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2022 Labor & Employment Annual Webinar

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Welcome & Opening Remarks

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Any Questions?

Please add questions to the chat

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2022 Connecticut Legislative Update

Lorey Rives Leddy
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December 9, 2022

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Overview

- Changes to Scope in CFEPA Definitions
- Voting Time Off
- Annual Increases to Minimum Wage
- Prevailing Wage Penalties for Public Contracts
- Free Speech Protections (Upcoming Full Presentation)
- Pay Transparency (Upcoming Full Presentation)

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2022 Amendments to the CFEPA

- CT Fair Employment Practices Act ("CFEPA") prohibits discrimination and harassment based on certain protected classes of employees
- Definition of "employer" has been modified from employers with three or more employees to ***one or more employees,*** making CFEPA applicable basically to all employers
- Definition of "employee" has been expanded to include "any elected or appointed official of a municipality, board, commission, counsel or other governmental body."
- Protected status has been expanded to include victims of domestic violence

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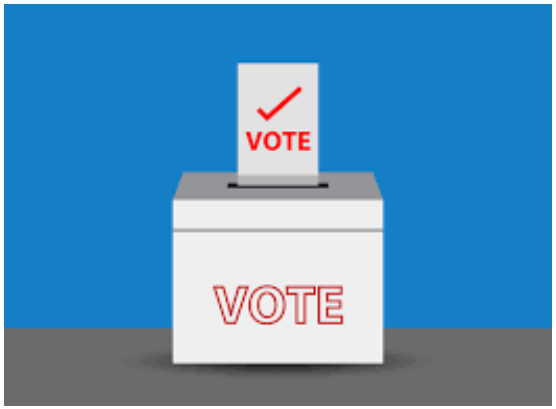
Voting Time under Conn. Gen. Stat. § 31-57y



- Connecticut passed a law in 2021 that applies from June 2021 to June 2024, requiring employers to provide their employees with two hours of unpaid time off to vote in state elections
- 2022 addition to the statute applies to probate court special elections
- Time off must be between 6:00 am and 8:00 pm on the day of an election
- Employee must provide an employer with notice of the intent to exercise the right at least two working days prior to the election

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Connecticut Minimum Wage

- Originally signed into law in 2019
- Over a series of years, minimum wage increases
- On July 1, 2022, minimum wage increased to $14.00 per hour
- Next and last hike to $15.00 goes into effect on June 1, 2023

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Prevailing Wage Enforcement

- Effective July 1, 2023, applies to any contractor or subcontractor employers on public works projects
- Increases the amount of fines that can be imposed for violating the prevailing wage statute
- Allows the Attorney General to commence a civil action against violators
- Allows the DOL to debar employers who are repeat offenders/violators of over $50,000 in wages

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Employee Free Speech

- A full analysis will be upcoming in a separate segment of the webinar.

Pay Transparency

- A full analysis will be upcoming in a separate segment of the webinar.

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Connecticut Legislation on Non-Competes that Did Not Pass in 2022: HB 5249

- "An Act Concerning Noncompete Agreements"
- Would apply to any non-competes entered into, modified or extended as of a specific date
- Essentially prohibits all non-compete agreements that do not meet very specific criteria

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HB 5249 Cont'd

- Would limit most non-competes to one year and to a specific geographic area and type of work of the employee
- Would apply only to "exempt employees" as defined in § 31-58 of the General Statutes
- Would require mandatory notices on employee rights
- Would require demonstration of compensation for such provisions

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2022 Massachusetts Legislative Update

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December 9, 2022

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Overview

- Minimum Wage Increase/Retail Premium Phase Down
- Paid Family and Medical Leave – Contribution Update
- Passage of CROWN Act - Protection for “Natural and Protective Hairstyles”
- Wage Act Guidance

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Minimum Wage Increase

- **Effective January 1, 2023**, Massachusetts minimum wage will increase from $14.25 to **$15.00**
- This is the final minimum wage increase passed as part of the "Grand Bargain" legislation passed in 2018
- Tipped employees – minimum wage increases to $6.75 effective January 1, 2023. Minimum wage for tipped employees must be met for each shift.

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Phase Out of Sunday/Holiday Retail Premium Pay

- Premium pay for retail employees for work on Sundays and some holidays has been phased out and will be eliminated in 2023
- **Effective January 1, 2023**, retail pay for Sundays and Memorial Day, Independence Day, Juneteenth Independence Day, and Labor Day will decrease to 1.0 times the employee's regular rate. **No more Premium.**
- Premium rate of 1.5 times hourly rate continues to apply on New Years Day, Columbus Day, Veterans Day

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Paid Family and Medical Leave

- New rates amounts take effect January 1, 2023.
- Employers of > 25: Contributions decrease to 0.63% of eligible wages (0.53% medical, 0.11% family)
- Employers of < 25: Contributions decrease to 0.318% of eligible wages (0.208% medical, 0.11% family)
- Maximum weekly benefit amount increased to $1,129.82/week.
- Employers must provide notice of new rates to EE's by **Dec. 2, 2022**

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CROWN Act - New Protections for Natural and Protective Hairstyles

- Effective October 24, 2022, Massachusetts law prohibits discrimination against “natural and protective hairstyles” in Massachusetts workplaces, schools, and places of public accommodation.
- “Natural or protective hairstyle” is defined as “hair texture, hair type and hairstyles, which shall include, but not be limited to, natural and protective hairstyles such as braids, locks, twists, Bantu knots and other formations.”
- 17 other states that have passed similar laws (including CT & NY).

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SJC Interprets the Wage Act

- Massachusetts Wage Act, M.G.L. c. 149, § 148
- Requires timely payment of all wages – either weekly or bi-weekly - with 6 or 7 days of the end of pay period.
- Wages defined broadly, includes accrued vacation pay.
- Departing employees must be paid in full on next regular pay day.
- Terminated employees must be paid in full on day of termination.
- Strict liability for any delay – whether honest mistake or not.

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SJC Interprets the Wage Act (cont.)

- *Reuter v. City of Methuen*
- City employee terminated; accrued vacation time paid three weeks late.
- City paid full amount plus interest prior to lawsuit being filed.
- SJC holds employee is automatically entitled to 3x the unpaid wages as soon as payment is 1 day late, even before lawsuit is filed.
- This applies to any late payment of wages.

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2022 New York Legislative Update

Salvatore Gangemi
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December 9, 2022

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Overview

- New York City's Automated Employment Decision Tools Law
- New York Employee Electronic Monitoring Law
- Amendments to New York's Paid Family Leave Law
- State, City, and County Wage Transparency Laws

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NYC Automated Employment Decision Tools ("AEDT") Law

- What is an AEDT?
  - Defined as "any computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence, that issues simplified output, including a score, classification, or recommendation" that is used to "substantially assist or replace discretionary decision making for making employment decisions that impact natural persons."

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NYC Automated Employment Decision Tools ("AEDT") Law

- Effective January 1, 2023, employers and employment agencies must:
  - Complete an independent bias audit of all AEDTs;
  - Maintain a publicly available summary of audit findings;
  - Provide notice to candidates and employees residing in NYC about the use of such tool; and
  - Allow candidates and employees to request an accommodation.

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NYC Automated Employment Decision Tools ("AEDT") Law

- Covered Employers
  - Law applies to tools used to screen candidates for employment or employees for promotion within the city.
  - It is unclear at this point if law applies to employers physically located in NYC or decisions related to jobs located in NYC.

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NYC Automated Employment Decision Tools ("AEDT") Law

- Audits must be completed by January 1, 2023.
- Audit must be an impartial evaluation by an independent auditor assessing the tool's disparate impact on people of a particular gender or race/ethnicity.
- More guidance expected after implementation from NYC Department of Consumer and Worker Protection (formerly, Department of Consumer Affairs).

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NYC Automated Employment Decision Tools ("AEDT") Law

- Employers and employment agencies must:
  - Provide posting on website summarizing the results of the most recent bias audit of the tool;
  - Provide notice to candidates or employees, at least 10 days before using the tool that the tool will be used and the characteristics the tool will analyze
  - Upon request from candidate/employee, disclose information about the data collected for the tool.

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NYC Automated Employment Decision Tools ("AEDT") Law

- Violations
  - Each day an employer uses an automated employment decision tool and has not complied with the requirements of this new law counts as a separate violation.
  - Employer's failure to provide notice to a candidate or employee constitutes a separate, daily violation.

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NYC Automated Employment Decision Tools ("AEDT") Law

- NYC Department of Consumer and Worker Protection (formerly Department of Consumer Affairs) responsible for enforcement.
- Employers found in violation will face daily fines for each violation ranging from $500-$1500.
- No private right of action.

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NYC Automated Employment Decision Tools ("AEDT") Law

- Recommendations
  - Begin analyzing all tools used to assist with hiring and performance management;
  - Determine how tools will track and maintain data;
  - Draft summary of tool for website;
  - Stay tuned for more substantive guidance in coming months.

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New York Employees' Electronic Monitoring Law

- Effective May 7, 2022, every private-sector employer must provide notice of electronic monitoring practices to all employees upon hiring, with written employee acknowledgement, and in a conspicuous place viewable by all employees.

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New York Employees' Electronic Monitoring Law

- The notice must advise employees that any and all telephone conversations, email communications and internet access or usage may be subject to monitoring "at any and all times and by any lawful means."

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New York Employees' Electronic Monitoring Law

- State Attorney General has enforcement authority
- Civil penalties range from $500-$3,000 per violation, with a maximum of $500 for the first offense, $1,000 for the second offense and $3,000 for any subsequent offenses.
- No private right of action.

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New York Employees' Electronic Monitoring Law

- Employers should immediately review their monitoring practices, update their handbooks and policies, and display an appropriate notice.

