MAYER | BROWN

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BENEFITS & COMPENSATION UNIVERSITY

Developments & Key Issues in US Employment Law

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Marcia Goodman primarily represents global employers on a wide range of US and cross-border employment law matters. In addition, she co-leads the firm's Japan Client Initiative, a program aimed at strengthening and expanding Mayer Brown's ability to serve Japanese clients.

She defends employers in federal class claims of race, age, sex, disability, national origin discrimination under EEO laws (e.g., reductions in force, promotions, sexual harassment, discriminatory terms, and conditions of employment) and in pattern and practice discrimination claims by the EEOC, as well as defending employee benefit plans and employers in ERISA class actions. Marcia also defends employers in litigation involving individual claims, such as a wide variety of EEO actions (race, age, national origin, sex, disability), Section 301 actions and Duty of Fair Representation Actions under collective bargaining agreements, Whistleblower claims under the Sarbanes-Oxley Act, federal and state court actions involving disputes over employment contracts, defamation, fraud, tortious interference with employment or business opportunity, FMLA actions, wage and hour issues, independent contractor/employee status, post-employment competition, and misappropriation of trade secrets.

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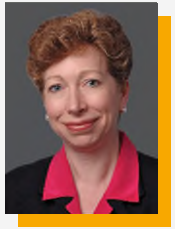
Maritoni Kane is a litigation counsel in Mayer Brown's Chicago office. She has extensive experience as a litigator and corporate advisor in the area of labor and employment law and is noted in Chambers USA as a recognized practitioner in Labor & Employment in Illinois.

She represents employers in matters before federal and state courts, including defending individual and class claims under EEO laws, collective actions under the FLSA, tort claims, breach-of-contract claims, employee safety and health claims, collective bargaining and unfair labor practice claims, and benefits claims. Maritoni's trial work includes bench and jury trials. She also represents employers in private mediations and court and agency-sponsored formal mediation programs.



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Kim Leffert is a counsel in the Chicago office of Mayer Brown's Litigation & Dispute Resolution practice. Kim has intensive experience in counseling employers in labor and employment matters. Kim's practice includes advising management in drafting employment and severance agreements. Kim represents employers in labor and employment disputes, but also counsels employers on proactive strategies to avoid litigation. And when mergers, acquisitions and other business transactions arise, Kim helps clients conduct employment-related due diligence, negotiates contract provisions, and drafts employment-related sections of transaction documents.

A significant and growing part of her work involves electronic discovery issues. Kim has substantial experience assisting clients with the preservation, collection, review and production of electronic documents in litigation. She also helps clients prepare document retention policies and procedures and records management programs, as well as develop electronic discovery programs.

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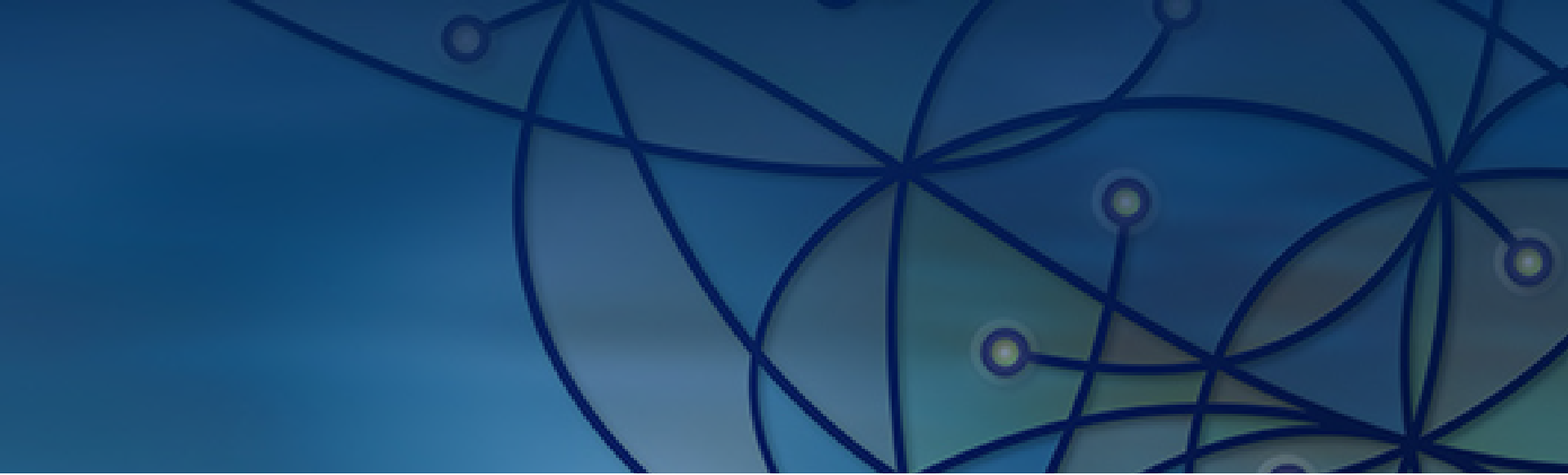
Scott Perlman concentrates on mergers and acquisitions and other transactional work, as well as on antitrust litigation and counseling. He has worked on a variety of mergers involving the healthcare, pharmaceutical, petrochemical, insurance, telecommunications, electronic components, agriculture, food ingredient, and securities broker-dealer industries. He advises on joint ventures in agriculture, transportation, and entertainment and has counseled business-to-business exchanges in the chemicals, metals, retail, and health care industries. He also has extensive experience in antitrust litigation, including class actions, involving alleged price fixing, exclusive dealing and bundling claims, predatory pricing, and government investigations of pricing and marketing policies.

