

EMPLOYMENT LAW AND HUMAN RESOURCES UPDATE

*NCMGMA FALL CONFERENCE
SEPTEMBER 2024*

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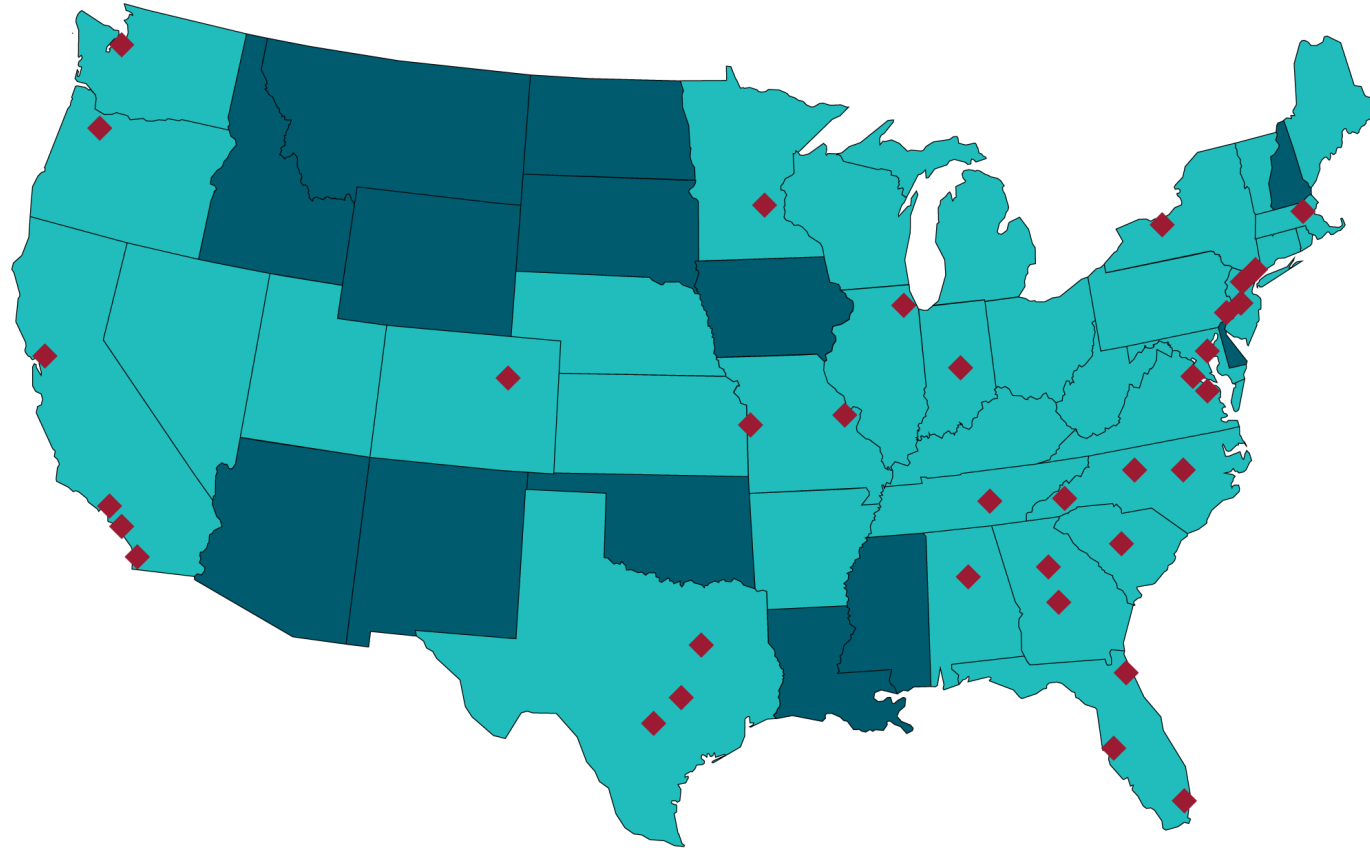
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CONSTANGY IS A NATIONAL LABOR & EMPLOYMENT LAW FIRM. WE HAVE MORE THAN 225 ATTORNEYS ACROSS 35 OFFICES IN 21 STATES, AS WELL AS ATTORNEYS LICENSED IN AT LEAST 35 STATES



