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Survey Says: Emerging Trends and 'Gotcha' Issues Every Staffing Agency Should Know About

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Survey Says: Emerging Trends and ‘Gotcha’ Issues Every Staffing Agency Should Know About

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Speakers:



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Geri has a multifaceted practice focusing on employment litigation, counseling, and compliance, as well as intellectual property and trade secret matters. In addition, she chairs the steering committee of the Mintz Women's Initiative.



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Shareholder
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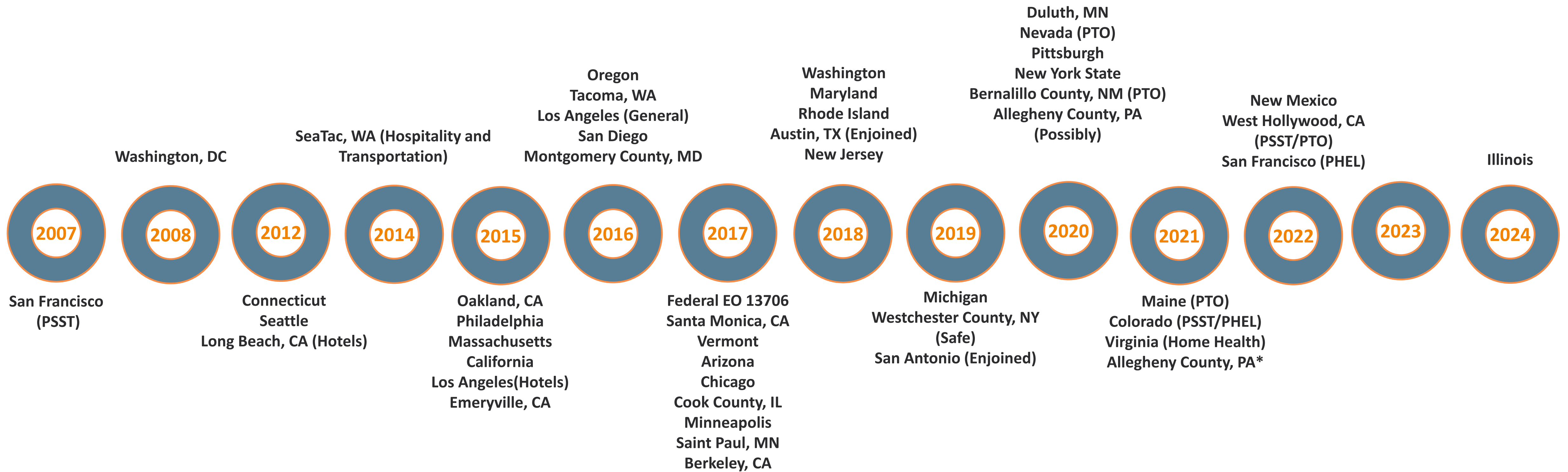
Mike represents employers in all aspects of labor and employment matters. A former GC of a staffing company, his practice includes employment litigation, employee leave and accommodation issues, wage and hour, noncompete agreements, independent contractor issues, and labor relations.



Continuing Explosion of State and Local Leave Laws



Timeline of Paid Sick and Safe or Paid Leave Laws



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2007: San Francisco (Feb. 5 PSST)

2008: Washington, DC (Nov. 13)

2012: Connecticut (Jan. 1); Seattle (Sept. 1); Long Beach, CA (hotels—November or December)

2014: SeaTac, WA (hospitality and transportation) (Jan. 1); New York, NY (April 1)

2015: Oakland, CA (March 2); Philadelphia (May 13); California (July 1); Los Angeles (hotels—July 1); Massachusetts (July 1); Emeryville, CA (July 2)

2016: Oregon (January 1); Tacoma, WA (Feb. 1); Los Angeles (general); San Diego (July 11); Montgomery County, MD (Oct. 1)

2017: Federal (government contracts—on or after Jan. 1); Santa Monica, CA (Jan. 1); Vermont (Jan. 1); Arizona (July 1); Minneapolis and Saint Paul, MN (July 1); Chicago and Cook County, IL (July 1); Berkeley, CA (Oct. 1)

2018: Washington State (Jan. 1); Maryland (Feb. 11); Rhode Island (July 1); Austin, TX (Oct. 1 but enjoined); New Jersey (Oct. 29)

2019: Michigan (March 29); Westchester County, NY (safe—Oct. 30); San Antonio (Dec. 1 but enjoined)

2020: Duluth, MN (Jan. 1); Nevada (PTO—Jan. 1); Pittsburgh (March 15); New York State (Sept. 30); Bernalillo County, NM (unincorporated—PTO—Oct. 1); Allegheny County, PA (possibly; TBD)

2021: Maine (PTO—Jan. 1); Colorado (Jan. 1); Virginia (home health—July 1); Allegheny County, PA*

2022: West Hollywood, CA (PSST/PTO—hotels—Jan. 1; other employers—July 1); New Mexico (July 1); San Francisco (PHEL—Oct. 1)

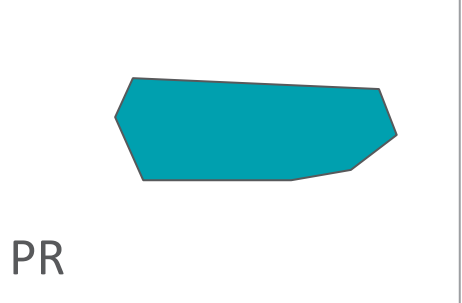
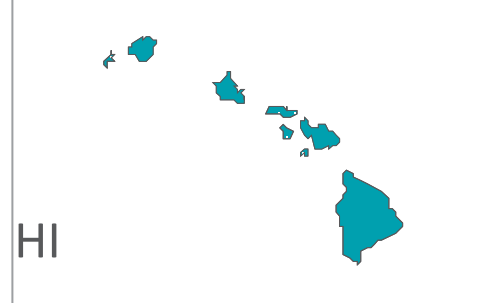
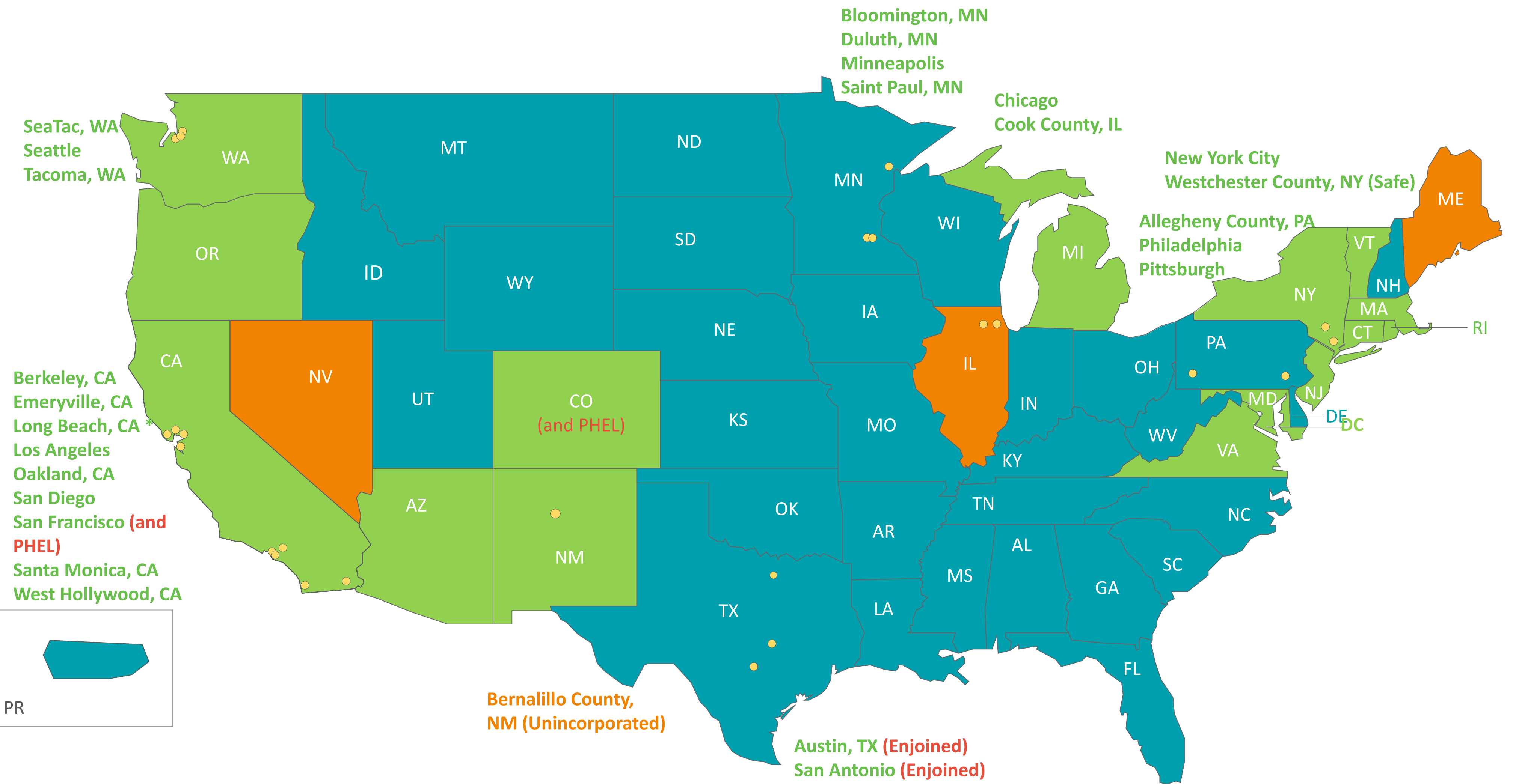
2023: Bloomington, MN (PSST—July 1)

