

The New Normal:

Continuing Considerations of Hybrid and Remote Work

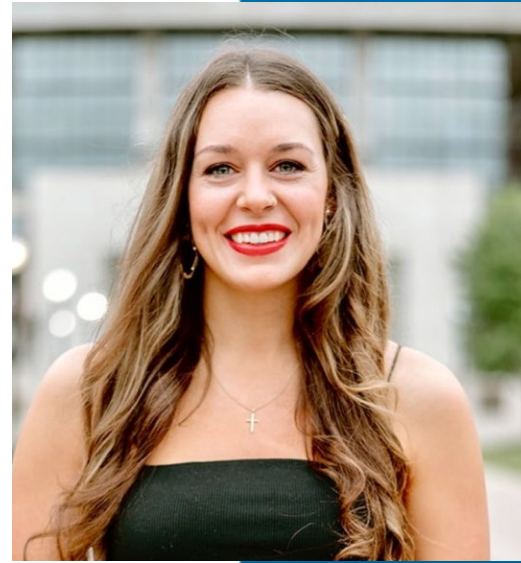
January 17, 2023

Today's Webinar Host

Stephanie Zielinski

Marketing Director of ComplianceHR

Zielinski@ComplianceHR.com



Who We Are



- Artificial Intelligence
- Infrastructure enterprise

- Subject matter expertise
- Knowledge management team
- Case databases

What we do:

Deliver expert guidance in a fraction of time and cost as traditional methods

Simplify the complexity of employment law



PolicySmart™

Create and maintain an up-to-date and legally compliant employee handbook



Navigator Independent Contractor

Remove risk in determining Independent Contractor status



Navigator Overtime

Determine if an employee is exempt or non-exempt



The Reference Center

A Comprehensive Solution for Employment Law and Common HR Compliance Questions



Navigator Onboarding

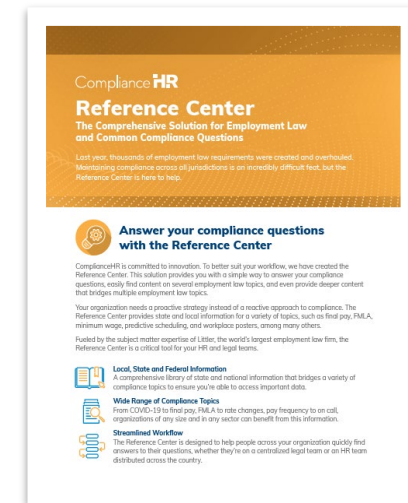
Assemble and produce legally compliant onboarding documents



Navigator Leave

Reduce the risk and administrative burden of leave management

Compliance Essentials



PolicySmart provides you with:

- Federal and state-compliant templates
- Innovative compliance timeline
- Handbook policy checklists
- Automated twice monthly legal update emails

The ComplianceHR Reference Center provides you with:

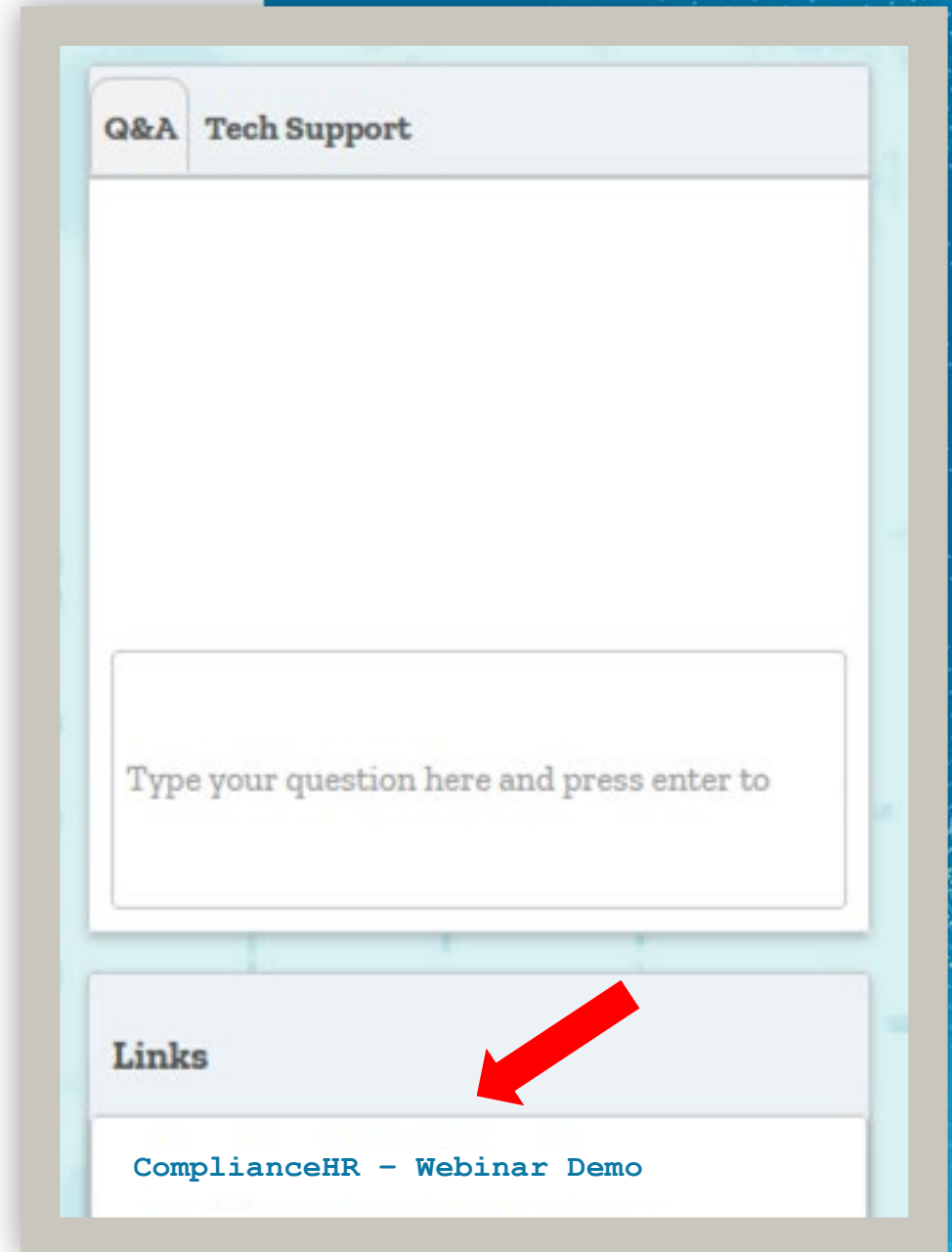
- Local, state, and federal information
- Streamlined workflows
- Wide range of compliance topics
 - COVID-19, final pay, FMLA, rate changes, and more

When coupled, these two solutions provide you with comprehensive compliance program support

Register for a Navigator Suite Demonstration

Benefits of a custom demonstration:

- Discuss your organization's requirements/challenges
- Review Navigator Suite Solutions
- Share compliance methodologies
- Provide free trial in Navigator Suite sandbox



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Shareholder | Littler

Washington D.C.



Overview

- Introduction
- Basics: Registering to Do Business
- Wage & Hour Compliance and Expense Reimbursement
- Paid Family and Medical Leave Laws
- Other State-Specific Laws
- Practical Recommendations



That was then...

If you can work from home, you should. Now.

Help slow the coronavirus down by making it harder to spread

Littler

Coronavirus (COVID-19) Update: Littler's Remote Work Plan

We are providing an important update for all Littler clients and friends of the firm in response to the COVID-19 situation. Littler has instituted a remote work plan for attorneys and employees for the United States, Canada and Mexico. We will continue to monitor the situation as we follow local, state, and federal guidance; and will keep you informed.

To ensure there is no business disruption, we have outfitted our professionals with appropriate remote technology support, consistent with our firm's privacy and security policies. We expect to remain fully operational and accessible for all client matters, and will continue

As coronavirus spreads in the US, employers gear up for massive work-from-home experiment

Experts share tips on how to stay afloat and operational amid an outbreak.



By Catherine Thorbecke

March 3, 2020, 5:03 AM • 11 min read



██████ tells staff to work at home due to coronavirus

🕒 11 March 2020



██████ Latest Tech Company to Push Remote Work Amid Coronavirus

Apple is among several tech companies to in recent days ask employees to work remotely as coronavirus cases continue to climb.



By Andrew Soergel, Senior Writer, Economics March 6, 2020, at 4:52 p.m.



BUSINESS & ECONOMY

Remote work becoming the new normal

By Anne Wallace Allen

Mar 16 2020

THE NEXT NORMAL

Working from home is here to stay, even when the economy reopens

PUBLISHED MON, MAY 11 2020 9:00 AM EDT | UPDATED MON, MAY 11 2020 1:01 PM EDT



Ari Levy
@LEVYNEWS

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Covid-19 could cause permanent shift towards home working

Tech firms will benefit, but some companies could find employees don't want to return to the office

UP FRONT

Telecommuting will likely continue long after the pandemic

Economy | Coronavirus pandemic

As new wave of COVID-19 cases hits, remote work becomes the norm

What for many workers started as a temporary break from the office to stop the spread of the coronavirus has turned into a new way of life.

