EYE ON WASHINGTON

Timely, topical insights on a variety of payroll and reporting issues.

Detailed Look at State, Local and Federal Updates

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State/Territory/District

Colorado Requires New Annual Notice

Colorado has enacted legislation (House Bill 23-1006) that requires employers to provide an annual notice to employees about certain tax credits that may be available to them.

The Details:

For tax years beginning January 1, 2023, and after, employers must provide all employees with a written notice of the availability of the federal and state earned income tax credits and the federal and state child tax credits. The notice must be provided at least once per year.

An employer may send the written notice to employees electronically, including via email or text message. The written notice must be in English and any other language the employer uses to communicate with employees, and must include any additional content the Department of Revenue requires via regulations.

Next Steps:

- Adopt practices to ensure the new notice requirement is met.
- Watch for developments closely in case the Department of Revenue issues regulations, guidance and/or a sample notice.

Connecticut Extends Registration Deadline for State-Run Retirement Plan

Connecticut employers with five to 25 employees will now have until August 31, 2023, to register with the MyCTSavings program, if they don't offer a retirement plan. MyCTSavings is a state-run, payroll withholding savings program using Roth Individual Retirement Accounts (IRAs).

The Details:

Connecticut employers with five or more employees in the state — at least five of whom have been paid more than $5,000 in the calendar year — are required to register with and facilitate the MyCTSavings program, if they don't offer a retirement plan. These employers must also provide employees with information on the state program, enroll employees in the program, and deduct and remit employee contributions.

Initially, the deadline for employers with five to 25 employees to register with MyCTSavings was March 30, 2023. However, the state has extended the registration deadline for these employers to August 31, 2023. The deadline for larger employers has already passed.

Next Steps:

- Employers with five to 25 employees in the state and don't offer a retirement plan, should **register with the MyCTSavings program** by August 31, 2023, and comply with the other program requirements.
- Employers with more than 25 employees and don't already offer a retirement plan should also ensure they are registered and comply with the other program requirements.
- Employers who already provide a qualified retirement plan should **certify their exemption** from the program.

Florida Requires Certain Employers to Use E-Verify

Florida has enacted legislation (Senate Bill 1718) that requires employers with 25 or more employees to use E-Verify to confirm a new hire is eligible to work in the United States. The requirement takes effect **July 1, 2023**.

The Details:

By way of background, E-Verify is an internet-based system operated by the federal government that enables employers to determine a new hire's eligibility to work in the United States. Notably, employers that use E-Verify must still complete a Form I-9 for each new hire.

For employees hired on or after July 1, 2023, Florida employers with 25 or more employees must use E-Verify to confirm the newly hired employee is eligible to work in the United States. These employers must retain a copy of the documentation provided and any official verification generated, if applicable, for at least three years.

Under the new law, an employer may not continue to employ a worker after obtaining knowledge that the individual is unauthorized to work in the United States.

If the E-Verify system is unavailable for three business days after the first day that the new employee begins working, and an employer cannot access the system to verify a new employee's employment eligibility, the employer must still complete the Form I-9 and document the unavailability of the E-Verify system.

The employer must do the latter by retaining a screenshot from each day that shows the employer's lack of access to the system, a public announcement that the E-Verify system is unavailable, or any other communication or notice recorded by the employer regarding the unavailability of the system.

Employers that are required to use E-Verify must also certify on their first return each calendar year to the tax service provider that they are in compliance with the requirement when making contributions to or reimbursing the state's unemployment compensation or reemployment assistance system.

Starting on July 1, 2024, penalties for non-compliance with the E-Verify requirements include potential Florida Department of Economic Opportunity fines of $1,000 per day until the employer provides sufficient proof to the department that the noncompliance was resolved, as well as the potential for suspension of a business license.

Employee-leasing companies that specifically place the primary obligation for E-Verify compliance upon client companies — in "a written agreement or memorandum of understanding" — will "not [be] required to verify employment eligibility of any new employees of the client compan[ies]."

Next Steps:

Covered Florida employers should:

- Review procedures to ensure compliance with Senate Bill 1718.

- Enroll and start using E-Verify by July 1, 2023 for all new hires. To enroll in E-Verify, visit the **E-Verify website**, or contract with a third-party agent to process E-Verify on your behalf.
- Train those who will be using E-Verify on how to use the system and post required **E-Verify posters**.

Idaho Restricts Vaccination Requirements

Idaho recently enacted legislation (Senate Bill 1130) that, with limited exceptions, prohibits employers from requiring employees to obtain a coronavirus vaccination. Senate Bill 1130 became effective immediately on April 6, 2023.

The Details:

Under Senate Bill 1130, employers doing business in the state are prohibited from requiring coronavirus vaccination as a term of employment, unless:

1. Required by federal law.
2. The terms of employment include travel to foreign jurisdictions that require coronavirus vaccinations for entry into the jurisdiction.
3. The terms of employment require entry into a place of business or facility in a foreign jurisdiction and it requires a coronavirus vaccination for entry into the jurisdiction.

If an employee is required to obtain a coronavirus vaccination related to business travel to a foreign jurisdiction (#2 and #3), the requirement must:

- Be included in the written employment contract between the employer and the employee (if one exists); or
- If an employment contract doesn't exist, advance written notice must be provided to an impacted employee no less than 14 days prior to the employee being required to receive a vaccination.

