WINSTON & STRAWN LLP

CLIENT ALERT

New Laws and Trends Affecting the Workplace in 2023

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Several important laws impacting employers have already taken effect this year, and several more could be finalized soon. Below is a summary of five key laws and trends employers should look out for in 2023.

1. Federal Speak Out Act Prohibits Certain Non-Disclosure and Non-Disparagement Provisions Regarding Sexual Harassment and Assault Claims

In line with a growing body of legislation relating to sexual harassment and assault claims, the Speak Out Act, signed into law by President Biden and already in effect as of December 7, 2022, prohibits employers from enforcing ***pre-dispute*** non-disclosure and non-disparagement clauses in cases involving sexual harassment or assault.

The law defines a non-disclosure clause as "a provision in a contract or agreement that requires the parties to the contract or agreement not to disclose or discuss conduct, the existence of a settlement involving conduct, or information covered by the terms and conditions of the contract or agreement." The law defines a non-disparagement clause as a "provision in a contract or agreement that requires 1 or more parties to the contract or agreement not to make a negative statement about another party that relates to the contract, agreement, claim, or case."

This law is not retroactive, and thus it does not impact the enforceability of non-disclosure or non-disparagement agreements in disputes filed prior December 7, 2022. And importantly, the law does not prohibit employers from using such provisions to protect trade secrets or other propriety information. Nor does this federal law alter the status quo in those states that have already passed similar (or more restrictive) laws allowing victims of sexual harassment and assault to publicly speak about their grievances. However, employers in states without such laws who utilize pre-dispute non-disclosure and/or non-disparagement agreements should revisit them, including by adding proper exceptions to comply with the requirements of the Speak Out Act. Moreover, while this law does not impact non-disclosure or non-disparagement clauses in separation or settlement agreements entered into after allegations of sexual harassment are made, employers should be aware that certain states also limit the use of such provisions in post-dispute agreements.

2. Pregnant Workers Fairness Act Ensures Reasonable Accommodation for Pregnant Workers

The Pregnant Workers Fairness Act ("PWFA"), enacted by Congress and expected to take effect on June 27, 2023, will require employers with 15 or more employees to provide temporary and reasonable accommodations to employees for conditions related to pregnancy or childbirth. The provisions of the PWFA, which are similar to the Americans with Disabilities Act, require only those accommodations that are reasonable, do not impact the essential functions of an employee's job, and do not pose an undue hardship on the employer. Furthermore, both laws require employers to engage in the interactive process.

More than half of all states already have laws requiring employers to accommodate employees with conditions resulting from pregnancy or childbirth. However, employers conducting business in states that lack such pregnancy-accommodation laws will need to make adjustments to their policies and their approaches to accommodating pregnant employees to ensure compliance with the federal PWFA, including by conducting an individualized assessment when faced with a pregnancy-related request for accommodation. What constitutes a "reasonable accommodation" will vary depending on the circumstances, including the employee's job, the nature of the employer's business, and the employer's resources. However, reasonable accommodations may include a remote-work arrangement, permission to take frequent breaks, or limitations in physical activity. The U.S. Equal Employment Opportunity Commission is expected to issue guidance with illustrations of the reasonable accommodations that can be provided to individuals covered by the PWFA.

3. New Rule for Independent Contractor Classification?

On October 13, 2022, the U.S. Department of Labor ("DOL") announced a proposed rule (the "Proposed IC Rule") that would impact the standard used to determine whether a worker is an employee or independent contractor. The proposed rule would rescind the "Independent Contractor Status Under the Fair Labor Standards Act" ("IC 2021 Rule"), which the DOL issued on January 7, 2021. The IC 2021 Rule identifies a five-factor inquiry to guide the analysis on worker classification and assigns more weight to certain factors than others. Specifically, it designates the nature and degree of control and the worker's opportunity for profit or loss as "core factors." This framework deviates from longstanding judicial interpretation of the Fair Labor Standards Act ("FLSA"). Courts interpreting the FLSA have historically used the "economic realities" test when analyzing questions of worker classification, which is much more flexible than the IC 2021 Rule. It allows for the consideration of multiple factors, does not assign more weight to any factor over another, and looks to the totality of the circumstances.

The Proposed IC Rule would, among other things: (a) align the DOL's approach with judicial interpretation of the FLSA and the "economic realities" test based on the "totality of the circumstances" and (b) rescind the IC 2021 Rule used to decide employee classification. The comment period closed on December 13, 2022, and employers should be on the lookout for the DOL's final rule. If finalized, the rule will provide more consistent guidance to employers on how to classify their workforce so as to avoid liability and will allow for more flexibility. Regardless of the ultimate formulation of the new rule, employers must still comply with state laws that provide a different or more stringent test for worker classification.

4. The End of Non-Compete Agreements?

On January 5, 2023, the Federal Trade Commission ("FTC") announced a proposed rule that would ban all non-competition agreements in employment contracts. The proposed rule applies to both employees and independent contractors in all industries. It not only prohibits employers from entering into non-competition agreements, but also requires them to rescind existing non-compete agreements and inform employees and former employees that such covenants are no longer in effect. Non-competition agreements, while widely used by employers across various industries to protect intellectual property, are criticized for chilling competition, preventing employees from advocating for themselves, and forcing employees to accept low pay and other unfavorable work conditions. Some states, such as California, have already banned or limited the use of such agreements, while other states, like Illinois,

have taken steps in recent years to curb restrictive covenants in various ways. Even if the FTC's proposed rule is not ultimately implemented, it may inspire additional efforts by federal and state governments to limit the use of restrictive covenants. If implemented as proposed, the rule will make it important for employers to protect intellectual property, trade secrets, and confidential information using other mechanisms, including non-solicitation agreements and confidentiality agreements.

Expectedly, the proposal has elicited strong opposition from employers, some of whom are taking the position that the FTC may not have the authority to impose such a rule. The FTC initiated a 60-day comment period (which ends on March 10, 2023), and invited members of the public to submit their thoughts on the proposal. At the close of the comment period, the FTC is expected to review the submissions and make changes in line with the feedback received. The full text of the proposed rule can be found here.

5. Trending Now: Salary and Pay Transparency Laws

In a continuing trend that began a number of years ago, several states and local jurisdictions have recently enacted or are considering enacting salary and pay transparency laws. While these laws have some variations, they generally require employers to provide job candidates and employees with position-specific salary information and pay ranges. These laws differ regarding at what point in the hiring process the employer must provide salary information, whether the candidate or employee must ask for salary information in order to be entitled to receive it, whether the law applies to independent contractors, and through what medium salary information needs to be communicated to candidates and employees. Some of these laws go beyond salary disclosure and include pay-reporting obligations, requirements to pay workers equitably, and document-retention duties.

Despite these nuances, these laws collectively demonstrate the growing legislative trend of requiring greater transparency in pay, all with an eye toward promoting pay equity. Our prior briefing on pay transparency laws can be found here. Since that publication, New York State and Rhode Island have joined the list of jurisdictions with pay transparency laws. Employers in jurisdictions with salary and pay transparency laws should consult legal counsel to develop a plan for ensuring compliance with those laws applicable to them.

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