

# **California Here We Come: Ever-Expanding Colorado and Federal Labor & Employment Laws**

Presented by:

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## TODAY'S SESSION:

Lots of changes on the Colorado and Federal legal landscape as it relates to employees!

- Vacation/PTO Policies
- COMPS Orders 37 & 38, Tip Pools, and Other Wage/Hour Issues
- Equal Pay for Equal Work Act & Wage Transparency
- Quick Reminders:
  - Healthy Families and Workplaces Act – Sick Leave
  - State FMLA – FAMLI Act
- ETS and Vaccines
- Q&A

# Vacation Policies

The Colorado Supreme Court decision:

- An employer must pay an employee's earned but unused vacation pay upon separation from employment –any agreement or policy forfeiting this pay is void as a matter of law.
- Colorado employers do not have to offer vacation pay - no automatic right to vacation pay.
- However, as confirmed by the June 14, 2021 decision in *Nieto v. Clark's Market*, once an employer chooses to provide vacation pay, it cannot be forfeited once earned.

# Case Analysis: *Nieto v. Clark's Market*

- Carmen Nieto worked for Clark's Market for eight-and-a-half years until she was fired in March 2017.
- The company policy at the time provided that vacation time was earned during the anniversary year prior to when it was used, and the amount earned based on length of employment.
- However, the policy provided that employees forfeited all earned vacation pay benefits if their employment was terminated.

# Warning Shots Fired?

- The Court supported its holding by noting that the Wage Act's purpose was to protect employees from "exploitation, fraud, and oppression."
- It concluded "Allowing an employer to manipulate contractual language to avoid paying rightful wages to employees contravenes these purposes behind the Wage Act."
- **Employers should now tread cautiously** when it comes to Colorado wage and hour law compliance, as this extremely broad language and reasoning could be used in the future by opportunistic plaintiffs' attorneys and sympathetic judges to expand the Wage Act's reach.

# What Employers Should Do Now

- **The good news** is that the Colorado Supreme Court has specifically held employers in Colorado do *not* have to provide vacation pay.
- **The bad news:** if you choose to do so, you must pay out vacation pay at termination. This decision requires you to consider some critical steps:

# What Employers Should Do Now

- You should review your handbooks and policies and make whatever changes are necessary to ensure that any earned and determinable vacation pay is not forfeited either at **year end** or at **termination** (same thing with PTO).
- Any “use-it-or-lose-it” language you have in your written policies is now considered void.
- Alternatives: Cap/maximum accrual; “forced vacation;” and periodic payouts.

# Colorado Overtime & Minimum Pay Standards (COMPS) Orders #37 & #38

- Effective January 1, 2022 and beyond . . .
- Key Provisions:
  - Covers all employers
  - Increased salary thresholds for exempt employees January 1, 2021 (\$40,500/\$778.85 per week – higher than FLSA requirements)
    - January 1, 2022: \$45,000 per year/\$865.38 per week
    - Rises each year to \$55,000 on January 1, 2024 (then CPI-based)



# COMPS Orders

- Additional Provisions:
  - Redefine and adds certain exemptions
  - Clarify overtime requirements
  - Orders must be posted
    - Translated if employees have limited English language ability
  - COMPS Order or poster must be included in handbooks (addendum)
  - Changes to rules on uniforms, meals, and lodging credits
  - Duty-free meal period issues remain the same
  - “New” interpretation of 10-minute break rule



# COMPS Orders

- A 10-minute break every 4 hours “or major fractions thereof”

<u>Work Hours</u>	<u>Rest Periods Required</u>
2 or fewer	0
Over 2, and up to 6	1
Over 6, and up to 10	2
Over 10, and up to 14	3
Over 14, and up to 18	4
Over 18, and up to 22	5
Over 22	6

- So how do you track? (Employee acknowledgement)

# **Let's talk about tip pools . . .**

# TIP CREDITS & POOLS

- Federal, state, and local law may apply
- **Tip Credit or full minimum wage???**
  - Advance written notice
  - Amount of tip credit claimed
  - Tipped wage + tips must = applicable M.W.
  - \$30/month in tips
  - Tips are sole property of employee

# TIP CREDITS & POOLS

- Tip Pools
  - Advance written notice
  - Only employees who customarily & regularly receive tips
    - Yes: Servers, counter personnel who serve customers, bussers, service bartenders
    - No: Owners, managers, supervisors, janitors
    - Maybe: Dishwashers, chefs, cooks, food prep

