

NAJJAR EMPLOYMENT LAW GROUP, PC

– A Labor, Employment and Benefits Boutique –

So Much To Do, So Little Time **Checklist for Human Resource Compliance Deadlines**

Human resource professionals are challenged with many new state and federal laws, as well as new regulations, which have significant upcoming deadlines. To assist Massachusetts employers in timely meeting their obligations, we have developed a Compliance Deadline Checklist. This Checklist outlines the most significant new laws impacting the workplace, and includes action items intended to guide human resource professionals in meeting deadlines to comply with the new laws.

Massachusetts Paid Family and Medical Leave Act (PFMLA)

The “Grand Bargain” signed into law on June 28, 2018, created the Massachusetts Paid Family and Medical Leave Act. The PFMLA is significantly broader than the federal FMLA, and will extend leave rights to employees of all Massachusetts employers as well as to some independent contractors. The paid leaves will be approved by a state agency, and will require reinstatement to the employee’s previous position. The first steps in meeting compliance obligations under the PFMLA begin immediately, although leaves will not become available for employees until 2021. The law creates a rebuttable presumption of retaliation if there is any negative change in terms or conditions of employment within 6 months of the leave. In addition to the deadlines discussed below, employers should update handbooks, estimate the financial and business impact of the new law on their company, and coordinate with their payroll company to assure a timely start of the employee and/or employer withholdings.

ACTION ITEMS

- 04/29/19: Employers who wish to seek an exemption from PFMLA by substituting their own Private Plan (currently no product available in the marketplace) may begin to submit Applications to the Department of Family and Medical Leave (DFML) through MassTaxConnect;
- 06/30/19: Notice of Rights to current employees under PFMLA (Model notice is on DFML website). The Notice must be signed by the employee and maintained in the employer’s records.
- 06/30/19: Notice of Rights provided to every new hire within 30 days of hire, with signed acknowledgement in personnel file.
- 06/30/19: Display PFMLA workplace poster in a highly visible location. (Model poster is on DFML website).

- 07/01/19: Final regulations to be promulgated by Department of Family and Medical Leave (DFML).
- 07/01/19: Employers begin making after tax deductions from employee wages to fund quarterly contributions to the DFML Trust Fund; consider whether the company wishes to absorb the employee part of the contribution tax.
- 07/01/19: Employers with 25 or more employees begin calculating employer contributions to the Trust Fund to fund employer's share of quarterly contribution. Funds are not remitted to the Trust Fund until October 31, 2019; employers with fewer than 25 employees not responsible for the employer's share.
- 09/20/19: Deadline to file for private plan exemption for Quarter 1. Going forward, applications for private plan exemption will be accepted on a rolling basis, but must be approved in the quarter prior to the quarter in which exemption will go into effect.
- 10/31/19: Remit employer and employee contributions to the Trust Fund through MassTaxConnect.
- 01/21/21: Paid family leave benefits will be available to employees for bonding with a new child, serious personal health condition or caring for covered service member.
- 07/01/21: Paid family leave benefits will be available for the care of a family member with a serious health condition.

EEO-1 Reporting Component 2, Pay Data Reporting for Covered Employers

The Equal Employment Opportunity Commission (EEOC) under the Obama administration revised the EEO-1 form to require employers to report pay information from workers' W-2 forms by race, ethnicity and sex. The pay-data provisions were suspended in 2017 by the Trump administration, but worker-advocacy groups challenged the EEOC's suspension of pay data collection. A federal judge lifted the stay on March 4, 2019, ordering the EEOC to begin collection of the pay data information. The EEOC has opted to collect pay data for both 2017 and 2018 this year, and covered employers must complete the EEO-1 Component 2 by September 30, 2019.

ACTION ITEMS

- 05/31/19: EEO-1 Component 1 Form Due for employers with 100 or more employees and federal contractors with 50 or more employees and contracts over \$50,000 (Component 1 asks for the number of employees who work for the business by job category, race, sex and ethnicity) (typically due March 31, but extended due to the federal shutdown).
- June, 2019: Covered employers should assess functional integration of their payroll and data information systems to assure ability to extract required pay reporting data; review pay equity flags; analyze the data; and consider proactive remediation.

- Mid-July 2019: EEO Component 2 Reporting Portal Opens.
- 09/30/19: Deadline (don't wait to the last minute) to submit EEO-1 Component 2 Form for employers (including federal contractors) with 100 or more employees (Component 2 requests hours worked and pay information from employees' W-2 Box 1 broken down by pay bands and race, ethnicity and sex).
- Stayed tuned. Pay data reporting requirements are still developing; on May 3, 2019, the Justice Department appealed the Federal District Court order.