AGENDA

- Employee Handbooks
- The EEOC
- Wage and Hour
- Pay Equity
- Privacy
- Hot Takes/Crystal Ball



EMPLOYEE HANDBOOKS



OVERVIEW

Does your handbook:

1. Comply with the law?
2. Describe your company's culture and tell the company story?
3. Outline the rules of the road for behavior?
4. Communicate goals, roles, and responsibilities?
5. Give employees the information they need about the company to handle situations that arise?
6. Outline consequences for not following the company procedures?

Get handouts on your Goto Webinar "Handouts" panel.

WHY HAVE AN EMPLOYEE HANDBOOK?

Reason #1: Compliance

- In many cases, the law requires certain policies
- Communicates company policies and procedures
- Contributes to uniform and consistent application/enforcement of policies

Reason #2: Employer protection

- Reduces claims of improper employer conduct
- Mitigates risk of employee lawsuits

WHY HAVE AN EMPLOYEE HANDBOOK?

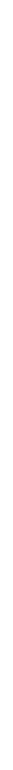
Reason #3: Helps define your culture and communicates what is important to employer

- Employee road map for understanding company values and expectations
- Cultural cues for employee behavior
- Sets clear expectations and requirements

Reason #4: Gives employees clear rules

Reason #5: Important tool for winning the war for talent

A COUPLE NOTES ON SPECIFIC POLICIES





AT-WILL EMPLOYEES

At-will Statements

- No representative of the Company has authority to enter into any agreement contrary to the foregoing employment at-will relationship.
- No manager, supervisor or employee has any authority to enter into an agreement for a specified period of time.

NON-SOLICITATION/NON-DISTRIBUTION POLICIES

Unlawful

ABC Company prohibits the distribution of literature during work hours in working areas and solicitation of employees during work hours, including by electronic methods. Solicitation or distribution of any kind by non-employees on Company premises or through Company networks is prohibited at all times.

More lawful

ABC Company prohibits the distribution of literature during **working time** and in work areas and solicitation of employees during work time, including by electronic methods. Solicitation or distribution of any kind by non-employees on Company premises or through Company networks is prohibited at all times.

SOCIAL MEDIA POLICIES

Unlawful

ABC Company prohibits harassment, threats or disparagement of fellow professionals, employees, clients, competitors or anyone else on social media. Do not make personal insults, malign, defame or disparage or use obscenities or engage in any conduct that would be unacceptable in a professional environment.

More lawful

ABC Company policy requires employees to be thoughtful in all communications and dealings with others, including email and social media. Never harass, threaten, libel or defame fellow professionals, employees, clients, competitors, or anyone else. Nothing in this policy is intended to prevent employees from engaging in concerted activity protected by law.

EMAIL POLICIES

Unlawful

ABC Company prohibits employees from using the corporate email system for non work-related purposes.

More lawful

ABC Company policy prohibits the use of the corporate email system by non-employees for any purpose, or by employees who do not use the corporate email system to do their jobs. Employees who use the corporate email system to do their jobs may only use the system for non work-related purposes during their non-working time and must refrain from attaching large data files or audio/video segments. Such employees are reminded that non-business use of the corporate email system is not private and is subject to monitoring in the same way as business email.