# TIP CREDITS & POOLS

- Tip Pools
  - Closer cases: Hosts, bar backs, **expeditors** (server helpers?), employees who act like supervisors
  - Federal overlap with COMPS Orders
  - Comps Order says the tip credit is nullified if you share with management or “food preparers,” or if you deduct credit card processing fees from tipped employees

# TIP CREDITS & POOLS

- Recent legal developments
  - Congress's Budget Reconciliation Bill (No owner/manager/supervisor tip sharing, period)
    - Does not include direct tips
  - *New Food Guy* (10<sup>th</sup> Circuit) – still good law
  - Amended C.R.S. Section 8-4-103 (6) (8/2/19)
    - Placard replaced by menu, tent, or receipt
  - Continued focus in class/collective actions
  - Leads us to various approaches and models

# TIP CREDITS & POOLS

## Various models:

- Classic Tipping
- Tip Pooling
- Hybrid – 2-3% Service Fee w/Tipping Combo
- 20% Service Fee



# AVOIDING CLASS & COLLECTIVE ACTIONS?

- Arbitration agreements?
  - Class/collective action waivers
  - Jury trial waivers

# Resurrection of the 80/20 Rule

- Tip credit may only be taken for time spent by the employee when they are “engaged in” a tipped occupation. Time spent outside of the tipped occupation must be paid at the federal minimum wage without a tip credit applied to those hours.
- An employer loses the tip credit if a tipped employee spends more than 20% of their *weekly* hours performing work that is not tip-producing work or work that directly supports tip-producing work.
- An employer loses the tip credit for a tipped employee who performs “directly-supporting work” for a *continuous* period that exceeds 30 minutes (think side work). This is true even if the continuous time spent on this work amounts to less than 20% of the employee’s total work for the week.

# Resurrection of the 80/20 Rule

- Tip-producing work?
  - walking to the kitchen or bar to retrieve prepared food and drink and delivering those items to the customers;
  - filling and refilling drink glasses;
  - attending to customer spills or items dropped on the floor adjacent to customer tables;
  - processing credit card and cash payments; and
  - removing plates, glasses, silverware, or other items on the table during the meal service.
  - **NOT:** general food preparation, including salad assembly, is not part of the tipped occupation of a server

# Resurrection of the 80/20 Rule

- Directly supporting work?
  - Defined as “work which is performed by a tipped employee in preparation of, or to otherwise assist tip-producing customer service work.”
  - Work “performed by a tipped employee such as a server or busser in a restaurant before or after table service, such as rolling silverware, setting tables, and stocking the busser station, which is done in preparation of the tip-producing customer service work.”

# Resurrection of the 80/20 Rule

- USDOL examples:
  - **Example 1.** A server is employed for 40 hours a week and performs 5 hours of work that is not part of the tipped occupation, such as cleaning the kitchen, for which the server is paid a direct cash wage at the full minimum wage. The server also performs 18 minutes of non-tipped directly supporting work twice a day, for a total of three hours a week. The employer may take a tip credit for all of the time the employee spends performing directly supporting work, because this time does not exceed 20 percent of the workweek. Because this employee has been paid the full minimum wage for a total of five hours a week, the employee could perform up to seven hours of directly supporting work (35 hours × 20 percent = 7 hours) without exceeding the 20 percent tolerance.

# Resurrection of the 80/20 Rule

- USDOL examples:
  - ***Example 2.*** A server is employed for 40 hours a week and performs 5 hours of work that is not part of the tipped occupation, such as cleaning the kitchen, for which the server is paid a direct cash wage at the full minimum wage. The server also performs 10 hours a week of nontipped directly supporting work, in increments of time that do not exceed 30 minutes. The 5 hours of work paid at the minimum wage is excluded from the workweek for purposes of the 20 percent calculation. Therefore, the employer may take a tip credit for 7 hours of the directly supporting work ( $35 \text{ hours} \times 20 \text{ percent} = 7 \text{ hours}$ ), but must pay the server a direct cash wage equal to the minimum wage for the remaining three hours.

# Resurrection of the 80/20 Rule

- If you utilize the tip credit . . . .
  - Consider developing a process where employees can notify management if they have performed directly supporting work in excess of either time limitation so that management can take steps to adjust their compensation appropriately.
  - Consider whether to implement an acknowledgement affirming whether the employee performed any work outside *tip-producing work* or *directly-supporting work*, and if so, for how long that work lasted.

