

# Employment Law Updates in an Evolving Workplace

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# Presenter




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- 27 year attorney who counsels and litigates client labor and employment matters for employers in the Public and Private sectors
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- Delivers practical, compliant alternatives in hiring practices, decisions to discipline or terminate, wage and hour, OSHA and workplace safety, employment policies and handbook updates, and restrictive covenants for business clients
- Frequent speaker, writer and workshop facilitator on employment matters
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**RECENT AND RELEVANT PUBLICATIONS**

- **"Employers and the Evolving Workplace: 2022 Employment Law Update,"** Larry Lee and Blaine Bengtson, Municipal Lawyer, March-April 2022/Vol. 63 No. 2
- **"Hot Spots in Employment Law 2022"**
- **"Post-U.S. Supreme Court OSHA Ruling: Managing Omicron and Coronavirus in the Workplace"**
- **"What's in Your Ransomware Defense Toolbox?"**
- **"Workplace Transitions: Managing A Stressed-out Workplace"**
- **"Managing the Toxic 'How Much Did You Make' Interview Question,"** Law Week Colorado

# Presenter



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- Five year labor and employment attorney representing employers in disputes under federal and state employment laws
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**PUBLICATIONS**

**"Employers and the Evolving Workplace: 2022 Employment Law Update,"**
Larry Lee and Blaine Bengtson, Municipal Lawyer, March-April 2022/Vol. 63 No. 2

# AGENDA

- State Leave and Job Protection Laws
- Anti-Discrimination Laws
- Government Response to Pandemic
- Work-From-Home



**Employment Law Updates in an Evolving Workplace**

The 2022 employment law update reveals a few key themes around vaccine mandates, expanded paid employee sick and medical leave benefits, and remote workforces. As the world experiences yet another year under the heel of COVID-19, it's unsurprising that developments in local, state, and federal employment laws continue to focus principally on responses to the pandemic. Join Employer Management Attorney Larry Lee and his associate counsel colleague Blaine Bengtson as they highlight changes in employment law that may impact employers in the local, state, federal, and international workplaces, with special considerations for work-from-home policies

Learning Objectives

- Understand the upward trend in State Leave and Job protection laws
- Renewed attention to anti-discrimination laws
- Government response to pandemic in 2022 (yes, Covid-19 strains are still infecting the country)
- Legal implications of remote work



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# State Leave and Job Protection Laws

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# State Leave and Job Protection Laws

- Lawmakers have expanded employee rights to medical benefits in response to pandemic, and employee's expectations have increased regarding paid time off and other types of related paid sick leave
- For example, the Colorado General Assembly enacted the Healthy Families and Workplaces Act (HFWA)
  - For larger employers, HFWA went into effect in January 2021
  - Since January 1, 2022, HFWA applies to all employers in Colorado (except the federal government) regardless of size, including municipalities
  - All employers required to provide at least 48 hours of paid sick leave each year to employees and increases the requirement to 80 hours of paid sick leave during a public health emergency (which remains in effect)
  - Includes time off for treatment, counseling, and legal services for victims of domestic violence



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# State Leave and Job Protection Laws



- California's family care and medical leave law for public sector employees authorizes employees to take available medical leave to care for a parent-in-law;
- Illinois House Bill 3582 requires employers to provide victims (and their family members) of any violent crimes with unpaid leave to seek medical attention for physical or psychological injuries caused by the crime, to obtain services from a victim services organization, to obtain counseling, and to seek legal assistance; and
- Since January 1, 2022, workers covered by the British Columbia Canada Employment Standards Act are eligible to take up to five days of paid sick leave per year for illness or injury (4), days in addition to the three days per year of unpaid sick leave already required under the Employment Standards Act

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# State Leave and Job Protection Laws



