



POMS

New Year, New Workplace Policies & Procedures You Need to Know

January 31, 2023

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POMS

Looking Ahead

Preventing Workplace Violence

February 28, 2023, 11am MST/10am PST

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Speakers



California

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Agenda

California Updates

New Mexico Updates

HR Updates

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Current Status of Cal/OSHA COVID-19 Nonemergency Standard

- On 12-15-22 Occupational Safety & Health Board voted to adopt the COVID-19 prevention nonemergency standards.
- As of January 31st, we are still waiting for final adoption.
- The COVID-19 Emergency Temporary Standards (ETS) is still in effect until the new regulation becomes effective.
- Once the nonemergency standard is adopted it will remain in effect for two years.

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What is in the Draft Nonemergency Standard?

- The main changes to General Industry Safety Order 3205:
 - COVID-19 must be addressed as a known hazard in the Injury and Illness Prevention Plan – no longer need separate plan.
 - COVID-19 cases must be investigated consistent with IIPP accident investigation procedures.
 - Provide face coverings when required by CDPH and provide respirator upon request.
 - Provide effective COVID-19 hazard prevention training.
 - Employees working together will be considered potentially exposed.
 - Notify affected employees of COVID-19 cases in the workplace.
 - Maintain records of COVID-19 cases and immediately report serious illnesses to Cal/OSHA and the local health department.
 - Make testing available at no cost to all exposed employees during an outbreak or a major outbreak.
 - Major outbreaks will need to be reported to Cal/OSHA.

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What Stays the Same?

- Employers must provide face coverings and ensure they are worn when CDPH requires their use.
- Employers must report to Cal/OSHA employee deaths, serious injuries/illness consistent with existing regulations.
- Employers must make COVID-19 testing available and at no cost and during paid time to employees following close contact.
- Employers must exclude COVID-19 cases from the workplace until they are no longer an infection risk.
- Employers must review CDPH and Cal/OSHA guidance regarding ventilation and develop, implement and maintain effective methods to prevent COVID-19 transmission by improving ventilation.

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Important Changes to Definitions – Close Contact

- "Close contact" is now defined by looking at the size of the workplace in which the exposure takes place. For indoor airspaces of 400,000 or fewer cubic feet, "close contact" is now defined as sharing the same indoor airspace with a COVID-19 case for a cumulative total of 15 minutes or more over a 24-hour period during the COVID-19 case's infectious period.
- For indoor airspaces of greater than 400,000 cubic feet, "close contact" is defined as being within six feet of a COVID-19 case for a cumulative total of 15 minutes or more over a 24-hour period during the COVID-19 case's infectious period.
- **EXCEPTION:** Employees have not had a close contact if they wore a respirator required by the employer and used in compliance with section 5144 whenever they would otherwise have had a close contact under subsections 3205(b)(1)(A) or (b)(1)(B).

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Biggest Change in the Draft Nonemergency Standard

- **No more Exclusion Pay.**
- The COVID-19 Prevention regulations do not require employers to pay employees while they are excluded from work.
- Instead, the regulations require employers to provide employees with information regarding COVID-19 related benefits they may be entitled to under federal, state, or local laws.
- Employees can use paid time off (PTO) or sick days.

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What to do now?

- Update IIPP with COVID-19 Prevention.
 - Designate a person who is responsible for monitoring CDPH, Cal/OSHA and local entities for updates.
 - Designate a person who will keep records and maintain contact tracing documentation.
- Conduct a "walk through" of your facility or location to ensure signage is appropriate, barrier guards are in place and keep in mind any visitors to your location must be treated as "potentially infectious".
- Make sure there are enough COVID-19 test available. What is the plan for testing during an outbreak?
- Train employees, managers and supervisors on their roles and responsibilities.
 - Document training.

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AB 1632 Restroom Access Bill

- This bill would, if certain conditions are met, require a place of business that is open to the general public for the sale of goods and that has a toilet facility for its employees to allow any individual who is lawfully on the premises of that place of business to use that toilet facility during normal business hours, even if the place of business does not normally make the employee toilet facility available to the general public.
- A willful or grossly negligent violation of this requirement would be subject to a civil penalty, not exceeding \$100 per violation, without creating or implying a private right of action, and without applying to an employee.
- Under the bill, an employee would not be subject to discharge or any other disciplinary action by their employer for a violation of this requirement, unless the employee's action is contrary to an expressed policy developed by their employer pursuant to these provisions.
- Under the bill, conditions for the above requirement would include, among others, that the individual has an eligible medical condition or uses an ostomy device, that a public restroom is not immediately accessible to the individual, and that providing access would not create an obvious health or safety risk to the individual or obvious security risk to the place of business.

