Employer Update

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Employment Law Trends Assessment: 2023 Edition

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As we look back on 2022 and ahead into 2023, the employment law space has been marked by significant changes in many different areas including restrictive covenants, independent contractor classification, non-disclosure and non-disparagement restrictions, enhanced state anti-discrimination protections, pay transparency, California-specific wage and hour issues, and post-pandemic return to office considerations. In this special edition of the *Employer Update*, we will review these developments and discuss our latest thinking and practice pointers regarding what we expect to see in the coming year.

In This Issue

Federal and State Legislative and Regulatory Developments in Restrictive Covenant Law

By Elizabeth J. Casey

In 2022, there were significant developments in the restrictive covenant space, and the beginning of 2023 has already been no different. In 2022, many state and local governments continued to impose limits on the use of restrictive covenants, specifically non-competition provisions. To ring in the year 2023, at the federal level, after President Biden previously signed a July 2021 executive order that encouraged the Federal Trade Commission (FTC) to "curtail the unfair use of non-compete clauses," the FTC proposed a new rule which, if promulgated, would prohibit non-compete agreements between employers and employees, as well as related agreements that function as "de facto" non-compete clauses, such as overbroad non-solicitation and non-disclosure provisions. The proposed rule would apply to independent contractors, employees and unpaid interns and would make it illegal for an employer to enter into, attempt to enter into, or to maintain a non-compete agreement with a worker or to represent to a worker that they are subject to such a provision. It would also place some fairly stringent limits on the use of non-competes in the sale of business context. The FTC, citing a preliminary finding that non-competition agreements constitute an unfair method of competition and therefore violate Section 5 of the Federal Trade Commission Act, is currently seeking public comment on the proposed rule. Please read our Weil Alert for further information and analysis on the proposed rule.

On the state level, several restrictive covenant laws that were enacted in 2021 took effect in 2022, including:

- The **District of Columbia's** revised non-compete law, the Non-Compete Clarification Amendment Act of 2022 went into effect on October 1, 2022. The amended law makes it unlawful to enter into non-compete agreements (outside the sale of business context) with employees who do not meet a certain compensation threshold (currently, for most employees, $150,000), which threshold will increase annually beginning in 2024. Employers must also provide job applicants and employees with statutory notice and a copy of the agreement 14 days before execution or commencing employment. Agreements that violate the law are void and unenforceable, and employers may be subject to civil and administrative penalties. D.C.'s law also requires employers to provide timely notice to all employees (not just highly compensated individuals) of workplace policies that fall within one of the exceptions to the definition of a non-compete provision, *i.e.*, non-disclosure, anti-moonlighting, etc. Please refer to our prior *Employer Update* article for further discussion regarding D.C.'s law.
- **Colorado's** restrictive covenant law, Colorado House Bill 22-1317, which took effect on August 10, 2022, forbids non-competition and customer non-solicitation agreements with employees who are not "highly compensated" if the agreements are not signed in connection with the sale of a business. An employee must meet the earning threshold both at the time the covenant is entered into, and at the time the employer seeks to enforce the covenant. The law also requires employers to notify job applicants of the covenants (this needs to be done in a separate document, so yet another administrative burden to keep in mind) and provide a copy of the agreement 14 days before (i) the applicant accepts the offer of employment, or (ii) for current employees, the earlier of the effective date of the agreement or the date the consideration for the agreement is provided. Significantly, the law mandates that Colorado law govern all such agreements with workers who primarily reside or work in Colorado at the time of the termination of their employment. Failure to comply with the law's requirements will void the restrictive covenants, and subject employers to actual damages as well civil and potentially criminal penalties.

- **Illinois'** amendments to Illinois' Freedom to Work Act went into effect on January 1, 2022. The amendments impose a host of new conditions for restrictive covenant agreements entered into on or after January 1, 2022, including (1) requiring a 14-day consideration period for a non-compete, (2) mandating that employees be affirmatively advised to consult with an attorney prior to signing a non-compete, (3) prohibiting employers from entering into non-competes with employees earning less than $75,000 annually or non-solicits with employees earning less than $45,000 annually, with these thresholds increasing incrementally every five years until 2037.
- **Oregon's** amendments to Oregon's non-compete statute also went into effect on January 1, 2022. Under the amended law, non-competition agreements entered into on or after January 1, 2022 cannot exceed 12 months in duration post-employment. The amended law also prohibits employers from entering into non-competes with employees earning less than $100,533 in gross salary and commissions annually (adjusted yearly for inflation) or non-exempt workers unless the employer agrees in writing to pay the employee at least the greater of (i) 50% of the employee's gross salary and commissions or (ii) 50% of $100,533 (adjusted yearly for inflation).

