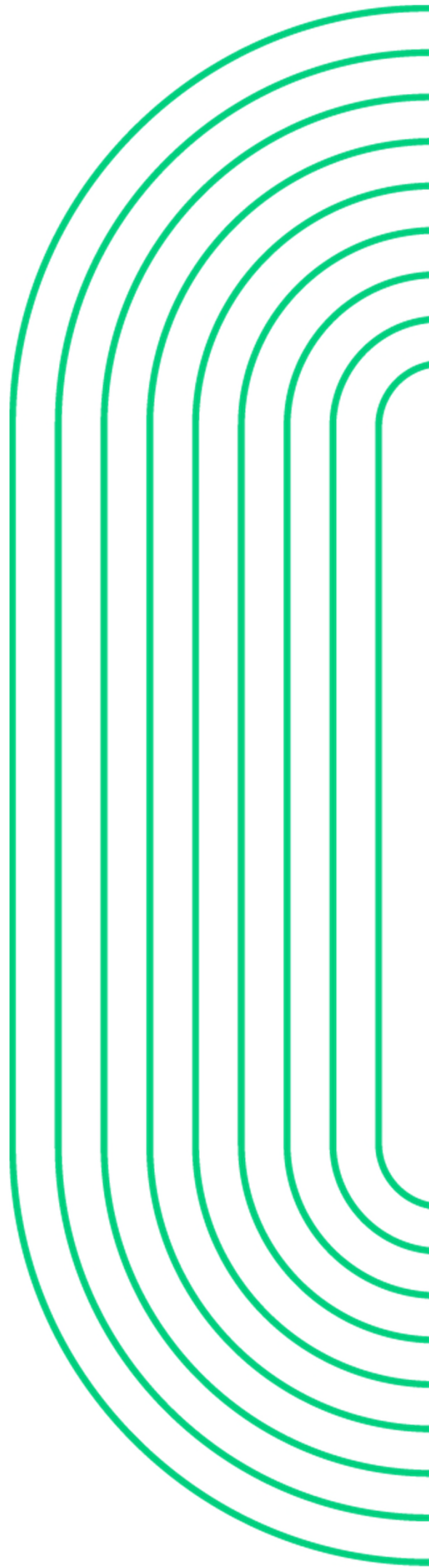


# Restrictive Covenants: Best Practices for In-House Counsel and HR Professionals in a Changing Legal Environment

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# Presentation Overview

## Different Types of Restrictive Covenants

- Non-Compete Agreements
- Non-Solicit Agreements
- Non-Disclosure Agreements

## Legislative Limitations on Restrictive Covenants

- Massachusetts Law
- Washington DC Law
- Illinois Law
- Federal Law

## What Can In-House Counsel and HR do to Protect Their Companies

- Onboarding Employee Best Practices
- Annual Employee Best Practices
- Departing Employee Best Practices



# Three Main Types of Restrictive Covenants

## NON-COMPETE AGREEMENTS

- Prohibits departing employees from accepting employment in a similar line of work or establishing a competing business for a specified period in a certain geographic area