CONFIDENTIALITY & EEO NON-HARASSMENT/DISCRIMINATION/ANTI-RETALIATION POLICIES

They must

Comply with HIPAA

They Should

Contain all local, state, and federal protected characteristics (sexual orientation, gender identity, PWFA)

Multiple reporting avenues

Reasonable Accommodation (Religious, Medical, Pregnancy, Lactation)

OTHER IMPORTANT HANDBOOK ISSUES

SUPERVISOR TRAINING

ACKNOWLEDGEMENTS

MAINTAIN HISTORIC COPIES



EEOC STRATEGIC ENFORCEMENT PLAN

Six priorities for 2024-2028

1. **Hiring** Practices – barriers in recruitment & hiring (such as job advertisements that exclude or discourage applicants in protected categories)
2. **Protecting** “Vulnerable Workers”
3. **Emerging** Issues (historical prejudice, hate speech (esp against religious minorities), and gender identity and sex orientation)



EEOC Strategic Enforcement Plan

Identified six priorities for 2024-2028

4. Equal pay
5. Preserving Access to the Legal System
6. Systemic harassment

EEOC STATISTICS FY - 2023


Total Money Recovered - \$665 million
(about \$30m over 2022)

143 lawsuits in 2023

81,055 charges of discrimination (10+ %
increase)

Democrat majority on commission

Increased funding



EEOC GUIDANCE ON HARASSMENT (APRIL 29, 2024)

Workplace harassment

How to prove harassment

What is a “hostile” work environment

Employer liability



EEOC GUIDANCE ON “CLASSIC” HARASSMENT

Employer liability

Coercing employee to harass a co-worker

Liability for conduct outside of work

Non-employee harasser

Automatic Liability

“Proxy” or “alter ego” harassment

Supervisor/management & tangible action

Employer knowledge



Gender Identity and Sexual Orientation

“Repeated and intentional” misnaming or misgendering, as well as preferred pronoun usage

Refusing to let a transgender employee use restroom corresponding with gender identity

Mistreating an employee for having an abortion (or not having one)

May be religious accommodation issue but not yet



EEOC GUIDANCE ON HARASSMENT

Sex-based: includes pregnancy and pregnancy/childbirth related conditions (lactation, contraception, abortion, sexual orientation, gender identity)

Based on a mistaken belief: assuming someone belongs to a certain protected group, such as a French employee being harassed because the co-worker **thinks** they are Russian



EEOC GUIDANCE ON HARASSMENT

Transgender employees

Religious expression & accommodations

“Consent”

“Preaching”

Pregnancy accommodations

ADDITIONAL GUIDANCE FROM EEOC ON HARASSMENT

“**Associational discrimination**” (for example, harassing a white employee because she is married to a Black man)

“**Intersectional Harassment**” (example: harassing Black women but not Black men)

“**Intraclass harassment**” (harassment where the perpetrator and the victim are in the same protected category)

- Employee in her 50s harassing a 65-year-old because of the latter’s age;
- A woman harassing female co-workers about their child-bearing choices.



EEOC GUIDANCE ON HARASSMENT

- What else is covered in Regs:
 - Effective (and updated) policies
 - Effective (and updated) training
 - Justification for *not* reporting harassment
 - Alternatives to the employer's process
 - Proper corrective action



CHEVRON V. NATURAL RESOURCES DEFENSE COUNCIL

Chevron Holding:

Courts should defer to an agency's reasonable interpretation of ambiguous statutes

Cited in more than 15,000 judicial opinions.
Courts rely on it reflexively.

- Justice Kavanaugh - “ushers in shocks to the system every four or eight years when a new administration comes in” and implements “massive change” in areas like securities law, communications law, and environmental law.

WAGE & HOUR

AREA LIKELY AFFECTING YOU NOW...AND IN THE FUTURE



Legal Updates

- A. New DOL Overtime Rules
- B. Minimum wage
- C. DOL's Independent Contractor Rule
- D. FTC Noncompete Ban

DOL Overtime Rule

Went into effect on July 1, 2024
(ongoing litigation)

Increase Exempt employee salary
minimum

- Up to \$43,888 annually (\$844/week)
- Previously \$35,568 (\$684/week)

January 1, 2025: Up to \$58,686
annually (\$1,128/week)

Updates every three years

Exempt Employees

Requirements:

- Paid a salary;
- Salary not less than minimum threshold amounts; and
- Employee primarily performs executive, administrative or professional duties.