Scott frequently counsels clients on antitrust compliance issues, and he has assisted numerous clients with preparation of compliance materials as well as organizing compliance programs for their employees. He also has primary responsibility for the entire firm for counseling clients on Hart-Scott-Rodino compliance.

Agenda

- The Current Non-Compete Legal Landscape
- Arbitration – *Viking River* Supreme Court Decision and Considerations in Mandatory Arbitration Clauses
- Antitrust is the New HR Skill
- Pay Transparency Laws on the Rise



The Current Non-Compete Legal Landscape

The Current Non-Compete Legal Landscape Overview 2022-2023

- The enforcement of restrictive covenants was historically governed by state common law
- Most jurisdictions enforced covenants not to compete when reasonable in duration, geographic scope, and substantive scope
- But, a legitimate business interest for the restriction was generally required
- CA has long prohibited covenants not to compete except in a sale of business
- Now 29 states and DC have statutory restrictions

Non-Compete, Non-Solicit, and Non-Disclosure Agreements

- Non-competes limit the alternative jobs an employee might seek
- Non-solicitation agreements restrict the recruitment or solicitation of former customers, clients, or co-workers
- Non-disclosure agreements limit the employee's ability to share or make use of trade secrets or other company confidential or proprietary information
- Employers may find it increasingly difficult to protect customer relationships and proprietary information as it becomes more and more challenging to enforce restrictive covenants

Federal Action: President Biden's July 9, 2021, Executive Order on Promoting Competition

- Section 5(g): "[T]he FTC is encouraged to consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority . . . to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."
  - What constitutes "use of non-compete clauses?"
  - What is the scope of "other clauses or agreements?"
  - Do all non-compete covenants "unfairly limit worker mobility?"
- Section 4 establishes a White House Competition Council to promote and advance efforts to address unfair competition in the economy

President Biden's July 9, 2021, Executive Order (cont'd)

- White House Fact Sheet: The Executive Order "includes 72 initiatives by more than a dozen federal agencies to promptly tackle some of the most pressing competition problems across our economy."
  - "Make it easier to change jobs and help raise wages by banning or limiting non-compete agreements…"
  - "Encourages the FTC to ban or limit non-compete agreements"
- The FTC, DOJ, NLRB, Congress and various states have continued action to limit and regulate non-compete agreements and other related agreements

Federal Legislation Introduced in 2021 Remains Pending

- At the federal level, two bills have been proposed in Congress to eliminate or significantly restrict non-compete agreements.
  - The Federal Freedom to Compete Act, initially introduced in the Senate in January of 2019 (S. 124), proposed to amend the Fair Labor Standards Act (FLSA) to ban non-competes for most non-exempt workers. The bill was reintroduced in the Senate in July 2021 (S. 2375).
  - The Workforce Mobility Act, first introduced in the Senate in 2019 (S. 2614) and the House in 2020 (H.R. 5710), would ban all non-competes except those associated with the sale of business or dissolution of or disassociation from a partnership, and impose civil penalties for violations. The bipartisan bill was reintroduced in the House (H.R. 1367) and Senate (S. 843) in February 2021.
  - Both Acts remain under consideration but not active as the current legislative session winds down

2022 FTC and NLRB Memorandum of Understanding, DOJ and NLRB Memorandum of Understanding

- On July 19, 2022, the FTC and NLRB jointly issued a Memorandum of Understanding ("MOU") regarding a shared "interest in protecting American workers and promoting fair competition in labor markets."
- Emphasis on the "continued and enhanced coordination and cooperation concerning issues of common regulatory interest" to "help protect workers against unfair methods of competition," including "the imposition of one-sided and restrictive contract provisions, such as non-compete and nondisclosure provisions."
- One week later, on July 26, 2022, the NLRB and the DOJ jointly issued a similar MOU, to "strengthen the Agencies' partnership through . . . information sharing . . . enforcement activity… training . . . education . . . and outreach."