## NON-SOLICIT AGREEMENTS

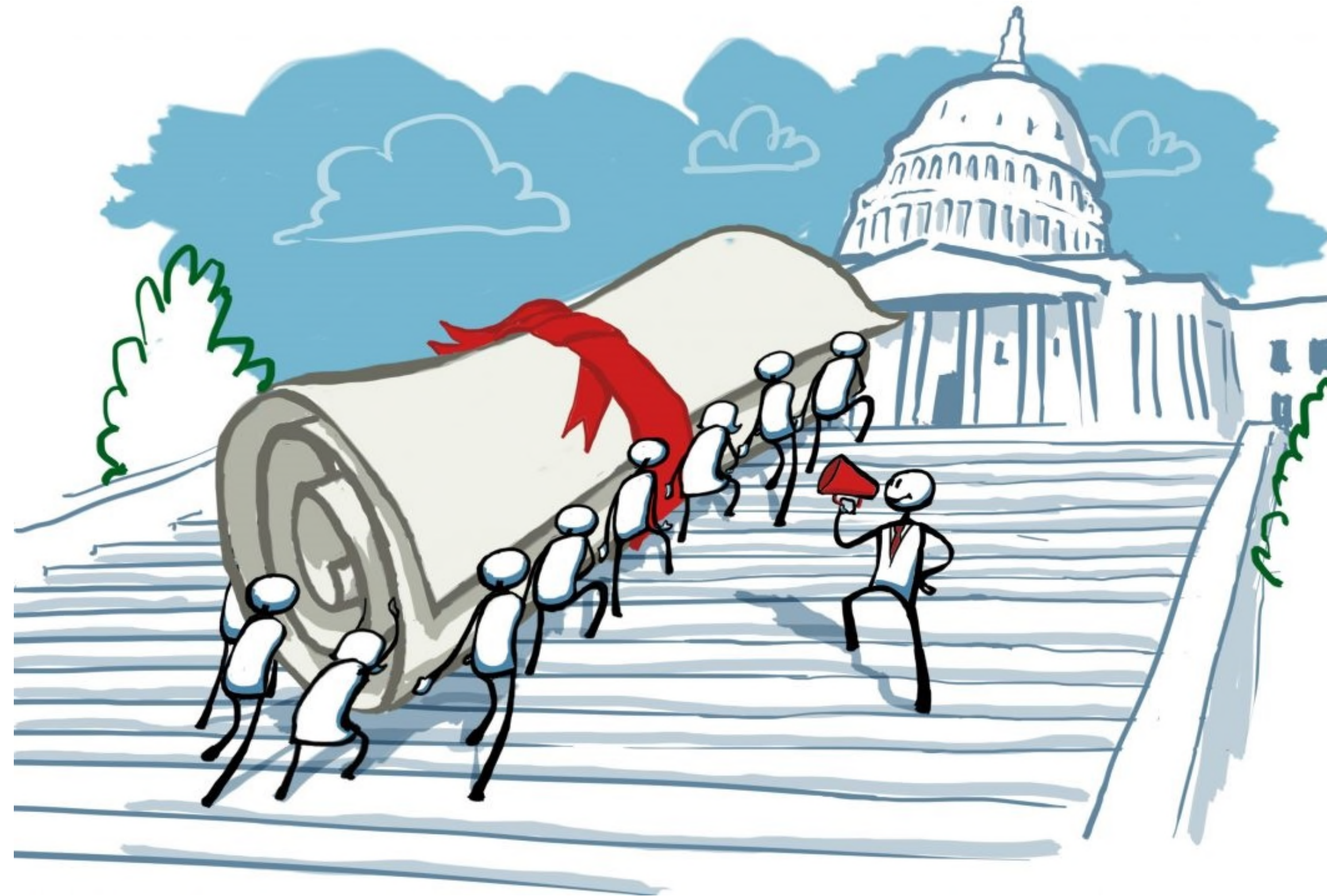
- Prohibits departing employees from soliciting business from customers/clients of former employer on behalf of new employer
- Prohibits departing employees from soliciting fellow employees to depart from former employer and join new employer (“non-poaching agreements”)

## NON-DISCLOSURE AGREEMENTS

- Prohibits employees, whether during or after employment, from disclosing specific information detailed within non-disclosure agreement



# State and Federal Initiatives to Limit Restrictive Covenants



Clipart: <https://share.america.gov/how-bill-becomes-law/>

# Massachusetts Legislative Limitations on Restrictive Covenants

- **Massachusetts Law:** Restrictive covenants are generally regulated in Massachusetts and must certain strict requirements
  - (1) Non-competes for “non-exempt” employees are banned
  - (2) Bars non-competes for those terminated without cause or laid off
  - (3) Non-competes must state that employee has the right to counsel
  - (4) Requires "garden leave" (50% of highest salary in two years)