The law also prohibits employers from providing or offering any different salary, hourly wage, or other ongoing compensation or benefits to an employee based on whether they have received a coronavirus vaccination. However, the law doesn't prohibit an employer from offering one-time incentives related to coronavirus vaccinations as long as they don't result in any different salary, hourly wage, or ongoing compensation or benefits being provided to an employee based on whether they have received a coronavirus vaccination.

Next Steps:

Review all vaccination-related policies and procedures to ensure compliance with Senate Bill 1130. Consult legal counsel as needed.

Illinois Issues Amended Rules on Employee Expense Reimbursement

The Illinois Department of Labor (IDOL) has published amended regulations implementing a law that requires employers to reimburse employees for certain business expenditures.

The Details:

By way of background, Illinois employers must reimburse employees for all necessary expenditures or losses incurred within their scope of employment and directly related to services performed for the employer. The law considers necessary expenditures as expenses or losses required in the discharge of an employee's duties and those that are for the primary benefit of the employer.

The amended regulations clarify definitions and requirements under the reimbursement law.

Primary Benefit of Employer:

Under the amended regulations, when determining if an expense is to the primary benefit of the employer, the relevant factors to be considered are:

- Whether the employee has any expectation of reimbursement;
- Whether the expense is required or necessary to perform the employee's job duties;
- Whether the employer is receiving a value that it would otherwise need to pay for;
- How long the employer is receiving the benefit; and
- Whether the expense is required of the job.

Under this test, no single factor is dispositive. Instead, the analysis should focus on the extent to which the expense benefits the employer and its business and business model.

Denied Requests:

If an employer denies or fails to respond to a request for reimbursement that should have been reimbursable under the law, the employee may file a claim against the employer with the IDOL.

If an employee cannot recover expenses during the course of the employee's employment, these expenses must be included in the final compensation owed to an employee at the end of the employee's employment.

Recordkeeping:

Employers must retain the following records for at least three years:

- All policies regarding reimbursement;
- All employee requests for reimbursement;
- Documentation showing approval or denial of reimbursement; and
- Documentation showing actual reimbursement and supporting documents.

Next Steps:

Illinois employers should review policies and practices to ensure compliance with the expense reimbursement law and **regulations**.

Maryland Delays Paid Family and Medical Leave

Maryland has enacted legislation (Senate Bill 828) that will delay implementation of a law that will provide job protection and wage-replacement benefits to employees who need time off from work for certain family and medical reasons.

The Details:

By way of background, Maryland enacted legislation, Senate Bill 275, in 2022. Under the law, employees will be entitled to job protection and wage-replacement benefits if they need time off from work for certain family and medical reasons. The wage-replacement benefits will be funded by a payroll tax paid by covered employees and employers with 15 or more employees.

Senate Bill 828 makes changes to the timeline for implementing the program and amends and clarifies other aspects of the law.

As Enacted by Senate Bill 275	As Amended by Senate Bill 828
Contributions by covered employees and employers with 15 or more employees were set to begin October 1, 2023.	Contributions by covered employees and employers with 15 or more employees will begin October 1, 2024.
Beginning January 1, 2025, employees would have been entitled to begin receiving wage-replacement benefits when they take leave for a covered reason.	Beginning January 1, 2026, employees will be entitled to begin receiving wage-replacement benefits when they take leave for a covered reason.

Employers with 15 or more employees would have paid 25 percent of the contribution and employees would have paid 75 percent of it. The split would have then been adjusted every two years.	Employers with 15 or more employees will be required to pay 50 percent of the contribution, with employees paying the other half. The contribution split won't be subject to adjustment by the state. An amendment also clarifies that employers may elect to pay all or part of the employee contribution, provided they notify the employee of the actual contribution rates the employer and employee will pay.
One of the covered reasons for leave is to care for a child during the first year after their birth or placement through foster care, kinship care or adoption.	An amendment clarifies that employees may also take the leave to bond with the child.
Employees were required to exhaust all their employer-provided leave that isn't required by law before receiving benefits under the program.	Employees may not be required to exhaust their paid vacation, paid sick leave or other paid time off before, or while, receiving benefits under the program. However, employers may give employees the option of supplementing their wage-replacement benefits with paid vacation, paid sick leave or other paid time off so they receive 100 percent of their regular pay. An employer can also require that benefits under the program be coordinated with benefits or leave provided under another employer policy due to parental care, family care, or military leave or disability policy.

Senate Bill 828 also clarifies:

- The rules for employers that want to establish a private plan to satisfy the requirements.
- The definition of wages for the purposes of the program.

See the **text of the law** for details.

Next Steps:

- Review leave policies and update, if necessary.
- Watch for the sample notice that must be provided to employees.
- Once published, provide the sample notice to new hires and existing employees.
- Prepare to begin making contributions on October 1, 2024.
- Train supervisors on how to handle leave requests.
- Begin providing leave for the covered reasons by January 1, 2026.

State of New York Expands Lactation Protections

New York State has enacted legislation (Senate Bill S4844B), which expands protections under the Nursing Mothers in the Workplace Act. Senate Bill S4844B takes effect on **June 7, 2023**.

