damage and litigation. To bolster stakeholder confidence in the company's whistleblowing mechanisms, several actions can be taken. It is crucial to enhance the existing framework around the whistleblower mechanism to ensure thorough investigation and resolution of all complaints. Providing various ways for employees to raise those concerns, including anonymously where possible. The reporting channel for whistleblowers should be easily accessible, set out the scope (including any limitations), be compliant with local and international regulations and should emphasise confidentiality. Periodic audits must be conducted to evaluate the efficacy of the whistleblower hotline. Additionally, leveraging technology can streamline whistleblowing mechanisms, making it easier for employees to report misconduct confidentially and for companies to conduct thorough investigations.

Implementing comprehensive training programmes can enhance awareness among stakeholders, thereby fostering trust and confidence in the existing whistleblowing procedures. While urging employees to report suspicions or allegations of malpractice or misconduct, it is imperative to emphasise that the whistleblowing process is not a tool for escalating interpersonal conflicts or advancing personal agendas within the workplace. Corruption issues often arise in dealings with external stakeholders such as vendors, suppliers and customers and therefore encouraging these stakeholders to utilise the system can help in unveiling corrupt practices by employees, which may result in significant cost and reputation savings. Furthermore, it is essential to transparently communicate the actions taken in response to whistleblower complaints to employees. Specifically, it must also highlight how the whistleblower was treated and protected throughout the process.

A strong ‘tone at the top’ fosters a culture of transparency and accountability, encouraging employees to feel confident in reporting misconduct without fear of reprisal. It sets the expectation that ethical behaviour is valued and supported throughout the organisation, thereby promoting whistleblowing as a constructive means of addressing wrongdoing. Also, the whistleblowing system needs resources tailored to the organisation's size, with clear roles for timely and policy-aligned response. An independent team, equipped with the necessary skills and expertise, should investigate reported issues like fraud and misconduct, supported by adequate training, budget and authority for effectiveness.

By embracing these measures, organisations can enhance transparency, strengthen their corporate governance practices and demonstrate a genuine commitment to accountability and ethical conduct.

Rewarding ethical behaviour and promoting transparency

Thanking the whistleblower for their valuable input is an often-overlooked step. Although there is no centralised system offering financial incentives, amid rising corporate scams in India, SEBI in 2019 introduced a reward system to encourage employees of listed companies to report concerns. In 2021, SEBI increased compensation for insider trading whistleblowers to100 million rupees (from 10 million rupees). The Competition Commission of India’s ‘lesser penalty plus’ regime incentivises disclosing vital information about unknown cartels. Internationally, examples from the SEC and US Commodity Futures Trading Commission further illustrate this trend. The US Commodity Futures Trading Commission recently granted US$4.5 million to a whistleblower, bringing the total awarded sum to US$370 million since 2010. Similarly, in the financial year 2023, the SEC's Whistleblower Program issued awards amounting to nearly US$600 million, having received over 18,000 tip offs. Additionally, the British Columbia Securities Commission offers rewards of up to C$250,000 for valuable information leading to enforcement actions.

Whistleblowing as a catalyst for accountability

Whistleblowing serves as a vital instrument for combating corruption and promoting ethical conduct within organisations. In 2023, a healthcare company initiated a forensic investigation of allegations made by an anonymous whistleblower on lapses by some employees. Similarly, in 2021, a large pharma company paid 5.6 million rupees to settle a case involving whistleblower complaints that alleged the company and its subsidiary were diverting funds through its sole distributor. These instances highlight whistleblowing's role in ensuring accountability and transparency.

Rising pressure on companies: need for proactive whistleblowing programmes

The impact of whistleblowing in exposing wrongdoing and fostering accountability underscores its importance in the country's governance landscape. Data from the Central Vigilance Commission reveals that whistleblowing complaints have

led to investigations into corruption cases worth billions of rupees over the past two years.

Today, companies encounter mounting pressure to effectively manage and address whistleblower grievances due to factors such as regulatory scrutiny, corporate governance reforms and a growing awareness of the importance of transparency and accountability. Deloitte's 2024 survey highlights this trend, indicating a 75 per cent increase in annual complaints. Moreover, regulatory bodies like SEBI report a 60 per cent rise in grievances related to corporate governance issues, emphasising the growing importance of robust compliance programmes.

In light of these developments, the need for well-equipped whistleblowing mechanisms and thorough investigations cannot be overstated. Insights from KPMG's 2023 research underscore the benefits of proactive measures, with companies boasting robust whistleblowing programmes being 70 per cent more adept at detecting and remedying misconduct early on. Such initiatives not only mitigate financial and reputational risks but also signal a commitment to integrity and the fostering of a culture where ‘speaking up’ is encouraged — a cornerstone of effective environmental, social and governance practices.

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