As we discussed in a prior *Employer Update* article, other states also have introduced legislation to curtail the use of restrictive covenants that are making their way through the legislative process, including New Jersey's Assembly Bill 3715. Among other restrictions, the proposed New Jersey bill would ban non-competes for low wage workers and cap the length of all post-employment restrictive covenants to 12 months. Perhaps most notably, the bill would require an employer to pay an employee 100% of their compensation during the restricted period – essentially mandating garden leave.

Given these significant developments at the federal and state level, we recommend that employers audit their existing restrictive covenants agreements to ensure that they comply with the many state laws requirements (particularly low wage thresholds, temporal scope and notice) and are properly tied to the protection of legitimate company interests (*i.e.*, confidential information, trade secrets and customer goodwill).

Developments in Federal Wage and Hour Regulation

By Nicole J. Jibrine

On February 22, 2023, the U.S. Supreme Court, in a closely watched case that may have significant implications for employers which utilize the "highly compensated executive" exemption to avoid paying overtime to certain employees, held in *Helix Energy Solutions Group, Inc. v. Hewitt*, No. 21-984, slip. op. (Feb. 22, 2023) that an employee paid a "daily rate" was not exempt from overtime under the Fair Labor Standards Act (FLSA), notwithstanding otherwise meeting the salary level threshold of a "highly compensated employee" and satisfying the "duties test" under the FLSA. In *Helix*, the issue was "whether a high-earning employee is compensated on a 'salary basis' when his paycheck is based solely on a daily rate." *Helix*, slip. op. at 1. Notably, the employee earned approximately $200,000 per year, which is well above the compensation threshold of a "highly compensated employee" under the FLSA. *Id.* at 3, 5. His paycheck was based on his daily rate multiplied by the number of days worked in a pay period. *Id.* at 5. The Supreme Court analyzed his compensation under the FLSA's general salary-basis test set forth in 29 C.F.R. § 541.602(a), which requires an employee to receive a predetermined and fixed salary irrespective of when the employee works in a given week. *Id.* at 8-9. Because the employee was paid "for each day he work[ed] and no others," the employee did not meet the FLSA's "salary basis" test under 29 C.F.R. § 541.602(a) and was entitled to overtime under the FLSA. *Id.* at 1, 9. The Court stressed that the "[e]mployees [] are not deprived of the benefits of [overtime compensation] simply because they are well paid." *Id.* at 2 (internal cites omitted). The Supreme Court's decision affirmed the U.S. Court of Appeals for the Fifth Circuit's *en banc* ruling.

In light of this ruling, employers in industries that pay traditionally high earners on a daily rate basis should review their pay practices to assess and mitigate any risk of unpaid overtime. In addition, employers should be mindful of the implications that this ruling may have on independent contractor misclassification, particularly for high earning individual, independent contractors. Paying an independent contractor on a daily rate basis may subject an employer to FLSA overtime exposure in an independent contractor misclassification claim.

On October 13, 2022, the Department of Labor (DOL) published a proposed rule to revise the analysis for worker classification under the FLSA. This proposed rule reverts largely to the DOL's position prior to the 2021 modified "economic reality" test adopted by the Trump Administration's DOL. The proposed rule intends to realign the DOL's approach with judicial precedent regarding the "economic reality" test and restore a multifactor, totality-of-the-circumstances analysis without any factors having a predetermined weight. Employee or Independent Contractor Classification Under the FLSA, 87 Fed. Reg., 62218, 62218-20 (Oct. 13, 2022) (to be codified 29 CFR Parts 780, 788, and 795). The proposed rule highlights six factors to evaluate the economic realities of the working relationship:

- opportunity for profit and loss depending on managerial skill;
- investments by the worker and the employer;
- degree of permanence of the work relationship;
- the nature and degree of control;
- the extent to which the work performed is an integral part of the employer's business; and
- skill and initiative of workers.

