

Strafford

Presenting a live 90-minute webinar with interactive Q&A

Reconciling Overlapping Local, State and Federal Employment Laws

Paid Sick and Family Leave, Minimum Wage, Maternity Considerations, Fair Work Week, and More

WEDNESDAY, MARCH 20, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Mark S. Goldstein, Counsel, **Reed Smith**, New York

Michelle B. Muhleisen, Of Counsel, **Ogletree Deakins Nash Smoak & Stewart**, Denver

Hanna B. Raanan, Of Counsel, **Ogletree Deakins Nash Smoak & Stewart**, Costa Mesa, Calif.

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1.**

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-866-258-2056** and enter your PIN when prompted. Otherwise, please send us a chat or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the ^ symbol next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today's program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.

Reconciling Overlapping Local, State and Federal Employment Laws

Mark S. Goldstein

mgoldstein@reedsmith.com

Goals

- ✓ Overview of recent federal and state employment law trends
- ✓ Review Minimum Wage and Overtime trends
- ✓ Review Background Check trends
- ✓ Review Paid Leave trends
- ✓ Review Expansion of Discrimination and Accommodations laws
- ✓ Review Independent Contractor trends

Recent Trends:

Minimum Wage and Overtime Laws

U.S. Department of Labor

Minimum Wage Rates

Jan 1, 1978	\$2.65 for all covered, nonexempt workers
Jan 1, 1979	\$2.90 for all covered, nonexempt workers
Jan 1, 1980	\$3.10 for all covered, nonexempt workers
Jan 1, 1981	\$3.35 for all covered, nonexempt workers
Apr 1, 1990 ⁴	\$3.80 for all covered, nonexempt workers
Apr 1, 1991	\$4.25 for all covered, nonexempt workers
Oct 1, 1996	\$4.75 for all covered, nonexempt workers
Sep 1, 1997 ⁵	\$5.15 for all covered, nonexempt workers
Jul 24, 2007	\$5.85 for all covered, nonexempt workers
Jul 24, 2008	\$6.55 for all covered, nonexempt workers
Jul 24, 2009	\$7.25 for all covered, nonexempt workers

Minimum Wage Rates

State Survey - 2019

- **New York City:** ↑ from \$13 to \$15/hr (Jan. 2019)
- **Missouri:** ↑ from \$7.85 to \$8.60/hr (Jan. 2019)
- **California:** ↑ from \$11 to \$12/hr (Jan. 2019)
- **New Jersey:** ↑ from \$8.60 to \$10/hr (Feb. 2019)
- **D.C.:** ↑ from \$13.25 to \$14/hr (July 2019)
- **Delaware:** ↑ from \$8.75 to \$9.25/hr (Oct. 2019)

New York Labor Law Exemptions

Overtime Exemptions - Federal

Salary	Current	March 7, 2019 Proposal
Per Week	\$455.00	\$679.00
Annually	\$23,660.00	\$35,308.00



Salaries for Exec/Admin Exemptions

State Survey - 2019

- **New York City:** ↑ from \$975 to \$1,125/wk (Jan. 2019)
- **Colorado:** ↑ to \$444/wk (Jan. 2019)
- **California:** ↑ from \$880 to \$960/wk (Jan. 2019)
- **New Jersey:** ↑ from \$8.60 to \$10/hr (Feb. 2019)
- **Maine:** ↑ to \$634.61/wk (Jan. 2019)
- **Delaware:** ↑ from \$8.75 to \$9.25/hr (Oct. 2019)

Recent Trends: Background Checks

Overview

Ban the Box

- Employer may not ask for candidate criminal history until after job offer made
- Enacted in over 33 states, and 150 cities and counties



Ban the Box

State Survey

- **Massachusetts:** “Reform Bill” (Oct. 2018)
- **California:** Clarified prohibition on decisions based on expunged/sealed records (Jan. 2019)

Recent:

- Nov. 2018: U.S. Virgin Islands
- Jan. 2019: Spokane, Washington
- March 2019: Westchester County

