# So, It's 2023… What Now?

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# National Update

# Employer Non-Compete Clauses

## Federal Trade Commission Proposes the End of Employment-Based Non-Compete Agreements

The federal government announced a proposed rule which would ban non-compete agreements between nearly *all* employers and *all* workers — employees, independent contractors, externs, interns, volunteers, apprentices, and even sole proprietors who provide a service to a client or customer.



# Employer Non-Compete Clauses

## What does this mean?

- It bans non-compete restrictions
  - Applies regardless of compensation level
- Does this include non-solicitation of customers provisions?
  - Probably not – FTC did not list these covenants as "de facto" non-competes

# Employer Non-Compete Clauses

- FTC's activities signal a considerable effort to prioritize non-compete covenants as an area for increased enforcement
- It is important to consider the following risk factors:
  - Patterns of aggressively enforcing non-compete clauses against employees
  - Large penalty clauses for violating non-compete clauses
  - Overly broad non-compete clauses in geographic or employment scope



# Employer Non-Compete Clauses

- (Cont.) It is important to consider the following risk factors:
  - Non-compete clauses that affect a large number of employees—particularly in highly concentrated industries
  - "Take it or leave it" clauses in standard forms
  - Employer/employee non-disclosure agreements that are overly broad and that have the effect of precluding future employment in an entire field

# EEOC News & Enforcement Policies

- EEOC's 2023 budget increased $35M will be directed to:
  - Racial justice and combating systemic discrimination;
  - Pay equity
- Equality vs. equity – what's the difference?



# EEOC News & Enforcement Policies

- The law requires equal pay for equal work, regardless of sex, race, or other immutable characteristics:
  - A relatively objective standard.
- No law requires equity, the notion everyone should receive the same pay--not for equal work--but to offset systemic biases related to immutable characteristics:
  - A subjective standard founded in politics

# New EEOC Poster for 2023

- EEOC has also updated its "EEO is the Law" poster
- "Must display poster in a conspicuous location at the worksite
  - Must replace old poster within "a reasonable amount of time"
    - Spring 2023 probably is about the outside limit of "reasonable"
  - Available in English and Spanish now

# Speak Out Act

- Signed into law Dec. 7, 2022 – immediately effective
- Prevents enforcement of pre-dispute non-disclosure and non-disparagement agreements relating to sexual assault and harassment
  - Broad NDAs signed at the commencement of employment, for example, may now be unenforceable
  - Prohibits granting "gag orders" based on such agreements

# Speak Out Act

- Expect a broad interpretation of "sexual harassment"
- Purportedly, applies to independent contractors
- **Does not** apply to confidentiality clauses in severance and settlement agreement



# Workplace Safety: OSHA Update

## Occupational Safety and Health Administration (OSHA) Flexed its Muscles

- It hit 400% of budgeted inspections for heat stress this summer;
- It has issued more subpoenas and made more criminal referrals than we have seen in the last decade or so.

OSHA®
Occupational Safety and Health Administration

# Workplace Safety: OSHA Update

- Our forecast for what we can expect out of OSHA in 2023 can be summed up in one word: **aggressive**
  - **Expect to be inspected.** Decided to cast a wider net to include even more workplaces in its enhanced inspection program known as the "Severe Violator Enforcement Program" or SVEP
  - **Increased Penalties.** We expect the agency to announce an initiative to require all state-run OSHA plans to increase their penalties to the same level as federal OSHA
  - **Heat Stress Standard.** OSHA's advance notice of proposed rulemaking that notes the agency is considering creating, for the first time, a federal standard to prevent heat illness.