Uniform Restrictive Employment Agreement Act (UREAA)

- In 2021, the Uniform Law Commission approved a new uniform state law to regulate restrictive covenant employment agreements
- UREAA regulates covenants that prohibit or limit an employee or other worker from working elsewhere after the work relationship ends
- The Act addresses non-competes, non-solicitation agreements, no-business agreements, no-recruit agreements, confidentiality agreements, payment-for-competition agreements, and training-repayment agreements (no-poach agreements are not covered)
- *Colorado adapted UREAA as the basis for a new law regulating restrictive covenants effective August 2022*

UREAA Core Elements

- **Wide scope**: Regulates all restrictive post-employment agreements, including noncompetes, confidentiality agreements, no-business agreements, nonsolicitation agreements, no-recruit agreements, payment-for-competition agreements, and training reimbursements agreements.
- **Low-Wage Workers**: Prohibits noncompetes and all other restrictive agreements except confidentiality agreements and training-reimbursement agreements for low-wage workers, defined as those making less than the state's annual mean wage.
- **Notice**: Requires advance notice and other procedural requirements for an enforceable noncompete or other restrictive agreement.
- **Penalties**: creates penalties and enforcement by state departments of labor and private rights of action, to address the chilling effect of unenforceable agreements.

29 States and DC Have Statutes Governing Restrictive Covenants

- Statutes range from virtually total prohibition to protection for non-highly compensated employees and codification of common law principles

- **Alabama**
- **Arkansas**
- **California**
- **Colorado**
- **Delaware**
- **Florida**
- **Georgia**
- **Hawaii**
- **Idaho**
- **Illinois**
- **Louisiana**
- **Maine**
- **Maryland**
- **Massachusetts**
- **Michigan**
- **Montana**
- **Nevada**
- **New Hampshire**
- **North Carolina**
- **North Dakota**
- **Oklahoma**
- **Oregon**
- **Rhode Island**
- **South Dakota**
- **Texas**
- **Utah**
- **Virginia**
- **Washington**
- **Washington D.C.***
- **Wisconsin**

The Current Non-Compete Legal Landscape Overview 2022-2023

- In a minority of jurisdictions, including California, North Dakota, and Oklahoma restrictive covenants are largely unenforceable, subject to limited exceptions (e.g., sale of a business)
- Some of the new state law requirements apply to all agreements, including existing agreements, and some apply only to new agreements entered into after the effective date of the statute
- For those states that have implemented new procedural requirements or substantive restrictions, the exact terms of those requirements and restrictions vary significantly
- Many of the new statutes impose penalties on employers for entering into prohibited agreements; many provide private right of action for employees subject to a violation

Recent Developments Across the US

State laws now increasingly prohibit non-compete restrictions for employees earning less than a threshold wage or salary.

- **Maine:** Cannot enter into non-competes with employees who earn wages at or below 400% of the federal poverty level (approximately $51,520 for a one-person household)
- **Maryland:** Employees must earn more than $15/hour or $31,200/year
- **Massachusetts:** Non-competes are not enforceable against any nonexempt employee
- **Rhode Island:** Non-competes are not enforceable against, inter alia, nonexempt employees and "low-wage employees" (i.e., employees whose average annual earnings don't exceed 250% of the federal poverty level for individuals)
- **Virginia:** Cannot enter into non-competes with "low-wage employees" based on fluctuating rate (currently employees who earn less than ~$1,195 per week (or ~$62,140 per year))
- **But see DC and Colorado –** Thresholds are $100,000 per year salary and more

Recent Developments Across the US (cont'd)

A number of states have also recently enacted (or have pending) legislation that requires the employer to pay employees during the non-compete period or prohibit where employee is terminated without cause. For example:

- **Massachusetts:** Requires employers to pay 50% of the employee's salary throughout the non-compete period and prohibits enforcement against employees terminated without cause
- **New Jersey:** Pending legislation would require employers to pay 100% of employee's regular compensation during non-compete period
- **Oregon:** Requires employers to pay 50% of the employee's salary and commissions throughout the non-compete period or 50% of the median family income for a four-person family

The Current Non-Compete Legal Landscape Overview 2022-2023

Washington D.C. non-compete law effective as of October 1, 2022.

