Insights, News & Events

THE TOP 16 WORKPLACE LAW STORIES FROM SEPTEMBER 2022

Insights
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It's hard to keep up with all the recent changes to labor and employment law. While the law always seems to evolve at a rapid pace, there have been an unprecedented number of changes for the past few years—and this past month was no exception. In fact, there were so many significant developments taking place during the past month that we were once again forced to expand our monthly summary well beyond the typical "Top 10" list. In order to make sure that you stay on top of the latest changes, here is a quick review of the Top 16 stories from last month that all employers need to know about:

1. **Top 10 New California Employment Laws Signed into Effect by Governor Newsom**

   A number of hot-button legislative proposals made it to Governor Newsom's desk this year – many of which would change the landscape for California employers. For the first time since the COVID-19 pandemic, this year has been a "return to normal" year for California lawmakers, which means a return to aggressive legislation establishing and expanding workplace protections for employees. Now that the September 30 deadline for the governor to sign or veto bills has passed, we know what new laws are coming. Here is a summary of the top 10 pieces of workplace legislation signed into effect.

2. **Comprehensive FAQs For Employers on Hurricanes and Other Workplace Disasters: 2022 Edition**

   This detailed set of Frequently Asked Questions, fully updated for 2022, addresses the workplace-related

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issues facing employers in the wake of hurricane-related disasters. In addition to legal obligations you need to consider, this Insight also addresses the practical questions that most often arise both while preparing and in the aftermath of storms. The information contained here could be of value beyond the current hurricane season and may be helpful following any natural catastrophe. What are the most critical issues you need to be aware of during preparation and recovery?

3. **California Attorney General Provides Key Enforcement Insights to Employers on CCPA Obligations**

   With the entire panoply of compliance requirements under the California Consumer Privacy Act of 2018 (CCPA) and the California Privacy Rights Act (CPRA) set to take effect on January 1, 2023, now is the time for employers to undertake efforts to ensure full compliance with the regulations. Many California employers may have previously ignored aspects of the groundbreaking privacy law given that employment data had been exempted from its reach. But now that state lawmakers have ensnared employers in the CCPA's grasp, the time is now for employers to take action – and the state Attorney General has chimed in with some critical insights that you should take to heart. Your first stop for compliance should be the newly launched Fisher Phillips CCPA Resource Center, where you can find all manner of helpful resources to aid your compliance efforts.

4. **The Never-Ending Story? NLRB Proposes New Rule Shifting Back to Broad Definition of 'Joint Employer'**

   The National Labor Relations Board (NLRB) just proposed a controversial new rule that could soon make it easier for workers to be considered employees of more than one entity for labor relations purposes. The Biden administration's NLRB – which announced its anticipated Notice of Proposed Rulemaking (NPRM) on September 6 – is seeking to rescind and replace a 2020 rule from the Trump administration that offered flexibility for modern working relationships by only deeming joint employment to exist when two businesses share or co-determine the employees' essential terms or conditions of employment and they actually exercise control over them. The proposed rule, however, would set that aside in favor of a broader standard through which evidence of even potential, unexercised, and indirect

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control over any working conditions could be deemed sufficient to confer joint employer status. The rule is just a proposal at this point. Nonetheless, employers should expect the Board to move full steam ahead with the rulemaking process and finalization of a new standard by early 2023. What do you need to know about the proposed rule and what can you do to prepare?

5. **OSHA Significantly Expands Severe Violator Enforcement Program: FAQs for Employers**

   The nation's workplace safety and health watchdog agency recently announced that it will now cast a wider net to include even more workplaces in its enhanced inspection program known as the "Severe Violator Enforcement Program" or SVEP. Employers placed in this program by the Occupational Safety and Health Administration (OSHA) are included on a list of "severe violators" that is publicly available on the agency's website – which is a list you do not want to land on for a variety of reasons. Not only could you face the fallout of being publicly named, but employers on the list are also subject to additional follow-up inspections, including at worksites other than the one at issue. What do employers know about this new development announced on September 15? Here are a series of FAQs to help you understand what you'll be dealing with – as well as a list of action steps you can take to minimize your chances of landing on the SVEP list.