- At least one municipality extends employment displacement protections for workers providing essential services under a city contract:
  - Summer 2021, the City and County of Denver, Colorado adopted Ordinance No. 21-0818, in response to COVID-19's exacerbation of worker displacement,
  - When a covered contract expires, or a change in control occurs, the successor contractor must offer covered workers under the former contract a right of first refusal of employment, and
  - Intent to retain experienced and trained workers, maintaining certain level of institutional knowledge and providing cost savings

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# Anti-Discrimination Laws

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# Anti-Discrimination Laws



- Trends bolstering anti-discrimination laws in equity in pay, expanding protected categories, broadening protected conduct, and further protections for pregnant female workers
- Transparency in worker pay a key issue for lawmakers throughout the U.S. and in foreign countries:
  - Numerous states have adopted pay scale disclosure laws;
  - In Colorado, all employers must disclose the hourly or salary compensation, or a range of the hourly or salary compensation, and a general description of all the benefits and other compensation to be offered to the hired applicant in each job posting;
  - In New York City, as of May 15, 2022, employers required to include minimum and maximum salary information in job postings; and
  - Many states adopted laws prohibiting employers from seeking pay history or relying on pay history when considering a job applicant or deciding the applicant's pay -
    - Rhode Island pay history law goes into effect January 1, 2023.

# Anti-Discrimination Laws

- In Illinois, lawmakers expanded anti-discrimination protections on two fronts:
  - First, the state added individuals associated with a person with a disability to the category of those who are protected from discrimination based on a disability; and
  - Imposed new requirement on the increasing number of employers using artificial intelligence in their hiring processes to report the race and ethnicity of all screened applicants to monitor whether any racial bias exists in the technology used for hiring.



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# Anti-Discrimination Laws

- In California, lawmakers prohibit employers, public and private ones, from including non-disparagement clauses in agreements with employees that limit an employee's ability to disclose information about unlawful acts in the workplace, *unless the agreement includes the following language*:
  - "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful."
  - Previously, the law precluded non-disparagement clauses relating to gender-based harassment but now prohibits such clauses for any type of harassment, including harassment not based on sex



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# Anti-Discrimination Laws

- "CROWN" laws (Create a Respectful and Open World for Natural Hair) have been passed in numerous jurisdictions, including:
  - California, New Jersey, Colorado, Connecticut, New Mexico, Nebraska, and several others.
  - CROWN acts have been introduced but not yet passed in other states like Illinois
- In Oregon, law includes protection against discrimination for natural hairstyles, and:
  - Oregon made it unlawful for employers to require current or prospective employees to possess or present a valid driver's license as a condition of new or continued employment
  - The law recognizes an exception where the ability to drive legally is an essential function of the job
- In Montana, lawmakers have added marijuana use during non-work hours as an activity for which employers, including local governments, cannot discriminate against employees



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# Anti-Discrimination Laws

- In Minnesota starting 2022, employers required to provide reasonable break times each day for nursing mothers to express breast milk, and cannot reduce an employee's compensation for lactation breaks
  - Nursing mothers must be afforded the opportunity to take paid lactation breaks for the twelve months following birth of the child
- U.S. Senate update on vote on the Pregnant Workers Fairness Act (PWFA), bolstering protections for pregnant employees
  - Prohibits employers from denying a reasonable accommodation during a normal pregnancy rather than accommodating only "difficult" pregnancies, similar to denying a reasonable accommodation to disabled employee under the ADA
  - PWFA championed as a bipartisan bill and support from both sides of the aisle may be enough to get support from the Executive Branch



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# Government Responses to Pandemic

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# Government Responses to Pandemic

- All employers continue to face infections and outbreaks in their workplaces and diverging employee stances regarding vaccinations



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# Government Responses to Pandemic

- A Healthcare Emergency Temporary Standard ("ETS") remains relevant for a number of local government employers:
  - Twenty-two states and territories in the United States have OSHA-approved State Plans, all of which cover state and local government workers in those states or territories;
  - State Plans must be at least as effective as the federal occupational safety and health program;
  - Before OSHA's withdrawal of the ETS, several of the states with State Plans had already adopted the federal ETS and others had initiated the process to implement the ETS for employees covered by their State Plan;
  - Some states, like Minnesota responded to OSHA's withdrawal of the ETS by suspending their enforcement of the ETS against covered employers; and
  - California  adopted their own emergency temporary standards that were unaffected by OSHA's withdrawal of the federal ETS