U.S. Workers Discovering Affinity for Remote Work

BY MEGAN BRENNAN

...this is now.

Meet Wallace!

- Wallace, an IT professional, is working for State University in hypothetical state “A.”
- State “A,” like 18 other U.S. States, does not have a separate overtime law, but instead follows the FLSA.
- Wallace is exempt under the FLSA, paid by the hour.

Wallace Wanders!

- After the pandemic hit, State University closed its IT offices and told all of its IT workers to work from home.
- Wallace works from home for about a week, but gets lonely, so he moves to his mother's house in state "B."
- He does not tell State U about the move.

Wallace Wanders!

- But state “B” does not recognize an hourly-paid exemption for IT professionals (like 8 other states).

- State w/h statute.
- Exempt? Maybe not.
- Misclassified?
- Minimum wage?
- Overtime?
- Wage theft?
- Prevailing wage?

Wait a Minute!

- Wallace was sneaky!
- He didn't tell State U about his move.
- Can State U put this back on him?



Wallace Wanders Again!

- State U finds out about the move, but allows Wallace to continue working from state “B.”
- But twice a week, he works from his sister’s house in another city in state “B.”
- While there, his sister gets sick and Wallace misses work for 3 days to care for his sister.
- His sister’s city, like many U.S. Cities, has a PSL ordinance providing paid sick leave.

- Sick leave?
- Other types of paid leave?

Wallace's Withholding

- State U starts to withhold “B” state income taxes.
- Wallace files an internal complaint because there is no state income tax in “A.”

- Withholding responsibilities.
- Penalties and interest.

Registering to Do Business



It's All About Location ... and Time

- Where is the **Employee** Working?
- Applicable employment law most likely the law of jurisdiction where that person is working – even if the employer is located elsewhere.
- The longer employee in state, the more likely the state law will apply.
 - Some states trigger obligations based on number of days the employee works.
 - E.g. Louisiana has adopted a 25-day income tax grace period for remote workers.



Registering to Do Business

States generally require employers to register as a business to “transact business” in the state, including employing individuals within the state.

Process varies by state, with some states having centralized registration process.

Registration may include:

- Employment taxation and withholding (assuming state income tax)
- Unemployment tax and insurance programs
- Worker’s compensation programs
- Other reporting (e.g., Texas new hire and quarterly reporting for Child Support)

Risks of Not Registering

Failure to withhold and report state income taxes and related fines / liability

Unexpected tax bills for your employees

Failure to have Workers Compensation coverage in applicable states can result in civil and criminal penalties

Failure to pay Unemployment tax and related fines / liability

Other fines, penalties, etc.

Wage and Hour Compliance



Seventy-fifth Congress of the United States of America;

At the Third Session,

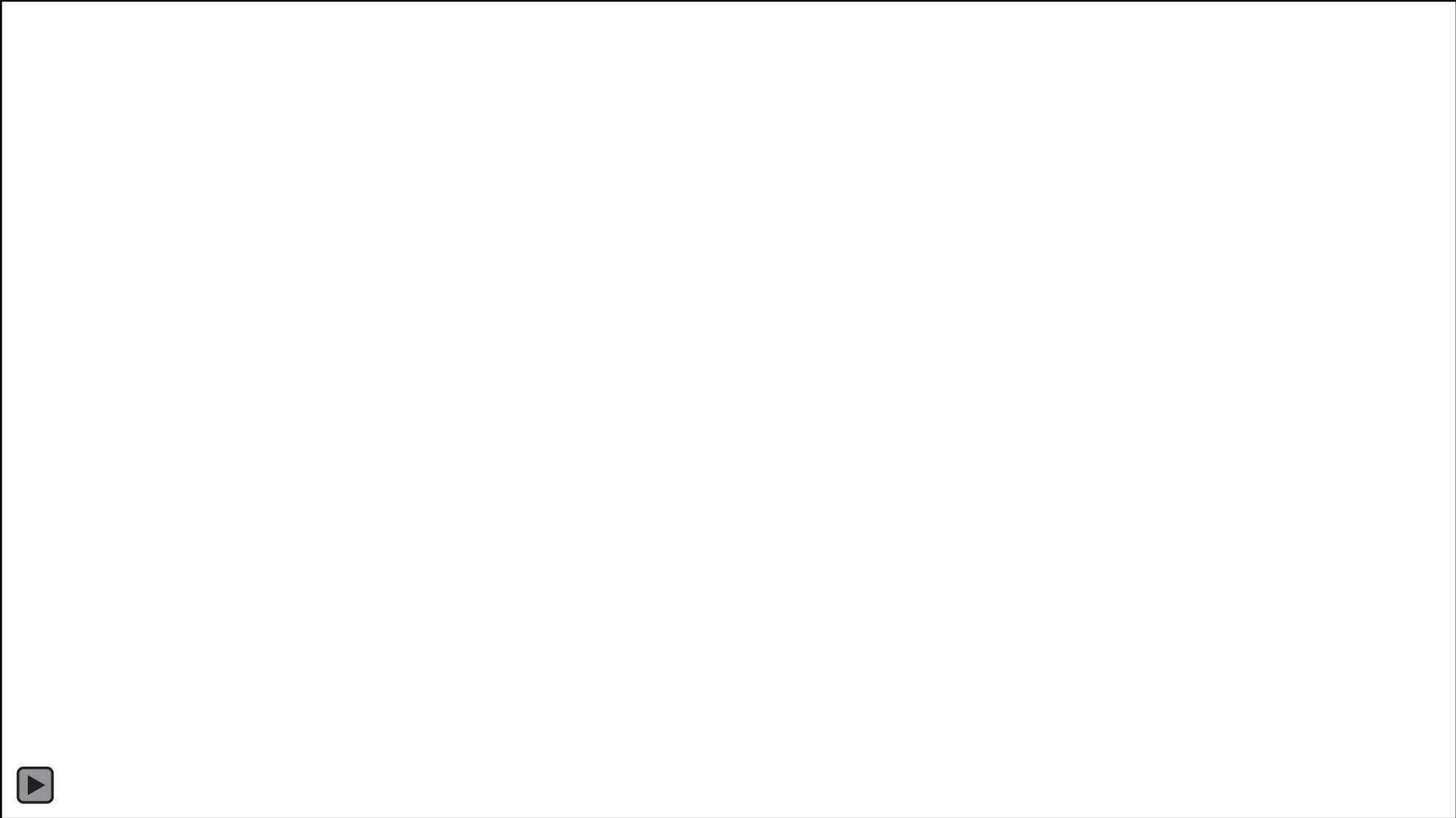
Begun and held at the City of Washington on Monday, the third day of January, one thousand nine hundred and thirty-eight.

AN ACT

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938".