2024: Illinois (MPTO—Jan. 1)







Jurisdictions With Paid Sick and Safe or Paid Leave Laws

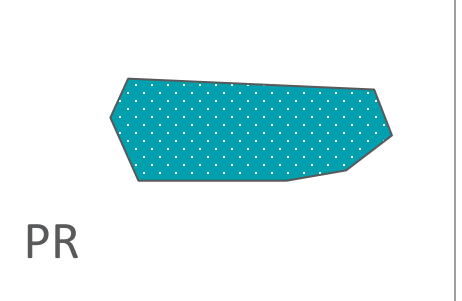
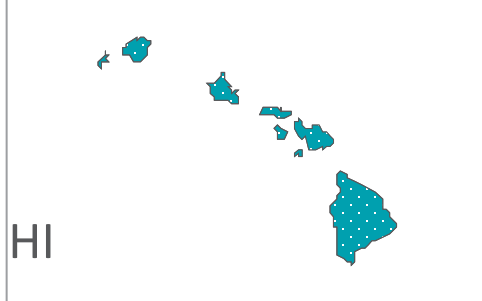
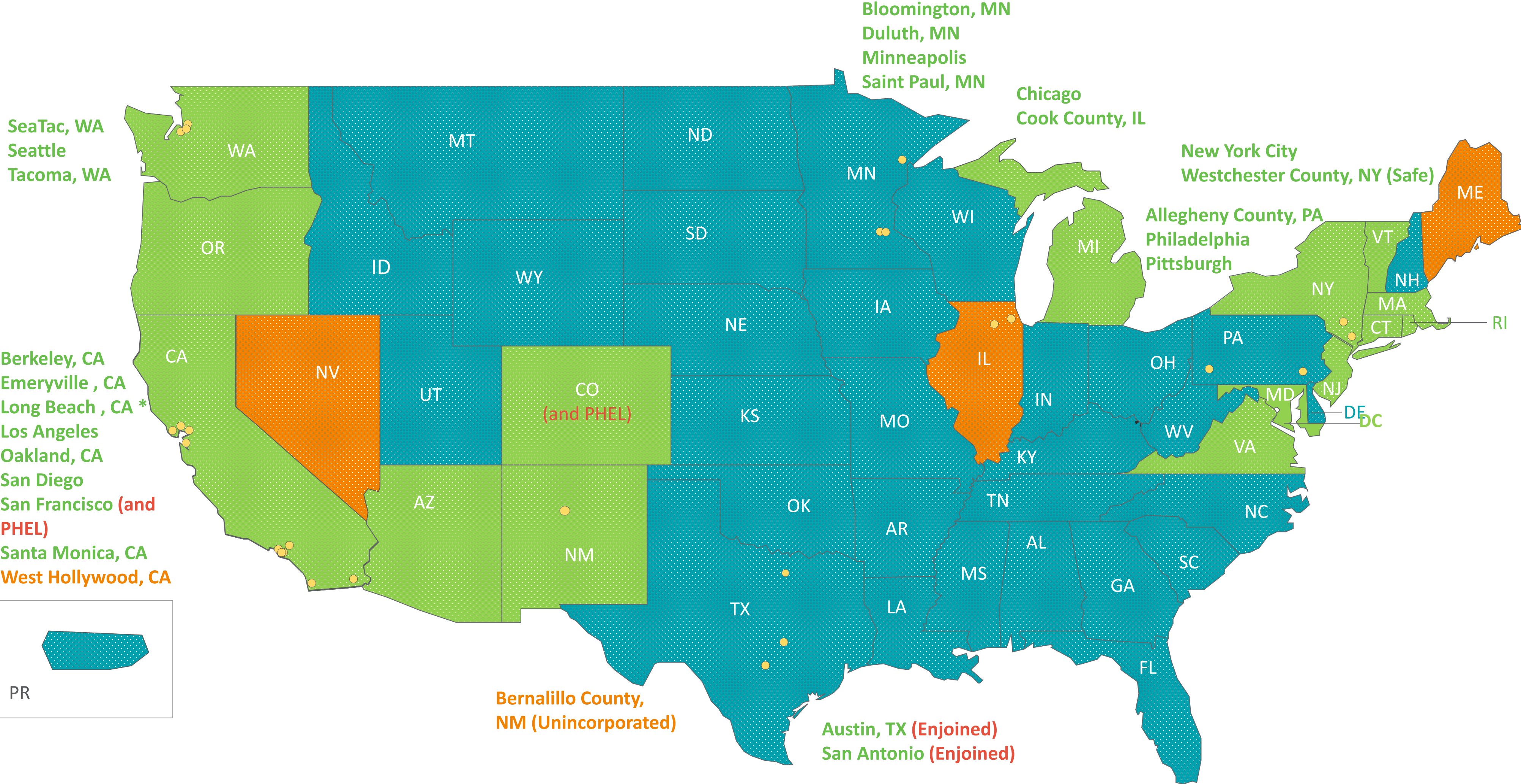
- State Paid Sick and Safe Leave Requirement
- State Paid Leave Requirement
- Local Paid Sick and Sick Leave Requirement





