The Top 14 Workplace Law Stories from July 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 14 stories from last month that all employers need to know about:

1. **Top 4 Things Employers Can Do to Prepare for a Possible Recession – and Top 3 Things to Ease Workers' Inflationary Concerns**

   With the July 28 announcement that the country's economic numbers have declined for the second straight quarter, many employers are fearful of a possible recession, or at least a sustained economic downturn – and are wondering what they should do to prepare. After all, we're dealing with a declining stock market, soaring inflation, and reports of hiring freezes. Meanwhile, your workers are probably on edge and no doubt dealing with inflationary concerns, adding to the tension we all feel each day. What four options should you consider to ensure you are positioning your organization to weather the storm – and what three steps can you take to relieve the inflationary strain that your workforce is no doubt dealing with?

2. **The New BA.5 Subvariant Is a Reminder for Employers the Perils of COVID-19 Aren't Going Away: Your 4-Step Plan**

   With the uptick in the COVID-19 positivity rate due to the emerging dominance of the BA.5 variant – thought to be the most transmissible yet – beleaguered employers once again find themselves in the position of confronting the politics and perils of implementing effective COVID-19 mitigation strategies. The increase is notable enough that it prompted the White House to issue a new fact sheet on July 12 outlining its strategy to "manage BA.5," including boosters, free testing, free masks, and encouraging building owners to implement ventilation and filtration improvements through the Clean Air in Buildings Challenge. While the positivity rate is still below January's peak, increasing case numbers and the doubling of hospitalizations since May are impacting employers' obligations under guidance from the Centers for Disease Control and Prevention (CDC), from the Occupational Safety and Health Administration (OSHA), and from the

Centers for Medicare & Medicaid Services (CMS) and state and local health departments. Employers should consider adopting this four-step plan.

3. **EEOC's New Workplace COVID-19 Testing Rules Might Require You to Make Key Changes: 7 Takeaways for Employers**

   Employers that continue to test workers for COVID-19 should review their policies to ensure they comply with updated guidelines from the Equal Employment Opportunity Commission (EEOC). In prior guidance, the EEOC broadly allowed employers to screen workers for COVID-19 without running afoul of the Americans with Disabilities Act (ADA) due to the state of the pandemic. In revised guidelines, however, the agency said you can continue to administer viral tests as a condition of entering a worksite, so long as you can show your testing practices are job-related and consistent with business necessity. The July 12 update "makes clear that going forward employers will need to assess whether current pandemic circumstances and individual workplace circumstances justify viral screening testing of employees to prevent workplace transmission of COVID-19," the EEOC said. What do you need to know about the latest guidelines? Here are seven key takeaways.

4. **New Collaboration Between Federal Agencies Spells Antitrust Trouble for Gig Economy – or Any Business with Independent Contractors**

   Two federal agencies announced plans to join forces and scrutinize business arrangements involving independent contractors, among others, to determine whether there are antitrust concerns – a troubling sign for gig economy businesses or any with a contractor workforce. In a July 19 press release, the National Labor Relations Board (NLRB) and the Federal Trade Commission (FTC) announced a Memorandum of Understanding (MOU) to enhance their information sharing and cross-agency consultations, training, outreach, and education. This sounds similar to the MOU that the NLRB entered into with the Department of Labor's Wage and Hour Division earlier this year. The NLRB's July 19 press release shows the agency is committed, as evidenced by these MOUs, to work closely with other federal agencies to promote fair competition and advance workers' rights. Businesses in the gig economy and elsewhere that fail to properly classify employees or impose non-compete and disclosure provisions could find themselves subject to scrutiny like never before – and with powerful federal laws at the disposal of regulators. With the MOU between the FTC and NLRB in effect, here is what businesses need to know.

5. **New Congressional Bill Would Create Hybrid Job Classification for Gig Workers – But is Already Facing Stiff Opposition**

   Answering industry calls for a 21st-century solution to a 21st-century problem, a bipartisan group of federal lawmakers recently introduced a bill in Congress that would create a hybrid job classification for gig economy workers that would allow businesses to avoid misclassification claims and give gig workers the flexibility they crave. However, some worker advocates and labor unions are already expressing their opposition to the "Worker Flexibility and Choice Act,"

introduced on July 20, claiming that it is an anti-worker law that would short-change gig workers from receiving minimum wage and overtime pay. What do you need to know about this bill – and what are its chances of ever becoming law?

