**Multi-State Employer (by choice or not):**

**Paying Attention to State Workplace Laws**

The most important thing for the multi-state employer to know is that they are obligated to follow the laws where employees are working—not just the laws where the business is based. If you have telecommuters or traveling employees (traveling interstate), it’s even more complicated.

**How Do I Know Which Law to Follow?**

You are most likely familiar with the Fair Labor Standards Act (“FLSA”). And while we generally think of following the FLSA, there are many state laws that differ from the FLSA. In addition, cities and counties have their own laws which address issues not covered by the FLSA or provide additional protections. This can be a challenge for every multi-state employer. This is why it is especially important for employers to know where their employees are located, and employers should be advising employees (especially those working remotely) that they need to tell the company when their work location (city/state) changes.

Federal law takes precedence where it has a higher standard. This includes the FLSA, the Family and Medical Leave Act (“FMLA”) and the Affordable Care Act (“ACA”). However, if a state, county, or city regulates something not addressed in the FLSA (or other federal law), you are obligated to comply with it. A good example of this would be paid sick leave. When a jurisdiction has a higher standard than federal law, you must follow the higher standard along with all provisions of the federal law (for example, overtime provisions).

**Document Compliance Policies in Your Employee Handbook**

Your employee handbook should include more than just compliance policies. You will want to start with a core section that applies to all employees, which typically includes policies related to federal laws. However, you will need additional sections for each regulated jurisdiction in which you have employees. When putting together your employee handbook, ensure that employees are alerted to the fact that jurisdiction-specific policies only apply to those who are working from that particular location. This can help avoid confusion regarding which state/locality-specific provisions set forth in the employee handbook apply to certain employees.

**Multi-State Employer Compliance Checklist**

With more businesses hiring employees from across the United States, whether as a result of a business expansion or the increased use of remote staff, employers are finding themselves tasked with figuring out how to comply with an ever-increasing amount of state and local requirements. To help, we’ve outlined below some of the areas you will want to be thinking about when it comes to multi-state employer compliance requirements.

**Meals and Breaks**

* Some states require breaks to be provided only for certain employees.
* State law varies on the permissibility of break waivers and the manner/format in which the waiver is presented to the employee.
* State law also varies when it comes to when breaks must be provided and how long a break must be in order for it to satisfy state law requirements.
* Remember that in order for a meal break to be unpaid time, the general rule is that the employee must be relieved of all duties while on their break. Some states attached additional conditions to the meal break being unpaid (for example, permitting the employee to leave the premises).

**Uniform Deductions**

* The FLSA does not permit the cost of uniforms or other items considered to be primarily for the employer's benefit or convenience to be included as wages. For that reason, employers cannot credit those items against their minimum wage and overtime pay obligations under the statute. If a uniform is required by law, the nature of the business, or the employer, the cost and maintenance of the uniform is a business expense of the employer. If the employer requires employees to bear the cost, doing so cannot reduce an employee's wages to below the federal minimum wage or overtime pay.
* However, depending on state law, employers are not required to pay for certain types of “ordinary clothing” that employees are required to wear as part of their job.
* Other states permit employers to make deductions for certain types of uniforms on the condition that the employer reimburse the employee for the cost at termination of employment (and the employer can require employees to return the uniform).

**Paid Time Off**

* Some states restrict employers from requiring employees to pay back unearned leave. As a result, PTO borrowing can create unique challenges for multi-state employers.
* Some states require employers to pay out unused earned PTO upon separation of employment.
* Some states prohibit employers from implementing use-it-or-lose-it policies, and instead require employers to permit employees to carry over their unused, earned PTO from year to year. For those states, accrual caps are both acceptable and advisable.
* One growing trend is the treatment of floating holidays. Because they can typically be used for any reason, some states may treat them as paid time off/vacation for purposes of carry over and payout at separation of employment.
* For employers that offer one bank of PTO instead of separate banks of vacation and sick leave, they need to ensure that their PTO policies also comply with applicable state/local paid sick leave laws.

**Final Paycheck**

* Most states mandate time limits for final paycheck for separated employees.
* Some states limit the practice of withholding the paycheck until company property is returned.

**Cannabis**

* If you open a location in a jurisdiction where marijuana is legal, you may need to modify your drug-testing or drug-free workplace policies. Some states/cities prohibit employers from testing for marijuana except for certain positions, while others require the employer to take additional steps should an employee/applicant tests positive for marijuana.
* Along this same vein, drug and alcohol testing is one area where one size does not necessarily fit all. Many states’ laws vary in terms of who can be tested, what the procedures are for testing, and what the employer can/cannot do when an employee or applicant tests positive for drugs or alcohol.