The Details:

New York employers must comply with the expanded lactation requirements by **June 7, 2023**.

Current Requirements:

Under current law, New York employers must provide the following to employees:

- A room or alternative location for employees to express milk in private;
- Reasonable unpaid break time (or allow employees to use paid rest periods or meal breaks) to express milk up to three years following the birth of a child; and
- At least **20 minutes at a time** to pump breast milk and additional time if needed.

Note: Employees may take breaks to pump breast milk at least once every three hours, and right before or after scheduled paid rest periods or meal breaks.

New Requirements (Effective June 7, 2023):

Under Senate Bill S4844B, employees may take breaks each time they have a reasonable need to express breast milk for up to three years following childbirth. The law also adds the following protections:

Location	Multi-purpose room	Designated room fixtures
Employers must provide employees a location to express milk that is: • Well-lit; • Shielded from view; • Close to the work area; • Free from the intrusion of others; and • Not a restroom or toilet stall	A room that has other uses may be designated as a lactation room if an employer: • Prioritizes lactation; • Makes the location available whenever an employee needs it to express milk; and • Ensures the space cannot be used for another purpose when an employee needs to express milk.	Designated rooms must have the following: • A chair; • A working surface; • An electrical outlet (if the space has electricity); and • Nearby access to clean running water. **Note:** If a workplace has access to refrigeration, an employee must have access to store their expressed milk.

Exceptions:

If the room and location requirements impose an undue burden (a significant difficulty or expense in relation to the business's size, financial resources, nature or structure) on an employer, the employer must make reasonable efforts to provide a room or location (other than a restroom or toilet stall), that is close to the work area for an employee to express milk in private.

Notice Requirements:

Under the law, employers must provide notice to all employees (as soon as practical) when a lactation room or location has been designated.

Lactation Policy:

The law also requires New York employers to adopt a policy that:

- Informs employees of their rights under the law;
- Specifies how an employee should submit a request to the employer for a room or other location for use by employees to express breast milk; and
- Requires the employer to respond within five business days to an employee's request for a room or location to express milk.

Employers must distribute the policy to all employees at the time of hire, to employees returning to work following childbirth, and to all employees on an annual basis.

Note: The New York State Department of Labor will develop a model written policy.

Non-retaliation:

Senate Bill S4844B expressly prohibits employers from retaliating against an employee that exercises their rights under the law.

Next Steps:

- Review the model written policy (once released by the state) and adopt it (or update any existing policies) to help ensure compliance with the new requirements.
- Employers in New York City should coordinate their compliance with their existing obligations to provide lactation accommodations.

State of New York to Raise Minimum Wage

The Governor of New York has signed into law **S4006**, which is the Budget Bill implementing the state's fiscal plan. Included in the bill is an increase to the state's minimum wage.

The Details:

The minimum wage per hour in New York will increase on the following schedule:

New York City (Current Minimum Wage is $15.00):

January 1, 2024	$16.00
January 1, 2025	$16.50
January 1, 2026	$17.00

New York – Nassau, Suffolk, Westchester Counties (Current Minimum Wage is $15.00):

January 1, 2024	$16.00
January 1, 2025	$16.50
January 1, 2026	$17.00

New York – other than New York City and Nassau, Suffolk, Westchester Counties (Current Minimum Wage is $14.20):

January 1, 2024	$15.00
January 1, 2025	$15.50
January 1, 2026	$16.00

The minimum wage will be increased based on the Consumer Price Index (CPI), beginning January 1, 2027.

Tipped Food Service Workers (Entire State):

These employees receiving tips must be paid at least a minimum cash wage of two-thirds of the above minimum wages, rounded to the nearest five cents or $7.50, whichever is higher. Tips received plus the minimum cash wage must bring the employee to at least the applicable minimum wage. Any deficiency must be paid to the employee by the employer.

Tipped Service Employees Other than Food Service Workers:

The enacted 2023-2024 Budget Bill did not address the minimum cash wage required for tipped employees other than food service workers. We are expecting further guidance from New York in the future.

Next Steps:

- Employers in New York State must pay their employees at least the minimum wage on the schedule as provided above.
- For more information, see **S4006** pages 33-35.

State of New York Updates Sexual Harassment and Discrimination Prevention Policy and Training

New York State has released an updated model policy and training materials that address sexual harassment and discrimination prevention.

The Details:

By way of background, New York requires employers to:

- Adopt written sexual harassment prevention policies that meet or exceed the state's model policy's requirements.

- Provide employees with information on the **sexual harassment prevention hotline** and classify the release of certain employee information as retaliation.

The New York State Department of Labor (NYDOL) has **released** an updated model policy and trainings on sexual harassment and gender discrimination that apply to all protected classes.

Key Model Policy Revisions:

Definitions:

The policy defines sexual harassment as a form of gender-based discrimination and clarifies definitions that fall under gender diversity, such as cisgender, transgender and non-binary persons. See **the policy** for further details.

New Provisions:

The policy states that sexual harassment does not need to be severe or pervasive to be illegal in New York and that it can happen in a remote workplace.

