



Recent Legislative Developments Affecting Washington, DC Employers

Part 3 – 2023 DMV Legislative Update

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Seyfarth Shaw LLP

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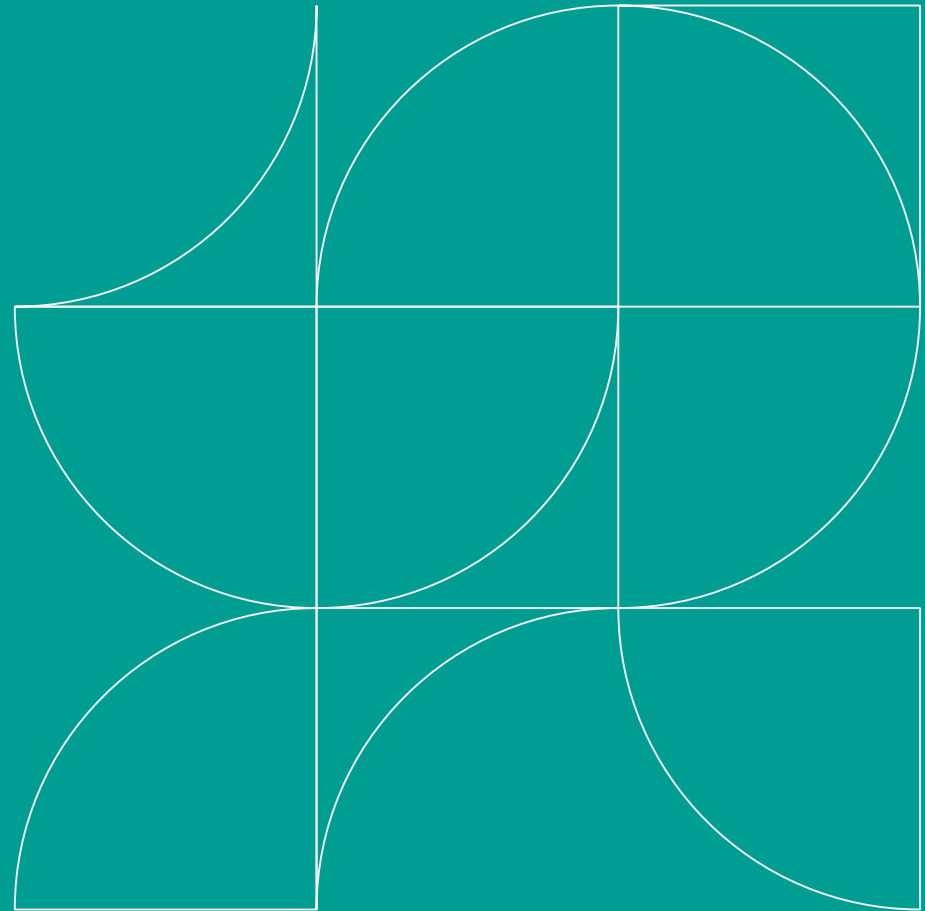


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Agenda

- 01** District of Columbia 2023 Legislative Updates
- 02** Maryland 2023 Legislative Updates
- 03** Virginia 2023 Legislative Updates

2023 DC Legislative Updates



DC Legal Updates

Overview

- DC Human Rights Act Amendments
- DC Paid Family Leave
- Employment Protections for Cannabis Use
- Tipped Wage Workers Fairness Amendment Act
- Initiative 82
- DC Second Chance Amendment Act
- Protections for Employee Reproductive Health Decisions
- DC Ban on Non-Completes

DC Legal Updates

DC Human Rights Act Amendments

- Covered Employees
 - Any individual employed by or seeking employment from an employer, including unpaid interns and *independent contractors*. D.C. Code § 2-1401.02.
 - Effective October 2022
- New Protected Class (18 total)
 - Homelessness
- Expiration of New Enforcement Mechanism (6/8)
 - Effective January 2023
 - Office of Attorney General empowered with additional investigation and enforcement tools (*i.e.*, civil actions and subpoena power)
- New Definition of Harassment

DC Legal Updates

New Harassment Standard: “Totality of the Circumstances”

