

# 2021 Legal Year in Review



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## Outline of Discussion

### STATE LAW UPDATE

- Earned Paid Leave
- Update to Maine Family Medical Leave Law
- Wages Payment/Payroll Changes
- Fair Chance in Employment
- Industry Specific Changes
- Whistleblower Protection Act
- MHRA Amendments

### FEDERAL LAW UPDATE

- COVID-19
  - Vaccine Mandates
    - OSHA 100 plus
    - CMS
    - Federal Contractors
- Employee Mobility
  - The Great Resignation
  - Work from Home

## State Update

Lots happened in Maine . . .

## Earned Paid Leave

- Went into effect 1/1/2021
- Still significant confusion concerning inter-relationship with current PTO policies
- How to determine regular rate of pay for non-exempt employees who receive bonuses/additional compensation
- Black-out periods/requests for leave
- Relationship with attendance policies



## Maine Family Medical Leave

- Applies to employers with 15 or more employees
- Amended to include grandchild, domestic partner's grandchild
- Now reads: "A child, domestic partner's child, grandchild, domestic partner's grandchild, parent, domestic partner, sibling or spouse with a serious health condition."
- 2021 Legislative Session –
  - LD 1559 – Signed July 22, 2021
  - Paid Family Medical Leave Working Group
  - \$200,000 funding to the Commission
  - Recommendation will be reported shortly



## Case Law Update – Pregnancy Discrimination

- *Oullette v. Francesca's Collections* (D. Me. Nov. 30, 2021)
  - Thus, unless an employer offers some sort of family leave, medical leave, disability leave, or other leave of absence to its non-pregnant employees who are unable to work, it is under no obligation to provide maternity leave to pregnant employees. And while an employer must offer reasonable accommodations, such as “temporary modification[s] in work schedules,” for pregnant employees who are otherwise able to work, id. § 4572-A(2)(C), maternity leave is not an accommodation. Accommodations enable individuals with disabilities to better perform core functions of their jobs, id. § 4553(8)(D), but maternity leave enables individuals to not perform their jobs for the duration of the leave. In any event, I would not presume that a statute prohibiting pregnancy discrimination includes a hidden requirement that employers offer some form of maternity leave to their employees.



## Payroll/Wage Acts

- 26 MRSA 635 – Overcompensation by Employer
  - Excludes paid leave as a form of overcompensation: “any compensation paid to an employee that is greater than that to which the employee is entitled under the compensation system established by the employer but does not include fringe benefits, paid leave, awards, bonuses, settlement or insurance proceeds . . . expense reimbursements, commissions or draws . . . .”
  - May not recover more than the amount of overcompensation paid to the employer in the 3 years preceding the date of discovery of the overcompensation.
  - Cannot withhold more than 5% of net amount (changed from 10% of net)
- 26 MRSA 621-A(7)
  - Cannot charge fee for direct deposit

## Employment Applications

- 26 MRSA 600-A – An Act Relating to Fair Chance in Employment
  - Employer – All employees excluding legislative, executive and judicial branch of state
  - Employer cannot:
    - Request criminal history information on initial employee application form
    - State on an initial application form or advertisement or specify prior to offer that a person with a criminal history may not apply or will not be considered for a position
  - At Interview
    - Can inquire about criminal history once determined to be otherwise qualified for the position
    - If employer inquires must afford the applicant with the opportunity to explain the information and circumstances surrounding the conviction and post-conviction rehabilitation
  - Exception
    - Can inquire on application form or state individual will not be considered if obligation imposed by state or federal law disqualifies individuals based on convictions and document states those limitations/disqualifying offenses



## Industry Specific Legislation

- Leave for Emergency Medical Services Personnel
  - Amends 26 MRSA 809 to include EMS Persons in addition to firefighters
  - Prohibits discharge or discipline for absences if based on emergency work
- Construction Industry
  - Mandatory safety training for construction workers
- Tipped Employees
  - Previously defined as regularly receiving more than \$30/month tips
  - Amended 1/1/2022 to \$100 a month in tips; 1/1/2023 to \$175
  - Increased based on cost of living following 1/1/2024



## *Nadeau v. Twin River Paper Company, LLC*

- Employee claim under the Whistleblower Protection Act
- CBA set forth rules governing employee conduct, safety policies and disciplinary procedures
- Quest before Court: Was the claim pre-empted by Section 301 of the federal Labor Management Relations Act and Section 837 of WPA
- WPA includes term that it shall not be construed “to diminish or impair the rights of a person under any collective bargaining agreement.”

