

# TOP WORKPLACE LAW STORIES YOU MAY HAVE MISSED FROM JANUARY 2023

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 order to ensure you stay on top of the latest changes, here is a quick review of the top stories from last month that all employers need to know about:

## **FTC Proposes Non-Complete Ban**

### **[Frequently Asked Questions About the FTC's Proposal to Ban Non-Compete Agreements](#)**

When the federal government proposed a rule on January 5 that would ban most non-competition agreements, many employers lined up with questions and concerns about the scope of the proposal and what it might mean for their day-to-day businesses. After all, non-competes have become a commonplace strategy for businesses of all types and sizes, and this rule would not only prevent employers from entering into new non-competes but would also require them to rescind those currently in place. The good news: we're here to help. This Insight presents a series of frequently asked questions about all aspects of the proposal as developed by leaders of our Employee Defection and Trade Secrets Practice Group and will be updated as new developments occur in the coming months.

## **SCOTUS Recap, Predictions, and Preview**

### **[Top 10 Ways You Can Protect Attorney-Client Communications After Supreme Court Punts Case](#)**

## **Related People**



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The Supreme Court was seemingly set to decide whether and when a party can assert attorney-client privilege protection over communications containing both legal and non-legal advice, but SCOTUS recently decided to bypass the debate completely and dismissed the case from its docket. On January 23, the Court dismissed the writ of certiorari it had granted in *In re Grand Jury* as “improvidently granted,” and as a result will not issue an opinion in the case. That means the status quo remains, with different courts in different jurisdictions applying different tests in deciding whether a “dual purpose” communication is covered by the attorney-client privilege. What does this mean for attorney-client communications? How should counsel, particularly in-house counsel, navigate this difficult area to maximize privilege protections? This Insight provides the top 10 ways you can proceed in this area.

### **Will the Supreme Court Make it Easier to Hold Unions Liable for Strike Misconduct?**

The Supreme Court heard arguments on January 10 in a case that could make it easier for employers to sue and recover damages from labor unions that damage an employer’s property during a strike. The issue before SCOTUS in *Glacier Northwest v. International Brotherhood of Teamsters* is whether federal labor law prevents employers from filing a state law tort claim for intentional damage where workers failed to take reasonable precautions to protect company property. How will SCOTUS rule? Read on for a discussion of the case and our predictions in light of recent oral arguments.

### **3 Takeaways for Employers as SCOTUS Agrees to Review Religious Accommodations Test**

Will the Supreme Court make it more difficult for employers to deny religious accommodation requests even if they are burdensome for the business? The Justices agreed on January 13 to decide a case brought by a mail carrier who was disciplined by the U.S. Postal Service for refusing to work on Sundays. The USPS said a blanket Sundays-off accommodation would place too heavy a burden on his coworkers — who would need to cover more weekend delivery demands — and the appellate court agreed, siding with USPS. The mail carrier, however, asked SCOTUS to overturn the ruling, and in doing so, reverse a decades-old precedent. The ultimate ruling in this case could have a significant impact on your operations. Therefore, you should



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stay informed on this case and consider these three important issues while we wait for SCOTUS to reach a decision in *Groff v. DeJoy*.

## Noteworthy Wage and Hour Decision

### [Federal Appeals Court Introduces “Relational Analysis” Test for FLSA Administrative Exemption](#)

Employers operating in certain states should note that the 1st U.S. Circuit Court of Appeals just provided some clarity on the Fair Labor Standards Act’s (FLSA’s) administrative exemption. A federal appeals court held that the proper test for determining whether a worker is an “administrative” employee is a “relational analysis” between an employee’s job duties and the employer’s business purpose. The January 11 decision serves as an important refresher for employers in Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico on how to successfully designate certain administrative employees as exempt from overtime compensation – and might provide guidance to employers elsewhere in the country. What does your business need to know about the ruling in *Walsh v. Unifit Service Corporation*?

## Key Immigration Updates

### [Passing the Buck: Feds Propose Increasing Workplace Immigration Fees](#)

Employers in the U.S. would face significant increases in filing fees for many employment-based petitions under a recent USCIS proposal. The changes would place the burden on employers to cover the cost of processing complex immigration applications in a timely manner. Notably, these increases — which are likely to take effect in March — would raise costs for every aspect of business. So, employers will need to consider how these fees will impact your budgetary process and hiring and retention practices. What are the key changes you should note from the Notice of Proposed Rulemaking (NPRM), which USCIS announced on January 3?

### [USCIS Agrees to Streamline Ability of Nonimmigrant Dependent Spouses to Secure Employment Authorization](#)

Federal immigration officials just agreed to streamline the process by which certain nonimmigrant dependent spouses are able to secure employment, reverting to a previous



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method that should reduce processing times and accelerate job authorizations. The Department of Homeland Security's January 20 settlement of *Edakunni v. Mayorkas* ushers in policy changes to the way USCIS adjudicates applications for extension of status and extensions of work authorization (EAD) for dependent spouses in H-4 or L-2 status. The settlement confirms that USCIS will adjudicate three key immigration forms – the I-129, I-539, and I-765 –when bundled and filed together in a concurrent fashion. What do employers need to know about this positive development?

## Workplace Safety News

### [OSHA Penalties Automatically Increase, Putting Pressure on Employers to Comply with Workplace Safety Obligations](#)

The U.S. Department of Labor published its yearly increases to the maximum civil penalties that may be assessed via citations against employers by the Occupational Safety and Health Administration (OSHA) as a result of workplace safety and health inspections. These penalties apply to all citations issued by OSHA starting January 16, including for employers who had an open inspection with OSHA.

