

Today's webinar will begin shortly. We are waiting for attendees to log on.

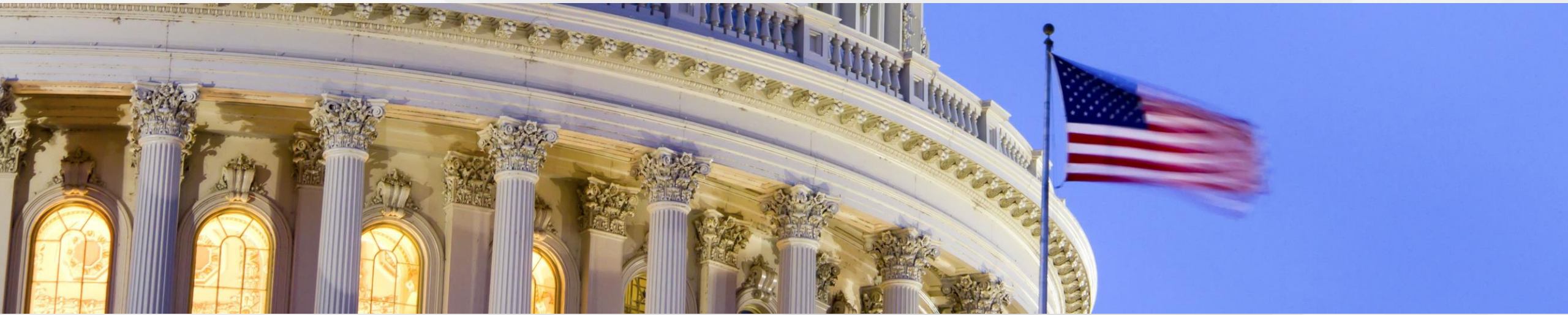
Presented by:

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# Recent Updates in Federal and Colorado Labor & Employment Law



Presented by:  
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# Arbitration Is Still OK



**CONFIRM**

**Arbitration Agreement**

# Why is this an issue now?

- It was inevitable that the issue of mandatory class action waivers would be challenged all the way to the U.S.S.C., which has now happened in the case of *Epic Systems v. Lewis*, decided on May 21, 2018.
- *Epic Systems* clearly and unequivocally held that class action waivers (in arbitration agreements) were enforceable.

# *Epic Systems*

- Background
  - Plaintiffs' attorneys challenged class action waivers arguing that they violated the National Labor Relations Act (NLRA)
  - Board agreed and found class action waivers unlawful
  - Most federal courts disagreed, finding that the Federal Arbitration Act (FAA) preempted the NLRA
  - In recent years a few courts began to agree with the Board
  - Circuit split led the Supreme Court to decide issue in *Epic Systems*

# *Epic Systems*

- Supreme Court Decision
  - 5-4 Decision – Upholding class action waivers under FAA
  - Consistent with several Supreme Court decisions over last several years enforcing parties' arbitration agreements
  - Decision does not affect state law considerations related to arbitration agreements, such as consideration, unconscionability, etc.

# State Law Consideration Issues

- New Employees
  - Offer of employment is typically sufficient
  - Can be a condition of employment
  - Recommend having employees sign agreement
- Current Employees
  - Many states require more than continued employment
  - Mutual agreement to arbitrate claims
  - Additional consideration?
- Depending on turnover, may consider rolling out only to new employees to avoid issues

# Should you change your agreements?

- If you don't have a mandatory arbitration clause with a class action waiver, you may want to think about making no change. Why?
- If you are a small employer, there may be nothing in it for you – arbitrations of individual claims can be as expensive as a full blown trial, so arbitration gains nothing for you.





# Take Away:

- There will be much litigation over class action waivers over the next few years.
- If you don't have a class action waiver in your arbitration agreement, this won't affect you.
- But if you do, there are 152 stayed cases out there pending *Epic*; 52 are in appellate courts and may deal with the retroactivity of *Epic*.
- Beware if you are a non-union shop: the experts predict that unions will be making greater efforts to unionize in the wake of *Epic*.