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Amendments to New York Paid Family Leave Law

- Effective January 1, 2023, the definition of "family member" expanded to include siblings, meaning biological siblings, adopted siblings, step-siblings, and half-siblings.
- Under the current law, employees can take up to 12 weeks of job-protected, paid leave to care for spouses, domestic partners, children and step-children, parents, parents-in-law, grandparents, and grandchildren with a serious health condition.

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Amendments to New York Paid Family Leave Law

- Employees taking paid family leave receive 67% of their average weekly wage, up to a cap of 67% of the current New York State Average Weekly Wage (NYSAWW).
- For 2023, the NYSAWW is $1,688.19, making the maximum weekly benefit is $1,131.08.

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Amendments to New York Paid Family Leave Law

- Employers should review and revise personnel policies related to paid family leave to account for the expanded uses.

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New York Wage Transparency Laws

- In summary, covered employers are now required to provide salary ranges in job postings to applicants.
- New York City's and Westchester County's wage transparency laws went into effect in November 2022.
- New York legislature passed its own statewide wage transparency legislation that is awaiting Governor’s signature and would become effective 270 days later.
- More detail on these laws later today in the pay transparency session.

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Applying Performance & Conduct Standards

To Employees with Disabilities

Salvatore Gangemi
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December 9, 2022

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Overview

- Basic Requirements under the ADA
- Performance Standards
- Conduct Standards
- Seeking Medical Information

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Basic Requirements under the Anti-Discrimination laws

Under the ADA and state laws, employers are prohibited from discriminating against a “qualified individual with a disability.” Disability under the ADA:

- (a) a physical or mental impairment that substantially limits a major life activity;
- (b) a record of such an impairment;
- (c) regarded as having such an impairment

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Basic Requirements under the ADA

"Qualified Individual"

- Among other things, must possess the requisite skills, education, or experience for a particular position and must be able to perform the essential functions of a position with or without a reasonable accommodation

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Basic Requirements Under the ADA

"Reasonable Accommodation"

- Generally, employees are obligated to request a reasonable accommodation.
- Once requested, employers must either grant the accommodation or engage in the "interactive process" to determine whether alternate accommodations exist or whether providing the accommodation would impose an "undue hardship."
- An employer may be required to initiate discussions with employee (i.e., start the interactive process) when they are aware of the disability and/or the possible need for an accommodation.

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Performance and Conduct

- Generally, an employee's disability should have no bearing on performance or conduct standards.
- In most instances, performance/conduct standards or issues should be addressed the same as they are for employees without disabilities.
- The purpose of providing a reasonable accommodation is to address disability-related performance/conduct issues to assist the employee to meet performance goals and avoid conduct problems.
- Reasonable accommodations are not intended to excuse or tolerate performance problems.

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Performance Standards

Employers establish job-related requirements (qualification standards), which includes:

- Possessing specific training, licenses or certificates;
- Possessing certain physical or mental abilities (e.g., vision, hearing, or lifting requirements, exercising good judgment);
- Meeting health or safety requirements;
- Demonstrating certain attributes (e.g., ability to work with others or under pressure.

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Performance Standards

- Job related requirements typically include specific tasks, job duties, or assignments (i.e., the *essential* and *marginal* functions);
- A job may contain requirements that ensure appropriate performance of job duties or related assignments (for example, specific hours to be worked, overtime);
- Employers are entitled to establish evaluation methods

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Performance Standards

- An employee with a disability must meet the same standards as other employees in the same position;
- Production/Performance standards refer to both
  - Quantitative Standards
  - Qualitative Standards
- Reasonable accommodation never requires lowering a production standard but may require accommodation to meet the standard.
- Essential functions are the most important job duties, and are the critical elements that must be performed to achieve the job. Marginal functions are those tasks that are tangential and not as important.

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Performance Standards

If an employee or applicant cannot meet a specific qualification standard because of a disability, the employer must demonstrate that it is “job related and consistent with business necessity.”

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Practical Guidance

- Job descriptions should be carefully reviewed on a periodic basis just to make sure that functions designated as “essential” are not just marginal. It is not enough that just because a particular function has been designated as essential, that it is in fact so. For example, how important are timetables and deadlines for a particular task.

- Supervisors should evaluate job performance of an employee with a disability in the same manner that they would evaluate any other employee’s performance.

- Failure to provide an accurate evaluation might result in an employee’s inability to improve and, if necessary, request a reasonable accommodation.

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Scenario: Employee discloses disability in response to a lower performance rating

- Supervisor should not focus on disability. The performance rating reflects the employee's performance regardless of what role, if any, disability may have played.
- Make clear why the employee earned the lower performance rating, or why supervisor must focus on performance problem, regardless of whether the disability played a role.
- Important that supervisor reiterate what employee must do to improve performance.
- If the employee does not ask for an accommodation, the employer may ask whether there is an accommodation that might help raise the employee's performance level.

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Scenario: Employee asks for reasonable accommodation in response to a lower performance rating

- Ideally, employees will request reasonable accommodation before performance problems arise. However, employees are not required by law to ask for a reasonable accommodation at a certain time.
- The employee does not have to rescind discipline, even if the discipline takes the form of a termination.
- If the performance problem does not rise to the level of a terminable offense, the employer can proceed with the discussion or evaluation but also should begin the interactive process to identify a reasonable accommodation.
- Employers cannot refuse to discuss the request or fail to provide a reasonable accommodation as punishment.

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Scenario: Employee asks for reasonable accommodation in response to a lower performance rating

- The reasonable accommodation should be determined and implemented as quickly as possible.
- Where an employee fails to give note of the need for an accommodation until after a performance problem arises, reasonable accommodation does not require the employer to:
  - Tolerate or excuse the poor performance;
  - Withhold disciplinary action (including termination) warranted by the poor performance;
  - Raise a performance rating; or
  - Provide an evaluation that does not reflect the employee's performance.

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Scenario: Employee requests removal of essential functions or changing performance standard as an accommodation

- The ADA does not require an employer to remove an essential function or modify performance standards.
- Temporary removal of an essential function or lowering a quantitative standard generally not recommended except if clearly done only for a short, definite period of time because of temporary medical issue(s) that should soon be resolved
- Employers often provide these temporary measures due to short-term medical or other issues (e.g., pregnancy, heart attack)
- Should focus on accommodations that will enable satisfactory performance of essential functions and ability to meet performance standards

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Conduct Standards

- Employer may discipline employee with disability for violating a conduct standard if the disability does not cause the misconduct.
- If an employee's disability results in a violation of a conduct standard that is job-related and consistent with business necessity and other employees are held to the same standard, the employee may be disciplined.
- The ADA doesn't protect employees from the consequences of violating conduct requirements even where the conduct is caused by a disability.

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Conduct Standards

- Prohibiting violence/threats of violence
- Prohibiting stealing/destroying property
- Prohibiting insubordination
- Requiring respect for clients, customers,and the public
- Prohibiting inappropriate behavior between coworkers
- Prohibiting alcohol/illegal drug use

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Conduct Standards

- Some Conduct Standards are ambiguous, e.g. “disruptive” behavior.
- What is disruptive?
  - Factors to consider:
    - Specific conduct at issue
    - Symptom of disability affecting conduct
    - Nature of job/work environment

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Example:

Darren is a long-time employee who performs his job well. Over the past few months, he is frequently observed talking to himself, though he does not speak loudly, make threats, or use inappropriate language. However, some coworkers who are uncomfortable around him complain to the division manager about Darren's behavior. Darren's job does not involve customer contact or working in close proximity to coworkers, and his conversations do not affect his job performance. The manager tells Darren to stop talking to himself but Darren explains that he does so as a result of his psychiatric disability. He does not mean to upset anyone, but he cannot control this behavior. Medical documentation supports Darren's explanation. The manager does not believe that Darren poses a threat to anyone, but he transfers Darren to the night shift where he will work in relative isolation and have less opportunity for advancement, saying that his behavior is disruptive.

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Was the manager's decision to transfer Darren consistent with the ADA's requirements?

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Was the manager's decision to transfer Darren consistent with the ADA's requirements?

- No. Under these circumstances it is not job-related and consistent with business necessity to discipline Darren for disruptive behavior. It also would violate the ADA to transfer Darren to the night shift based on this conduct. While it is possible that the symptoms or manifestations of an employee's disability could, in some instances, disrupt the ability of others to do their jobs that is not the case here. Employees have not complained that Darren's voice is too loud, that the content of what he says is inappropriate, or that he is preventing them from doing their jobs. They simply do not like being around someone who talks to himself. Their discomfort is not sufficient.

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Example:

A telephone company employee's job requires her to spend 90% of her time on the telephone with coworkers in remote locations, discussing installation of equipment. The company's code of conduct requires workers to be respectful towards coworkers. Due to her psychiatric disability, the employee walks out of meetings, hangs up on coworkers on several occasions, and uses derogatory nicknames for coworkers when talking with other employees. The employer first warns the employee to stop her unacceptable conduct, and when she persists, issues a reprimand.

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Was the employer's decision to reprimand the employee consistent with the ADA's requirements?

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Was the employer's decision to reprimand the employee consistent with the ADA's requirements?

- Yes. The employee's behavior violated a conduct rule that is job-related and consistent with business necessity and therefore the employer's actions are consistent with the ADA.

What if the employee requests a reasonable accommodation after being confronted with the reprimand?

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Conduct Standards

Withholding disciplinary action or changing a conduct rule as an accommodation.

- Not required by the ADA.
- Should focus on accommodations that will enable employee to meet the conduct standard.

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Reasonable Accommodation
Timing of Request

- After performance issue/misconduct that now warrants termination
  - May proceed with termination.

