Insights, News & Events

# TOP WORKPLACE LAW STORIES YOU MAY HAVE MISSED FROM JUNE 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:

**SCOTUS Blockbusters**

**SCOTUS Severely Limits Affirmative Action Admissions in Education: 6 Things You Should Do + 6 Things to Boost Diversity Efforts**

The Supreme Court just severely restricted higher educational institutions from using race or ethnicity as part of their admissions process, curbing the practice of using affirmative action principles during admissions for schools across the country. A pair of blockbuster decisions released on June 29 will force admissions teams to rethink and rework a decades-old approach that had become interwoven into the day-to-day practices of many colleges and universities – not to mention K-12 schools. Now comes the hard part. What should higher education do to comply with the ruling? When can race be considered as part of the admissions process? Does the decision only apply to higher educational institutions or should K-12 schools begin adjusting their policies as well? And what can schools do to boost their diversity, equity, and inclusion efforts in light of this decision? This Insight will provide six steps you should take to comply with the SCOTUS ruling – and six steps to take if you want to elevate your DEI efforts.

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## 3 Ways the Affirmative Action SCOTUS Ruling May Have Ripple Effects on Employers + 6 Steps to Boost Your DEI Program

While employers may not be directly impacted by the Supreme Court's decision blocking affirmative action in education admissions, the new standard will likely have big ripple effects on the world of workplace law before long — and the time is now to prepare for the oncoming chain of events. What do employers need to know about the ruling and its possible impact on the workplace? Here are three ways the decision may have ripple effects on your organization and the six key steps you can take now to bolster your DEI efforts while maintaining compliance with anti-discrimination laws.

## Supreme Court Makes It More Difficult for Employers to Deny Religious Accommodations: Your 6-Step Action Plan

Employers now have a higher hurdle to clear when determining whether an employee's religious accommodation request would cause an undue burden on their business. A mail carrier argued that it was too easy for his employer to reject his request for Sundays off under a decades-old legal test that gave employers considerable leeway. As we predicted earlier this year, SCOTUS just clarified a higher standard under federal law than the lower courts applied. In a unanimous decision on June 29, the Court said federal anti-discrimination law requires an employer to show that "the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business." Here's what you need to know about the ruling and your 6-step action plan to ensure compliance with the clarified standard.

## Supreme Court Ruling Makes It Easier for Employers to Recover Damages Caused by Union Strike Misconduct

The Supreme Court delivered welcome news on June 1 to employers seeking to sue and recover economic damages from labor unions, ruling that federal labor law does not prevent them from filing state law claims for intentional damage when workers fail to take reasonable precautions and destroy company property during a strike. Although the National Labor Relations Act (NLRA) generally blocks state law claims when the two "arguably conflict," SCOTUS noted in an 8-1 decision that federal law does not shield strikers in

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every situation. In *Glacier Northwest v. International Brotherhood of Teamsters*, the union called for a driver strike in the midst of delivering highly perishable concrete that was destroyed in the process. Siding with the employer, the Court explained that the NLRA does not "arguably protect" the union's actions if they posed a material risk of harm to company property. The Supreme Court's decision paves the way for employers to hold unions accountable and recover damages in state court. Here's what you need to know about the ruling and its potential impact on the workplace.

## SCOTUS Ruling Protects Top 3 Benefits of Arbitration: Key Takeaways for Employers

Employers seeking to move workplace claims from the courthouse to arbitration received some good news from the U.S. Supreme Court on June 23. If a trial court denies a party's request to compel arbitration, the court must pause pre-trial and trial proceedings while the decision is appealed, according to the 5-4 ruling. Why is the decision significant to employers? According to SCOTUS, many of the benefits of arbitration — such as efficiency and lower cost — could be lost if trial court proceedings continue, even if an appeals court ultimately finds that the case belongs in arbitration. Moreover, despite having an arbitration agreement in place, the employer could face significant pressure to settle claims to avoid such proceedings during the appeal. So, how did we do with our predictions in this case? Like the Justices, our attorneys were divided in their predictions, but FP Partner Matthew Korn was on point. He accurately predicted that Justice Kavanaugh would pen a 5-4 opinion reversing the 9th U.S. Circuit Court of Appeals and finding that trial court proceedings are automatically paused during the appeal. Here are your key takeaways from the ruling in *Coinbase, Inc. v. Bielski*.

