2022 HR compliance risks

Expert advice on risks to watch out for this year

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HR compliance gets harder every year

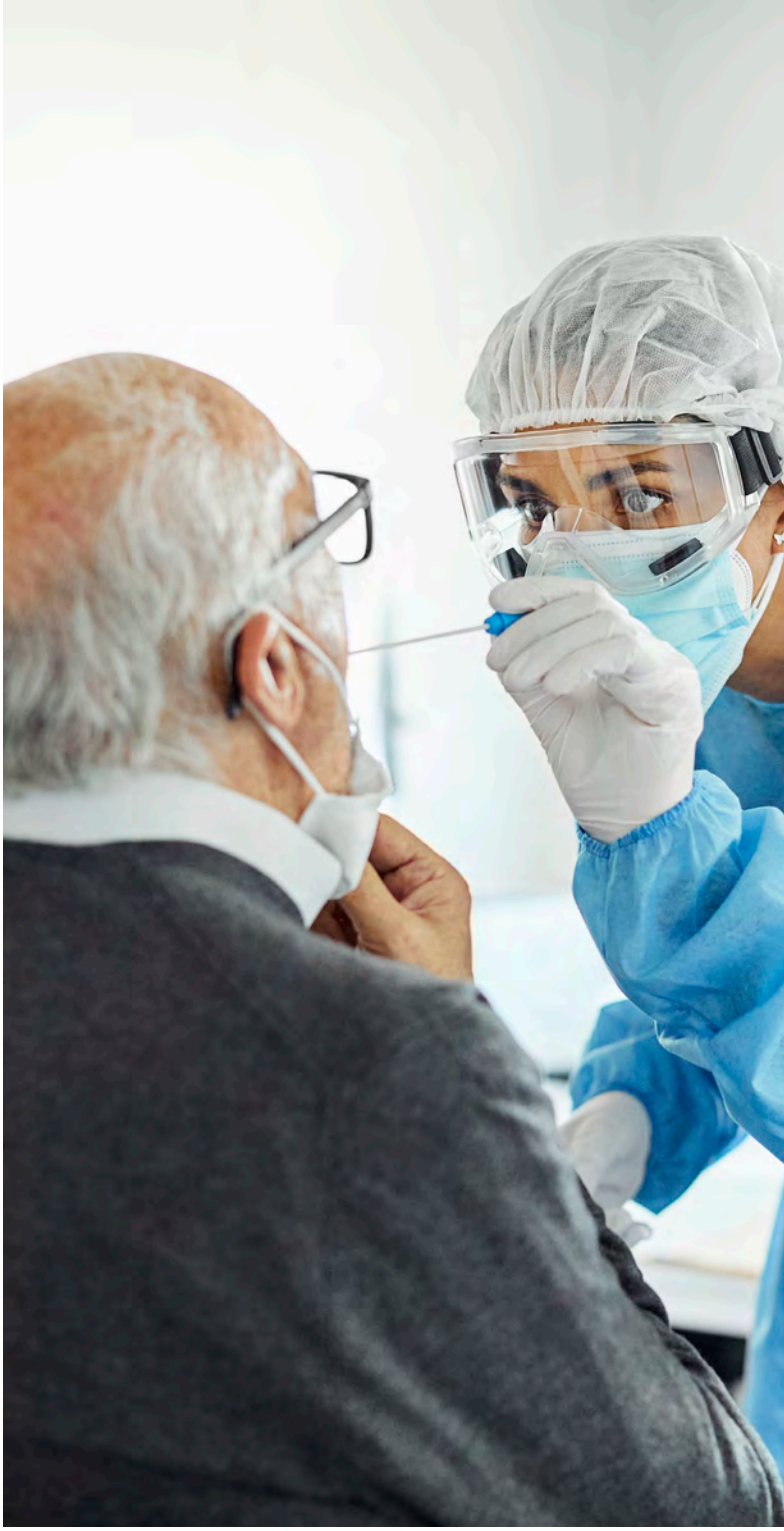
"Just knowing which laws apply to you is easier said than done."