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AB 1632 Restroom Access Bill (Continued)

- The bill would define "eligible medical condition" as Crohn's disease, ulcerative colitis, other inflammatory bowel disease, irritable bowel syndrome, or another medical condition that requires immediate access to a toilet facility.
- The bill would permit the place of business to require the individual to present reasonable evidence of an eligible medical condition or use of an ostomy device.
- The bill would authorize the individual to satisfy that evidence requirement through a signed statement by a licensed physician, nurse practitioner, or physician assistant, on a specified form to be developed by the State Department of Public Health and posted on its internet website.
- The bill would require the department to implement these provisions in consultation with the Department of Consumer Affairs, and only to the extent not in conflict with, nor construed to limit rights under civil rights law, as specified.

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Federal/New Mexico OSHA Updates

- OSHA 300A Summaries Posted by 2/1/2023
 - List of Partially Exempt Industries
<https://www.osha.gov/recordkeeping/presentations/exempttable>
- Cal/OSHA Reminder to Employers: Post 2022 Annual Summary of Work-Related Injuries and Illnesses on February 1
<https://www.dir.ca.gov/DIRNews/2023/2023-07.html>
- First Aid/CPR Requirements
 - *In the absence of an infirmary, clinic, or hospital in near proximity to the workplace which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid. Adequate first aid supplies shall be readily available.**

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Key Policies and Updates for 2022-2023



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New Mexico Laws Impacting Policy

Minimum Wage Increases

- New Mexico's minimum wage increased effective Sunday, January 1st, 2023:
 - State minimum wage: \$12.00 per hour
 - State tipped minimum wage: \$3.00 per hour
- Employers are required to post the New Mexico Minimum Wage Act Summary Poster in a place where all workers can easily see it.
- The City of Albuquerque, Bernalillo County, the City of Las Cruces, the City of Santa Fe, and Santa Fe County currently enforce their own minimum wage. Businesses should be aware that the state will enforce the highest available rate.

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New Mexico Laws Impacting Policy

NM HEALTHY WORKPLACES ACT: Paid Sick and Safe Leave

- The HWA requires all private employers in New Mexico to allow employees to accrue and use earned sick leave. The law took effect on July 1, 2022.
- Employees may use this leave for various reasons listed in the Act, like the employee's or their qualifying family member's illness or injury, or to deal with certain legal and family issues.
- Employers can use a "front loading" method, or an accrual method – there are pros and cons to each. Front loading must be a minimum of 64 hours, and accrual needs to be at least 1 hour for every 30 hours worked.
- Employers with paid-time-off policies that are more generous than the minimum accrual and usage limits specified in Act are compliant with the Act if employees may use the leave for the same purposes and under the same terms and conditions specified in the Act.
- The earned sick leave required by the Act is in addition to any paid time off provided by an employer pursuant to a collective bargaining agreement unless employees may use the paid time off for the same purposes and under the same terms and conditions specified in the Act.
- For more information, see NHDWS: <https://www.dws.state.nm.us/NMPaidSickLeave>

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New Mexico Laws Impacting Policy

LABOR AND EMPLOYMENT POSTER REQUIREMENTS

- Employers are required by state and federal law to post at their workplaces certain information concerning the rights of employees.
- The required posters can be downloaded from the website below and may be printed individually using a standard printer and paper.
- You may also print posters at your local New Mexico Workforce Connection center.
- Federal 7-in-1 posters that include all mandatory federal postings in one are also available for pick up for free in both English and Spanish at New Mexico Workforce Connection centers.
- Employers should never have to pay a commercial service for posters.
- <https://www.dws.state.nm.us/en-us/State-and-Federal-Posters>

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New Mexico Laws Impacting School Policy

HB 128 – School Personnel Background and Training:

- **NMSA 22-10A-5.1. Duty to report ethical misconduct; responsibility to investigate ethical misconduct; ethical misconduct report coordination.**
 - School district personnel, a school employee, a contractor or a contractor's employee who knows or has a reasonable suspicion that a child or student has been subject to ethical misconduct by school district personnel, a school employee, a school volunteer, a contractor or a contractor's employee shall report the matter immediately to:
 1. the superintendent; or
 2. the department.
- **NMSA 22-10A-5.2. Applicants for school employment, contracts, or volunteer positions; requirements for work history and other information.**
 - A public school shall require an applicant for employment to provide ... (see statute)
- **22-10A-32. School district personnel, school employees, school volunteers, contractors, and contractors' employees; required training program.**
 - All school district personnel, school employees, school volunteers, contractors and contractors' employees shall be required to complete training in the detection and reporting of child abuse and neglect, ethical misconduct, professional responsibilities, sexual abuse and assault and substance abuse.