### Updates Under Federal Law

## New Workplace Protections for Pregnant and Postpartum Workers Take Effect: Critical FAQs for Employers

Many employers may have missed the news about a new federal law protecting pregnant employees and those with childbirth-related medical conditions. After all, it was approved as just one part of a massive omnibus spending bill, and it was signed into law during the rush of the winter holidays this past December. But the Pregnant Workers


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Fairness Act (PWFA) can no longer fly under your radar, as it took effect on June 27 – and could require you to change your workplace accommodation and leave practices in a significant way. What do you need to know about the new workplace requirements? Here are some important FAQs for you to consider.

**Labor Board Returns to Stricter Independent Contractor Standard: 4 Things Employers Need to Know**

A highly anticipated decision by the National Labor Relations Board (NLRB) makes it significantly harder for companies to classify their workers as independent contractors. The Board's June 13 decision in *Atlanta Opera* reverts to a broader independent contractor standard that was established during the Obama administration in 2014 — which means more workers will again be considered "employees" under federal labor law. What are the top four things employers need to know about this development?

**Are You on the List? Construction Contractors Should Review OFCCP's Latest Audit Scheduling List and Follow This 7-Step Plan If Selected**

Construction contractors should take immediate action to find out if any of their establishments have been selected for an upcoming audit by the Office of Federal Contract Compliance Programs (OFCCP). On June 5, the agency released its 2023 Corporate Scheduling Announcement List (CSAL) specifically for construction contractors. The CSAL Construction Scheduling List serves as a courtesy notification to 250 federal and federally assisted construction contractors and subcontractors that they have been selected for an audit. This Insight explains how to find out if you've been selected, summarizes the scheduling methodology in more detail so you can learn why you were chosen, and provides a seven-step plan for responding.

**Artificial Intelligence Policies**

**The 10 Things All Employers Must Include in Any Workplace AI Policy**

Whether your organization has deployed a generative AI tool for your employees or hasn't (yet) hopped on the bandwagon, the time is now for you to create a workplace policy governing the use of the technology. Many organizations are exploring ways their workforces can


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## Service Focus

**AI, Data, and Analytics**

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harness the revolutionary advances in productivity, efficiency, and creativity that generative AI (GenAI) products like ChatGPT, Google's Bard, or Microsoft's Bing can bring. And, even if you aren't doing the same, your employees almost certainly are. But how can you do so in a responsible way? A first step is developing a workplace GenAI policy. Read on for the 10 things you should include. *Bonus: download Fisher Phillips' recently released complimentary workplace GenAI policy template by clicking here.*

**Consumer Privacy Laws**

**FAQs for Businesses as Texas Passes Consumer Privacy Legislation**

Texas became the latest state to pass comprehensive consumer data privacy and security legislation when Governor Abbot signed the Texas Data Privacy and Security Act into law on June 18. It will require businesses to take several compliance steps by July 1, 2024, including updating website privacy notices, implementing a process for consumers to exercise rights under the Act, updating contracts with vendors acting as data processors, and conducting data protection assessments. Here are answers to your most pressing questions about how this impacts your business – and what you need to do to comply.

**Oregon Expected to Pass Consumer Privacy Law: 8 Things Businesses Need to Know**

Businesses should prepare now for a potential new law in Oregon designed to provide consumer privacy rights regarding access to and control over personal data collected by covered entities. On June 23, the state legislature passed the Oregon Consumer Privacy Act (OCPA), which now moves to Governor Kotek for consideration. If approved, Oregon will become the eleventh state — and the sixth in just 2023 alone — to pass comprehensive consumer privacy legislation. The OCPA follows in the footsteps of similar laws passed in California, Virginia, Colorado, Utah, Connecticut, Iowa, Indiana, Tennessee, Montana, and Texas. Assuming that the legislation is approved by the Governor in its current form, here are the answers to your top eight questions about the OCPA.

**California Updates**



## Industry Focus

## Reprieve! Enforcement of California's CPRA Regulations Delayed Until March 2024

In a last-minute ruling on June 30, a California judge delayed enforcement of the California Privacy Rights Act (CPRA) regulations until March 29, 2024. Enforcement of the regulations was otherwise set to commence on July 1. This delay is a nice reprieve for businesses subject to the California Consumer Privacy Act (CCPA), but it is not a wholesale carveout from any enforcement of the CPRA. Here is a discussion of the implications on businesses and the next steps you should take.