6. **Workers Aim to Outmaneuver OSHA and Seek Court Relief for Workplace Safety Claims: What it Could Mean for Your Business**

   A three-judge panel of the Third Circuit Court of Appeal recently heard oral arguments on the issue of when federal courts may intervene in workplace safety disputes between employers and their employees, as OSHA squared off with worker advocates about whether workers claiming to have been exposed to "imminent danger" on the job can outmaneuver the agency and seek relief from the courts. This case, argued before the Third Circuit on September 7, is the first time a federal appellate court has been asked to make a decision as to when workers dissatisfied with OSHA's response to safety concerns can ask a court to intervene in the administrative process. If the court ultimately rules in favor of the employees, it could result in more petitions by

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unions and other worker advocacy groups asking judges to intervene if they believe that OSHA is not responding quickly enough to protect employees from life-threatening work hazards.

7. **FTC Sends Strong Antitrust Warning to Gig Economy Businesses**

   The Federal Trade Commission just announced that it will put gig economy businesses in its crosshairs by cracking down on worker misclassification and other alleged anticompetitive conduct – the second such attack by the same agency in the last few months. The FTC's new policy statement, released on September 15, announced that the agency would use the full portfolio of laws it enforces to prevent "unfair, deceptive, anticompetitive and otherwise unlawful practices" affecting gig workers. Specifically, the FTC said it will take on businesses that misrepresent workers' potential earnings, wrongfully use artificial intelligence to evaluate worker productivity, and engage in wage-fixing with other gig companies, commonly seen as classic antitrust behavior that is getting increased attention under the Biden administration. "No matter how gig companies choose to classify them, gig workers are consumers entitled to protection under the laws we enforce," said an agency representative. What do gig economy businesses need to know about this latest antitrust shot across the bow from the federal government?

8. **Black Women's Equal Pay Day: A Reminder to Review Your Diversity and Pay Practices**

   Closing the gender pay gap has become more challenging in recent years, especially since the COVID-19 pandemic has disproportionately affected women – who must juggle work, childcare, eldercare, and other demands. And research shows that women of color have felt the greatest impact. Notably, September 21 was Black Women's Equal Pay Day – the day that symbolizes how long into the current year black women must work to earn what men did in the previous year. The deepened pay gap for 2022 is hopefully temporary, as factors primarily attributed to the pandemic pushed many women out of the workforce or into part-time and seasonal jobs. But there are proactive steps employers can take to attract and retain women in the workplace and ensure improved

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pay equity now and in the future. What can you do to promote pay equity and help close the gender pay gap?

9. **Last Exit to Cooperstown: An Employer's Guide to Baseball's Latest Workplace Strife**

   Fall baseball provides a few guarantees for fans, as playoff races, assaults on historical records, and jockeying for draft position typically imbue the last month of the season with an air of certain uncertainty. This year, however, it seems that there is more doubt in the baseball world — and it has nothing to do with the surprising Baltimore Orioles. In recent weeks, Major League Baseball (MLB) has been hit with labor relations developments which have come at them faster than a Jordan Hicks fastball: from the Players Association joining the AFL-CIO on September 7, to the unionization efforts of their minor league counterparts, to a $185 million settlement in contentious FLSA litigation, baseball as we know it is in for some major changes. What do employers need to know about these developments?

10. **Love Can Cost a Thing: Sports Employers Can Learn Lessons from the Boston Celtics Workplace Romance Scandal**

    In an unprecedented move, the Boston Celtics suspended head coach Ime Udoka for a full season on September 22 due to multiple violations of team policies arising from alleged unwanted advances he made towards a female member of his staff, with whom he admits having engaged in a consensual sexual relationship. This significant fall from grace for Udoka – and the swift and decisive action taken by the Celtics organization – can serve as a valuable lesson for sports teams and organizations of all types. If not prepared, workplace romances – even consensual ones – can result in unwanted scandals and potential litigation. This insight provides guidance to sports employers on how you can deal with the reality of workplace romances and avoid the potential fallout unique to your industry.

11. **Democratic Lawmakers Push for Compulsory Union Membership and Dues Payment in Reintroduced Legislation**

    In yet another push to strengthen worker organizing efforts, a group of Democratic lawmakers joined Senator

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Elizabeth Warren (D-Mass.) and Representative Brad Sherman (D-Calif.) in announcing the reintroduction of the Nationwide Right to Unionize Act. The legislation, reintroduced on September 8, seeks to bolster employees' right to unionize by taking aim at "right-to-work" laws that have proliferated in states throughout the country. Such laws are currently permitted under Section 14(b) of the National Labor Relations Act (NLRA) and generally ban compulsory union membership and payment of union dues and fees as a condition of employment. What do employers need to know about right-to-work laws and this pro-labor legislation?