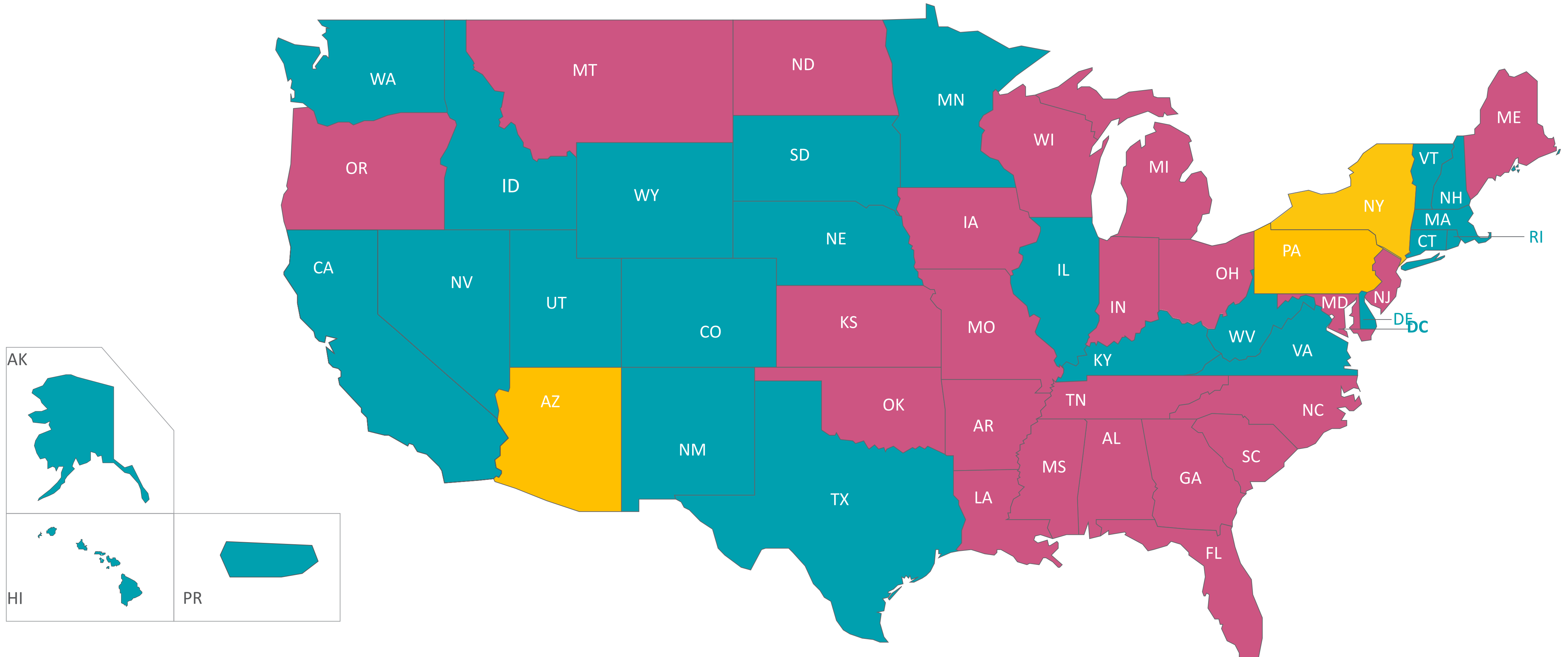
Jurisdictions With Paid Sick and Safe or Paid Leave Laws

-  State Paid Sick and Safe Leave Requirement
-  State Paid Leave Requirement
-  Local Paid Sick and Sick Leave Requirement
-  Federal Contractor Paid Sick and Safe Leave Requirement



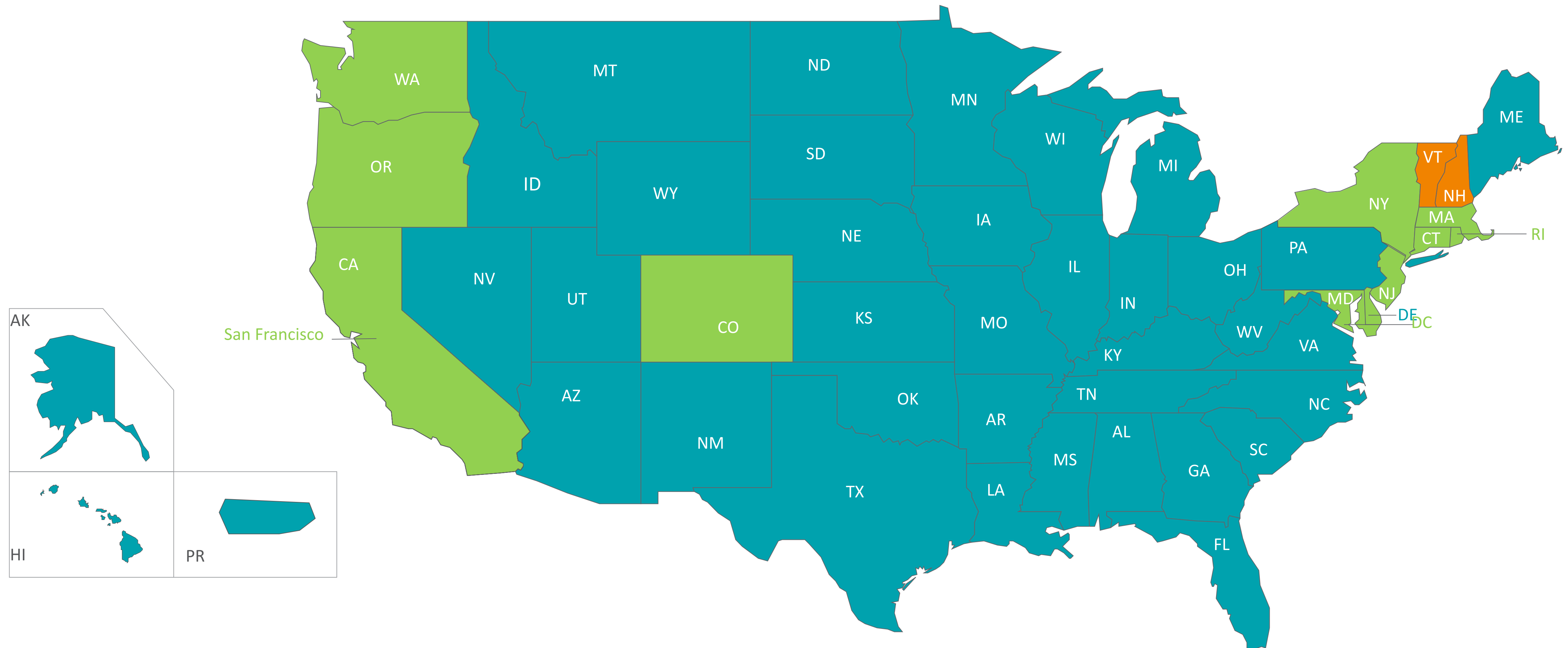


State Laws Pre-Empting Local Paid Sick and Safe Leave Ordinances





Jurisdictions With Paid Family Leave Laws





PAGA Update!



PAGA Basics

- California: The Private Attorneys' General Act (Cal. Lab. Code 2698 – 2699.5)
- Permits individual employees to bring representative actions against employers for civil penalties on behalf of the state of California for labor code violations
- \$100 penalty for the first violation, \$200 for subsequent violations; 75% of the recovery goes to the state
- Provides a statutory right to attorneys' fees for a prevailing individual employee
- Open question: Does the Federal Arbitration Act permit individuals to waive their right to bring a PAGA action?



