Insights, News & Events

TOP WORKPLACE LAW STORIES YOU MAY HAVE MISSED FROM FEBRUARY 2023

Insights
Mar 3, 2023

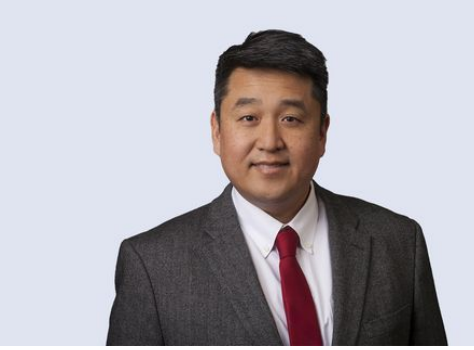
It's hard to keep up with all the recent changes to labor and employment law. While the law always seems to evolve at a rapid pace, there have been an unprecedented number of changes for the past few years — and this past month was no exception. In order to ensure you stay on top of the latest changes, here is a quick review of the top stories from last month that all employers need to know about:

1. **Employers Must Draft Severance Agreements with Caution After NLRB Renders Critical Provisions Unlawful: 9 Crucial Questions Answered**

   A pendulum-swinging decision from the National Labor Relations Board on February 21 means that severance agreements – in both unionized and non-union workplaces – could once again be deemed unlawful if they could be construed to broadly restrict a worker's rights to speak about the agreement or otherwise talk negatively about their former employer, among other things. While several Trump-era rulings permitted employers to include confidentiality provisions and non-disparagement clauses in severance pacts, the ruling in McLaren Macomb wiped those decisions off the books – thereby jeopardizing any agreements including them. How should you change your standard severance agreement practices thanks to this setback, what should you do about existing agreements, and what does this decision signal for the future? Here are the answers to your nine most important questions.

2. **Businesses Still Have Time to Submit Comments on the FTC's Proposed Non-Compete Clause Rule**

Related People



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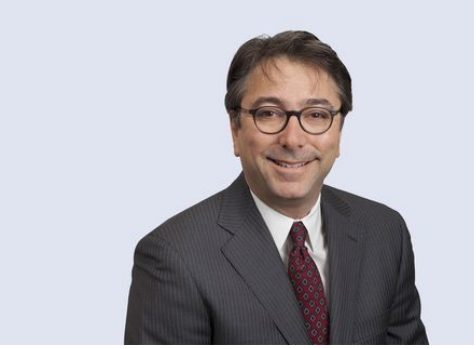
Employers have a few weeks left if they want to submit a formal comment to the federal government about the proposal that would ban most noncompetition agreements and force you to rescind existing agreements – but should you? And what would you say? The Federal Trade Commission's current deadline for such comments is March 20. What do employers need to know in advance of this impending date?

3. **Highly Paid Employee Entitled to Overtime Pay: 4 Tips for Employers After SCOTUS's "Head-Scratching" Decision**

   High-earning workers making more than $200,000 a year might be eligible for overtime pay thanks to a new Supreme Court ruling on February 22. The decision is a wake-up call for all employers to review their OT exemptions to ensure they are compliant with applicable federal and state requirements. To be exempt from overtime pay under the Fair Labor Standards Act's "white-collar" exemptions, employees must earn at least $684 a week on a salary basis, among other requirements. In this case, an oil rig worker was paid a guaranteed daily rate of at least $963, which is significantly higher than the weekly salary threshold. In a 6-3 ruling, however, the Supreme Court said the worker was eligible for overtime pay because he was not paid on a salary basis. What do you need to know about this shocking decision and what are four key steps you should consider taking in light of the ruling?