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# Government Responses to Pandemic

- Several states have prioritized worker exemptions to any such employer mandates:
  - In Alabama, employers are prohibited under a new law from requiring an employee to receive a COVID-19 vaccination as a condition of employment without first providing the employee an opportunity to seek a religious or medical exemption
    - Employee's submission of a completed exemption form creates a presumption that the employee is entitled to the exemption
  - In West Virginia, employers with vaccine mandates required to accept certifications from licensed medical providers indicating that an employee's or prospective employee's religious beliefs prevent them from receiving the COVID-19 vaccine



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# Government Responses to Pandemic

- Some states have amended existing laws to bolster other pandemic mitigation measures, such as contact tracing
  - California law requires private and public employers to provide their employees with notice of potential exposure to COVID-19
    - Employers notify relevant local public health agency within 48 hours or one business day, whichever is later, if they become aware that the number of cases among their employees meets the definition of a COVID-19 outbreak, and
    - Specifies the categories of employees and other individuals who must be notified of potential exposure to an infected person in the workplace.



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# Work-From-Home

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# Work-From-Home

- Employees preference to work remotely is not a new development
- Public and private sector employers wrestle with whether, when, and how they will allow their employees to work remotely
- Obvious benefits to remote workforce, but a downside is inability for diligent employees to disconnect outside of normal work hours
- Striving to solve this problem, the Ontario, Canada government passed legislation taking effect June 2, 2022, helping employees disconnect from their employment responsibilities after work hours
  - Law requires Ontario employers with 25 or more employees to develop a written policy giving employees the right to disconnect from their work at the end of their workday
  - "Disconnecting" under the new law includes not engaging in work related communications such as e-mails, telephone calls, video calls, and other messages.



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# Work-From-Home Legal Matters

- In 2022, most employers continue to allow some work from home as their new normal based on helpful technology, employer accommodation and flexibility.  Issues:
  - Continue flex-work arrangements?
  - Remaining concerns with worker productivity, administrative management challenges, and the lack of interpersonal interaction of a traditional workplace?



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# Work-From-Home Legal Matters



Private sector surveys shed light on key remote work statistics in 2022:

- 16% of companies in the world are 100% remote.
- 44% of companies don't allow remote work.
- Better work-life balance is the main reason why people choose to work remotely.
- 77% of remote workers say they're more productive when working from home.
- The average annual income of remote workers is $4,000 higher than that of other workers.
- 85% of managers believe that having teams with remote workers will become the new norm.
- 74% of workers say that having the option to work remotely would make them less likely to leave a company.
- The three biggest challenges associated with remote work are unplugging after work (22%), loneliness (19%), and communication / collaboration (17%).

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# Work-From-Home Legal Matters

- Public-entity employers challenged with allowing remote work for the majority of their workforce based on the services provided to the public that usually require personal interaction, such as courts, law enforcement, land use, and overall governmental functions
- City and state attorneys' offices are losing potential applicants to law firms where entry-level or less-tenured attorney positions offer more lucrative compensation packages
- Public entity/attorney employers are seeing fewer candidates for hire and facing challenges in retaining younger attorneys because public sector salaries cannot competitively meet scale
- Public sector employers in general should consider creating work-from-home policies, if feasible, for some office workers and evaluate prospect of other benefits to stay competitive in onboarding and retaining valued workers



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# In Summary…

- In 2022, public sector employers and their legal counsel should pay close attention to labor law changes in their states, including new anti-discrimination rules and greater protections and benefits for employees as a result of the pandemic
- Effects of the pandemic on employment law likely to be felt for many years to come
- Employers should consider having employment counsel prepare work-from-home plans or guidelines and update existing non-wage benefits with the goal of staying competitive in a tight labor market and retaining high-performing employees
- Thank you!