**Expense Reimbursements**

* Several states, including but not limited to California, South Dakota, and Illinois, require employers to reimburse employees for necessary business expenses the employee incurs at the direction of the employer or as a result of the performance of their job duties.
* Having a remote workforce (or remote employees) creates additional challenges, as employers must determine what (if any) supplies/equipment/services that the employee pays for as a result of working remotely must be reimbursed, and how much the employer is responsible for reimbursing the employee for incurring such expenses.

**Jury Duty Leave**

* Some states, such as New York and Massachusetts, afford employees special protections when it comes to payment of jury duty leave.
* Other states prohibit employers from requiring employees to use their company-provided time off in place of unpaid leave.

**Employee Data Privacy and Access**

* Some states limit what employment data employers must give employees access to and the process for obtaining the information.
* Each state varies in terms of the notice and timing requirements when it comes to employee access to personnel files, while still other states are silent on whether employees are permitted to access their personnel file at all.

**Family Medical Leave**

* A growing number of states are passing, or are considering passing, laws related to family medical leave. Some states, such as Wisconsin, have family medical leave laws that offer unpaid leave similar to the FMLA, but that are more generous in terms of coverage than the FMLA.
* Other states, such as New Jersey and California, have rolled out state-sponsored family leave insurance benefit laws, which provide employees with a certain percentage of their income for a specified period of time while on leave.

**Minimum Wage and Overtime Laws**

* As a result of Congress’s complete inaction with respect to raising the minimum wage, many states and localities have taken it upon themselves to enact laws to raise the minimum wage (some of which are close to or more than double the federal minimum wage rate).
* In addition to minimum wage laws, some states afford employees greater protections when it comes to overtime pay. California and Colorado, for example, not only afford employees overtime after working a certain number of hours in a workweek, but they also require employers to pay employees an overtime premium after working a certain number of hours in a day (or working a certain number of hours consecutively).

**Employee Scheduling**

* Predictive Scheduling: While typically limited to retail, food service, and hospitality industries, several states and cities have enacted laws requiring employers to give employees advance notice of their work schedules (otherwise known as “predictive scheduling”) and afford employees protections in the event the employer tries to schedule an employee for an unscheduled shift or if the employer cancels the employee’s scheduled shift.
* Flexible Scheduling: Similar to predictive scheduling laws, flexible scheduling laws are designed to afford employees with a certain amount of guaranteed pay (often referred to as “reporting time pay”) in the event an employee shows up to work for a shift but is sent home due to lack of work. States and localities generally target these types of laws towards the retail, food service, and hospitality industry, where it is common for employers to send employees home during periods of low business volume.

**Accommodations for Nursing Mothers**

* At least 30 states and dozens of cities have laws which address breastfeeding in the workplace. Some jurisdictions even require employers to designate a certain area specifically for breastfeeding.
* Minnesota recently amended its Nursing Mothers law to require that the time an employee spends nursing be paid time.

**Artificial Intelligence (“AI”) Use in Hiring and Promotion Processes**

* AI use puts employers at a greater risk of federal law violations like Title VII, the ADEA or the ADA. In fact, both the [EEOC](https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence) and the [Department of Justice](https://beta.ada.gov/ai-guidance/) recently released guidance on the use of AI and algorithms in the hiring process.
* Illinois requires disclosure of race and ethnicity reporting for candidates and hires when AI is used.
* New York City has passed a measure to prohibit the use of automated decision-making tools to screen job candidates and evaluate current employees for promotion (Effective date January 2, 2023).

**Whistleblower Protections**

* Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Washington D.C., Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, and Washington all have laws governing protections for whistleblowers.
* New York also extended whistleblower protections to independent contractors and former employees.

**Restrictive Covenant Agreements**

* Many states have restrictions on the use of non-compete agreements, and several others are considering proposals to further restrict their usage.
* State law also varies in terms of what constitutes acceptable durational and geographic scopes for non-compete agreements.
* Illinois and Massachusetts both have laws on the books that prohibit the use of non-compete agreements for employees whose income is below certain annual thresholds (and these thresholds will change yearly).
* Several states, including California and New York, place additional restrictions on an employer’s ability to bind an employee to confidentiality when it comes to the disclosure of harassment or unlawful workplace conduct.