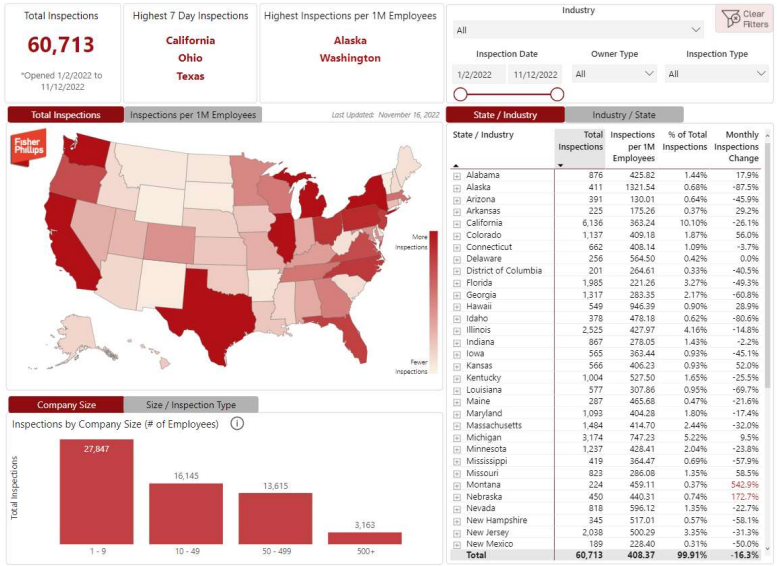


# Workplace Safety: OSHA Update

**So What Should Employers Do?**

- Continue to train on safety and awareness
  - If you see something, say something
- Take action to correct risks before and after incidents
  - Largest penalties are for willful, repeated, or unabated violations
- Learn from others
- Monitor trends in OSHA inspections – check out Fisher Phillips OSHA inspection tracker

OSHA Inspections Tracker






# Federal Respect for Marriage Act

**Effective December 13, 2022*

**What did it do?**

- Overrides Defense of Marriage Act (DOMA), which defined marriage between one man and one woman
- Protects rights of same-sex marriage
- Does not require states to grant marriage licenses to same sex-couples but requires states to fully recognize marriages that are legally formed in other states
- Exceptions: nonprofit organizations and religious liberties

# Federal Respect for Marriage Act

**Effective December 13, 2022*

**So, does anything change?**

- Not really…but employers should take this opportunity to ***review their benefits offerings – as well as their diversity, equity, and inclusion (DEI) policies***
  - Remember: Civil Rights Act protects from discrimination based on sexual orientation and gender identity



# Pay Scale Information

- Part of a growing trend of state and local legislation requiring pay scale information in job postings.
- Current or pending requirements in CO, WA, New York, NYC and other jurisdictions.

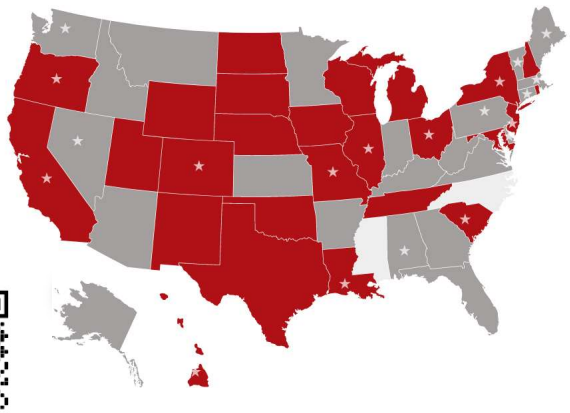
# Pay Scale Information

| Job Posting | Upon Request | With Conditional Offer | Other |
|---|---|---|---|
| Colorado | California (after first interview) | Connecticut | Nevada (after first interview) |
| Jersey City, NJ (4/13/22) | Maryland | Cincinnati, OH (upon request) | |
| Ithaca, NY (9/1/22) | Connecticut | Toledo, OH (upon request) | |
| New York City (11/1/22) | Rhode Island (1/1/23) | | |
| Westchester, NY (11/6/22) | | | |
| Washington (1/1/23) | | | |
| California (1/1/23) | | | |
| NYS (TBD) | | | |