## Maine Human Rights Act

- Addition of Familial Status
- Amendment to Maine Human Rights Act
- LD 1688 – An Act to Improve Consistency in Terminology and within the Maine Human Rights Act
- Signed by Governor Mills on June 24, 2021
- Took effect on September 22, 2021
- Effects all Maine employers with 1 or more employees



## Most Pertinent MHRC Amendments

**Sec. 2. 5 MRSA §4553, sub-§5-A**, as amended by PL 2019, c. 464, §1, is further amended to read:

**5-A. Familial status.** "Familial status" means ~~that a family unit may contain one or more individuals who have not attained 18 years of age and are living with~~ that contains:

A. One or more individuals who have not attained 18 years of age and are living with a parent or another person having legal custody of the individual or individuals or the designee of the parent or other person having custody with the written permission of the parent or other person; or

B. The designee of the parent or other person having custody, with the written permission of the parent or other person.

B-1. One or more individuals 18 years of age or older who lack the ability to meet essential requirements for physical health, safety or self-care because the individual or individuals are unable to receive and evaluate information or make or communicate decisions.

The protections afforded against discrimination on the basis of familial status apply to any person who is pregnant or who is in the process of securing legal custody of any individual who has not attained 18 years of age.

### **§4571. Right to freedom from discrimination in employment**

The opportunity for an individual to secure employment without discrimination because of race, color, sex, sexual orientation or gender identity, physical or mental disability, religion, age, ancestry ~~or~~, national origin or familial status is recognized as and declared to be a civil right.

**Sec. 5. 5 MRSA §4572, sub-§1**, as amended by PL 2005, c. 10, §§11 and 12, is rther amended to read:

**1. Unlawful employment.** It is unlawful employment discrimination, in violation of is Act, except when based on a bona fide occupational qualification:

A. For any employer to fail or refuse to hire or otherwise discriminate against any applicant for employment because of race or color, sex, sexual orientation or gender identity, physical or mental disability, religion, age, ancestry ~~or~~, national origin or familial status, because of the applicant's previous assertion of a claim or right under former Title 39 or Title 39-A or because of previous actions taken by the applicant that are protected under Title 26, chapter 7, subchapter 5-B; or, because of those reasons, to discharge an employee or discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment; or, in recruiting of individuals for employment or in hiring them, to utilize any employment agency that the employer knows or has reasonable cause to know discriminates against individuals because of their race or color, sex, sexual orientation or gender identity, physical or mental disability, religion, age, ancestry ~~or~~, national origin or familial status, because of their previous assertion of a claim or right under former Title 39 or Title 39-A or because of previous actions that are protected under Title 26, chapter 7, subchapter 5-B;



## What's Pending in Augusta?

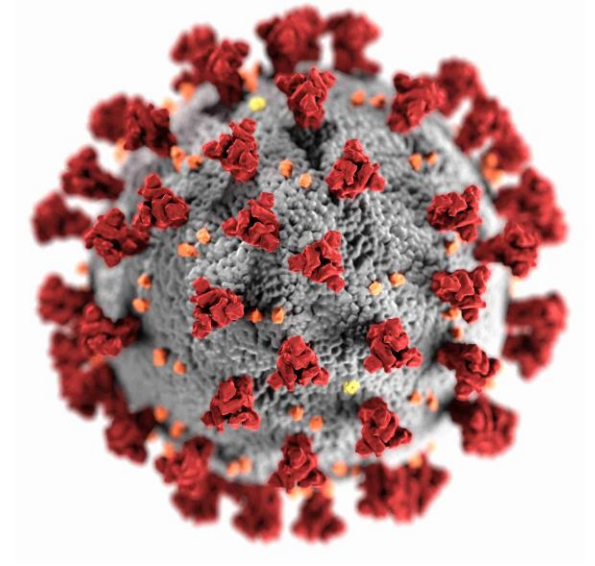
- *DHHS – Prohibit COVID-19 Vaccine Mandate for 5 years*
- *An Act to Clarify the Laws Related to the Use of Medical Marijuana and Workers Compensation (LD 1881)*
- *An Act to Amend the Whistleblowers' Protection Act to Ensure Coverage in Unionized Workplaces (LD 1889)*
- *An Act to Restore Overtime Protections to Maine Workers (LD 607)*
- *An Act Concerning Non-Disclosure Agreements in Employment (LD 965)*
- *An Act to Increase Accountability for Wage Violation (LD 616)*
- *An Act to Prohibit Employers from Retaliating Against the Use of Earned Paid Leave (LD 1338)*
- *An Act to Make Health Care Coverage More Affordable for Working Families and Small Businesses (LD 1463)*



## Federal Update

(We are still talking about COVID. . . .)