**Privacy and Surveillance Disclosure**

* California, Connecticut, Delaware, New Jersey, and New York all have laws that require employers to disclose to employees that they are subject to monitoring, if the employer monitors their activity.
* Employers must also be aware of their states’ laws pertaining to employee consent to monitoring phone calls; as employee consent may be required prior to monitoring phone calls depending on the state.

**Anti-Harassment and Anti-Discrimination Training**

* Know which states require certain policies and training.
* States such as California and Illinois require that these trainings cover certain specified topics, while other states (such as Washington) require certain training and policies for specified industries.

**Concealed Carry – Guns in the Workplace**

* More than 20 states have enacted some type of law addressing guns at work. Many of these laws share the common goal of protecting an individual's right to bear arms, but they differ in how much restriction is placed on an employer's ability to prohibit weapons at work.
* Several states, including Alabama, Alaska, Arkansas, Illinois, Kansas, Kentucky, Minnesota, Mississippi, Nebraska, Oklahoma, Tennessee, and Texas require employers to post notices if they ban firearms at the workplace.

**Payroll Transparency**

* Many states (at least 14) and local laws that govern pay equity and transparency.
* An ever-growing number of states now require employers to include information in job postings or provide information to applicants, regarding wage/salary ranges for open positions.

**Paycheck Direct Deposit**

* Some states allow employers to require that employees use direct deposit. However, employers must be mindful of whether a state requires the employer to pay for an employee’s costs of opening a bank account where the employer requires the use of direct deposit, and the employee does not already have a bank account.
* A majority of states permit payment via direct deposit but require the employee to consent to such payment method.

**Anti-Discrimination Expansion**

* Many states have added gender identity, sexual orientation, and gender expression as protected characteristics.
* Oregon, Minnesota, California, and even some cities in North Carolina include natural hairstyles as a protected characteristic.

**Employee Misclassification**

* There areincreased penalties under state law for employers that misclassify employees as independent contractor to avoid taxes and other obligations.
* States continue to enact legislation to address employee misclassification issues in the gig sector, as individuals in those sectors are increasingly becoming the focal point for misclassification issues.

**State Income Tax Withholdings**

* Each state has unique tax rates.
* The “physical presence” rule requires employers to withhold at the rate for the state in which the work is performed, even if the business is headquartered in another state. However, some states have “reciprocity rules” which require withholding for both locations.

**Other Considerations**

* Timekeeping
* Unemployment Taxes
* Cell Phone Use
* Workers Compensation
* Disability Insurance: Required in Hawaii, New Jersey, New York, California, and Rhode Island
* Seasonal Workers
* Human Trafficking Awareness:Some states require certain businesses to post human trafficking awareness signage
* Unpaid Internships
* COVID-19 Vaccination Leave

**The NLRB’s Continued Impact on Employee Handbooks**

When we think of the National Labor Relations Act (“NLRA”), the first thing that comes to mind is a unionized workplace. However, employers must remember that the NLRA applies both to unionized and non-union workplaces. Under the Biden Administration, the National Labor Relations Board (“NLRB”), a five-member, has already seen the confirmation of two long-time, pro-union members; and many would consider the NLRB to be comprised of a pro-union majority.

Additionally, the NLRB’s General Counsel, Jennifer Abruzzo, has already signaled her intent to seek the reversal of many pro-employer NLRB decisions from the Trump era. One area pertinent to all employers (union and non-union) that falls within the NLRB’s purview is the regulation of employer policies.

**Protected Employee Speech on Social Justice Issues**

The NLRB will regulate employer policies regarding protecting speech.If and when theNLRB overturns [*Boeing*](https://www.law.uh.edu/faculty/rturner/labor2020/boeing.pdf)*,* the more employee-friendly standard in the [*Lutheran Heritage-Livonia*](https://casetext.com/analysis/martin-luther-memorial-home-inc-dba-lutheran-heritage-village-livonia-decision-summary)case will likely apply. Therefore, employers would need to check their employee handbook for policies that unlawfully regulate employee speech and make sure they are permitted under the new standard.

Provisions that might be unlawful under the *Lutheran Heritage*standard include:

* Policies prohibiting “loud, abusive, or foul language”;
* Rules banning “false, vicious, profane, or malicious statements about an employer or its employees”;
* Standards requiring employees to “work harmoniously” with one another; or
* Mandates prohibiting “negative energy or attitudes.”

While the NLRB has yet to overturn *Boeing*, the writing does appear to be on the wall. Shortly after President Biden was elected, guidance documents pertaining to *Boeing*’s effect on employer policies was quickly rescinded.

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