- Historically, DC applied “severe or pervasive” standard when evaluating harassment claims
 - Still applies in most jurisdictions
 - Standard under Title VII
 - Courts look for pattern of misconduct in the workplace that is either severe or pervasive
- Now, “totality of the circumstances”
- Harassment under the DCHRA “need not be severe or pervasive to constitute harassment and no specific number of incidents or specific level of egregiousness is required.”
 - Direct contrast to requirement under Title VII that to be actionable harassment, the conduct complained of must be “severe or pervasive”

DC Legal Updates

New Harassment Standard: “Totality of the Circumstances”

Five factors to determine whether conduct constitutes unlawful harassment, including:

- the frequency and duration of the conduct;
- the location where the conduct occurred;
- whether the conduct involved slurs, epithets, stereotypes, or humiliating or degrading conduct; and
- whether a party to the conduct held a position of formal authority or informal power relative to another party.

DC Legal Updates

New Harassment Standard: “Totality of the Circumstances”

- Conduct may constitute unlawful harassment, regardless of the following circumstances:
 - The conduct consisted of a single incident;
 - The conduct was directed toward a person other than the complainant;
 - The complainant submitted to or participated in the conduct;
 - The complainant was able to complete employment responsibilities despite the conduct;
 - The conduct did not cause tangible physical or psychological injury;
 - The conduct occurred outside the workplace; or
 - The conduct was not overtly directed toward a protected characteristic.

DC Legal Updates

DC Paid Family Leave (Universal Paid Leave Act)

- Updated Notice/Poster
 - <https://dcpaidfamilyleave.dc.gov/wp-content/uploads/2022/10/OPFL-Employee-Notice-2022.pdf>
 - Compliance Date was February 1, 2023
- No modifications in contribution rates or available benefits for FY2024

DC Legal Updates

Employment Protections on Cannabis Use

- D.C. Law 24-190 – Cannabis Employment Protections Amendment Act of 2022
- Employers may not refuse to hire, terminate from employment, suspend, fail to promote, demote, or penalize an individual due to an individual's: (i) use of cannabis; (ii) status as a “medical cannabis program patient;” or (iii) having “the presence of cannabinoid metabolites in [their] bodily fluids in an employer-required or requested drug test without additional factors indicating impairment.”
- Employers may take action:
 - related to the use of cannabis if the employee is working in a “safety-sensitive position”
 - related to the use of cannabis if their actions are required by federal statute, federal regulations or a federal contract or funding agreement
 - against employees who are impaired at work and are permitted to require post-accident and reasonable suspicion drug testing of employees

****Scheduled to go into effect on July 13, 2023, but will not become operative until its fiscal impact is included in an approved budget**

DC Legal Updates

Tipped Wage Workers Fairness Amendment Act

- File reports regarding sexual harassment complaints and copies of sexual harassment policies for 2020 and 2021 by March 31, 2023
 - Note: If the employer has a D.C. location opening later this year, the employer must submit the Documents and Certifications Online Form within 90 calendar days of opening
 - Separate certifications for *each location*
- Sexual Harassment Training Deadline is August 31, 2023
 - must be conducted by certified sexual harassment trainer
- Resources
 - <https://ohr.dc.gov/page/tipped-wage-workers-fairness-act>

DC Legal Updates

Initiative 82

- In Nov. 2022, DC voters approved Initiative 82
 - Gradually phase out the DC tip credit, and increase the min. hourly wage until it matches DC's min. wage rate (currently, \$16.10/hr).
 - Effective May 1, 2023, the tipped min. wage in DC is \$6.00/hr, and the max. allowable tip credit rate is \$10.10/hr.
- Given usual delays in congressional review, DC Council issued revised deadlines, including an increase to \$8.00/hr on July 1, 2023.
- Also on July 1, DC min. wage will increase from \$16.10/hr to \$17.00/hr for *all* employers.

