April 2021: The Top 16 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 16 stories from last month that all employers need to know about:

1. **American Families Plan Includes Proposal For Federal Paid Leave Program** – President Biden's latest infrastructure proposal – called the American Families Plan– includes a plan that would establish the nation's first permanent federal paid leave program. Unveiled on April 28, the proposed legislation would permit workers to receive paid leave for their own health problems, parental purposes, or to care for sick family members, feathering in benefits to eventually offer a full 12 weeks of leave by 2031. What do employers need to know about this groundbreaking proposal?
2. **Biden Taps California Safety Chief to Lead Federal OSHA** – President Joe Biden recently announced that he intends to nominate Doug Parker as the head of the Occupational Safety and Health Administration (OSHA). Parker has led the California Division of Occupational Safety and Health (Cal/OSHA) since 2019 and has made a name for himself prioritizing workplace safety through aggressive enforcement tactics. If confirmed by the Senate, Parker would fill a position that has been vacant since January 2017. OSHA's stated mission is to "assure safe and healthy working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance," and the agency is tasked with enforcing a variety of whistleblower and safety regulations. What do employers need to know about the April 9 announcement?
3. **Hospital Encounters Pushback on Mandatory Vaccine Policy: 7 Issues to Consider Before Your Company Requires Vaccines** – Pushback against employer-mandated COVID-19 vaccines has stirred media attentionin Texas, home to the world's largest medical complex. Specifically, a nurse working at a hospital in the Houston Methodist system has anonymously circulated a petition and spoken to the media about the employer's upcoming deadline for employees to be vaccinated unless they obtain a medical or religious exemption. She claims to speak on behalf of

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"everybody who is too scared to speak up" about what she characterized as threatening or bullying conduct by Methodist in its attempt to reach as close to 100% vaccination rate as possible. The controversy highlights issues that every employer should consider as you evaluate whether to require your employees to get vaccinated. The central dispute is more philosophical than legal, juxtaposing some employees' individual concerns against an employer's lawful approach to maximizing safety in a healthcare setting.

4. **Federal Contractor Employees to See Minimum Wage Increase to $15** – President Biden signed an Executive Order on April 27 that will increase the minimum wage for federal contractor employees to $15 per hour beginning in 2022 – providing a big boost in wages for many workers across the country and increasing labor costs for those employers doing business with the federal government. On January 1, 2023, and annually thereafter, the Secretary of Labor will determine a new minimum wage rate that cannot be less than the then-existing minimum wage rate and will be increased to reflect changes in the Consumer Price Index for Urban Wage Earners and Clerical Workers, rounded to the nearest $0.05. What do you need to know about this development?

5. **California Hospitality Employers Will Need to Track COVID-19 Layoffs Until 2025 Due to New Right-of-Recall Bill** – California Governor Gavin Newsom signed into law on April 16 a statewide right of recall for employees in certain industries who were laid off due to effects of the COVID-19 pandemic. SB 93, which enacts Labor Code Section 2810.8 *effective immediately*, primarily impacts hospitality employers in California but also includes a few other industries. The new law will remain in effect until December 31, 2024 and contains some potentially devastating consequences for violations – so compliance will be critical. Especially as we head towards the full reopening of the state's economy, what do California employers need to know about this new law?

6. **Employers May Claim Tax Credit For Providing COVID-19 Vaccination Paid Leave, With Qualifications** – In an attempt to boost the nation's COVID-19 vaccination rate, President Joe Biden announced on April 22that small- and medium-sized employers offering vaccine-related paid leave will be eligible for a significant tax credit. The tax credit will fully offset the cost of providing paid time off to employees not only to get inoculated but also for any time needed to recover from vaccination side effects. As explained below, however, obtaining this tax credit is not entirely new, nor is it free of related requirements.

7. **Federal Appeals Court Limits ADA Website Accessibility Lawsuits** – A federal appeals court has just provided some much-needed relief to businesses facing a barrage of website accessibility lawsuits alleging that their sites do not comply with the nation's main disability discrimination statute. These lawsuits typically involve a prospective plaintiff, or their counsel, merely accessing a company's website and testing various screen reading software, filing suit if any portion of the website is not compatible with any of the assistive technologies. In the April 7 *Gil v. Winn-Dixie*decision, the Eleventh Circuit Court of Appeals struck a blow to these lawsuits by holding that a website is not a place of public accommodation subject to the Title III the Americans with Disabilities Act (ADA) and setting a high bar for website accessibility issues to

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rise to the level of a statutory violation. While yesterday's decision itself only directly impacts businesses in Alabama, Florida, and Georgia, it adds to a split among the various circuit courts and could result in the issue ultimately being decided by the U.S. Supreme Court. What should businesses do in response to this key ruling?