# Washington DC Legislative Limitations on Restrictive Covenants

## On March 15, 2021 Washington D.C. enacted the “Ban on Non-Compete Agreements Amendment Act of 2020”

- Under the Act, “No employer operating in the District of Columbia may request or require any employee working in the District of Columbia to agree to a non-compete policy or agreement.”
  - Applies only to non-competes entered into after the Act becomes effective; pre-existing non-competes are exempt
- The Act defines “non-compete provision” as including any provision that “prohibits the employee from being simultaneously or subsequently employed by another person, performing work or providing services for pay for another person, or operating the employee’s own business.”
- **Exceptions** – The Act’s prohibitions do not apply to agreements with medical specialists, volunteers, babysitters or certain religious organization workers, as the definition of “employee” excludes these four categories of individuals. Similarly, the definition of “employer” expressly excludes the District of Columbia and United States governments.



# Illinois Legislative Limitations on Restrictive Covenants

- **The Trend in Illinois:**
- **Illinois Freedom to Work Act – Enacted in 2016**
  - Banned non-competes for low wage workers who earn the greater of (1) the Federal, State, or local minimum wage; or (2) \$13.00 an hour
    - Maine, Maryland, New Hampshire, Washington, and Rhode Island have also banned non-competes for low-wage earners
- **Illinois case law on what constitutes adequate consideration**
  - Courts in Illinois hold continued employment is not adequate consideration unless for a “substantial period of time”
    - Illinois state courts: Two years = “bright line rule”  
  
(Massachusetts: Continued employment no longer adequate consideration)



# Illinois Legislative Limitations on Restrictive Covenants

- **Currently Pending Illinois Legislation - Illinois House Bill 4007**
  - Requires an “employer that elects to enforce a covenant not to compete . . . must pay to the employee . . . full compensation, including all benefits, that the employee would have received had his or her employment not been discontinued (1) for the time specified in the covenant not to compete or (2) until the separated employee is employed full-time at a commensurate rate of pay and benefits in a field of work not subject to the covenant not to compete”
  - Renders void a noncompete that the employer attempts to enforce “in a manner that does not comply with” the payment obligations
  - Forces employers to really examine how important the information the restrictive covenant seeks to protect is to the employer. Is the information worth paying the employee his/her full freight?





# Illinois Legislative Limitations on Restrictive Covenants

- **Currently Pending Illinois Legislation - Illinois House Bill 789**
  - Defines “covenant not to compete” to include agreements that “impose adverse financial consequences on a former employee” for competitive activities
  - Defines “consideration” as either two years of employment, or “some other fair and reasonable consideration specifically bargained for in exchange for the covenant not to compete” (a clear nod to *Fifield v. Premier Dealer Services*)
  - Requires that a restrictive covenant (i) is not greater than required for the protection of a legitimate business interest, (ii) does not impose undue hardship on the employee, and (iii) is not injurious to the public (a clear nod to *Reliable Fire v. Arredondo*).
  - Permits employees to recover costs and reasonable attorneys’ fees if they prevail in an action initiated by an employer involving a covenant not to compete



# Illinois Limitations on Restrictive Covenants

- **Currently Pending Illinois Legislation - Illinois House Bill 789 Cont.**
  - Prohibits the use of non-compete agreements unless the employee's actual or annualized earnings exceed \$75,000 per year, increasing to \$80,000 on January 1, 2027; to \$85,000 on January 1, 2032; and to \$90,000 on January 1, 2037
  - Prohibit the use of non-solicit agreements (both employee and client non-solicitation restrictions) unless the employee's actual or annualized earnings exceed \$45,000 per year, increasing to \$47,500 on January 1, 2027; to \$50,000 on January 1, 2032; and to \$52,500 on January 1, 2037
  - Renders non-compete agreements non-solicit agreements unenforceable unless employers: (i) advise employees to consult with counsel before agreeing to the restrictive covenant; and (ii) provide an employee with a copy of the covenant at least fourteen calendar days before the commencement of the employee's employment
  - Prevents employers from enforcing non-compete agreements against any employee who is terminated or furloughed due to the COVID-19 pandemic, or under any circumstances that are similar to the COVID-19 pandemic, unless the employee receives compensation equivalent to his or her base salary during the enforcement period minus compensation earned elsewhere during the enforcement period