# **Colorado Equal Pay for Equal Work Act**



# Equal Pay for Equal Work

Became effective January 1,  
2021

Prohibits an employer (with only  
1 employee) from discriminating  
between employees

- on the basis of sex or
- on the basis of sex plus another  
protected status

by paying one employee a wage  
rate less than the rate paid to an  
employee of a different sex for  
substantially similar work



# Equal Pay for Equal Work

Exceptions: different rates may be paid if pursuant to:

- Seniority system
- Merit system
- System that measures earnings by:
  - quantity or quality of production
  - the geographic location where the work is performed
  - education, training or experience or
  - travel

# Equal Pay for Equal Work

Job postings (internal and external) must include salary ranges and a general description of benefits

- May include a hyperlink to compensation and benefits information
- Ultimately may pay more or less than the posted range. Only the Colorado range is required for multi-state or remote postings; postings may specify a different range for different parts of Colorado

# Equal Pay for Equal Work

Internal promotion opportunities must be posted for all employees:

- Reasonable effort to announce promotional opportunities to all Colorado employees prior to making a promotion decision
- Promotional opportunity - existing or new position that could be considered a promotion for at least one employee in terms of compensation, benefits, status, duties, or access to further advancement
- CDLE: Companies may not limit the announcements to only “qualified” employees.
- Announcements must include the job title, means by which employees may apply, and compensation and benefits for the position
- Notice must be “sufficiently in advance of the promotion decision for employees to apply.”
- Employers may post the announcements by any method so long as all covered employees can access them within their regular workplace (either online or in hard copy) and are told where to find them

# Equal Pay for Equal Work

Act does not place any restrictions on the hiring process or who is hired:

- Employers may already know who the position is intended for, may state that applications are open only to those with certain qualifications, and may screen or reject candidates based on qualifications.
- No set number of days a promotional opportunity must be posted before the hiring decision
- No requirement that an employer must receive or consider applications

# Equal Pay for Equal Work

Prior wage history may not be relied upon to justify a disparity in current wage rates

- Employers may not:
  - ask for prior wage history
  - discriminate against an individual who fails to disclose wage history
  - Employers may not prohibit employees from discussing their wage rates

# Equal Pay for Equal Work

## Recordkeeping requirement

- Must keep for duration of employment plus two years after the end of employment
  - job descriptions
  - wage rate history of each employee



# Equal Pay for Equal Work

## Penalties for violations

- Back pay for 2-3 years after discovery of pay gap
- Liquidated damages in an equal amount
  - Defense: if pay disparity was made in good faith as shown by a comprehensive pay audit performed in the last two years
- Job posting violations: \$500 to \$10,000 per violation
- Attorney fees and costs



# HEALTHY FAMILIES AND WORKPLACES ACT

# Healthy Families and Workplaces Act

- COVID-19-related sick leave protections still in effect.
- Created a traditional paid sick leave requirement beginning January 1, 2021.

# Paid Sick Leave “PSL”

- Currently, employers with 16+ employees
  - January 1, 2022, all employers regardless of size.
  - Accrued at one hour for every 30 hours worked, maximum of 48 hours.
  - Accrual starts when employment begins
  - May use PSL as it is accrued
  - May carry forward up to 48 hours
  - BUT **not** paid out at termination
- More generous PTO already provided? Can cover state-required PSL.

# Paid Sick Leave “PSL”

## Uses

- Condition prevents work
- Care or treatment
- Victim of domestic abuse
- Care for family member
- Public Health Emergency

## Documentation

- Four consecutive working days



# Public Health Emergency Leave

- Any employee who works for employer is eligible immediately:
  - No minimum days/hours of employment
  - Federal PHO remains in effect
- If the employee is sick, entitled to:
  - Full-time Employees – 80 *supplemental* hours of paid sick leave
  - Part-time Employees – The greater of either (1) the amount of time the employee is scheduled to work in a fourteen-day period or (2) the amount of time the employee actually works on average in a fourteen-day period.



# Public Health Emergency Leave

- Uses
  - Need to Quarantine
  - Care, diagnosis, or treatment
  - Exposure
  - Inability to work due to increased susceptibility
  - Care for a family member
- Documentation
  - Not required to take this leave



# PTO, PSL, and PHE ... Oh my!

How do these all work together?

