



The Changing Landscape of Worker Protections: Noncompetes, Pay Equity, Pay Transparency and DEI

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Agenda

- **Noncompete Agreements**
- **Employee Mobility & Worker Protection**
- **Pay Equity & DEI**

Noncompete Agreements: an Evolving Landscape

- **Federal**
 - Executive Order
- **State approaches**
 - Massachusetts – procedural and substantive hurdles
 - Colorado – hurdles plus criminalization
 - California – blanket ban
- **Nonsolicitation agreements often (but not always) treated differently**

Noncompete Agreements: Practical Experience

- **Shift in enforcement focus from noncompete agreements to non-solicit agreements**
 - *But see CA (and other states)*
- **Best practices**
 - Preemptive (hiring)
 - Preemptive (departing)
 - Responsive

Employee Mobility

- “Hybrid” or remote work model pros & cons
- **Pros**
 - Higher employee satisfaction / retention
 - Broader talent pool
 - Broader footprint
 - Cost savings
- **Cons**
 - Increased “bad” hires
 - Employees move without notice to “undesirable” jurisdiction
 - Increased tax and other administrative burden

Worker Protections Across Jurisdictions

▪ Familiar

- Noncompetes and nonsolicits
- Overtime and independent contractor classification rules
- Sick time “patchwork”
- “At will” employment

▪ Emerging

- Paid family and medical leave
- Pay transparency obligations
- Limitations on use of “AI” in hiring
- Privacy
- Electronic monitoring

Worker Protections: Managing a Distributed Workforce

- **Recruiting**
- **Offer letters**
- **Policies**
 - Criteria for requesting flexible schedule
 - Work location requirements
 - Notification requirements
- **Oversight**
 - Manager training
 - Requiring consistency

Worker Protections: Focus on DEI

- Scope of efforts
- Responses to BLM and Me Too
- Responses to ESG and legislation
- Internal and external reporting

Worker Protections: Focus on Pay Equity Issues

- **Federal Equal Pay Act**
- **State Laws**
 - New York, New Jersey
 - Massachusetts
 - California

Pay Equity & DEI

- **Pay Equity Audits**
 - Purpose
- **Who should conduct the audit?**
 - In-house vs. outside counsel vs. consultant
 - Audits may (or may not) be privileged
- **Frequency**

Massachusetts Pay Equity Act

- Cannot pay workers a salary or wage less than what they pay employees of a different *gender* for comparable work
 - Other protected categories?
- “Comparable work” as work that requires substantially similar skill, effort, and responsibility, and is performed under similar working conditions.

Federal Equal Pay Act

- **Employers may not pay unequal wages to men and women who perform jobs that require substantially equal skill, effort and responsibility, and that are performed under similar working conditions within the same establishment**
 - The jobs need not be identical, but they must be substantially equal

Government Contractors/Subcontractors

- **Directive 2022-01**
 - Purports to be a clarification of existing requirements under the law or agency (OFCCP) policies
- **Seeks to identify patterns of segregation by race, ethnicity, and gender, which may result from assignment, placement, or upgrading/promotion barriers that drive pay disparities**
- **Attorney-client privilege/work product doctrine**

Questions?



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