## Fisher Phillips Pay Equity Map

- Fisher Phillips' Online **Pay Equity Interactive Map** shows the various pay equity laws by simply clicking on each state
- Located at https://www.fisherphillips.com/pay-equity-map/index.html



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# Pregnant Workers Fairness Act (PWFA)

*(signed by Pres. Biden on 12/29/2022; Effective June 27, 2023)*

- Applies to employers who have 15 or more employees
- Protects a "qualified employee" - defined as "an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the position, with specified exceptions"
- *In effect requires employers to consider employee and applicant accommodation requests related to pregnancy, childbirth, or related medical conditions the same as accommodation requests under the ADA, which does not define disability to include pregnancy or pregnancy-related conditions.*



# Pregnant Workers Fairness Act (PWFA)

*(signed by Pres. Biden on 12/29/2022; Effective June 27, 2023)*

**It Prohibits**:

- Failing to make reasonable accommodations to known limitations of qualified employees unless the accommodation would impose an undue hardship on an entity's business operation;
- Requiring a qualified employee affected by such condition to accept an accommodation other than any reasonable accommodation arrived at through an interactive process;
- Denying employment opportunities based on the need of the entity to make such reasonable accommodations to a qualified employee;
- Requiring such employees to take paid or unpaid leave if another reasonable accommodation can be provided; and
- Taking adverse action in terms, conditions, or privileges of employment against a qualified employee requesting or using such reasonable accommodations.

# PUMP Act

## Providing Urgent Maternal Protections for Nursing Mothers Act

- Effective December 29, 2022
- Extends workplace protections for nursing mothers previously adopted in the 2010 Affordable Care Act (provided non-exempt employees an entitlement to unpaid breaks to express milk).
  - Expands the break time to exempt employees.
  - Clarifies that if the employee is still on the clock or not completely relieved from duties then this time will be considered "hours worked" and compensable.



# PUMP Act

## Providing Urgent Maternal Protections for Nursing Mothers Act

- Does not apply to small employers (employers with fewer than 50 employees) if they can establish an undue hardship, involving significant difficulty or expense.
- Violations of the PUMP Act fall under the FLSA, and penalties can include unpaid wages, reinstatement, liquidated damages, and attorney's fees.

# CROWN Act

- The Crown Act is law: Tennessee, Illinois, California, New York, Louisiana
- Legislation is filed or pre-filed: Florida (The Crown Act is Law Broward County), Indiana, Michigan (The Crown Act is Law An Arbor, Genesee County)

- <u>Best Practices for Employers</u>
  - Employers are advised to review and update any existing employee handbook and employee training material to ensure they follow both the letter and the spirit of the CROWN Act.
  - Pay attention to dress codes or policies, particularly those referring to either acceptable or prohibited hairstyles.
  - Supervisory employees should further be cautioned not to make hiring, disciplinary, or other employment decisions based on an employee's protected hairstyle.

