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2022 Labor & Employment Year in Review… and Looking Ahead to 2023

Law and the Workplace on **January 6, 2023**

There is no doubt that 2022 was an eventful year in employment law. In this post, we review some key developments from the prior year that employers should be aware of and hot topics to watch out for as we move forward into 2023.

Salary and Pay Transparency

The trend of enacting salary and pay transparency laws continued in 2022 and shows no signs of slowing down. As discussed in more detail in our previous blog post, several jurisdictions passed or enacted salary transparency legislation last year, including New York City (effective November 1, 2022), Westchester County, New York (effective November 6, 2022), California (effective January 1, 2023), and Washington State (effective January 1, 2023). Though employers' specific obligations under pay transparency laws vary among jurisdictions, these laws generally require employers to disclose a prospective salary or salary range when advertising an open employment position. For example, New York City's pay transparency law (discussed in more detail here) provides that "it shall be an unlawful discriminatory practice for an employment agency, employer, or employee or agent thereof to advertise a job, promotion or transfer opportunity without stating… the lowest to the highest annual salary or hourly wage the employer in good faith believes at the time of the posting it would pay for the advertised job, promotion or transfer opportunity."

Limits on NDAs and Mandatory Arbitration

The "Speak Out Act," which was signed into law by President Biden on December 7, 2022, renders pre-dispute nondisclosure and non-disparagement clauses judicially unenforceable with respect to sexual assault or sexual harassment disputes.

Earlier in 2022, President Biden enacted the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act," which similarly prohibits enforcement of mandatory pre-dispute arbitration agreements, as well as agreements prohibiting participation in a joint, class or collective action in any forum, "at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct."

In 2023, employers should be on the lookout for the potential expansion of similar laws at the more local level, as several states (including California, Hawaii, Maine, New York, Oregon, and Washington State) have recently enacted more expansive laws regarding non-disclosure and arbitration agreements in the wake of the #MeToo movement.

Expanding Leave Benefits

While there is still no paid leave benefit requirement for employers under federal law, states and localities are continuing the trend of enacting (or otherwise expanding existing) paid sick, paid medical and/or paid family leave laws (including New York, California, Massachusetts, the District of Columbia, and Chicago, Illinois). In 2022, Maine and Maryland became the latest states to enact new paid family and medical leave legislation. Payroll deductions under the laws are scheduled to begin on October 1, 2023 in Maryland and on January 1, 2025 in Delaware. Employees will be eligible to take statutory paid leave in Maryland beginning in 2025 and in Delaware starting in 2026. Our analysis of the new paid leave laws can be found here.

Employee Monitoring and Data Collection

With remote and hybrid work looking like it's here to stay – and with the recent emergence of "quiet quitting," referring to employees doing the bare minimum required of their job – some employers may consider expanding electronic monitoring of employees in response. These employers should be mindful of certain laws that limit the ability of employers to monitor employee activity.

Effective May 7, 2022, New York law requires all private employers with a place of business in New York state to provide written notice upon hire to new employees if they monitor, or plan to monitor, their employees through telephone, email, or internet communications. New York City is also currently considering an ordinance that would place significant limitations on employers' ability to utilize electronic monitoring for purposes of discipline or discharge. And effective January 1, 2023, the California Privacy Rights Act (CPRA) expanded to apply to employer/employee data, and requires employers to let workers know what personal information they collect about them, among other provisions. Enforcement of the CPRA, however, will not begin until July 1, 2023.

In addition to state law action, the proposed bipartisan federal Data Privacy and Protection Act seeks to regulate the kind of personal data companies can collect on employees, and could preempt existing state law if passed. However, the law faces opposition from Democratic leadership at the federal and state levels, as well as from business interests. The National Labor Relations Board (NLRB) may also become more active in this area, as NLRB General Counsel Jennifer Abruzzo recently issued a memo advocating for "zealous enforcement" to protect employees from intrusive or abusive forms of electronic surveillance.

New California Laws to Watch Out For In 2023

A new year in California brings the arrival of many new labor and employment laws, and 2023 is no exception. Here, we highlight some of these recently enacted laws:

- Fast Food Accountability and Standards (FAST) Recovery Act: On September 6, 2022, California Governor Gavin Newsom signed this law that reshapes standards for employers in the "fast food" industry. The bill applies to non-unionized fast food chains with more than 100 locations, and establishes a council that will determine a minimum wage and working conditions for covered employees. The law was set to come into effect on January 1, 2023, but enforcement of the FAST Act was temporarily enjoined in December 2022, pending a challenge to the statute.
- State of Emergency: This law, effective January 1, 2023, prohibits employers from taking adverse employment action against employees who have a reasonable belief that a worksite is unsafe.
- Leave Law Developments: California passed two leave expansion laws, both of which took effect on January 1, 2023. AB 1041 expands the definition of a "designated person" when an employee takes medical leave to care for others.

> “Designated person” now includes “any individual related by blood or whose association with the employee is the equivalent of a family development. AB 1949 provides employees with up to five days of bereavement leave upon the death of a qualifying family member.

Additionally, California enacted pay transparency requirements, discussed further in our previous blogs here and here.

PAGA and *Viking River Cruises*

The California Labor Code Private Attorneys General Act of 2004 (“PAGA”) also will remain a hot-button issue for California employers in the aftermath of the Supreme Court’s ruling in *Viking River Cruises, Inc. v. Moriana*, Case No. 20-1573, 142 S.Ct. 1906 (June 15, 2022). The opinion reversed previous California Supreme Court precedent by holding that PAGA claims can be separated into “individual” and “representative” claims, and that “individual” claims can be subject to mandatory arbitration. Our full summary of the ruling can be found here.