- After performance issue/misconduct that warrants discipline other than immediate termination
  - May impose discipline but begin interactive process
  - An employee whose poor performance/conduct is due to current illegal use of drugs is not entitled to reasonable accommodation.

- Important to handle request for accommodation expeditiously.

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Performance or Conduct Problem

- Focus on what employee is doing wrong (be specific), what employer expects employee to do to improve, and consequences if no improvement

- Employer should not raise disability but only respond if employee raises disability because employer raising it could lead to "regarded as" claim (i.e., imposed disciplinary action based on employee's impairment)

- Might have to defend discipline to EEOC

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Potentially Violent Conduct

- Distinguish between real threats and behavior that is outside the norm.
- Making threats is misconduct that can be punished, regardless of whether it's attributable to a psychiatric disability.
- Don't assume that an employee with a particular mental illness will likely become violent. Illegal stereotyping.
- If behavior is causing a problem, deal with it as a personnel issue.

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Aging at Work

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AGING WORKFORCE

- An aging workforce can mean experience, knowledge, and loyalty;
- Don’t stereotype;
- Age is not the problem.
- Documented performance problems can be addressed.

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THE STATS

- CDC statistics: Aging population creates aging workforce.
- Employment of workers 65 or older and workers 75 or older grew by 117% in a span of 20 years. (1994-2014)

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MORE DATA

- Frequency of occupational injuries among older workers decreases but injuries are more likely to be serious.
- The percentage of older workers is projected to grow.
- But remain lower than those of the prime age group.

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Applicable Laws

The Age Discrimination in Employment Act (ADEA) (1968)

- Prohibits discrimination against employees aged 40 or older.

The Americans with Disabilities Act (1990) (ADA), as amended (2008)

- Prohibits discrimination against qualified individuals with disabilities; requires employers to engage in the interactive process to consider whether the disabled employee can perform the essential functions of the job with or without a reasonable accommodation.

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ADEA Statistics

- In 1990, workers in the age 40-54 age cohort filed the majority of ADEA charges and workers in the age 65+ cohort filed relatively few.
- By 2017, more charges were filed by workers ages 55-64 than the younger age cohort.
- By 2017, the percentage of charges filed by workers age 65 and older was double what it was in 1990.

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Types of age discrimination claims

- Failure to hire or promote;
- Mandatory retirement;
- Suggesting or assuming retirement;
- Denial of benefits based on age;
- Age-based remarks, comments, jokes;
- Age-based testing requirements

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Recent case - Age-based testing requirements

- Recent Yale New Haven Hospital case—all physicians 70 and older who apply for or renew privileges must undergo a neuropsychological exam and an eye medical exam. Younger workers do not need to take tests.

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Interplay between ADEA and ADA

- ADEA does not require accommodation based on age.
- ADA requires employer to consider accommodations for disabilities.
- Age and disabilities do not necessarily correlate but they might.
- Treat disability as you would for any other disabled employee.

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Fitness for Duty Testing

- Generally, a disability-related inquiry or medical examination of an employee may be job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence, that:
  - (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or
  - (2) an employee will pose a direct threat due to a medical condition.

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Fitness for Duty Testing

- Sometimes this standard may be met when an employer knows about a particular employee's medical condition, has observed performance problems, and reasonably can attribute the problems to the medical condition. An employer also may be given **reliable information** by a credible third party that an employee has a medical condition, or the employer may observe symptoms indicating that an employee may have a medical condition that will impair his/her ability to perform essential job functions or will pose a direct threat. In these situations, it may be job-related and consistent with business necessity for an employer to make disability-related inquiries or require a medical examination.

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Situation #1

- A crane operator appears to become light-headed, has to sit down abruptly, and seems to have some difficulty catching his breath. In response to a question from his supervisor about whether he is feeling all right, the crane operator says that this has happened to him a few times during the past several months, but he does not know why.
- What can you do?

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Response:

- The employer has a reasonable belief, based on objective evidence, that the employee will pose a direct threat and, therefore, may require the crane operator to have a medical examination to ascertain whether the symptoms he is experiencing make him unfit to perform his job. To ensure that it receives sufficient information to make this determination, the employer may want to provide the doctor who does the examination with a description of the employee's duties, including any physical qualification standards, and require that the employee provide documentation of his ability to work following the examination.

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Situation #2

- Several customers have complained that Richard, a customer service representative for a mail order company, has made numerous errors on their orders. They consistently have complained that Richard seems to have a problem hearing because he always asks them to repeat the item number(s), color(s), size(s), credit card number(s), etc., and frequently asks them to speak louder. They also have complained that he incorrectly reads back their addresses even when they have enunciated clearly and spelled street names.

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Response:

- In this case, the employer has a reasonable belief, based on objective evidence, that Richard's ability to correctly process mail orders will be impaired by a medical condition (i.e., a problem with his hearing). The employer, therefore, may make disability-related inquiries of Richard or require him to submit to a medical examination to determine whether he can perform the essential functions of his job.

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You've noticed an older employee is slowing down in his productivity at work. What do you do?

- How are you measuring productivity?
- Is it the same measurement applied to everyone?
- Is it an objective productivity standard?
- Can you performance manage the employee?

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An older worker cannot perform all of the physical requirements of the job. What do you do?

- Does the ADEA require that you accommodate the employee based on his age?
- Is there an ADA issue here?
- Has the older worker requested an accommodation?

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Older employee is forgetting things and repeating himself. What should you do?

- Is this affecting his job performance?
- If so, how?
- Can you discuss the concerns with the employee?
- Can you ask the employee to undergo a “fitness for duty” test?
- Do you do fitness for duty testing for other employees?

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Free Speech in the Workplace:

Connecticut's "Captive Audience" Law

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December 9, 2022

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2022 CT "Captive Audience" Law

- Prohibits employers from disciplining/discharging (or threatening to discipline/discharge) an employee for refusing to:
  - (a) attend employer-sponsored meetings that have the primary purpose of communicating the employer's opinion concerning religious or political matters, or
  - (b) listen to speech or view communications that have a primary purpose of communicating the employer's opinion regarding religious or political matters.

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Political or Religious Matters

- "Political matters" means matters relating to elections for political office, political parties, legislation, regulation, and the decision to joint or support any political party or political, civic, community, fraternal, or labor organization
- "Religious matters" means matters relating to religious affiliation and practice and the decision to join or support any religious organization or association

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What Is Not Prohibited Under the Law?

- Employers communicating any information that the employer is required by law to communicate, but only to the extent of such legal requirement
- Employers communicating any information that is necessary for employees to perform their job duties
- Institutions of higher educations meeting with or participating in any communications with employees that are part of coursework, any symposia, or an academic program at such institution
- Casual conversation between employees, or employee and an agent of the employer, provided participation in such conversations is not required
- A requirement to attend a meeting limited to the employer's managerial and supervisory employees

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Exempted Organizations

- Any religious corporation, entity, association, educational institution, or society that is exempt from the requirements of Title VII of the Civil Rights Act of 1964, or is exempt from the provisions of C.G.S. § 46a-81p, with respect to speech on religious matters to employees who perform work connected with the activities undertaken by such religious entity

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History of Legislation

- In 1948 case Babcock v. Wilcox Co., the NLRB held that the then newly amended National Labor Relations Act allowed employers to hold "compulsory audience" meetings
- New CT law was championed by state unions
- Prior versions of the 2022 bill have been floated for years, and prior versions were deemed too legally flawed to proceed
- Ongoing struggle between labor and business dating back to the passage of the Wagner Act in 1935

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Questions Left Open

- When is speech "primarily intended" to convey the employer's opinion? How is that determined?
- Is the state legislation in conflict with the National Labor Relations Act, and does the NLRA preempt this new law?
- Does the law infringe upon the free speech rights of corporations?
- How broadly can "political speech" be construed?
  - Public health measures (abortion access, COVID-19 vaccine mandates), DEI?

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Legal Challenges

- NLRB's new general counsel issued guidance in April 2022 that mandatory meetings violate federal law; the memo was quickly challenged in a federal suit in TX
- U.S. Chamber of Commerce financed a successful challenge to a California law in 2008 that regulated employer communications with employees without banning mandatory meetings
- Business groups sued Wisconsin in 2010 for passing similar law; parties entered into agreement where Wisconsin agreed the NLRA preempted state law
- The NLRB filed a suit in 2020 against Oregon for a 2010 law that bans employers from retaliating against employees who refuse to attend anti-union meetings; the suit was dismissed in 2021 for lack of standing due to lack of concrete injury

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Connecticut Lawsuit

- Lawsuit challenging CT law was filed in the District of Connecticut on November 1, 2022, by the U.S. Chamber of Commerce, the CBIA, and trade groups representing retailers and others
  - Argues that law is preempted by the NLRA
  - Argues that the ban violates free-speech and equal-protection rights under the Constitution by "chilling and prohibiting employer speech" with their workers

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Conn. General Statutes § 31-51q

- This 1983 statute has always provided both public and private employees the right to sue their employer if the employer disciplines or terminates the employee because of his or her exercise of free speech rights under both the First Amendment to the U.S. Constitution and the Connecticut Constitution
- Such protected speech must be on a matter of "public concern" and must not substantially or materially interfere with the employee's bona fide job performance or working relationship with their employer

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Trusz v. UBS Realty Investors, LLC

- Law became a bit clearer in recent years, particularly under the Connecticut Supreme Court's 2015 decision in Trusz
  - "[U]nder the state constitution, employee speech pursuant to official job duties on matters of significant public interest is protected from employer discipline in a public workplace, and § 31-51q extends the same protection to employee speech pursuant to official job duties in the private workplace."
  - Rejected the rule articulated by the U.S. Supreme Court in Garcetti v. Ceballos—that when employees make statements pursuant to their official job duties, the First Amendment provides them no protection
- Much of the analysis of free speech claims looks at balancing test between speech at issue and disruption to workplace

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Conn. General Statutes § 31-51m

- Whistleblower protections
- No employer shall discharge, discipline, or otherwise penalize any employee because
  - (1) the employee reports, verbally or in writing, a violation or a suspected violation of any state or federal law or regulation or any municipal ordinance or regulation to a public body;
  - (2) the employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action; or
  - (3) the employee reports a suspected incident of child abuse or neglect pursuant to certain state statutes.

