

JUNE 2021: THE TOP 19 LABOR AND EMPLOYMENT LAW STORIES

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

1. **[OSHA Provides New COVID-19 Workplace Guidance: The 10 Things Employers Need to Know](#)**

On the same day the Occupational Safety and Health Administration issued the [long-anticipated Emergency Temporary Standard \(ETS\) applicable to healthcare employers](#), the agency also issued updated [Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace](#) applicable to all other workplace settings. Generally, OSHA aimed its June 10 guidance at "unvaccinated or otherwise at-risk" employees to help employers identify COVID-19 exposure risks and to prevent exposure and infection. And while this guidance is not legally binding like the healthcare ETS, you should still carefully review its contents and use the guidance to determine any appropriate control measures to implement. Here are the 10 key takeaways to ensure your workplace takes appropriate measures.

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2. **It's Final – California Revises COVID-19 Workplace Safety Rules**

After a whirlwind several weeks, California finalized changes to Cal/OSHA's Emergency Temporary Standard (ETS) that immediately took effect on June 17 and will require workplaces across the state to adjust their pandemic-related practices. These actions put into place a revised ETS that will – thankfully – largely track existing CDC/CDPH guidance and generally allow fully vaccinated employees to remove face coverings regardless of whether others at the workplace have been vaccinated. But the revised ETS will also make several other changes that employers will have to implement in short order.

3. **Supreme Court Reins in Out-Of-Control Class Actions: Technical Statutory Violations Insufficient to Confer Class Members' Standing**

The U.S. Supreme Court just gave employers and businesses a powerful tool to fight back against those class actions seeking monetary damages where class members only experienced technical statutory violations. By a 5-to-4 vote in *TransUnion v. Ramirez*, the Court substantially reduced a \$40 million class action jury verdict by eliminating three quarters of the class. The Court ruled that individuals who suffered purely technical violations of the Fair Credit Reporting Act's (FCRA) procedural and notice provisions with no actual disclosures to third parties or other evidence of harm do not have standing to pursue FCRA claims despite the availability of statutory damages. What can you take away from the June 25 ruling to assist in defending class actions that threaten your business?

4. **New Labor Department Proposal Would Resurrect Troublesome 80/20 Rule for Tipped Workers**

The U.S. Department of Labor just issued a Notice of Proposed Rulemaking that will affect most businesses with tipped employees if the business utilizes the tip-credit method of payment. The thrust of this proposal is the re-introduction of the notorious 80/20 Rule – sometimes called the "20% Rule." The DOL's new version of the 80/20 rule is even more burdensome for employers as it places additional limitations on the amount of time that tipped employees can spend performing work that is not directly tip-producing itself, but which supports that tip-producing work. The DOL's proposal also removes clarity about which job duties fall into the category of



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“supporting tip-producing work.” Needless to say, this development is not good for employers. What do employers need to know about this June 21 release?

5. **SCOTUS Decision Ushers in The “Gates Up or Down” Era For Employers Seeking to Protect Workplace Computers and ESI**

The U.S. Supreme Court has once again defined the rules of the road for millions of employers and employees in the American workplace with its recent decision in *Van Buren v. United States*. The Court’s June 3 opinion resolved conflicting interpretations of a federal statute, the Computer Fraud and Abuse Act, 18 U.S.C. Section 1030 (CFAA), which protects workplace computers and the information stored on them from different types of unauthorized access, whether perpetrated by current employees like appellant Nathan Van Buren, former employees, or business competitors. As is the case with many of the Court’s opinions, the Justices didn’t just resolve the legal issue presented by *Van Buren*. The Court notably set the stage for future workplace litigation under the CFAA, and this so far is perhaps the most underdiscussed and important aspect of *Van Buren*.

6. **Supreme Court Dismisses Another Challenge To The Affordable Care Act**

Thanks to a June 17 ruling by the U.S. Supreme Court, the Affordable Care Act remains fully intact and will remain the law of the land for the foreseeable future. In a 7-to-2 vote, the Court dismissed a case that challenged the constitutionality of the Patient Protection and Affordable Care Act’s (ACA) minimum essential coverage provision, known as the “individual mandate.” The Court ruled that the plaintiffs, a group of states led by Texas and two individuals, did not have standing – or a legal right to sue – to challenge the constitutionality of the ACA. The Court did not even address the merits of whether the individual mandate was constitutional, perhaps leaving the question for another day. In light of this decision, employers’ reporting requirements to the IRS remain unchanged. What else do you need to know about this critical decision?