However, it remains uncertain whether “representative” claims can be subject to mandatory arbitration. The California Supreme Court is poised to determine in *Adolph v. Uber Technologies, Inc.,* whether an employee who has had “individual PAGA claims” forcibly arbitrated maintains statutory standing for representative claims. Alternatively, the California legislature could follow advice from Justice Sotomayor’s concurrence in *Viking River Cruises* and modify PAGA to explicitly allow an employee to litigate representative PAGA claims on behalf of other employees, even if the employee loses individual standing because the employee-plaintiff’s claims have been compelled to arbitration.

Finally, in 2024, California voters will have an opportunity to vote on the future of PAGA directly, by choosing whether to replace it entirely with the California Fair Pay and Employer Accountability Act (“FPEAA”). We will continue to report evolving developments in the PAGA space in 2023 on California Employment Law Update.

DEI (Diversity, Equity, and Inclusion) Initiatives

Many employers continued to focus in 2022 on improving DEI (diversity, equity, and inclusion) in their workplaces. However, those initiatives have not been without challenge. Some state legislatures have passed laws restricting activities that have long been associated with DEI efforts. For example, Idaho passed legislation specifically targeted to stop "preferential treatment" when hiring employees based on race, while Florida's Individual Freedom Act, which amended Florida's Civil Rights Act, prohibits employers from endorsing various race-, sex-, and national origin-based concepts during mandatory trainings. A federal judge enjoined much of the Florida law, but that decision is currently on appeal.

In 2023, the Supreme Court is also poised to decide what could be a landmark decision on race conscious admissions in higher education. On October 31, 2022, the Court heard oral arguments in two cases related to affirmative action programs at universities. *Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard College*, 142 S. Ct. 2810 (2022); *Students for Fair Admissions, Inc. v. U. of N. Carolina*, 142 S. Ct. 2809 (2022). A ruling on the lawfulness of these programs, even if narrowly tailored to college affirmative action programs, could have implications down the road for employer-sponsored DEI initiatives.

Employee v. Independent Contractor Tests

Uncertainty surrounding how various federal and state laws classify workers will keep challenging employers in 2023.

On October 13, 2022, the Department of Labor ("DOL"), issued a proposed new rule for classifying workers. The proposed rule largely mirrors the Obama-era test, and aims to totally replace guidance made in the waning days of the Trump administration. The proposed rule seeks to focus "on the economic realities of the workers' relationship with the employer," and frames a worker's economic dependence on their employer as the "ultimate inquiry" for the test.

Ultimately, courts have the power to apply the new multi-factor test how they think is best. In addition, certain states, including California, Massachusetts, and New Jersey, have adopted the "ABC test" in recent years, an even more stringent test used to determine whether workers should be classified as employees, rather than as independent contractors. The test's stringency has made it a target for employers and certain workers who desire to be classified as independent contractors, including truckers in California who protested earlier this year. This year, a California appellate court held that the "ABC test" for determining employee vs. independent contractor status can be applied even if workers do not first establish that they were actually hired by the defendant-employer or its agent. No sector is more in flux with these laws than companies in the "gig economy."

The independent contractor rules are another area of law that employers should monitor, particularly for developments throughout the various states that adopt different standards.

Artificial Intelligence (AI) Tools in Employment

In recent years, an increasing number of employers have turned to artificial intelligence (AI) tools to help more effectively evaluate and select job candidates. Federal, state and local governments have begun scrutinizing the use of these tools in response to research suggesting that the widespread use of AI tools may increase the possibility of bias or discrimination on the basis of protected characteristics.

For example, in May 2022 the DOJ and EEOC issued guidance for employers concerning the use of AI tools. On the local level, beginning in April 2023, New York City employers will be prohibited from using automated employment decision tools to screen applicants and employees, unless the tool has been subject to a bias audit and the employer satisfies a series of potentially burdensome notice requirements. While the law was initially set to take effect on January 1, 2023, the NYC Dept. of Consumer and Worker Protection has announced that due to the pendency of proposed rules, the law will not be enforced until April 15, 2023.

Further, two measures were proposed in 2022 to regulate the use of AI tools in employment in the state of California. In January 2022, AB 1651— Worker Rights: Workplace Technology Accountability Act— was introduced into the California State Legislature. This bill would (1) grant California employees the right to "know, review, correct, and secure data collected from them by their employer"; (2) "impose various limitations on the collection and use of data via electronic monitoring"; (3) limit the use of "machine learning, statistics, or other data processing or artificial intelligence techniques, that makes or assists an employment-related decision"; and (4) "require employers to prepare and publish impact assessments for the use of various technology." In March 2022, the California Fair Employment and Housing Council published a Draft Modification to Employment Regulations Regarding Automated-Decision Systems, which seeks to further regulate California employers' use of AI tools.

OFCCP Enforcement

The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has increased its enforcement efforts under the Biden administration, as indicated in Directive 2022-02, *Effective Compliance Evaluations and Enforcement*, and through OFCCP's subsequent adoption of new directives and regulatory procedures. Among other things, OFCCP has indicated that contractors will no longer be guaranteed advance notice of audits, and can expect more requests for additional data, witness information and witness interviews.

Moving into 2023, OFCCP is also considering adopting a revised Compliance Review Scheduling Letter and Itemized Listing for OFCCP audits, which would impose significant new initial audit submission requirements on federal contractors. The public has until January 20, 2023 to submit comments on proposed changes. Our analysis of the proposed changes can be found here.

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