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Questions?

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Lunch Break

We will resume at 12:50 p.m.

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Pay Transparency and Pay Equity

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December 9, 2022

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Why is Pay Transparency Important?

- Across industries, women are paid less than men in similar roles, and people of color are paid less than white workers.
- Once an employee is underpaid, it is almost impossible to make up the deficit over a lifetime.

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Pay Transparency may be Working

According to the U.S. Census Bureau, median earnings for women in the 2016-2020 period showed women making 81% of what men earn as a median salary, which is better than the 59 cents on the dollar earned by women prior to the push for pay transparency.

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Pay Transparency may be Working

According to the U.S. Department of Labor Bureau of Labor Statistics, median earnings for Black workers were about 80% of those earned by White workers in 2022.

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Business Case for Pay Transparency

- Facilitates attraction and retention of employees
- Promotes trust and fairness and may boost individual performance
- Employees are sharing their salary information with co-workers anyway and it may be incomplete or overstated

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History

- Company-wide salary information was historically not disclosed.
- Workplace norms often discouraged frank and open conversations among employees about salaries.
- Lack of transparency made perceiving pay discrimination more difficult than other discrimination.

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Correcting Historical Discrepancies

Ledbetter v. Goodyear Tire & Rubber Co. (550 U.S. 618)

- Effectively barred individuals from suing over pay discrimination, even when they could not have discovered it any sooner.

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Pay Transparency Laws

- Several states now require employers to disclose pay ranges in job advertisements.
- Several states enacted laws preventing employers from asking applicants about their salary history and from banning employees from discussing salary in the workplace.

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Salary History Inquiries

- In 2018, Massachusetts became the first state to pass an equal pay law banning employers from inquiring about salary history before making a job offer.
- In addition, employers cannot retaliate against employees who discuss their own compensation level with others.
- Connecticut and New York followed suit on January 1, 2019 and January 6, 2020, respectively.

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Massachusetts

- Massachusetts Equal Pay Act (July 2018)
  - Prohibits employers from asking applicant salary history unless it is voluntarily disclosed;
  - Prohibits employers from banning employee wage discussion;
  - Requires that employers provide equal pay for comparable work.
- Massachusetts has not implemented pay transparency laws requiring disclosures in job postings.

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Massachusetts

- An employee or applicant may file a claim for violation of the MEPA in court or file a complaint with the Attorney General's Office within three years of the alleged violation.

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Massachusetts

- For purposes of unequal pay claims, a violation occurs:
  - when a discriminatory compensation decision or other practice is made,
  - when an employee becomes subject to a discriminatory compensation decision or other practice, or
  - when an employee is affected by the application of a discriminatory compensation decision or other practice, including each time wages are paid.

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Connecticut

- Public Act 21-30 (October 2021)
  - Employers must disclose wage range for all vacant positions to current employees and applicants.
  - Applies to transfers and promotions.

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Connecticut

- Covered employers
  - Any entities within CT using the services of one or more employees.
- Covered employees
  - Applicants and employees who apply for or work for a CT employer even if they work remotely from another state.

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Connecticut

- Wage range
  - The range of wages an employer anticipates relying on when setting wages for a position.
    - may include
      - reference to any applicable pay scale,
      - previously determined range of wages for the position,
      - actual range of wages for employees currently holding comparable positions or
      - the employer's budgeted amount for the position.

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Connecticut

- Employers prohibited from inquiring about an applicant's salary history.
- An employee or prospective employee may bring a civil action for claimed violations within two years of a violation.
  - A successful claimant may obtain compensatory damages, attorneys' fees and costs, and punitive damages.

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Connecticut

- Equal pay law
  - an employee alleging pay discrimination based on sex must prove that the employer pays employees of the opposite sex a lower wage for *comparable* work that requires *comparable* skill, effort, and responsibility under similar working conditions.
  - Employees no longer need to prove that the work or skill was equal.

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New York City

- Covered employers must provide a good faith salary range for any posting for a new job, promotion or transfer opportunity for positions based in New York City.
- Covers remote jobs and part-time jobs.

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New York City

- Covered employers
  - Any employer with at least four employees (including the owner) where at least **one** employee works in NYC.

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New York City

- Good faith range
  - The salary range the employer honestly believes, at the time they are listing the advertisement, that they are willing to pay the successful applicant.
  - Must provide lower and upper estimates for the salary.

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New York City

- Posting
  - Any written description of an available job, promotion or transfer opportunity that appears in any medium, including internet advertising, internal bulletin boards, newspapers, and printed flyers distributed at job fairs.

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New York City

- Penalties
  - Anonymous reports can be submitted to the NYC Commission on Human Rights.
  - Employers found in violation will have 30 days to redress. If employer fails to redress, it may be liable for up to $250,000.
  - Current employees have the right to sue their current employer for violations.
  - Applicants are not currently authorized to sue a prospective employer.

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Westchester County

- Local Law 2022-119 (November 2022)
  - Requires employers to post the salary range for any job, promotion, or transfer opportunity.
  - Applies to positions that are required to be performed, in whole or in part, in Westchester County.

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Westchester County

- Covered employers
  - Employers with at least four employees located in Westchester County.
  - Independent contractors not included in reaching the four-employee threshold.
- Penalties
  - Violations are subject to penalties of up to $250,000.

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New York State

- Pending legislation has passed, but not yet signed by the Governor. Will go into effect 270 days after signing.
  - Will require employers with four or more employees to disclose compensation or range of compensation to applicants and employees upon posting an employment opportunity for work that can or will be performed, at least in part, in New York.
  - For a commission-only position, the disclosure obligation is satisfied by making a general statement that compensation will be based on commission.

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New York State

- Range of compensation
  - The minimum and maximum annual salary or hourly wage that the employer believes it would pay for the position.

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New York State

- Any person claiming to be aggrieved by a violation can file a complaint with the NYS Department of Labor.
- Penalties
  - Up to $1,000 for first violation, $2,000 for second violation, and $3,000 for third and subsequent violations.

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New York State

- State law already prohibits employer inquiries into salary history during the hiring process and banning employee discussion of pay at work.

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Strategy for Compliance

- Setting ranges
  - Start the process by conducting internal pay audit to ensure consistency.
  - Document the objective factors considered in creating ranges.
- Training
  - Managers, recruiters, and HR professionals must understand their obligations when creating job postings and hiring.

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Strategy for Compliance

- Prepare and train managers to address inquiries from current employees about salary disclosures that may not be in line with what they are getting paid

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Paid Family Medical Leave Act

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December 9, 2022

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Objectives

- Discuss the basics of Connecticut's Paid Family Medical Leave Program ("CT PFML" or "PFML");
- Discuss PFML's interaction with other leave laws;
- Discuss claim administration and employer obligations;
- Identify potential legal issues in application and implementation of PFML.

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Changes to CT FMLA

- In June 2019, significant amendments were made to the CT FMLA, with key changes effective **January 1, 2022**.
- In tandem with these amendments, the Connecticut Paid Family and Medical Leave (CT PFML) Program was created to provide wage replacement for eligible employees who take leave for a permitted purpose under the CT FMLA.
- It is anticipated that the Connecticut Labor Commissioner will adopt regulations to implement these amendments (including CT PFML) by January.

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What is CT PFML?

- Paid leave benefit funded by employees via a mandatory payroll deduction.
  - Employers are responsible for making sure the deductions are made in a timely manner. Otherwise, the employer will be responsible for the deduction amount, penalties and interest.
  - Employers can choose to contribute on behalf of their employees, however this is a taxable benefit.
- The rate of the deduction is initially capped at 0.5%.
- The deduction applies to each employee's wages up to the Social Security contribution base ($142,800 in 2021).
- Benefits will be paid to employees starting Jan. 1, 2022.

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Who Administers the CT PFMLA?

- The Connecticut Paid Leave Authority.
- Responsibilities include:
  - Administering claims for paid leave benefits;
  - Establishing the employee contribution rate / receiving contributions;
  - Approving and auditing private plans;
  - Developing policies and procedures.
- The Authority's website is a great resource for employers.
- Note: challenges by an employee to eligibility and the amount of leave granted will be raised with the CT Department of Labor, not the Paid Leave Authority. There is no mechanism for employers to challenge an award of PFML benefits.

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Private Plans

- Must offer the same or better benefits as the public plan.
- Cannot cost employees more than the public plan contribution (.5%).
- Must demonstrate ability to administer claims and benefits.
  - Bond posting requirement.
- Must be approved by majority vote of all eligible employees who work in CT.
- CT Paid Leave Authority must approve the plan.

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Employer Coverage

- Beginning January 1, 2022, CT FMLA (and PFML) will apply to employers who have one or employees working in CT.
- Applies to sole proprietors and self-employed individuals who opt-in, but they must remain in the plan for at least 3 years.
- Does not apply to:
  - Municipalities, unless they have “covered public employees”
  - Local or regional boards of education, unless they have “covered public employees”
  - Non-public elementary or secondary schools.
- “Covered public employees” = unionized employees collectively bargain to be included, thereby including both unionized and nonunionized employees.

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Employee Eligibility for PFML

- Employee must work in CT, have earned wages of at least $2,325 in the "base period," and be employed by a covered employer*
  - No hour or length of service requirement for PFML.
  - Employee may meet the wage threshold by combining income from multiple employers.
- Five categories of employees are specifically excluded from coverage.