The Next New Normal

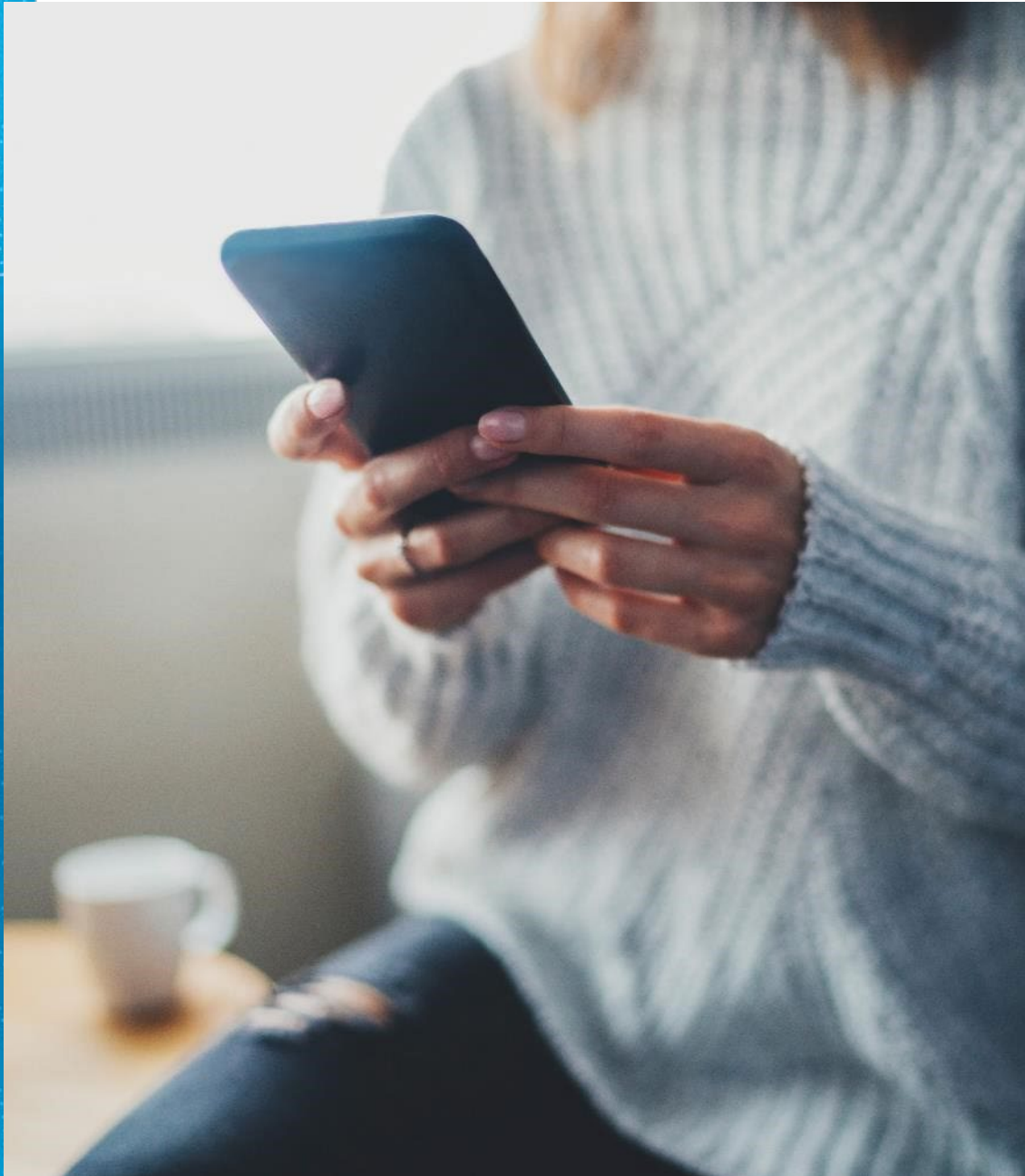


ROUND 1!



I SPY

a wage and hour compliance risk!

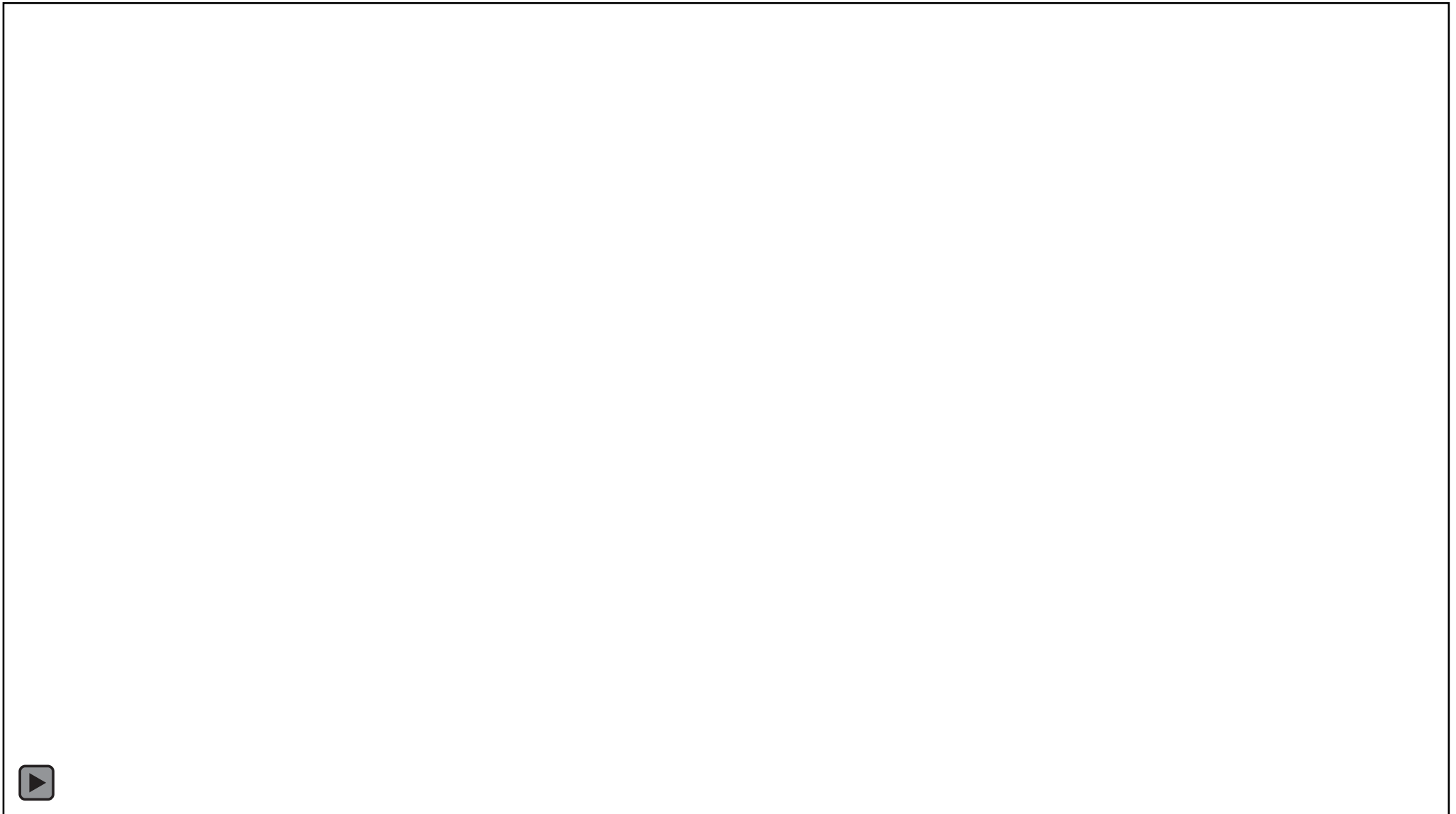


I SPY

... a wage and hour compliance risk!

- ***Non-exempt employees***
 - Hours Worked and Timekeeping Policy
 - Specify what constitutes work
 - Defined work schedule
 - Prohibit work outside schedule

One Month Later...



ROUND 2!



I SPY

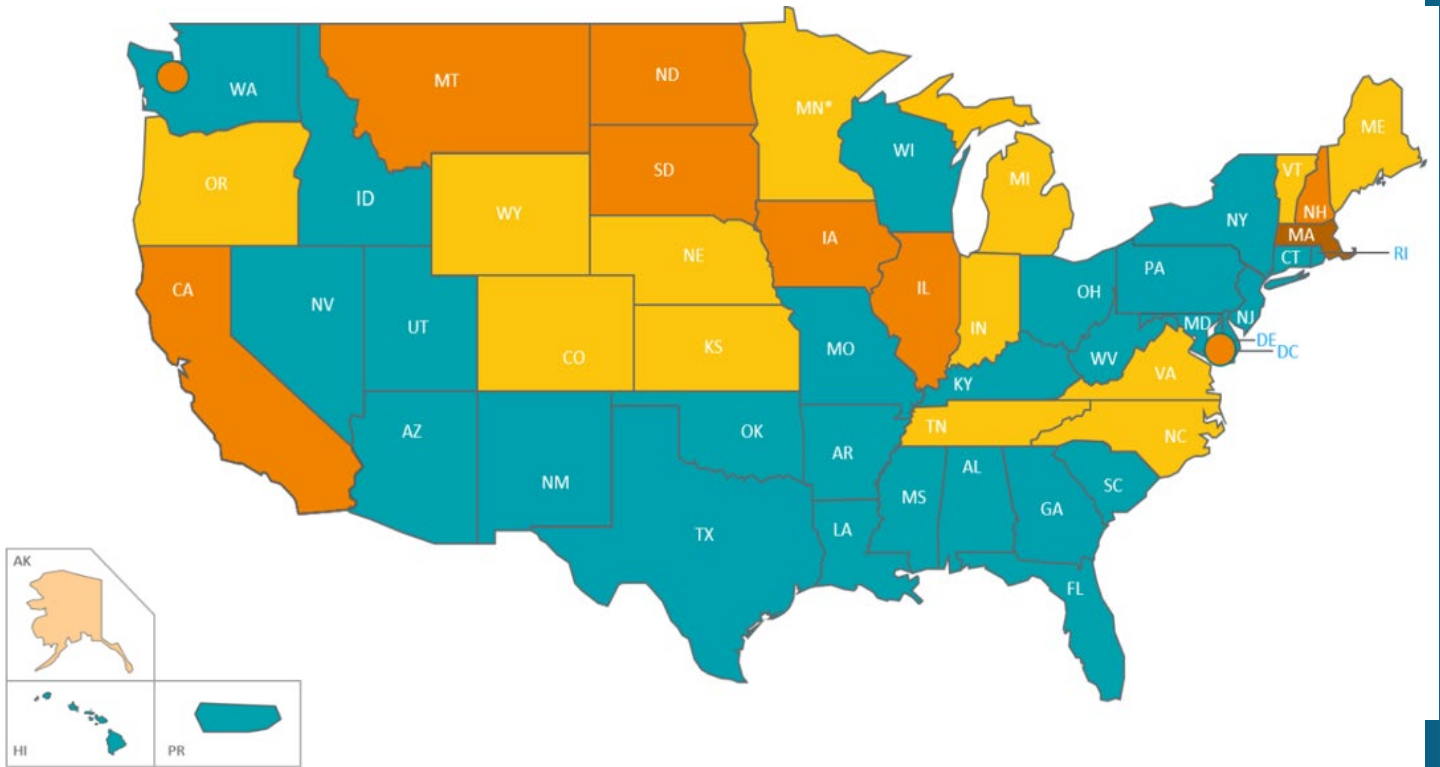
a wage and hour compliance risk!