Highly Compensated Employees:

- Makes \$132,964/year; up to \$151,164/year as of Jan.

Overtime

Non-Exempt Employees entitled to overtime:

- Work over 40 hours in a workweek (FLSA)
- States may have additional regulations

Overtime rate = 1.5 times regular rate

- Regular rate often not the same as hourly rate

Items included in regular rate:

- Commissions; piece workers; noncash; some bonuses

Minimum Wage

FLSA requires minimum wage of at least \$7.25/hour

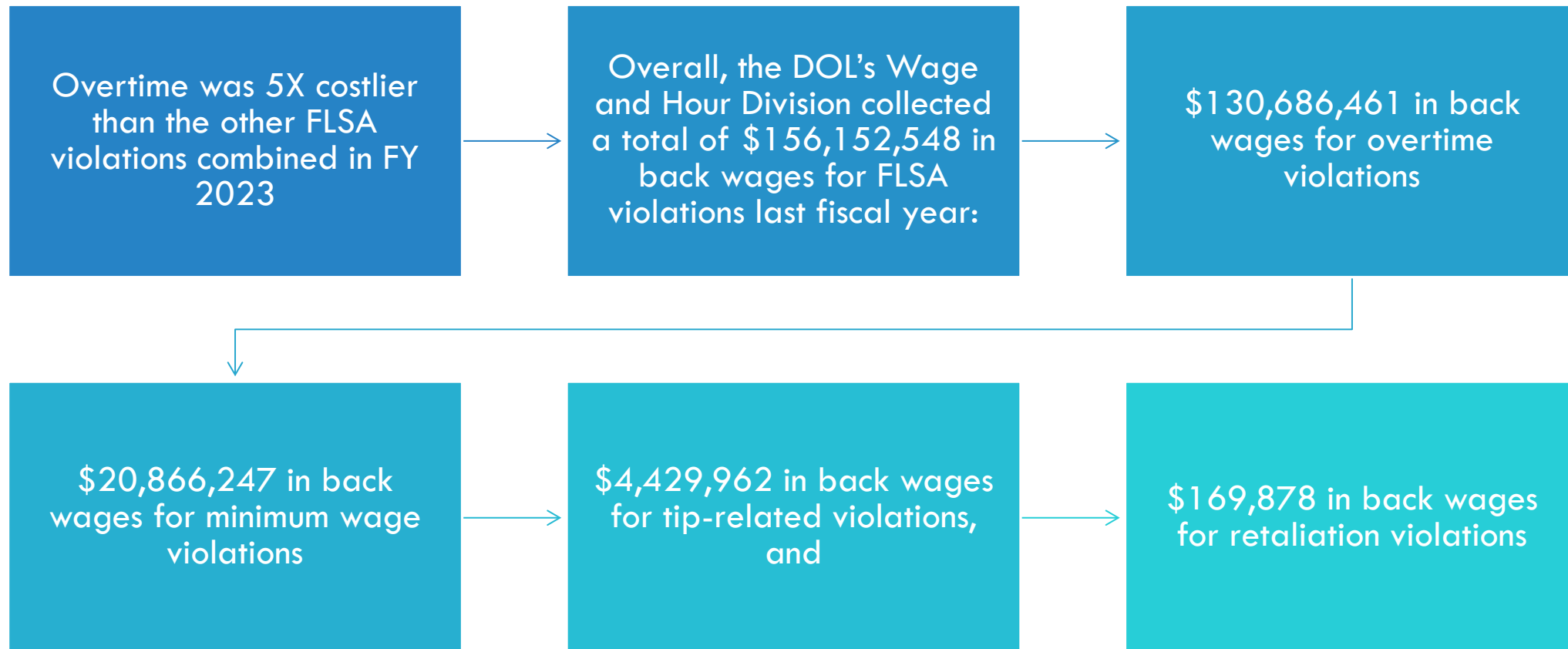
Many states and municipalities impose higher rates

