2023 Mid-Year Labor and Employment Update

Coblentz Patch Duffy & Bass LLP

We are halfway through 2023 so it is a good time to look back on this year's employment law developments so far and look forward to what lies ahead. What follows is a short overview of the legal changes that we are monitoring the closest and that we think our clients should be aware of. These changes include new laws, regulations, and decisions in the areas of workplace diversity programs, pay transparency, non-compete agreements, religious accommodations, non-disclosure and confidentiality restrictions, independent contractor relationships, whistleblowing, drug-free workplaces, and remote employee onboarding. We've also included our thoughts on "what now?" regarding each key legal development and potential ways to help mitigate employment law risk. If you have any questions about any of the issues discussed in this mid-year update, please reach out to a member of the Coblentz Employment Team.

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Increased Scrutiny on Workplace Diversity

In June 2023, the U.S. Supreme Court struck down race-conscious admissions programs used to promote student diversity at Harvard College and the University of North Carolina. The decision did not directly implicate Title VII of the Civil Rights Act of 1964 ("Title VII"), which prohibits discrimination based on race, national origin, gender, and other characteristics in employment decisions, but we anticipate that legal advocacy groups, certain state agencies, and individual plaintiffs will use this decision to challenge corporate diversity groups in the future. Indeed, thirteen Republican state attorneys general sent a letter to the nation's largest employers in the wake of the Supreme Court decision arguing that corporate diversity programs that explicitly or implicitly include race or other protected characteristics as factors in employment decisions violate federal law.

However, guidance from the Equal Employment Opportunity Commission ("EEOC") and Title VII case law may provide employers who are committed to creating a diverse workforce with a legally-compliant path. That authority provides that an employer's voluntary affirmative action plan may be permissible under Title VII if the employer first identifies an imbalance in jobs where a particular characteristic had been significantly underrepresented in the past and takes reasonable action to correct that underrepresentation. These theories from both sides of the workplace diversity debate remain to be fully tested in the courts. But there is no doubt that diversity programs now carry more risk than they ever did before and deserve a careful look by employers.

What now?

- Inventory existing diversity programs and assess potential risks in advance of expected challenges alleging that they are race-based.
- Review diversity policies, materials, and communications to ensure that they will not be interpreted as promoting race-based employment decision-making.
- Train HR and hiring managers on how they should recruit, interview, hire or promote workers in a way that promotes diversity but also decreases the risk of discrimination claims.

Patchwork of Pay Transparency Laws Complicate Recruiting and Reporting

As of January 1, 2023, California law requires employers with more than fifteen total employees (including at least one in California) to publish pay scale information on job postings. The law also requires employers to maintain records of employees' job titles and wage history until three years after the end of their employment and provide pay scale information to employees for their job classification upon their request. For employers with more than one hundred employees, California law now requires submission of a detailed annual pay data report to the California Civil Rights Department ("CRD") by the second Wednesday of May each year, starting in 2023. It remains unclear how aggressive the California Labor Commissioner will be in bringing enforcement actions based on the pay disparities it identifies in analyzing these pay data reports employers submit. But failure to comply with these new California pay transparency requirements poses another significant risk: private rights of action from aggrieved employees where several remedies, including attorney's fees, are available.

Other states have also recently passed pay transparency laws, including New York (effective September 17, 2023), Hawaii, Illinois, Colorado, and Washington. Similar bills have been introduced in Massachusetts, Washington D.C., New Jersey, and Oregon, among others, but have yet to be passed. Each of these laws has different requirements, including some that require specific benefit disclosures in job postings, so drafting job postings that comply with the patchwork can be challenging. To further complicate things, most of these states, including California, have taken the position that their laws apply to job postings for remote positions that could be performed in their state.

What now?

- Perform attorney-client privileged pay equity analyses to mitigate the risk of equal pay claims that can arise as a result of pay data reporting and increased pay transparency. Reminder: the next California pay data report is due to the CRD on May 8, 2024.
- Develop a pay transparency compliance plan adopting either a uniform or state-by-state approach to the complex web of pay equity laws.
- Audit pay practices across job classifications to determine if they have established pay scales that employers would be comfortable disclosing to applicants and current employees.
- Train HR staff on how to respond to pay scale requests and pay equity complaints from applicants and employees.