— Suzanne King, Partner, Pierce Atwood

Employment law is a vast patchwork of federal, state and local legislation and regulation that gets more complex every single year. The cascading impacts of the COVID-19 pandemic have added a new and intricate layer of workplace issues, each with their own legal implications. Compliance mistakes can be costly for businesses, both in dollars and reputation, so businesses of all sizes need to be aware of the risks they face.

In this guide, our employment law experts weigh in on the compliance risks HR professionals often misunderstand, and those to watch out for now and in the months to come.

COVID-19 vaccine/ testing mandates



An ever-changing landscape

In late 2020, the arrival of safe and effective COVID-19 vaccines was greeted with relief and hope that the spread of the virus might be halted after a year of fear and suffering. Throughout 2021, deaths and hospitalizations decreased dramatically among vaccinated people, but many people decided not to get vaccinated. New strains of the virus caused cases to surge, but public relations efforts to boost vaccine uptake stalled.

In response, various states, localities and businesses decided to mandate that employees get vaccinated or regularly test negative for COVID-19 before entering the workplace. Ultimately, the federal government announced various mandates for government, health care and private-business employees to convince more people to take the vaccine. As of this writing, the health care worker requirement is the only federal mandate moving forward.

In many cases, vaccine/testing mandates have been challenged in the courts, and some states have passed legislation blocking mandates, with these efforts also being challenged. This means many employers may be unclear as to whether they can or must require their employees to be vaccinated or tested as a condition of employment.

In an effort to provide some clarity, here are the broad outlines of some of the more notable mandates and related legislation.

Visit our vaccine mandate page to hear Unum legal experts weigh in on employer responsibilities under the federal vaccine/ testing mandates.

Federal mandates

Health care worker mandate

Requirements. Employees in most health care settings, including nursing homes, hospitals, outpatient surgical facilities, dialysis facilities and home health agencies, must be fully vaccinated without the option to test instead, in order for their employers to receive Medicare and Medicaid funding.

Latest status. On January 13, 2022, the U.S. Supreme Court lifted a stay on enforcing this mandate, meaning that covered employers must now require employee vaccination as a condition of employment. Visit our FAQ page and the Centers for Medicare and Medicaid Services' website for up-to-date information on the health care worker mandate.

OSHA's Emergency Temporary Standard (ETS) for private employers

Requirements. Employers with at least 100 employees must develop, implement and enforce a mandatory COVID-19 vaccination policy. They can require all employees provide proof of vaccination or allow employees to choose between showing proof of vaccination or proof of a negative COVID-19 test at least weekly.

Latest status. On January 13, 2022, the Supreme Court stayed enforcement of this mandate and on January 25 OSHA withdrew the ETS while it works on a permanent rule instead. See OSHA's website for the latest on the status of the ETS.

Federal contractor mandate

Requirements. Employees of covered federal contractors must be fully vaccinated to enter their workplaces, without the option to test instead.

Latest status. As of this writing, the federal contract mandate has been stayed while litigation proceeds. For the most up-to-date information on the federal contractor mandate, see the Safer Federal Workforce website.

Important provisions in all the federal vaccine mandates

Confidentiality. All employee medical information, including vaccine and testing records, must be kept secure and confidential.

Exemptions. Employees may request to be exempt from vaccination on two types of grounds: medical and religious. Employers can decline to grant religious exemptions if doing so would place an undue hardship on the business.

State and local mandates

As of this writing, more than 20 states have implemented some form of vaccine mandate for state employees and, in some cases, health care workers. In contrast, more than a dozen had passed legislation limiting or banning employers — even private businesses — from mandating vaccines for their workers. While federal law generally supersedes state laws, ongoing lawsuits make the rules unclear nationwide.

Visit the KFF website for up-to-date status on vaccine policies across the U.S.

In addition, a number of major cities have instituted vaccine or vaccine-or-test requirements for municipal employees. Again, these requirements are being widely challenged and some conflict with state law, making their implementation uncertain.