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New Mexico Laws Impacting School Policy

HB 43 – The Black Education Act:

- **NMSA 2-5-4.3. School discipline policies; racial sensitivity and anti-racism training; hotline for reporting racially charged incidents and racialized aggression involving students or school personnel; students may self-administer certain medications.**
- The bill details the sections within the proposed act to include, among other things:
 1. creation of the Black Education Advisory Council (BEAC or council);
 2. BEAC's meeting requirements and duties;
 3. creation of the Black Education Liaison (Liaison), along with the prescribed Liaison's duties, within PED;
 4. requirement for PED to submit a Black Education Statewide Status Report (BESSR) annually;
 5. requirement that school discipline policies define and include a specific prohibition against racialized aggression involving a student or school personnel;
 6. requirement that every school district and charter school have a hotline to report racially charged incidents or racialized aggression; and
 7. requirement for all school personnel to successfully complete an anti-racism and racial sensitivity training or professional development approved by PED.

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Some New Laws in California Impacting Policy

Minimum Wage Increases; Impact on Exempt Employees Salary Level Test

- As of Jan. 1, 2023, the California state minimum wage increased to \$15.50 for all employers, regardless of employee headcount.
- This also means that as of Jan. 1, 2023, exempt employees in California must be paid a minimum annual salary of \$84,480.
 - Covered exempt computer professional employees must be paid a minimum of \$53.80 per hour, or \$112,065.20 in annual salary.
- "Living wage ordinances" in various locales within the state have been enacted, so local standards should be confirmed to ensure compliance with all governing wage requirements.

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Some New Laws in California Impacting Policy

AB 1041 – Expanded Definition of “Family Member” for Medical and Sick Leave

- Through AB 1041, the California legislature amended Government Code section 12945.2 and Labor Code section 245.5 to expand the definition of “designated person” for purposes of employee medical leave.
 - Section 12945.2 provides qualifying employees with up to 12 workweeks in any 12-month period for unpaid family care and medical leave. Section 245.5 relates to California paid sick leave.
- AB 1041, the Legislature added a “designated person” to this list of “family members” for whom an employee may take protected leave.
 - A “designated person” is defined as “any individual related by blood or whose association with the employee is the equivalent of a family relationship.”
- In light of this broad definition, employers should be prepared to provide employees with leave to care for a wider range of persons. An employee may identify his or her designated person at the time of requesting protected leave. However, an employer may limit an employee to one designated person per 12-month period.

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Some New Laws in California Impacting Policy

AB 1949 – Bereavement Leave

- AB 1949 adds section 12945.7 to the Government Code, to provide employees with protected leave for bereavement. Under this new law, eligible employees may request up to five days of bereavement leave upon the death of a qualifying family member.
 - Family member is defined as a spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law.
 - Although the employee must complete bereavement leave within three months of the family member’s death, the employer may not require that the five days be used consecutively.
 - Statutory bereavement leave is unpaid, but the employer must allow the employee to use any accrued and unused paid vacation, personal leave, sick leave, or other paid time off for this purpose.
 - The employer must maintain confidentiality when an employee takes bereavement leave.
 - Finally, section 12945.7 does not apply to certain union employees, with an existing agreement regarding bereavement leave.

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Some New Laws in California Impacting Policy

SB 1162 – Posting Pay Ranges and EEO Reporting Requirements

- SB 1162 modifies Government Code section 12999 and Labor Code section 432.3 to require employers with more than 15 employees to provide candidates with salary ranges on job postings, report employee compensation and demographic information to the California Civil Rights Department (formerly the DFEH) on an annual basis and retain relevant records.
 - For job postings (including those posted by third parties), employers with 15 or more employees will be required to include a pay range, which is defined as the salary or hourly wage range that the employer reasonably expects to pay for the position.
 - In addition to the current requirement that, upon request, the employer must provide a candidate a pay range, the employer must now also provide existing employees with a pay range, when requested.
- The new reporting requirement concerns annual employer pay data reports.
 - Employers must now report the median and mean hourly rate by each combination of race, ethnicity, and sex, within each job category, with the first report due on May 10, 2023, based on 2022 pay data.
 - Employers with 100 or more employees hired through labor contractors must now produce data on pay, hours worked, race/ethnicity, and gender information in a separate report.
- Finally, employers must retain records of job titles and wage rate histories for each employee for the duration of the employee’s employment and three years after termination.

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Some New Laws in California Impacting Policy

AB 2188 – Off the Job Cannabis Use Protection

- Effective January 1, 2024, AB 2188 adds section 12954 to the Government Code, which prohibits employers from discriminating against a person because of cannabis use while off the job, with some exceptions.
 - Employers may take action against a person who fails a pre-employment drug test, or other employer-required drug test, that does “not screen for non-psychoactive cannabis metabolites.” This is because, according to the California Legislature, cannabis “metabolites do not indicate impairment, only that the individual has consumed cannabis in the last few weeks.”
 - The employer may administer a performance-based impairment test, and terminate any employee who is found to be impaired in the workplace.
 - This new law does not apply to employees in the building or construction industry, or in positions requiring a federal background investigation or clearance and does not preempt state or federal laws that require employees such as federal contractors or USDOT-covered drivers, to be tested for controlled substances.