Pregnant Workers Fairness Act

The Massachusetts Pregnant Workers Fairness Act (PWFA) became effective April 1, 2018. The law amended the Massachusetts Law Against Discrimination. M.G.L. c. 151B. by making it an unlawful employment practice to discriminate against an individual based on “pregnancy or a condition related to said pregnancy including, but not limited to, lactation or the need to express breast milk for nursing a child.” The Federal Pregnancy Discrimination Act and Title VII only apply to employers with 15 or more employees. The Massachusetts Pregnant Workers Fairness Act (PWFA) was designed to close the gap in protection offered by Federal law, and applies to employers of six or more employees. In addition to reviewing handbooks to include a policy regarding the PWFA and posting the workplace notice, employers must:

ACTION ITEMS

- 04/01/18: Provide written notice to employees of the right to be free from discrimination due to pregnancy or a condition related to pregnancy, including the right to reasonable accommodations for conditions related to pregnancy, in a handbook, pamphlet, or by other means of notice.
- 04/01/18: Prior to Start of Employment, provide written notice of rights under PWFA to new employees at or prior to start of employment.
- 04/01/18: Within 10 Days After Notification of Pregnancy, provide written notice of rights under the PWFA to an employee who notifies the employer of a pregnancy or a pregnancy-related condition.
- 04/01/18: Upon Request for Accommodation, begin the good faith interactive process with the employee requesting an accommodation (Note: unlike under the ADA, employer may not require medical evidence for certain common accommodations, including if the accommodation requested is for: (i) more frequent restroom, food or water breaks; (ii) seating; (iii) limits on lifting no more than 20 pounds; and (iv) private, non-bathroom space for expressing breast milk).

Massachusetts Non-Compete Statute and Federal Defend Trade Secrets Act

The Massachusetts Non-competition Agreement Act (M.G.L. c. 149, § 24L) became effective on October 1, 2018 and applies to both employees and independent contractors. Non-solicitation, non-

disclosure and confidentiality agreements are generally unaffected by this new law. However, employers need to assure that the non-compete is not imbedded within other restrictive covenant agreements (e.g., pre-hire agreements, separation agreements, imbedded in stock option and other incentive plans), and if so, assure that any non-compete entered after October 1, 2018 is compliant.

ACTION ITEMS

- 10/01/18: Review all restrictive covenant agreements to assure that any non-compete provisions meet the requirements of the Massachusetts Non-Compete law.
- 10/01/18: Review all restrictive covenant agreements to include reference to the Massachusetts Trade Secrets Statute (which adopted the Uniform Trade Secrets Act and amended M.G.L. c. 93, §42), and recognizes the “inevitable disclosure doctrine” and recognizes that “customer lists” and “customer data” are protectable trade secrets.
- Assess which employees have access to confidential and/or proprietary information and who should be subject to a restrictive covenant and/or confidentiality obligation to the company.
- Audit how the company maintains its confidential and proprietary information, who “owns” social media accounts, and what is confidential and proprietary data (e.g., anything that gives the business a competitive advantage in the marketplace, including customer information, software, and proprietary information such as methods and processes).
- Review the Federal Defend Trade Secrets Act of 2016 (DTSA) definitions, and audit company policy and practices to assure reasonable efforts are taken to preserve confidentiality of any commercially valuable information that is not publicly known.
- Assure that employees are advised of whistleblower immunity in any contract or other employment agreement entered into after the enactment of the DTSA, in order for the employer to take advantage of punitive damages and attorney’s fees in the event of an employee misappropriation.

Massachusetts Equal Pay Act

The Massachusetts Pay Equity Act became effective on July 1, 2018. The law prohibits employers from discriminating on the basis of gender in the payment of wages; prohibits inquiry about an applicant’s current salary or wage history; and prohibits discipline of employees who discuss their own wages.

ACTION ITEMS

- Review Employment Applications to assure no unlawful questions are posed about salary history or wages during the hiring process.