I SPY... a wage and hour compliance risk!

Expense Reimbursement

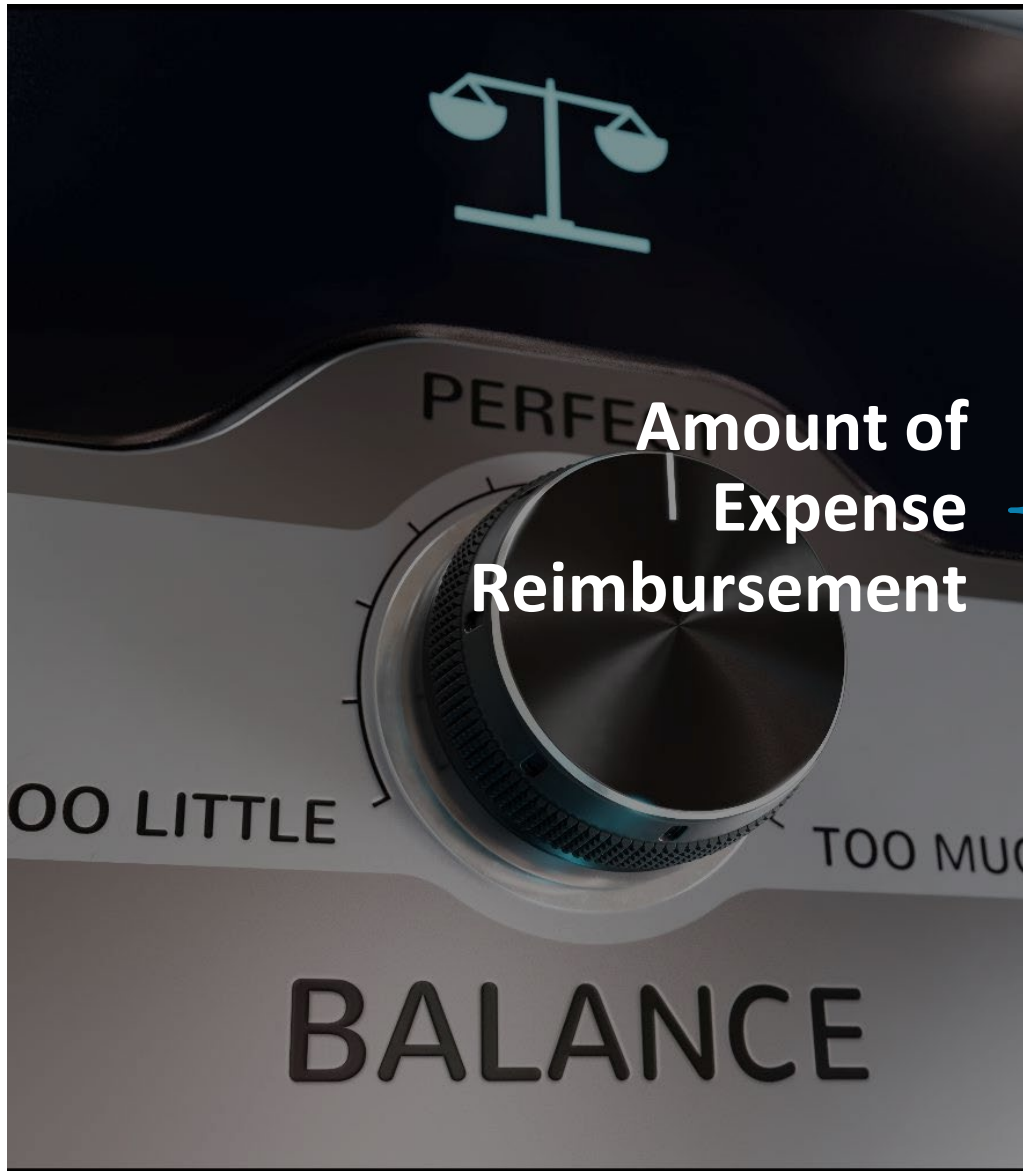
Necessary
“Reasonable
Percentage”
“Free and Clear”
Exempt Employees



Is it “Necessary”?

**Expenses
associated
with telework
are not
“necessary” if:**

- participation is **optional**; *and*
- employer **makes workspace and necessary equipment available.**



I SPY

... a wage and hour
compliance risk!

Follow the Goldilocks Rule...

**NOT
TOO
BIG!!!**

not too small

Just right!

I SPY

... a wage and hour
compliance risk!

A modern home office setup featuring a white desk on black trestle legs, a black ergonomic chair, a large computer monitor, a desk lamp, and a small potted plant. The background wall is light gray with several framed pictures. The floor is made of light-colored wood.

Telework Policy and Agreement

- **Make clear:** voluntary or involuntary
- Identify equipment and resources
- Prior approval for purchases
- Replenishing supplies
- Reasonable cost / percentage
- Right to appeal

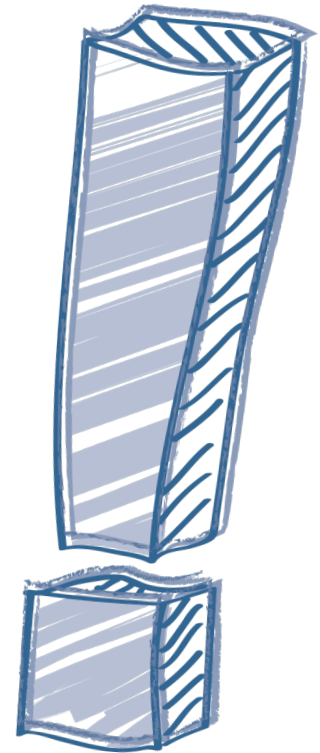
Differing Wage and Hour Rules

- Differing reimbursement rules
- Differing available exemptions and exemption standards
- Differing minimum wage rates
- Differing rules on availability of overtime (e.g., daily OT)
- Differing meal and rest break rules
- Differing split shift and reporting time rules



Increased Risk for Employers

- Litigation is expensive and complicated
 - More lawsuits, higher exposure, bigger claims and more plaintiffs
 - Evidence often difficult to obtain/in the hands of plaintiffs
 - Limited defenses; susceptible for class treatment
- Intersection with other legal issues
 - Disability accommodation
 - Injury prevention and occupational safety

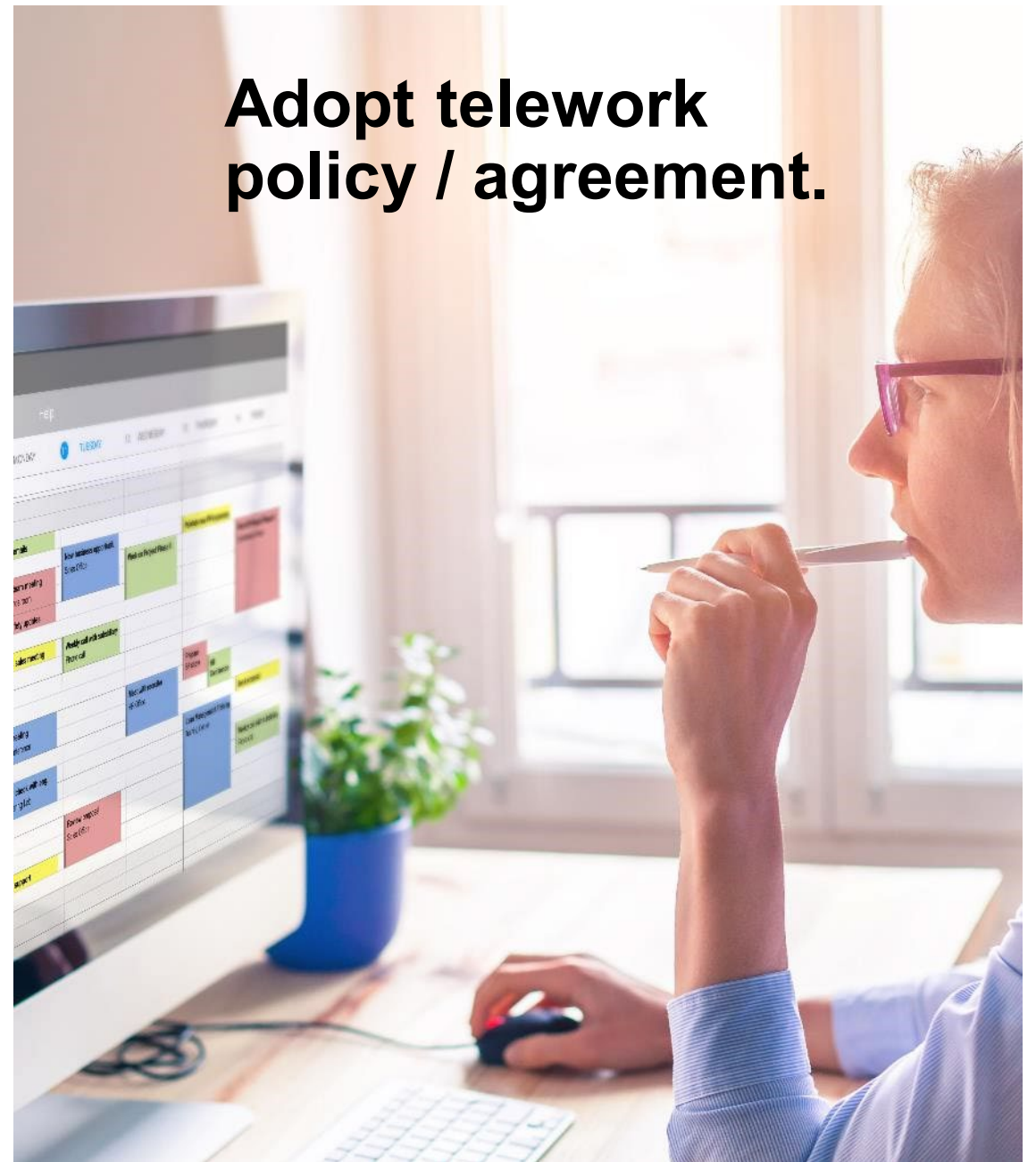


I SPY... solutions!