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Some New Laws in California Impacting Policy

AB 152 – COVID-19 Supplemental Paid Sick Leave Extension

- AB 152 modified Labor Code section 248.6 and 248.7 in order to extend COVID-19 Supplemental Paid Sick Leave (SPSL), which was expected to expire on September 30, 2022.
- This new modification allows California employees to use any remaining SPSL through December 31, 2022. It does not provide employees with new or additional SPSL.
- In a departure from the original version of the law, when an employer requires an employee to take a COVID-19 test five days or later after a positive test result, the employer is now permitted to require the employee to submit to a second diagnostic test within no less than 24 hours. 1
- If the employee refuses, the employer may decline to provide additional SPSL.
- The employer obligation to cover the cost of any employee COVID-19 tests remains in effect.

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Some New Laws in California Impacting Policy

SB 1044 – Prohibition on Adverse Employment Action for Fears of Workplace Safety

- SB 1044 will prohibit employers, in the event of an "emergency condition," from taking any adverse employment action against an employee who refuses to report to, or leaves, a workplace or worksite within the affected areas because the employee had a reasonable belief that the workplace or worksite is unsafe.
- The law also prohibits the employer from preventing any employee from accessing a phone or other mobile device to seek emergency assistance, assessing the safety of the emergency condition or communicating with others to confirm that the employee is safe.
- NOTE: The new law does require employees to notify employers of the emergency condition.
- The new law defines "emergency condition" as either "conditions of disaster or extreme peril to the safety of persons or property caused by natural forces or a criminal act" or "an order to evacuate a workplace, worksite, or worker's home, or the school of a worker's child due to a natural disaster or a criminal act."
- The new law also states that a health pandemic does not constitute an "emergency condition."

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Social Media

- **Do you adequately cover relevant topics?**
 - It's important to include guidelines on confidentiality of company/client information, posting on work time or devices, and staying away from harassing colleagues.
- **Who can post on official company sites?**
 - You may wish to limit who comments/posts on company sites and pages.
 - In addition, you may wish for employees who comment on company social media posts to disclose their employment with the company.
- **Does your language leave the impression that the company is trying to prohibit employees from talking about work?**
 - Remember that the National Labor Relations Act enables employees to converse freely with each other about employment and working conditions, including topics like pay, hours, and treatment.

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Hybrid or Remote Work Policies

- Organizations that don't already have hybrid or remote work policies should develop them for their 2023 employee handbooks.
- Having these policies in place is vital for protecting the company from unnecessary risk and exposure, improving employee performance and experience, and ensuring the organization gets all its equipment back when employees move on. A remote work policy should address these items:
 - How employees deliver work
 - Rules for cyber safety
 - How meetings are conducted, including technologies used and dress codes
 - Technologies and equipment employees will use
 - Expected working hours and scheduling
 - The return of equipment when employees move on
 - Expectations for employee availability and response times
 - Incentive weather procedures, especially whether employees will still work if the headquarters is closed

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Hybrid or Remote Work Policies

- **Who is eligible to telecommute**, and under what circumstances?
- **What technology is required, and who will pay for it?**
- **Do employees have set hours to be online** while telecommuting, and is there any flexibility in scheduling?
- **What security measures does the company have in place** and expect telecommuting employees to follow when working outside of the office?
- **Is it clear that telecommuters must display the same professional behavior when working online as when in the office?**
 - Ensure employees know improper conduct such as bullying coworkers on company chat platforms is subject to disciplinary measures.
- **Note that supplementary handbook material** may prove useful when presenting work-from-home policies during the COVID-19 pandemic.

CA Labor Code § 94.172 / Penal & Associated Insurance Statutes

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Inclement Weather

- **Is it clear how weather-related closure decisions get made?**
- **How does information regarding weather-related decisions get conveyed to employees**, including the timing of such messages and communication method?
- **Do employees get paid on snow days?**
 - Spell out any differences by status (exempt vs. non-exempt) and length of closure (partial or full day).
- **Who, if anyone, can work at home when the weather is questionable but the office is open?**
 - How does one get approval? What activities (such as trainings) "count" as working?