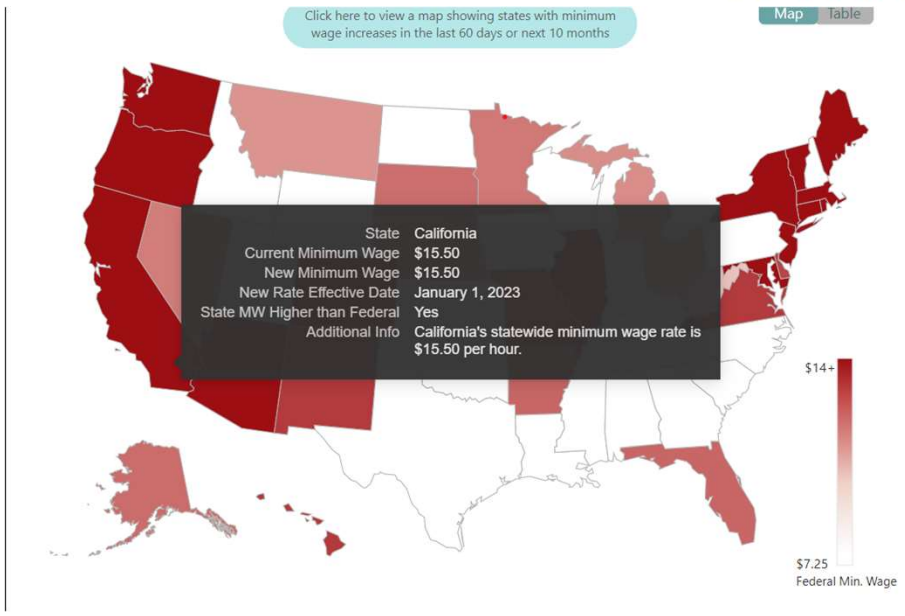
# Federal Minimum Wage

- Federal Minimum Wage: Currently $7.25/hour

**Don't forget to double check any state increases!*

*California is currently $15.50/hour for all employers, regardless of size*



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# Potential Issue: Wage & Hour

**DOL *may* issue a new overtime regulation**

- Current minimum salary for exemptions =$35,568 ($684 per week)
  - Expected to increase substantially
  - May build in automatic increases
- Duties tests may change as they are currently under scrutiny
- Enforcement to focus on deductions that cut into minimum wage



# Potential Issue: Wage & Hour

**What Can Employers Do To Prepare?**

- Carefully review positions and exemptions
- Ensure time records are accurate and certified by employees
- Discipline employees that fail to record time or work unauthorized overtime
- Do not permit "off-the-clock" work
- Assess new jobs closely to determine the exempt status and audit regularly
- Watch who receives stipends and extra pay

# 2023 CALIFORNIA Employment Law Update

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## 2023 Notable New Laws

- Employment Discrimination and Cannabis
- Bereavement Leave
- CFRA/PSL "Designated Person"
- Extension of a Few Other COVID-19 Laws

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# AB 2188 – Employment Discrimination and Cannabis

**Prohibits an employer from taking adverse action based on:**

1) An employee's use of cannabis off the job and away from the workplace.
2) A drug-screening test that found the employee to have nonpsychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids.
   - An effort to try to move employers away from metabolite testing.
   - Adverse action based on THC-positive test results is still permitted.



# AB 2188 – Employment Discrimination and Cannabis

- Does not allow an employee to possess or use on the job or to be **"impaired by"** cannabis on the job.
  - But how do you measure **"impairment?"**
- Does not apply to employers covered by federal laws or receiving federal funds or federal contractors that have different requirements.
- Does not apply to employees subject to federal background investigations or security clearances.
- Does not apply to employees in the building and construction trades.
- Goes into effect **January 1, 2024.**

# AB 1949 – Bereavement Leave

- Five days of bereavement leave upon the death of a family member.
- Unpaid but an employee can used accrued paid time.



# AB 1949 – Bereavement Leave

- Applies to employers with **5 or more** employees.
- Applies to employees who have been employed for **at least 30 days** prior to the leave.
- Family member is spouse, registered domestic partner, child, parent, parent-in-law, sibling, grandparent, grandchild, domestic partner, or a designated person as defined under CFRA (see next slides).
- Days of leave **need not be consecutive** and must be completed **within 3 months** of the death of the family member.

# AB 1949 – Bereavement Leave

- If you provide less than five days of **paid** bereavement leave, you must provide additional unpaid days (ex, 3 paid days + 2 additional unpaid days).
- Employer can ask for **documentation** to be provided within 30 days of the first day of the leave (death certificate, published obituary, written verification of death, burial or memorial service from a mortuary, etc.)
- Anti-retaliation and confidentiality provisions.
- CBA exemption if expressly provides for equivalent bereavement leave.



# AB 1041 – CFRA/PSL "Designated Person"

- Expands CFRA and PSL to allow employees to take leave to care for a "designated person."
- Employers can limit workers to having one designated person per 12-month period.