Supreme Court Makes It More Difficult For Employers To Deny Religious Accomodation Requests

At the end of June, the Supreme Court raised the bar for when employers can legally deny an employee religious accommodation request in *Groff v. DeJoy*. Under Title VII, employers are generally required to accommodate an employee's religious observances or practices, unless doing so would impose an "undue hardship." Examples of religious accommodations include leaves or schedule changes for religious observances, or dress code or grooming policy variances for religious head coverings or facial hair.

Groff involved an employee's request for Sundays off from the U.S. Postal Service to attend church. In the past, employers could argue that a religious practice accommodation amounted to undue hardship if the employer was required to bear "more than a *de minimis* cost." The *Groff* Court ruled that the proper test for evaluating undue hardship is whether the accommodation results in "substantial increased costs in relation to the conduct of [the employer's] particular business." The Court found that it would not be enough for USPS to simply conclude that forcing other employees to work overtime would constitute an undue hardship, and it needed to consider other options like shift swapping before denying the accommodation. As a practical matter, this means that larger employers may have a more difficult time prevailing on an undue hardship defense, particularly with scheduling accommodations, because they have available scheduling alternatives and can presumably absorb more of the cost of accommodation. We expect this ruling to result in both more religious accommodation requests from employees and lawsuits from activist groups testing this new standard.

What now?

- Train HR staff or other employees who review religious accommodation requests on how to apply the Groff standard.
- Think twice before denying a religious accommodation unless there is documented evidence that it would substantially increase the costs for the employer to grant it in the context of its particular business.

California Employers Can't Ignore Employee Privacy Obligations

Employers subject to California's privacy statute (i.e., the employer has $25 million or more in annual global revenue, collects the personal information of 100,000 California residents, or derives fifty percent of its annual revenue from selling or sharing personal data) should be aware that their *employees and job applicants* are subject to the same rights as California consumers. That means employees can assert privacy rights (to know, request, amend, delete – with exceptions) previously only afforded to California consumers. The California Attorney General recently issued a statement on July 14, 2023, stating that the California Department of Justice (the "DOJ") intends to make sure companies are complying with this new law which went into effect January 1, 2023. The DOJ intends to continue issuing notices to employers asking to see the companies' efforts in complying with this new law such as compliant employee privacy policies and a process for employees and applicants to make privacy-related inquiries. This signals California's intent in enforcing its new privacy law as to employees' new privacy rights—something companies may not be focusing on when complying with the new privacy law which has mostly been consumer-facing.

What now?

- Identify vendors and service providers that process employee information (i.e., payroll providers, 401K, benefits providers).
- Work with legal counsel to create a privacy policy reflecting the collection practices, set up a system for your employees/job applicants to receive data requests, and enter into compliant service provider agreements with your vendors that handle employee data.

Limitations on Non-Compete Agreements on the Rise Outside of California

Federal agencies and several state legislatures have been voicing their concerns over non-competition agreements this past year, following the lead of California, Minnesota, North Dakota, and Oklahoma which already have laws barring non-competes in almost every circumstance. This means that employers' ability to prevent departing employees from starting a competing business or working for a competitor is severely limited in many jurisdictions and may be limited nationally soon.

In January 2023, the Federal Trade Commission ("FTC") proposed a new rule that would ban any provisions that would have "the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer." The FTC extended the notice and comment period, and legal insiders predict that the rule, once final and adopted by the FTC, is unlikely to go into effect until early 2024. However, that doesn't mean employers should rest on their laurels. On May 30, 2023, the National Labor Relations Board ("NLRB") General Counsel sent a memorandum with her view that non-compete provisions in employment contracts and severance agreements could violate the National Labor Relations Act ("NLRA") in certain circumstances. The memorandum did note that in certain cases, a non-compete could be lawful if the provision is narrowly tailored and only restricts the employee's own individual managerial or ownership interest in a competing business, or true independent-contractor relationships.