CA Labor Code § 94.172 / Penal & Associated Insurance Statutes

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Health and Safety

- **Have your policies kept pace with relevant legislation**, such as federal law requiring employers to provide reasonable time and space accommodations for breastfeeding mothers?
- **Are elements of the Family and Medical Leave Act** spelled out in a way that workers know how the information pertains to your workplace?
- **Do you make it clear that sick people are expected to stay at home for their own good and that of their fellow employees?**
- **Do you have general policies concerning communicable diseases, and pandemic responses?**
 - Regarding COVID-19, is information presented about testing, quarantining, contact tracing, and returning to the office? Are leave policies spelled out in detail?
 - What screening procedures are in place at the office, and what hygiene rules are employees expected to follow?
- **Again, a separate supplement with greater detail** could be beneficial when presenting information directly related to the pandemic.

CA Labor Code § 94.172 / Penal & Associated Insurance Statutes

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Workplace Violence Prevention

You can be sure your workers are still thinking about the many workplace shootings that have happened recently, and likely are wondering what safety measures you have taken to protect against a similar attack or workplace violence.

Make sure you update or add safety policies to your handbook. Start with the basics like a strict no-fault violence and threats of violence disciplinary policy. Your policy should make it clear that any violation will result in immediate termination. Then address each type of workplace violence as outlined by OSHA in their guidance and at the National Institute for Occupational Safety and Health (NIOSH). These are:

- **Criminal intent.** The perpetrator has no legitimate business relationship to the workplace and usually enters the affected workplace to commit a robbery or other criminal act. Your handbook policy should assure employees that you have plans for possible criminal acts and are committed to regularly updating prevention measures.
- **Customer or client.** The perpetrator is either the recipient or the object of a service provided by the affected workplace or the victim. The assailant may be a current or former client, patient, customer, passenger, criminal suspect, inmate, or prisoner. Your handbook policy should acknowledge potential violence and offer training for vulnerable employees. OSHA provides industry-specific guidance and training ideas.

CA Labor Code § 94.172 / Penal & Associated Insurance Statutes

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Workplace Violence Prevention

- **Co-worker or supervisor.** The perpetrator has some employment-related involvement with the affected workplace. Usually, this involves an assault by a current or former employee, supervisor, or manager. Your handbook policy should reassure workers that you take every complaint seriously, have processes in place for security during and after contentious discharges or disciplinary meetings, and encourage workers to speak with HR about alarming behavior.
- **Personal relationship.** The perpetrator is someone who does not work there but has or is known to have had a personal relationship with an employee. Your handbook policy should encourage workers to use your employee assistance program to address relationship and mental health challenges and provide information on how to access treatment.

Finally, as part of your workplace violence policies, adopt the strictest no-weapons policy possible under your state's laws. You can tell employees no weapons are allowed at work. If you are in a state that allows workers to store unloaded weapons in their automobiles in company-owned parking lots, you may want to use a weapons checkpoint at entries.



1 Criminal Intent
Workplace violence by a perpetrator that has no direct or previous relationship with the employee at the establishment.

2 Customer / Client
The act of violence that occurs while the employee is performing their daily duties. The perpetrator is a client of the employee or the establishment.

3 Worker-on-Worker
Act of violence is a result of an aggression between two or more employees in the same workplace.

4 Personal Relationship
The perpetrator has a direct relationship with someone whom affects their work and workplace, but does not work with them.

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Evolving Leave Policies (Paid and Unpaid)

The past year saw increasing calls for paid leave laws to be enacted at both the state and local level. And new paid leave laws have come into effect in several states in 2022, like **New Mexico's Healthy Workplaces Act**.

At least 11 states and municipalities have enacted paid leave laws and others are likely to follow.

Consider these factors when assessing whether your leave paid policies may be in need of an update:

1. **Pay attention to where employees are located and headcount.** Depending on the laws in those jurisdictions, consider a state or local supplement to the main handbook to account for the nuances under greatly differing paid leave laws, which may apply depending on how many employees you have in a particular state.

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Evolving Leave Policies (Paid and Unpaid)

2. **Clearly explain employee eligibility.** Federal law requires employers provide FMLA leave after one year on the job and 1250 hours worked and state and local requirements may require leave after less time on the job.
 - Wisconsin's unpaid FMLA law only requires 1000 hours in the preceding 52 weeks). However, employers can also offer leave at any point before those requirements kick in.
 - Ensure that your policy clearly explains when an employee may be eligible for various paid leaves and ensure that if such leave is protected by law, the policy is compliant.
3. **Make sure your leave policies are not inadvertently discriminatory.** For example, parental leave policies should apply equally to all types of new parents, although there is an important distinction to be made between paid leave for recovering from childbirth and paid leave for bonding or other non-medical reasons.

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Evolving Leave Policies (Paid and Unpaid)

The big-ticket items for employers to watch at the state level involve paid and unpaid leave laws.