6. **OSHA Will Soon Focus on Weekend Inspections in Colorado, Montana, and South Dakota**

   Through the fall of 2022, OSHA area offices in Colorado, Montana, and South Dakota will undertake the Weekend Work initiative to open workplace safety and health inspections on Saturdays and Sundays. The initiative, announced on July 11, will identify and address construction-related fall-hazards on weekends – a time when many employers typically do not monitor their job sites well, said OSHA Regional Administrator Jennifer Rous (Denver). OSHA intends its approach to identify hazardous worksites, ensure that workers are protected from injuries or worse, and help ensure employers provide a safe and healthful workplace. What should employers in these areas do to prepare?

7. **Adding Fuel to Fire: OSHA Focuses on Trenching Inspections with Heat Program Still in Force**

   OSHA is also responding to what it notes as a rising trend in trench-related fatalities. Citing its National Emphasis Program (NEP) for excavations, OSHA announced on July 14 that compliance officers will perform more than 1,000 trench inspections nationwide, which means they may stop by and inspect any excavation site during their daily duties – even on the weekends. Moreover, OSHA said it will place additional emphasis on how agency officials evaluate penalties for trenching and excavation related incidents, including criminal referrals for federal or state prosecution. With employers already addressing OSHA's NEP for heat-related injuries and illnesses, what can employers do to prepare for OSHA's new focus?

8. **Massachusetts Governor Signs CROWN Act Banning Hairstyle-Based Discrimination**

   Massachusetts just joined 17 other states that ban discrimination based on hairstyle by passing the CROWN Act, which Governor Baker signed into law on July 26. The CROWN Act stands for "Creating a Respectful and Open World for Natural Hair" and prohibits discrimination in schools and workplaces based on natural hairstyles that are historically associated with race. What do Bay State employers need to know about this new law?

9. **Massachusetts High Court Says Grubhub Delivery Drivers Must Arbitrate Claims**

   The Massachusetts Supreme Judicial Court (SJC) held on July 27 that local Grubhub delivery drivers are not exempt from the Federal Arbitration Act (FAA), and those workers can be compelled to individually arbitrate their claims against the delivery app. The SJC's decision in *Archer v. Grubhub, Inc.* reverses an egregiously wrong trial court decision and joins a chorus of other courts that have decided this issue in favor of arbitration. What do you need to know about the decision?

10. **Baltimore Bombshell: Federal Court Rules Private School's Nonprofit Status Leads to Title IX Coverage**

In a decision that should put the nation's private and independent school community on notice, a federal judge in Baltimore recently ruled that a school's nonprofit status in and of itself constituted the receipt of federal financial assistance – which means that it is subject to Title IX requirements, among other things. For now, the July 21 decision only impacts schools in Maryland, and is almost certain to be appealed (and could even be blocked from going into effect during the appeal process). But this could be the beginning of a trend (see below) that could catch on elsewhere, meaning that all private tax-exempt schools should review this ruling and be on guard to adapt your policies and practices if necessary.

11. **California Joins the Fray: Another Court Rules that Nonprofit Schools are Subject to Title IX**

    Just days after the Baltimore court's ruling that a school's nonprofit status automatically led it to be subject to Title IX, a California federal court joined the fray and echoed the same principle. A July 25 ruling out of the Central District of California concluded that a school should be considered to have received federal financial assistance just by being classified as a nonprofit entity. This is a troubling development and one that should cause all nonprofit private and independent schools to take notice.