- Permits and provides guidelines for employers entering into non-compete agreements with highly compensated employees
  - Highly compensated = earn or are expected to earn total compensation of at least $150,000 per year

    Exception: for licensed physicians, threshold is $250,000 annually

    Starting Jan. 1, 2024, thresholds will increase according to the annual average increase in DOL price index
- Establishes notice requirements
- Allows anti-moonlighting policies that prohibit conduct posing a conflict of interest
- Allows restrictions on competition if supported by long-term incentive compensation
- Penalties: $350 to $1,000 for each violation

The Current Non-Compete Legal Landscape Overview 2022-2023

- Illinois enacted a sweeping restriction effective January 1, 2022
  - Limits Covenants Not to Compete and Covenants Not to Solicit
  - Requires advance notices by employers to employees
  - Minimum annual compensation thresholds
  - New remedies and enforcement actions
  - New definition of “adequate consideration”
  - Reformation of unenforceable covenants or “blue-penciling”
  - COVID-Related Personnel Actions

The Current Non-Compete Legal Landscape Overview 2022-2023 (cont'd)

- Colorado places new limitations on restrictive covenants in August 2022 (H.B. 22-1317)
  - Restrictive covenants entered into on or after August 10, 2022, must comply with new requirements, or otherwise void
    - "Highly compensated" salary thresholds – currently $101,500 annual salary
    - Requires advance notices by employers to employees
    - Mandated use of Colorado law and venue for employees who worked and were terminated in Colorado
    - New remedies and enforcement actions

Recommended Best Practices for an Evolving Legal Landscape

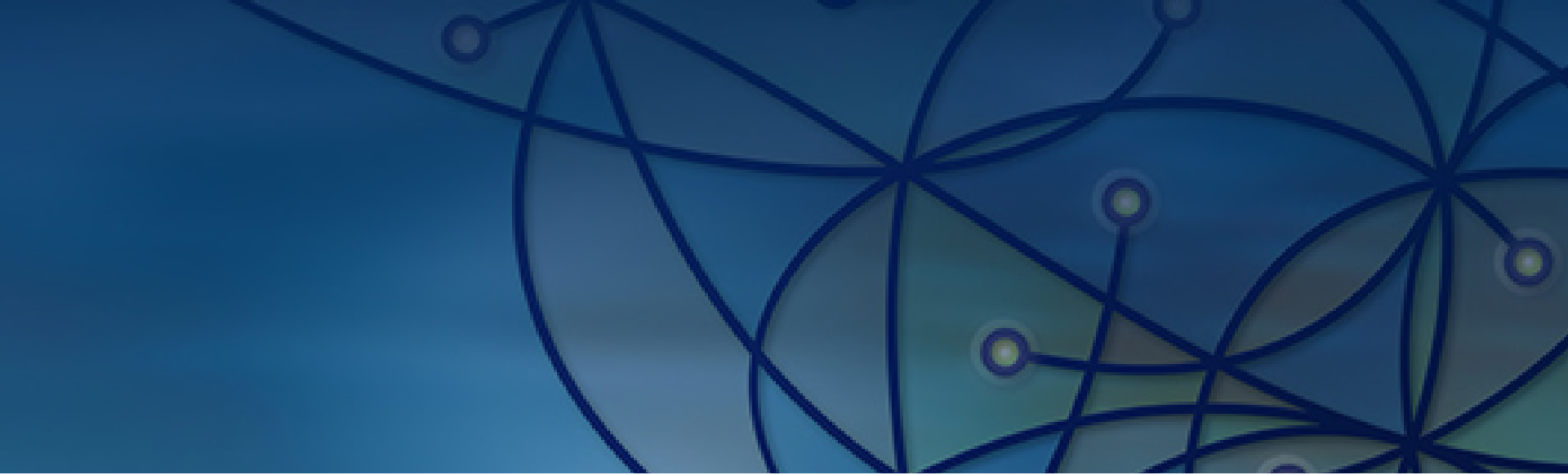
- Important to remember that there are different types of restrictive covenants
- Most states allow non-disclosure (confidentiality) agreements
  - Enforceability depends on scope
  - Note: it is illegal to restrict conversations regarding salaries/wages
- Non-solicitation restrictions related to employees or customers are sometimes treated more favorably than covenants not to compete (e.g., Oregon, Georgia)
- In some cases, however, non-solicitation agreements are treated with the same kind of scrutiny as non-compete agreements
  - Illinois statute
  - New York: In *Penton Learning Sys. LLC v. Defense Strategies Institute Group,* the Court held that "the same standards governing the enforceability of non-compete provisions apply" to the enforceability of an employee non-solicit"
  - Texas: In *Cooper Valves, LLC. v. ValvTechnologies, Inc.,* the Court evaluated a non-solicit under the standard applied to non-compete provisions

Recommended Best Practices for an Evolving Legal Landscape (cont'd)