- Many states expanded access to leave for COVID-19-related and other medical reasons.
- Effective Jan. 1, 2021, all private employers with five or more employees are covered under the California Family Rights Act (CFRA)—only applied to private employers with 50 or more employees.
- Effective Jan. 1, 2022, the California Family Rights Act was expanded to allow covered workers to take leave to care for a parent-in-law.
- Effective July 1, 2022, New Mexico private employers are required to provide paid sick leave.
- In 2022, Connecticut and Oregon also expanded their family-leave laws, and Illinois has a new law requiring employers to provide victims of violent crimes (and family members of victims) with unpaid leave or allow them to take available paid time off.

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Drug-Free Workplace Policies

- Several states have enacted medical and/or recreational use of marijuana, which affects your drug-free workplace policies and procedures.
- Post-Accident/Incident drug and alcohol testing – most policies we see do not comply with current law and regulations:
 - OSHA issued a rule on post-accident/incident/injury drug testing (29 CFR § 1904.35(b)(1)(ii)), effective August 2016, which clarified in 2016 when post-accident drug testing is permitted.
 - OSHA requires that employers replace a blanket testing policy or rule.
 - OSHA clarified that most workplace drug-testing programs are permissible, including:
 - Random drug testing.
 - Drug testing unrelated to the reporting of a work-related injury or illness.
 - Drug testing under a state workers' compensation law.
 - Drug testing under other federal law, such as a U.S. Department of Transportation rule.
 - Employers need not specifically suspect drug use before testing, but there must be a reasonable possibility that drug or alcohol use by the reporting employee was a contributing factor to the reported injury or illness; for an employer to require drug testing.
 - Additionally, drug testing that is conducted to evaluate the root cause of a workplace incident that "harmed or could have harmed employees" is allowed if the employer tests all workers who could have contributed to the incident, rather than just the employees who reported injuries.

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Expense Reimbursement

- While federal law only requires that employers reimburse employees for expenses that bring an employee's earnings below the federal minimum wage, state and local laws vary greatly in the treatment of worker expenses and reimbursement.
- California, Illinois, Iowa, Massachusetts, Montana, New York and the District of Columbia require that employers reimburse employees for various work-related expenses.
 - Further, several of those states consider expense reimbursement wages subject to the same timing requirements as regular payroll.
- Lawsuits for failure to properly reimburse employees for expenses are rapidly increasing in these states and for all manner of expenses ranging from typical work-related expenses such as telephone and internet fees and the cost of office supplies, to the extra cost of energy to heat or cool a house.

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Expense Reimbursement

Expense reimbursement also raises questions regarding the ultimate ownership of devices and equipment, especially when employment ends. To address these issues, a good expense reimbursement policy clearly provides:

- What expenses are reimbursable and by when the employer will reimburse the employee (applicable state law will govern these and set floors for reimbursement);
- Who owns the devices or equipment; and
- How the equipment is handled when the employment relationship terminates (will they be wiped of company information and the employee can keep them, must they be returned, etc.?)



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Protected Characteristics

- Over the last several years, state and local authorities have expanded definitions of protected characteristics. At least 18 states and many municipalities have added protections for natural and protective hair styles, for example.
- Moreover, medical or recreational use of marijuana is now legal in 26 states. Several of those states such as Connecticut, Montana, Nevada, New Jersey, New York, and Rhode Island provide protections for employees that participate in off-duty recreational use of cannabis products and therefore limit an employer's ability to refuse to hire or take adverse action against those workers.
- While catch-all language to include additional protected characteristics, such as "and any other characteristic protected by federal, state, or local law," is a common solution, adding the particular protected characteristic to the policy – and better still to harassment and discrimination training – can serve as a defense against liability.

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Sexual Orientation and Gender Identity

- Does the language used throughout the handbook reflect the recent Supreme Court ruling that Title VII's sex discrimination provision applies equally to discrimination based on sexual orientation and gender identity?
- Does your equal opportunity statement include that the company does not discriminate on the basis of sex – including sexual orientation and gender identity/transgender status?
- Has your anti-harassment policy been updated to specifically state that the organization does not tolerate harassment based on sex, sexual orientation, or gender identity?
- Have outdated rules (such as requiring men to wear suits and women to wear dresses) been modified to reflect that the company does not enforce the dress code in a way that reinforces stereotypes about how a particular gender should look and dress?

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Sexual Orientation and Gender Identity

- Have gendered hairstyle rules (such as no long hair or buns on men) been rectified?
- What legislation regarding hairstyles may affect your workplace? Several states already have passed the CROWN Act (Creating a Respectful and Open World for Natural Hair) to ban discrimination against natural hair (including afros, braids, twists, and locks), with federal action on the horizon.
- Does the code correctly place an emphasis on neatness, cleanliness, and safety in workplace dress over dictating specifics?
- Do the guidelines display an organizational commitment to supporting employees' religious, ethnic, and cultural beliefs?
- Does the policy manual encourage workers with questions regarding appearance standards to consult with HR?