Check the Bloomberg Cities Network website for up-to-date information about municipal mandates.

How employers may wish to respond

Given the fluid and uncertain state of vaccine and testing regulations and challenges, employers should be sure to regularly check with their legal advisors to determine which laws apply to them in this fast-moving environment.

Health care employers should already be implementing vaccine-verification requirements and determining how they will handle exemption requests. Also, testing instead of vaccination may be allowed as an accommodation to an exemption request, so employers should also be determining how they will manage testing compliance.

Even if you are not currently under a mandate, it may also be wise to prepare to implement some kind of vaccine and/or testing program at your workplace, not only to comply with possible upcoming regulations but also to ensure the safety of your employees and customers.

Any program will require a method for collecting and maintaining proof of vaccination in a secure and confidential manner. It should also be able to help monitor testing compliance and manage requests for exemptions. Technology solutions can help employers meet what will likely be a significant administrative challenge.

Distributed workforce impacts

What happens when employees can work anywhere?

Another major COVID-19 impact is the rise of a much more distributed workforce. Employers who may have been used to complying with employment laws in a single state may now have employees working remotely or on-site in several states — where additional laws may apply. Here are some risk areas to be aware of if your workforce is more spread out than it used to be.

Expense reimbursement

During the shift toward more remote work, many employees incurred work-related costs, either for travel or equipment needed to work from home. Employers should be aware that different states have different requirements for expenses employers must reimburse.

Leave laws

At least 13 states and the District of Columbia require that employees receive paid sick, family or medical leave for covered situations. According to HR Dive, these laws "generally apply to employees who are working in a given area, which could include remote workers who are temporarily or permanently working in states or localities different from those to which they used to commute." Leave and absence management tools with built-in compliance can help employers meet the challenge of complying with a variety of local paid leave laws.

Taxes

When employees work in new states or localities, new tax laws may apply, including requirements for employer registration, corporate taxes, unemployment taxes and employee withholding. Employers should be aware of the taxation liabilities they may incur when they allow employees to work in new locations and proactively consult their tax advisors for help.

Licenses

For some professions, employees must have state-issued licenses or certifications to perform their jobs. If they have moved during the pandemic, they may need to be re-licensed or certified according to the requirements of their new state.

Posting requirements

Different states and localities have different laws and regulations concerning workplace notifications. Employers with people in new locations will need to ensure they are complying with requirements for posting wage, leave, benefit and other notifications in all the required locations.

Minimum wage laws

Raises in the minimum wage, long a goal of activists and subject of political campaign promises, became a major topic during the economic shockwave of the pandemic. Changes in local minimums — coupled with uncertainty about an increased federal standard — create complexity for employers with distributed workforces. Employers need to be aware of the differences in state minimum wages (see this handy reference from the U.S. Department of Labor), and in the rules surrounding timekeeping and breaks for hourly employees in various locations.

Benefits

Employees who move to new locations may not be able to access in-network health providers, as many health insurance networks are based on geography. In cases where a large number of employees will be permitted to work remotely, employers may wish to evaluate their plans to see if any adjustments are necessary or possible.

Record-keeping challenges

While not strictly a compliance issue, keeping track of employees' whereabouts is especially important with a distributed workforce. Employers should have a consistent process for accounting for everyone's work location and approving new locations ahead of time. Changes in address can affect a number of things, from taxes to benefits to insurance claim payments.

Compliance thresholds

They're not as simple as you might think

Across the spectrum of federal employment laws, the minimum number of employees needed for an employer to be covered by that law varies greatly. This leads to a lot of confusion. Larger businesses may assume they are covered, but may have new questions in the age of the distributed workforce. That's because some laws depend not just on how many total employees you have, but also how many you have in a given local area.
Here's a rundown:

- Generally, **if you have 15 or more employees**, you're required to comply with the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act (Title VII).
- **If you have 20 employees**, the Age Discrimination in Employment Act (ADEA) also applies to you.
- **At 50 employees**, you have responsibilities under the Family and Medical Leave Act (FMLA) and the Affordable Care Act (ACA).
- **When you get to 100 employees** (50 if you're a federal contractor), you also have some Equal Employment Opportunity (EEO) reporting responsibilities.