In 2024, more than 20 states have increased minimum wage

Growing trend to increase to \$15/hour (currently 8 states)

- Three more states to increase to \$15/hour as of Jan. 1, 2025
- Three additional states to increase to \$15/hour in 2026

U.S. DEPARTMENT OF LABOR



DOL'S INDEPENDENT CONTRACTOR RULE

Went into effect on March 11, 2024

- Rescinds 2021 rule
- Restores the multifactor, totality-of-the-circumstances analysis
- Ensures that all economic realities test (ERT) factors are analyzed equally without assigning a predetermined weight to a particular factor or set of factors.

Only applies to FLSA

TOTALITY-OF-THE-CIRCUMSTANCES

- Six Factors:
 - (1) the worker's opportunity for profit or loss;
 - (2) investments by the parties;
 - (3) the work relationship's permanency;
 - (4) the nature and degree of control over the work;
 - (5) whether the work is an integral part of the employer's business; and
 - (6) the worker's skill and initiative.
- No factor given predetermined weight over the other

ECONOMIC DEPENDENCE

- “[E]conomic dependence is the ultimate inquiry for determining whether a worker is an independent contractor or an employee.”
- Independent contractors who perform substantially all of their work for one business are likely to be economically dependent on that business, and thus likely to be misclassified employees.

FTC'S NONCOMPETE BAN

- May 7, 2024 – FTC published a Final Rule prohibiting employers from entering into or enforcing noncompete clauses with most employees.
- Effective Date: N/A – IMPLEMENTATION SET ASIDE ON A NATIONWIDE BASIS VIA FEDERAL COURT IN AUGUST 2024
- So great...nothing to worry about in regard to Non-Competes, right?

NLRB ON NON-COMPETE AGREEMENTS

NLRB General Counsel: restrictive covenants unlawfully interfere with employees' right to engage in protected concerted activity

Has recognized that there may be “special circumstances” that permit restrictions; has implied that non-competes with supervisors could violate the NLRA

NLRB could issue a ruling in the near future that broadly bans most non-competes (and non-solicits)

PAY EQUITY



LET'S TALK ABOUT PAY...BABY....

Don't be coy, avoid, or make void the
topic
Cause that ain't gonna stop it
Now we talk about pay behind closed
doors
It's no longer, anything goes
Let's tell it like it is, and how it could be
How it was, and of course, how it should
be
Those who think it's inequitable have a
choice
Pick up their bag and turn their laptop off

Let's talk about pay, baby
Let's talk about employees
Let's talk about all the good things
And the bad things that may be
Let's talk about pay
Let's talk about pay
Let's talk about pay
Let's talk about pay

Let's talk about pay for now
To those remote or in the office
It keeps coming up somehow

WHY IS PAY EQUITY IMPORTANT?

Prevent discrimination lawsuits

Comply with equal pay regulations

Improve productivity and morale

- Reduce workplace turnover
- Attract talented new employees



IMPLEMENT AND IMPROVE PAY EQUITY

Document strategies

Update (create) job descriptions

Communicate goals

Adjust recruitment tactics

Conduct an analysis

Address any wage gaps



PAY EQUITY ANALYSIS

Lay the groundwork

Historical perspective is important

Collect workforce data

Group similar jobs

Review findings

Correct wage gaps



SMALL INITIAL GAP CAN LEAD TO LARGE DISPARITIES

	Female Employee's Pay	Male Employee's Pay	Annual Difference
2015	40,000.00	44,000.00	\$4,000.00
2016	41,600.00	45,760.00	\$4,160.00
2017	43,264.00	47,590.40	\$4,326.40
2018	44,994.56	49,494.02	\$4,499.46
2019	46,794.34	51,473.78	\$4,679.44
2020	48,666.12	53,532.73	\$4,866.61
2021	50,612.76	55,674.04	\$5,061.28
2022	52,637.27	57,901.00	\$5,263.73
2023	54,742.76	60,217.04	\$5,474.28
2024	56,932.47	62,625.72	\$5,693.25
The above chart assumes an annual 4% increase for both the female and male employee each year.			
Total Difference in Pay Over 10 Years:		\$48,024.45	