- Unless prohibited by state law, be strategic about selecting governing law and venue
- Courts often enforce contractual choice of law and venue provisions, especially if the selected jurisdiction has a substantial relationship to the parties or transaction
- Ensure that there is adequate consideration under the circumstances in connection with entering into the agreement
- Be strategic about which restrictions to impose on different categories of employees based on their roles, training received and the Company's protectable business interest in imposing a restriction
  - Non-solicitation or non-disclosure for some employees and non-compete for others?
  - Beware of the "janitor rule" in applicable jurisdictions

Recommended Best Practices for an Evolving Legal Landscape (cont'd)

- Include a tolling provision providing that in the event of a breach, the restricted period is extended by the amount of time the covenant was breached
- Call out injunctive relief as a remedy to a breach
- Specify a non-exhaustive list of legitimate business interests
- Ensure agreements explicitly call for reformation or "blue penciling"
- Consider pro-employer language on fees/costs if employer prevails
- Train recruiters, interviewers, HR teams and management on new state law requirements
- Ensure offer letters and employment agreements satisfy changing state law requirements



Arbitration

VIKING RIVER SUPREME COURT DECISION AND CONSIDERATIONS IN MANDATORY ARBITRATION CLAUSES

Viking River Cruises, Inc. v. Moriana

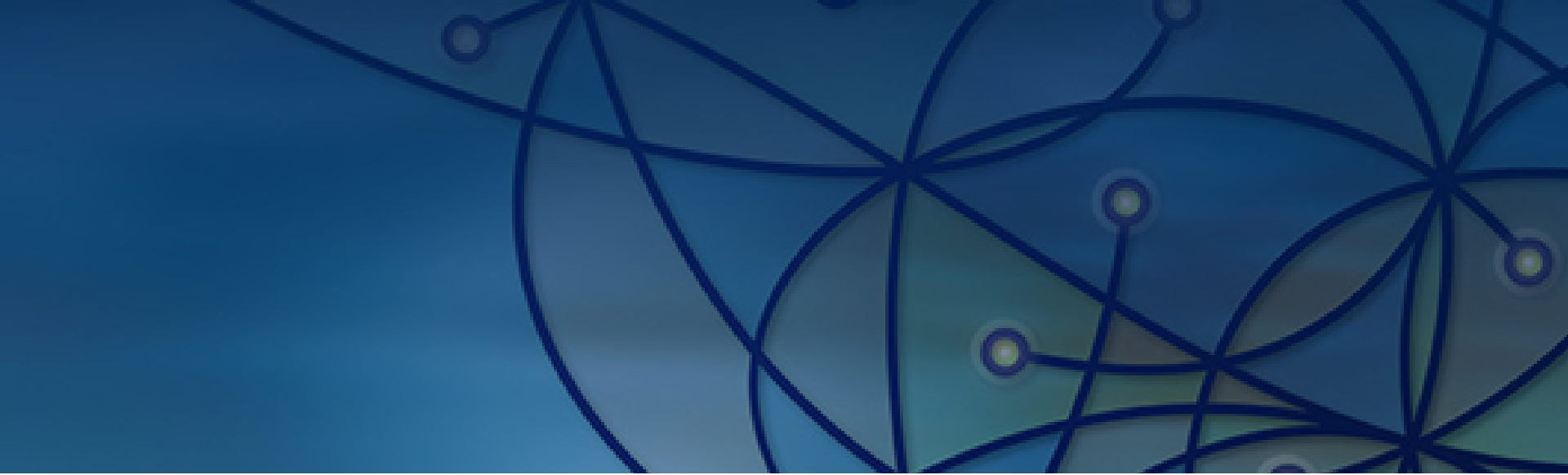
- The Supreme Court's 2022 decision in *Viking River Cruises, Inc. v. Moriana* represents a **significant victory** for employers with interests in California.
- In the case, the Supreme Court held that the Federal Arbitration Act (FAA) **preempts** a California rule that **invalidated** certain arbitration agreements. In particular, the California rule provided that under California's Private Attorney General Act (PAGA), an arbitration agreement was invalid if the employee agreed to arbitrate their **individual** claims but waived their claims **brought on behalf of other employees**.
- Employers with agreements for individual arbitration should now be able to **compel arbitration of individual PAGA claims** and obtain the **dismissal of remaining non-individual PAGA claims** seeking penalties on behalf of other employees.

Federal and State Restrictions on Arbitration

- **Federal:** Signed into law in March 2022, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act provides that "at the **election** of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, **no predispute arbitration agreement** . . . shall be valid or enforceable with respect **to a case** which is filed under Federal, Tribal, or State law and **relates to the sexual assault dispute** or **the sexual harassment dispute**." 9 U.S.C. § 402.
- **Illinois:** The Illinois Workplace Transparency Act, which became effective in 2020, states in relevant part that an agreement "that is a unilateral condition of employment or continued employment" and requires the employee or prospective employee to "**arbitrate** . . . any existing or future claim, right, or benefit **related to an unlawful employment practice** to which the employee or prospective employee would otherwise be entitled under any provision of State or federal law, is **against public policy**." 820 ILCS 96/1-25.
- **New York:** A 2019 amendment to New York law similarly prohibits an agreement providing for "mandatory arbitration to resolve **any allegation or claim of discrimination**" except "where **inconsistent with federal law**." CPLR § 7515.

