Top Workplace Law Stories You May Have Missed from May 2023

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 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:

Artificial Intelligence and the Workplace

EEOC's Latest AI Guidance Sends Warning to Employers: 5 Things You Need to Know

Employers using or thinking about using artificial intelligence (AI) to aid with workplace tasks received another reminder from the federal government that their actions will be closely scrutinized by the EEOC for possible employment discrimination violations. The federal agency released a technical assistance document on May 18 warning employers deploying AI to assist with hiring or employment-related actions that it will apply long-standing legal principles to today's evolving environment in an effort to find possible Title VII violations. What are the five things you need to know about this latest development?

Bans on Non-Compete Agreements

Many Non-Compete Agreements Violate Federal Law According to NLRB's Chief Prosecutor

Employers should review their non-compete agreements now that the NLRB General Counsel announced that many of them violate federal labor law – regardless of whether you have a unionized workforce. General Counsel Jennifer Abruzzo's May 30 memo was yet another broadside against employers, urging NLRB regional directors to find that many employer-mandated non-compete agreements infringe on employees' rights under Section 7 of the National Labor Relations Act (NLRA). You should immediately examine your non-compete agreements for potential compliance concerns, understand the risks that are now presented by using such agreements, and decide whether to update your practices accordingly. Here are the answers to your top seven questions about this development.

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FTC's Non-Compete Ban Reportedly Delayed Until 2024: Your 7-Step Guide While Waiting

The Federal Trade Commission is also seeking to formally ban non-compete agreements in most employment agreements, but a recent report from Bloomberg Law indicated that the FTC's vote won't take place until April 2024. While this delay could be welcome news for those dreading the ban, it also leaves employers throughout the country playing a painful waiting game to determine if the proposed rule will ever take effect – and unsure what to do in the interim. What should you be doing to prepare while waiting for the other shoe to drop? Here is a seven-step guide for employers to follow.

Minnesota Bans Non-Compete Agreements: The 10 Things Employers Need to Know

Minnesota became the fourth state – together with California, North Dakota, and Oklahoma – to enact a near-total ban on the use of non-compete restrictive covenants. The Minnesota Legislature recently passed an omnibus spending bill, which the Governor signed on May 24. The non-compete ban, which will take effect on July 1, actually goes beyond the restrictions commonly contained in other states' non-compete statutes by extending protections to independent contractors and is also not limited by any income threshold. Not to be overlooked, the bill prohibits out-of-state employers from adjudicating their employment agreements in their preferred state or under their preferred state's laws. What are the 10 things employers need to know about this significant development?

COVID-19 Public Emergency Ends

What Employers Can Expect with the End of the COVID-19 Public Health Emergency: Your 6-Step Plan

The COVID-19 national and public health emergencies officially ended on May 11 with the expirations of two dual emergency declarations – so what should employers expect? One of the two declarations is the public health emergency (PHE) declared in January 2020 by the Department of Health and Human Services (HHS), and the second is the national emergency declaration issued in March 2020. The World Health Organization (WHO) also announced on May 5 that it is time to transition to long-term management of COVID-19 as an ongoing health concern versus an international public health emergency. While we anticipate that more guidance is coming from federal and state agencies as they roll back pandemic-era COVID-19 requirements and transition to sustainable long-term processes, here are the key changes you should be aware of – and a six-step plan for compliance.

U.S. Eases Burden on Businesses by Lifting COVID-19 Vaccine Requirement for International Travelers

The COVID-19 vaccination requirement for international travelers also ended on May 11. The removal of the vaccine requirement – which had been in place since November 8, 2021 – aligns U.S. policy with other countries, including Canada, which eliminated similar restrictions for international travelers in October 2022. The policy change is expected to not only ease international travel but

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relieve the burden on businesses wishing to bring over foreign workers and business visitors. Here's a brief background on the requirement, as well as the changes.

Workplace Safety News

Fisher Phillips' Win Over State OSHA Quota Plan Could Help Employers Across the Country

When Fisher Phillips attorneys recently secured a key victory over a state OSHA plan that was improperly trying to create a quota system to encourage investigators to issue citations and assess penalties, it opened the door for businesses across the country to challenge their state OSHA plans over any number of other issues. If you are a business owner or a safety professional, this victory should lead you to explore how it might be able to help your organization, too. The May 16 victory at the Fourth Circuit Court of Appeals knocked back the North Carolina state OSHA agency and creates a pathway for employers in North Carolina – and across the country – to challenge their state OSHA plans where the local authorities have overstepped their bounds beyond federal limits. You should immediately contact your Fisher Phillips attorney to discuss any existing workplace safety citations you are disputing. It may be that the same arguments can be deployed as part of your defense. Read on to learn more about this significant employer victory.

