Top Workplace Law Stories You May Have Missed from March 2023

Insights
3.31.23

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:

Bank Failure Fallout

Employer FAQs on Liquidity Concerns in Light of the SVB Crisis

The recent collapse of Silicon Valley Bank highlights many of the concerns that employers might face should they find themselves in the midst of a liquidity crisis. Making payroll, arriving at decisions related to wage reductions, considering furloughs – and possibly reductions-in-force – are just some of the actions you might need to take into consideration. But each of these potential moves carry with them significant legal risk and therefore must be approached with care. This set of FAQs provides employers with a general overview of the most significant topics on your mind during any liquidity crisis.

FAQs for Schools on Liquidity Crisis and Bank Failure Fallout

Schools may also face repercussions from the liquidity crisis caused by Silicon Valley Bank's collapse, subsequent bank failures, and the resulting financial tremors rippling across the country. Many of those employed by companies impacted by the liquidity crunch may have trouble meeting their financial obligations to your school – a pattern we have experienced before during other financial crises. In addition to our comprehensive set of FAQs created for employers dealing with the crisis, here are a set of frequently asked questions we've started to field from impacted schools about the unique challenges you may face.

DOL Leadership Change

New Leader at the Labor Department: What Employers Need to Know About Julie Su

President Biden announced on March 1 that he wants Julie Su to join his Cabinet as Secretary of the U.S. Department of Labor, elevating her from the number two role of Deputy – but what do employers need to know about the nomination? Obviously, the news is significant for the employment community given that the head of the Labor Department wields tremendous influence over the nation's workplace policy. So what's the upshot for curious employers? If Su is confirmed as expected, you can assume we'll see a seamless transition from former Secretary Marty Walsh and a continued emphasis at the department on worker-centered policy moves.

Leaves and Accommodations

SCOTUS Will Hear Case About ADA Accommodation "Tester" Who Sued Business She Never Planned to Visit

The Supreme Court just agreed on March 27 to weigh in on whether a private citizen can serve as a legal "tester" that goes from business to business looking for – and suing for – alleged violations of the Americans with Disabilities Act (ADA), even if they have no intent of patronizing the business. A hotel in Maine is challenging a federal appeals court ruling in favor of a so-called "accessibility tester" who has filed hundreds of such lawsuits against hotels even though she never planned to stay at their properties. Why is the case significant for hospitality, retail, and just about any other business with a physical location (and possibly just a website)? The ADA doesn't require claimants to notify you of alleged violations that would give you a chance to fix the problem before a lawsuit is filed. That means many businesses are caught off guard when served with a lawsuit. Worse, they may spend thousands of dollars in attorneys' fees to resolve a case – even when the cost of actual compliance is very low. What do you need to know about the potential impact of a SCOTUS ruling in *Acheson Hotels v. Laufer*?

Colorado Employers Face First FAMLI Quarterly Payment Deadline – What 5 Things Should You Do?

Colorado employers are subject to new paid family and medical leave insurance obligations in 2023 – and your first quarterly premium payments were due on March 31. The Colorado Family and Medical Leave Insurance (FAMLI) program requires all employers to collect insurance premiums from workers' wages and, if you have at least 10 employees, to separately contribute insurance premiums to help finance the FAMLI program. While there is a 30-day grace period allowing payment by April 30, you shouldn't delay any compliance obligations. What are the five things you should do — if you haven't already — given this deadline?

COVID-19 Reflections and Updates

Pandemic-versary is Upon Us: The 5 Ways Your Workplace is Different Now Than 3 Years Ago

It was March 11, 2020 – three years ago – that a series of earth-shattering events occurred over the course of a few hours that would forever change the nature of the workplace. Most of us remember

exactly where we were on the day the World Health Organization declared COVID-19 to be a pandemic, President Trump banned European travelers from entering the U.S., and movie icon Tom Hanks became the first person many of us "knew" to announce they had COVID. The shocking news came fast and furious that afternoon and evening as we saw the stock market plunge, received word that schools across the country would shut down for "two weeks," and the NBA postponed the rest of its season. More stressful days, weeks, and months followed that fateful day – and while many restrictions have been lifted and life has (mostly) returned to normal, the pandemic's impact has forever shifted workplace norms. As we take stock on the past three years, what are the five biggest ways your workplace is different now than in March 2020?