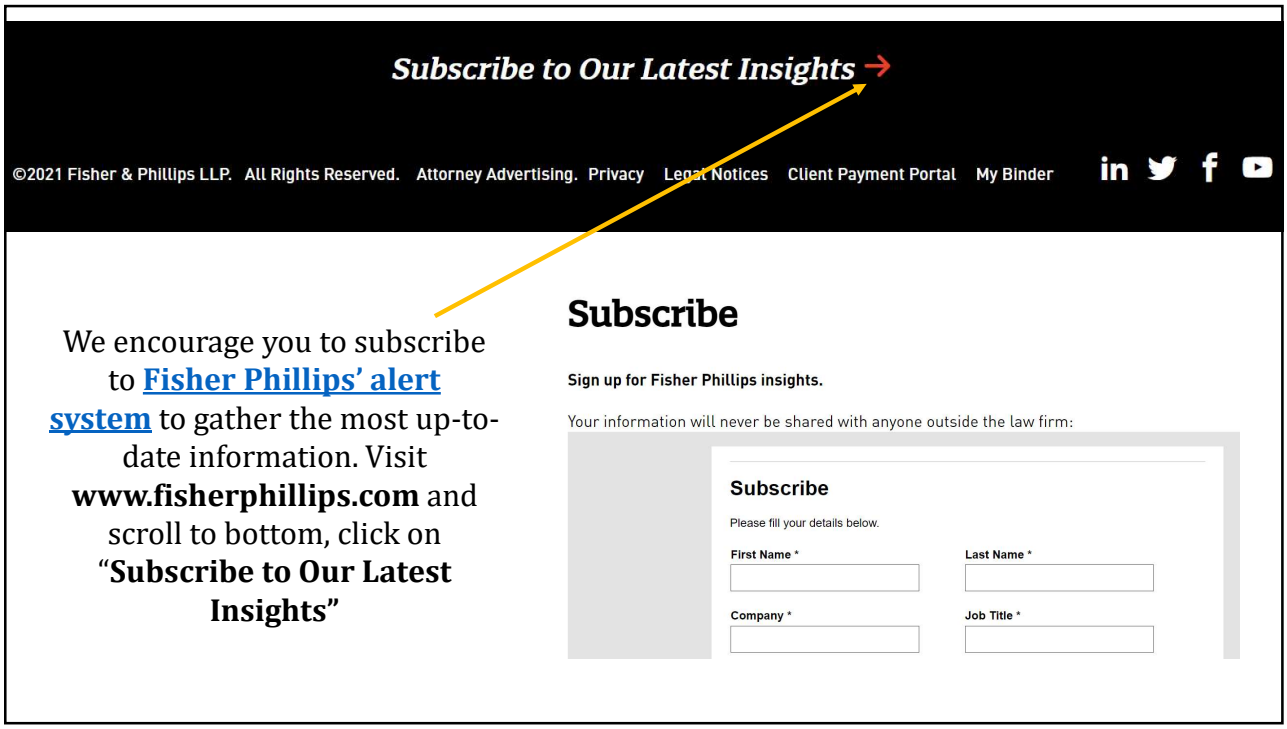
# AB 1041 – CFRA/PSL "Designated Person"

- **CFRA** - anyone related by blood or the **"equivalent of a family relationship."**
  - **Can you challenge this? Probably an uphill battle.**
- **PSL** – just says "designated person" but **does not define**.
- Under both laws the designated person can be designated at the time the employee requests leave (but again can limit to one designated person per 12-month period).



# Cal/OSHA's "Permanent" COVID-19 Regulation

- The ETS is **expiring**.
- To be replaced by the new **"permanent"** or non-emergency regulation for two years.
- The new regulation is a streamlined version of the ETS.
- Also some flexibility on notices and other requirements.
- Approved by the Cal/OSHA Standards Board on 12/15/2022 - will be effective within 30 "working" days when approved.
- Once approved will be in effect for **two years** from the effective date.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# Thank You!

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