DC Legal Updates

DC Second Chance Amendment Act

- DC's Second Chance Amendment Act (District of Columbia Bill 24-63) amends the requirements to seal criminal records, which now include automatic sealing for individuals charged, but not convicted, of non-violent crimes.
 - Shortens the waiting periods to seal conviction records.
 - Permits employment applicants to indicate a "no record" response when asked about prior arrests, court appearances, adjudications, or convictions.
 - Records may still be accessed by specific employers, including those that work with children, the elderly, or other special needs populations
- Scheduled to go into effect in March 2023 but will not become operative until its fiscal impact is included in an approved budget

DC Legal Updates

Protections for Employee Reproductive Health Decisions

- Response to the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* (2022), which overturned the constitutional right to an abortion, DC Council passed the Enhancing Reproductive Health Protections Amendment Act of 2022 (ERHPAA)
 - Recognizes the right of every individual to choose or refuse contraception or sterilization
 - Recognizes the right of every individual who becomes pregnant to decide whether to carry a pregnancy to term, to give birth, or to have an abortion
- Prohibits employers from penalizing an individual seeking or inducing an abortion or assisting another individual who is seeking or inducing an abortion
- Employee who believes this law has been violated “shall have a cause of action in any court of competent jurisdiction for damages and such other remedies as may be appropriate...within 2 years of the violation or the discovery of the violation.” § 7-2086.01(d).
- Effective February 23, 2023

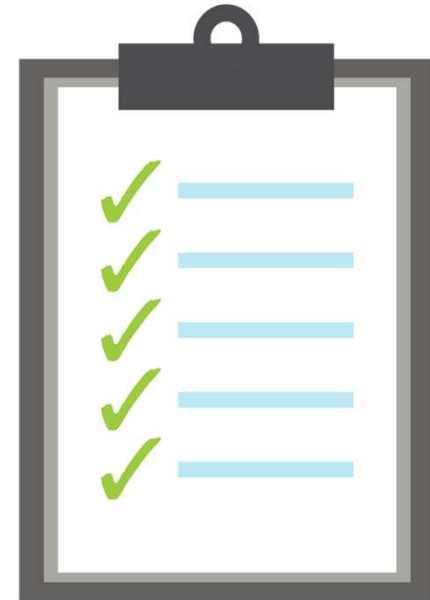
DC Legal Updates

DC Ban on Non-Compete Agreements Amendment Act

- Noncompete provisions are now illegal for many DC workers
 - Effective October 1, 2022
- Prohibits employers from imposing noncompetes on most DC employees who make under \$150,000 per year, or medical specialists who make under \$250,000 per year
 - Noncompete are allowed for workers who make more than those income thresholds, but only with limitations, and only if the worker is notified in advance
- September 13, 2023 is the fourth installment of our micro-webinar series
 - “Hiring/Onboarding”
 - Will cover compliance with DC Ban on Non-Compete Agreements Amendment Act, among other topics, in greater detail