The model policy also:

- States that impact (not intent) matters in assessing a sexual harassment claim.
- Clarifies that whether harassing conduct is "petty" or "trivial" is determined from the perspective of a reasonable victim of discrimination with the same protected characteristics under the New York State Human Rights Law.
- Provides examples of sexual harassment and retaliation. This includes intentionally misusing preferred pronouns and creating different expectations for individuals based on their perceived identities. See **the policy** for more examples.
- Makes reference to the confidential sexual harassment prevention hotline, which launched in July 2022.

Supervisor Responsibilities:

Under **the policy**, supervisors and managers should be aware of how investigations into sexual harassment can impact victims and must accommodate such victims to ensure the workplace is safe, supportive and free from retaliation during and after an investigation.

Bystander Intervention:

The policy also includes methods to use if a bystander witnesses harassment or discrimination. Under the policy, a bystander can:

- Interrupt the harassment (or ask a third-party to help intervene, if they feel unsafe) by engaging with the person being harassed and distracting them from the harassment;
- Record or take notes on the harassment incident to help in a future investigation;
- Check in with the person who was harassed after the incident to see how they are feeling and reaffirm that the harassment was not okay; and
- If they feel safe to do so, confront any harassers and name the behavior as inappropriate.

Note: When confronting harassment, physical assault is never appropriate.

Updated Model Training Materials:

The NYDOL also updated its model training materials, which include a **script** and **slides** on preventing sexual harassment and discrimination. Key revisions to the trainings mirror much of the key revisions to the policy. The trainings also, among other things:

- Acknowledge that the subject matter can be sensitive or difficult for some employees, including those that might have experienced harassment, discrimination or violence in the past. The instructions state that if the training is being facilitated in a group (whether in-person or virtually), trainers should make clear to those attending that anyone needing to step out briefly on behalf of their mental health may do so.

Note: All employees need to complete the training, but an employee may complete the training at a later time if need be.

- Include an exercise on identifying examples of sex stereotyping.
- Provide new scenario examples on the remote work environment and harassment that is based on gender identity. See **the training** for further details.

Note: The NYDOL has posted **a new training video** and other resources on its **website** to help employers navigate the updated policy requirements.

Next Steps:

New York employers should review and update their harassment prevention policies and training materials as soon as possible to align with the updated material provided by the state.

Utah Employers May Obtain Workplace Protective Orders

Utah has enacted legislation (House Bill 324), which provides an additional way for employers to help maintain a safe working environment. House Bill 324 takes effect on July 1, 2023.

The Details:

Under House Bill 324, a business that employs an individual in Utah, or an authorized agent of the employer, may petition for a workplace violence protective order if they reasonably believe workplace violence has occurred against them or an employee.

By way of background, the federal Occupational Safety and Health Act (OSHA) and the Utah OSHA require covered employers to provide a safe workplace, free from recognized hazards that cause or are likely to cause death or serious physical harm to employees.

Under the federal OSHA, employers must take reasonable steps to prevent or abate a recognized violence hazard (an act or threat of physical violence, harassment, intimidation, or other threatening or disruptive behavior that occurs at a worksite), which includes verbal threats and physical acts and can involve employees, customers, vendors or visitors.

House Bill 324 defines workplace violence as:

- Knowingly causing or threatening to cause bodily injury to, or significant damage to the property of an employer or employee performing their duties as an employee; and
- The action or threat would cause a reasonable person to feel terrorized, frightened, intimidated or harassed (and in cases of a threat, that the threat will be carried out).

Employer Requirements:

The law adds a new method of protecting employees, by allowing an employer to petition for a workplace violence protective order if the employer has knowledge that a specific individual is the target of workplace violence. The employer must make a good-faith effort to notify the individual that a workplace violence protective order is being sought.

Protective Order Protections:

A workplace violence protective order may require an individual to:

- Cease committing workplace violence or threatening the employer or employee while the employee is performing their duties; and
- Stay away from the workplace.

Note: A protective order must be narrowly tailored to the location where an action or threat caused bodily injury, or significant damage, to the property of an employer or employee.

The law does not prohibit an individual from engaging in protected exercise of free speech under the law and engaging in an activity that is part of a labor dispute.

Employer Protections:

House Bill 324 protects employers from civil liabilities if the employer seeks a workplace violence protective order in good faith or fails to seek a workplace violence protective order.

Next Steps:

- Review communication policies and practices on workplace violence mitigation.
- See **the text of the law** for details on court actions and orders filed on behalf of a party.
- Refer to legal counsel with further inquiries.

Utah Protects Against Vaccination or Immunity Status Discrimination

Utah has enacted legislation (**House Bill 131**), which prohibits most private employers from discriminating on the basis of vaccination or immunity status in employment decisions. House Bill 131 took effect on May 3, 2023.

The Details:

House Bill 131 prohibits many employers from taking the following actions on the basis of an individual's vaccination status or whether the individual has an immunity passport:

- Refusing or barring them from employment; or
- Discriminating in compensation, or in a term, condition or privilege of employment.

The law defines an immunity passport as a document, digital record or software application that indicates an individual is immune to a disease (through vaccination or infection and recovery). Vaccination status is defined as an indication of whether an individual has received one or more doses of a vaccine.