Viking River Cruises Inc. v. Moriana

- In June 2022, the U.S. Supreme Court ruled that employers can enforce arbitration agreements in California that require arbitration of individual PAGA claims.
- *Open questions:*
 - Whether an employee compelled to arbitrate individual PAGA claims loses standing to pursue claims on behalf of other employees
 - California Supreme Court is currently set to decide this issue in *Adolph v. Uber Technologies Inc.*
 - In the interim, multiple California Court of Appeal cases have held that individual employees retain standing to pursue non-individual PAGA claims
 - *Galarsa v. Dolgen California LLC, Piplack v. In-N-Out Burgers, Gregg v. Uber Technologies Inc.*



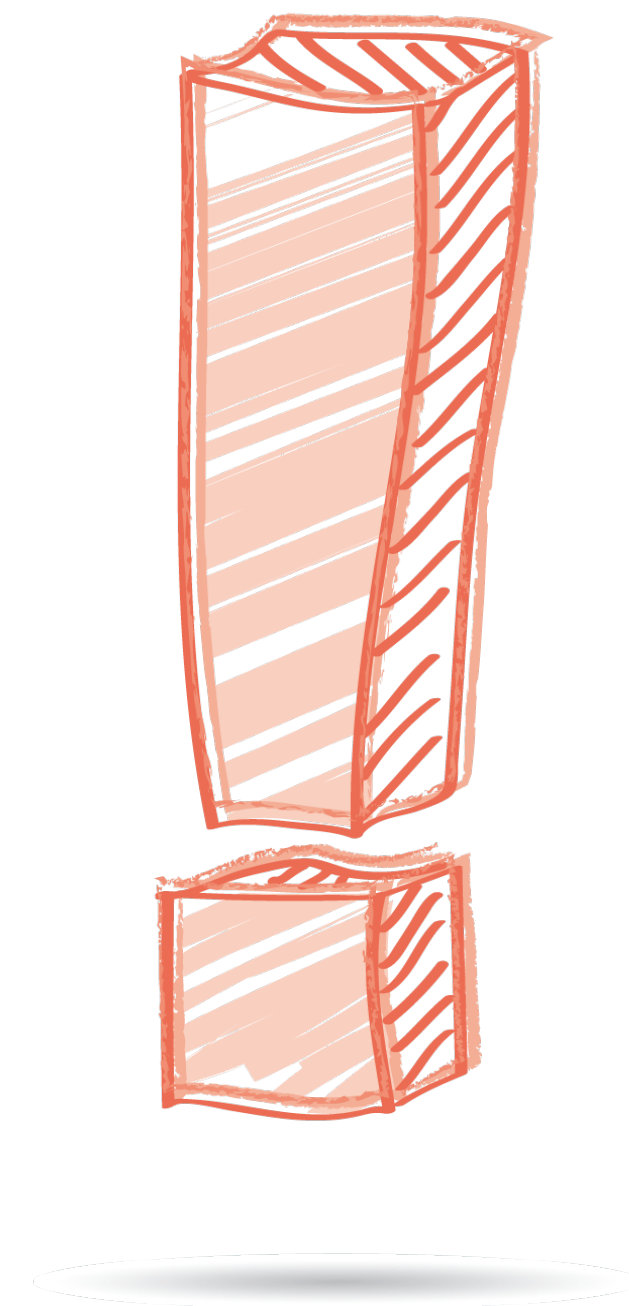
Employee Engagement (or Managing Employee Disengagement and Related Issues)



Remote Worker Challenges

Remote Work—Legal Risks

- Wage and hour compliance
- Expense reimbursement
- ADA accommodations and leaves of absence
- Workplace safety and workers' compensation
- Privacy and information security
- Unique wandering worker challenges



The Boundary Between Personal and Work Expenses Is Blurred

- **Even before Covid hit, claims for expense reimbursement were starting to expand:**

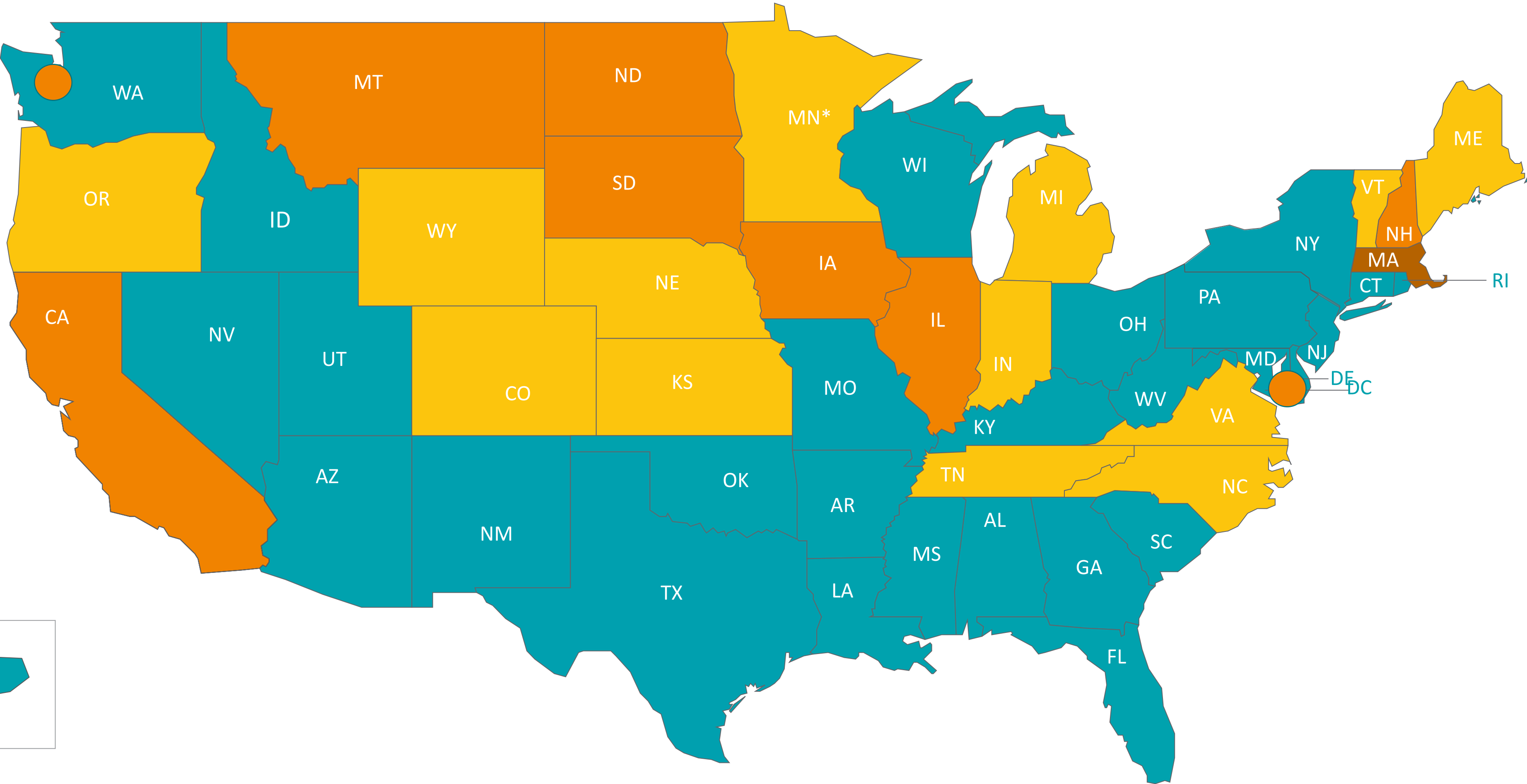
- ✓ Cell phone reimbursement
- ✓ Internet reimbursement
- ✓ Mortgage
- ✓ Property tax
- ✓ Homeowner's insurance
- ✓ Electricity
- ✓ Water
- ✓ Trash collection