4. **Federal Appeals Court Blocks California's Ban on Mandatory Arbitration Agreements: 7 Key Takeaways for Employers**

   A federal appeals court just paved the way for California employers to continue utilizing mandatory arbitration agreements with employees and job applicants. You may be familiar with the litigation roller coaster of California's Assembly Bill 51 (AB 51), which was slated to take effect January 1, 2020, placing a ban on mandatory arbitration in employment in California. Fortunately, right before its effective date, it was temporarily blocked while several business groups proceeded with legal challenges. The 9th U.S. Circuit Court of Appeals initially upheld parts of the law – but on February 15 it fully blocked AB 51, concluding that the California law is preempted by the Federal Arbitration Act (FAA). What do employers need to



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know about AB 51 and what are the seven key takeaways from the 9th Circuit's ruling?

5. **5 Employer Takeaways – and Predictions – From Biden's 2023 State of the Union**

   "For too long, workers have been getting stiffed. But not anymore. We're beginning to restore the dignity of work." With these words, spoken by President Biden midway through his State of the Union address on February 7, workplace law was placed at center stage in the national conversation. The President, in fact, touched on at least five labor and employment topics during his 72-minute speech. But given the fractured nature of Congress and the ambitious scope of his agenda, how realistic are his proposals and what are the chances of them ever getting off the ground? This Insight will review the five main talking points that employers should be paying attention to, along with our predictions for what will become of them.

6. **Workplace Immigration: Feds Announce Visa Renewal Pilot Program to Improve Processing Times**

   Employers just received some good news from the federal government that should help reduce the backlog for some visa renewals. Certain foreign workers looking to renew their visas can now do so within the U.S. instead of having to travel abroad and face significant visa processing times. Here's what you need to know about the State Department's new pilot program for non-immigrant H and L visa renewals, which is expected to launch later this year.

7. **Illinois Supreme Court Opens Door for Massive Damage Awards in Biometric Cases: 5 Things Employers Need to Know**

   The Illinois Supreme Court just ensured that employers who don't strictly comply with the state's landmark biometric law could be on the hook for massive damage awards, a ruling that should cause you to immediately review your biometric collection practices. Specifically, the court addressed the way "violations" under the Illinois Biometric Information Privacy Act (BIPA) are determined. Under the far-reaching ruling, a separate claim accrues each time a private business scans or discloses an individual's biometric information or identifier without

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prior written consent— rather than just the first time it happens. This means employers in the state may face steep penalties even for technical "violations" each and every time an employee provides their biometric information, such as when they use fingerprints to clock in and out of shifts. BIPA has been the source of expensive class action lawsuits, arbitrations, and settlements over the past several years — and the February 17 ruling further tilts the scales in favor of employees. What do you need to know about the ruling and its impact on employers in the state?

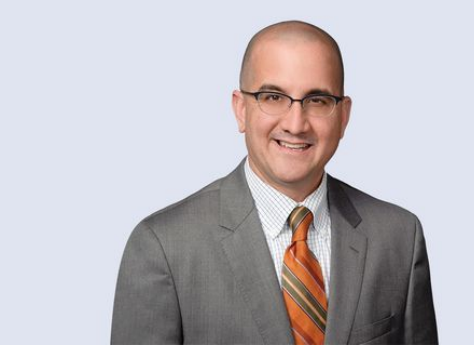
8. **Top 8 Takeaways from New Jersey's Sweeping "Temporary Workers' Bill of Rights"**

   New Jersey is leading the movement to create affirmative protections for temporary laborers. On February 6, Governor Murphy signed the "Temporary Workers' Bill of Rights," which strengthens protections for temporary workers. The law provides robust protections to temporary workers, who the State found to be typically underpaid compared to permanent workers and far less likely to receive employer-sponsored retirement and health benefits. Here's what you need to know about this new law, which will go into effect in 90 to 180 days, as discussed below.

9. **Seattle Becomes First City in Nation to Ban Caste Discrimination**

   The Seattle City Council voted on February 21 to pass a bill that adds "caste" to those classes of people protected from discrimination in various arenas, including employment, housing, and public accommodations. While a small number of colleges have prohibited caste discrimination in admissions and internal employment, Seattle is the first jurisdiction to do so as a matter of law. CB 120511 outlaws employers from making workplace-related decisions based on any "system of rigid social stratification characterized by hereditary status, endogamy, and social barriers sanctioned by custom, law, or religion." To ensure you comply with the new law and protect the rights of this new class, you may need to familiarize yourself with how "caste" appears in traditions you may not know well.