Salary Bans

State Survey

- **California:** Eff. Jan. 2018
- **Massachusetts:** Eff. July 2018
- **Connecticut:** Eff. Jan. 2019
- **Hawaii:** Eff. Jan. 2019
- **Illinois:** Eff. Jan. 2019 (State Agencies)
- **Atlanta:** Eff. Feb. 2018 (City Agencies)

Recent Trends: **Paid Leave**

Paid Family Leave

State Survey

- **California:** Jan. 2019, Governor proposed 6-month paid parental leave
- **Colorado:** 2018 paid family leave bill likely to pass
- **Washington:** launching paid family leave on Jan. 1, 2020
- **Massachusetts:** paid family leave program launching Jan. 1, 2021
- **New York:** Paid Family Leave (10 weeks)



Paid Sick/Vacation Leave

State Survey

- **New Jersey:** Eff. Oct. 2018, required paid sick leave
- **Texas:** San Antonio
 - Eff. Jan. 2019, required paid sick leave
 - Eff. Aug. 2021, required for employers with 5+ EEs
- **Michigan:** Eff. Mar. 2019, amended paid sick leave law
- **New York:**
 - ESSTA (5 days)
 - Proposed Required PTO (10 days)

Recent Trends: Discrimination Laws and Accommodations Expansions

Equal Pay

State Survey

- **Hawaii:** Employers cannot prohibit EEs from disclosing wages (Eff. Jan. 2019)
- **Illinois:** Employers may not discriminate against African-American EEs in payment of wages (Eff. Jan. 2019)
- **Oregon:** State DOL adopted regulations implementing equal pay provisions (Eff. Jan. 2019)
- **Wyoming:** Increased penalties for willful violations of equal pay law (Eff. July 2019)
- **California:** requirement for female directors of publicly held corporations (Multiple Dates)

Sexual Harassment Laws

State Survey

- **Maryland:** New disclosure and waiver requirements for claims (Eff. Oct. 1, 2018)
- **California:** Required training by Jan. 1, 2020
- **Virginia:** New disclosure and confidentiality restrictions for claims (Eff. July 2019)
- **Delaware:** Required notices by July 1, 2019 and trainings by Dec. 31, 2019
- **New York:**
 - **State:** Required training by Oct. 9, 2019 and written policies by Oct. 9, 2018
 - **City:** Required training by April 1, 2020

Expansion of Protected Classes

State Survey (cont'd)

- **New York:**
 - *State:* N.Y. Human Rights Law prohibits gender identity or expression, including transgender status (Eff. Mar. 2019)
 - *City:* Employers cannot discriminate on the basis of sexual or reproductive health decisions (Eff. May 2019)

Expansion of Protected Classes

State Survey

- **New Jersey:** Added breastfeeding as protected class (Jan. 2019)
- **Vermont:** Expands protections to crime victims (Eff. July 2018)
- **Missouri:** Sex stereotyping recognized as prohibited sex discrimination (Eff. Feb. 2019)
- **Oregon:** Portland – religious discrimination includes “non-religion” (Eff. March 2019)

Medical Marijuana

State Survey

- **Michigan:** Personal possession of marijuana permitted. Employers can prohibit use at work. (Eff. Dec. 2018)
- **Missouri:** Permission to use medical marijuana for qualifying conditions. Employers can prohibit use at work. (Eff. Dec. 2018)
- **Maine:** Medical marijuana permitted to treat medical diagnosis with written certification. Employers may not discriminate against ee for use outside of work. (Eff. Dec. 2018)