Id. at 62219. The DOL notes that additional factors may be relevant to the analysis. *Id.* at 62257. The DOL permitted interested parties to submit comments on the proposed rule through December 13, 2022.

The proposed rule is the DOL's latest effort to overturn the Trump Administration's DOL rule that had relaxed the federal standard by prescribing two "core factors" as primary indicators of worker classification: (1) the nature and degree of the worker's control over work; and (2) the worker's potential for profit or loss. In January 2021, the Biden Administration issued a memorandum to block the modified "economic reality" test from taking effect and, on May 6, 2021, the DOL issued a final rule to withdraw it. The withdrawal was subsequently challenged, and a district court in Texas vacated the withdrawal. The DOL appealed to the Fifth Circuit, but later abandoned the appeal so that the agency could engage in the current rule-making process.

During the 2020 presidential campaign, the Biden Administration had also signaled plans to mirror California's AB5 legislation by establishing the "ABC" test as the federal standard for worker classification. The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions. The "ABC" test has more stringent requirements to classify workers as employees than the "economic reality" test. But the DOL explained it would not seek to adopt the "ABC" test as the federal standard at this time because it is inconsistent with current U.S. Supreme Court precedent interpreting the FLSA. *See* Employee or Independent Contractor Classification Under the FLSA 87 Fed. Reg., at 62231.

While the proposed rule is not yet final, employers should consider the impact of the proposed rule on their classification determinations, and continue to keep in mind various states' laws with more stringent or otherwise different tests for determining employee versus independent contractor status, including California, Massachusetts and New Jersey.

State and Local Pay Transparency Laws Proliferate

By Brett Bonfanti

Beginning in 2017, state and local jurisdictions began enacting legislation aimed at closing what the legislatures considered historical wage gaps based on race and gender. Initially, such legislation generally prohibited employers from asking job applicants about their pay history. More than 25 states now have some

form of a prohibition on inquiring into candidates' pay history in the hiring process. In 2021, Colorado went a step further by requiring employers to disclose in job postings the pay range and a general description of all other compensation and benefits employers would offer to hired applicants. In 2022, a number of state and local governments followed Colorado's lead by enacting similar legislation.

New York City (effective November 1, 2022), California (effective January 1, 2023), Washington (effective January 1, 2023), and New York State (scheduled to be effective September 17, 2023) enacted statutes that require job postings for most employers to include the pay range that the employers expect to pay the hired applicant. The pay ranges in New York City and New York State must be identified in "good faith," and those in California and Washington must be ranges the employer "reasonably" expects to offer. The pay range requirements apply to postings that could be performed, at least in part, within each jurisdiction, including remote workers. The laws also apply to postings by third-party staffing agencies and have their own recordkeeping requirements concerning compensation for each job position.

These laws also differ in some respects as to the required content of the job postings. For instance, the Washington law requires employers to include a "general description" of benefits and other compensation (including healthcare benefits, paid time off, bonuses, stock options, and commissions) to be offered to the hired applicant. The New York City, New York State, and California laws require disclosure only of the pay range for the offered position. In addition to a pay range, the New York State law requires that job postings include a job description, if one exists.

Rhode Island (effective January 1, 2023) is also joining the pay transparency trend, requiring employers to provide a pay range for a given position at the time of hire and at the request of an applicant or current employee. The Rhode Island statute also forbids employers from inquiring into a job applicant's pay history or considering pay history when setting wages. Employers may, however, consider an applicant's pay history after an offer of employment is made if the applicant voluntarily discloses the applicant's pay history and the information is used for the purpose of increasing the offered wage.

The pay transparency trend is likely to continue into 2023. Massachusetts and South Carolina already have pending pay transparency legislation. Both bills would require certain employers to provide a pay range for a given position to an applicant or to an employee currently holding the position upon the request of the applicant or employee. The South Carolina bill also would prohibit South Carolina employers from inquiring into an applicant's pay history, which is already unlawful in Massachusetts.