DC Employer Takeaways

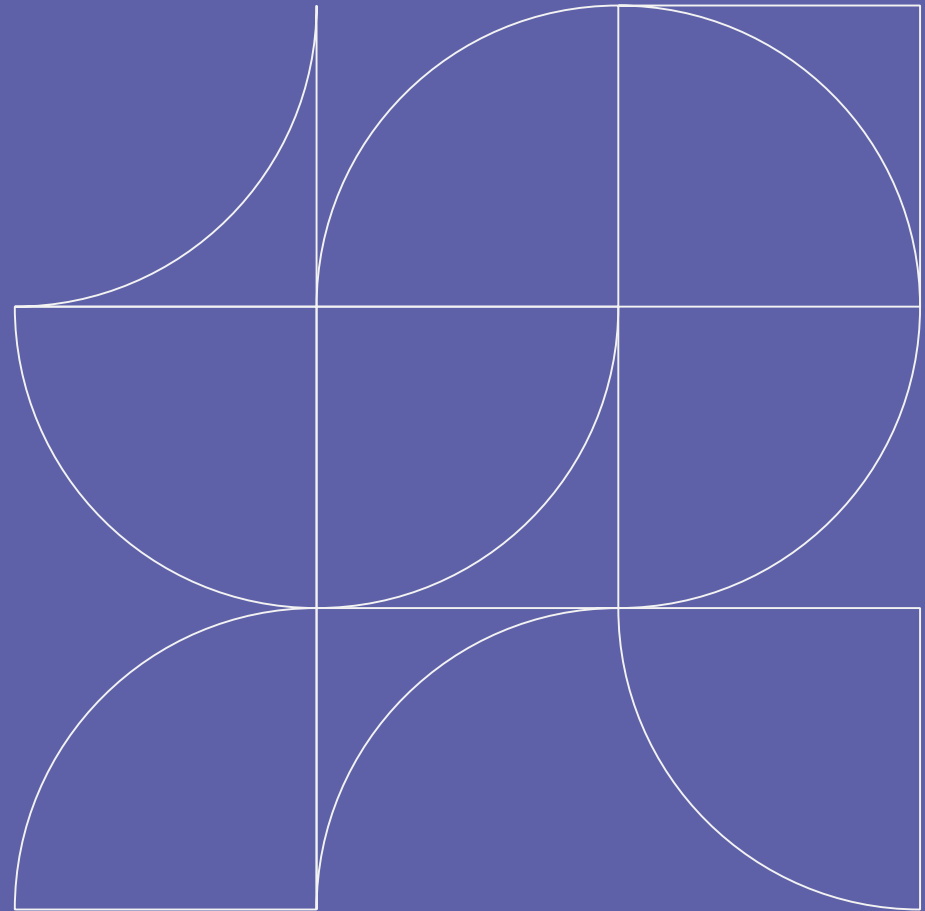
- Consider Human Rights Act amendments impact on contracts with independent contractors.
- Consider reviewing anti-harassment policies and harassment training to see how might adjust to deal with the new provisions.
- Ensure compliance with updated DCPFL posting and notice requirements and sexual harassment reporting and training deadlines for TWFAA
- Review drug testing policies and procedures to comply with new cannabis protections in employment



DC Legislation to Watch

- **Pay Range Act of 2023 (B25-26 & 24-708; Under Council Review)**
 - As introduced, prohibits employers from posting a job advertisement without including the maximum and minimum salary or hourly pay information (public hearing on 6/14/23)
- **Pay Scale and Benefits Disclosure Amendment Act of 2023 (B25-194)**
 - Permit prospective employees to access the pay scale of positions from employer and require private employers (25+ employees) to disclose the schedule of benefits (public hearing on 6/14/23)
- **Fair Wage Amendment Act of 2023**
 - prohibits employers from screening prospective employees based on wage history or requiring disclosure of wage history as a condition for consideration (public hearing on 6/14/23)
- **Minimum Wage Clarification Amendment Act of 2023 (B25-134)**
 - Require employers to pay DC minimum wage rates when an employee performs at least two hours of work in DC in one workweek (public hearing on 6/28/23)

2023 Maryland Legislative Update



Maryland Legal Updates

Paid Family and Medical Leave

- Time to Care Act of 2022 (**Amended 2023)
 - Family and Medical Leave Insurance Program that will be administered by the Maryland Department of Labor
- Employees who have worked at least 680 hours over the 12-month period immediately preceding the date on which the leave is to begin are “covered individuals” under the Act.
 - qualified leave reasons similar (but not identical) to FMLA
 - employee generally may not receive more than 12 weeks of benefits in an application year
 - Covered workers can begin receiving benefits on January 1, 2026
- Beginning October 1, 2024, (a) employers with 15 or more employees, (b) all employees, and (c) all self-employed individuals who elect to participate in the program, shall start making contributions to the Family and Medical Leave Insurance Fund (the “Fund”).
 - A covered employer can also satisfy the Act’s requirements through a private employer-plan that meets or exceeds the benefits and coverages provided in the Act and is approved by the Department.