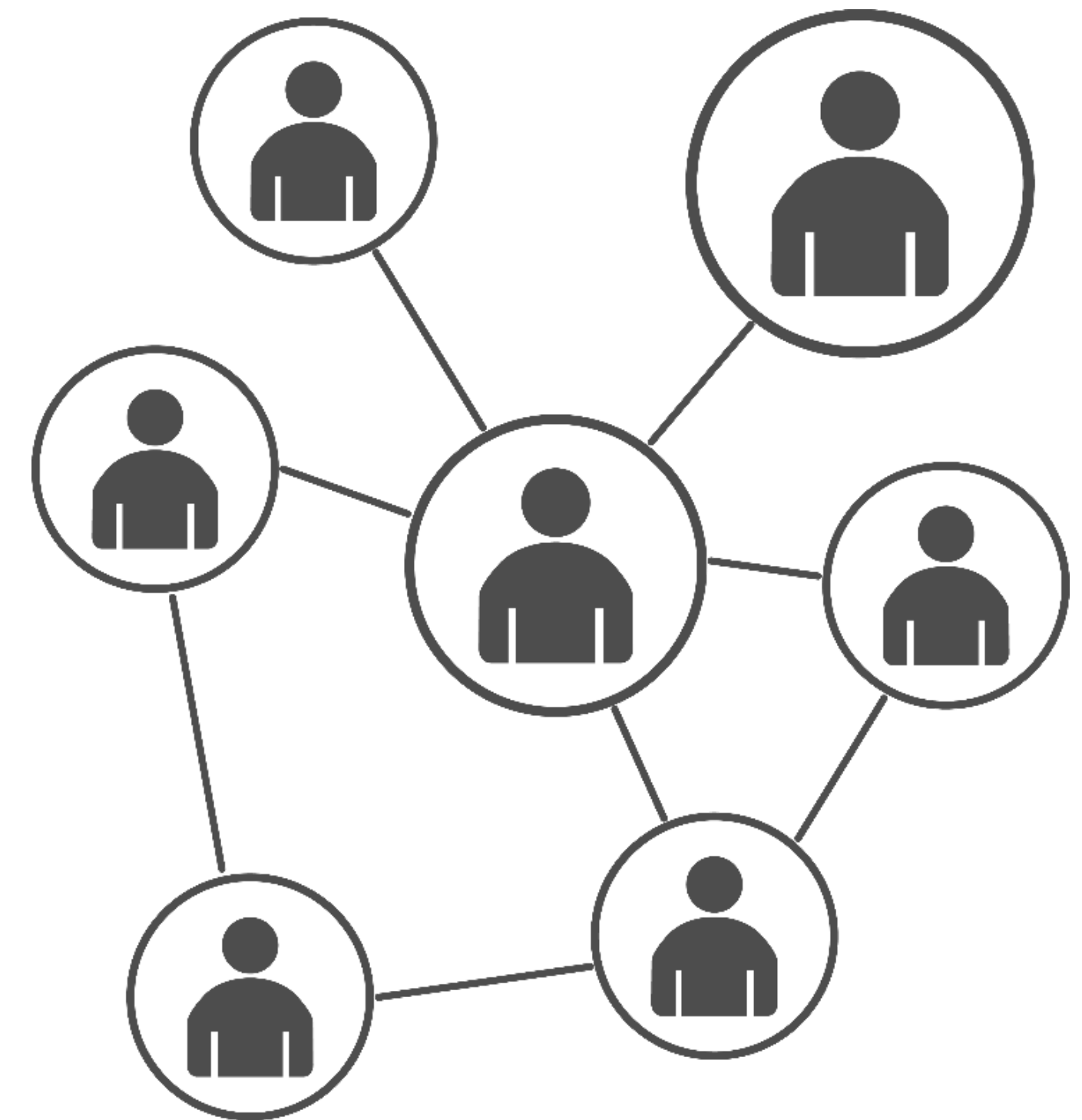
All Over the Map! Reimbursement Regulations and Interpretations

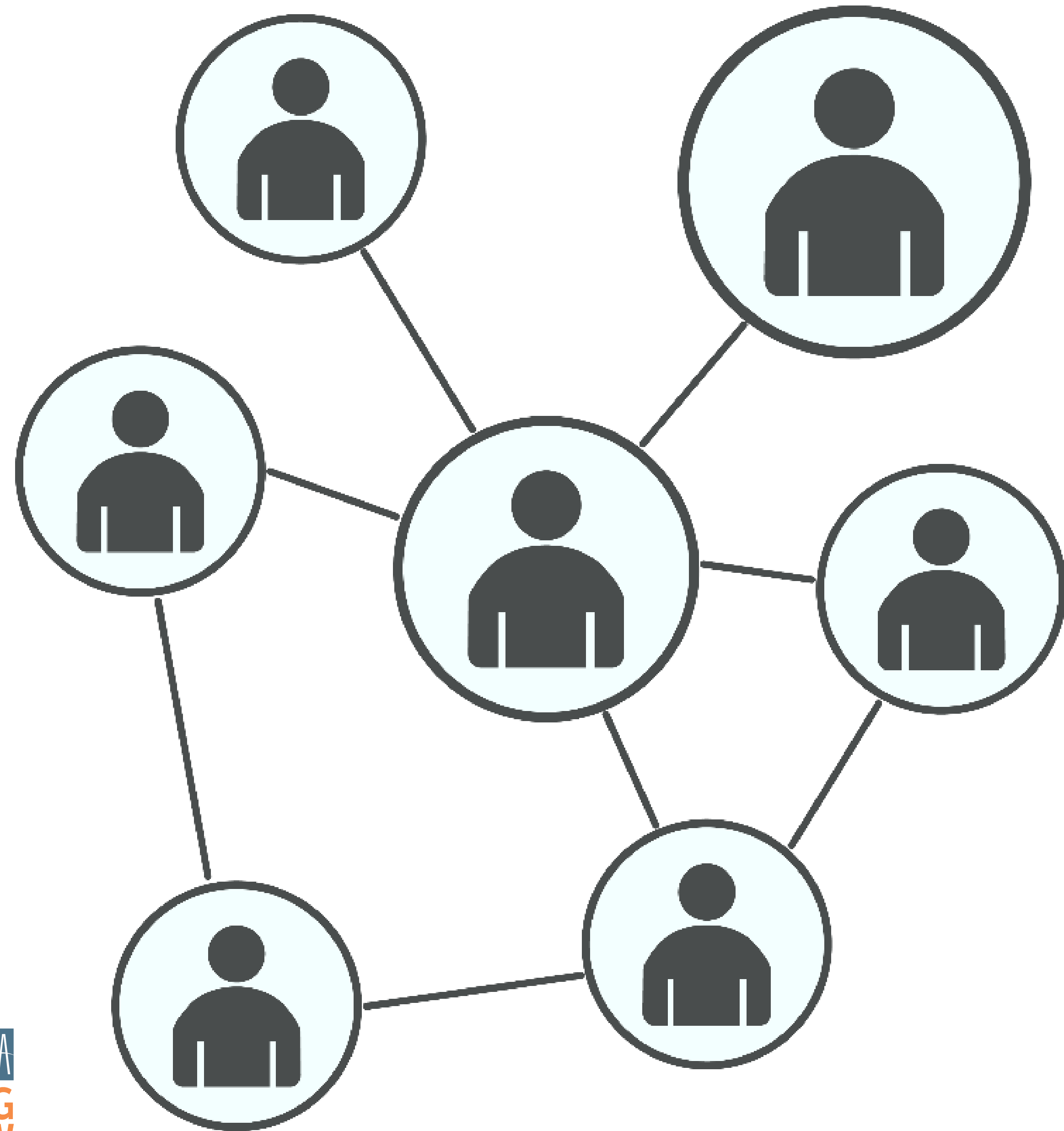
While other jurisdictions do not have express requirements or interpretations, **employers still must pay applicable minimum wage + expenses or higher wages to offset expenses to avoid employees' pay dropping below minimum wage.**



Remote Work Policies

- Eligibility: good standing, probationary period, business goals, team and customer communication, manager approval
- Not a substitute for family care, PTO, or leave
- Communication; availability; system outages
- **Location, location, location**
- Confidentiality and IT capability
- Workspace safety
- Equipment and **Reimbursement**
- **Timekeeping**
- Reasonable accommodations; subject to revision





What Have the EEOC and Courts Said About Remote Work?