Employers must be mindful of the changing landscape concerning pay transparency laws when engaging in employee recruitment. They should consider training recruiters and other employees involved in the hiring process on the "dos" and "don'ts" of these statutes, especially any bans on inquiring into salary history. Questions gauging a candidate's pay requirements like "[w]hat are your compensation expectations?" are likely permissible. Recruiters and hiring managers at multi-state companies or companies that hire remote workers will need to be thoughtful about whether a job could be performed in a jurisdiction that requires a salary range disclosure before posting. And employers should be equally thoughtful in generating required pay range disclosures so that they can defend such ranges as being made in "good faith" or "reasonable." They may consider market pay research or considering internal comparators as helpful techniques for generating pay ranges that not only would satisfy legal requirements, but provide an attractive offer for potential candidates.

State Laws Extending Discrimination Protections to New Classes of Employees

By Sahar Merchant

In 2022, a number of states enacted equal employment opportunity legislation, extending protections even further beyond the baselines set by

federal law. Most notably, many cities and states have focused on prohibiting discrimination on the basis of hairstyle and hair texture, criminal background, marijuana use, and caste. These new areas of discrimination protection present fresh challenges for employers in terms of compliance.

Hair Discrimination

In 2019, California became the first state to ban hair discrimination by passing the Create a Respectful and Open Workplace for Natural Hair (CROWN) Act, which outlaws policies that prohibit natural, textured, or cultured hair or hairstyles typically associated with Black individuals in the workplace. Since 2019, similar laws have passed in Colorado, Connecticut, Delaware, Maine, Maryland, Nebraska, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Virginia, Washington, and 44 municipalities, which generally prevent employers from taking adverse actions against employees or applicants based on hairstyles or hair texture associated with a certain race. In July 2022, Illinois, Tennessee, Massachusetts, and Louisiana became the latest states to enact CROWN Acts, expanding the states' definitions of race-based discrimination to similarly cover certain hairstyles and hair textures associated with a certain race. Some examples of protected hairstyles and hair texture identified in these laws include afros, dreadlocks, twists, locs, braids, cornrows, Bantu knots and other hair styled to protect texture or for cultural significance. Many state laws still allow hair restrictions for legitimate non-discriminatory reasons, such as health and safety. While a federal version of the CROWN Act has been stalled in the Senate, there is EEOC guidance and some case law suggesting that hair based discrimination can constitute unlawful race discrimination under Title VII. *See Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 538 F.2d 164 (7th Cir. 1976).

Employers should review their dress code, grooming and antidiscrimination policies to ensure they comply with state laws, and should train employees in managing roles not to consider appearance of hairstyles or texture historically associated with race in any employment related decisions. If an employer has a legitimate non-discriminatory reason relating to hair requirements (such as concerns relating to health and safety), the employer may want to also consider alternatives to requiring certain hair styles, such as the use of hair nets or other protective equipment.

Criminal History Discrimination

Nearly two-thirds of states have "ban-the-box" laws, which prohibit initial job applications from inquiring into an applicants' criminal background, and many other states prohibit consideration of convictions that have been sealed or expunged, juvenile records, and arrests. The policy consideration upon which most of these laws is based is to "end the cycle" – meaning, that if individuals with criminal backgrounds are denied opportunities to gain and hold good jobs then, just to provide for themselves or their families, they may be more likely to return to activity that could have criminal implications. California, Hawaii, Illinois, New York, Pennsylvania, Washington D.C., and Wisconsin all have laws that restrict the ability for private employers to make employment decisions based on criminal convictions. In 2022, Colorado and Atlanta joined these states by enacting laws providing employment discrimination protections for individuals with criminal records. Colorado HB 1383 prohibits employers from making employment determinations concerning an applicant whose criminal offense has been sealed, expunged, or if the criminal offense occurred in a juvenile proceeding. The city of Atlanta adopted an ordinance that prevents employers from discriminating against individuals for any terms of employment based on criminal history. However, the Atlanta ordinance allows an adverse employment decision based on criminal history if the criminal history is related to the responsibilities of the job based on (1) whether the person committed the offense; (2) the nature and gravity of the offense; (3) the amount of time since the offense; and (4) the nature of the job.

Employers should review their policies and procedures related to employment determinations to ensure that criminal history is considered only where an offense may be related to the responsibilities of a job. In jurisdictions that require consideration of multiple factors before rendering a determination on

whether a criminal history would impact an applicant's fitness for a particular job, employers should take steps to document the legitimacy and bona fide nature of any such evaluation, preempting allegations that such process was merely perfunctory.