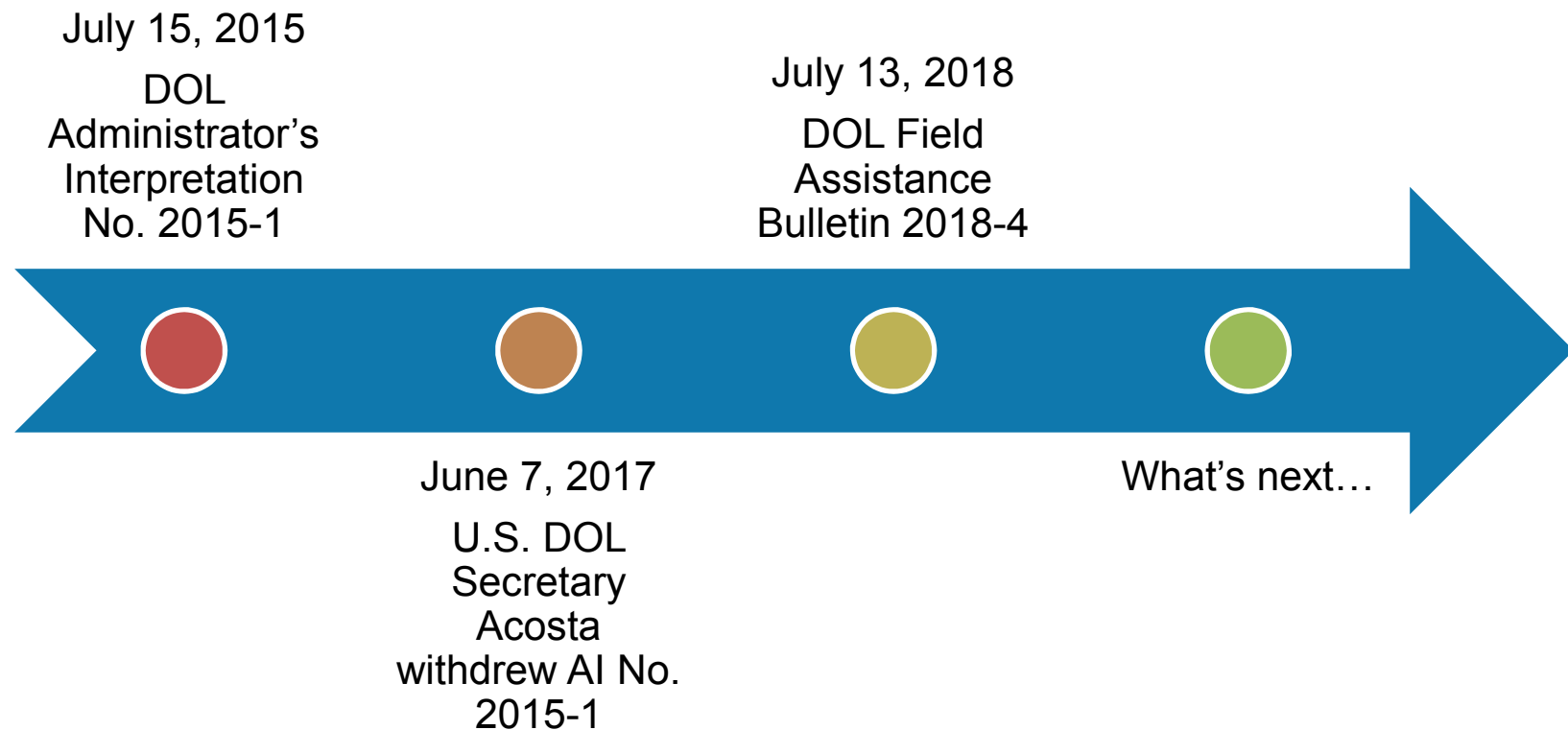
Expansion of Accommodations

State Survey

- **Illinois:** Requires paid nursing breaks (Eff. Aug. 2018)
- **New Jersey:** Requires accommodations for nursing mothers (Eff. Jan. 2019)
- **California:** Prohibits use of toilet stalls to express breast milk (Eff. Jan. 2019)
- **New York City:**
 - Cooperative Dialogue requirement (Eff. Oct. 2018)
 - Lactation Law (Eff. March 2019)

Recent Trends: Independent Contractors

U.S. DOL Trends: Independent Contractors



Independent Contractors

Freelance Isn't Free Act – New York

- Effective May 15, 2017
- Freelance Worker: Any individual or organization composed of one individual “hired or retained as an independent contractor to provide services in exchange for compensation”
- Excludes:
 - Sales representatives
 - Licensed medical professionals
 - Individuals engaged in the practice of law

Independent Contractors

Freelance Isn't Free Act - Eligibility

- All freelance workers
- Who contract with a Company
- For \$800 or more
- In any 120-day period



RECONCILING OVERLAPPING LOCAL, STATE AND FEDERAL EMPLOYMENT LAWS

Michelle B. Muhleisen

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

michelle.muhleisen@ogletree.com

303-764-6825

WHY CARE?