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What Does It Mean to Work in CT?

- Basic rule of thumb: if the employee is subject to CT unemployment insurance, then they are "working within the state."
- If not subject to CT UI, then:
  - If the services are localized (i.e., performed entirely) within Connecticut, then the employee will be considered to be working in CT;
  - If the services are not localized: if the base of operations is in Connecticut and some of the services are performed within Connecticut, then the employee will be considered to be working in CT;
  - If the work is not localized and there is no base of operations: if the employee performs some of the services within CT and receives direction and control from CT, then the employee will be considered to be working in CT;
  - If and only if there is no place of direction and control, no localized services, and no base of operation: if the employee resides in CT, then the employee will be considered to be working in CT.

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What About Job Protection?

- PFML does not provide any job protection.
- Employee must qualify for job-protected leave under federal FMLA or CT FMLA.

Federal FMLA job-protected leave	Current CT FMLA job-protected leave	CT FMLA job-protected leave (as of 1/1/2022)
Employed by a covered employer for at least 12 months; and Worked at least 1250 hours in the 12 months immediately preceding the requested leave.	Employed by a covered employer for at least 12 months; and Worked at least 1,000 hours during the 12 months immediately preceding the requested leave.	Employed by a covered employer for at least 3 months. No hours worked requirement.

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Unemployment Tax "Non-Charge"

- Creates a "non-charge" against an employer's unemployment tax experience rate when an employee's separation is due to the return of someone who was on bona fide FMLA leave.
    - In other words, employers will not be penalized for complying with the law – employer can lay off an employee who was temporarily filling the job of an employee on job-protected FMLA leave without increasing employer's unemployment tax experience rate.

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Length of Leave

Federal FMLA job-protected leave	CT FMLA job-protected leave (as of 1/1/2022)	CT PFML paid leave benefits (as of 1/1/2022)
Up to 12 weeks in a 12-month period for all leave reasons except: • Employees can take up to 26 weeks in a 12-month period for military caregiver leave	Up to 12 weeks in a 12-month period for all leave reasons except: • Up to 26 weeks in a 12-month period for military caregiver leave • Up to 12 days (out of the 12 weeks) can be used for family violence leave • Up to 2 additional weeks of leave for incapacity due to pregnancy Recall that currently, job-protected leave under CT FMLA is 16 weeks in a 24-month period.	Up to 12 weeks in a 12-month period for all reasons including military caregiver leave except: • Up to 12 days of the 12 weeks may be used for income replacement during family violence leave • Up to 2 additional weeks of income replacement available during leave for incapacity due to pregnancy

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Changes to Covered "Family Members"

- Under federal FMLA, "family member" will still be defined as a parent, spouse or child who is under 18 or who is over 18 and has a disability.
- Currently, a "family member" for purposes of CT FMLA is a spouse, child, parent (including in-laws).
- As of January 1, 2022, "family member" will include: spouse, child, parent (including in-laws), grandparent, grandchild, sibling, and *any other blood relative or close association equivalent to family*.

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"Any other blood relative or close association equivalent to family"

- Any person with whom the employee has a significant personal bond that is like a family relationship, regardless of biological or legal relationship, e.g.:
  - Foster child in the same home in which the employee was a foster child for several years and with whom the employee has maintained a sibling-like relationship, despite the lack of a biological or legal relationship;
  - A friend of the family in whose home the employee lived while she was in high school and whom the employee therefore considers to be family, despite the lack of a biological or legal relationship;
  - An aunt or uncle who relies on the employee for unpaid care and has maintained a strong and enduring relationship with the employee as typically seen between individuals and their parents, grandparents, or siblings;
  - A child of an employee's former partner who lived with the employee for several years and maintains a parent-like relationship with the employee; or
  - A person with whom the employee lived for several years and considers to be family, sharing financial responsibilities of the household and one another's common welfare, despite not sharing a romantic, legal, or blood relationship.

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Qualifying Reasons for PFML

- Birth of a child of the employee or placement of a child with the employee for adoption or foster care ("bonding leave");
- Need to care for a family member with a serious health condition ("caregiver leave");
- Employee's own serious health condition, including:
  - Serving as an organ or bone marrow donor;
  - Pregnancy.
- Qualifying exigency related to employee's spouse, son, daughter, or parent being on active duty or having been notified of impending call or order to active duty in the armed forces; or
- Reasons related to family violence (up to 12 days per year).

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Can Employers Request Medical Documentation?

- An employee who is seeking job-protected leave under the CT FMLA and/or federal FMLA must apply to their employer and provide all required documentation, including medical certification, if applicable.
- An individual who is seeking income replacement benefits under the CT Paid Leave Program must apply to the CT Paid Leave Authority and provide all required documentation, including medical certification, if applicable.
    - The CT Paid Leave Authority will not share the medical records it receives with the employer.

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How do employees access paid leave benefits?

- Employee submits application with the CT Paid Leave Authority;
- The Authority validates the employee's eligibility for benefits and the reason the employee is seeking the benefits;
- The Authority calculates the employee' benefit amount;
- The Authority, the employee, and the employer communicate in order to validate the employee's actual covered absences, and to account for any offsets based on employer-provided PTO;
- The Authority issues the benefit payments.

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Interaction with PTO, STD and LTD

- Employers may require employees to use PTO prior to PFML, but employees must be allowed to keep at least 2 weeks of PTO.
- PFML benefits and employer-provided benefits can be paid simultaneously provided that the total amount of wages does not exceed 100% of the employee's regular wages.
- Generally, STD and LTD insurance policies require that state-provided paid leave benefits are utilized before an employee can qualify for benefits under the STD or LTD policy.

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Interaction with Other Leave Laws

Laws Providing Job-Protected Leave	Laws Providing Income Replacement During Leave
Federal FMLA (50+ employees)	CT PFML (1+ employees working in CT) • Eff. 1/1/22 as to income replacement
CT FMLA • Currently, 75+ employees • 1/1/22, 1+ employees	Workers' Compensation • For covered on-the-job injuries/illnesses
ADA (15+ employees) / CFEPA (3+ employees) • Leave may be a reasonable accommodation	
Federal and State Pregnancy Discrimination Act (15+ employees / 3+ employees) • Leave may be a reasonable accommodation	

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Case Study #1

- Employer has 100 employees working in CT.
- Employee has worked full-time for Employer for 10 years and has 4 weeks of accrued paid sick time and 2 weeks of accrued vacation time.
- Employer has a policy requiring employees to exhaust all available PTO (except for 2 weeks) prior to seeking PFML.
- Employee injures his hand in a non-work-related accident and needs to be out of work for 8 weeks.
- Is Employee eligible for job-protected leave?
  - If so, under what statutes and when does the job-protected leave start?
- Is Employee eligible for income replacement?
  - If so, from whom and when do the benefits start?

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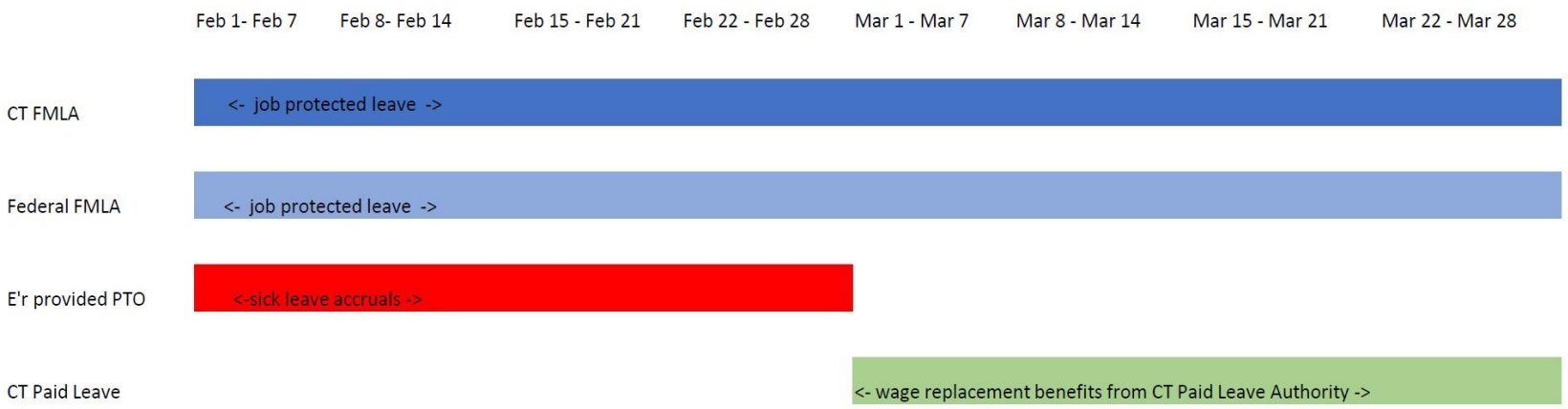
Case Study #1

- Employee is eligible for CT FMLA, federal FMLA, and CT PFML



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Case Study #2

- Employer has 20 employees working in CT.
- Employee has worked part-time for Employer for 2 years and has 6 days of accrued paid sick time and 3 weeks of accrued vacation time.
- Employer has a policy requiring employees to exhaust all available PTO (except for 2 weeks) prior to seeking PFML.
- Employee breaks her leg while running with her dog and needs to be out of work for 10 weeks.
- Is Employee eligible for job-protected leave?
  - If so, under what statutes and when does the job-protected leave start?
- Is Employee eligible for income replacement?
  - If so, from whom and when do the benefits start?