Is the employer actually REQUIRED to provide:  
PTO + 48 hours PSL + 80 hours PHE ?!?!?

Not necessarily

# CO Family and Medical Leave

Colo. Rev. Stat. § 8-13.3-301) – FAMLI Act

- 12 weeks of paid family and medical leave funded through a payroll tax paid by employers and employees - 50/50 split.
- Additional four weeks of leave would be allowed for pregnancy or childbirth complications.
- First premiums would be paid beginning January 1, 2023; benefits start January 1, 2024.
- Non-retaliation provisions.



# CO Secure Savings Program

- Not intended to replace your existing 401(k) programs – covers employers with 5 or more employees
- Employees are automatically enrolled in the new program
  - Percentage of employee pay (the default is likely 5%) will be automatically deposited into an Individual Retirement Account (IRA)
  - Account belongs to each employee and is portable from job to job - employees can opt out of the program or decrease the percentage of pay being withheld
- Nothing is required right now – awaiting “employer implementation package” (with model disclosures) and an “employee information packet” (with an explanation of how to opt out) – October 2022

# **OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard Subpart U**

# Which employers will be covered?

- ALL employers covered by the OSH Act with 100 or more employees must comply with the ETS.
- Includes many office-based employers who do not regularly interact with OSHA.
  - Financial institutions;
  - Insurance companies;
  - Law firms;
  - Other professional and technical work environments.



# Which *employees* are not covered?

The ETS does not apply to the following employees of covered employers:

- Employees who do not report to a workplace where other individuals, such as coworkers or customers, are present;
- Employees who work from home full time;
  - An employee who switches back and forth from teleworking to working in a setting where other people are present (e.g., an office) is covered by the ETS and must be vaccinated if required by the employer, or have a negative test within 7 days of returning to the workplace.
- Employees who work exclusively outdoors.

# The 100-Employee Threshold

## Who is counted in the 100?

- Employers must include all employees across all of their U.S. locations, regardless of employees' vaccination status or where they perform their work.
  - Part-time employees do count towards the company total, but independent contractors do not.
- For a single corporate entity with multiple locations, all employees at all locations are counted for purposes of the 100-employee threshold for coverage under this ETS.
- In a traditional franchisor-franchisee relationship in which each franchise location is independently owned and operated, the franchisor and franchisees would be separate entities for coverage purposes, such that the franchisor would only count "corporate" employees, and each franchisee would only count employees of that individual franchise.

# The 100-Employee Threshold

- In other situations, two or more related entities may be regarded as a single employer for OSH Act purposes if they handle safety matters as one company, in which case the employees of all entities making up the integrated single employer must be counted.
- In scenarios in which employees of a staffing agency are placed at a host employer location, only the staffing agency would count these jointly employed workers for purposes of the 100-employee threshold for coverage under this ETS.
- Traditional joint employer principles would apply where both employers are covered by the ETS.

# The 100-Employee Threshold cont'd.

## What about the change in the number of employees?

- If the employer has 100 or more employees on the effective date, the ETS applies for the duration of the standard.
- If the employer has fewer than 100 employees on the effective date of the standard, the standard would not apply to that employer as of the effective date.
  - If that same employer subsequently hires more workers and hits the 100-employee threshold for coverage, the employer would then be expected to come into compliance with the standard's requirements.
- Once an employer has come within the scope of the ETS, the standard continues to apply for the remainder of the time the standard is in effect, regardless of fluctuations in the size of the employer's workforce.

# COVID-19 Vaccine and Testing ETS Requirements

The COVID-19 Vaccine or Testing ETS contains the following requirements in 29 CFR 1910.501, Subpart U:

- The employer must establish, implement, and enforce a written mandatory vaccination policy that requires each employee to be fully vaccinated against COVID-19

OR

- The employer must implement a policy that allows employees to choose between being fully vaccinated or both tested and wearing a face covering.



# The Testing Alternative

The ETS requires employers to ensure that employees who are not fully vaccinated and who report at least once every seven days to a workplace where other individuals such as coworkers or customers are present are:

- (1) tested for COVID-19 at least once every seven days; and
- (2) provide documentation of the most recent COVID-19 test result to the employer no later than the seventh day following the date the employee last provided a test result.

Employers must also ensure that employees who are not fully vaccinated and do not report during a period of seven or more days to a workplace where other individuals are present are:

- (1) tested for COVID-19 within seven days prior to returning to the workplace; and
- (2) provide documentation of that test result upon return to the workplace.