Immigration Update

End of the Line? 4 Steps for Employers to Prepare for Impending End of Remote I-9 Verification Policy

If you remotely verified I-9 forms during the pandemic, your deadline for completing in person verification is fast approaching. The Department of Homeland Security (DHS) previously announced that employers would have until July 31 to complete in person review of I-9 documents that had originally been reviewed remotely under the COVID I-9 Flexibility policy. On May 4, however, DHS announced a 30-day grace period that extends the deadline until August 30. While immigration officials have repeatedly extended the I-9 flexibility since initially adopting the policy in March 2020, the issuance of a grace period instead of another extension signals that the policy is finally coming to an end. What are the four things you need to do to prepare for this jolt to reality?

Wage and Hour Collective Actions

Appeals Court Sets New Standard in Federal Wage and Hour Collective Actions: 4 Biggest Takeaways for Employers

An appeals court just raised the bar for employees seeking to notify other potential plaintiffs about collective wage and hour claims under federal law. Employees may bring such claims under the Fair Labor Standards Act on behalf of themselves and "similarly situated" workers — but they must meet certain criteria before a court will allow additional employees to be notified about the claims and given an opportunity to opt into the lawsuit. On May 19, the 6th Circuit Court of Appeals set a new

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standard, holding that an employee must show a "strong likelihood" that other employees are similarly situated. It rejected the "fairly lenient" two-step collective process used by many district courts – and also diverged from the 5th Circuit's stricter standard. While the 6th Circuit's ruling will impact employers in Kentucky, Michigan, Ohio, and Tennessee, employers in all locations should pay attention to developments in this area, particularly since SCOTUS may ultimately need to weigh in on the evidentiary standard. What are the four biggest takeaways for employers defending federal wage and hour claims?

Student-Athlete Claims

Labor Board Advances Claims that Student-Athletes Are Employees: What Does Your Athletic Department Need to Know?

NLRB General Counsel Jennifer Abruzzo just took another big step in the continuing saga surrounding college sports by filing a complaint on May 18 seeking to have student-athletes classified as employees under the National Labor Relations Act – which would clear the way for them to consider forming a union. The complaint against the University of Southern California, its athletic conference, and the NCAA alleges all three committed unfair labor practices as "joint employers" of football and basketball players at the school, the latest round in the push to classify student-athletes as employees. If successful, this action could fundamentally alter the nature of college sports. What does your athletic department need to know about this watershed moment?

New Laws for New York

Movin' On Up: New York Minimum Wage Set to Rise

Employers in the Empire State may need to review and revise their budgets in light of recently finalized minimum wage hikes. As part of the New York State budget legislation enacted on May 3, the minimum wage is set to rise up to $17 per hour in certain parts of the state by 2026. What do you need to know about these changes and what actions should you consider taking now?

Sizing Up Size Discrimination: New York City Will Soon Prohibit Height and Weight Discrimination in the Workplace

The movement to expand legal protections against forms of appearance-based discrimination just gained a formidable ally. New York City became the second city in New York State, after Binghamton, to prohibit discrimination based on a person's height or weight. Intro. No. 209-A, which Mayor Adams signed into law on May 26, takes effect on November 22 and will prohibit employers from discriminating against employees and applicants on the basis of their height or weight. Here is what employers need to know.

California News

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A 10-Step Plan for Irvine Hotels to Comply with Workload Limitations Law

Many hotel employers in Irvine must implement additional requirements of the city's new Hotel Worker Protection Ordinance – including stringent workload limitations for room attendants. While certain obligations such as the requirement to provide personal security devices to workers kicked in late last year, other sections of the ordinance governing room attendants and their workload limitations just took effect on May 21. What are the 10 steps that Irvine hotel employers should consider taking in order to ensure compliance with the law?

California Governor Confirms Unionization of Agricultural Employees Through "Card Check" Process: Your Top 3 Takeaways

Governor Newsom recently signed a bill into law clarifying that a single alternative to the traditional secret ballot method – an alternative known as the "card check" election – may be used for unions to organize at agricultural work settings in California. AB 113, which was signed on May 15 and takes effect immediately, amends last year's controversial AB 2183. As we previously reported here, AB 2183 provided that employers could enter an agreement called a "Labor Peace Compact" where they would agree to act neutrally with respect to unionization. In turn, instead of participating in a card check election, these employees would vote either in-person through the traditional secret ballot election *or* through a secret mail-in ballot election. AB 113 eliminates the secret mail-in ballot election and the "Labor Peace Compact" altogether. What are the three main points you need to know about the new California law and its impact on agricultural employers?