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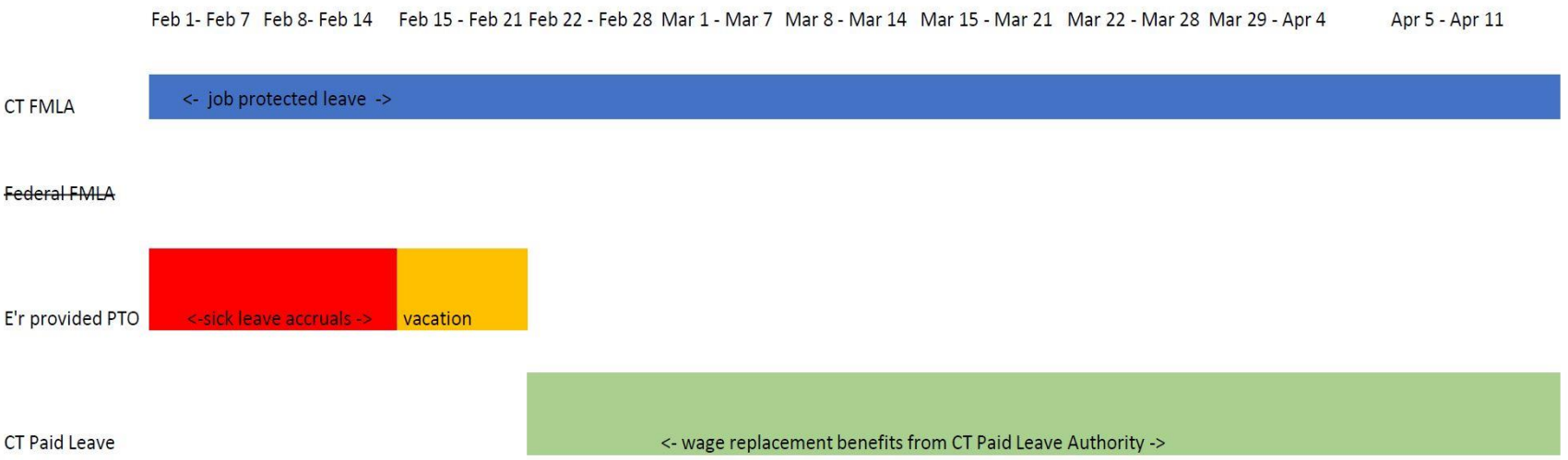
Case Study #2

- Employee is eligible for CT FMLA and PFML, but not federal FMLA.



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Process for Addressing Employee Requests for Leave

- Every time an employee asks for time off from work for a potentially FMLA-qualifying reason, consider:
  - Is the employee eligible for job-protected leave under one of more statutes?
  - Is the employee eligible for any income replacement while on leave?

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What Happens If an Employer Interferes with an Employee's Leave Rights?

- Aggrieved employees may file a complaint with the Labor Commissioner.
  - 180-day statute of limitations, unless good cause exists for the late filing.
  - Process is similar to proceedings at the CHRO.
- However, aggrieved employees also have the right to bring a civil action without first filing an administrative complaint.
  - 180-day statute of limitations.

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Important Upcoming Dates

- "Catch up" deductions must be remitted to the Authority by September 30.
- Quarter 3 payments are due October 31.
- Winter 2021 – Employees can begin submitting applications for paid leave benefits.
- January 1, 2022 benefit payments begin for eligible employees on approved leave.
- July 1, 2022 – Covered employers must provide written notice to eligible employees of their entitlement to PFML at the time of hire and annually thereafter.

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Recent Developments in Employee Benefits Law

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December 9, 2022

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Retirement Plan Dollar Limits for 2023

Dollar Limit	2023	2022
Elective Deferrals [IRC § 402(g)(1)]	**$22,500**	$20,500
Age 50 Catch-Ups [IRC § 414(v)(2)(B)(i)]	**$7,500**	$6,500
Annual Compensation (Non-Governmental Plans) [IRC § 401(a)(17)]	**$330,000**	$305,000
Annual Compensation (Certain Governmental Plans) [IRC § 401(a)(17)]	**$490,000**	$450,000
DC Annual Additions [IRC § 415(c)(1)(A)]	**$66,000**	$61,000
DB Annual Benefit [IRC § 415(b)(1)(A)]	**$265,000**	$245,000
HCE Threshold [IRC § 414(q)(1)(B)]	**$150,000**	$135,000
Key EE Threshold [IRC § 416(i)(1)(A)(i)]	**$215,000**	$200,000
OASDI Taxable Wage Base	**$160,200**	$147,000

Sources: IRS Notice 2022-55 and IRS News Release IR-2022-188 (10/21/2022); IRS Chart, "Cost-of-Living Adjustments for Retirement Items", available at https://www.irs.gov/pub/irs-tege/cola-table.pdf; SSA Fact Sheet (10/13/2022).

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Implications for Retirement Plan Sponsors

- Possible financial impacts include:
  - Higher compensation, DC annual addition and DB annual benefit limits could increase plan's cash cost
  - Increases in elective deferral and catch-up limits could increase matching contributions, depending on the matching formula
- Communicate 2023 limits to plan participants before 1/1/2023
- Possible impacts on nondiscrimination and top-heavy testing
  - Ask TPA or actuary to develop early *pro forma* test results for 2023

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Retirement Plan Amendments Due by PYE 2022

- Discretionary Changes: Retirement plans must be amended by the end of PY 2022 to reflect any discretionary changes (e.g., plan design changes, changes in plan administration that affect the plan document, or collectively-bargained changes) implemented during PY 2022
- Plan Termination: A retirement plan terminating during PY 2022 must be amended by the termination date to reflect applicable law as of that date
- Section 457(b) Plans of *Tax-Exempt* Employers: Plans must be amended by the end of PY 2022 to reflect applicable provisions (e.g., the new RMD rules) of the SECURE Act (will the IRS extend this deadline?)
- RAL Amendments: 401(a) and 403(b) plans must be amended by 12/31/2022 (*not* PYE 2022) to reflect applicable amendments listed in IRS Notice 2020-83

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Retirement Plan Amendments Due by 12/31/2025 or Later

- IRS Notice 2022-33 (8/3/2022) and IRS Notice 2022-45 (9/27/2022) extended, from the end of PY 2022 to 12/31/2025 (with later deadlines for governmental plans), the deadline to amend retirement plans and IRAs to reflect applicable provisions of the following federal legislation:
  - SECURE Act (12/20/2019), all applicable provisions
  - CARES Act (3/27/2020), provisions waiving 2020 RMDs from DC plans and IRAs, penalty-free coronavirus-related distributions, COVID-19 plan loan relief
  - Relief Act (12/27/2019), provision allowing penalty-free disaster distributions
  - Miners Act (12/20/2019), provisions lowering the minimum age for in-service distributions under qualified pension plans (DB and MPP) from 62 to 59½ and under governmental 457(b) plans from 70½ to 59½

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Chart of Retirement Plan Amendment Due Dates

Plan Amendment Category	12/31/2025 Deadline for Nongovernmental Plans	Further Extended Deadline for Governmental Plans*	Last Day of the 2022 PY Deadline (Unextended Deadline)
SECURE Act	401(a) plans (401(k), PS, DB, MPP plans, etc.)	401(a) plans (401(k), PS, DB, MPP plans, etc.)	457(b) plans of tax-exempt employers
CARES Act			
Relief Act	403(b) plans of tax-exempt employers	403(b) plans of public schools	
Miners Act	IRAs	457(b) plans	N/A

*Note: For governmental 401(a) and 403(b) plans, the further extended plan amendment deadline is 90 days after the close of the third regular legislative session of the legislature with authority to amend the plan beginning after 12/31/2023.

For governmental 457(b) days, the further extended plan amendment deadline is the later of (1) 90 days after the close of the third regular legislative session of the legislature with authority to amend the plan beginning after 12/31/2023, or (2) if applicable, the first day of the PY beginning more than 180 days after the date the IRS notifies the plan sponsor that the plan is not being administered in compliance with IRC § 457(b).

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IRS Expands Determination Letter Program to Individually-Designed 403(b) Plans

- IRS Notice 2022-40 (11/7/2022) expands the IRS's determination letter (DL) program, for the first time ever, to individually-designed 403(b) plans
- 403(b) plan sponsors may submit DL applications to the IRS as follows:
  - For initial plan determination:

If Plan Sponsor's EIN Ends In:	A DL Application May Be Submitted Beginning On:
1, 2 or 3	June 1, 2023
4,5, 6 or 7	June 1, 2024
8,9 or 0	June 1, 2025

  - Determination upon plan termination: Beginning on June 1, 2023, a plan sponsor may submit a DL application upon plan termination without regard to the above submission schedule (but must submit within one year after plan termination)

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IRS Opens its Cycle 2 Opinion Letter Program to Pre-Approved 403(b) Plan Providers

- Pre-approved 403(b) plan providers can obtain IRS approval (in the form of in IRS Opinion Letter) as to whether the form of their 403(b) plan documents meets IRC § 403(b) requirements
  - Submission period for 403(b) pre-approved plan providers to submit applications for Cycle 2 Opinion Letters began on 5/2/2022 and will end on 5/1/2023
- An employer that adopts a provider's pre-approved 403(b) plan document generally has assurance that its plan document complies with IRC § 403(b)
  - Adopting employers must adopt their Cycle 2 pre-approved 403(b) plan documents within a 2-year adoption period (to be announced in the future by the IRS)

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IRS Guidance Signals That Employers Will Have Less Discretion Over Discretionary Matching Contributions

- Employers that make flexible discretionary matching contributions under Cycle 3 401(k) plans which they adopted by 7/31/2022 must satisfy the following requirements to ensure that those contributions will be made under a "definite predetermined allocation formula":
  - Before making any discretionary matching contributions to the plan, employers must give written instructions to the plan administrator or trustee describing:
    - How the contribution will be allocated to participants (e.g., as a uniform percentage of elective deferrals or a flat dollar amount);
    - The computation period(s) to which the matching contribution formula applies; and
    - If applicable, each business location/classification subject to different matching contribution allocation formulas.
  - Within 60 days after making the last discretionary matching contribution for the plan year, employers must send a summary of the above instructions to plan participants

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IRS Guidance Signals That Employers Will Have Less Discretion Over Discretionary Matching Contributions (cont'd.)