But it's not as simple as looking around the office and counting how many people work for your business today. The definitions are complex. Under all of these laws, a covered employer is one who employs the requisite number of employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.

"When it comes to FMLA, a lot of employers stop reading when they get to 50 employees,'" says Ellen McCann, employment law expert and Assistant Vice President of Unum Group Solutions. "And what they don't realize is that if you're covered for one year you are covered for two years, because we are looking at the current or preceding year."

Quiz: Is this employer covered by FMLA?

Jane owns a restaurant on the beach. Last year, she had 75 employees for more than 20 weeks from June through October. Now, in the off season, she has only 30 employees.

Question: Is Jane covered under FMLA?

Answer: Yes. Jane is covered under FMLA (and ADA, ADEA and ACA) for all of this year, because she had at least 50 employees for more than 20 weeks last year.

State laws add to the complexity

Making things even more confusing, state thresholds can differ from federal. "The reach of state laws goes further than the reach of federal laws, and this is particularly important if you are a multi-state employer," says King. As a few examples, the compliance threshold for anti-discrimination is six employees in Massachusetts and New Hampshire, five in California and four in New York.

So, imagine you are an employer with a large work-force in your headquarters state, a few smaller regional offices in different states, and a handful of remote workers in still other states. You would need to figure out which thresholds apply to you in which states and understand when you had hit the magic number to trigger additional requirements.

And then there are paid leave laws...

As discussed earlier, paid leave laws are complicating the leave landscape for employers, with an ever-growing number of state and local paid leave requirements evolving and coming online. The threshold requirements for coverage vary from state to state, as do the employer's responsibilities for accommodating leave.

In some cases, the law only counts those employees in the state for purposes of determining whether the threshold is met. And in other cases, the law requires the employer to count all people employed across the country.

"One thing companies really need to be concerned about here is that many of these laws apply to employers that have just one employee in the jurisdiction," says McCann.

Some employers are coping with the complexity by offering leave programs that are equal to or more generous than their state or local requirements.

However, employers should be aware that in states where employers are permitted to use their own plan rather than the state/local plan, the employer's plan must be equivalent across all provisions of the state/local plan, not just the amount of leave or the amount of pay — for example, rights to appeal, protection against retaliation, and presumption in favor of granting the leave.

Stay up to date on state paid leave laws
Visit our state leave law website

The difference between FMLA employer coverage and employee eligibility

"If we're covered under FMLA, then all of our employees are covered, right?"

Not necessarily.

A lot of employers are confused about the difference between FMLA employer coverage and employee eligibility. Your company might be large enough that it has to provide eligible employees with FMLA leave, but that doesn't mean that every employee is eligible.

Under the FMLA, an employee is eligible to take job-protected leave only if:

- Their reason for wanting leave is covered under the FMLA.
- They have worked for the company for at least a year, and for at least 1,250 hours in the 12 months preceding the leave request.
- The employer has at least 50 employees working within a 75-mile radius of the requesting employee's worksite.

So, if you have 50 employees working anywhere in the U.S., according to the regulations, you're a covered employer. But you only have to grant leave if the particular employee is one of at least 50 employees working with a 75-mile radius of the employee's worksite.

How does the 75-mile rule apply to employees working remotely from home?

For the purposes of FMLA, a home office is not considered the employee's work location. Rather, the work location is the company office or location where the employee gets most of their assignments from. So, as long as that location has at least 50 employees within 75 miles, the employee working remotely is covered under FMLA.

The regulations are clear that employers should not grant FMLA leave if employees don't meet these requirements. While it may seem like the generous thing to do, it may cause trouble if the employee later becomes eligible for FMLA, but has exhausted their 12 weeks according to the employer's records.

Understanding FMLA leave periods

"Employees can take FMLA leave once, and that's it. Right?"

Wrong.