- Legal compliance - violations could be costly
- Often state laws are a sign of what is to come
- State laws could be looked at as “best practice”
- Cutting edge employers are using some of these issues to differentiate themselves in recruiting, even if they do not legally have to

COMPLIANCE CONSIDERATIONS

- Determine which law applies
- Decide how to comply



PRIORITIZE THIS LIST OF CONSIDERATIONS

- Ease of administration?
- Exercising broadest employer rights?
- Overall cost?
- Enterprise-wide employee morale?

QUELL THE BREWING STORM

- Wage and hour
- Ban the Box
- Drug testing
- Salary history questions
- Restrictive covenants
- Paid sick leave

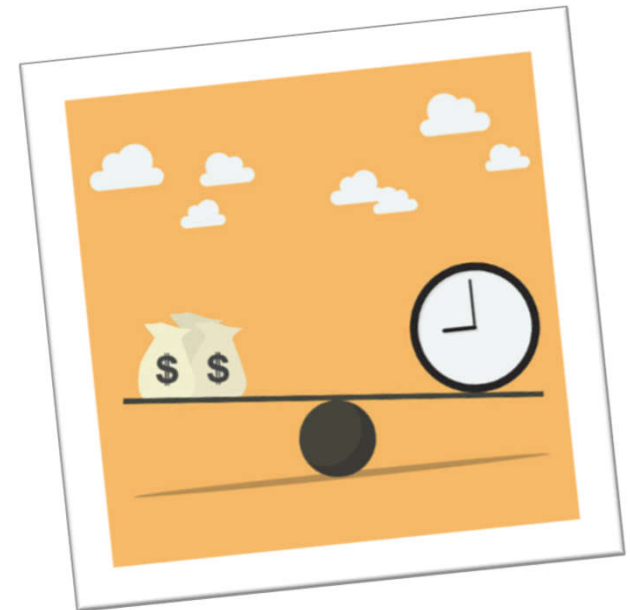


WAGE AND HOUR



WAGE AND HOUR Considerations

- Meal and rest breaks
- Minimum wage
- Overtime
- Breastfeeding breaks
- Independent contractor status
- Payroll
- Voter leave laws
- Compensable time
- Wage deduction
- Tipped employees
- Final paycheck
- Vacation pay
- Pay notice
- Payment of wages



“BAN THE BOX”

Considerations

Two primary questions:

- (1) How do we *get* it legally?
- (2) How do we *use* it legally?