Advantages and Disadvantages of Arbitration

- Potential **advantages** of arbitration:
  - Increased **confidentiality** (which may be important, for example, for disputes with executives)
  - Less **adversarial**
  - Arbitrator with **subject-matter expertise**
  - Potential to avoid **representative litigation** (such as class and collective actions and PAGA post-*Viking*)
- Potential **disadvantages** of arbitration:
  - If the matter involves **restrictive covenants**, the litigation will often involve third parties, such as the new employer, who cannot ordinarily be included in the arbitration proceeding
  - Could increase the **cost of litigation** due to obligation to pay arbitrator's costs
  - Arbitrator may try to **split the difference**



Antitrust is the New HR Skill

DOJ Antitrust Review of Employment Issues

- **No Poach Agreements**: agreements under which companies agree not to hire or solicit for employment each other's employees.
- **Wage Fixing Agreements**: agreements to fix or limit wages or other terms of compensation.
- These agreements can be *per se* illegal under the Sherman Act and State statutes
- Criminal Penalties under the Sherman Act
  - Fines of up to $100 million for the companies involved
  - Fines of up to $1 million and jail terms of up to 10 years for individuals
- Include written and oral agreements and agreements inferred from conduct
- "Naked" agreements vs. ancillary agreements

DOJ Antitrust Review

- *United States v. DaVita Inc.* – First criminal case brought by the U.S. Department of Justice based on a "no poach" agreement
- April 2022, DaVita and its CEO were acquitted on all counts
- In December 2021, the U.S. Attorney's Office pursued criminal charges against aerospace executives for allegedly conspiring to refrain from soliciting or hiring each other's workers. The workers also filed two putative class actions alleging that the conspiracy adversely impacted their wages and careers (*Doe v. Raytheon Technology Corp. et al.,* No. 22-cv-00035 (D. Conn.))
- Likely to see more litigation on scrutinizing no poach agreements

No Poach Agreements

Guidelines to avoid criminal or civil liability for no-poach agreements:

1. Unilateral and independent hiring.
2. No agreements with other companies regarding hiring or soliciting.
3. No hiring discussions or sharing of information regarding hiring between employees of different companies.
4. If an individual from another company contacts you to object to your company attempting to hire any employee of their company, terminate the conversation immediately and report it to your company's Legal Department.
5. Non-solicitation and no-hire agreements in a legitimate transaction are not per se illegal if necessary + reasonably limited in scope (i.e., type of employees, geography, duration).

Wage Fixing Agreements

Guidelines to avoid criminal or civil liability for wage fixing agreements:

1. Unilateral and independent compensation decisions.
2. No agreements regarding compensation with other companies competing for the same employees.
3. No discussions or sharing of information regarding compensation between employees of competing companies.
4. If an individual from another company that competes with your company contacts you to ask for information about what your company is paying, terminate the conversation immediately and report it to your company's Legal Department.
5. Do not agree to participate in any survey or study of compensation paid by companies that compete with your company without first conferring with your company's Legal Department.

Guidance to HR Regarding Antitrust Compliance

- Employees responsible for the recruitment or compensation of company personnel should not discuss their company's internal employment practices with competitors.
  - Antitrust compliance training
- Report violations of guidelines to Legal Department.
- Direct questions to Legal Department.
- Ensure employees abide by guidelines.
  - Annual certification
- Ensure appropriate antitrust safeguards in business transactions.