For non-exempt employees:

- Define “work”
- Set a schedule
- Include breaks
- Prohibit work outside schedule
- Set expectations regarding interruptions
- Include reasonable reporting procedure

Adopt telework policy / agreement.





I SPY... solutions!

- For all employees:
 - Identify equipment and resources
 - Specify which are employer-provided
 - Clarify expense reimbursement
 - What, how much
 - Allow appeals
 - Plan for lost or damaged property, and return of equipment upon separation

I SPY... solutions!

- For all employees:
 - Specify if arrangement is voluntary or involuntary
 - Reconsider exemption status
 - Take state law variations into account
- Don't leave this to chance!
 - Document!
 - Training!
 - Don't forget the supervisors!



Paid Family and Medical Leave



Disability, Sick, Family/Medical and Leave Laws

- Many additional leave types available at the state level – not all are unpaid, or permit an employer to require use of earned time off
- Emerging paid family/medical leave laws often require employee and/or employer contributions to fund state insurance programs
- Many of these leave laws also impose specific requirements related to recordkeeping, content for handbooks policies, or notices that must be provided to employees
- Rules regarding disability accommodations, maintaining safe workspaces, and liability for workers compensation claims still apply to remote workers

Differing Mandatory Paid Leave Laws

- Are there special or unique paid (or unpaid) leave laws?
- Do state, county, or city laws apply to you as an employer?
- When does my employee begin to accrue leave under these laws?
- Are there local rules about how employees can use that accrued leave?



Paid Family and Medical Leave Programs

Covered Reasons

- All cover family member care **and** bonding with new child
- Some cover employee illness, although some states have a separate statutory disability program for self
- Some cover family military events under FMLA

States with Programs

- CA, NJ, NY, RI, WA, DC, MA
- CT Contributions began 1/1/21; Benefits effective on 1/1/22
- OR effective 9/3/23; contributions start 1/1/23
- CO effective 1/1/24; contributions start 1/1/23
- NH: Benefits effective 1/1/23: Mandatory for state employees; voluntary for private.

Plan Structure

- Statutory insurance programs that are administered by the state or an insurance company
- Some states added paid family leave to a statutory disability program
- Other states adopted paid family and medical leave programs and built them off of unemployment or workers' compensation programs

States with Separate Disability Insurance Programs

- California
- Hawaii (no PFML)
- New Jersey
- New York
- Rhode Island (no PFML)



Leave of Absence Laws

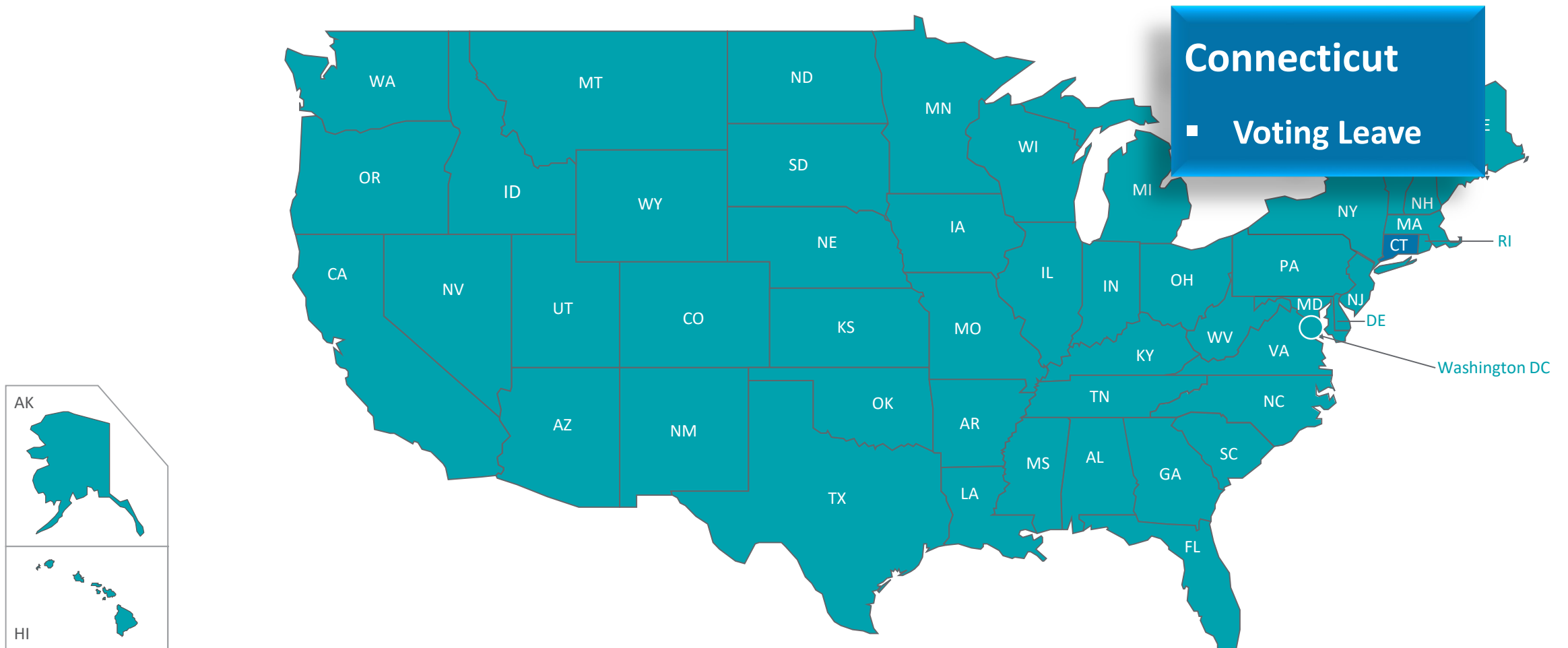


Other Types of State/Local Leave Laws

- Voting
- Military
- Bone marrow or organ donor leave
- Emergency responders
- And more!



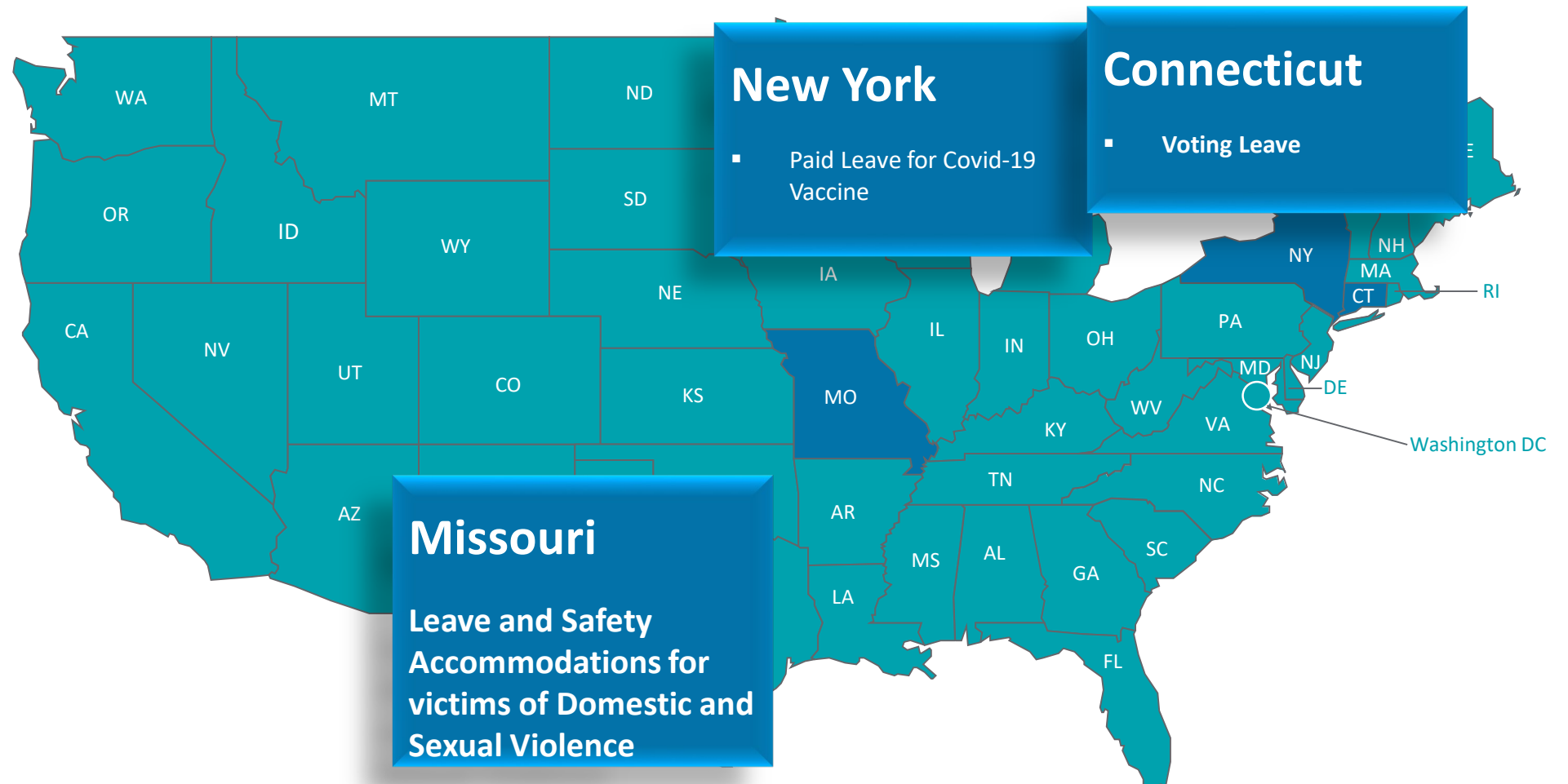
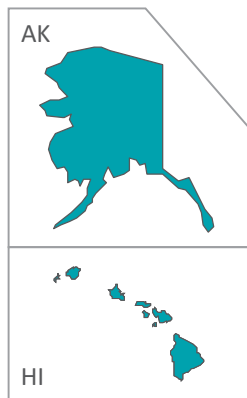
New Leave Laws We Haven't Covered