California Changes COVID-19 Isolation Requirements – What Do Employers Need to Know?

California public health officials just issued updated COVID-19 isolation guidance that at first blush seems to smooth the way for simpler workplace compliance obligations. But the Department of Public Health's (CDPH) guidance, released March 3 and clarified through a series of updated FAQs, doesn't completely change the way you should implement the new Cal/OSHA non-emergency COVID-19 regulation at your workplace. While the first change that eliminates the testing requirement for those returning to work after five days will apply to your workplace, a second change related to potential shorter mask wearing for such individuals will not impact the Cal/OSHA rules – for now. What do you need to know about the changes and what should you do?

Labor Relations News

NLRB General Counsel Doubles Down on Captive Audience Meetings in Response to Legal Challenge

As you may know, the NLRB's top prosecutor issued a memo last year seeking to bar employers from convening employee meetings on working time to address union representation unless they provide employees specific assurances that participation is completely voluntary. General Counsel Jennifer Abruzzo has taken this position on so-called "captive audience" meetings even though they have been a staple in the American workplace for nearly 75 years. A business group recently filed a lawsuit, however, claiming the memo violates employer free speech rights. Days after the lawsuit was filed, GC Abruzzo quickly issued a new memo on March 20 that doubles down on her position. You'll want to pay close attention, since employee meetings are routinely conducted to educate employees – particularly in response to arguments advanced by organized labor outside the workplace. Here's what you need to know about the latest developments.

What NLRB's New Collaboration with Consumer Financial Agency Means for Gig Economy Businesses

If your business relies on gig economy workers, you may want to review your policies on monitoring workers and requiring them to pay for training and equipment. That's because the National Labor Relations Board (NLRB) announced on March 7 that it's joining forces with the Consumer Financial

Relations Board (NLRB) announced on March 7 that it's joining forces with the Consumer Financial Protection Bureau (CFPB) to address potential misconduct regarding workplace surveillance, monitoring, data collection, and employer-driven debt. The agencies said they will share information to enhance their enforcement efforts and better protect workers in the gig economy and other labor markets from harmful financial practices. What do you need to know about the new Memorandum of Understanding and its impact on the workplace?

Michigan "Right to Work" Law Soon to Be Repealed: What Should Employers Do?

Michigan lawmakers recently approved legislation that will repeal Michigan's 2012 right-to-work law for private sector workers, ushering in a new day for labor relations in the state. Governor Whitmer signed the bill on March 24, and it is expected to take effect next year, in March 2024 (90 days after the planned close of the state's legislative session). "Right to work" laws actually prohibit employers from requiring that their employees pay union dues as a condition of employment. In light of this news, what should private sector unionized employers do?

Pay Equity Laws

New York State Expands – and Contracts – Pay Transparency Law to Address Remote Work Questions

In advance of the September 17 effective date of New York's impending pay transparency law, state lawmakers just amended the law in ways that both expand and contract the obligations imposed on employers — particularly with respect to application to jobs performed outside of the state by remote workers. There's both good news and bad news for New York employers and for those across the country. Here's what employers need to know about the amended law, which was signed into effect by Governor Hochul on March 3.

Hospitality Industry News

Restaurant Owner Learns Dangers of Comingling Employees Between Locations – 4 Lessons for Hospitality Employers

Federal wage officials recently announced that two Florida restaurants with common ownership failed to properly calculate overtime pay when their employees worked at both locations in the same workweek – sending a stark reminder to all multi-unit operations about the importance of complying with wage and hour law. The Department of Labor (DOL) also found that the restaurants withheld tips earned by service staff to recoup money from customers who failed to pay their tabs, improperly deducted pay for uniforms, and failed to pay tipped workers for all hours worked. In total, the DOL announced on March 9 that it recovered nearly $200,000 in back pay and liquidated damages for 89 employees. Here are four lessons hospitality employers can learn from this settlement to avoid the same fate.