Maryland Legal Updates

Paid Family and Medical Leave

- Additional Notable Modifications
 - contribution rates will be set by October 1, 2023
 - 50/50 split between employer and employee
 - was previously 25% employer/75% employee
 - cannot exceed 1.2% of employee's "wages"
 - applied to all wage up to and including social security wage base
 - initial rates will be in effect from 10/1/24 to 6/30/26
 - employers can count FMLA leave against the maximum duration of leave available under FAMLI even if employee declines to apply for benefits
 - employers are not required to exhaust other forms of paid leave before taking FAMLI
 - certification must include expected leave dates and intent to take intermittent/continuous leave
 - Maryland DOLI is expected to issue implementing regulations by January 1, 2024

Maryland Legal Updates

Expanded Definition of Harassment

- Lowers the standard to demonstrate a claim for harassment under Maryland law
- Removes the requirement that harassing conduct be “severe and pervasive”
- Updated definition of sexual harassment: Includes conduct, *which need not be severe or pervasive*, that consists of unwelcome sexual advances, requests for sexual favors, or other conduct of a sexual nature when:
 - (1) submission to the conduct is made either explicitly or implicitly a term or condition of employment of an individual;
 - (2) submission to or rejection of the conduct is used as a basis for employment decisions affecting the individual; or
 - (3) **based on the totality of the circumstances**, the conduct unreasonably creates a working environment that a reasonable person would perceive to be abusive or hostile.
- MD Code SG § 20-601; Effective October 2022
- **Also MD Code SG § 20-1013 (2022) established tolling period for all time limitations on filing a civil action alleging an unlawful employment practice while an administrative charge remains pending.

Maryland Legal Updates

Reasonable Accommodations for Applicants

- State law previously only required accommodations for employees with disabilities; now extended to applicants
- Effective October 2022
- No need to change process unless you work with or for small employers that were not subject to ADA requirements

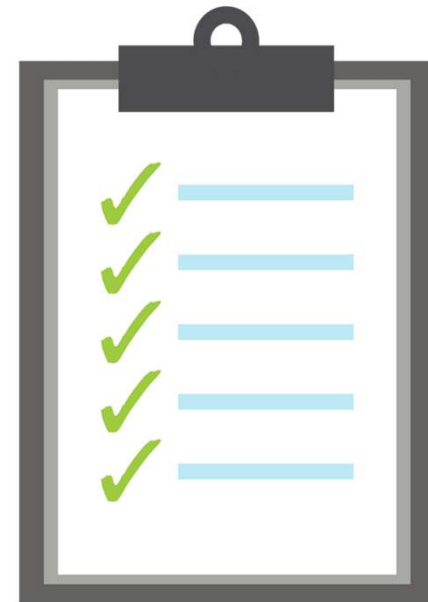
Maryland Legal Updates

Accelerated Minimum Wage Increase

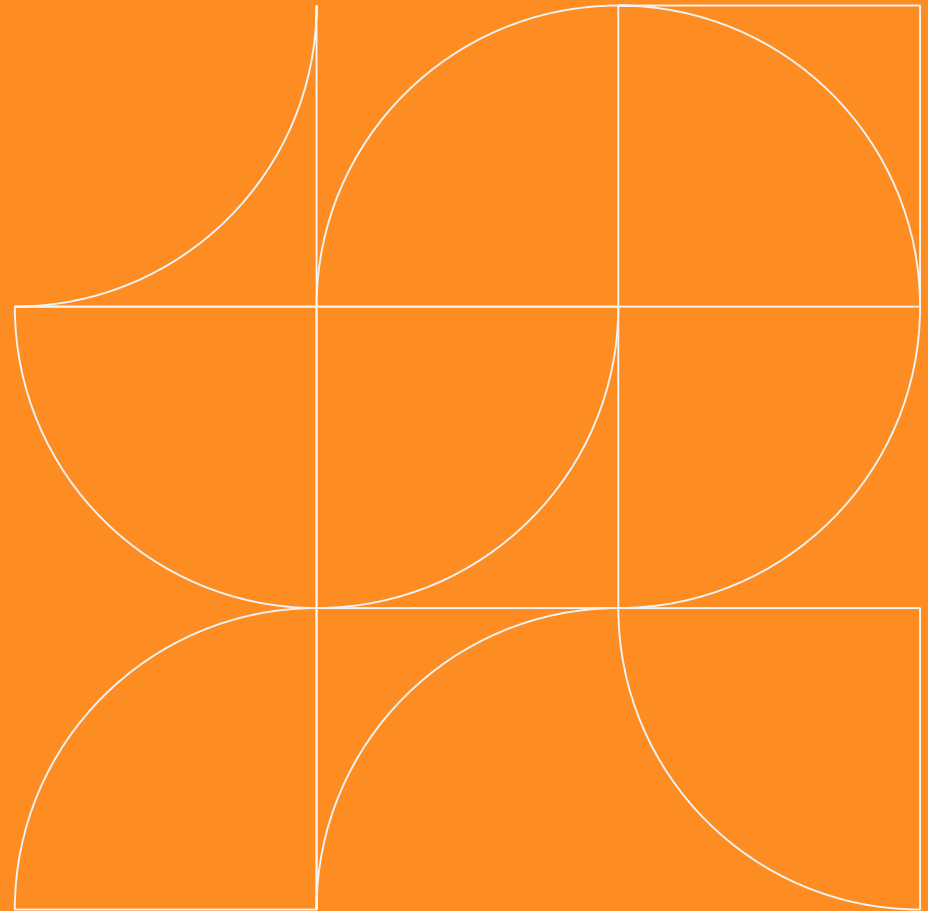
- The increase in Maryland minimum wage to \$15.00 will now take effect in January 1, 2024.
 - Eliminates distinction based on employer size
 - Previously scheduled to be effective in 2025 or 2026 based on employer size
- **Howard County and Montgomery County have separate minimum wage requirements*