# Types of Tests

- Qualified tests must be: (i) cleared, approved, or authorized, including in an Emergency Use Authorization (EUA) by the U.S. Food and Drug Administration (FDA) to detect current infection with the SARS-CoV-2 virus (e.g. a viral test); (ii) administered in accordance with the authorized instructions; and (iii) not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.
- Employees who have completed the entire primary vaccination by the January 4, 2022 effective date do not have to be tested on that date, even if they have not yet completed the 2-week waiting period.



# Who pays for testing?

- ETS does not require employers to pay costs of testing for employees who “choose not to be vaccinated.”
  - OSHA notes that the ETS does not prohibit the employer from paying for costs associated with testing required.
- Some workers and/or their representatives will negotiate the terms of payment.
- Some employers may choose to pay for some or all of the costs of testing as an inducement to keep employees in a tight labor market.



# Who pays for testing?

- Employers may choose to put the full cost of testing on employees in recognition of the employee's decision not to become fully vaccinated.
- Insurance may cover the cost of tests.
- Several states have laws predating COVID-19 requiring employers to pay for mandatory medical tests or reimburse employees for any such testing.



# Not so fast...must employers pay employees for time spent getting tested?

- No clear answer for all employees – safest to pay for the time.
- Generally, time spent by employees receiving employer-required tests should be treated as compensable
  - If the testing is required during the workday or
  - If necessary to perform the job safely and effectively.



# Must employers pay employees for time spent getting vaccinated?

- The employer must:
  - (i) provide a reasonable amount of time to each employee for each of their primary vaccination series dose(s); and
  - (ii) provide up to 4 hours paid time, including travel time, at the employee's regular rate of pay for this purpose.
- The employer must provide "reasonable time and paid sick leave" to recover from side effects experienced following any primary vaccination series dose to each employee for each dose. (OSHA presumes that 2-days is a reasonable time for recovery).
- Employers can require that employees use existing accrued paid sick leave to recover from side effects, but cannot require that employees use vacation pay or future, unaccrued, paid sick leave.



# Additional ETS Requirements

- Employers must determine employee vaccination status, and must require that any employees who are not vaccinated be tested for COVID-19 at least once every 7 days.
- Employers must provide specified information to employees regarding COVID-19 vaccine efficacy, safety, and the benefits of being vaccinated in a written vaccination plan.
- Employers must maintain a record of:
  - Employees' COVID-19 vaccination status;
  - Proof of vaccination;
  - Copies of employee COVID-19 test results; and
  - The aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace.

# Written Vaccination Policy

To ensure compliance with ETS the written policy should address:

- Requirements of the ETS and other workplace policies and procedures;
- Requirements for COVID-19 vaccination and vaccine efficacy;
- Information on determining an employee's vaccination status and how this information will be collected (paragraph (e));
- Paid time and sick leave for vaccination purposes (paragraph (f));



# Written Vaccination Policy cont'd

- Notification of positive COVID-19 tests and removal of COVID-19 positive employees from the workplace (as described in paragraph (h));
- Information to be provided to employees pursuant to paragraph (j) (e.g., how the employer is making that information available to employees); and
- Mask policy for unvaccinated workers
- Disciplinary action for employees who do not abide by the policy.

# Proof of Vaccination

Employers must require employees to provide an acceptable proof of vaccination status, including whether they are fully or partially vaccinated.



# Proof of Vaccination

Acceptable proof of vaccination status is:

- the record of immunization from a health care provider or pharmacy;
- a copy of the COVID-19 Vaccination Record Card;
- a copy of medical records documenting the vaccination;
- a copy of immunization records from a public health, state, or tribal immunization information system; or
- a copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s).
- A signed and dated employee attestation is acceptable in instances when an employee is unable to produce proof of vaccination. Must state that their vaccination status and that they have lost and are otherwise unable to produce proof. Must require that employees declare that the statement of their vaccination status is true and that they understand providing false information may subject them to criminal penalties.

# Facial Coverings

All employees who are not fully vaccinated must wear a face covering when indoors and when occupying a vehicle with another person for work purposes, except:

- when an employee is alone in a room with floor to ceiling walls and a closed door;
- for a limited time while the employee is eating or drinking at the workplace or for identification purposes in compliance with safety and security requirements;
- when employees are wearing respirators or face masks; or
- where the employer can show that the use of face coverings is infeasible or creates a greater hazard.