12. **OFCCP Announces 'Minor' Changes to Directive on Functional Affirmative Action Plans**

    The Office of Federal Contract Compliance Programs (OFCCP) recently announced "minor" changes to its directive on Functional Affirmative Action Plans (FAAPs) – but some of the changes don't resonate as "minor." First, what is a FAAP? Through an agreement with the OFCCP, a federal contractor may opt to establish an affirmative action program based on functional or business units rather than by establishment, as is traditional. So, what's new? On September 22, the OFCCP announced that its third revision to Directive 2013-01 "provides clarification regarding procedural requirements, in addition to minor language and formatting changes, that continue to provide for a FAAP process that is efficient, fluid, and collaborative." Although the update provides some clarity for contractors, you should be aware of certain inconsistencies. What do you need to know about the revised directive?

13. **Employers Earn Critical Post-Viking River Arbitration Victory: Your 7-Step Action Plan to Beat Back PAGA Claims**

    Following the U.S. Supreme Court's June decision in *Viking River Cruises, Inc. v. Moriana*, employers in California have awaited further guidance by federal courts regarding the scope and impact of this key decision that ruled that employers can compel arbitration of individual claims brought under the state's Private Attorneys General Act (PAGA). On September 21, a California federal judge handed employers a critical victory by granting an employer's motion to compel arbitration of claims as to the plaintiff's individual PAGA

claims and to dismiss representative PAGA claims as to other allegedly aggrieved employees. In the holding, the judge noted that, absent intervening California authority regarding the Supreme Court's interpretation of standing, the Supreme Court's interpretation would be applied. The *Johnson v. Lowe's Home Centers* decision closely followed the U.S. Supreme Court's holding and rationale, which signals great hope for employers relying on arbitration agreements to swiftly resolve PAGA claims. This Insight summarizes the ruling and provides employers with a helpful seven-step action plan to help earn similar victories.

14. **NYC Fast Food Employers Back in the Spotlight: More Amendments to the City's Fair Workweek Law Coming Your Way**

    It is looking increasingly likely that fast food employers in New York City will have to deal with troubling new workplace regulations in the near future, including the prospect of increased penalties for violations, additional employee training requirements, and the threat of revoked business permits. Building off of recent punitive enforcement efforts by New York City's Department of Consumer and Worker Protection (DCWP) for violations of the Fair Workweek and Just Cause Laws (FWW) and Earned Safe and Sick Time Act (ESTA), City Council members introduced two bills this summer that further target fast food employers by amending the FWW. On September 19, a City Council committee held a hearing on these two bills. Since a sizeable portion of the City Council is co-sponsoring them, some version of each is likely to eventually pass. Here's what's potentially in store for New York City fast food employers.

15. **Dazed But Less Confused: New Jersey Releases Workplace Guidance on New Recreational Cannabis Law**

    Almost six months after New Jersey approved the sale of recreational cannabis use, state authorities have just released Interim Guidance on workplace impairment outlining how employers should address employees' suspected impairment from cannabis while performing their job duties. The September 9 guidance confirms that an employee's off-duty use of cannabis cannot be the reason for any adverse employment action, but employers can terminate workers for being under the influence during work hours. But there are some specific

practices and protocols you need to follow in order to ensure you comply with the law. What do New Jersey employers need to know about this latest development?

16. **What Employers Need to Know as Minnesota Nurses Engage in Largest-Ever Private Sector Nursing Strike in U.S. History**

    Approximately 15,000 nurses represented by the Minnesota Nurses Association began a three-day strike on September 12 in the largest ever-reported strike of nurses in the private sector in the United States. The strike directly affected 16 hospitals across the state of Minnesota, forcing some to reschedule non-emergent appointments and procedures to ensure patient safety. What do you need to know about this latest activity continuing the workforce stoppage trend, regardless of your industry – and regardless of whether your organization is unionized?

We will continue to monitor developments related to all aspects of workplace law. Make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information. If you have questions, contact your Fisher Phillips attorney.