- Guidance the IRS gave to pre-approved 403(b) plan providers applying for Cycle 2 Opinion Letters provides that, for a discretionary matching contribution formula to satisfy the "definite predetermined allocation formula" requirement, the 403(b) plan document must address the following items:
  - The matching computation period, such as the payroll period or plan year, must be identified, in order to eliminate ambiguity over the need for a true-up match;
  - There must be a provision regarding the possible need for a true-up match at plan year-end where the employer makes matching contributions more often than the matching computation period; and
  - There must be a definite allocation formula for the discretionary match, such as "a discretionary match shall be allocated to each participant at a uniform rate, for example, 100% of elective deferrals up to a uniform deferral percentage of compensation"
- Employers can still have discretion over the matching contribution amount, the rate at which elective deferrals are matched, and any limit on the elective deferrals that are matched

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IRS Offers New Pre-Examination Compliance Program

- In June 2022, IRS launched a pre-examination (audit) retirement plan compliance program
- IRS sends plan sponsor a letter stating that its plan was selected for an upcoming examination (audit)
  - IRS letter gives the plan sponsor a 90-day window to review its plan document and operations to determine whether they meet current tax law requirements

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IRS Offers New Pre-Examination Compliance Program (cont'd.)

- If plan sponsor finds plan document or operational mistakes, then:
  - Plan sponsor may be able to self-correct the mistakes using the IRS's Employee Plans Compliance Resolution System (EPCRS) program
  - If the mistakes cannot be corrected using EPCRS, the plan sponsor can request a closing agreement with the IRS, and the IRS will use the Voluntary Correction Program (VCP) fee structure under EPCRS to determine the sanction amount that the plan sponsor will pay
- If IRS agrees with plan sponsor's conclusions and self-corrections, it will issue a closing letter; if not, IRS will conduct either a limited or full scope examination (audit) of plan sponsor's retirement plan

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IRS Relief from "Physical Presence Requirement" Set to Expire on 12/31/2022, Unless IRS Further Extends Relief

- IRS regulations require that certain signatures (e.g., a spouse's signature on a consent to a retirement plan participant's waiver of a QJSA) must be witnessed "in the physical presence" of a plan representative or notary public
- During the COVID-19 pandemic, the IRS has provided temporary relief from the physical presence requirement:
  - IRS Notice 2020-42: provided temporary relief through 12/31/2020
  - IRS Notice 2021-03: extended the temporary relief through 6/30/2021
  - IRS Notice 2021-40: further extended the temporary relief through 6/30/2022
  - IRS Notice 2022-27: further extended the temporary relief through 12/31/2022. If IRS does not offer further relief, the "physical presence requirement" resumes on 1/1/2023

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DOL Proposes Changes to VFC Program, Including Self-Correction of Delinquent Participant Contributions and Loan Payments

- DOL's Voluntary Fiduciary Correction (VFC) Program (last updated in 2006) allows plan sponsors to apply to the DOL/EBSA to correct ERISA fiduciary breaches affecting employee welfare benefit and retirement plans
  - Current VFC Program does not allow plan sponsors to self-correct breaches (i.e., all breaches must be corrected via VFC Program application to DOL/EBSA)
  - The most common breaches corrected under the VFC Program are delinquent participant contributions and loan repayments to retirement plans (e.g., 401(k))
- On 11/18/2022, DOL proposed an updated version of the VFC Program, which for the first time ever, would allow plan sponsors to self-correct delinquent participant contributions and loan repayments, if certain conditions are met
  - Public comments are due by 1/20/2023; DOL will issue a notice in the Federal Register when the new VFC Program becomes available

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DOL Issues Final Rule Governing When ERISA Plan Fiduciaries May Consider ESG Factors in Selecting Investments and Exercising Shareholder Rights

- On 11/22/2022, the DOL issued a Final Rule under ERISA, clarifying that plan fiduciaries may consider climate change and other environmental, social and governance (ESG) factors when they make investment decisions and exercise shareholder rights, including voting on shareholder resolutions and board resolutions
    - Final Rule was published in the 12/1/2022 Federal Register and will become effective on 1/30/2023
- The new Final Rule overturns two previous Final Rules (published on 11/13/2020 and 12/16/2020) which essentially prohibited ERISA fiduciaries from considering ESG factors when selecting investments or exercising shareholder rights

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DOL Issues Final Rule Governing When ERISA Plan Fiduciaries May Consider ESG Factors in Selecting Investments and Exercising Shareholder Rights (cont'd.)

- The new Final Rule does not change two important ERISA principles:
  - First, the duties of prudence and loyalty require ERISA plan fiduciaries to focus on relevant risk-return factors and not subordinate participants' and beneficiaries' interests (such as by sacrificing investment returns or assuming additional investment risk) to objectives unrelated to providing plan benefits
  - Second, the fiduciary duty to manage plan assets that are shares of stock includes the management of appurtenant shareholder rights, such as the right to vote proxies

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DOL Issues Final Rule Governing When ERISA Plan Fiduciaries May Consider ESG Factors in Selecting Investments and Exercising Shareholder Rights (cont'd.)

- The new Final Rule changes the current Final Rule in ways including these:
  - ESG Factors are Allowed: A fiduciary's determination regarding an investment or investment course of action must be based on factors that the fiduciary reasonably determines are relevant to a risk/return analysis and factors may include the economic effects of ESG factors on the particular investment or investment course of action
  - QDIAs: The same standards apply to QDIAs as to investments generally
  - Old "Tiebreaker" Test: Replaced with a new standard that requires the fiduciary to prudently conclude that competing investments, including ESG investments, equally serve the plan's financial interests over the appropriate time horizon

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IRS Delays Final RMD Regulations

- IRS Notice 2022-53 (10/7/2022): Provides that final RMD regulations under IRC § 401(a)(9) will apply no earlier than the 2023 distribution calendar year (i.e., a calendar year for which an RMD is required)
  - Proposed RMD regulations that the IRS issued on 2/24/2022 had said that the final RMD regulations would apply to 2022 and later distribution calendar years
  - It is possible that the effective date of final RMD regulations could be delayed beyond 2023, if Congress makes further changes to the RMD rules (e.g., SECURE Act 2.0) or if the IRS' final RMD regulations significantly change the proposed RMD regulations
  - Until the IRS issues final RMD regulations, plans and taxpayers may rely upon existing final RMD regulations and a good-faith interpretation of the RMD changes made by the SECURE Act (enacted on 12/20/2019 and generally effective as of 1/1/2020) as set forth in the proposed RMD regulations

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IRS Gives Relief from 10-Year RMD Rule

- IRS Notice 2022-53 (10/7/2022): Also provides relief to DC plans (and IRAs) that failed to pay certain post-death RMDs in 2021 or 2022 under the SECURE Act's new 10-year RMD payment rule and gives excise tax relief to affected individuals
- Under the 10-year RMD payment rule, if a DC plan participant (or IRA owner) with a "designated beneficiary" dies after 12/31/2019, whether before, on, or after, his/her required beginning date (RBD), his/her entire remaining interest must be distributed by the end of the calendar year that includes the 10th anniversary of his/her death

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IRS Gives Relief from 10-Year RMD Rule (cont'd.)

- The proposed RMD regulations which the IRS issued on 2/24/2022 offered an unexpected interpretation of how the new 10-year RMD payment rule would work when a DC plan participant (or IRA owner) dies on or after his/her RBD
  - The proposed RMD regulations would require post-death RMDs under the 10-year rule to begin the year after the DC plan participant's (or IRA owner's) death if the individual died on or after his/her RBD
  - The IRS explained that this was required because both the "at least as rapidly" rule and the 10-year RMD payment rule apply simultaneously

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IRS Gives Relief from 10-Year RMD Rule (cont'd.)

- Many were caught off guard by the IRS's interpretation, and thought that the new 10-year RMD payment rule would apply like the existing 5-year rule, which allows delaying all RMDs until the end of the 5th year after the plan participant's/IRA owner's death
  - So, many DC plans and IRAs did not pay post-death RMDs in 2021 or 2022 to beneficiaries of plan participants/IRA owners who died in 2020 or 2021 after reaching their RBDs
  - Under the IRS proposed RMD regulations, this would violate the RMD rules and could trigger the 50% excise tax under IRC § 4974

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IRS Gives Relief from 10-Year RMD Rule (cont'd.)