# As to Union Shops

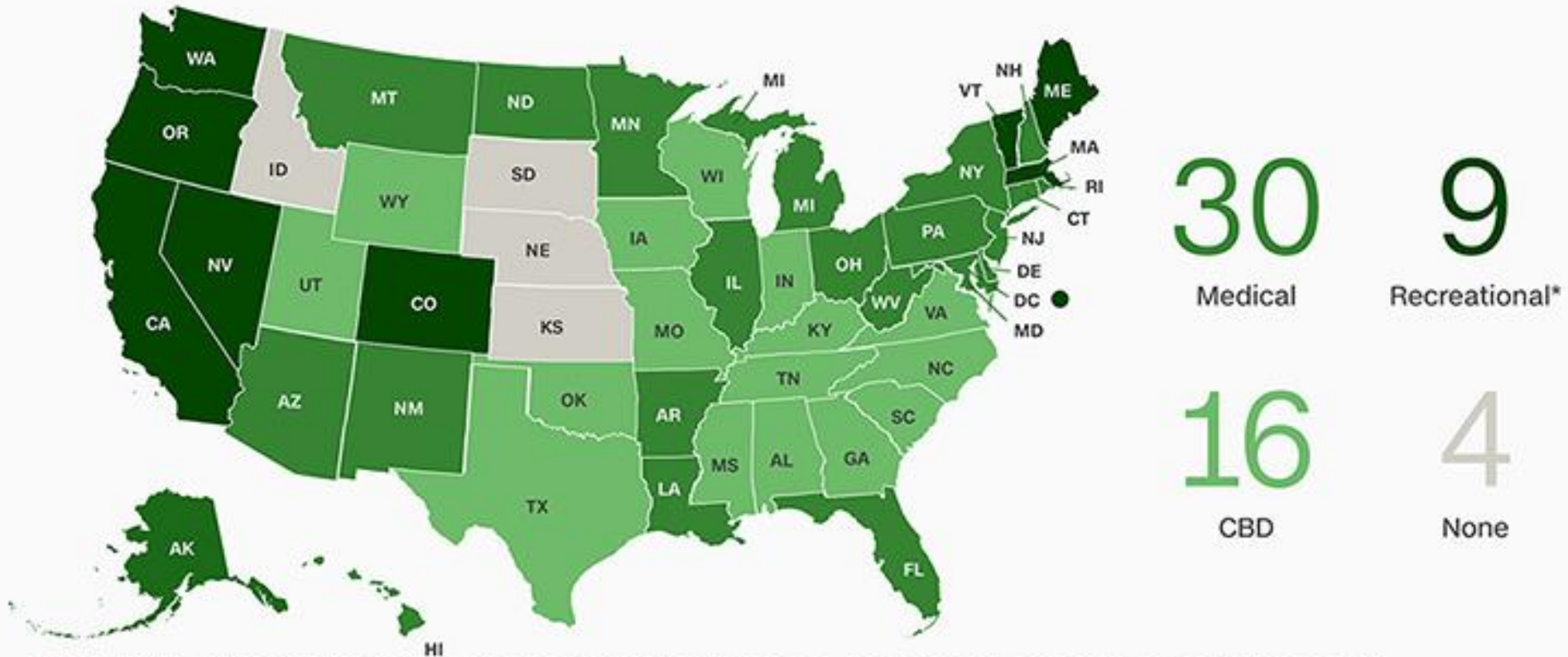
- Union lawyers may start to bring individual case after individual case with attendance application – or not – of “non-mutual offensive collateral estoppel.”
- Other lawyers (not union lawyers) will “bundle” cases and do the same thing.