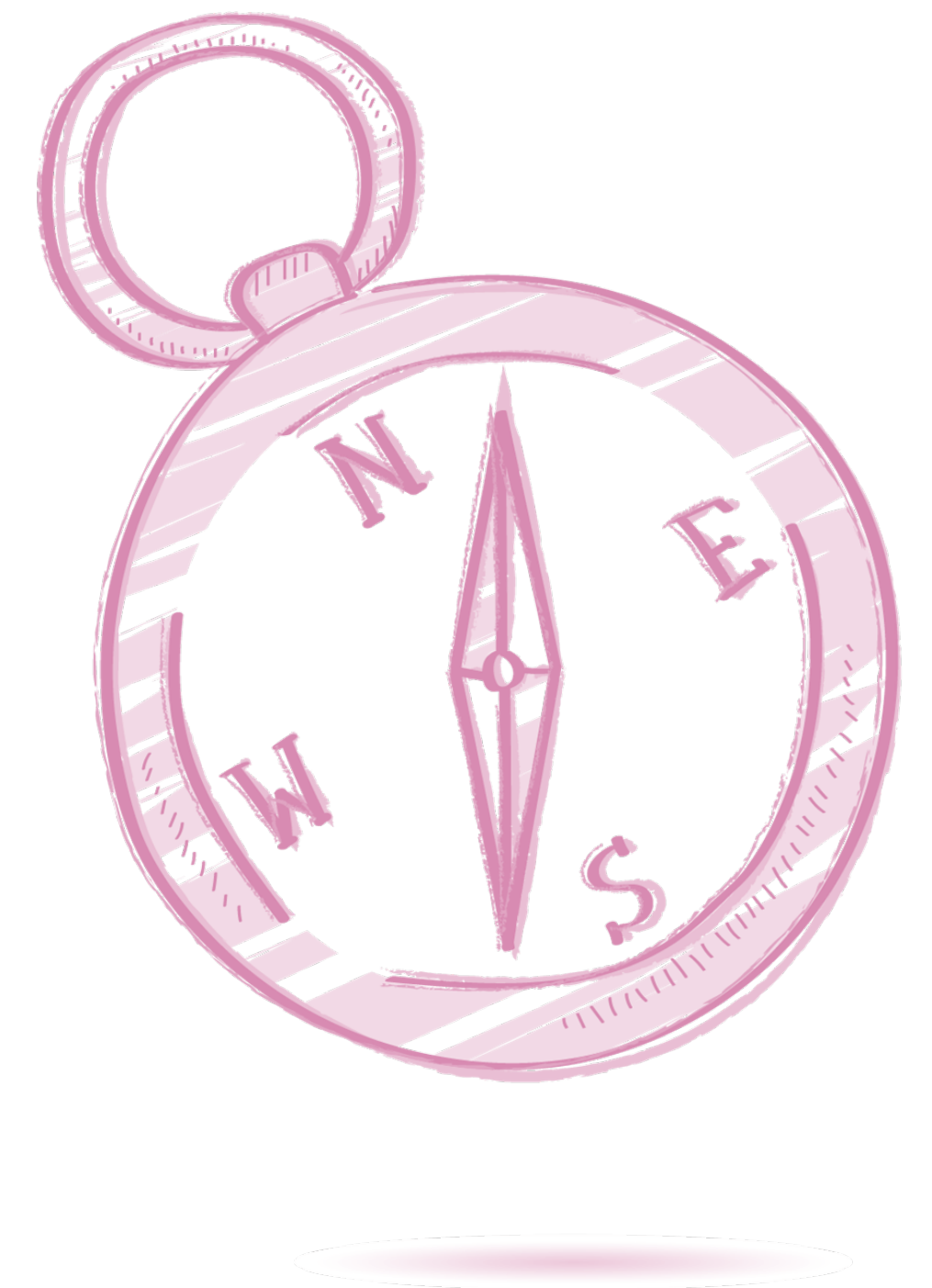
Considering Work From Home as a Reasonable Accommodation

Must be

- A “**meaningful dialogue** with the employee to find the best means of accommodating that disability.”
- A process that requires “**communication and good-faith exploration**”
 - EEOC: “includes the consideration of all possible reasonable accommodations”

Courts (prepandemic) have held that employers

- Must answer employees’ requests
- Should suggest available alternatives to employees’ proposals
- Can take some time to make a decision
- Should get credit for their efforts even if results are ineffective

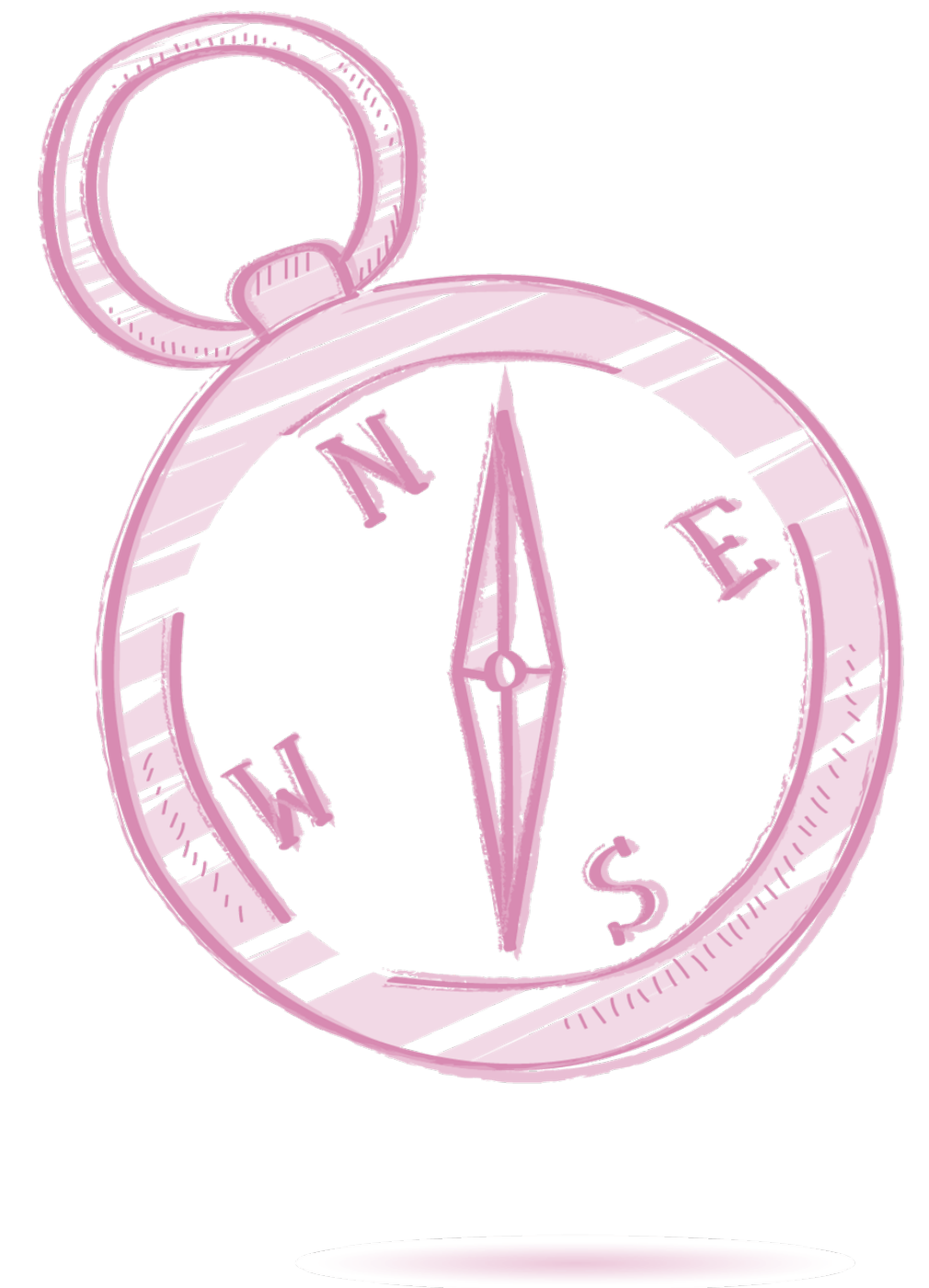




Considering Work From Home as a Reasonable Accommodation

Recent statement from EEOC commissioner Andrea Lucas”