Eligible employees can take FMLA leave for covered reasons for up to 12 weeks in a 12-month period. This means that an employee with a chronic medical condition could be away from work for 12 weeks every 12 months, and their job would have to be protected.

"That's a significant amount of leave and it can create a significant challenge for employers to manage," according to King.

Employers also need to understand that the FMLA may require them to provide leave that is intermittent as well as continuous. "So, if an employee needs every Tuesday off to attend treatment or has a migraine condition and is out unpredictably several times a month, that may very well be covered under FMLA," says King.

The rules around intermittent absences are also complicated, presenting another level of challenge for employers to manage. Check out this helpful webinar for some guidance on managing intermittent leave.

Federal employment law thresholds and responsibilities: a quick guide

Law	Basic employer responsibilities	Employee coverage threshold	How number of employees are calculated
ADA	Not to discriminate in employment on the basis of physical or mental disability. To accommodate disabled employees in the workplace, as long as it does not cause undue hardship.	15	You are covered if you had the minimum number of employees during 20 weeks in the current **OR** preceding year. The weeks don't have to be consecutive.
Title VII	Not to discriminate in employment on the basis of race, color, religion, sex (including sexual orientation and gender identity) or national origin.	15	
ADEA	Not to discriminate in employment on the basis of age for people 40 and older.	20	
FMLA	Provide up to 12 weeks of job-protected leave in a 12-month period to eligible employees who need to care for themselves or certain family members after a new child joins the family, a serious illness occurs or a military service member is deployed (up to 26 weeks in some cases).	50 within 75 miles	

Sources: U.S. Equal Employment Opportunity Commission, Who is an "Employee" Under Federal Employment Discrimination Laws?, accessed Feb 9, 2022. U.S. Department of Labor, Fact Sheet #28: The Family and Medical Leave Act, 2012.

Classifying employees under FLSA

Employee or contractor? That is the question.

Classifying a worker as an employee or contractor is an important consideration. Employees may be entitled to minimum wage and overtime pay protections under the Fair Labor Standards Act (FLSA). But as the gig economy expands, the line between employee and contractor has been blurred. The Department of Labor (DOL) and some states have been attempting to clarify where this line can be drawn, with limited success.

In early January 2021, DOL issued and then withdrew a new rule about classifying workers as contractors, creating some possible confusion for employers. Today, the standards from before 2021 remain in effect, as laid out in this DOL fact sheet.

It's important to note that misclassifying employees can result in significant penalties. If the DOL finds that an employer has misclassified an employee as a contractor, penalties range from back payment of wages and taxes (for honest mistakes) to $2,050 for every time that a worker should have been paid as an employee (if the misclassification was intentional).

California has attempted to pass its own legislation on this issue, with court challenges resulting in additional confusion. Massachusetts may also soon put an employee-classification proposition on the ballot. (See "Gig economy laws: The California and Massachusetts" for more information.)

Employers should also keep in mind the overtime pay regulations that passed in early 2020, raising the threshold for time-and-a-half overtime pay to $35,568 per year for employees who work over 40 hours in a week. The Department of Labor publishes a compliance guide that can help smaller-sized employers understand when they must pay employees overtime.

Employee or independent contractor?

Employee

- Works for someone else's business
- Is paid hourly, by piece rate or a salary
- Uses the employer's materials, tools and equipment
- Typically works for one employer
- Has a continuing relationship with the employer
- Employer decides when and how the work will be performed
- Employer assigns the work to be performed

Independent contractor

- Runs their own business
- Is paid when the project is completed
- Provides their own materials, tools and equipment
- Works with multiple clients
- Has a temporary relationship until the project is completed
- The worker decides when and how they will perform the work
- Worker decides what work they will do

Source: U.S. Department of Labor, Misclassification of Employees as Independent Contractors, accessed Dec. 4, 2021.

Gig economy laws: The California and Massachusetts stories

The California 2020 law

In California, many gig economy workers must be classified as employees, according to a law passed January 1, 2020. Later that year, voters passed a proposition basically nullifying part of this law, declaring that app-based drivers like those working for Uber and Lyft should be classified as contractors. This proposition was challenged in court and ultimately declared unconstitutional, meaning the 2020 law remains in effect. Appeals are expected.