12. **Appeals Court Confirms that Federal Law Supersedes California Sick Leave Rules for Railroad Workers: Key Takeaways for Employers**

    Employers the transportation industry earned a rare win when an appeals court held that a federal law covering railroad employees preempts sick leave provisions under California law. In short, this means you do not have to comply with California's sick leave laws for railroad workers and need only follow the federal Railroad Unemployment Insurance Act (RUIA). The 9th U.S. Circuit Court of Appeal's July 26 ruling relies heavily on the plain language of the RUIA and patently rejects the California Labor Commissioner's attempts to draw distinctions between the benefits provided under RUIA and California's sick leave laws. The ruling simplifies the leave requirements for railroad employers and paves the way for additional favorable rulings in situations where Congress has made clear that federal rules and regulations supersede state law. What do you need to know about the ruling and its broader implications?

13. **Michigan Court Says Employers Must Pay $12 (or more) an Hour and Provide Expanded Sick Leave Rights Starting in February 2023: 3 Steps to Prepare**

    Michigan employers will have to pay a minimum wage of at least $12 an hour and provide expanded sick leave rights to all employees starting February 19, 2023, since the Michigan Court of Claims said it would delay enforcement of a recent ruling that is currently being appealed. On July 19, the court held that the Michigan Legislature improperly usurped a voter initiative that was slated for the 2018 ballot – which led the court to reinstate the 2018 voter-initiated versions of the state's minimum wage law and paid sick leave law. What actions led to this decision and what does it mean for employers?

14. **Dealerships Avoid Wage Claims Against Detailer: 4 Tips to Keep it a "Them" Problem**

A Houston-based vendor that provides detailer, car wash, and valet services to area dealerships recently agreed to pay $166K to resolve an employee misclassification complaint filed with the United States Department of Labor – but luckily area dealerships were never caught up in the legal web that ensnared the detailer. Instead, for the dealerships, this remained a "them" problem and not an "us" problem. According to the complaint, Majestic Dealership Services Inc. treated the workers providing these services to its dealership customers as independent contractors when they should have been classified as employees. The USDOL determined that these workers were actually Majestic's employees and that the company had not paid them in compliance with applicable law. This insight summarizes the situation that unfolded and provides four suggestions your dealership can take to ensure this remains a "them" problem and not a "you" problem.

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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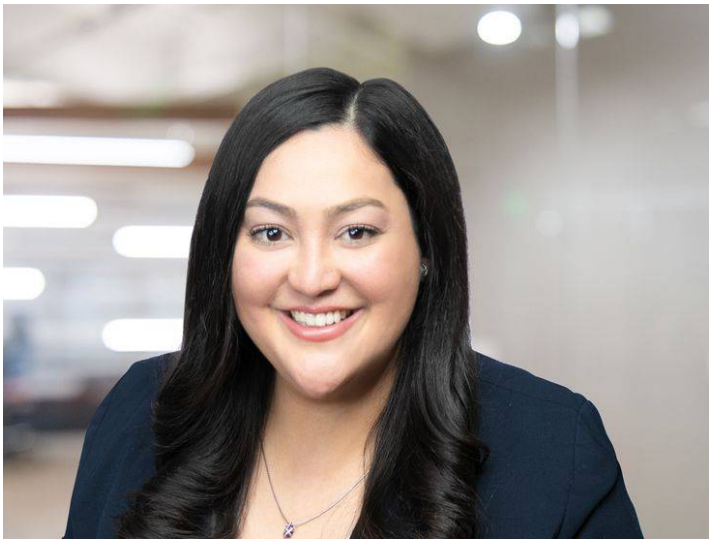

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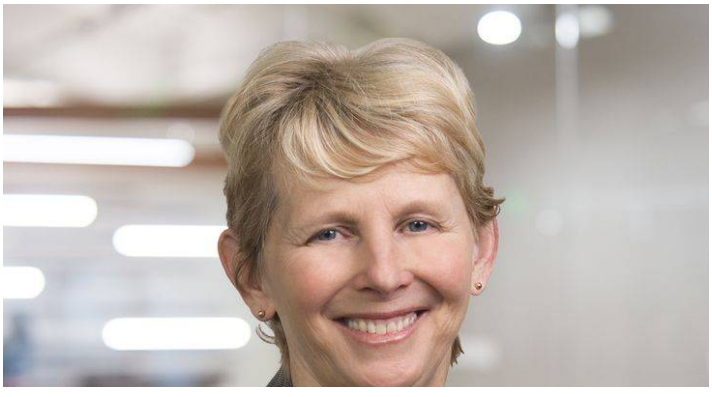

