



The Top 15 Workplace Law Stories from October 2021

Insights

11.02.21

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 15 stories from last month that all employers need to know about:

1. **OSHA's Mandate-or-Test Emergency Rule Gets Sent to White House for Final Review: How Employers Can Avoid Living in a Land of Vaccine Confusion**

The Department of Labor just took the next step in advancing President Biden's vaccine mandate-or-test emergency rule, sending the Emergency Temporary Standard to the White House's regulatory office on October 12. Coming on the heels of Texas Governor Greg Abbott's announcement that he was barring employers from “compelling” employees to become vaccinated against COVID-19, and in the context of a patchwork of states that each seem to have their own approach to workplace safety rules, could yesterday's news be the genesis of employers getting stuck in a land of confusion? In order to avoid any misunderstandings, here is a brief recap of what just happened, what to expect in the coming days and weeks, and how employers in different states will be impacted by the impending development.

2. **Federal Appeals Court Puts Final Nail in Coffin for Business-Friendly Joint Employer Rule**

Laying any doubt to rest that employers would miss out on the chance to enjoy a business-friendly interpretation of the standard to determine joint employment status, a federal appeals court just put the final nail in the coffin of the Trump-era attempt to shield businesses from being considered joint employers in a wide spectrum of circumstances. This October 29 move clears the way for the current administration to cement into place a broad standard that captures a wide swath of business arrangements into the “joint employer” category. Nothing much is changed in the short term – the business-friendly standard had been on ice since a New York federal judge struck it down in September 2020 and on death watch since the new Department of Labor proposed rescinding it altogether in March and formally pulled it in July – and businesses have been operating under the standards previously set by courts around the country since then.

Now, you can anticipate that the DOL may take further regulatory action to return to standards similar to the Obama-era approach to joint employer status. What do you need to know about this October 29 court order?

3. **7 Employer Takeaways from EEOC's Latest Vaccine Guidance on Religious Accommodations**

The U.S. Equal Employment Opportunity Commission (EEOC) just updated its online COVID-19 technical guidance to further explain its position regarding religious objections to employer COVID-19 vaccination requirements, specifically relating to Title VII of the Civil Rights Act of 1964. The Commission's guidance, which is consistent with Insights and analyses that we published earlier this year, focuses on questions that arise when applicants or employees seek exemptions or accommodations from vaccine requirements. There are seven key points from the EEOC's October 25 update.

4. **Hospitality Employers in for a Fright This Halloween: Labor Department Reinstates Notorious 80/20 Rule for Tipped Employees**

Just in time to frighten hospitality employers, the U.S. Department of Labor just issued its final rule regarding tipped wages on October 28, reinstituting a worker-friendly rule that will cause challenges for most businesses utilizing the tip-credit method of wage payments. Like a zombie rising from the crypt, the main part of the final rule released yesterday is the resurrection of the notorious "80/20" Rule (referring to the percentage of time "dual job" employees spent on their job duties). The DOL's final rule will be difficult for many hospitality employers to administer where it places limitations on the amount of time that tipped employees can spend performing work that is directly supporting tip-producing itself. The new rule will go into effect December 28, 2021 – what do you need to know in advance of this frightening implementation date?

5. **Employers Take Note: California Employees Can Be "Silenced No More" In Workplace Settlement Agreements**

In a sweeping expansion of existing law, Governor Gavin Newsom signed legislation on October 7 that broadly prohibits non-disclosure clauses in settlement agreements involving workplace harassment or discrimination on any protected bases, not just sex. SB 331 — known as the "Silenced No More Act" — takes what state lawmakers believe will be a final stand against employers preventing employees from discussing unlawful acts in the workplace. The new law, which takes effect on January 1, 2022, will nullify and make void provisions within any agreement entered on or after that date that prevent or restrict an employee from disclosing factual information on any type of harassment, discrimination, or retaliation. What do employers need to know about this new law?

6. **5 Employer Considerations as Texas Governor Attempts to Ban Workplace Vaccine Mandates**

Texas Governor Greg Abbott issued an Executive Order on October 11 immediately restricting entities in the state – including employers – from compelling any individual to receive a COVID-19 vaccination if that individual "objects for any reason of personal conscience, based on a

religious belief, or for medical reasons, including prior recovery from COVID-19.” He also called upon the Texas legislature to address this issue in its current time-limited special session. Although the Order is in some ways consistent with existing federal law, it also appears to widely expand the reasons for which employees may be exempted from vaccine requirements. The language raises numerous questions for employers and also sets up inevitable clashes with federal law, where courts are likely to find that EO-40 is superseded by federal law. Legal challenges, further guidance from the governor, and action by the state legislature may soon provide some clarity. In the meantime, EO-40 makes the road ahead more uncertain for many employers who are attempting to manage the on-going public health crisis and to comply with all applicable laws. What are the five key considerations you should keep in mind as you navigate these turbulent times in Texas?