MD Employer Takeaways

- Monitor Family and Medical Leave Insurance updates
- Consider reviewing anti-harassment policies and harassment training to see how might adjust to deal with the new provisions.
- Make sure to consider reasonable accommodations for applicants with disabilities
- Ensure planned compliance with accelerated minimum wage



2023 Virginia Legislative Update



Virginia Legal Updates

Effective January 1, 2023

- Effective January 1, 2023, minimum wage is now **\$12.00**.
 - Expected Future Increases:
 - \$13.50 by January 1, 2025
 - \$15.00 by January 1, 2026
- However, requires action by legislature by January 1, 2024. Otherwise increases will be consistent with increase in Consumer Price Index (CPI).

2023 Virginia Legislative Session – At a Glance

Enacted*

- Non-disclosure of sexual harassment
- Prohibited use of Employee SSNs
- Unpaid Organ Donor Leave
- Subminimum wage for employees with disabilities

vs.

Failed

- Paid Family Leave
- Expansion of Paid Sick Leave to coverall private employers
- Sexual Harassment Training Requirements
- Workplace violence policy requirements
- Prohibition on wage or salary history inquiries
- Disclosure of statute of limitations to file discrimination claims
- Workers' Comp Notice

Virginia Legal Updates

Non-Disclosure re: Sexual Harassment Claims (Va. Code § 40.1-28.01)

- No employer shall require an employee or a prospective employee to execute or renew any provision in a nondisclosure or confidentiality agreement, including any provision relating to nondisparagement, that has the purpose or effect of concealing the details relating to a claim of sexual assault pursuant to § 18.2-61, 18.2-67.1, 18.2-67.3, or 18.2-67.4 *or a claim of sexual harassment as defined in § 30-129.4* as a condition of employment. Any such provision is against public policy and is void and unenforceable
- Does not apply to severance/post-term agreements

Prohibited Use of Employee SSNs (Va. Code § 40.1-28.7:10)

- No employer shall
 - *use an employee's social security number or any derivative thereof as such employee's identification number or*
 - *include an employee's social security number or any number derived thereof on any identification card or badge, any access card or badge, or any other similar card or badge issued to such employee.*
- Civil Penalty of \$100 for each “knowing” violation
- Effective 7/1/23

Virginia Legal Updates

Unpaid Organ Donor Leave (Va. Code § 40.1-33.7-§ 40.1-33.12)

- Applies to employers with 50+ employees
- Employers must provide up to:
 - *(i) up to 60 business days of unpaid organ donation leave in any 12-month period to serve as an organ donor and*
 - *(ii) up to 30 business days of unpaid organ donation leave in any 12-month period to serve as a bone marrow donor.*
- Eligible Employees:
 - *will have been employed by that employer for at least (i) a 12-month period and (ii) 1,250 hours during the previous 12 months.*
- Does not run concurrent with FMLA

Unpaid Organ Donor Leave (cont'd)