- Review Handbooks to assure no policies prohibit employees from discussing their own wages.
- Train recruiters (inside and outside), persons involved in hiring/interviewing, and supervisors about the limitations in the new law.
- Audit and Revise Job Descriptions to identify “comparable” positions (i.e., work that requires substantially similar skill, effort, and responsibility and is performed under similar working conditions), and assess whether wages are non-discriminatory across “comparable” positions for males and females.
- Consider a self-audit (under attorney-client privilege) which includes a pay regression analysis to identify and align possibly unlawful gender-based wage differentials.
- In coordination with the EEO-1 Component 2, consider establishing pay bands for job titles (i.e., pay what the job is worth, regardless of the person’s prior wages or market driven factors).

Drug Testing and the 2018 Federal Farm Bill: Marijuana and CBD in the Workplace

There is no requirement for most private employers to adopt a drug-free workplace policy or to perform drug testing of any kind under federal or state law. The exceptions are: (a) federal contractors and grantees who are required to maintain a drug free workplace under the Drug-free Workplace Act of 1988; and (b) safety and security sensitive industries and positions which are regulated by federal agencies which have established specific drug-testing requirements. With the legalization of both medical and recreational marijuana in Massachusetts (as well as in many other New England States) and passage of the Federal Farm Bill which removed CBD derived from hemp (having less than .3 percent of THC) from Schedule 1 of the Controlled Substances Act, employers should assess their drug testing programs and compliance with state and federal laws.

ACTION ITEMS

- Employers should evaluate their current drug testing policies and consider who is tested, when testing is performed, who performs the testing, whether to engage an MRO to assess results before reporting, and what circumstances trigger testing.
- Assess whether the employer can or should test for Marijuana and its derivatives, and if the test is positive, determine whether reasonable accommodation and the interactive dialogue may be required.
- Review workplace smoking policies to identify where smoking is permitted, including vaping, and personal hygiene policies for workplace odors.
- Assess whether the employer has federal contracts which require testing of certain employees, and/or a drug free workplace.

- Review drug and alcohol policies to clarify how marijuana, both recreational and medical, and its derivatives will be treated within the workplace.
- Train supervisors to identify workplace impairment; develop observation checklist.
- Post-accident testing: consider OSHA guidelines.
- Foreign workers should be reminded that USCIS issued policy guidance in the USCIS Policy Manual to clarify that violations of federal controlled substance law, including violations involving marijuana, are generally a bar to establishing good moral character for naturalization, even where that conduct would not be an offense under state law.
- Consider policies regarding food products and prescription drugs in the workplace which contain CBD and/or marijuana.
- Fall 2019: Users can register for the Federal Motor Carrier Safety Administration (FMCSA) Clearinghouse. The Clearinghouse is a secure online database that will give employers, FMCSA, State Driver Licensing Agencies, and State law enforcement personnel real-time access to important information about CDL driver drug and alcohol program violations.
- 01/06/20: The FMCSA Clearinghouse goes into effect requiring DOT employers to use the Clearinghouse to report and query information about driver drug and alcohol program violations. Employers must conduct both electronic queries within the Clearinghouse and manual inquiries with previous employers to cover the preceding three years.
- 01/06/23: Once three years of violation data are stored in the Clearinghouse, employers are no longer required to also request information from the driver's previous FMCSA-regulated employers under 391.23(e).

Office of Federal Contract Compliance Programs (OFCCP)

Federal contractors should review the Corporate Scheduling Announcement (CSA) to determine if the company and/or its customers with whom they contract are on the list for potential audit. Many employers confuse Affirmative Action obligations with mere EEO obligations, and execute contracts without appreciating their undertaking of AA obligations when becoming a federal contractor.

ACTION ITEMS

- If your company is on the CSA, prepare for an OFCCP audit.
- Federal Contractors subject to Section 503 of the Rehabilitation Act of 1973, the Vietnam Era Veterans Readjustment Assistance Act of 1974 or Executive Order 11246 must update their written Affirmative Action Plans annually.

- If covered, assure that company sick time policy complies with Executive Order 13706.
- Audit compliance with Prevailing Wage obligations under Davis Bacon and Service Contract Act compliance, including overtime and benefits, to assure the pay system is properly paying the applicable wage, benefits, and overtime and covered workers are properly classified.
- Assure that federal compliance obligations are flowed down into covered subcontracts, and spot audit to verify compliance.
- Assure implementation and documentation of affirmative action initiatives.
- Assure company website is disability accessible and includes required notices for AA Employers.

Fair Labor Standards Act (FLSA)

The US Department of Labor issued proposed regulations in March 2019 to update the salary threshold for white collar workers, clarify the “regular rate” for overtime pay purposes, and clarify the “joint employer” classifications. The regulations are likely to be effective before the end of the year and employers need to assess the impact on their workplace.