COMMON PITFALLS

- Failure to protect privilege
- Conducting the analysis, but not ready to address the issues
- Not addressing poor quality of data
- Underestimating time needed to address data issues
- Underestimating time needed to research areas that “pop”
- Model does not equate to reality
- Not refreshing the analysis on a routine basis

SOME STATES
REQUIRE PAY
REPORTING, BUT
ONLY CA, IL,
AND SOON TO
BE MA SO NO
WORRIES,
RIGHT?

According to its July 5 regulatory agenda, the Equal Employment Opportunity Commission (EEOC) is seeking to revive Component 2 pay data collection as part of your annual EEO-1 submission.



100 OR MORE EMPLOYEES?? BEWARE 2025

Revival Expected: There have been lots of rumors about a revived EEO-1 Component 2 requirement since President Biden first took office – but the recent regulatory agenda announcement is the first official step we've seen. The EEOC said it expects to issue a proposed rule in January 2025.

HOT TAKES & QUICK HITS



PREGNANCY (EFF. JUNE 27, 2023)

Pregnancy Workers Fairness Act (“PWFA”)

Requires reasonable accommodations to **known** limitations for employees & applicants

Pregnancy;

Childbirth; or

Related medical conditions



PREGNANCY ACCOMMODATIONS

PWFA Requirements

Must discuss accommodations with individual

May not deny job/opportunities based upon accommodation need(s)

Cannot require leave if other accommodations available

No Retaliation



PREGNANCY ACCOMMODATIONS

PWFA Guidance Issued on April 19, 2024

Not required to be “substantially limited”

Pre-pregnancy application

Known limitations

Qualified employee



PREGNANCY ACCOMMODATIONS (EXAMPLES)

Additional, longer, or more flexible breaks to drink water, eat, rest, or use the restroom;

Changing food or drink policies to allow for a water bottle or food;

Changing equipment, devices, or workstations, such as providing a stool to sit on, or a way to do work while standing;

Changing a uniform or dress code or providing safety equipment that fits;

Changing a work schedule, such as having shorter hours, part-time work, or a later start time;



PREGNANCY ACCOMMODATIONS

Must be provided unless there is an “undue hardship” on the employer.

“Undue hardship” means **significant** difficulty or expense.

Case-by-case

“PUMP” ACT (EFFECTIVE JUNE OF 2023)

- DOL-based
- ALL employers covered under the FLSA
- Lactation Space (not restroom)- Clean, electricity, surface, close to sink and fridge
- Periodic, as needed breaks
- Non-exempt employees must be completely relieved of work (unpaid ok)



OSHA RECORDKEEPING REQUIREMENTS

Restructuring Section 1904.41 (a)

Effective January 1, 2024

Updates the list of “high-hazard” industries

Creates new obligations

Establishments with 100 + in certain high-hazard industries obligated to report

Certain establishments with 20-249 employees are still required to annually submit information from their Form 300A summary each year.



OSHA PENALTIES

<u>2023 Penalties</u>		<u>2024 Penalties</u>
Other than Serious	\$15,625	\$16,131
Serious	\$15,625	\$16,131
Repeat	\$156,259	\$161,323
Willful	\$156,259	\$161,323

QUICK OVERVIEW OF PRIVACY LAWS

- 14 states have adopted data protection laws
 - Only California Privacy Rights Act applies to HR data
 - All other current state laws exclude data collected about employees, job applicants, independent contractors, beneficiaries and other “HR data.”
- Some states have high thresholds for applicability
- Likely more law will include HR data in the future
- NC has a cyberbreach reporting law

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QUESTIONS?

THANK YOU!