7. **COVID-19 International Travel Ban Lifted for Vaccinated Visitors on November 8, but Significant Immigration Headaches Remain for Employers**

We now have the exact date that international travel to the United States will be reopened for vaccinated visitors – November 8 – meaning that businesses will have an easier time bringing over business visitors and employees. But in some cases the immigration nightmare will continue for employers, depending on the citizenship and residence of any given visitor or noncitizen employee. What do employers need to know about the October 15 announcement and what should you do in the coming weeks to prepare?

8. **California Businesses Receive New COVID-19 and Reasonable Accommodation Guidance**

California businesses struggling to police local vaccine verification mandates in places such as [San Francisco](#), [Los Angeles](#), Contra Costa, West Hollywood, and Berkeley received good news last week as state officials issued guidance regarding COVID-19 safety measures and reasonable accommodations. The October 18 [Guidance](#) for businesses, published by the Department of Fair Employment and Housing (DFEH), addresses rights and obligations under the Unruh Civil Rights Act, not those imposed by other state or local laws (i.e. local ordinances requiring face coverings or COVID-19 vaccination). While compliance with the Unruh Civil Rights Act alone does not relieve your business from obligations under existing state or local COVID-19 ordinances, the Guidance is still an informative publication that can help your business navigate these challenging times. Here’s what your business needs to know about the new Guidance.

9. **Good News for Employers as More Employees are Eligible to File for Employment-Based Green Card Applications in October**

Because Congress limits how many green cards can be issued annually, the Department of State (DOS) releases a visa bulletin every month establishing the cut-off dates per preference category and country for the upcoming month. And when it comes to the announcement regarding October’s information, employers were pleased – as we’ll see an increase in the number of workers who will be eligible to apply for green card status. What do you need to know about this latest development?

10. **New York Publishes Guidance on Adult Cannabis Use and the Workplace – 4 Key Facts for Employers**

New York employers have been anxiously awaiting additional information about how the legalization of recreational marijuana will impact the workplace – and they finally have some. The state’s Office of Cannabis Management (OCM) recently published a fact sheet on cannabis and the workplace offering an overview of employers’ rights and responsibilities in this area. As previously reported, New York passed the Marijuana Regulation and Taxation Act (MRTA) in April, legalizing the use of cannabis for adults aged 21 or over and protecting employees from disciplinary action and discrimination for off-duty usage. OCM’s fact sheet, released on October 8, is the first guidance employers have received on the new law. Here are four key facts from the guidance employers need to know.

11. **New Jersey Amends Workplace Bias Law to Expand Protections Against Age Discrimination**

New Jersey Governor Phil Murphy recently signed a bill amending the state’s workplace bias statute by expanding protections against age discrimination. The most significant aspect of Assembly Bill No. 681, signed into law on October 5 and taking effect immediately, is the elimination of a provision of the New Jersey Law Against Discrimination (NJLAD) that permitted employers to refuse to hire or promote any person over 70 years old. What do New Jersey employers need to know about this development?

12. **California Governor Orders Students to be Vaccinated: What Your School Needs to Know**

California Governor Gavin Newsom announced a new emergency order on October 1 requiring all students in both public and private schools to get the COVID-19 vaccine once fully authorized by the Federal Drug Administration (FDA). In issuing this Order, California has become the first state to require vaccinations for students. What does your school need to know about this significant development?

13. **Los Angeles County Implements Vaccine Verification and Workplace Mandate Rules for Many Hospitality Businesses**

Not long after West Hollywood issued an Emergency Order requiring vaccine verification and a vaccine mandate for certain businesses, Los Angeles County followed suit with its own vaccine mandate for many hospitality workplaces and large events. The County issued an updated Health Officer Order – with most requirements taking effect October 7 – with new vaccine or proof of negative test requirements for outdoor mega events and a vaccine verification and vaccine mandate for bars, breweries, wineries, distilleries, nightclubs, and lounges. It also strongly recommends that restaurants and food facilities reserve and prioritize indoor seating and services for those who are fully vaccinated against COVID-19. Here’s what you need to know about this new Los Angeles County Order.

14. **Wake County and Raleigh City Expand Non-Discrimination Provisions for Workplaces and Public Areas**

Both Wake County (NC) and Raleigh City (NC) just expanded their non-discrimination provisions to prohibit discrimination against individuals based on their sexual orientation, gender identity, and natural hairstyle in both the workplace and in public areas. The Wake County Board of Commissioners voted on October 20 to expand protections, and the Raleigh City Council voted to join Wake County's ordinance the next day. The ordinance takes effect on February 1, 2022. What do employers and businesses need to know about these impending changes?

15. **Comprehensive Review of all California Workplace Law Bills Signed – and Rejected – by Governor Newsom**

California Governor Gavin Newsom recently completed final action on bills that were passed by the state legislature in 2021, and employers are once again faced with a raft of new compliance obligations thanks to several new laws that will soon take effect – or have already done so. The ongoing COVID-19 pandemic continued to have a significant impact on the legislative cycle this year, as much of the discussion continued to focus on pandemic-related policy issues. If there was any good news for employers, it was a procedural rule that limited legislators to 12 bills this year, which reduced the overall volume of measures that were acted upon in 2021. Nonetheless, Governor Newsom signed some significant labor and employment legislation with which California employers will need to comply. Unless noted otherwise, the bills below will take effect on January 1, 2022.

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.

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