The Massachusetts proposition

In September 2021, backers of a proposition similar to California's Proposition 22 received permission from the Massachusetts attorney general to begin collecting the signatures required for the measure to appear on the ballot in November 2022.

The California timeline

JAN 2020

Assembly bill 5 (AB5) passes, requiring application of the "ABC test" to determine whether California workers are employees or contractors.

The ABC test

Workers are employees unless all these conditions apply:

- The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact
- The worker performs work that is outside the usual course of the hiring entity's business
- The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed

Not all workers are covered. Many are exempt.

Source: California legislative information, AB-5 Worker Status: Employees and Independent Contractors, Sept. 19, 2019.

NOV 2020

Proposition 22 passes, classifying app-based drivers as independent contractors.

JAN 2021

The Service Employees International Union (SEIU) and four app-based drivers sue the state, seeking to have the proposition declared unconstitutional.

AUG 2021

Alameda County Superior Court rules that two sections of the proposition were unconstitutional and the entire measure was unenforceable. The court said the proposition unconstitutionally limited the power of the legislature and violated the state's single subject rule.

Anti-discrimination laws

Employers often have more responsibilities than they realize

Federal law prohibits covered employers from discriminating in employment based on race, color, religion, sex, national origin, age or disability. Some employers think that once they've made a hiring decision, their responsibilities stop. But that's not the case.

Commonly overlooked provisions include:

ADA accommodations

In addition to not discriminating in hiring, employers have an affirmative obligation to provide workplace accommodations that make it possible for disabled employees to perform the essential functions of their jobs, unless they can show that this will create an undue hardship for the company.

It's also important to remember that leave can be an accommodation. So even if an employee doesn't quality for FMLA (e.g., because they haven't been employed at the company long enough), an employer may still need to provide job-protected leave to accommodate a disability (e.g., to allow time for a treatment or surgery). "The junction of ADA and FMLA is confusing for a lot of employers," says King.

EEOC

Private employers with at least 100 employees must submit an annual report (called the EE0-1) categorizing employment data by race/ethnicity, gender and job category, which helps in national enforcement of Title VII.