7. **The 7 Main Takeaways for Healthcare Employers Now That OSHA Has Finally Unveiled Its Long-Awaited COVID-19 Emergency Temporary Standard**

Almost six months after President Joe Biden directed the Occupational Safety and Health Administration to



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determine whether emergency temporary standards (ETS) concerning COVID-19 were necessary, OSHA [finally issued the long-anticipated ETS](#) on June 10. In an interesting twist, however, the ETS applies only to employers who provide healthcare and healthcare support services. OSHA explained that, despite the success of vaccines in helping address the pandemic, data shows that healthcare workers treating patients with suspected or confirmed COVID-19 remain at the highest risk of infection. The ETS is effective immediately upon publication in the Federal Register, and healthcare employers must comply with most provisions within 14 days. You must comply with other provisions (involving physical barriers, ventilation, and training) within 30 days. It is unclear when the ETS will be published in the Federal Register, but healthcare employers subject to the ETS should start preparing now. Here are the seven key takeaways to ensure your workplace is in compliance with OSHA's requirements.

8. [What Employers Need To Know as Federal Judge Upholds Houston Hospital's Workplace Vaccine Requirement](#)

Concluding that a highly publicized lawsuit challenging Houston Methodist Hospital's mandatory vaccination policy failed to state viable legal claims and misrepresented certain facts, federal Judge Lynn Hughes dismissed the case on June 12 [as we explained and predicted the previous week](#). By injecting a much-needed dose of reality into the controversy over vaccine mandates in the workplace, the court provided some welcome news for those employers requiring their workers to receive the COVID-19 vaccine. While the case is certain to be appealed and is not the last we'll hear over such challenges, this result is a good first step for employers.

9. [5 Employer Takeaways as EEOC Issues New Guidance on Sexual Orientation and Gender Identity Discrimination in the Workplace](#)

The Equal Employment Opportunity Commission (EEOC) observed LGBTQ+ Pride Month and the one-year anniversary of the landmark [Bostock v. Clayton County Supreme Court decision](#) by announcing new resources to aid employers in understanding the EEOC's position regarding sexual orientation and gender identity discrimination. These resources include a new [landing](#)



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[page](#) and a new [technical assistance document](#). These new resources, according to the EEOC, will “help educate employees, applicants and employers about rights of all employees, including lesbian, gay, bisexual and transgender workers, to be free from sexual orientation and gender identity discrimination in employment.” What are the five biggest takeaways from this new guidance for employers published on June 15?

10. [Cussing Cheerleader Wins SCOTUS Free Speech Case, Creating Headaches for Public Schools Dealing with Off-Campus and Social Media Messages](#)

By an 8-to-1 vote, the U.S. Supreme Court affirmed on June 23 that public schools might have an interest in regulating student speech, but the leeway the First Amendment grants to schools is diminished in the off-campus context. Accordingly, given the specific facts presented in *Mahanoy Area School District v. B.L.*, the Court held that the school district violated Brandi Levy’s rights when it suspended her from its junior varsity cheerleading squad based on a crude Snapchat post. This decision is especially important in today’s environment where social media and digital communications blur what is and is not considered on-campus speech.

11. [Supreme Court Blocks Access to Company Property for Agricultural Union Organizing Absent Just Compensation](#)

In an opinion authored by Chief Justice John Roberts, the Supreme Court issued a ruling that should result in a decrease in union organizing efforts for agricultural workers on June 23. In a 6-to-3 ruling in *Cedar Point Nursery v. Hassid*, the Court ruled that California’s law permitting union organizing access to private agricultural land constitutes a per se physical taking under the Fifth and Fourteenth Amendments, regardless of if it is temporary, and therefore just compensation is required. What do agricultural employers across the country need to know about this pivotal ruling – and what should you do as a result?

12. [Colorado Supreme Court Says Employers Can’t Maintain “Use-it-or-Lose-it” Vacation Pay Policies](#)

The Colorado Supreme Court issued its long-awaited decision on vacation pay on June 14, ruling that an employer must pay an employee’s earned but unused vacation pay upon separation from employment – and any

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agreement or policy forfeiting this pay is void as a matter of law. Colorado employers do not have to offer vacation pay to their workers as nothing in state law creates an automatic right to vacation pay. However, as confirmed by the decision in [*Nieto v. Clark's Market*](#), once an employer chooses to provide vacation pay, it cannot be forfeited once earned. What do Colorado employers need to know about this critical decision?