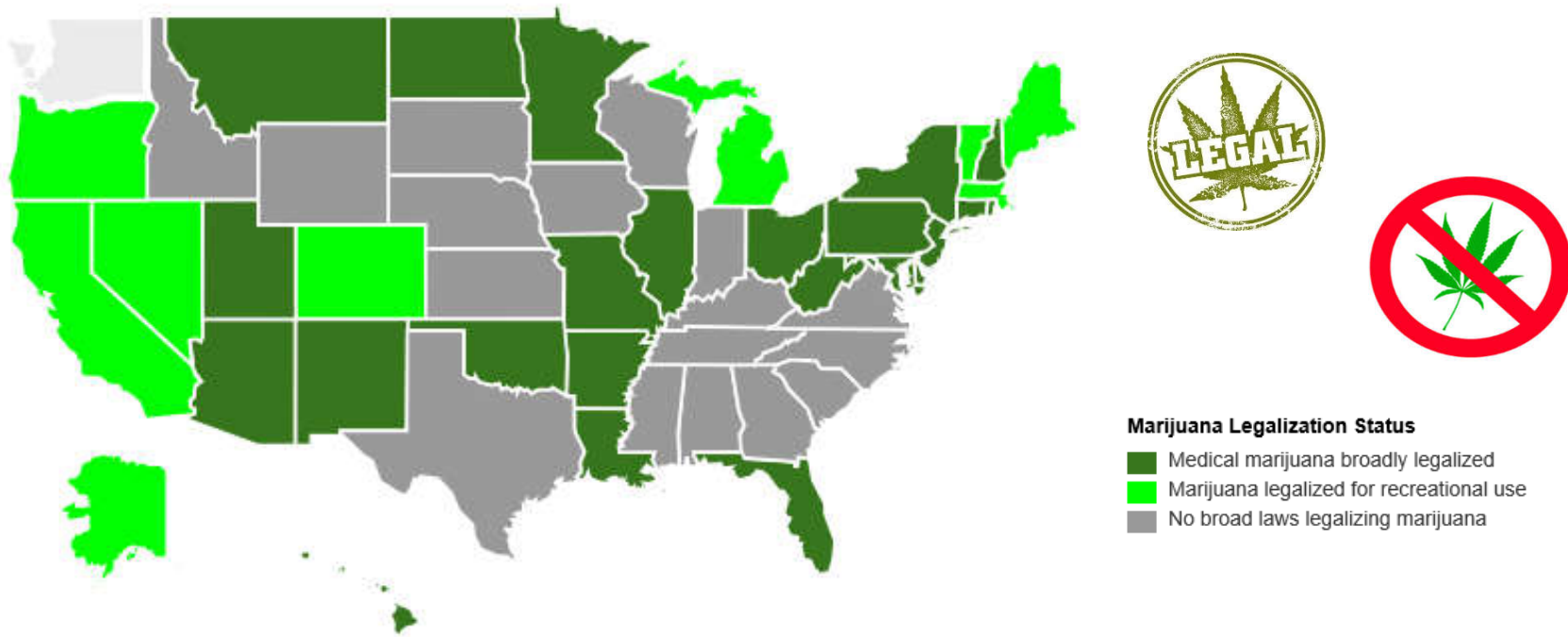


“BAN THE BOX” (Continued...)

1. State “Ban the Box” laws
2. Federal & State Fair Credit Reporting Acts
3. EEOC Guidance on the use of criminal history information
4. State/local laws that restrict use of criminal history information

DRUG TESTING

Spotlight on Marijuana



DRUG TESTING (continued...)

General Elements of a Defensible Drug Policy

- Always beware of state-specific provisions: one size does not fit all!
- Confront medical and recreational marijuana use in any drug policy
- Reference (explicitly) the federal law prohibition on marijuana in states that have legalized recreational marijuana
- Prohibiting “working under the influence” may not be enough...
 - Some policies might want to explicitly state, for example, that it is impermissible to have “any detectable level of any illegal controlled substance”
 - Once a policy is developed, communicate it to employees and provide training for supervisors



NON-COMPETES



RESTRICTIVE COVENANTS

- Ease of administration:
 - One agreement
 - Not enforceable in all jurisdictions
 - Enforceable in ONE jurisdiction
- Multiple agreements
 - Difficult to administer
 - Greater likelihood of enforcement

SALARY HISTORY INQUIRIES

- Pennsylvania (eff. Sept. 4, 2018) (state agencies only)
- Massachusetts (eff. July 1, 2018)
- Vermont (eff. July 1, 2018)
- Michigan (eff. June 24, 2018)
- Wisconsin (eff. Apr. 18, 2018)
- New Jersey (eff. Feb. 1, 2018)
- California (eff. Jan. 1, 2018)
- Delaware (eff. Dec. 14, 2017)
- Oregon (eff. Oct. 6, 2017)
- Philadelphia (eff. May 23, 2017, but stayed)
- Puerto Rico (eff. March 8, 2017)
- New York City (eff. Jan. 9, 2017)



PAID SICK LEAVE

Considerations

- Accrual rates
- Accrual caps and rollovers
- Payout rates and requirements
- Combining into PTO
- Which employees are covered?