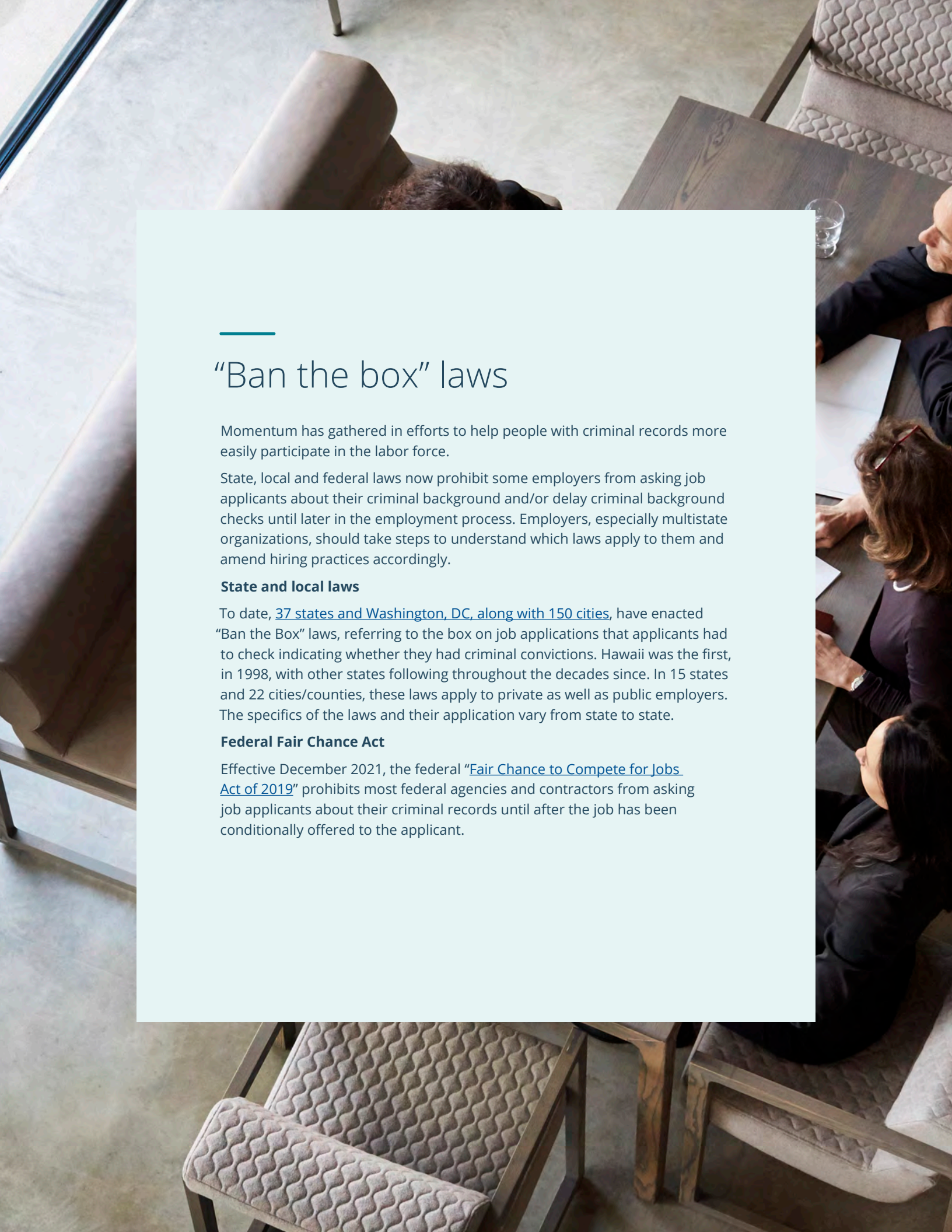
ADEA provisions

Several protections are built into the ADEA beyond not hiring or firing based on age. For example, if an employer offers an employee who is 40 or older a severance agreement that includes a release of age claim, they must offer certain protections regarding the review period and a revocation right. Review the ADEA protections here.

Variance in protected employee characteristics

All covered employers must abide by the non-discrimination provisions set forth under Title VII, the ADEA and the ADA, but some states also have their own specific list of protected characteristics.

For example, age discrimination is handled differently depending on the state. In New Hampshire, age discrimination is prohibited for all ages, not just employees who are 40 or over. In New York, discrimination based on age is prohibited for employees 18 or older.



“Ban the box” laws

Momentum has gathered in efforts to help people with criminal records more easily participate in the labor force.

State, local and federal laws now prohibit some employers from asking job applicants about their criminal background and/or delay criminal background checks until later in the employment process. Employers, especially multistate organizations, should take steps to understand which laws apply to them and amend hiring practices accordingly.

State and local laws

To date, 37 states and Washington, DC, along with 150 cities, have enacted “Ban the Box” laws, referring to the box on job applications that applicants had to check indicating whether they had criminal convictions. Hawaii was the first, in 1998, with other states following throughout the decades since. In 15 states and 22 cities/counties, these laws apply to private as well as public employers. The specifics of the laws and their application vary from state to state.

Federal Fair Chance Act

Effective December 2021, the federal “Fair Chance to Compete for Jobs Act of 2019” prohibits most federal agencies and contractors from asking job applicants about their criminal records until after the job has been conditionally offered to the applicant.