On the state and local level, several restrictive covenant laws took effect in the past year or are in the works. The New York Legislature passed a bill in June that could make it the fifth state to broadly ban non-competes if the governor signs it into law. As of today, both Michigan and New Jersey have non-compete bills working their way through the legislative process. California, along with Minnesota, North Dakota, and Oklahoma ban non-competes in their entirety, with exceptions like the sale of the goodwill of a business. Several states (including Colorado, Illinois, Maine, Maryland, Nevada, New Hampshire, Oregon, Rhode Island, Virginia, Washington, and Wisconsin) and Washington, D.C., now have laws limiting non-competition agreements for workers below a specific income threshold or requiring very specific notice or consideration periods before they are enforceable against an employee. Some of these laws also include limits on other types of restrictive covenants including no-hire and non-solicitation of customer or employees provisions. Importantly, the consequences of offering an employee a prohibited restrictive covenant go beyond unenforceability of the provision: courts in some states will void the entire agreement containing the provision or impose civil penalties against the employer.

What now?

- Inventory employee contracts with non-compete provisions or other restrictive covenants to ensure compliance with new laws.
- Consider exploring alternative strategies for preventing unfair competition and protecting trade secrets, confidential information, and business relationships from departing employees, including increased physical and electronic security, garden leave or sit-out periods, offboarding processes, longer notice periods, and robust non-disclosure provisions.

Labor Board Issues New Ruling on Lawfulness of Employee Handbooks

On August 2, 2023, the NLRB adopted a new standard for evaluating whether the conduct policies often found in employee handbooks violate the NLRA. With labor organization on the rise nationally and the associated media coverage, this new standard is likely to cause an increase in unfair labor practices charges even in workplaces that are not in the midst of unionization campaigns.

A workplace policy is now unlawful under the new NLRB ruling if it has a "reasonable tendency" to chill employees from engaging in organizing activity, including discussing the terms and conditions of employment with other employees or third parties. This means that a policy presumptively violates the NLRA if it could reasonably be interpreted to have a coercive meaning, even if it is neutrally worded and does not facially restrict employees' NLRA rights. The burden then shifts to the employer to present evidence showing that its legitimate and substantial business interest would not be protected with a more limited version of the policy. The types of seemingly neutral and standard policies under fire with this new ruling include limits on recordings or cameras in the workplace, and social media, press, confidentiality, and employee civility policies. For example, a workplace conduct policy that requires employees to behave in a professional manner and refrain from using abusive language concerning the employer is likely to be presumptively unlawful under this new NLRB ruling.

What now?

- Document business justifications for workplace rules that could be interpreted to chill organizing activity.
- Review employee handbooks and other workplace conduct policies for compliance with new ruling.
- Evaluate risks with disciplining employees for violations of recording, social media, press, confidentiality, and civility policies that could run afoul to the NLRA.

Expanded Whistleblower Protections For California Employees

In May of 2023, the California Supreme Court issued yet another decision expanding whistleblower protections for employees. As part of its policy goal to encourage disclosure of wrongdoing, California Labor Code section 1102.5 prohibits employers from retaliating against any employee who discloses (or who the employer believes *may* disclose) information that the employee has reasonable cause to believe discloses a violation of federal or state statute, or violation or noncompliance with a local, state, or federal rule or regulation. Such employee reports can be made to a government or law enforcement agency, a supervisor, or any other employee who has the authority to investigate, discover, or correct the violation. In *People ex rel. Garcia Brower v. Kolla's, Inc.*, the California Supreme Court clarified that an employee raising potential legal violations to their employer (there, a bartender's complaint of unpaid wages for her three previous shifts) constitutes whistleblower activity, even if the employer presumably knew about the violation. Previously, certain California authorities suggested that an employee's disclosure constituted protected activity only if the information disclosed was "the revelation of something new, or at least believed . . . to be new."

The *Kolla's* decision builds on recent developments that make it more likely that plaintiffs will bring retaliation claims in situations where they previously may not have. In 2021, Labor Code section 1102.5 was amended to authorize courts to award attorneys' fees and costs to prevailing plaintiffs, in addition to damages, including back pay, front pay, lost benefits, and emotional distress damages, making section 1102.5 actions even more economically viable for plaintiff's attorneys.

What now?