Tip-Credit Turmoil Continues: USDOL Releases Guidance That Continues Trend of Trimming Employer Practices

More than a year after the US Department of Labor announced the return of the time-keeping nightmare that is the 80/20 rule with new tweaks that encourage even more litigation, the agency just released new guidance that simply adds to the morass facing employers whose industries rely heavily on this method of payment. Specifically, USDOL released two new fact sheets on March 3 providing guidance on paying tipped employees and those with dual jobs while updating the Field Operations Handbook to incorporate guidance on the regulations issued in late 2021. What do you need to know – and what are the five steps you should consider taking?

FAQs for Hospitality Employers on Tennessee's "Anti-Drag" Law

When Tennessee Governor Bill Lee signed the state's "Anti-Drag" law into effect on March 3, he raised a host of questions for hospitality businesses across the state. According to the law's sponsor, it is not meant to target drag performers or transgender persons but instead to protect minors from "sexually explicit performances." Opponents and cautious businesses think otherwise. Regardless of the intent, if you are a hospitality employer and you include drag performers as part of your entertainment, you'll want to learn more about this statute and how it impacts you. Here are some common FAQs and responses to guide your business decisions.

More Wage and Hour Guidance

Federal Appeals Court Confirms the Obvious: "Salary" Does Not Include Fringe Benefits

A federal appeals court just ruled that paid time off (PTO) is not a part of an employee's salary under federal wage and hour law, shutting down an inventive attempt by plaintiffs' attorneys to find a new way to assert wage and hour claims against employers. The Third Circuit Court of Appeals' March 15 decision in *Higgins v. Bayada Home Health Care Inc.* handed a win to employers by giving the go-ahead under federal law to deduct fringe benefits from exempt employees if they fail to meet productivity quotas – as long as the deductions do not affect their guaranteed base salary. The appeals court correctly found that an employee's base salary is distinguishable from PTO – a fringe benefit – allowing employers to deduct from such fringe benefits under federal law without affecting employees' overtime-exempt statuses. Although the outcome is good for employers, especially those in New Jersey, Pennsylvania, and Delaware, the fact that the case was filed at all is a good reminder that plaintiffs' attorneys are looking for any wage hour vulnerability they can exploit through litigation.

Agricultural Employers Learn New Methodology to Calculate Wage Rates: 4 Things You Need to Know

On the heels of the new rule for the H-2A program impacting nonimmigrant agricultural workers that took effect late last year, the Department of Labor recently published a follow-up rule

introducing the methodology that employers need to follow when calculating H-2A wage rates. The bad news is that it could lead you to need to pay significant higher rates that you have been paying. The new rule took effect on March 30 – so what are the four most important things agricultural employers need to know?

Privacy and Cyber

Iowa Latest State to Pass Consumer Privacy Law: 5 Things Employers Need to Know

Iowa recently became the sixth state in the nation to pass a comprehensive consumer privacy law – but the good news for employers is that it does not apply to data collected in the employment context and does not include a private right of action. Iowa Senate File 262 passed in the House on March 15 after previously passing in the Senate. Governor Kim Reynolds signed the bill into law on March 28, and it will take effect on January 1, 2025. What does this law mean for your business? Here are the answers to your five biggest questions.

FCRA and Background Screening

Employers Must Update Their Summary of Rights Notice for Background Check Screenings

Employers should promptly update their Summary of Consumer Rights notice provided to applicants and workers before taking adverse employment action based on their background check reports, thanks to a new rule about to take effect. On March 17, the Consumer Financial Protection Bureau (CFPB) released an updated "Summary of Your Rights Under the Fair Credit Reporting Act" notice for consumer reporting agencies and background check users to incorporate into their screening processes. While the CFPB's final rule is set to take effect on April 19, the agency has provided a grace period for mandatory compliance until March 20, 2024. What should employers do in order to get into compliance?