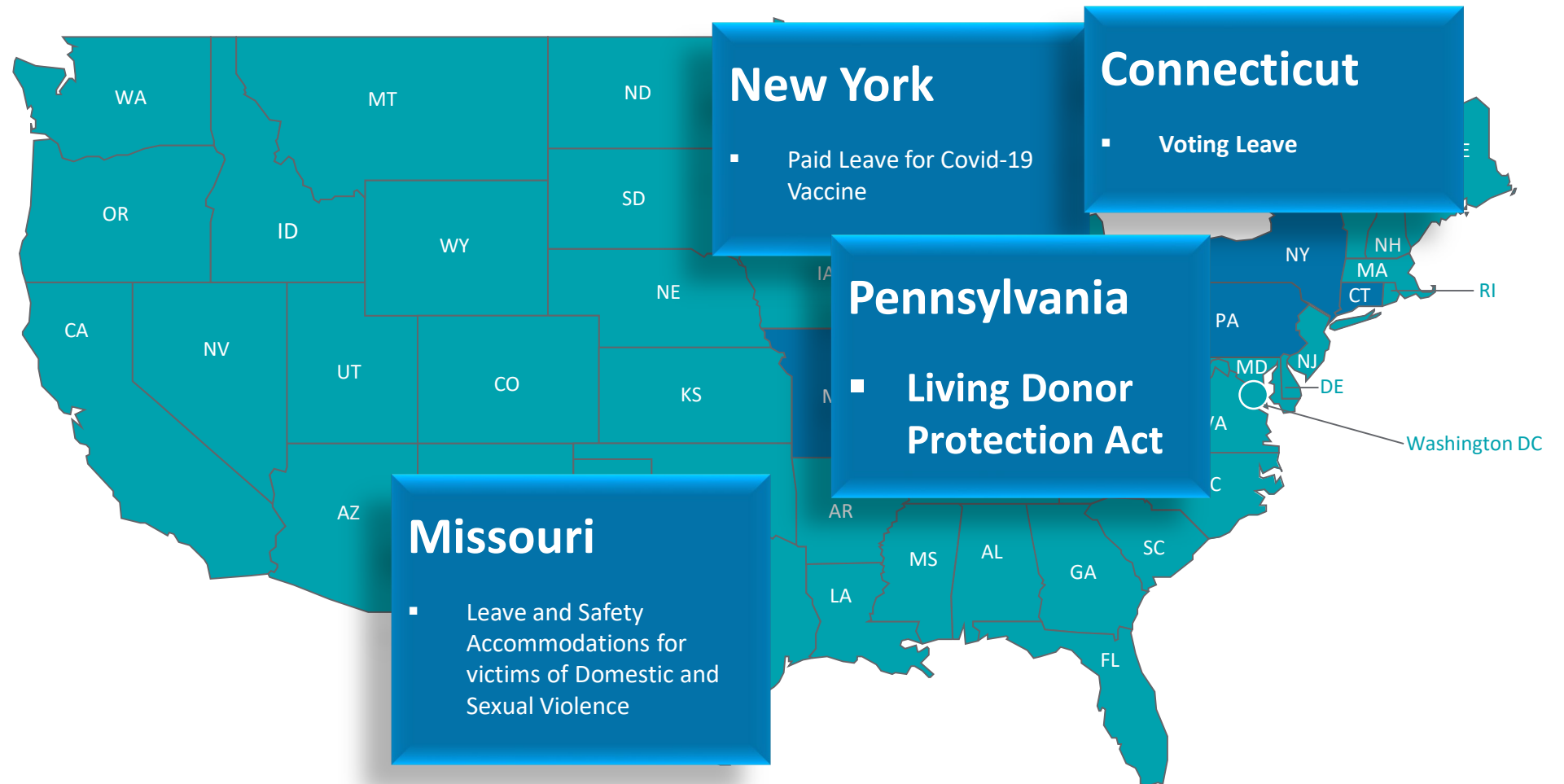
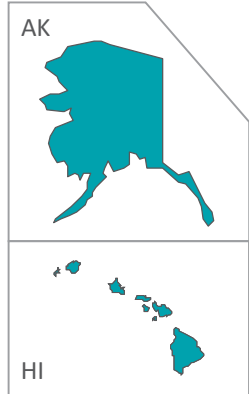
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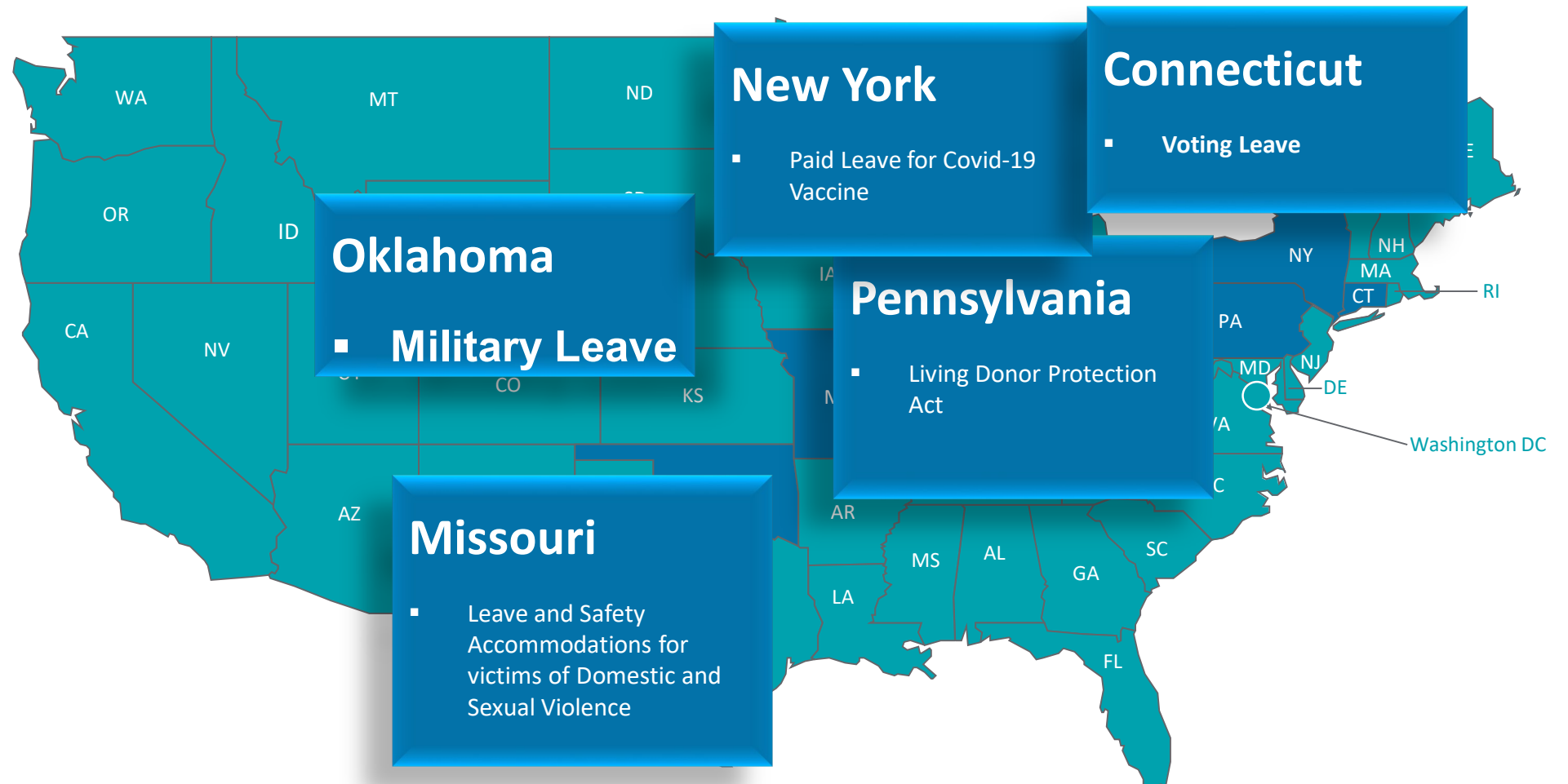
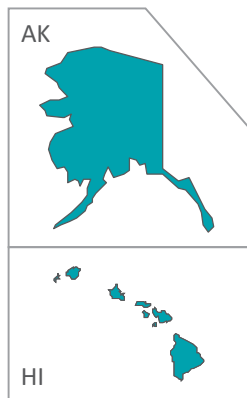
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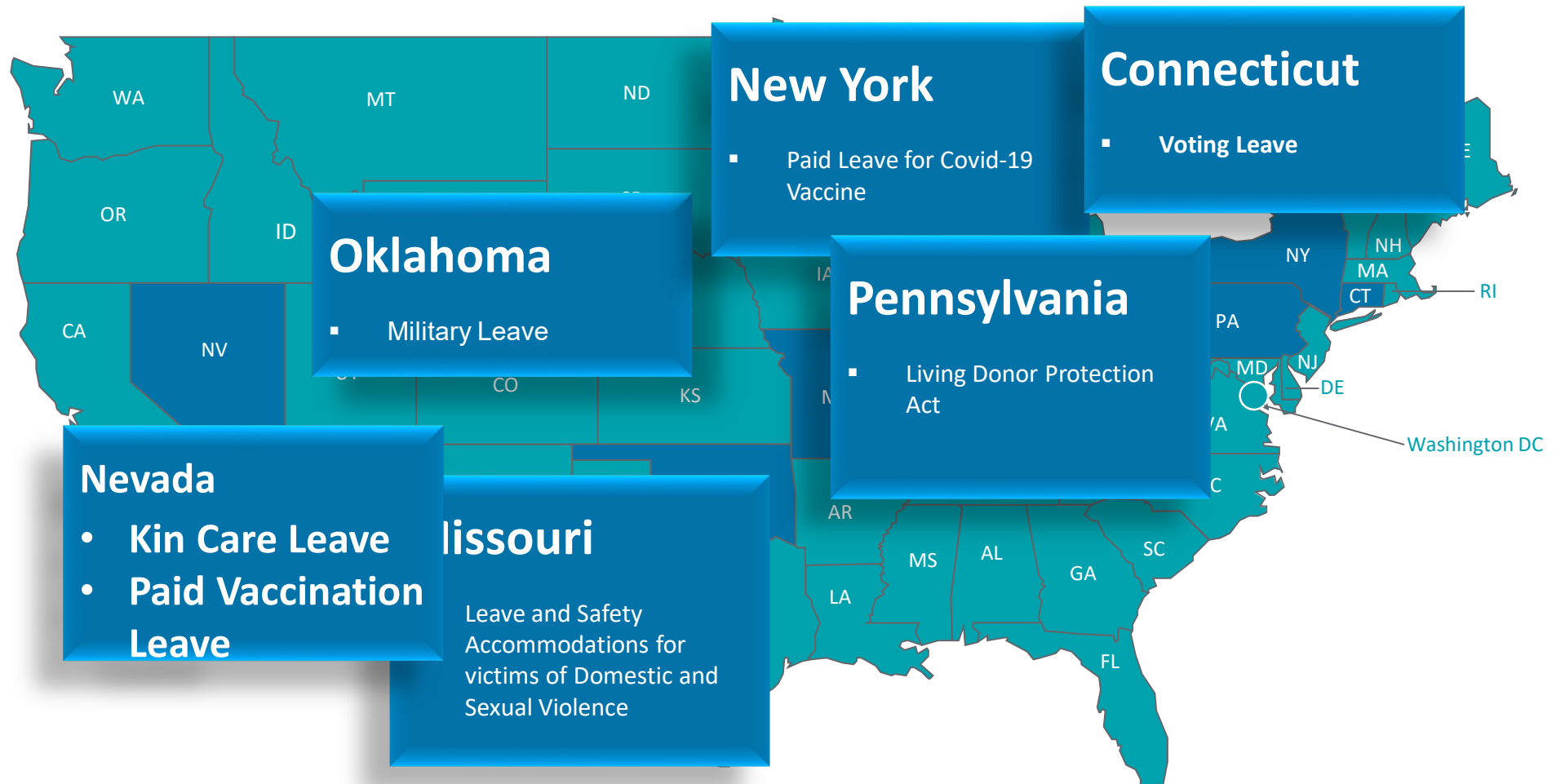
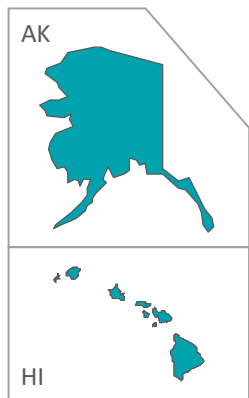
New Leave Laws We Haven't Covered