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Protected Classes/Characteristics

- At a minimum, every handbook should contain an Anti-harassment and Anti-Discrimination Policy that:
 - Provides the state and local-specific characteristics that are protected from unlawful harassment and discrimination;
 - Has a reporting procedure providing multiple reporting avenues for individuals to make complaints about harassment; and
 - Emphasizes the employer's commitment to maintaining a workplace free from such unlawful conduct.
- Finally, Remember the Basics:
 - Use plain language.
 - Set clear expectations for attendance, conduct, and discipline.
 - Include that the handbook is not a contract of employment and does not modify the at-will nature of employment.
 - Include that the policies within the handbook may be revised, modified, or revoked at any time, with or without notice.
 - Make sure that the company retains discretion and flexibility when making decisions.
 - Ensure that you actually follow the policies!

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DEIB and The Crown Act

- Diversity, equity, inclusion, and belonging (DEIB) has been a hot-button topic for employers for a long time. However, in 2023, many organizations may need to create or update specific policies (including grooming and dress code policies) and language in their employee handbook for a few reasons.
 - First, there are 18 states with their own version of The CROWN Act (Creating a Respectful and Open World for Natural Hair). This legislation protects employees (often black women) with natural hairstyles from discrimination.
 - There may be a federal CROWN Act in the future, as well. Additionally, more states are adding natural hairstyles to the list of protected classes.
 - Outside of a legal perspective, DEI is becoming more important to all workers. A report by the Pew Research Center finds that Generation Z is the most ethnically and racially diverse generation yet. This means the talent employers are trying to attract and retain are racially and ethnically diverse, or they have deep connections with people who are.
 - Employers will pay the price in talent loss if they don't update their employee handbook to support DEI efforts, reduce opportunities for discrimination, and condemn racism, sexism, homophobia, and general bigotry.

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Pay Transparency Laws

- Generally, Pay Transparency laws require employers to disclose prospective salary or salary range when advertising an open employment position. More specific obligations vary by state.
- Currently, pay transparency laws include those passed by New York City, New York state, California, Rhode Island, Connecticut, Nevada, Colorado, Maryland, and Washington state. Employers in these states should review their upcoming job postings to ensure compliance. There is an expectation that this will continue as a trend in other states.
- As pay transparency laws continue to take hold in new jurisdictions, employers should carefully consult state guidance keep job posting policies current. Non-compliance can result in mounting penalties, and compliance may be especially challenging in light of the increased number of remote work opportunities.
- Remote work may lead to confusion about which jurisdiction's pay transparency law applies to a given job posting since several jurisdictions have opted to apply their laws broadly. For example, the California law applies to any job posting where the position could ever be performed by someone residing in California, even working remotely—as long as the employer has at least one employee residing in California.

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Employee Wellness and Mental Health

- To retain staff in 2023, employers are increasingly looking to keep up with the recent trend in supporting employee wellness and mental health. The pandemic accelerated this trend.
- Employers should deeply review employee benefits and a general prioritization of employee wellness.
 - Do they offer enough vacation time for employees to avoid burnout?
 - Do their health insurance plans make mental health care more accessible?
 - Many employers are offering mental health days and Employer Assistance Programs (EAPs) to improve access to mental health care services.
 - Employers may also want to adopt language urging employees to stay home or work from home when sick.
 - FMLA policies can be expanded to include language about mental health conditions, which often also qualify for leave.
 - It may be a good idea for employers to create a specific "Wellness Policy" in your 2023 employment policies, including the initiatives and benefits offered to support employees' physical and mental health.

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Parental Leave Benefits for Working Parents

- Employment policies should be updated to meet new and changing parental leave programs, as well as the expectations of working parents generally.
- Parental leave policies have been multiplying all over the US. Currently, ten states in the US have paid parental leave programs, with more states working on their own.
- Employers in these ten states and with employees who work remotely from these states must have paid family leave policies that are updated and in compliance.
- Beyond the legal requirements, employers should also seriously consider offering more flexibility for working parents as part of their employer brand.
 - Post-pandemic, employees can expect a substantial increase in flexibility at work.
 - Parents have benefitted from this flexibility and often consider it a necessity, not a perk.
 - Especially in the current, tight labor market, employers are more likely to lose talent (or have trouble attracting it) when they don't offer the flexibility that working parents demand.