LGBTQ Worker Protections

Michigan Lawmakers Seek to Expand Workplace Protections for LGBTQ Workers

The Michigan Senate took a historic step on March 1 to increase workplace protections for members of the LGBTQ community by passing a law that would prohibit discrimination on the basis of sexual orientation, gender identity, or expression. Senate Bill 4 (2023) expands the protections of Michigan's Elliott-Larsen Civil Rights Act not only in employment but also in public accommodations and services. While several steps still need to occur before the bill can become law, the groundwork appears to be laid for this new classification of protected worker to be added to state law in the near future. What do employers need to know about this legislative development and what should you do to prepare?

Federal Contract Compliance

Fewer Federal Contractors Will Qualify for Religious Exemptions as OFCCP Rescinds 2020 Rule

The federal agency that oversees federal contractors and affirmative action programs just announced it would rescind a Trump-era rule that had expanded the scope of long-standing religious exemption principles it had utilized for decades, which means that fewer federal contractors will now qualify for religious exemptions that allow them to avoid other common compliance obligations. The Office of Federal Contract Compliance Programs (OFCCP) announced on March 1 that it was scrapping the 2020 Rule, noting that it now believed that rule went too far and departed from the traditional approach to religious exemption as established by federal law. Importantly, however, this does not mean that federal contractors cannot qualify for religious exemptions. Instead, the effect of this announcement is to realign the religious discrimination principles for federal contractors with Title VII's standard approach. What do you need to know about this development – and what should you do?

Affirmative Action Plan Compliance: Federal Contractors Must Prepare for OFCCP's 2023 Certification Deadline

For the second year in a row, federal contractor and subcontractors will have to certify that their affirmative action plans are compliant with federal requirements. The Office of Federal Contract Compliance Programs (OFCCP) opened the certification portal on March 31, and supply and service contractors and subcontractors will have until June 29 to submit their required certification. What do you need to know about your compliance obligations for 2023?

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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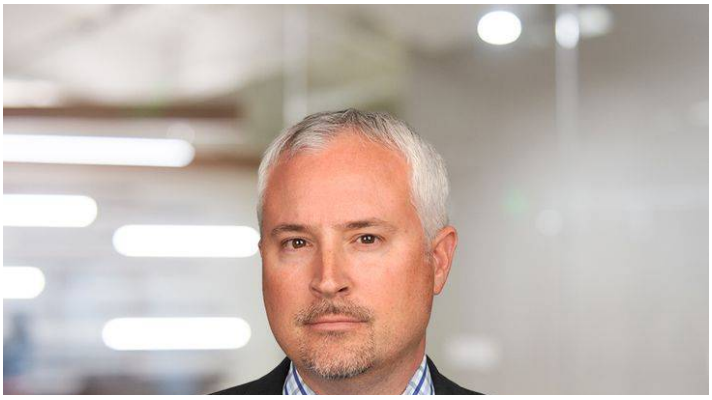

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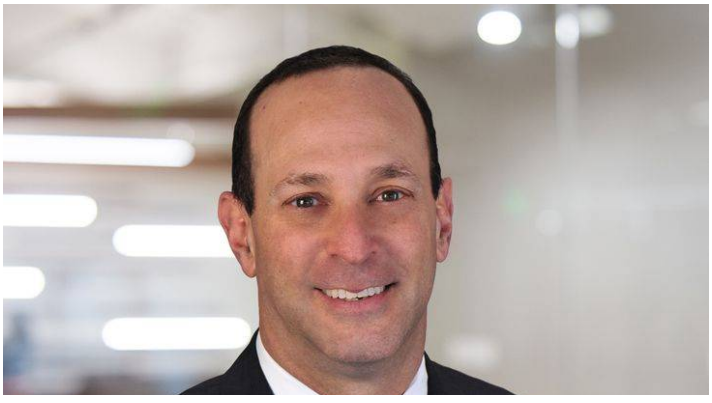

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