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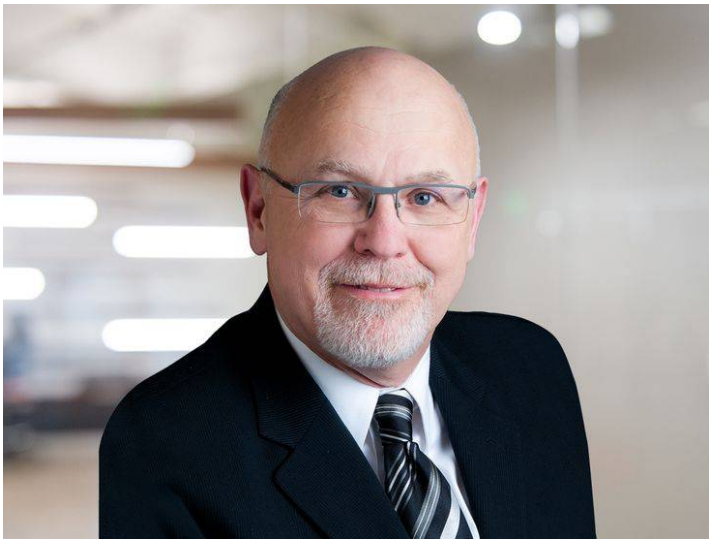

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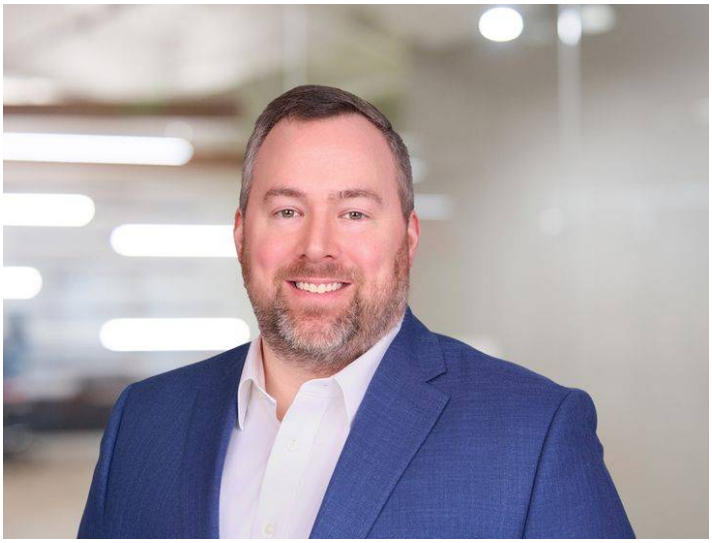

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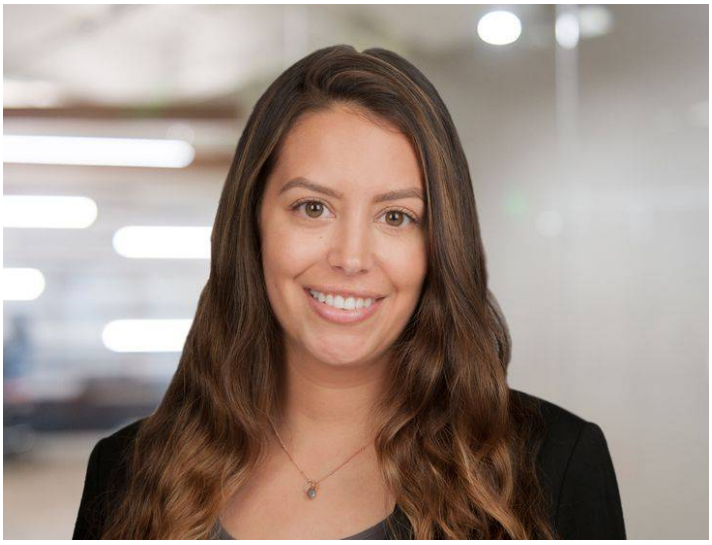