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Weingarten Rights May Soon Apply to Non-Union EEs

- The National Labor Relations Board (NLRB) recently released an advice memo in which it signaled it is evaluating whether to extend Weingarten rights to nonunion employees.
 - Nonunion employees can have representative in investigatory interviews that could lead to discipline.
 - Should your organization's policy change? Or just your practice?
- The NLRB may be looking to expand this right to nonunion workforces once again may signal it will be more lenient when it comes to the type of conduct allowed by representatives in such meetings. Accordingly, this is an issue all employers should watch.
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U.S. Dept. of Labor (DOL) Changes in Overtime and Independent Contractor Rules

- The DOL agenda lists May 2023 as the target date for two key Fair Labor Standards Act (FLSA) developments:
 - a proposed overtime rule and
 - a final independent contractor rule.
- The DOL's new overtime rule is expected to raise the minimum salary ("salary level test") for most overtime-exempt employees and possibly update the duties tests as well.
- Last October, the DOL proposed a new independent contractor rule that would establish a version of the "economic realities test" as the standard for determining whether a worker is an employee or an independent contractor under the FLSA.
 - The proposed rule is more consistent with the IRS IC guidelines.

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Discrimination and Artificial Intelligence (AI)

- In the workplace context, AI technology may be used to help with employee management functions, such as recruiting and hiring by analyzing resumes, predicting job performance or evaluating a job candidate's attention span.
- While the hope in using these tools in the recruitment process is to reduce or eliminate bias, the use of artificial intelligence is not without risk and may give rise to employment discrimination claims even on a class-wide basis.
- Last year, the USDOL Equal Employment Opportunity Commission (EEOC) issued a guidance on AI decision making tools and algorithmic disability bias.
- Also last year the U.S. Office of Science and Technology Policy issued its ["Blueprint for an Artificial Intelligence Bill of Rights"](#) concerning Algorithmic Discrimination Practices. The AI Bill of Rights provides recommendations to ensure that AI is safe and equitable in various sectors of society, including the workplace.
- Some states, such as New York, Illinois, and Maryland have enacted measures to regulate the use of algorithms in the workplace. Employers in these states should review these laws. It is anticipated that other states may propose legislation in this area.

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The FTC Proposed Noncompete Rules

- The Federal Trade Commission (FTC) proposed a rule on January 5, 2023, prohibiting noncompete provisions in employment agreements.
 - The FTC rule proposed to ban agreements that are written so broadly as to effectively ban working in the same field post-employment and ban clauses that require paying unreasonable training costs if the employment terminates within a specified period.
- If the rule is implemented as proposed, it would bar employers from entering into or enforcing noncompete agreements with employees or independent contractors. The proposed rule would also nullify any existing agreements within six months from the date the rule takes effect.
- Employers should review their existing agreements and consider revising the agreements to include other contractual provisions that would protect their legitimate business interests even if the FTC rule takes effect.

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New Protections for Pregnant & Nursing Mothers

The 2023 omnibus government funding bill includes two provisions that expand protections for pregnant and nursing employees.

- **The Pregnant Workers Fairness Act (PWFA)**, and
- **The Providing Urgent Maternal Protections (or PUMP) for Nursing Mothers Act**
- These two laws are aligned with Title VII, the Pregnancy Discrimination Act, the Americans with Disabilities Act (ADA), and many existing state laws.
- The new legislation clarifies many of the rights and treatment of working mothers that have historically been pieced together under multiple statutes, regulations, and court decisions.
- **The PWFA** requires employers with 15 or more employees to engage in an interactive process to determine temporary reasonable workplace accommodations for pregnant applicants and employees with conditions related to pregnancy and/or childbirth, and to provide such accommodations if doing so would not impose an undue hardship.
 - The PWFA took effect at the first of this year.
 - Employers should be mindful of these expanded protections for pregnant employees and carefully consider accommodations that may be needed as a result of their pregnancy.

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New Protections for Pregnant & Nursing Mothers

- **The PUMP Act** amends the Fair Labor Standards Act (FLSA) by requiring employers to provide all employees—both exempt and non-exempt—with reasonable break time and a private location other than a restroom in which to express breast milk.
 - PWFA's requirements do not take effect until June 2023.
 - Employers with fewer than 50 employees may be granted an exemption from complying with the requirements if the employer is able to show that doing so would present an undue hardship in terms of expense or other difficulties in light of the employer's size, resources, nature, or business structure.
 - Employees must provide an employer with notice of an alleged failure to comply with the requirement to provide a private location to pump and give the employer 10 days to remedy the matter before initiating any legal action based on the failure.
 - Employers subject to the PUMP Act will need to immediately ensure that they afford to all nursing mothers, regardless of their status as exempt or non-exempt, adequate break time and access to a private location for purposes of expressing breast milk.
 - Employers should also evaluate their current policies and procedures to ensure they are prepared to address accommodation requests from pregnant employees.

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Resources for State Updates

The Littler firm has an excellent blog summarizing many state-specific updates you should consider:

- <https://www.littler.com/publication-press/publication/employment-law-update-2023-new-compliance-obligations-new-year>

And the Littler firm's good summary of California employment laws:

- <https://www.littler.com/publication-press/publication/no-rest-california-employers-2022-here-are-latest-employment-laws>



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