8. **Vaccine Incentive Help is on the Way: EEOC Announces Upcoming Employer Guidance Insights** – Heeding calls from a consortium of over 40 business groups, the EEOC announced on April 15 that it would soon provide guidance to employers across the country on workplace incentives and the COVID-19 vaccine. Noting that businesses asked the EEOC in early February to clarify the extent to which employers can offer employees incentives to vaccinate without running afoul of the Americans with Disabilities Act (ADA) and other federal anti-bias laws, the agency said it "expects to update its technical assistance about COVID-19 to address these issues, among others, and that work is ongoing." The EEOC's letter, signed by Acting Legal Counsel Carol Miaskoff, did not provide a date for when you could expect this guidance, but the hope is that the information will come soon.
9. **Workers' COVID-19 Vaccine Reactions Might Be Recordable on Your OSHA 300 Logs Insights** – If an employee has a reaction to the COVID-19 vaccine, do you need to record that illness on your 300 log? The Occupational Safety and Health Administration (OSHA) recently provided guidance on this issue, one that many employers have been contemplating since the COVID-19 vaccine became available. According to the agency in a series of answers to frequently asked questions, the key issue in this analysis if whether you are requiring the vaccine or merely encouraging it. OSHA states that if you require employees to obtain a COVID-19 vaccine, any side effects from the vaccine will create a recordable event and you have an obligation to include that information on your OSHA 300 log. If you only encourage the vaccine, you will not have that obligation.
10. **New Labor Secretary Says Gig Economy Workers Should Be Classified As Employees** – Secretary of Labor Marty Walsh didn't beat around the bush when he provided his first public thoughts about the gig economy workforce since assuming office. In an interview with Reuters released on April 29, Walsh said "in a lot of cases, gig workers should be classified as employees." His comments should come as little surprise to those in the industry who have tracked his career and followed President Biden's campaign promises to crack down on purported misclassification. While he tried to strike a balanced tone – noting that in "some cases" gig workers are treated respectfully, and indicating that he didn't "begrudge" any companies for raising revenue and making profits – his pointed comments send a direct signal to gig economy businesses that the Biden Department of Labor will soon ramp up efforts to force gig workers to be considered employees.
11. **ICE Extends "Relaxed" I-9 Document Inspection Rules Through May 31 and Clarifies Remote Worker Rules for New Hires** – As previously reported, U.S. Immigration and Customs Enforcement (ICE) has relaxed its rules regarding the in-person inspection of employee documents when filling out a Form I-9, and the agency recently announcedthat these relaxed rules have been extended until May 31. The continued flexibility offered to employers is in response to the COVID-19 pandemic and the prevalence of workers still doing their jobs on a

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remote basis. In its announcement, ICE also announced that employees hired on or after April 1, 2021 who work exclusively in a remote setting due to COVID-19 related precautions will be exempt from the I-9 physical inspection requirements until they undertake non-remote employment on a "regular, consistent, or predictable basis or until the flexibility policy is terminated which is earlier."

12. **DOL Issues Guidance to Help Employers Understand Obligations Regarding COBRA Premium Assistance Provisions in the American Rescue Plan Act** – The recently enacted American Rescue Plan Act (ARPA) provides for 100% premium assistance to certain qualified beneficiaries for continuation coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)for periods of coverage beginning on or after April 1, 2021 and ending September 30, 2021. The new law allows assistance for eligible individuals to forego paying applicable COBRA coverage premiums but be deemed to have made full payment. Employers will be able to claim employment tax credits to offset the amounts (including applicable administrative fees) of unpaid COBRA premiums. ARPA left many questions unanswered, and employers have been awaiting further guidance from the U.S. Department of Labor (DOL). Additionally, ARPA charged the DOL with drafting model templates for various COBRA-related notices mandated by the law. The DOL has now issued a set of Frequently Asked Questions and a series of Model Notices to help clarify how employers must comply with ARPA's COBRA assistance provisions. What do employers need to know about this April 7 release?

13. **April Sees End to Work Visa Ban, Bringing Relief to Employers** – The Trump-era Presidential Proclamation that temporarily suspended certain nonimmigrant visas expired at the end of March, and federal immigration officials announced that temporary workers could once again begin applying for visas effective immediately. The Department of State announced on April 1 that H-1B, H-2B, L-1, and J-1 visa applicants who were previously refused visas due to the restrictions of Presidential Proclamation 10052 – commonly called as the "work visa ban" – may reapply by submitting a new application including a new fee. This comes as welcome news for many employers who faced significant obstacles in bringing their much-needed workforce since the Proclamation was issued.

14. **Washington Changes Key Employer Obligations for High-Risk Workers Insights** – Washington Governor Jay Inslee recently amended an executive proclamation that imposes certain workplace protection for high-risk workers during pandemic, granting employers some additional flexibility that took effect April 23. However, stringent obligations remain in place, so employers should ensure they are fully up to speed on the rules. What do you need to know about the changes about to take effect – and the rules already in place?

15. **Kentucky's New 'Reentry' Law Gives Employers Clearance to Hire Workers With Criminal Backgrounds** – Under a new Kentucky law that will take effect in July 2021, employers can hire qualified applicants with criminal records without fearing legal barriers and liabilities. Specifically, House Bill 497 creates a certificate program that will give employers relief from civil liability for hiring an ex-offender who was trained for a particular job. The goal is to enhance the ability of formerly incarcerated people to get jobs once they are in the community to further aid in

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their rehabilitation and reintegration. The bill was signed by Governor Andy Beshear on April 5 after being unanimously passed by the Kentucky Legislature in late March. Here's what Kentucky employers need to know about this new law.

16. **Philadelphia Set to Ban Pre-Employment Marijuana Testing: What Employers Need to Know** – Philadelphia is set to join a small but growing list of jurisdictions (including Nevada and New York City) that prohibit employers from testing prospective employees for marijuana. The proposal, which was recently approved by city council and is expected to be signed by the mayor, will prevent most employers from rescinding a candidate's job offer due to the presence of marijuana in a pre-employment drug test. Nothing within the bill, however, would forbid an employer from disciplining an employee for impairment or marijuana use in the workplace. If approved by the mayor, the legislation would go into effect on January 1, 2022.

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