- Organ Donation Leave:
 - *leave of an eligible employee for the purpose of donating one or more of such employee's human organs, including bone marrow, to be medically transplanted into the body of another individual.*
- Employee must provide:
 - *written physician verification to the employer that (i) the eligible employee is an organ donor or a bone marrow donor and (ii) there is a medical necessity for the donation of the organ or bone marrow.*

Unpaid Organ Donor Leave (cont'd)

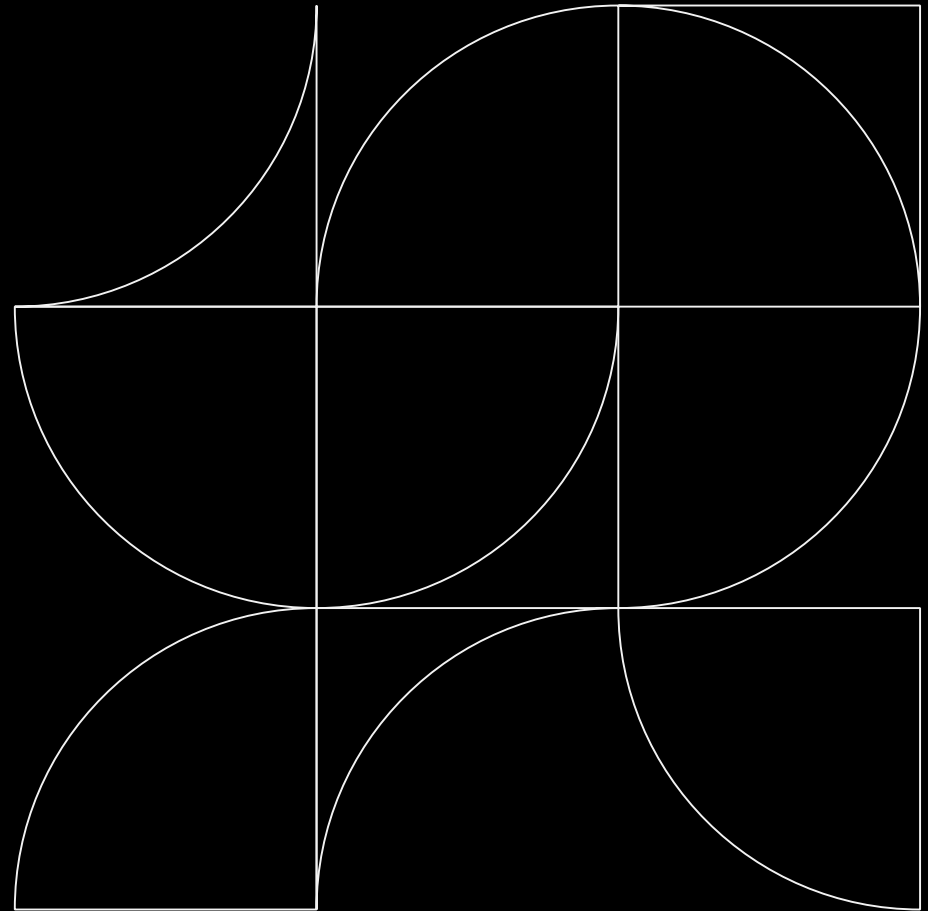
- Employee Rights/Protections
 - Organ Donation Leave shall not be considered a break in service for salary adjustments, sick leave, vacation, PTO, annual leave, seniority or other employee benefits
 - Restoration to same or equivalent position following the leave
 - “equivalent employment benefits, pay and other terms and conditions of employment”
- Employer Obligations
 - maintain coverage of health benefit plan during leave
 - pay any commissions that become due as a result of work performed before leave
 - No retaliation

VA Employer Takeaways

- Ensure that employee identification numbers, badges passes, etc. do not use any employee social security numbers. If they do, plan to roll out new identification systems by July 1st.
- Review employment agreements for non-disparagement or non-disclosure provisions that could encompass sexual harassment claims. (This does not apply to severance agreements.)
- Review leave policies and administrative functions to prepare for Organ Donation Leave implementation
- Ensure compliance with all updates minimum wage rates.



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Thank You

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