Washington State Updates

Washington State Restricts Pre-Employment Cannabis Testing: 4 Key Takeaways for Employers

Washington state is joining the growing trend to provide some level of protection for off-duty recreational cannabis use. SB 5132, which the Governor signed into law on May 9, will impose new restrictions on employers that conduct pre-employment drug screening. Specifically, since recreational cannabis use is legal in the state, the Washington State Legislature is concerned that there may be a disconnect between an employee's legal off-duty activities and an employer's hiring criteria. What are the four main takeaways for employers as you prepare for the new law to take effect in January 2024?

New Washington Law Targets Warehouse Production Quotas: Top 10 Questions for Employers and Staffing Agencies

A new law in Washington state aims to protect warehouse employees by setting certain requirements for employers and warehouse staffing agencies. HB 1762, which Governor Inslee signed into law on May 4, defines and requires production quotas, sets communication requirements for them, and limits adverse actions against employees who fail to meet them. The new law will take effect on July 1, 2024, and it will radically alter the way warehouses and warehouse staffing agencies

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that use quotas can manage their workers. It will also carry civil penalties for non-compliance, so warehouse employers and staffing agencies should start taking steps now to prepare for this significant industry shift. Here are the answers to your top 10 questions about the new law.

Florida Legislative Activity

How Florida's New Bathroom Law Will Impact Schools, Public Employers, and Businesses

A new Florida law will make it a crime for individuals to use certain bathrooms that don't align with their gender at birth, raising many questions for schools, public employers, and businesses in the state. Governor DeSantis approved the Florida Safety in Private Spaces Act on May 17. Once the new law takes effect on July 1, it will impact all schools, both private and public, throughout the state in a significant way – requiring them to take least three proactive steps to comply – and will also require affirmative steps by public employers. However, it will not require other private employers or businesses that open their doors to the public to make any changes to their policies or otherwise criminalize conduct in the private business setting – and will not shield employers or businesses from federal anti-discrimination law. What do Florida schools, public employers, and businesses need to know about this new law?

Florida to Require Employers to Use E-Verify with New Hires: Your 5 Key Takeaways

As part of a potentially growing trend, a new law in Florida will require private employers with at least 25 employees to use E-Verify – the digital immigration verification tool – during their onboarding process starting July 1. SB 1718, which Governor Ron DeSantis signed into law on May 10, will also increase penalties for noncompliance and for employers who knowingly hire undocumented workers. Notably, if employers use the E-Verify system in good faith – whether use is mandatory or voluntary – the government will presume they have not knowingly hired unauthorized workers. What do you need to know about the new law and how will it impact your new hire process?

Florida Hospitals Must Soon Require Patients to Declare Immigration Status: What Healthcare Employers Need to Know

Florida's new immigration reform law has some high-profile requirements for employers, but a specific healthcare-related provision will require industry employers to change their practices related to immigration-related patient care. Starting July 1, any hospital in Florida that accepts Medicaid will need to ask each patient if they are U.S. citizens or otherwise in the country legally – or whether they are not lawfully present – and then report findings to the state. What do you need to know about this change in policy?

Florida Increases Public-Sector Union Transparency and Accountability with New Legislation: 5 Key Takeaways for Employers

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Governor DeSantis signed SB 256 into law on May 9. The law amends the Florida Public Employees Relations Act (FPERA) and aims to promote greater public-sector union transparency and accountability and to provide paycheck protection for public-sector bargaining unit employees. We can expect labor unions to mount legal challenges, but here's what will change under the new legislation and the five key takeaways for Florida public employers.

Florida Likely to Join Growing Trend with Digital Bill of Rights: Top 9 Questions for Businesses

Florida is expected to be the tenth state to pass comprehensive consumer privacy legislation. The Florida Digital Bill of Rights was approved by the state legislature in May and is expected to soon be signed by Governor DeSantis and take effect on July 1, 2024. The proposed law will apply to certain controllers and data processors, and includes protections regarding biometric data, the collection of data by smart speakers, and protections for minors. The Florida bill further demonstrates that businesses must adapt to new consumer privacy rights and keep up with pending legislation that is advancing across the country. California, Connecticut, Colorado, Indiana, Iowa, Utah, Virginia, Montana, and Tennessee have already enacted similar laws. Additionally, more than a dozen other states are considering consumer privacy legislation. For now, here are the answers to your top nine questions about Florida's pending Digital Bill of Rights.

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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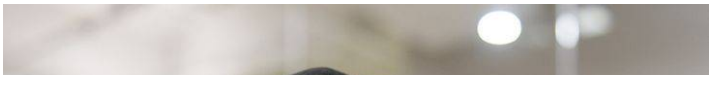

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