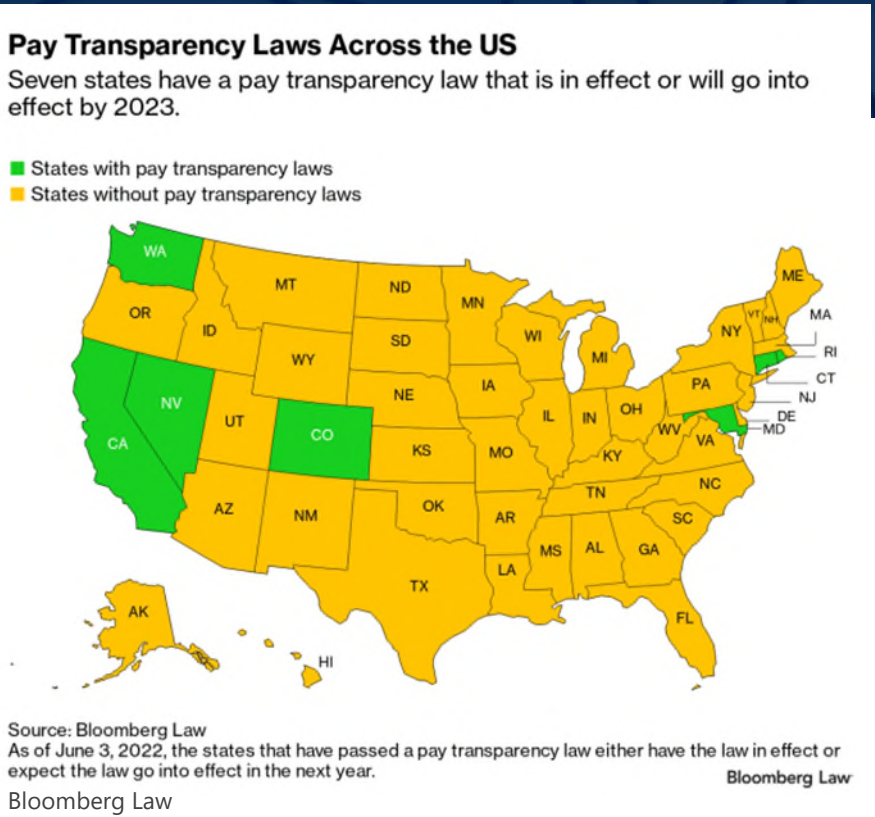
Pay Transparency on the Rise

Pay Transparency Laws on the Rise

- Q: What are pay transparency laws?
- A: Laws requiring employers to disclose salary information for each position at some point during hiring processes

State Laws

- **Currently in effect**: CO, CT, MD, NV, WA
- **Passed and soon taking effect**: CA, RI, WA (amendments) (January 1, 2023)
- **Pending**: NY (Senate Bill 9427)



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Pay Transparency Laws on the Rise

Movement on local level:

- Pending in the State of New York
  - NYC (effective Nov. 1, 2022)
  - Westchester County (effective Nov. 6, 2022)
  - Ithaca (effective Sept. 2022)
- Nothing for the State of Ohio
  - Cincinnati (effective Mar. 2020)
  - Toledo (effective Jun. 2020)

Law Requirements: California

Effective Jan. 1, 2023:

- **The Pay Transparency for Pay Equity Act** requires:
  - employers provide current employees with the pay scale for their current positions upon request.
  - employers with 15 or more employees to include in all job postings the pay scale for the advertised position.
  - employers to maintain records of job title and wage rate history for each employee for the duration of their employment plus three years thereafter.

Law Requirements Vary

- **CO**: requires employers to disclose the pay range and benefits for each job posting for each job opening.
- **CT**: requires employers to provide a salary range for all extended offers, or before offers are extended, upon request.
- **MD, RI**: requires employers to provide pay ranges to candidates upon request.
- **NV**: requires employers to automatically provide a salary range to candidates after the first interview.
- **WA**: requires employers to provide a salary range after they've made an offer to a candidate if the candidate requests it. (automatic disclosure effective Jan 1, 2023)
- **NYC*:** Employers must disclose the minimum and maximum salary, or hourly wage, for each job, promotion or transfer opportunity. Applies to independent contractors and interns.

Pay Transparency Laws

Examples of Penalties

- California – no less than $100 and no more than $10,000 per violation
- Colorado – $500 to $10,000 per violation
- Maryland – $300 to $600
- Nevada – not more than $5,000 for each violation
- New York City – up to $250,000 for an uncured first violation, as well as subsequent violations

Data Reporting on Pay to Government Agencies

Several states are requiring employers to submit pay data reports to government agencies: CA, IL, MN

CA Government Code Section 12999; Senate Bill 1162:

- Private employers with 100 or more employees (at least 1 employee in CA)
- Data report reflecting employees by race, ethnicity, and sex in specific job categories and whose annual salaries fall within BLS pay bands, and within each job category, median and mean hourly rates; total earnings, and total hours worked
- Every year
- Penalties: at least $100 per employee

820 ILCS 112/11:

- Private employers with more than 100 employees in Illinois and are required to file an EEO-1
- Must obtain an "equal pay registration certificate" from the IDOL
- Beginning on the later of March 23, 2024, or three years after the employer commences operations
- Recertify every 2 years
- Penalties: up to $10,000 per employee

820 ILCS 112/11: Equal Pay Registration Certificate

Requirements:

- Copy of most recent EEO-1 report
- List of employees separated by gender, race, ethnicity as reported in EEO-1, plus more
- Statement certifying:
  - In compliance with Equal Pay Act, Title VII, IL Human Rights Act, IL Equal Wage Act
  - Average compensation for female + minority employees not consistently below average for male + non-minority employees
  - Don't restrict employees of one sex to certain job classifications; makes promotion/retention decisions w/o regard to sex
  - Wage + benefit disparities are corrected when identified
  - Frequency with which employer evaluates compliance
  - Methods used to set wage and benefits