- In response to these general concerns, IRS Notice 2022-53 provides that the IRS will not treat DC plans or IRAs as violating IRC § 401(a)(9) merely because they did not make "specified RMDs"
  - Also, individuals who did not take "specified RMDs" will not be subject to the 50% excise tax (and anyone who paid the tax can get a refund)
  - The term "specified RMD" generally means an RMD that should have been made under the new 10-year rule to the beneficiary of a DC plan participant/IRA owner who died in 2020 or 2021 after reaching his/her RBD

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Selected Health Plan Dollar Limits for 2023

Dollar Limit	2023	2022
Health FSA Contributions		
▪ Maximum Contribution	$3,050	$2,850
▪ Carryover Maximum	$610	$570
HSA Contributions		
▪ HDHP Self-Only	$3,850	$3,650
▪ HDHP Family	$7,750	$7,300
▪ Age 55+ Catch-Up	$1,000	$1,000
HDHP		
▪ Maximum OOP		
➢ Self-Only	$7,500	$7,050
➢ Family	$15,000	$14,100
▪ Minimum Deductible		
➢ Self-Only	$1,500	$1,400
➢ Family	$3,000	$2,800

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Cafeteria Plan Amendment Deadline for Optional CAA Changes

- Consolidated Appropriations Act of 2021 (CAA, enacted 12/27/2020) provided temporary COVID-19-related relief for health care FSAs and dependent care FSAs
- Expanded Carry-Over or Grace Period:
  - Carry-Over: Health care FSAs *and* dependent care FSAs with carry-over provisions could carry-over any unused funds from the 2020 plan year to the 2021 plan year, and from the 2021 plan year to the 2022 plan year
  - Grace Period: *Or*, health care FSAs and dependent care FSAs with grace period rather than carry-over provisions, could extend their grace periods associated with their 2020 and/or 2021 plan years from up to 2½ months after plan year-end to up to 12 months after plan year-end

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Cafeteria Plan Amendment Deadline for Optional CAA Changes

- Post-Termination Reimbursements for Health Care FSAs: Health care FSAs could permit employees who terminated employment or otherwise ceased participating during the 2020 or 2021 plan year to keep incurring expenses and receiving reimbursements until the end of the year in which participation ended
- Mid-Year Election Change Flexibility: Ordinarily, cafeteria plan benefit elections are irrevocable during a plan year, unless a participant experiences an IRS-approved permitted election change event (e.g., change in family status event).
    - CAA permitted cafeteria plans to allow prospective health care FSA and dependent care FSA election changes for *any* reason during plan years ending in calendar year 2021

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Cafeteria Plan Amendment Deadline for Optional CAA Changes

- Extended Coverage for Dependents Who Age-Out
  - CAA increased the maximum age limit for reimbursement of dependent care FSA expenses from 12 to 13 for calendar year 2020
  - CAA also allowed dependents who aged-out during 2020 to carry over amounts from the 2020 plan year to the 2021 plan year
- Cafeteria Plan Amendment Deadline
  - Although all of these CAA changes for health care FSAs and dependent care FSAs were optional, plan sponsors must adopt formal cafeteria plan amendments reflecting and optional changes that they chose to implement by the last day of the first plan year following the plan year in which such change became effective
  - For example, any optional changes that became effective during calendar plan year 2021 must be reflected in a cafeteria plan amendment adopted no later than 12/31/2022

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IRS Fixes the ACA's "Family Glitch" and Adds Another Cafeteria Plan Election Change Event

- The ACA "Family Glitch"
  - The ACA provides individuals who do not have "affordable" minimum value coverage through their employer-sponsored group health plan (GHP) a subsidy in the form of a premium tax credit (PTC) for purchasing coverage on the Marketplace Exchange
  - For purposes of PTC eligibility, the GHP's "affordability" determination was based on whether the lowest-cost, employee (self)-only coverage offered under the GHP did not exceed 9.5% (as adjusted) of household income
    - If employee (self)-only coverage offered under the GHP was "affordable", then both the employee *and* the employee's family members were ineligible for the PTC
    - This preclusion of family members from PTC eligibility is known as the "family glitch"

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IRS Fixes the ACA's "Family Glitch" and Adds Another Cafeteria Plan Election Change Event (cont'd.)

- Fixing the ACA "Family Glitch"
  - IRS recently issued final Regulations (effective on 12/12/2022) that eliminate the "family glitch", beginning in 2023, by basing the "affordability" of employer-sponsored GHP coverage for an employee's family members on the cost of *family* GHP coverage, rather than on employee (self)-only GHP coverage
    - Specifically, the GHP's "affordability" will be based on whether the cost for *family* coverage does not exceed 9.5% (as adjusted) of household income
    - Thus, family members who are offered unaffordable *family* coverage under the employer's GHP would become eligible for the PTC for coverage purchased on the Marketplace Exchange

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IRS Fixes the ACA's "Family Glitch" and Adds Another Cafeteria Plan Election Change Event (cont'd.)

- Adding a New Cafeteria Plan Election Change Event: In conjunction with its final Regulations fixing the ACA "family glitch", the IRS issued Notice 2022-41, which expands the list of cafeteria plan election change events, starting in 2023
  - Under the new election change event rule, cafeteria plans (both calendar and non-calendar plan year plans) may permit employees to prospectively revoke their employer-sponsored GHP coverage elections (but not their health care FSAs elections) mid-plan year specifically for family members who are enrolled in the unaffordable GHP coverage to allow those family members to purchase Marketplace Exchange coverage and claim the PTC
  - For example, a cafeteria plan could allow the employee, mid-plan year, to prospectively elect out of family GHP coverage and to elect into employee (self)-only GHP coverage
  - Employers making this optional change must amend their cafeteria plans by the last day of the plan year in which the change is implemented, although employers implementing the change in plan year 2023 must amend their cafeteria plans by the end of the 2024 plan year

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2022 Immigration Update

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December 9, 2022

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I-9 Updates

Recap: Purpose of I-9

- Verification of the employee's* employment eligibility
- Serves as a defense in case of audit or investigation

Make sure you have proper I-9 practices—if you don't have one set up, do so as soon as possible.

* An "Employee" for I-9 purposes excludes independent contractors.

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COVID-19-Related Flexibilities Extended through July 31, 2023

Exception *only* applies to employers & workplaces that are operating remotely due to COVID (but NOT to new employees who were hired for remote work only).

- May inspect documents remotely & retain copies within 3 business days → enter "COVID-19" as reason for physical inspection delay.
- Employer must physically inspect documents within 3 business days once normal operations resume → again enter "COVID-19" as reason for delay and add "documents physically examined" with the date of inspection to Section 2 or Section 3, as appropriate.
- We don't know if flexibilities will be extended further → use this time to complete physical inspections if those have not been completed.

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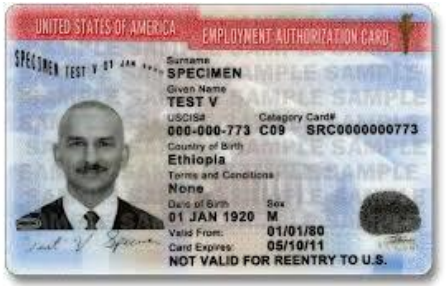
List A Documents – Automatic proof of ID, Status, & Employment Authorization (full list on USCIS website)

- U.S. Passport or Passport Card
- Green Card
- EAD Card
- Foreign passport with I-94 which allows employment incident to status (e.g. I-551 Stamp, L-2S, E-2S, certain Afghan & Ukrainian parolees)



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List B Documents

(see USCIS website for full list)

- U.S. Driver's License or State Photo ID
- Military ID
- Voter Registration Card
- School or medical records (for those under 18)
- **If List B Document is shown, then employee must also provide List C document**

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List C Documents

(see USCIS website for full list)

- Unrestricted Social Security Card
- Original or certified copy of U.S. Birth Certificate
- Certification of Birth Abroad


DEPARTMENT OF STATE

Certification of Birth Abroad

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New Categories Allowing Work Incident to Status

- **E & L Visas**
  - On January 30, 2022, USCIS and CBP began the use of new classes of admission (COA) codes for E and L nonimmigrant spouses (e.g., E-1S, E-2S, E-3S, and L-2S) to reflect work authorization incident to status based on the November 12, 2021 policy change by USCIS. USCIS noted that new I-94 admission records reflecting these codes may be presented for Form I-9 purposes as List C, #7 documents issued by the Department of Homeland Security.

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Ukrainian & Afghan Parolees

- Effective Nov. 21, 2022, Ukrainian and Afghan parolees, and their qualifying family members, with certain classes of admission are considered employment authorized incident to parole, which means that they do not need to wait for USCIS to approve their Form I-765, Application for Employment Authorization, before they can work in the United States. This updated policy guidance applies to the following individuals, if their parole has not been terminated:
  - Afghan parolees whose unexpired Form I-94, Arrival/Departure Record, contains a class of admission of “OAR.”
  - Ukrainian parolees whose unexpired Form I-94 contains a class of admission of “UHP”; and
  - Ukrainian parolees whose unexpired Form I-94 contains a class of admission of “DT” issued between Feb. 24, 2022, and Sept. 30, 2023, and indicates Ukraine as the country of citizenship on the document.

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USCIS & DOS Updates

The pandemic greatly affected USCIS/DOS operations

- USCIS & DOS are still filling job vacancies and training new hires—this has created huge delays but improving
  - Affected processing times for benefits applications (EADs in particular) but USCIS is working to adjudicate benefits within 6 months of filing.
  - Long wait times to obtain interview at US Consulates abroad (but getting better) → make sure employees plan ahead if they need to travel abroad and get visa stamp

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DOL & IER Updates

- Equal Pay Transparency Laws
  - May affect PERM ads and H-1B LCA Postings
  - Recommendation: include salary (or range) in newspaper ads and LCA postings
- Technology Platforms
  - Look at your recruitment platforms to make sure recruitment ads are not discriminatory
- 2 Safe Harbor Questions:
  - Are you now authorized to work?
  - Will you need sponsorship in the future?

→unless employee disclose possible future sponsorship, you can't go digging.

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CT For Ukraine Refugee Matching Program

Connecticut for Ukraine (CT4U) is a volunteer-based matching service in support of applicants for the United for Ukraine (U4U) program launched by the Biden administration in April 2022. The CT4U program facilitates the matching of qualified Ukrainian applicants with the most suitable sponsors in the state of CT through a simple online pre-screening process.

As a public service to US sponsors and Ukrainian refugees alike, we have established a partnership between the Honorary Consulate of Romania to Connecticut and the Immigration Practice Area of the Murtha Cullina LLP law firm, which will provide a free pre-screening form that collects information from sponsors and beneficiaries to match them.

Visit https://ctukraine.org

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