Marijuana Use Discrimination

In recent years, a significant number of states have enacted discrimination protections for employees who medicinally use marijuana off-duty and off the employer's premises. In 2022, Louisiana, Missouri, and Utah joined that trend.

Additionally, in recent years, six states (New Jersey, New York, Connecticut, Nevada, Rhode Island, and Montana) have enacted laws that prohibit employment discrimination against legal recreational marijuana. Please refer to a previous Weil article for more details. In 2022, California, Rhode Island, and Missouri were the latest states to ban discrimination against employees or applicants for off the job recreational marijuana use. Employers in these states will still have to follow federal drug testing requirements for certain occupations (such as safety-sensitive transportation industries). However, while employers may restrict consumption or possession or marijuana in the workplace and may discipline employees who are under the influence at work, employers may face arguments from employees that because current drug testing is unable to identify current intoxication, employers cannot rely exclusively on the results of a positive drug test in disciplining employees.

While employers may have arguments that these state laws are preempted by the federal Controlled Substances Act, and can remind employees of restrictions on possession of and impairment by marijuana in the workplace, they would be well advised to nevertheless re-evaluate their marijuana testing policies. Employers should also consider collecting additional documentation, such as visual indicia of impairment, to supplement a positive drug test as evidence of workplace intoxication. Employers may want to also consider training and certifying certain employees as impairment recognition experts to further enhance the record that any discipline is for workplace intoxication and not protected off-duty use.

Caste Discrimination

In February 2023, Seattle became the first U.S. jurisdiction to ban discrimination based on caste. According to the statute, caste is "a system of rigid social stratification characterized by hereditary status, endogamy, and social barriers sanctioned by custom, law, or religion." The Seattle law specifically cites a study which found that in the U.S. "two in three [caste-oppressed people] face workplace discrimination." While Seattle is the first jurisdiction to prohibit discrimination on the basis of caste, universities such as Brandeis University and California State University have added caste as a protected category in their anti-discrimination policies. More jurisdictions may be banning caste discrimination in the future, either through legislation, or through expansive interpretations of current anti-discrimination laws. For example, in October 2022, the California Department of Fair Employment and Housing won an appeals court ruling to proceed with a lawsuit where an employee alleged he was denied a promotion due to caste discrimination in violation of California's Fair Employment and Housing Act's prohibition on race and ancestry discrimination. *See Dep't of Fair Emp. & Hous. v. Cisco Sys.*, 82 Cal. App. 5th 93 (2022). This is also an area in which the Equal Employment Opportunity Commission may seek to regulate through guidance or other interpretive policy statements.

Employers should monitor legislative and judicial developments in the jurisdictions in which they operate to update their antidiscrimination policies, procedures, and trainings to account for potential discrimination on the basis of caste.

Two Court Decisions Set Noteworthy Wage and Hour Precedent for California Employers

By Heylee Bernstein

In 2022, California employers saw two important court decisions that will impact their operations in both the wage and hour and arbitration spaces. As California employers are well aware, employers which fail to properly provide even modest wages can invite immense additional liability for derivative violations. For example, California Labor Code § 203 assesses penalties against employers which willfully fail to pay wages due to employees at the end of their employment. This "waiting time" penalty is calculated by multiplying the number of days that the employee was not paid their final wages by their daily wage rate, up to a maximum of 30 days. Separately, California Labor Code § 226 assesses penalties upon employers who fail to provide accurate wage statements. Further, the California Labor Code's Private Attorneys General Act (PAGA) imposes additional penalties for missed meal and rest break premiums, waiting time penalties, and inaccurate wage statements.

In *Naranjo v. Spectrum Sec. Servs., Inc.*, 509 P.3d 956 (2022), the employer failed to provide a class of employees their statutorily required meal breaks. California employees are entitled to a meal break of at least 30 minutes for each work period of more than 5 hours. Employees who are denied meal breaks are entitled to an additional hour of pay at their regular rate for each workday the meal is not provided, referred to as "premium pay." And, as was the issue in *Naranjo*, due to the fact that California's Labor Code imposes multiple penalties for single wage violations as explained above, if this missed-break premium pay constitutes "wages," then an employer's failure to provide premium pay introduces the possibility of waiting time and inaccurate wage statement penalties.