13. [**Student-Athletes Win This Tournament Round: The Supreme Court Issues a Unanimous Decision Against the NCAA on Benefits Issue**](#)

By a 9-0 vote, the U.S. Supreme Court ruled in favor of student-athletes on the NCAA rules restricting education-related benefits given to athletes on June 21. However, while the ruling in the *NCAA v. Alston* case went in favor of the athletes, institutions of higher education need to proceed with caution as the decision did not dismantle all of the NCAA's rules on athlete compensation. While the NCAA was hosting this year's March Madness basketball tournament, it was also busy waging one of its biggest legal battles in decades – and those that followed the March 31 oral arguments at the Supreme Court anticipated this type of ruling given the harsh spotlight the Justices placed on the NCAA's compensation ban. What do you need to know about this pivotal decision?

14. [**Two Key Takeaways from Texas' New COVID-19 Vaccine "Passport" Ban for Businesses and Employers**](#)

On the heels of [Florida's highly publicized COVID-19 vaccine passport ban](#), Texas Governor Greg Abbott [announced on June 8 via Twitter](#) that he too had signed a law banning Texas businesses from requiring vaccine passports under certain circumstances. Passed during the concluding days of this year's legislative session, Senate Bill 968 mirrors an earlier Executive Order by the governor. It includes language banning businesses in the state from requiring proof of the vaccine from their *customers* but does *not* mention employees and employers. This is obviously an important distinction for Texas employers, particularly in view of the [well-publicized vaccination requirement that Houston Methodist is enforcing among with workforce](#). Below are two main takeaways that every employer should know about the Texas vaccine passport ban.

15. [**New Jersey Eases COVID 19 Restrictions for Businesses and Employers**](#)

New Jersey's Governor Phil Murphy issued executive orders easing some of the state's COVID-19 restrictions and providing employers and businesses some much-welcomed flexibility. Executive Order 243, which became effective June 4, rescinds the telework or "work from home" mandate that has been in place since March 2020 and eases other requirements on businesses that operate private offices. Executive Order 242 – which went into effect in late May – eases many restrictions on businesses open to the public. What do you need to know about these significant changes?

16. **7 Takeaways for Employers as Connecticut Passes Recreational Marijuana Bill**

The Connecticut Senate just voted to approve a bill legalizing recreational cannabis use, and since Governor Ned Lamont has stated he will sign the bill, Connecticut will soon become the nineteenth state to legalize adult-use cannabis. The June 17 vote will also have implications for employers doing business in Connecticut, so you will want to familiarize yourself with the new law sooner rather than later. What are the seven main takeaways for employers?

17. **What Employers Need To Know As Santa Clara County Phases Out Vaccination-Tracking Order**

The Santa Clara County Health Officer just issued a new order phasing out the May 18 Order that had introduced a vaccine-tracking mandate for employers, relieving employers of the administrative burden imposed by the groundbreaking requirement. However, there remains a caveat or two, and the county provided a list of recommendations that you should consider adopting as best practices. What do you need to know about the June 21 Order that immediately went into effect?

18. **5 Trade Secret Protection Steps Employers Should Take in Response to New Corporate Espionage in Florida Act**

Florida Governor Ron DeSantis recently signed the Combating Corporate Espionage in Florida Act into law, and it will take effect on October 1, 2021. The new law was created to protect intellectual property in Florida from theft by foreign governments and their agents – but the Act also creates important new considerations for employers in their efforts to protect their closely held trade secrets. Likewise, the Act also re-emphasizes considerations for employers who hire employees from their competitors. What do Florida employers need to

know about this new law, and what are the five steps you should consider taking to put yourself in the best position to protect your trade secrets?

19. **The End of a Disaster: Pennsylvania Local Paid Sick Leave Laws Have Expired**

Like many cities across the country, Philadelphia and Pittsburgh issued emergency paid sick leave laws as a result of the COVID-19 pandemic. Both of these leave laws were set to expire at the conclusion of Pennsylvania's Proclamation of Disaster Emergency. Now that the state legislature voted on June 10 to end the Proclamation, the paid sick leave obligations for Philadelphia and Pittsburgh employers have expired. What do you need to know about these developments?

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.