Expect More to Come on Data Reporting

Biden Administration's Equity Action Plans

- Goals
  - Tackle systemic discrimination
  - Advance equity
  - Improve data collection and reporting
  - Supporting diversity, equity and inclusion

Comments from EEOC Commissioner

- "Watch out, it is coming."
  - EEO-1 Component 2 pay data reporting

Actions to Consider

- Conducting an internal audit
- Using objective criteria*/uniform or centralized processes/decision-making
- Maintaining records
- Training
- Preparing to address employee relations issues

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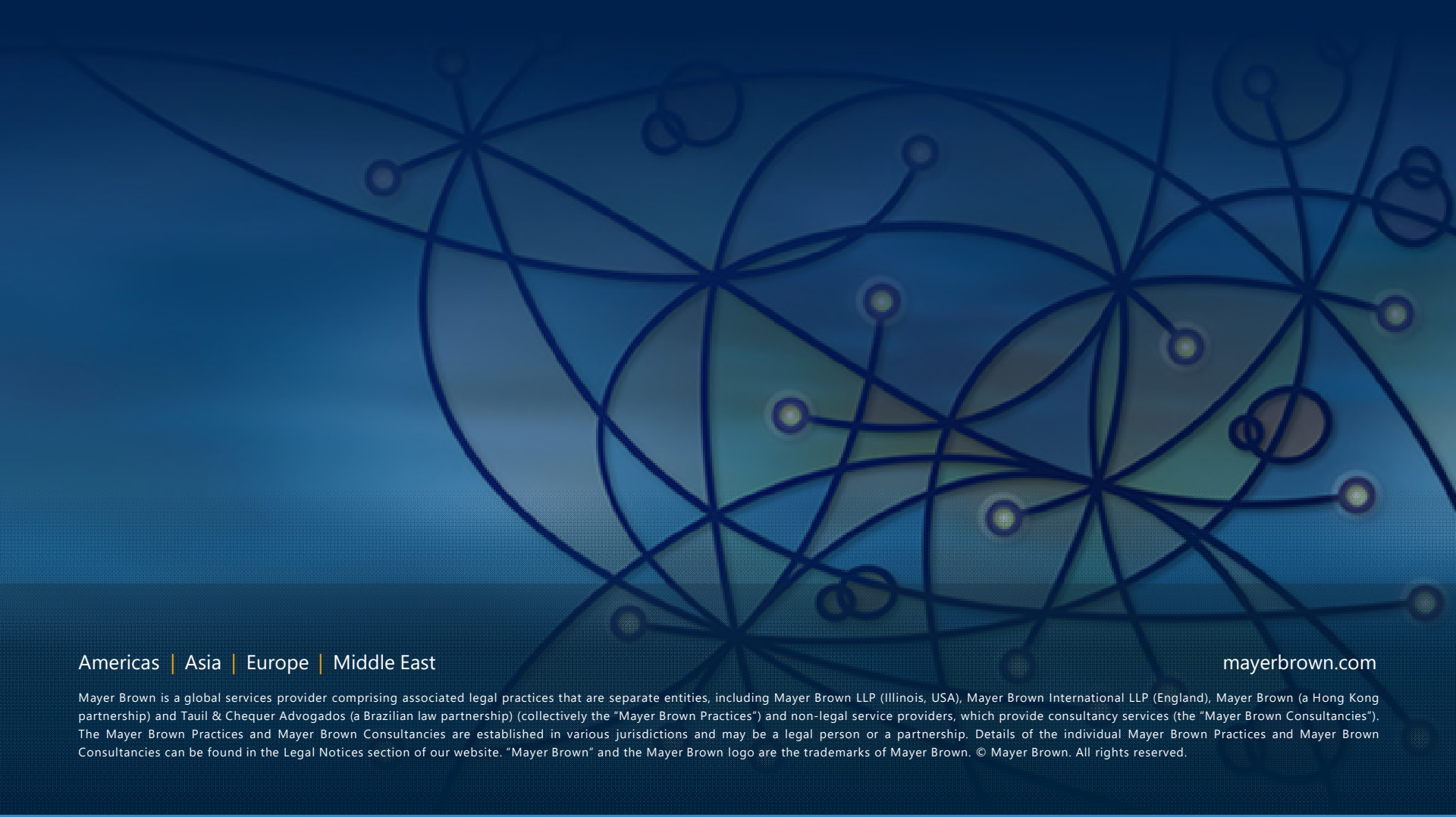

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