“As pandemic wanes” (is that now?), employers should take a “very careful, highly individualized look at all Covid-19 related health and safety measures as well as accommodation requests related to them”



Things to Consider Before Denying Remote Work as a Reasonable Accommodation

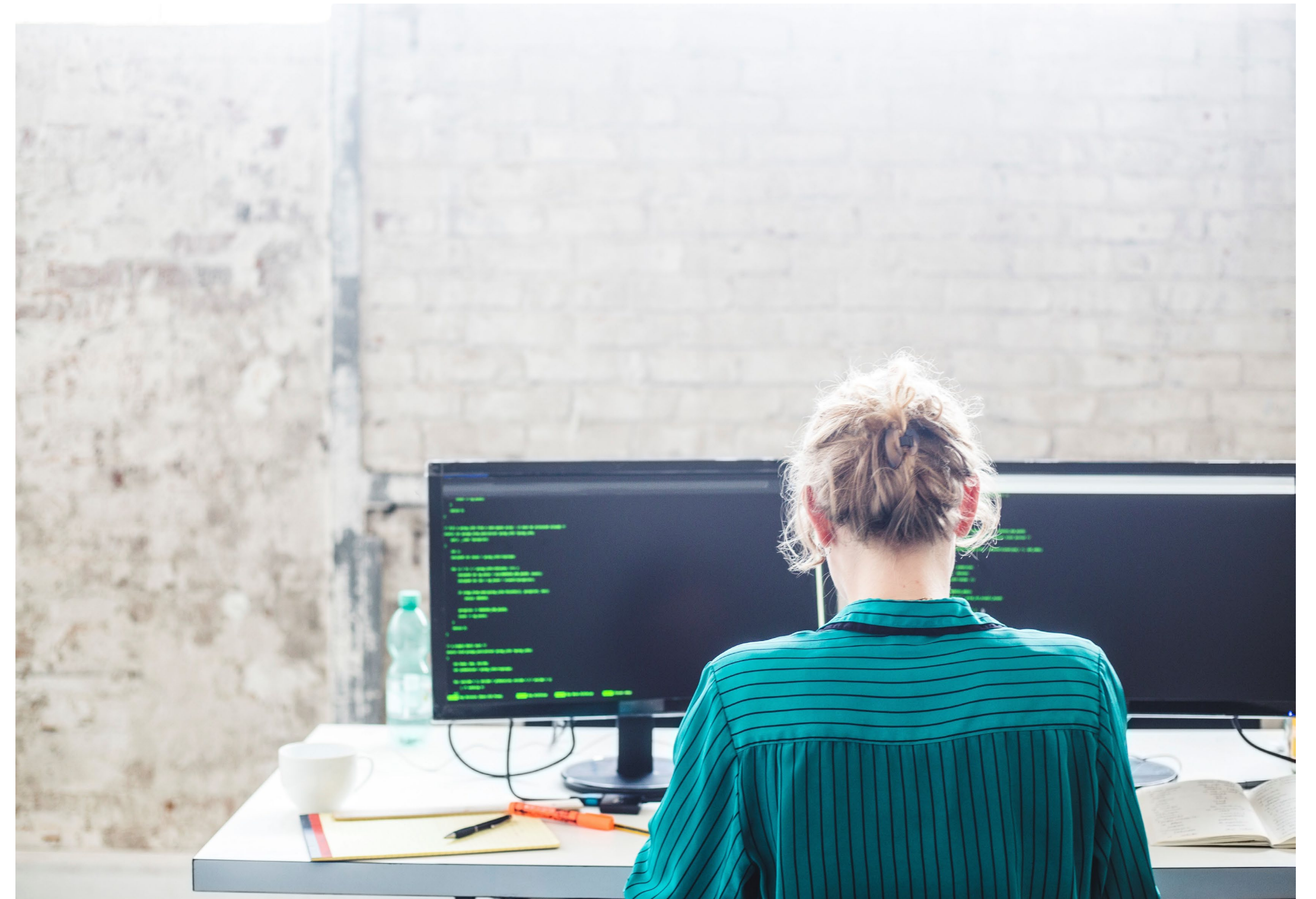
Handling accommodation requests for remote work:

- Is in-person work essential—really?
- What operational hardships are created by employees working from home?
- Be prepared to explain why remote work during the pandemic was not optimal
 - Technological issues?
 - Decreased productivity, performance issues?
 - Effects on teamwork, creativity?
 - Can you prove it?



Data Security and Privacy Challenges in Remote Work

- Accessing sensitive data through unsafe wi-fi networks
- Using personal devices for work
- Ignoring basic physical security practices in public places
- Email scams
- Security controls are weaker
- Cyberattacks on remote-working infrastructure





Wandering Workers: Working From Anywhere?



What Happens When...

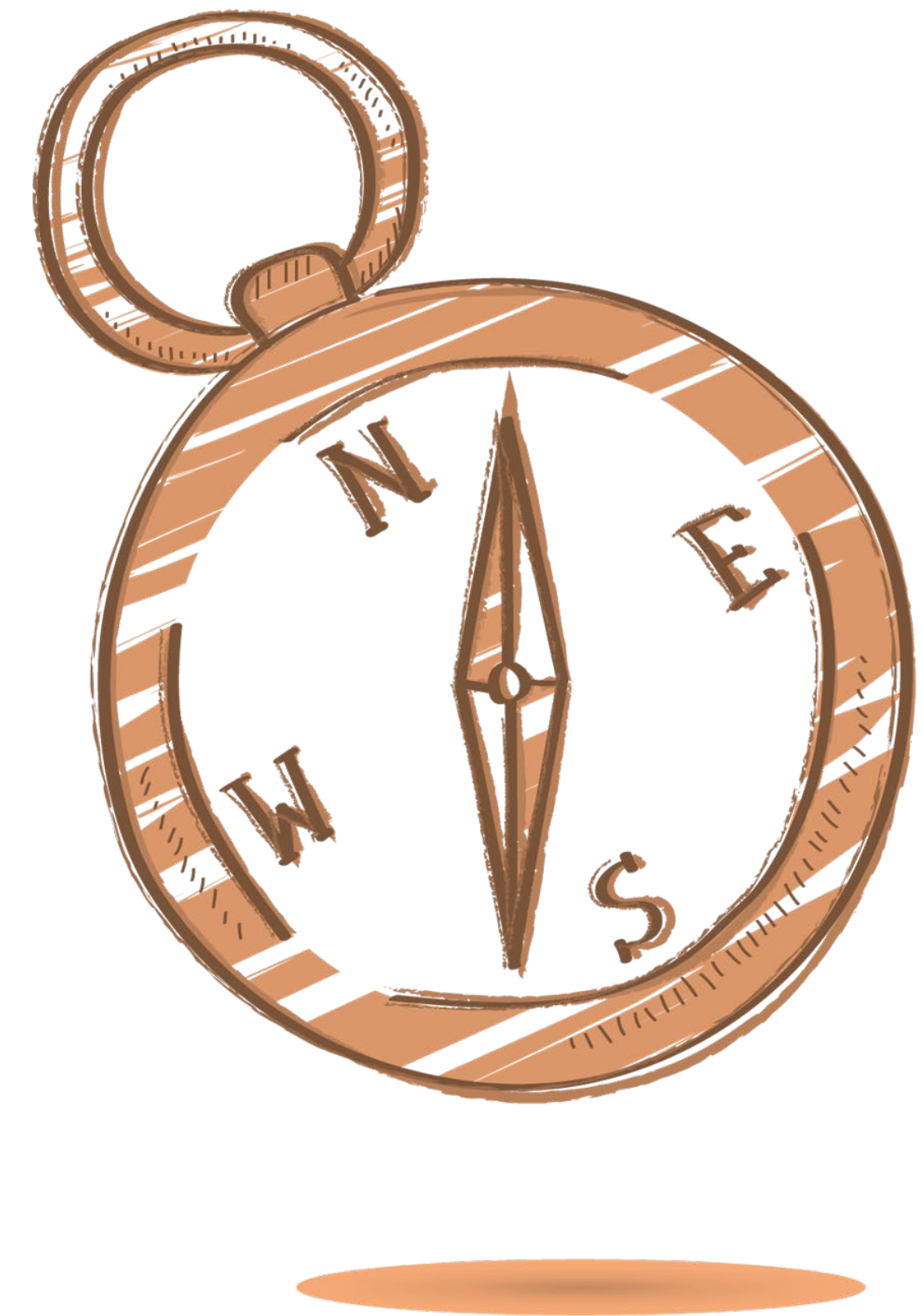
Your employee is working from home, **BUT**

- Their “home” is in a different **city** from their place of work?
- Or in a different **state**?
- Or in a different **country**?