OVERLAPPING LOCAL, STATE & FEDERAL LAWS – PRACTICAL TIPS FOR DRAFTING COMPANY-WIDE POLICIES

Hanna B. Raanan

Ogletree Deakins Nash Smoak & Stewart

hanna.Raanan@ogletree.com

714.800.7988

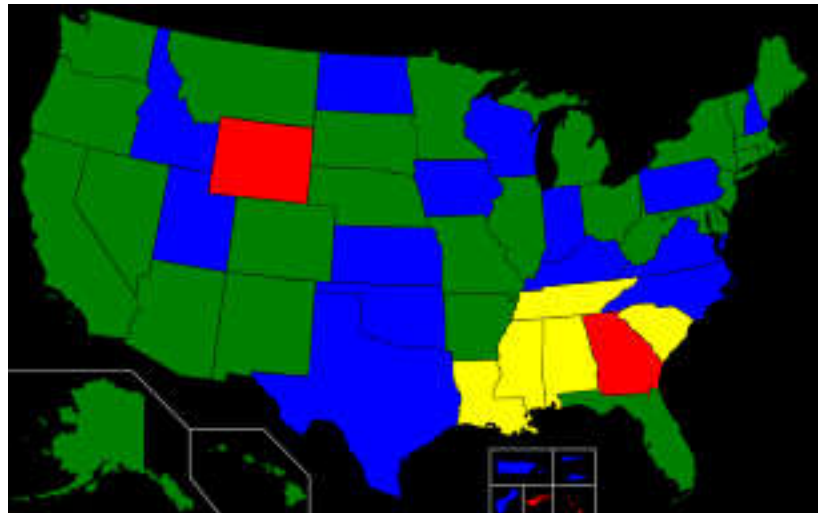
Drafting Company-Wide Policies

1. Make sure you understand all potential areas of regulation your company may be doing business in.
2. Use a Check-list to identify the policies that should be addressed
3. Determine whether you want to draft separate policies for each different jurisdiction you may be doing business in, or whether you prefer to have one overarching policy covering everyone.



Understanding Potential Areas of Regulation

1. Multi-state/multi-jurisdictional surveys
2. Review of locations where company has operations and both state and local ordinances/regulations affecting those locations



Using Check-Lists

1. Using outside resources to ensure you've identified appropriate potential areas for discrepancy
 - a. Chamber of Commerce
 - b. SHRM
 - c. Attorneys
1. Check-List for policies to be addressed in employment handbook
 - a. Examples:
 - i. EEO Policies
 - ii. Wage/hour Policies
 - iii. Equal Pay Policies
 - iv. Leave/Benefits Policies



Separate Policies for Each Jurisdiction

1. If the former, you'll want to have separate "inserts" for each state/location your company is doing business in
 - a. Examples: National/U.S. Handbook
 - i. Plus State/Local Specific Policies for each location your company has operations which may have requirements different from federal policies, like:
 1. California
 2. New York
 3. Massachusetts
 4. Connecticut



"When you bring the Sunday newspaper Angus, try not to drop the inserts!"

Comprehensive Handbook Using Most Expansive/Encompassing Jurisdiction

1. If the corporate/institutional preference is to avoid separate (potentially conflicting policies for different jurisdiction)
 - a. Most conservative approach is to choose the most expansive jurisdiction and set your policy to match that one.
 - b. If you choose this option, you will still need to confirm that there aren't local regulations that could create conflict



- i. Example: California is likely the most conservative when it comes to employee-friendly policies, but there are local ordinances, such as in San Francisco, San Diego and Los Angeles (for issues like minimum wage and paid family leave), that go further than the state guidelines.

Best Practices and Stories From the Road



Best Practices

Best Practices

- ✓ Update employee handbooks
- ✓ Compare workplace practices to written policies
- ✓ Review recruitment practices
- ✓ Review complaint process

Best Practices

- ✓ Implement manager/supervisor training
- ✓ Alerts: Blogs, Legislation
- ✓ Consult with outside counsel