Lawsuits challenging termination decisions

Documentation and honest performance appraisals are key

"One of the biggest legal risks in managing people is termination decisions that are not well supported," says King. Many employers open themselves up to lawsuits by not sufficiently documenting and enforcing performance requirements. These best practices can go a long way toward protecting companies from legal action:

- **Define and document job descriptions.** For legal and business reasons, it's critically important that employees know what is expected of them. One of the best ways to convey that, and document it, is through a job description.
- **Include soft skills.** Job descriptions should include skills that influence fit, such as communication skills. If these aren't documented, it will be riskier to terminate someone based on personality characteristics that interfere with office harmony — especially if other performance requirements are being met.
- **Require and document honest performance feedback/reviews.** Managers should read and know their employees' job descriptions and hold employees accountable to job requirements. Risk will be reduced in a culture that supports fair and constructive criticism, instead of allowing managers to write unduly positive reviews just to avoid conflict.
  It is also important to document all performance reviews and all efforts to help an employee meet requirements before termination. A digital HR information system can be particularly valuable for storing reviews and keeping them accessible even after an employee leaves your company.

- **Document termination process and responsibilities.** Who makes termination decisions in your company? How are they evaluated for legal risk? Does a manager have the ability to make a termination decision without involving HR? Does legal review come into play?

Employers should make sure they have thought through each of these questions from the standpoint of minimizing risk, document the process and then ensure everyone is following it.

> **One of the biggest legal risks in managing people is termination decisions that are not well supported.**
>
> Suzanne King
> Partner, Pierce Atwood

Could these employees sue their employers for wrongful termination?

Suzanne King of Pierce Atwood offers guidance and best practices.

PHIL

Phil, 55, was let go for "performance issues" even though his last review showed three "exceeds" and three "meets" on performance standards. He was replaced by a 30-year-old woman fresh out of business school.

Would Phil have a case? Probably.

Phil could sue for wrongful termination based on age and/or sex discrimination. If his performance was inadequate, his performance appraisals should have documented it.

AMIN

Amin was out for four weeks to care for a dying family member overseas. Although he had been a great employee for eight years, he was terminated for attendance problems.

Would Amin have a case? Maybe.

If the employer was covered by FMLA, Amin could have had job-protection rights. It's the employer's duty to determine whether an employee's leave request is eligible for FMLA protection, even if the employee doesn't specifically ask for FMLA leave.

SUSAN

Susan's team members found her challenging to work with. Some found her demeanor unpleasant and others said she was hard to talk to. Despite adequate performance reviews, Susan was let go.

Would Susan have a case? Possibly.

Susan's lack of "fit" could have been due to cultural differences based on national origin (protected by Title VII), a disability affecting communication (protected by the ADA), or even a simple difference in age from most of her team members (protected by the ADEA).

Her employer could have avoided a potential lawsuit by including soft skills in her job description, documenting her performance evaluations, and, if Susan is disabled, offering accommodations (e.g., allowing her to communicate through email instead of face-to-face meetings).

Illustrative examples. Not real cases.

Overwhelmed by complexity?

Compliance will not be getting simpler next year, or any other year, so take steps now to stay on top of changes and reduce your compliance burden.

Unum's HR Trends resource site provides a wealth of podcasts, webinars, reports and articles featuring insights from industry experts that can help you stay up to date. Visit unum.com/employers/hr-trends and subscribe to our monthly newsletter.

Finally, technology solutions can help your HR team meet their responsibilities more easily and with greater confidence. Unum solutions include:

- Unum Vaccine Verifier™. Backed by a trusted leader in managing compliance, ADA and sensitive medical records, Unum Vaccine Verifier can ease the burden of vaccine management on HR and increase peace of mind for everyone. Be prepared for vaccine mandate implementation with a solution that helps you verify vaccination status, manage exemptions and oversee testing compliance all in one place.
- Unum Total Leave™. Total Leave is a digital solution that simplifies corporate, state and federal leave for HR — while making it easy for employees to plan leaves, receive benefits and return to work smoothly. It helps automate compliance with over 100 state and local leave laws, in addition to FMLA, making sure you provide the correct notifications and follow the rules in every work location.
- Unum HR Connect®. In the age of the distributed workforce, keeping track of employee-level information is challenging, but important to compliance. Unum HR Connect can help ensure that all changes in employee information are synced with your Unum benefits in real time.

About Unum

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