# Federal Legislative Limitations on Restrictive Covenants

- **President Biden’s “Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions**
  - “Eliminate non-compete clauses and no-poaching agreements that hinder the ability of employees to seek higher wages, better benefits, and working conditions by changing employers.”
- **Department of Justice initiated first-ever criminal case (U.S. v. Surgical Care Affiliates LLC et al.) involving “no-poach” agreements in January 2021**
  - The indictment, which follows an investigation conducted by the DOJ’s Antitrust Division, alleges that Surgical Care Affiliates LLC (and its successor entity, Scai Holdings, LLC) entered into agreements with at least two other competing healthcare companies whereby they would not recruit or solicit the other’s senior-level employees, thereby suppressing competition for the services of those employees



# So What?

- Why should in-house counsel and HR professionals have these emerging trends on their radar?
- Do we know if there is going to be a continuing trend to limit non-competes?
  - We know President Biden wants to eliminate non-competes
  - We know about The new laws in Massachusetts and Washington DC
  - We know new initiatives are pending in other states, like Illinois
- **SO WHAT ARE WE SUPPOSED TO DO DURING THIS TIME OF UNCERTAINTY?**
  - **“If there's one thing that's certain in business, it's uncertainty.” Stephen Covey**



# What Can In-House Counsel and HR Do To Protect Their Companies?



# Issues to Consider to Protect in Your Restrictive Covenants

- **CHOICE OF LAW:** Choice-of-law provision designating the law of a state (if possible) with more favorable laws regarding the enforceability of restrictive covenants
- **CONSIDERATION:** Make additional consideration beyond just continued employment explicit within your agreement:
  - Examples include a cash payment, stock options, training, education, a raise, additional paid time off, guaranteed severance, or a promotion
- **NOTICE:** Have employees agree to a "required notice" clause, rather than a traditional non-compete or non-solicit clause. Under such a provision, an employee is required to give advance notice of his or her resignation (e.g., 30 – 90 days) and, during the notice period, the employee remains on the employer's payroll and owes the employer a fiduciary duty of loyalty (and therefore cannot work for a competitor during that period).



# On-Boarding New Employees

- Acknowledgement in Offer Letters
  - No breach of third-party obligation
  - No trade secrets from third-parties
- Beware of Indemnity Clauses
  - Conditioning a new hire's continued legal defense on signing a non-compete was coercive
  - Beware having new hires agree to indemnify hiring company in case of lawsuit
- Don't be a bad hirer
  - Large sign-on bonus may be seen as a "premium" for trade secrets
  - Assigning new hires to same tasks puts hiring company "at risk"
- Beware of "evergreen" or automatic renewal clauses



# Annual Practices

- Annual re-acknowledgements
  - Low cost/high return
- Taking specific measures to protect confidential and/or proprietary information
- Perform annual audits of employees' access to proprietary information and/or trade secrets and limit access accordingly
- Build independent protectable customer relationships
  - Make sure that customer/client relationships are with the company, not just with their account executive





# Departing Employees

- Exit interviews: Remind departing employee of restrictive obligations and have them re-acknowledge same in writing
  - “Reminder of Obligations” letters v. “Cease & Desist” letters?
- Determine what proprietary information and/or trade secrets departing employee has had access to and act accordingly
- Computer Forensic Exam?
  - Return of Company Property Clauses
  - BYOD and Acceptable Use Policies?
- Enforcement of every non-compete?
- Trying to enforce questionable non-competes



# Questions?



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# Thank You

## **Legal Disclaimer**

This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.