Exceptions:

The law does not cover the following:

- Employers that establish a link between a vaccination requirement and the employee's assigned duties and responsibilities or identify an external requirement for vaccination (not imposed by the employer) that relates to the employee's duties and responsibilities;
- Employees that are directly exposed to human blood, human fecal matter or other potentially infectious materials that may expose them to hepatitis or tuberculosis (as determined by the employer);
- Certain childcare programs that require vaccinations under the law;
- Federal contractors;
- A regulated entity where compliance with the law would violate binding, mandatory regulations or requirements that affect funding issued by the Centers for Medicare and Medicaid Services or the U.S. Centers for Disease Control and Prevention; or
- A contract for goods or services that is entered into before May 3, 2023, if:
  - It would result in a substantial impairment of the contract; and
  - The contract is not between the employer and their employee.

Requesting Proof of Vaccination:

Existing law allows employers to request proof of a COVID-19 vaccination from employees or prospective employees, but they must exempt the employee or prospective employee from the requirement if the individual:

- Provides a statement that receiving the COVID-19 vaccination would be injurious to their health and well-being or conflict with a sincerely held personal belief, or religious belief, practice or observance; or

- Has a letter from a primary care provider that states they had previously contracted COVID-19.

House Bill 131 does not repeal existing law and does not appear to expressly prohibit employers from requesting vaccination status or proof of immunity from employees. However, the law prohibits employers from discriminating against employees or prospective employees by using their vaccination status or whether they have an immunity passport as the basis for hiring decisions, termination or making other decisions related to terms and conditions of employment.

Existing law also prohibits employers from keeping or maintaining records or copies of an employer's proof of vaccination unless a legal requirement, established business practice, or industry standard requires otherwise. House Bill 131 does not appear to alter this existing prohibition.

Next Steps:

Review all vaccination policies and procedures and make any necessary changes.

Virginia Eliminates Subminimum Wage for Individuals with Disabilities

Virginia has enacted legislation (House Bill 1924), which will eliminate subminimum wage certificates for individuals with disabilities. House Bill 1924 takes effect on **July 1, 2023**.

The Details:

There is an exception to the Virginia Minimum Wage Act that allows employers with a special certificate issued under the federal Fair Labor Standards Act to pay workers with disabilities less than the state minimum wage (also known as a subminimum wage).

After July 1, 2023, these certificates will no longer be issued and employers can't begin paying a subminimum wage to individuals with disabilities. Employers that had a subminimum wage certificate that was issued prior to July 1, 2023, will have until July 1, 2030 to increase the pay rates of workers with disabilities to at least the Virginia minimum wage.

Next Steps:

Virginia employers should review their pay policies and practices to ensure compliance with House Bill 1924.

Virginia Prohibits Provisions that Conceal Sexual Harassment Claims

Virginia has enacted legislation, House Bill 1895, which prohibits employers from requiring an employee or prospective employee from executing or renewing a "nondisclosure or confidentiality agreement, including any provision relating to non-disparagement, that has the purpose or effect of concealing the details relating to a claim of sexual harassment … as a condition of employment." House Bill 1895 takes effect on July 1, 2023.

The Details:

Virginia law defines sexual harassment as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when the conduct:

- Creates an intimidating, hostile or offensive work environment;
- Explicitly or implicitly affects an individual's employment; or
- Unreasonably interferes with an individual's work performance.

House Bill 1895 expands an existing Virginia law that addressed nondisclosure and confidentiality agreements as they relate to sexual assault claims to now include non-disparagement clauses and sexual harassment claims.

Virginia's law now prohibits Virginia employers from requiring an employee or a prospective employee, as a condition of employment, from executing or renewing a provision in a nondisclosure or confidentiality agreement (including a provision relating to non-disparagement)

that has the purpose or effect of concealing details that relate to sexual assault or sexual harassment claims. Such provisions are considered void and unenforceable under the law.

Note: House Bill 1895 does not apply to severance or post-termination agreements.

Next Steps:

Revise nondisclosure and confidentiality agreements and consider working with legal counsel to ensure compliance with House Bill 1895 by July 1, 2023.

Virginia Requires Organ Donation Leave

Virginia has enacted legislation (Senate Bill 1086), which requires certain employers to provide unpaid leave to organ or bone marrow donors. Senate Bill 1086 takes effect on July 1, 2023.

The Details:

Virginia employers with 50 or more employees must provide unpaid leave (up to 60 business days for organ donation and up to 30 business days for bone marrow donation in a 12-month period) to eligible employees.

This leave cannot be taken concurrently with federal Family and Medical Leave Act leave, and employees will generally be able to use available paid leave from their employer.

Eligibility:

An employee must have worked for their employer for 12 or more months prior to the leave and have worked at least 1,250 hours in the preceding 12 months to be eligible for the leave.

Required Documentation:

An employee must provide written verification by their physician that states they are an organ or a bone marrow donor and that there is a medical necessity for the donation.

Working Conditions:

Employers must:

- Pay commissions that become due from work performed prior to the leave;
- Continue providing an employee's health benefits during the leave; and
- Restore employees to at least the same or an equivalent position in terms of benefits, pay, and other terms and conditions of employment following the leave.

Note: Employers are prohibited from considering a period of the leave to be a break in an employee's length of service for seniority, salary adjustments and paid leave entitlements.