### [OSHA Announces Aggressive Plan to Address Workplace Safety in 2023: 6 Tips for Employers](#)

Federal workplace safety officials just issued a press release announcing new enforcement guidance to make its penalties more effective in, as they describe it, "stopping employers from repeatedly exposing workers to life-threatening hazards or failing to comply with certain workplace safety and health requirements." According to OSHA's January 26 press release, the goal of this new guidance is to save lives, target employers who "put profit over safety," and hold employers to greater accountability for safety and health failures. Here is a summary of the key points from the press release and six tips for employers to help maintain good workplace safety practices as OSHA turns up the heat on inspections and citations.

## OFCCP Proposes Change

### [What Federal Contractors Need to Know About OFCCP's Proposed Changes to the Complaint Intake Process](#)



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## Service Focus

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The Office of Federal Contract Compliance Programs (OFCCP) recently announced proposed changes to its intake process for complaints of discrimination, which the agency says will help it assess allegations before a formal complaint is filed. The OFCCP – like its sister agency, the Equal Employment Opportunity Commission (EEOC) – has authority to investigate allegations of discrimination made against federal contractors on the bases of race, color, sex, sexual orientation, gender identity, religion, national origin, or veteran status. For OFCCP complaints, however, the agency only investigates claims made against federal contractors — and the charging party must be alleging claims under three specific EEO laws. Since the OFCCP only accepts a small percentage of filed complaints, the agency is seeking to add a preliminary form to the intake process to help determine whether complaints are eligible for an OFCCP investigation. Here's what federal contractors need to know about the OFCCP's proposal, which was published in the Federal Register on January 18.

## Data Privacy Day Announcement

### [Your Business's Mobile App Could Be Subject to California Attorney General Investigation](#)

The California Attorney General just announced an investigative sweep of mobile apps that allegedly fail to meet the requirements of state data privacy law, meaning businesses that conduct business through apps need to immediately ensure they are compliant with the latest laws and regulations. And given that California data privacy law impacts businesses across the country, you might not be spared just because you don't have a physical location in the state. Timed to coincide with January 28's Data Privacy Day – the annual day aiming at raising awareness and promoting best practices surrounding digital privacy and data protection – you should use the warning as an important reminder to determine whether you are selling mobile data and have a mechanism for users to opt out of such sales. For businesses with a mobile app, what do you need to know about the California Consumer Privacy Act's (CCPA) requirements pertaining to the sale of personal information and consumers' related rights?

## California

### [California Releases New Guidance on Pay Data Reporting: 4 Key Changes for Employers to Note](#)

## [Litigation and Trials](#)

## [Pay Equity and Transparency](#)

## [Privacy and Cyber](#)

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## Industry Focus

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## Resource Hubs

### [U.S. Privacy Hub](#)

California employers with at least 100 employees are likely familiar with the pay data reporting requirements that were enacted in 2020. Recent amendments under SB 1162, however, make some significant changes for 2023. You may have noticed that SB 1162's job posting requirements (which we discussed [here](#) and [here](#)) have garnered the most attention – at least until now. But don't forget to review the updated FAQs on pay data reporting, which were issued on January 19 by the California Civil Rights Department (CRD). What are the four main pay data reporting changes that will affect your business in 2023 and beyond?

## **New York**

### **[Achieving the New York Dream – 4 Key Workplace Initiatives in Governor Hochul's State of the State Address](#)**

New York Governor Kathy Hochul recently delivered her second State of the State address – her first as an elected governor – and managed to provide insight on a few key areas of workplace law that will affect New York employers in the year and years ahead. Her address focused on less “hot-button” labor and employment law initiatives than last year's address, and, for the second year in a row, did not address the “gig worker” issue or propose a change to the independent contractor classification test which was so often a focus of former Governor Cuomo. Here is a review of the top four workplace related proposals Governor Hochul gave during her January 10 address.

### **[New Laws for New York Employers in a New Year: What You Need to Know as 2023 Unfolds](#)**

After a few years of rapid and expansive change to New York's workplace laws, involving adjustments to workplace safety, employee pay, benefits, and privacy, there was a noticeable slowdown for the state legislature this past year. However, New York employers must remain alert as a flurry of bills signed into law within the last few months will add to your compliance burdens this year. Let's review what laws were enacted in 2022 and legislation that will soon go into effect in 2023.

## **New Jersey**

### **[New Jersey's Significant and Expansive WARN Act Amendments Will Soon Go Into Effect: 4 Key Changes You Should Know About](#)**

Since January 2020, New Jersey employers have been watching and waiting for the effective date of key amendments to the state's mass layoffs law – formally the Millville Dallas Airmotive Plant Job Loss Notification Act, but more commonly known as the New Jersey WARN Act. Due to COVID, the effective date of the amendments was delayed until 90 days after the expiration of Executive Order No. 103. However, on January 10, Governor Phil Murphy signed legislation providing that the amendments will be effective April 10 even though Executive Order 103 remains in place. What are the four most significant changes you need to know about?

## Michigan

### [Michigan Employers Avoid Strict Paid Sick Leave Law and Minimum Wage Hike – For Now: 2 Steps Employers Should Take](#)

The Michigan Court of Appeals just blocked a \$13+ minimum wage and shut down the expanded paid leave law for Michigan workers that was set to take effect next month. The Court of Appeals' January 26 decision ruled that state lawmakers had the authority in 2018 to adopt and amend two ballot initiatives in the same session, giving them the right to take these steps. The ruling, which also blocks the impending tip credit law, overturns a lower court decision from summer 2022. However, the Court of Appeals decision will be appealed to the Michigan Supreme Court any day now. So how did we get here and what two steps should employers take while we wait for the state's highest court to have its say?

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.