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# Footnotes

1. C.R.S. §§ 8-13.3-402(5)(a) & 403(c).
2. Assemb. B. 1578 (Cal. 2021) (codified in Section 12945.2 of the Government Code).
3. 102d Gen. Assemb., H. B. 3582 (Ill. 2021).
4. Employment Standards Act, R.S.B.C. 2021- B. 13.
5. City and County of Denver, Ordinance No. 21-0818 (2021).
6. Id.
7. C.R.S. § 8-5-201.
8. N.Y.C. Council Law No. 2022/032 (2022).
9. Gen. Assemb., H 5261A (R.I. 2021).
10. 102d Gen. Assemb., H.B. 1838 (Ill. 2021).
11. 102d Gen. Assemb., H.B. 53 (Ill. 2021).
12. S.B. 331 (Cal. 2021) (clarifying Section 12964.5 of the Government Code).
13. 81st Leg. Assemb., H.B. 2935 (Or. 2021).
14. 101st Gen. Assemb., H.B. 3499 (Ill. 2019).
15. 81st Leg. Assemb., S.B. 569 (Or. 2021).
16. Mont. Code Ann. § 39-2-313.
17. 91st Leg., S.B. 9 (Minn. 2020).
18. Id.
19. https://www.natlawreview.com/article/labor-and-employment-law-what-s-new-2022
20. Occupational Safety and Health Administration, Department of Labor, COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 FR 61,402 (November 5, 2021).
21. Of course, state and local governments are excluded from coverage under the federal OSHA laws and regulations except where a state adopted a federally approved workplace safety and health program that includes municipal employees, under Sec. 18 of the OSH Act.
22. Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, No. 21A244 (Jan. 13, 2022); Ohio v. Dep't of Labor, No. 21A247 (Jan. 13, 2022).

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# Footnotes



23. Occupational Safety and Health Administration, Department of Labor, COVID-19 Vaccination and Testing; Emergency Temporary Standard, 87 FR 3928 (January 26, 2022).
24. U.S. Dep't of Labor, Occupational Safety and Health Administration State Plans, https://www.osha.gov/stateplans/ (last visited February 4, 2022).
25. 29 C.F.R. § 1902.3(d)(1) ("The State plan shall provide a program for the enforcement of the State standards which is, or will be, at least as effective as that provided in the [OSH] Act.").
26. See, e.g., 46 Minn. Reg. 789 (Jan. 3, 2022); Maine Dep't of Labor, Maine Board of Occupational Safety and Health to Meet on January 18 on OSHA's Emergency Temporary Standard Requiring COVID-19 Vaccination or Testing for Public Sector Employees, (Jan. 3, 2022) ("[T]he U.S. Department of Labor informed the Maine Department of Labor that its requirement will apply to public sector employers in Maine, including state, county, and local governments, and public school systems.").
27. Minn. Dep't of Labor and Indus., Minnesota OSHA suspends enforcement of COVID-19 Vaccination and Testing Emergency Temporary Standard, available at https://www.dli.mn.gov/about-department/rulemaking/minnesota-osha-rulemaking.
28. California Dep't of Indus. Relations, Revisions to the COVID-19 Prevention Emergency Temporary Standards (effective January 14, 2022) Frequently Asked Questions, https://www.dir.ca.gov/dosh/coronavirus/Revisions-FAQ.pdf.
29. S.B. 9, 2d Spec. Sess. (Ala. 2021) (codified in Ala. Code § 25-1-4).
30.. Id.
31. H.B. 335, 3d Extra. Sess. (W. Va. 2021).
32. Assemb. B. 654 (Cal. 2021) (amending Section 6409.6 of the Labor Code).
33. Id.
34.Working for Workers Act, 2021, S.O. 2021, c. 35 – B. 27.
35. https://findstack.com/remote-work-statistics/

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# Questions, please

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# Here to help

Employment issues can be sticky. Contact us as questions come up.


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