Non-retaliation:

Under the law, employers are prohibited from retaliating against employees who request or exercise their rights under the law or claim a violation of the law. An employer that knowingly violates the law may face fines.

Next Steps:

Covered employers should review and update their leave policies and procedures, and train supervisors to ensure compliance with Senate Bill 1086 by July 1, 2023.

Local

Denver Wage Theft Rules Adopted

The Denver Auditor's Office has issued civil wage theft rules in response to recently passed **Ordinance 22-1614**. The Ordinance, among other things, increased the civil penalties for wage theft violations in the city.

The Details:

On January 9, 2023, the Denver City Council passed the Civil Wage Theft Ordinance (Ordinance 22-1614) which created new procedures and penalties regarding civil wage theft.

On March 13, 2023, the Denver Auditor's Office adopted "Civil Wage Theft Rules," which became effective on the date of adoption.

The **civil wage theft rules** address numerous issues regarding wage theft, including the examples provided below:

Wage Notice:

Required Content:

Employers must provide all workers covered by the Denver Minimum Wage Ordinance or Civil Wage Theft Ordinance with the Auditor-approved wage notice detailing the Denver minimum wage, that wage theft is a crime, that workers are entitled to civil recovery of unpaid wages, and that complaints alleging wage theft may be submitted to the Auditor's Office. A copy of the notice is available **here**.

Providing the Wage Notice:

Employers must post the wage notice in an area easily accessible to their workers, or otherwise share it in any manner reasonably calculated to provide the notice. Employers may satisfy this posting requirement by any method that will provide workers with ready access to the wage notice. This could include, but is not limited to, posting the notice in a physically convenient location; providing it directly to each worker; or sharing it electronically. Employers must translate the notice as needed to ensure that each worker receives such a notice in a language the worker may understand within the first month of employment.

Wage and Hour Calculations:

Denver has prescribed the following city-wide minimum wage schedule:

- $17.29 from January 1, 2023 – December 31, 2023.
- On January 1 in subsequent years, the minimum wage will increase by the prior year's increase in the regional consumer price index, if any.

Exceptions to Denver Minimum Wage Ordinance:

Tip Credit:

Employers of food and beverage workers may reduce the employers' minimum wage obligation by as much as $3.02 per hour worked for actual tips received by a worker ("Tip Credit").

Next Steps:

Employers subject to the Denver Ordinance 22-1614 should post or distribute the required Wage Notice, review the **civil wage theft rules** and make any necessary changes to their current practices, if required.

New York City Adopts Final Rule on Automated Employment Decision Tools

New York City (N.Y.C.) has issued a Final Rule on Automated Employment Decision Tools (AEDTs). The date of enforcement is now **July 5, 2023**.

The Details:

Beginning on July 5, 2023, an employer or employment agency (employer) that uses an Automated Employment Decision Tool (AEDT) to substantially assist or replace discretionary decision-making in an employment decision (e.g., screening candidates for employment or promotion) must:

- Provide notice to candidates and employees that the AEDT is being used;
- Conduct an audit for AEDT bias within one year of using the AEDT; and
- Make the audit information available to the public.

As a way of background, **an initial version** of this Rule was published in 2022. The city is adding rules to implement new legislation regarding AEDTs.

The Final Rule:

The Final Rule defines several terms.

Under the Final Rule, to substantially assist or replace discretionary decision-making means:

- Relying solely on a simplified output with no other factors considered; or
- Using a simplified output: 1) as one of a set of criteria where such output is weighted more than another criterion in the set; or 2) to overrule conclusions derived from other factors, such as human decision-making.

The Final Rule also defines simplified output as a prediction or classification as specified in the definition for machine learning, statistical modeling, data analytics, or artificial intelligence that may take the form of a:

- Score, such as rating a candidate's estimated technical skills;
- A tag or categorization, such as categorizing a candidate's resume based on keywords, assigning a skill or trait to a candidate, or recommendation (whether a candidate should be given an interview); or
- Ranking (such as arranging a list of candidates based on how well their cover letters match the job description).

Note: This does not include output from analytical tools that translate or transcribe existing text, such as converting a resume from a PDF or transcribing a video or audio interview.

Under the Rule, for AEDT purposes, machine learning, statistical modeling, data analytics, or artificial intelligence means a group of mathematical, computer-based techniques:

- That generate a: 1) prediction (expected outcome) for an observation, such as an assessment of a candidate's fit or likelihood of success, or 2) a classification (an assignment of an observation) to a group, such as categorizations based on skill sets or aptitude; and
- In which a computer (at least in part) identifies the inputs, the relative importance placed on those inputs, and, if applicable, other parameters for the models to improve the accuracy of the prediction or classification.

Bias Audit:

The Final Rule requires an employer or employment agency to conduct an audit when they use an AEDT to assess employees or candidates for employment or promotion. An employer or employment agency may not use (or continue using) an AEDT if more than one year has passed since their latest audit.

Under the Final Rule, for purposes of the required audit, an independent auditor must be used and be a person or group with the capability to exercise objective and impartial judgment on all issues within the scope of an audit.

The independent auditor cannot:

- Be involved in the use, development or distribution of the AEDT;
- Have an employment relationship with either the employer or an employment agency that seeks to use the AEDT during the audit; or
- Have a direct or indirect material financial interest in using, or continuing to use, the AEDT during the audit.