New Leave Laws We Haven't Covered



New Leave Laws We Haven't Covered



State Leave Amendments

- **California** – CFRA amended to cover care of parent-in-law with serious health condition
- **District of Columbia** – Universal Paid Leave Act amended to increase the amount of medical leave, cover “pre-natal leave,” eliminate waiting period for up to 1 year after COVID emergency, and prohibit reducing STD benefits to offset UPLA benefits; DC FMLA expanded eligibility for workers seeking leave related to the COVID-19 pandemic
- **Illinois** – Victims’ Economic Security and Safety Act amended to cover crimes of violence and expanded family members; kin care amendment allows leave for family member’s “personal care”
- **Kentucky** – adoption leave law amended to require that if company parental leave policy provides >6 weeks, must provide to adoptive parents too, and increase child’s age from 7 to 10 years

State Leave Amendments

- **Maine** – ME FMLA amended to cover care of grandchild and domestic partner's grandchild
- **Maryland** – amended Flexible Leave Act allows eligible employees to use available paid leave for bereavement purposes
- **Oregon** – OFLA amended to expand eligibility for public health emergency leave and sick child leave and add restoration provision for employees rehired within 180 days
- **Rhode Island** – Incremental increases of temporary caregiver insurance benefits
- **Washington** – WA PFMLA amended to cover leave for care dependent and temporarily expand eligibility; volunteer emergency responder leave law amended definition of volunteer firefighter

Other Compliance Challenges



Information & Property Security Still Should Be a Priority



- Being remote should not change an employer's expectations for information and property security, safety or ownership.
- Even when they are remote, employees should provide the same level of security for your organization's equipment, materials, and work product.

Practical Considerations for Remote Work Policy

- Information/property security rules and expectations should be part of remote work policy.
- Although it is difficult to separate work and personal time for remote workers, significant effort should be given to separate work and personal *equipment and materials*.



“Fair Chance” Hiring Laws

Prohibit or limit inquiries about **criminal** history until after conditional offers of employment are extended

- If using third party source for information, must comply with Fair Credit Reporting Act (FCRA) including a compliant authorization
- Rescinding employment offers must also comply with FCRA; multi-step process
 - Notice of planned adverse action, including source of info
 - Opportunity to cure
 - Rescind Offer

Prohibit or limit inquiries into certain types of **arrests and/or convictions**

- Recommend DO NOT ask about arrests, only convictions
- Limit look back period for convictions to 7-10 years depending on type of crime
- Convictions should be related to the job
- If arrested while an employee - difficult, murky water



“Fair Chance” Hiring Laws

Drug Tests should also be after conditional offers of employment are extended

Salary Inquiry – 19 states (and PR) regulate salary history inquiries for private employers (AL, CA, CO, CT, DE, HI, ME, MD, MA, MO, NV, NJ, NY, OH, OR, PA, RI, VT, WA, + Puerto Rico)

- Prohibit asking about salary history
- Prohibit retaliation (refusal to hire, interview) if applicant refuses to disclose salary history
- Prohibit setting salary based on salary history, even if volunteered
- Prohibit disciplining employees who discuss/disclose salary information
- Require employers to provide wage range for the job



21st Century Problems

- AI In Hiring
 - Illinois law requires that an employer that relies solely on artificial intelligence to determine whether someone will qualify for an interview must gather and report race and ethnicity data
 - LinkedIn posts, Indeed, etc. ... recruitment tools that use algorithms or send you only the “best” candidates / matches
 - EEOC is intrigued with AI in hiring and looking for a good test case
- Personally Identifying Information
 - Patchwork of state and federal laws that limit what you can collect and how you store it
 - Notice to individuals if PII is breached/stolen