- Train managers and supervisors on how to listen for potential whistleblowing.
- Investigate allegations of potential wrongdoing as necessary, and take prompt corrective action when warranted.
- Investigate allegations of retaliation and take prompt corrective action when warranted.
- Document employee performance to ensure corrective action and progressive discipline is narrowly tied to unsatisfactory performance.
- Carefully scrutinize any proposed adverse action against a complainant or witness that has alleged the employer has acted illegally to ensure that it is based on a legitimate and not retaliatory reason.

New Developments in California Employee Arbitration

On February 15, 2023, the Ninth Circuit Court of Appeals invalidated California's AB 51, which attempted to prohibit employers from requiring employees and job applicants to agree to arbitration as a condition of employment. In *Chamber of Commerce of the United States of America v. Bonta*, the court held that the Federal Arbitration Act ("FAA") preempts AB 51 because the California law criminalizes the use of mandatory arbitration agreements. The decision was good news for California employers, as it made clear that California law cannot prohibit employers from requiring employees and job applicants to agree to arbitrate their disputes as a condition of their employment, provided the FAA applies to the arbitration agreement.

There was another recent major development on the arbitration front: On July 17, the California Supreme Court held that even when an employee enters into an arbitration agreement requiring the employee to arbitrate their individual Private Attorneys General Act ("PAGA") claims, the employee still has a right to continue to represent other employees under PAGA in court.

This case, *Adolph v. Uber Technologies*, built on a 2022 arbitration decision from the U.S. Supreme Court, *Viking River Cruises v. Moriana*, which held that arbitration provisions requiring PAGA plaintiffs to arbitrate their "individual" claims are enforceable under the FAA. The *Adolph* Court explained that the PAGA standing requirement is very easy to meet and that an "aggrieved employee" plaintiff who settled and dismissed their individual claims for damages still had standing to proceed with PAGA claims on behalf of other employees. The *Adolph* decision was not a total setback for employers, however, as the Court also opined that an individual's class-action claims that remain in court may be stayed until the arbitration ends. Notably, the *Adolph* holding does not alter precedent that employers may include class action waivers in employee arbitration agreements.

Employers may, for now, continue to compel arbitration of individual PAGA claims under FAA arbitration agreements and may move to stay corresponding PAGA representative actions in court.

What now?

- Review arbitration agreements to make sure the language regarding PAGA reflects the Adolph, Viking River Cruises, and Chamber of Commerce decisions, particularly that they be governed by the FAA.
- Realize that settlement of an individual PAGA claim in or out of arbitration will likely not extinguish the risk of a PAGA representative action brought by that same employee.

Limits on Confidentiality and Non-Disparagement Restrictions in Employee Severance Agreements

In February, the NLRB ruled that overly broad confidentiality and non-disparagement clauses in all non-supervisory employee severance agreements were unlawful under the NLRA. The decision, and ensuing guidance from the NLRB's General Counsel ("GC"), stated that merely offering a severance agreement with a problematic confidentiality or non-disparagement clause was a violation of the NLRA—even if an employee does not sign it.

The issue of what type of confidentiality and non-disparagement clauses will pass muster will be addressed in future cases. But so far, the NLRB has implied that provisions defining "disparagement" narrowly to statements that are knowingly false or made with reckless disregard for the truth may not violate the NLRA. Further, confidentiality clauses that broadly prohibit disclosure of the terms of the severance agreement itself likely run afoul of the NLRA, while those limited to the protection of employer trade secrets and proprietary information are likely fine. Adding NLRA disclaimer language to a severance agreement is also unlikely to make it bulletproof, but could mitigate the risk of a challenge even under these new employee-friendly decisions.

The GC guidance clarified that the NLRB's decision applied retroactively to prior severance agreements with former employees. It also signaled that other commonly used clauses in severance agreements may violate the NLRA, including non-solicitation clauses, broad liability releases, broad covenants not to sue, and cooperation agreements, but the NLRB has yet to take formal action regarding those terms. Remedies for violation of the NLRA in these circumstances can include orders to: (1) rescind or revise the agreements employees have signed; (2) cease any enforcement actions the employer has taken; and (3) notify affected employees (including former employees) of the same.

What now?