Data Use:

The bias audit must use historical data of the AEDT. An individual employer or employment agency may rely on a bias audit of an AEDT that uses the historical data of other employers or employment agencies, if the employer or employment agency provided historical data from its own use of the AEDT to the independent auditor conducting the bias audit, or if such employer or employment agency has never used the AEDT.

Employers and employment agencies may rely on a bias audit that uses test data if insufficient historical data is available to conduct a statistically significant bias audit. However, they must explain why historical data was not used.

Calculations:

Under the Final Rule, the bias audit must include the calculation of the impact ratio for each EEO race/ethnicity category, sex category (male/female) and the intersectional categories of sex, ethnicity and race. The impact ratio is calculated in one of two ways depending on whether the AEDT provides a scoring rate or selection rate for candidates.

Specifically, scoring rate is defined as a rate at which individuals in a category receive a score above the sample's median score where the score has been calculated by an AEDT. Selection rate is defined as the rate at which individuals in a category are either selected to move forward in the hiring process or assigned a classification by an AEDT.

Where the AEDT selects candidates to move forward in the hiring process, a bias audit must calculate the selection rate and impact ratio for each sex and race/ethnicity category and the intersectional categories of sex, ethnicity and race. The impact ratio will be calculated by dividing the selection rate for a category by the selection rate of the most selected category.

If the AEDT scores candidates for employment, the bias audit must calculate the median score for the full sample of applicants, the scoring rate for individuals in each category, and calculate the impact ratio. These calculations must be done for each sex, race/ethnicity and intersectional categories. Where the AEDT scores candidates for employment, the impact ratio is calculated by dividing the scoring rate for a category by the scoring rate for the highest scoring category.

The independent auditor may exclude a category that represents less than two percent of the data being used for the bias audit from the required calculations for impact ratio. However, the independent auditor's justification for the exclusion, as well as the number of applicants and scoring or selection rate for the excluded category must be included in the bias audit.

See the **text of the Rule** for more examples.

Publishing Audit Results:

Before using an AEDT, an employer or employment agency in N.Y.C. must make the following publicly available on the employment section of their website in a clear and conspicuous manner:

- The date of the most recent AEDT audit and a summary of the results, including:
  - The source and explanation of the data used to conduct the audit,
  - The number of people an AEDT assessed that are in an unknown category; and
  - The number of applicants or candidates, the selection or scoring rates, as applicable, and the impact ratios for all categories; and
- The distribution date of the AEDT.

Note: Employers may meet the publishing requirements with an active hyperlink to a website containing the required summary of results and distribution date, if the link is clearly identified as a link to the results of the audit.

Recordkeeping:

An employer must keep the summary of results and distribution date posted for at least six months after its latest use of an AEDT in an employment decision.

Notice and Posting Requirements:

Employers are not required to provide an alternative selection process, but they are required to include instructions for how an individual can request an alternative selection process or a reasonable accommodation under other laws, if available.

The Final Rule also provides for notice requirements and various ways that the notice requirements may be complied with, depending on whether the notice is being given to a candidate for employment or an employee seeking promotion.

For candidates for employment who reside in the city, employers may comply with the notice requirement if they (at least 10 business days before the use of an AEDT) provide notice on the employment section of its website in a clear and conspicuous manner, in a job posting or via U.S. Mail.

Employers and employment agencies may comply with the notice requirements for employees who reside in the city and are seeking promotion by providing such notice at least 10 business days before use of an AEDT in a written policy or procedure given to employees, in a job posting or via U.S. Mail.

Employers and employment agencies must also either post in a clear and conspicuous manner on the employment section of its website information about its data retention policy, the type of data collected for the AEDT and the source or such data or provide instructions for making a written request for such information, as well as an explanation as to why disclosure of such information would violate local, state, or federal law, or interfere with a law enforcement investigation.

Next Steps:

By July 5, 2023, employers and employment agencies covered under the law that currently use or are considering using an AEDT should:

- Evaluate if their use of an AEDT requires further action under the Final Rule.
- Follow the proper protocols under the law for all bias audits.
- Provide the required notice to employees, candidates, and the audit results to the public in the timeframes specified under the Final Rule.

Upcoming Minimum Wage Increases

Minimum Wage Announcements – 4/16/23 – 5/15/23

The following states or localities have announced new minimum wage increases.

State or Locality	Minimum Wage Rate	Minimum Tipped Cash Wage	Effective Date(s)	New or Updated Poster Requirement?	Notes
Oregon	$14.20	N/A*	7/1/23	Yes	Poster will be found **here** by June 1, 2023.
Oregon – Portland, Urban Growth Boundary	$15.45	N/A*	7/1/23		
Oregon – Non-Urban Counties	$13.20	N/A*	7/1/23		
Alameda, CA	$16.52	N/A*	7/1/23	**Yes**	
Milpitas, CA	$17.20	N/A*	7/1/23	**Yes**	
Connecticut	$15.00	$6.38 Waitstaff $8.23 Bartenders	7/1/23	**Yes**	
Berkeley, CA	$18.07	N/A*	7/1/23	**Yes**	
Santa Monica, CA	$16.90	N/A*	7/1/23	**Yes**	

*CA and OR do not allow the use of a tip credit.