## California Changes Definition of COVID-19 "Outbreak" – Easing the Impact on Employer Protocols

By now, California employers are quite familiar with the following situation: the California Department of Public Health (CDPH) makes a change to COVID-19 guidance and your workplace obligations are affected under Cal/OSHA's COVID-19 regulations. CDPH has done it again – but this time in a manner that will benefit employers in the state. Here's what changed (effective June 23), how it will impact your policies, and a recap of your continuing obligations.

**New York News**

## Contracts, Discrimination, and Pay, Oh My! A Slew of Employment Protection Bills Head to New York Governor's Desk

New York state lawmakers passed a flurry of employment-related bills in the final weeks of the legislative session. The bills – which now head to Governor Hochul's desk for consideration – aim to provide workers in the state with new workplace protections and impose new possible obligations on New York employers. Here's what you need to know about these potential new laws and their impact on six key areas.

## New York Lawmakers Say "No" to Non-Competes: 3 Things You Need to Know About Non-Compete Ban Heading to Governor's Desk

New York lawmakers just passed legislation that would ban employee non-compete agreements, which is heading to Governor Hochul for consideration. If signed into effect by the governor, the law will be a sea change for New York

employers, who have historically been able to enter into reasonable non-compete agreements with their workers. With this legislation passed on June 20, New York is the latest jurisdiction to push back on restrictive covenants, joining California, Minnesota, North Dakota, and Oklahoma – all of which have also banned the use of non-compete agreements. New York's bill is also in line with the position recently taken by the General Counsel of the NLRB, as well as the Federal Trade Commission's recent proposal to implement a rule banning the use of non-competes. Here are the three key things you need to know about the New York statute – and what employers should be doing about it.

**NYC Delivering on Minimum Wage Promise for App-Based Delivery Workers**

For the first time ever, app-based restaurant delivery workers in New York City – engaged as independent contractors – are set to make a minimum wage. The nation's first-of-its-kind law is set to have a massive impact, as it will affect approximately 65,000 delivery workers when it takes effect on July 12. The law treads new ground by providing delivery workers with workplace protections typically provided to employees and not independent contractors. Here is what third-party restaurant delivery services and third-party courier services need to know.

**More State Law Updates**

**The 10 Things Colorado Employers Should Do After Lawmakers Pass Batch of New Workplace Laws**

The Colorado legislature has been busy this season passing new employment laws, adding to your compliance obligations in a big way. We reviewed the key workplace laws that Colorado Governor Jared Polis signed into effect and have developed a comprehensive overview of the most important aspects you'll need to know about. Here are the 10 things you should do to stay up to speed with all of the new laws coming into effect.

**Georgia Employers Must Act Now as Recent Court Decision Potentially Invalidates Most Employee Non-Solicitation Covenants**

The Georgia Court of Appeals just made it significantly more difficult for employers to enforce employee non-solicitation provisions, which might require you to take immediate action

to protect your company's interests in protecting the stability of your workforce. In the Court of Appeals' June 13 decision in *North American Senior Benefits v. Wimmer*, it held that an employee non-solicitation provision must have a territorial limitation in order to pass muster under Georgia's 2011 Restrictive Covenants Act (RCA). Because most traditional employee non-recruitment provisions do not have such clauses, the majority of such restrictions are now unenforceable in Georgia. What do you need to know about this decision – and more importantly, what do you need to do to correct this problem?

**International Law**

**7 Steps to Success: China Releases New Guidelines on Standard Contracts for Exporting Personal Information**

Chinese government data privacy officials recently implemented Guidelines for Filing of Standard Contracts for Export of Personal Information that carry significant consequences for non-compliance – which means organizations that do business in China need to get up to speed right away. The Cyberspace Administration of China (CAC) implemented the new guidelines on June 1, following up on the Measures on Standard Contracts for the Export of Personal Information released in February. Together, they define the scope of application of contracts and prevent data controllers from separating data exports into different batches to avoid the security assessment mechanism. What do Personal Information Handlers need to know about the steps outlined in the Guidelines in order to comply with the new law? The seven steps are outlined here.

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.