- Review confidentiality and non-disparagement provisions in severance agreement forms for overly broad language and consider adding an NLRA disclaimer.
- Evaluate the risks of continuing to include non-solicitation clauses, broad liability releases, broad covenants not to sue, and cooperation agreements in severance agreement forms.
- Monitor GC memoranda and new NLRA cases for more definitive guidance on severance agreement compliance.

Stricter Independent Contractor Standard Means More Workers Can Unionize

A June 2023 NLRB ruling makes it more difficult for employers to classify workers as independent contractors and therefore avoid the potential for those workers to organize under the NLRA. In a new case, *Atlanta Opera, Inc.*, the NLRB reversed the Trump-era independent contractor test that relied only on whether the worker had "entrepreneurial opportunity for gain and loss." The NLRB returned to the common-law test that looks at several factors to determine NLRA classification—primarily the extent of control the employer exercises over the details of the work and whether the worker is engaged in a distinct occupation or business. Notably, NLRB guidance suggests that workers properly classified as independent contractors under an exemption to California's "AB5" worker classification law (e.g., exceptions for specific creative services occupations, referral agencies, and business-to-business contracting relationships) could still be considered employees for NLRA purposes. This case implies that a broader cross-section of workers will be able to unionize under the protections of the NLRA and file unfair labor practices charges with the NLRB. Employers can expect that the NLRB GC will aggressively enforce this new ruling, especially against employers in industries that rely heavily on independent contractors, including creative services, entertainment, and technology. Indeed, the NLRB is expected to issue additional regulations on independent contractors in August 2023.

What now?

- Consider auditing independent contractor workforce through the *Atlanta Opera, Inc.* lens to evaluate which of those workers may now be covered by NLRA.
- Review independent contractor agreements and assess the risk of including provisions that may violate the NLRA were the worker to be classified as an employee.
- Proceed with caution before taking action against independent contractors that have engaged in potential NLRA-protected activity, including discussing pay and working conditions with other workers or third parties.

New California Law Will Protect Employee Off- Duty Cannabis Use

Beginning January 1, 2024, California employers will be prohibited from discriminating against employees or job applicants for (1) off-duty and off-site cannabis use or (2) an employer-required drug test that reveals nonpsychoactive cannabis metabolites. Under this new law, AB 1288, employers will still be able to penalize employees and job applicants based on drug screenings that identify any current impairment or active THC levels. AB 1288 does not apply to an employee "in the building and construction trades," a term that the legislation did not define.

What now?

- Evaluate existing workplace procedures regarding drug screenings and existing accommodations for medical cannabis use to ensure compliance with the new law.

End of COVID-Era Remote Employment Verification at Onboarding

During the COVID-19 pandemic, U.S. Immigration and Customs Enforcement ("ICE") suspended the Form I-9 physical document inspection requirement, allowing employers greater flexibility in how they verified the identities and citizenship/immigration status of incoming employees during the employee onboarding process. On May 4, 2023, ICE announced it was suspending remote document inspection for Form I-9 as of July 31, 2023, and that in many circumstances, employers had an obligation to physically re-inspect I-9 supporting documents that were inspected remotely during the pandemic before August 30, 2023.

On July 21, 2023, ICE partially reversed its May 2023 re-examination requirement, adopting new rules for employers enrolled in E-Verify to avoid physical re-inspection of supporting documents in some circumstances. Employers that are not E-Verify participants, however, cannot remotely verify Form I-9 documents after July 31, 2023, and are still required to re-examine past remote verifications under the new ICE rules. Lastly, ICE released a new Form I-9 on August 1, 2023, that all employers must use starting October 31, 2023.

What now?

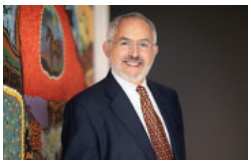
For E-Verify employers:

- Carefully review ICE regulations to ensure exemption from in-person Form I-9 document verification requirements for both past and future Form I-9s.

For non-E-Verify employers:

- Develop (or bring back) an in-person process for physically reviewing employee Form I-9 documents.
- Audit Form I-9s completed remotely during the pandemic.
- Develop a process to reinspect pandemic-era, remote Form I-9 supporting documents or evaluate the compliance risks of foregoing that reinspection.

Employment Team



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