The *Naranjo* court reasoned that while missed-break premium pay was certainly a statutory remedy for a legal violation, it was also wages, because employees became entitled to missed-break premium pay solely by virtue of their being required to work through their break. *Naranjo*, 509 P.3d at 961-62. The Court concluded that, just as with other forms of wages, when an employer willfully fails to comply with its obligation to timely pay missed-break premium pay once an employee leaves the job, the employer is subject to waiting time penalties. *Id.* at 964. The Court further found that employers' obligations under § 226 to report wages earned includes an obligation to report missed-break premium pay and applied the seven percent rate of prejudgment interest for actions brought for the non-provision of meal periods. *Id.* at 972-73.

Through its ruling in *Naranjo*, the California Supreme Court raises the stakes for California employers by conclusively exposing them to derivative liability for even modest meal and rest break violations. California employers should take care to abide by meal and rest break requirements, timely pay any and all missed-break premium pay due at the end of employment, and properly report such pay to avoid penalties.

The second decision, *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022), is a U.S. Supreme Court decision regarding Private Attorneys General Act's (PAGA) reach. In essence, PAGA is a qui-tam like statute that enlists employees to act as private attorneys general to enforce California labor law. PAGA authorizes any aggrieved employee to bring an action against an employer on behalf of themselves, as well as any other current or former employees. PAGA suits are representative, rather than class, actions, meaning the employee-plaintiff acts on behalf of the state.

Prior to *Viking*, California employers operated under the precedent established in *Iskanian v. CLA Transp. Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014). *Iskanian* prohibited arbitration agreements from (1) waiving employees' PAGA claims wholesale, as well as (2) disaggregating employees' PAGA actions into individual and non-individual – meaning claims brought on behalf of the employee, and claims brought on behalf of other employees – claims. *Iskanian*, 327 P.3d at 148-49. *Iskanian* presented employers with a unique area of risk, in that they

could not utilize arbitration agreements and corresponding class action waivers to mitigate their risks of PAGA claims, as they could with regard to class or FLSA collective actions.

The Supreme Court reasoned that while PAGA actions deviate from traditional bilateral arbitration in that they involve employees arbitrating on behalf of an absent principal, the state, single-agent, single-principal representative suits are common throughout much of substantive law. *Viking*, 142 S. Ct. at 1921-22. Drawing from examples such as shareholder-derivative actions, the Supreme Court concluded that the FAA does not categorically require that waivers of representative capacity claims be enforced. *Id.* at 1922. Therefore, the Supreme Court found that the FAA did not preempt *Iskanian's* first holding. *Id.* at 1923.

On the other hand, *Iskanian's* second holding forces employers into arbitrating not only a single employees' claims, but all joined claims, such that employers utilizing arbitration agreements are forced to assume more risk and more claims than they consented to under the employee's arbitration agreement. *Id.* at 1923-24. In this way, PAGA's joinder rule coerces parties into opting for a judicial forum, and is therefore preempted by the FAA. *Id.* at 1924. Finally, the Court found that PAGA has no mechanism through which an individual can adjudicate non-individual claims if their own claims are subject to arbitration. *Id.* at 1925. Therefore, if an individual's own claims are subject to arbitration, the individual would not have standing to litigate the non-individual joined claims.

As it stands, *Viking* allows California employers' arbitration agreements and class action waivers to offer more protection to employers than they previously did. But California employers should be wary of the longevity of the *Viking* decision. As Justice Sotomayer signaled in her concurrence, the California legislature may amend PAGA to confer standing on employees bringing non-individual claims, even if their own claims are subject to arbitration.

Heading into 2023, California employers should be aware that courts which had deferred decisions on matters relating to arbitration have begun issuing decisions following *Viking*. For example, in *Chamber of Commerce of the U.S., et al. v. Bonta, et al.*, No. 20-15291, 2023 WL 2013326, (9th Cir. Feb. 15, 2023), a Ninth Circuit panel re-heard a challenge to a district court's granting of a preliminary injunction prohibiting California officials from enforcing Assembly Bill (AB) 51. AB 51 made it a criminal offense for employers to require existing employees or applicants for employment to consent to arbitrate specified claims as a condition of employment. But, in order to avoid conflict with Supreme Court precedent which holds that a state rule that discriminates against arbitration is preempted by the FAA, AB 51 criminalized only contract *formation*, and did not speak on arbitration agreements actually executed in violation of AB 51. Id. at *2.