State Specific Marijuana Questions

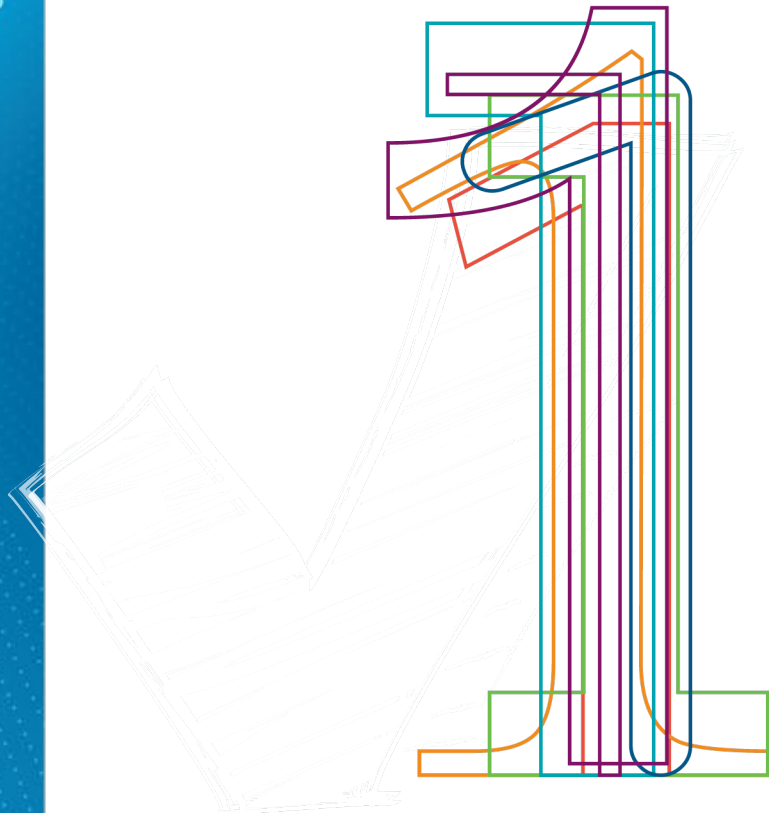
- Can I drug test before extending an offer to hire?
- Can I even test for THC?
- Am I required to “reasonably accommodate” someone who tests positive if they are taking it for medical reasons?
- May I terminate an employee who tests positive for THC if I cannot establish that it was used at work and/or impaired their work performance?



So, What Can an Employer Do to Avoid Wandering Worker Liability?

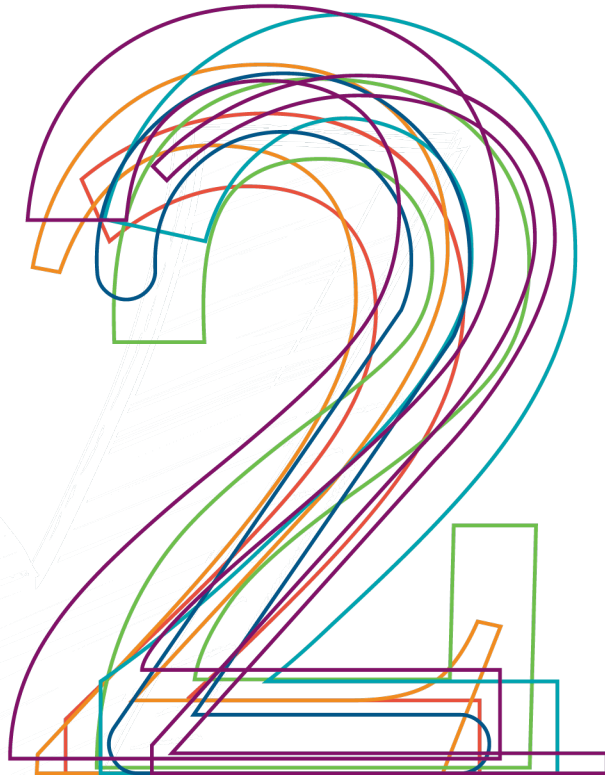


Practical Suggestion For Dealing With Wandering Workers



- **Ignorance ≠ bliss**
 - Step one: **WHERE?**
 - **Where** is everyone?!
 - ***Who is not where we thought they were?***
- Ignorance of the law is no excuse; ignorance of the work location of your employees also is no excuse.

Practical Suggestion For Dealing With Wandering Workers



- Make sure your remote work agreements and policies address location
 - “Tell us where you are” is probably not enough.
 - Lay out some basic understandings and parameters
 - What about a “*You Can’t Move*” policy?
- Should you embrace flexibility?
 - “Where you **can** work” vs. “where you **can’t** work”
 - When does a vacation become a relocation?

Practical Suggestion For Dealing With Wandering Workers

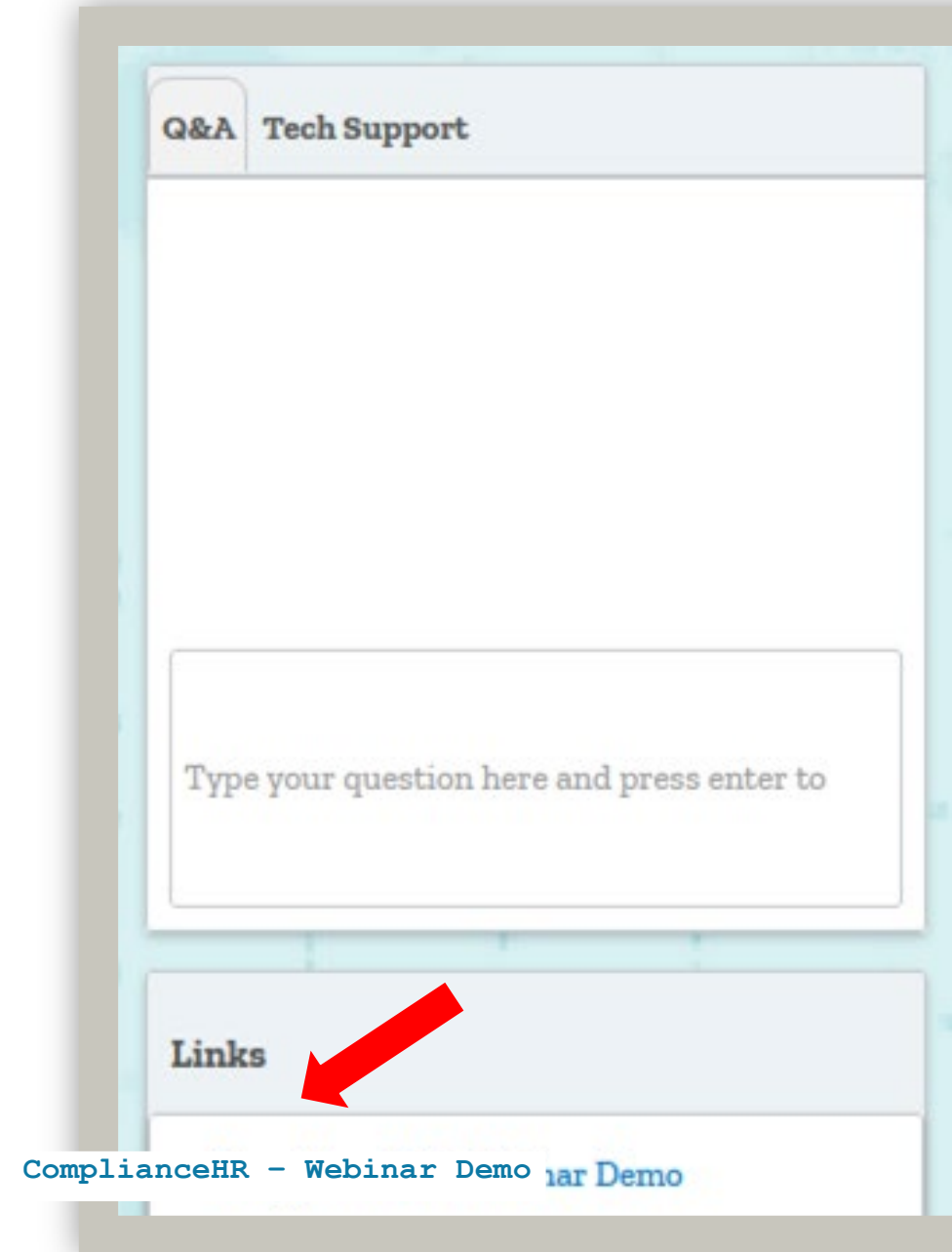


- Build and maintain your own checklist:
 - ✓ State/local/international business licensing
 - ✓ Payroll tax withholding
 - ✓ Wage and hour
 - ✓ Leaves of absence
 - ✓ Unemployment insurance
 - ✓ Workers' compensation
 - ✓ WARN Act

Last Chance to Register

Benefits of a custom demonstration:

- Discuss your organization's requirements/challenges
- Review Navigator Suite Solutions
- Share compliance methodologies
- Provide free trial in Navigator Suite sandbox



Questions?

Please add any additional questions to the Q&A box

Thank you!

To register for a demonstration of the Navigator Suite, please email demo@compliancehr.com or submit the form on our website: [Compliancehr.com/webinar-demo](https://compliancehr.com/webinar-demo)