10. **A First of Its Kind: Manhattan D.A.'s "Worker Protection Unit" Raises Many Questions for Employers**



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Manhattan District Attorney Alvin Bragg Jr. recently announced a new prosecutorial branch tasked with investigating and prosecuting wage theft and other forms of worker harassment and exploitation throughout the borough. The Worker Protection Unit, announced on February 16, will serve as part of a broader effort from the D.A.'s office to hold corporations accountable for workplace wrongdoing. It will pursue criminal charges against corporations – and potentially individuals – who engage in wage theft and disregard worker safety. In addition, D.A. Bragg announced the first-ever Stolen Wage Fund for Manhattan victims of wage theft, which will be funded through the D.A.'s Criminal Justice Investment Initiative and operated in partnership with the New York State Department of Labor. These developments raise many questions for NYC-based employers – what do you need to know?

11. **Federal Court Carves New Path for Philadelphia Employers to Defeat Workplace Claims**

    A recent federal court decision provides a new pathway for Philadelphia employers to defeat certain workplace discrimination claims. In the February 13 decision of Lee v. Bay, LLC, District Court Judge Joshua Wolson from the Eastern District of Pennsylvania held that a plaintiff failed to exhaust her administrative remedies under Philadelphia's local ordinance against discrimination – the Philadelphia Fair Practices Ordinance (PFPO) – because she failed to also file a complaint with the local-level administrative agency. By ruling that her PFPO claim should be dismissed because of this misstep, employers may now have another avenue to challenge such discrimination claims. What do you need to know about this ruling?

12. **Proposed CCPA Regulations Set to Take Effect As Soon as April – The Time to Get Into Compliance is Now**

    California data privacy officials just cleared the way for key regulations to take effect as soon as this April – which means the time is now for businesses located both in and out of the state to take seriously your efforts to get into compliance with the California Consumer Privacy Act (CCPA). The California Privacy Protection Agency also voted at its February 3 meeting to set the wheels in motion to issue another round of CCPA regulations, this time on risk assessments, cybersecurity audits, and

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automated decision-making. What do businesses working towards CCPA compliance need to know about the agency's most recent votes – and what should you do?

13. **The New Cal/OSHA COVID-19 Rule is Now in Effect: A 3-Step Action Plan for California Employers**

    The new Cal/OSHA COVID-19 regulation has been approved as is now officially in effect. The new regulation was approved and became effective on February 3 and will be in effect for two years, until February 3, 2025, with some recordkeeping obligations remaining in effect through 2026. This also brings to a final end the previous Emergency Temporary Standard (ETS), which California employers had been following for the better part of the last three years. Now that the waiting game is over and the new regulation is in effect, what do you need to do next? Here's a three-step action plan for compliance.

14. **It's a Reverse! Florida Removes University Restrictions From Name, Image, and Likeness Law**

    Governor Ron DeSantis signed a bill on February 16 repealing Florida's Name, Image and Likeness (NIL) law and significantly altering student-athlete NIL compensation, as well as the involvement of Florida universities and colleges. Previously, the state's law limited universities by requiring that any NIL deals with student athletes be conducted by third-parties, or collectives, that have no direct ties or supervision by the universities. Now, Florida has remedied this issue by eliminating these restrictions through House Bill 7-B. How will this impact universities in Florida and the collectives that have been created to support them?

15. **FP Safety Series: Workplace Falls Remain Most Common Safety Concern**

    Every year, OSHA releases a list of its Top 10 Most Cited Workplace Safety Standards – but many employers are not aware of this list, which can be of great assistance in eliminating the most dangerous workplace situations. To address this problem, we will be providing focused Insights over the course of 2023 discussing the most common workplace safety violations and some other workplace safety areas that frequently require employer attention. And of course, we'll offer tips to help you create a safer workplace. This month, we'll start with the most

frequently cited workplace safety standard: fall protection.

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.