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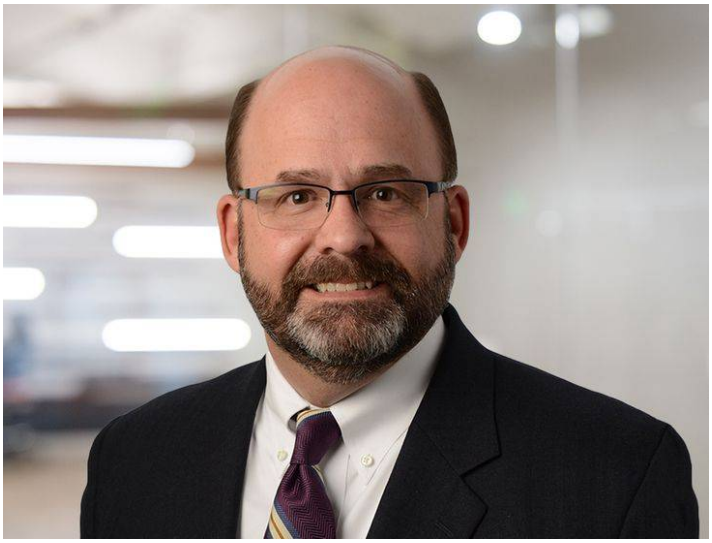

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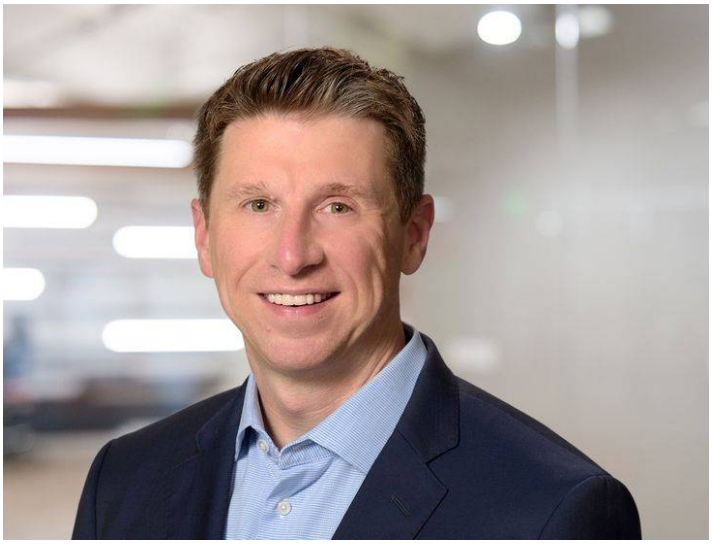

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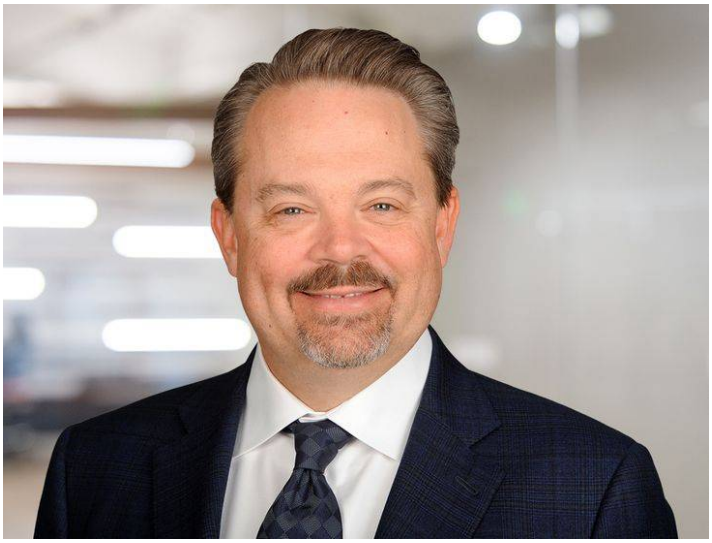

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