ACTION ITEMS

- Review job descriptions to assure “exempt” employees meet both the “duties” and the “salary basis” test (Proposed Rule will increase base salary to \$679 per week, equivalent to \$35,308 per year).
- If currently “exempt” employees will not meet the new salary threshold, determine whether to increase their salary or change status to “hourly” or “salary non-exempt” (i.e., overtime eligible).
- Review pay practices to assure that overtime eligible employees are paid overtime based on the “regular rate,” which may exceed one and one-half times the “hourly rate.”
- Assure all “time worked” is properly determined and paid (e.g., commuting between worksites and mandatory meetings).
- Evaluate potential “joint employer” relationships under the proposed rule, assess risk, and revise contracts to assure indemnification of your company if a joint employer (e.g., subcontractor, staffing agency, leasing company, PEO) violates employment or wage laws.

National Labor Relations Act -- Handbook Updates

Under the Obama Administration, the NLRB substantially expanded the scope of Section 7 rights (for employees to engage in concerted activities regarding wages, hours and terms and conditions of employment) including in non-unionized workplaces. These changes made many common workplace policies (e.g., civility rules, confidentiality, social media, email use and insubordination) unlawful under the NLRA. The new NLRB general counsel issued Memorandum GC 18-04 which retracted some of the prior General Counsel's guidance regarding handbook policies and workplace practices which he advised would interfere with the exercise of Section 7 rights by employees.

ACTION ITEMS

- Review Memo GC 18-04 and consider re-implementing work rules/policies that were considered unlawful under the previous NLRB guidance.

Mass. Data Privacy Law Amendments (WISP)

Effective April 11, 2019, Massachusetts amended its data breach notification law to include new notice requirements in the event of a breach and credit monitoring services. Since 2010, all entities which own or license personal information (i.e., social security number, driver's license number, financial account number, credit or debit card number or other data) about a Massachusetts resident are obligated to develop, implement and maintain a comprehensive written information security program (WISP) that complies with the Massachusetts data breach notification act and implementing regulations.

ACTION ITEMS

- Update WISP to comply with the amendments.
- Periodically audit the WISP to assure that administrative, technical, and physical safeguards are in place and that employees are complying with the WISP designed to protect personal information from unauthorized disclosure.
- Assure that vendors who have access to personal information have a WISP designed to prevent unauthorized disclosure of such protected information, and agree to report and remedy a data breach.
- Consider an IT security audit for electronically stored and accessible PI.
- Check with your cybersecurity carrier to confirm insurance coverage to remedy a data breach, including 18 months of credit monitoring in the event of a data breach.

H-1B Employers

Effective April 1, 2019, USCIS made changes to the H-1B Program. Employers who wish to hire H-1B non-immigrant workers will need to assure compliance with the pre-registration requirement in order to participate in the H-1B program. Once implemented, USCIS will announce the designated electronic registration period at least 30 days in advance for each fiscal year it is required.

ACTION ITEM

- Employers seeking to file cap-subject H-1B petitions will now be required to electronically register to participate in the program (DHS Announces Final Rule for a More Effective and Efficient H-1B Visa Program). Only those whose registrations are selected will be eligible to file an H-1B cap-subject petition beginning in 2020.

In addition to complying with deadlines for many new state and federal laws and regulations, human resource professionals should review, and if necessary revise, employment applications, job descriptions, handbooks, policies, drug testing programs, and review wage surveys in an effort to comply with the rapidly changing workplace landscape. Employers also need to assess the impact of such new laws and changes in the law on staffing as well as the economic impact on the company, and possible need for cross-training of employees to assure essential coverage of job duties during a leave of absence under the new Massachusetts Paid Family and Medical Leave Law. If adjusting wages (due to pay equity and/or changes in the FLSA salary requirements or minimum wage laws), employers also will need to budget for the ripple effect of the changes on other employees' wages, particularly in a tight labor market. Human Resource professionals need to participate at the strategic level to assure all C-suite executives anticipate the impact on the bottom line.

If employers need assistance assessing the impact of these laws on their workplace, need compliance assistance, or have any questions regarding the new laws, they may contact any member of the NELGPC employment and benefits group.

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Our labor and employment attorneys, working with our pension and benefits attorneys, bring together one cohesive team with diverse capabilities to assist our clients in managing and addressing complex benefits and employment law issues which arise in the workplace. Our team understands the importance of learning about each client's business and culture.

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