**IN THE WEEDS . . .**

# United States of Marijuana

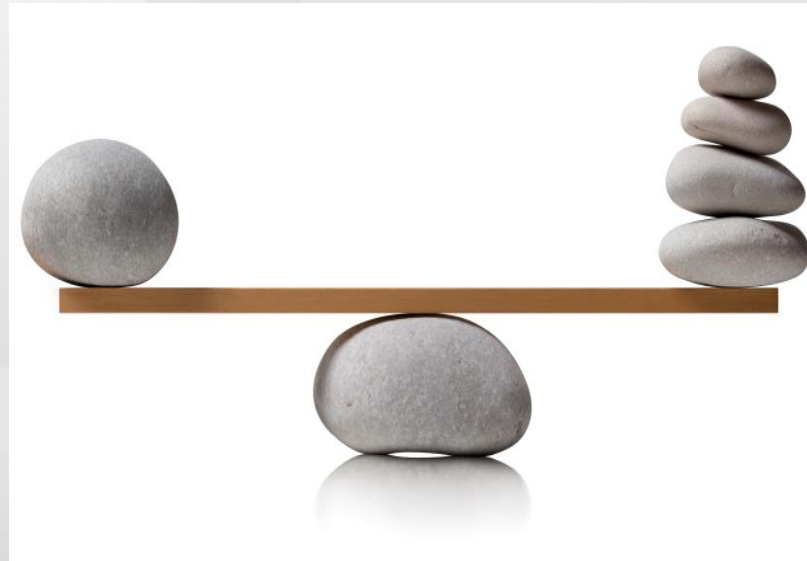
The state of the union is strong for marijuana, a \$9 billion industry. Recreational weed is legal in nine states and Washington, D.C. Medical marijuana is legal in 30 states, but it's still prohibited by the federal government.



Source: CNN Money

# Questions for Employers

- Keeping workforce and public safe
- Maintaining productive workforce
- Complying with “the law”
- Respecting employee privacy



# Status of the Law - Federal

Still a Schedule I drug under the Federal Controlled Substances Act, which means according to the Feds:

- (1) high potential for abuse,
- (2) no currently accepted medical use in treatment in the US, and
- (3) lack of accepted safety for use of it.



# So What are Feds Doing?

Obama's DOJ: Oct. 2009, declared that enforcement of marijuana under CSA, with respect to state laws, was not a priority. No cases prosecuted.

Trump's DOJ: February 8, 2017, AG Sessions declared that states should "expect greater enforcement" of federal laws regarding marijuana.

Sessions: *"Good people don't smoke marijuana..."*  
4/5/16



# Corey Gardner on Friday, April 13

- President Trump promised Senator Gardner of Colorado he would support efforts to protect states that have legalized marijuana.
- In exchange, Gardner will stop blocking DOJ nominations.





# Marijuana In The Workplace

- The analysis always starts with recognizing that marijuana use of any kind is still a Federal Crime.
- No state law can compel an employer to commit a crime or become an accessory to a crime.
  - Employers CAN prohibit **possession** & sale of marijuana in any form on company property.
  - Employers CAN prohibit **use** of marijuana in any form (regardless of prescription) on company property, during work hours and/or while performing work for the company.
  - Employers CANNOT be required to **pay** for employee's marijuana even if the employer would normally have to pay for other workplace accommodations and worker's compensation treatments.

# Marijuana In The Workplace

- You may prohibit use in the workplace!
  - No case has held that you must permit employees to use marijuana at work.
- Employers won decisions in California (2008), Oregon (2010), Washington (2011), Montana (2012), Colorado (2015), and New Mexico (2016) – *do not have to accommodate medical marijuana use*



## ***Barbuto v. Advantage Sales & Marketing***

(Massachusetts July 27, 2017)

- ***Employees might be entitled to accommodations***
- ***Employers must engage in interactive process***



# What Do We Do?

1. Decide your position based on your business needs and business culture.
  - Safety-sensitive positions; law enforcement;
  - Federal requirements applicable to your business
2. Update handbook and policy if needed, but **BE CAREFUL** and think expansively.
  - Adopt clear policies that bar possession, use or sale of marijuana on company property
3. Apply policies uniformly.
4. Consider a proactive memo to employees.