Workplace Laws Differ by Jurisdiction!

- Differing EEO protected categories
- Differing workplace protections
- Differing employment tax/withholding issues
- Differing unemployment insurance laws
- Differing workers' compensation laws
- Differing workspace safety standards
- Differing paid and sick leave laws





Quiet Quitting ...

Quick Quitting...

Quiet Hiring?



“Quick Quitting”

- Employees more comfortable than ever leaving their jobs abruptly—and leaving a job after a very brief tenure
- Impacting entry- to executive-level roles
- Recent surveys showed that nearly 50% of working professionals are currently looking for a job or will be looking for one in 2023
- Once thought that you should not leave a job before one year—not anymore
- What does this mean? How to prevent rapid turnover? (Hint...employee engagement)



“Quiet Quitting”

- 50% of the U.S. workforce is engaged in “quiet quitting”
- Why employees are “quiet quitting”
 - Burnout
 - Safeguard mental health
 - Prioritize personal life
- How best to respond to “quiet quitting”
 - Ensure staff feels valued
 - Invest in employee well-being
 - Increase employee engagement



“Quiet Quitting”

Napoli Shkolnik PLLC v. Heather Palmore and Palmore Law Group P.C.

- Law firm sued one of its lawyers for taking advantage of a new remote work environment to “quiet quit” her job and simultaneously work at two different law firms at once.
- Employer alleged that Palmore did little to no work for the firm while drawing one of its largest salaries and directly competing with the firm by starting and running Palmore Law Group PC.
- Employer asserts claims of breach of contract (employment agreement), breach of duty of loyalty/fiduciary duty, defamation/injurious falsehood (based on employee’s statements about employer re: racial discrimination), and unjust enrichment



Employee Engagement Amid Reductions-in-Force

- Low morale
 - Be transparent
 - Seek out employee feedback and develop communication plans
- Anxiety regarding own job security
 - Increase face time between managers and employees so that employees have an opportunity to feel engaged with decision makers and the trajectory of the company moving forward



“Quiet Hiring”

- Don't forget about remaining employees!
- Following a RIF (or quick quitting), remaining employees often take on additional workloads
 - Be intentional about workflow and ensure that workloads can be redistributed
 - Consider retention agreements



Disciplinary Issues in a Transforming Workplace

- Increasing focus by employers on activity monitoring
 - Use of software to track employee browser and application use, and logs keystrokes; can log time and attendance statistics; tracking keycard office entry
 - It is becoming more commonplace—the number of large employers that monitor their employees is expected to grow to 70% within the next few years
 - If implemented, should be done transparently, and with a focus on using the data to increase efficiency



Employee Engagement: Political and Social Justice Issues in the Workplace



Politics in the Workplace?

- First Amendment rights have little to no application to private employers. Employers may regulate (or restrict) what employees do and say in the workplace.
- Political conversations are inherently contentious, but does that mean employers should have them?
 - Risks—Such conversations might intrude on issues that relate to an employee’s membership in a protected class, leaving employers vulnerable to discrimination claims
 - Benefits—Encourages employees to accept differences; fosters open communication



Politics in the Workplace?

- Employers should consider, for example
 - (1) Does the company have core values? Are certain issues consistent with those core values (therefore ripe for the company to take a position/engage with employees)? Are certain topics off limits?
 - (2) Does the company have relevant workplace conduct policies?
 - (3) Are certain types of activities prohibited by policy or law (e.g., soliciting financial contributions for political candidates/issues)?
 - (4) In what ways can the company encourage employees to engage in a civil and respectful manner toward each other at all times regardless of conversation topic?
 - (5) Should the company offer professionalism training?



Dobbs v. Jackson Women's Health Org.

- Supreme Court overturned decades of precedent, holding that the Constitution does not confer a right to an abortion
 - Can employers provide abortion-related benefits?
 - *“Bounty” laws: Texas based employee travels to California for a lawful abortion. Texas (along with some other states) has bounty laws allowing private citizens to sue those who “aid or abet” abortions. What liability does the employer have if employee-sponsored health plan covers the procedure or the travel?*
 - *Employee bodily autonomy (Troogstad et al. v. City of Chicago et al.): In the face of employee challenges to Covid-19 vaccination requirements, the City of Chicago is arguing that Dobbs’ voiding of a woman’s right to bodily autonomy in abortion applies to other areas, including employee resistance of employer policies.*



And More!



Recent Legal Updates

- *McLaren Macomb, 372 NLRB No. 58 (Feb. 21, 2023)*
 - U.S. National Labor Relations Board warns employers to cut back on overbroad nondisparagement and confidentiality provisions in severance agreements
- California's Assembly Bill 51 overturned
 - California employers can now require workers to sign arbitration agreements as a condition of employment
- Congress expands protections for pregnant and nursing employees
 - Pregnant Workers Fairness Act and the Providing Urgent Maternal Protections for Nursing Mothers Act require employers to provide additional accommodations to pregnant and breastfeeding employees



NLRB Tinkering (Again) With Joint Employer Test

- Current NLRB law requires a joint employer to actually exercise “substantial direct and immediate control” over a worker’s essential terms of employment. Under this standard, it is uncommon for a client to be deemed a joint employer of staffing agency workers under the National Labor Relations Act of 1935.
- In September 2022, the board proposed returning to a standard for determining joint employer status that was briefly the law during the Obama administration. Under that test, a company may be deemed the joint employer of a second company’s employee where its control over employee is only indirect, or even simply reserved but not ever exercised.
- If the board’s proposed rule becomes law, expect some client questions. Understand, though, that a limited impact is expected on clients’ current responsibilities as to staffing firm employees. It would also not increase union membership among temporary employees.



Staffing Industry Regulation—States

- New Jersey enacts Temporary Worker “Bill of Rights.” Significant obligations, including
 - Equal pay and equal benefits provision: Pay assigned employees at least the average rate of pay and hourly cost equivalent of benefits received by client employees performing the same or substantially similar work
 - Employee notices: Detailed notice required for each assignment, including pay, breaks, schedule, sick leave, etc
 - Registration and record-keeping

- Illinois (HB 1604). The bill would require staffing firms to, among other things
 - Pay employees assigned to a client for more than a week at least the average rate of pay and hourly cost equivalent of benefits received by client employees performing the same or substantially similar work
 - Record the race and gender of each employee or applicant
 - Notify each employee of the client bill rate for each hour the employee worked
 - Provide each applicant not assigned to a job with written confirmation that the applicant sought work

- The bill would also provide a private right of action against covered staffing agencies for any violations of the Day and Temporary Labor Services Act.



Staffing Trend in 2023

- Preference for contract or freelance work?
 - Number of workers who prefer contract and freelance work compared with traditional full-time work is rising and is expected to continue to rise. Freelance-type work offers employees more scheduling flexibility and is low-commitment.



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Q&A