## COVID-19

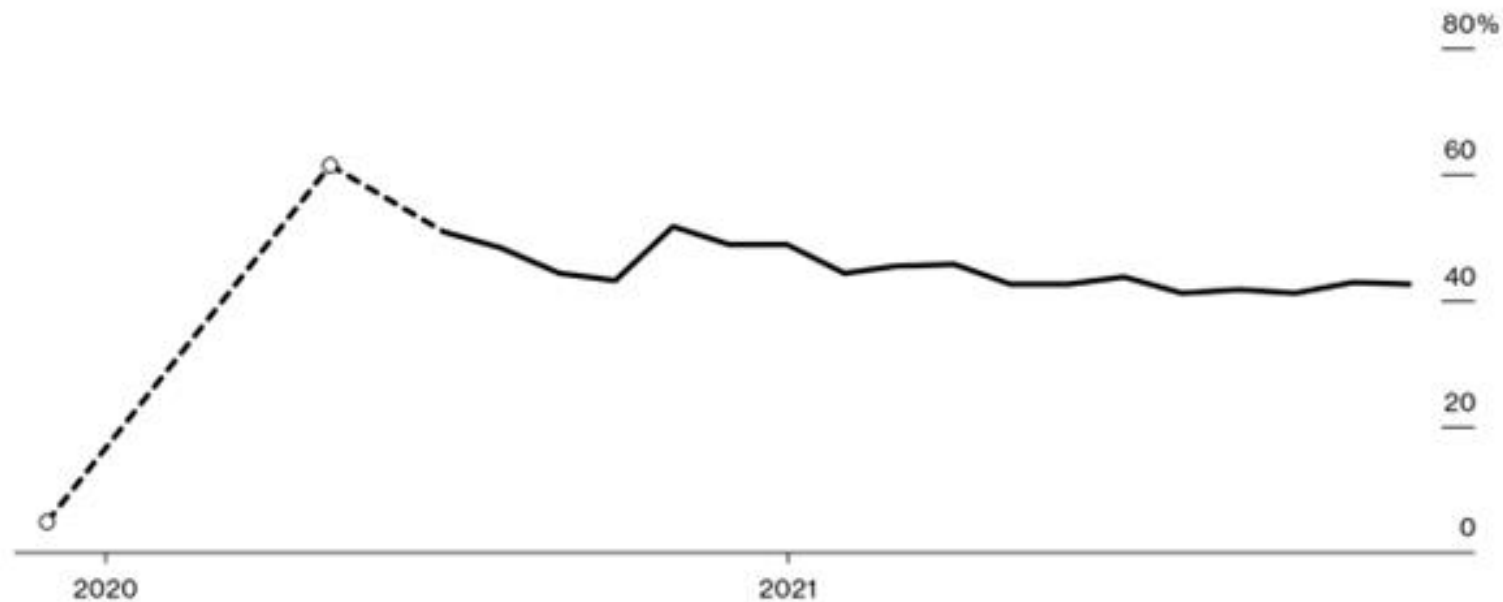


- Vaccine Mandates
  - OSHA 100 plus ETS – Stayed by Supreme Court
  - CMS Mandate – Upheld by Supreme Court
  - Federal Contractor Mandate - Split Jurisdictional Determinations
  - Best Practices Generally
- CDC Guidance for Employers
  - Boosters
  - Close Contact/Quarantine Periods
- Wage and Hour Questions Related to COVID-19

## Employee Mobility

### The WFH Plateau

Percentage of U.S. full paid days worked from home



Data: Chicago-ITAM-MIT-Stanford Survey of Working Arrangements and Attitudes, [www.wfhresearch.com](http://www.wfhresearch.com) (2020 and 2021 data); pre-2020 figure is an estimate based on the 2017-2018 American Time Use Survey conducted for the Bureau of Labor Statistics





## Employee Mobility

- Hiring/Attracting/Retaining
  - I-9 Remote
- Remote Work Policies
  - Tax implications
  - Safety implications
  - Security Considerations
  - Electronic Monitoring and State Law
- Wage and Hour Implications for Non-exempt Employees
  - Tracking time
  - Expense reimbursement

## National Labor Relations Board - 2022

- Employment Status
- Legality of Workplace Rules
- Appropriateness for Smaller Bargaining Units
- Availability of Consequential Damages
- Confidentiality Clauses in Arbitration Agreements