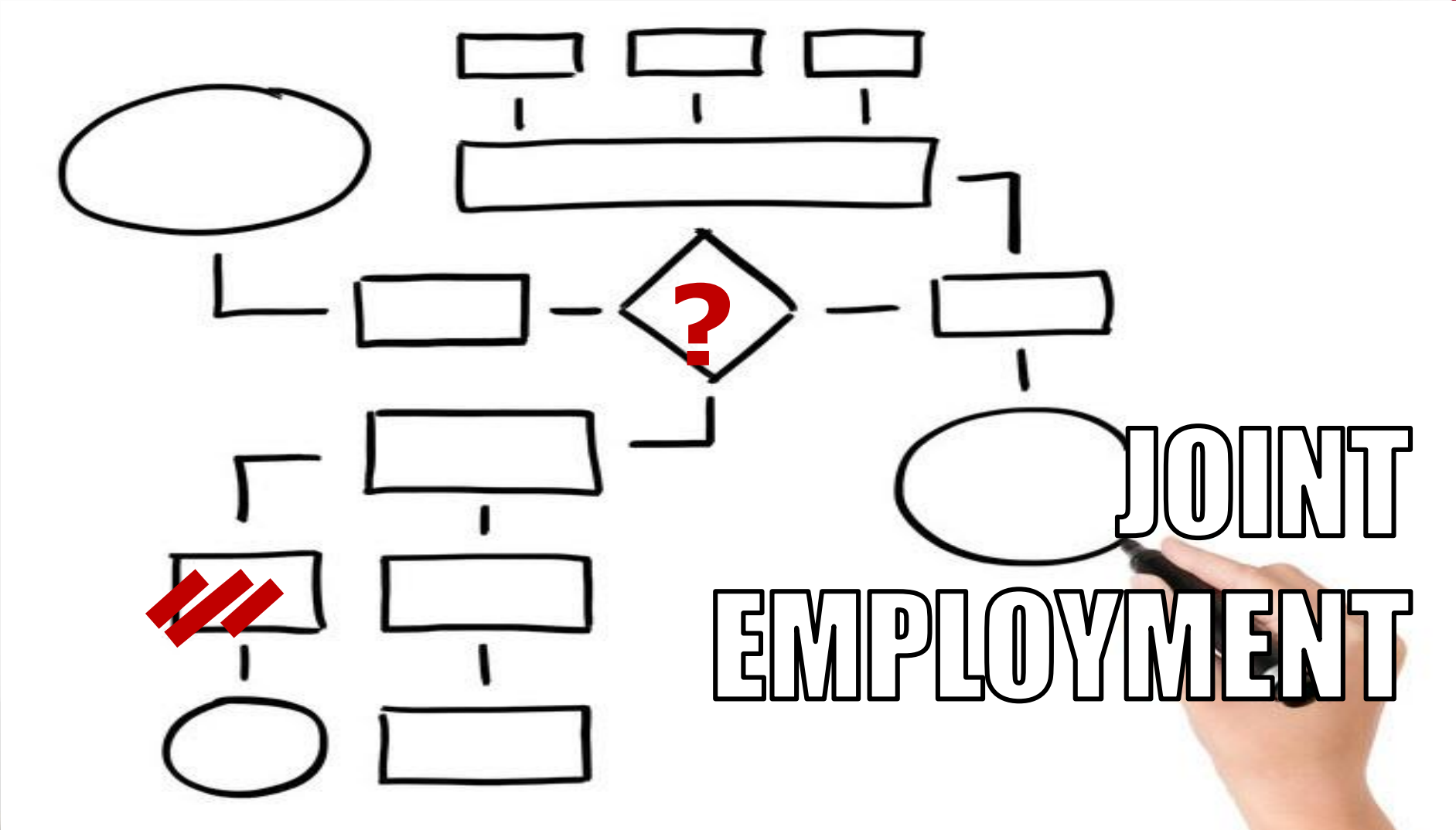
# What Do We Do?

5. Publicize your policy and train supervisors and managers.
6. Review all anti-discrimination laws in jurisdictions where you do business
7. Keep an eye on new developments in the law.
  - Make Sure You're Not the "Test Case".
8. Consider eliminating strict post-accident/post-injury testing and replacing it with reasonable-suspicion testing.
9. Consider testing that focuses on employee intoxication at work



# What Do We Do?

10. Consider eliminating pre-employment drug tests for marijuana or implementing a procedure for applicants to request an accommodation.
11. Create a formal process for applying for a medical marijuana accommodation.
  - Require employees to obtain certification from health care provider setting forth the nature and limits of the requested accommodation.
12. Do not create unreasonable expectations; update and inform employees and applicants throughout the interactive process.
  - Do not want job applicants to quit their old job only to find out that positive drug test disqualifies them.