# What Records to Maintain?

- Employers must maintain a record and a roster of each employee's vaccination status and testing records.
- This information is subject to applicable legal requirements for confidentiality of medical information.
- These records must be preserved while the ETS is in effect.

The standard 30-year record retention requirements do not apply.



# Reporting COVID-19 Fatality or In-Patient Hospitalization

Employers must report:

- (i) Each work-related COVID-19 fatality within 8 hours of the employer learning about the fatality.
- (ii) Each work-related COVID-19 in-patient hospitalization within 24 hours of the employer learning about the in-patient hospitalization.

When reporting COVID-19 fatalities and in-patient hospitalizations to OSHA in accordance with paragraph (j)(1) of the ETS, the employer must follow the requirements in 29 CFR part 1904.39, except for 29 CFR part 1904.39(a)(1) and (2) and (b)(6).



# Penalties for Non-Compliance

## Employee penalties

- Penalties for employee could include criminal penalties for knowingly providing false information to their employer attesting to their vaccination status (fully vaccinated or partially vaccinated); and attesting that they have lost and are otherwise unable to produce proof required by the ETS.



# Fifth Circuit Stay Order

- Nov. 6 - Court issued an order blocking the ETS from taking effect on a nationwide basis.
- Order cites Statutory and Constitutional issues
- Nov. 12 – Court upholds stay after briefing from the parties
- Orders OSHA to stop Implementation of ETS





# Litigation and the 6th Circuit Stay

## *What Comes Next?*

- In response to order, OSHA announces it will stop implementing and enforcing the ETS until further resolution
- Sixth Circuit is assigned to hear all of the various legal challenges on a consolidated basis
- That Court could keep or revoke the Fifth Circuit's stay
- Sixth Circuit did not agree to expedited ruling
- The losing side will likely appeal directly to SCOTUS

# Mandatory Vaccine Policy

Any requirement should be based on objective facts; tied to employee's job duties/job descriptions; and consistently administered.

- Decide how to gather vaccine information
- Clearly describe expectations and rationale
- Explain how to seek an exemption as an accommodation
- Ensure no retaliation (or appearance of retaliation)
- Safeguard all medical information - separate from general personnel files

# Accommodation Requests

## **Develop a plan for handling accommodation requests.**

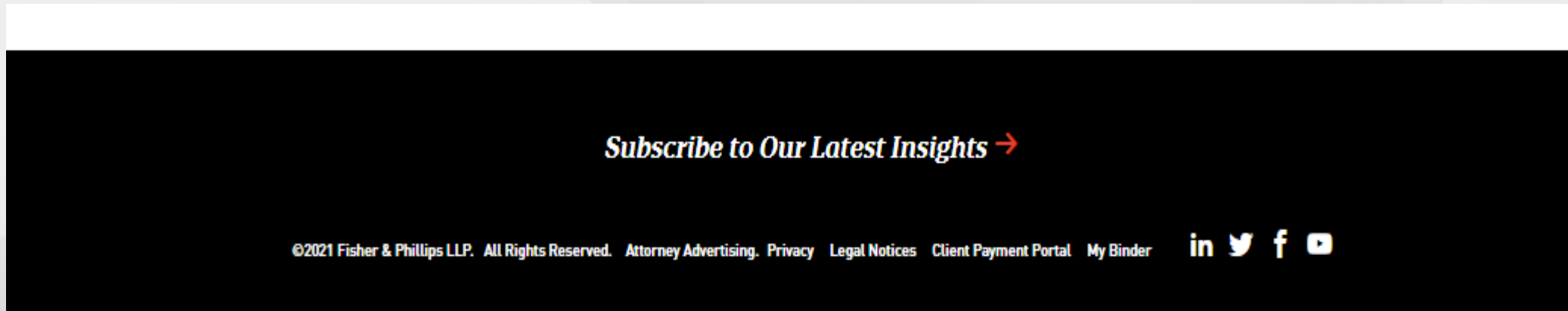
- Employees may request accommodations for disabilities or for religious reasons under federal or state laws.
- Develop a robust and clear reasonable accommodation policy to address religious and disability issues.
- Communicate and administer the accommodation process thoughtfully, emphasizing individualized, confidential consideration of each request.
- Be prepared for employees to request an accommodation from the weekly testing requirement.



# FP Legal Alerts



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# Q & A

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