Federal

I-9 Inspection Flexibility Ends Soon; In-Person Examination Deadline Set

The Department of Homeland Security (DHS) is reminding employers that the temporary policy that allowed employers to inspect Form I-9 documents remotely in certain situations related to COVID-19 will end on July 31, 2023. DHS also announced that employers will have until August 30, 2023 to perform all required in-person/physical examinations of I-9 documents for those individuals who have only received a virtual examination.

The Details:

Background:

The Form I-9 includes multiple sections:

Section Name	Section Overview	Completion Deadline
Section 1	Employee must attest that they are authorized to work in the U.S..	The employee's first day of work for pay.
Section 2	Employee must present certain identity and work authorization documents. The employer must examine the document(s) to determine whether they reasonably appear to be genuine and relate to the employee. Employers must record the document details here.	Within three business days.
Section 3	If an employee's employment authorization expires, they must present new or updated document(s) and the employer must examine and record the document number(s) here. Employers may also complete this section when an employee is rehired within three years of the date that Form I-9 was originally completed and when an employee has a legal name change.	No later than the date employment authorization expires.

Employers must generally inspect original Section 2 documents in the employee's physical presence. However, due to the pandemic, DHS had offered employers some flexibility and previously announced a temporary deferral of this requirement. Instead, employers have been permitted to review documents virtually or in copy, with the expectation that physical inspection would occur when normal operations resumed. DHS previously announced that employers would have until July 31, 2023 to complete in-person review of I-9 documents that had originally been reviewed remotely under this temporary flexibility policy.

Temporary Policy Ends July 31, 2023; Deadline for in-person Document Review is August 30, 2023:

With the temporary policy ending on July 31, 2023, employers will now have until August 30, 2023 to perform all required in-person physical examinations of documents for those individuals who have only received a virtual/remote examination under the temporary policy. **DHS provides instructions** on how to annotate the I-9 when performing the in-person physical document inspection. These instructions are summarized on the next page.

Who has performed the remote/virtual documents inspection and who will be performing the in-person/physical documents inspection?	Instructions/Example
The person who performed the remote/virtual inspection will also perform the physical inspection.	Note that you physically examined the documents and the date, and then add your initials in the "Additional Information" field in Section 2. Do the same if you conducted both the remote inspection and physical inspection in connection with a reverification. **Example:** COVID-19; Documents physically examined on [date] by [initials].
One person performed the remote/virtual inspection and a different person will perform the physical inspection.	Note that you physically examined the documents and the date and add your full name and title in the "Additional Information" field in Section 2. Do the same if you are conducting only the physical inspection in connection with a reverification. **Example:** COVID-19; Documents physically examined on [date] by [full name], [job title].

What if you are unable to physically meet with the employee and examine original I-9 documents?

You may designate, hire, or contract with any person you choose to complete, update or make corrections to Section 2 or 3 on your behalf. This person is known as your authorized representative. Keep in mind that you are liable for any violations in connection with the form or the verification process committed by your authorized representative. Therefore, you should ensure that your designated representative has experience in completing Form I-9 and review the form completed by your designated representative to ensure it is error-free.

Will DHS allow remote/virtual inspection in the future?

Possibly. DHS has proposed a rule that would create a framework under which the DHS Secretary could authorize alternative options for document examination procedures with respect to some or all employers. Such procedures could be implemented as part of a pilot program, or upon the Secretary's determination that such procedures offer an equivalent level of security, or as a temporary measure to address a public health emergency declared by the Secretary of Health and Human Services or a national emergency declared by the President. A final rule is expected later this year.

Next Steps:

If you have employees who have only received a virtual/remote examination of I-9 documents then ensure you complete in-person physical examinations and annotate their I-9s by August 30, 2023. We will continue to keep you informed of any future developments related to the proposed rule for virtual/remote inspections.

New Voluntary Self-Identification Form for Federal Contractors

The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has released a revised Voluntary Self-Identification of Disability Form (CC-305). Federal contractors must implement the **new form** by July 25, 2023.

The Details:

By way of background, federal contractors must invite applicants to self-identify as an individual with a disability (IWD) at both the pre-offer and post-offer phases of the application process. Contractors must also invite their employees to self-identify as IWDs every five years.

Federal contractors must use the Voluntary Self-Identification of Disability Form (CC-305) to meet these requirements.

The OFCCP recently revised the form to update the preferred language for disabilities and to include additional examples of disabilities. Contractors have until July 25, 2023 to start using it.

The only content of the form that contractors may modify or delete is the "For Employer Use Only" section, which was added to give contractors flexibility to enhance their recordkeeping for data analysis required by the OFCCP's regulations.

Next Steps:

If you are a federal contractor:

- Implement the new version of the form by July 25, 2023.
- Make sure anyone involved in contractor compliance is made aware of the new version.

ADP Compliance Resources

ADP maintains a staff of dedicated professionals who carefully monitor federal and state legislative and regulatory measures affecting employment-related human resource, payroll, tax and benefits administration, and help ensure that ADP systems are updated as relevant laws evolve. For the latest on how federal and state tax law changes may impact your business, visit the ADP ***Eye on Washington*** Web page located at **www.adp.com/regulatorynews.**

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Updated on May 18, 2023