# What Happened?

August 2015: NLRB creates broad new standard

*Joint employment exists even where one company only has the **right** to exert **indirect or potential control** over the terms and conditions of another company's employees (**Browning-Ferris Industries of California, Inc.**).*



# What Happened?

## January 2016: USDOL issues Joint Employment Guidance

*Expansive interpretation of the principles governing joint employment standards for wage and hour matters, along with a new and aggressive agency enforcement posture.*





# What Happened?



**June 2017: Trump administration withdraws Joint Employment Guidance**



**July 2017: Bill introduced in Congress to narrow joint employment definition**

- *Would apply to NLRA and FLSA*
- *Only if business “directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over essential terms and conditions of employment” of a worker*

# HOME RUN

## Dec. 14, 2017: NRLB Overrules Unworkable Test

- To find joint employment, need proof that one entity has exercised **control** over essential employment terms of another entity's employees (rather than merely having reserved **the right** to exercise control); and has done so **directly and immediately** (rather than indirectly) in a manner that is **not limited and routine**

# The Baker & The Court



# The Baker & The Court

- *Masterpiece Cakeshop v. Colorado Civil Rights Commission*
  - The U.S. Supreme Court ruled baker Jack Phillips did not get a fair hearing at the Colorado Civil Rights Commission when it weighed whether he could receive a religious exemption from the Colorado Anti-Discrimination Act.
  - Baker's Free Exercise Clause rights under the Constitution were not properly considered by the Colorado Civil Rights Commission
  - The court's holding did not change the substance or enforcement of CADA.
  - **Clickbait headlines did not tell the entire story.**



# Unfulfilling Decision

- The Baker won
  - *Kind of. Not really.*
- Set back for LGBT rights?
  - *Not really. See what happens going forward.*
- Address Free speech or compelled speech issues?
  - *Nope.*
- Address religious liberty versus equality claims?
  - *Nope.*



# Decisions after Masterpiece

- **Arizona**

- The Arizona Court of Appeals ruled a pair of business owners cannot refuse to make artistic creations (calligraphers) for same-sex weddings based on their religious beliefs.

- **Hawaii**

- Supreme Court declined to hear appeal from B&B owners who challenged Hawaii's discrimination law.

- **Washington**

- The U.S. Supreme Court sent a case back to the Washington Supreme Court to reconsider in light of the Masterpiece Cakeshop decision, when the state court has previously ruled against a florist who refused to create arrangements for a same-sex couple's wedding.

# What Should Employers Do?

- *Masterpiece* should not be read to permit employers to discriminate on the basis of sexual orientation or other protected category, no matter the strength of a business owner's religious beliefs.



- *“Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth”*
- *“it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.”*

# Colorado Legislative Update





# Colorado Legislative Update

- Colorado legislative bills related to employment this past session:
  - 18-1030 To prohibit discrimination based on union participation, postponed indefinitely
  - 18-1033 Leave to participate in elections, postponed indefinitely
  - 16-1166 Prohibit seeking salary history for job applicants, postponed indefinitely
  - 18-1368 To repeal prohibitions on local governments enacting minimum wage laws, postponed indefinitely
  - 18-1378 Equal Pay for Equal Work Act, postponed indefinitely

# Colorado House Bill 18-1128

## Protections for Consumer Data Privacy

### Background

- The bill was introduced January 19, 2018.
- There were six unpublished versions.
- Signed by the Governor on May 29, 2018.
- Passed both houses without a single NO.
- Effective September 1, 2018.
- Trend – 20% of states have enacted or amended statutes in 2017 or 2018.



# Colorado House Bill 18-1128

## Protections for Consumer Data Privacy

- **Purpose:** Protect personal identifying information from unauthorized use, modification, disclosure or destruction.



- Covered entity is any person that **maintains**, owns or licenses personal identifying information in the course of their business, vocation or occupation.
- “Person” is an individual, corporation, business trust, estate, trust, partnership, unincorporated association, etc.

# Colorado House Bill 18-1128

## Protections for Consumer Data Privacy

### What is Protected?

- "Personal identifying information" means a social security number; a personal identification number; a password; a pass code; an official state or government-issued driver's license or identification card number; a government passport number; biometric data; an employer, student, or military identification number; or a financial transaction device.



# Recommended Actions

1. Create and implement a Written Information Security Program or WISP.
2. Designate a responsible individual for managing the information security program.
3. Conduct a risk assessment at least once a year.
4. Train all employees.
5. Create a disaster recovery plan.
6. Create an incident response program and team and test the IR plan at least once a year.
7. Encrypt all sensitive data.
8. Create Access Control for sensitive data.
9. Create data classification and document marketing program.
10. Third-party risk management program.

# Final Questions



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# Thank You



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