The Ninth Circuit panel affirmed the district court's finding that AB 51 was preempted by the FAA. The panel noted that California law allows employers to enter into employment contracts that include non-negotiable terms as a condition of employment generally, but AB 51 prohibits employers from entering in employment contracts with non-negotiable terms *essential to an arbitration agreement*. *Id.* at *10. In this way, AB 51 treated arbitration provisions as an exception to generally applicable law. *Id.* Additionally, the panel reasoned that AB 51 "deters an employer from including non-negotiable arbitration requirements in employment contracts by imposing civil and criminal sanctions on any employer who does so," and that such sanctions "inhibit [employers'] willingness to create an arbitration contract with employees." *Id.* at *9. The panel concluded that that because the FAA preempts a state rule that discriminates against arbitration by discouraging or prohibiting the formation of an arbitration agreement, the FAA preempts AB 51. *Id.* at *9, *13.

At this stage, AB 51 remains subject to a preliminary injunction, and California officials may not enforce the law. In practice, this means that employers may require employees to enter into arbitration agreements as a condition of employment. Still, as was the case in 2022, mandatory arbitration agreements seem poised to remain a target for the

California legislature in an ever-changing area for employers to keep their eyes on in 2023.

Employers Adapt to Hybrid Workforces

By Lauren Kelly

In the wake of the COVID-19 pandemic, many employers are now operating with hybrid workforces, with some employees working at an office, some employees working remotely, and other employees spending time doing both. This new reality creates concerns that employers should keep top of mind.

First, this shift requires many employers to develop more robust policies and practices to ensure compliance with the applicable employment laws across every state where its employees are located. Notably, employers may be obligated to comply with certain state laws by employing just one individual located in the state. For example, under Oregon law, every employer in the state must adopt a written policy containing procedures and practices for the reduction and prevention of discrimination. Or. Rev. Stat. § 659A.375 (2023). Further, employees in certain states may be entitled to certain benefits, even if the employer does not otherwise operate in the state. For instance, employers with any employees located in California should be mindful that any employee located in California is entitled to payment for any vested but unused vacation time upon termination, subject to certain exceptions. Cal. Lab. Code § 227.3.

This same concept applies to employers' restrictive covenant practices: employers need to be cognizant of *where* employees physically sign and perform the services considered by restrictive covenant agreements. For example, employers who enter into non-compete agreements with individuals located in Colorado may face certain penalties under Colorado law, even if the employer is not located in Colorado. Colo. Rev. Stat. § 8-2-113 (2022). Additionally, employers should consider whether individuals who move to other states and continue working for the employer remotely can continue to be bound by pre-existing restrictive covenants. For example, a non-compete signed in New York by an employee who subsequently moves to California, Oklahoma or North Dakota will likely be subject to challenge. Cal. Bus. & Prof. Code §§ 16601-07. Ultimately, employers should ensure their personnel records are kept up to date, including for remote workers, by taking measures such as requiring employees to periodically confirm their physical work locations.

With respect to those employees who are returning to work in the office, many employers have established policies requiring employees to be vaccinated against COVID-19. Employers with such policies should be mindful of certain federal and state laws that limit employers' ability to fully enforce such vaccination requirements. For example, states such as Arizona, Florida, Utah, Tennessee, and Texas require certain exemptions to private employers' vaccine mandates. S. 1824, 55th Leg., 1st Reg. Sess. (Ariz. 2021); H.R. 1B, 2021 Leg. (Fla. 2021); H.R. 63, 2022 Leg., Gen. Sess. (Utah 2022); S. 1823, 2022 Leg. (Tenn. 2022); Exec. Order GA-40 (Tex. 2021). Employers operating in such states should consider including a statement within their applicable vaccination policies stating that it is willing to make reasonable accommodations and/or exceptions to its policy for employees with a disability, a sincerely held religious belief, practice, or observance, or as otherwise required under federal, state, and/or local law.

2022 Developments in Non-Disclosure and Confidentiality Provisions

By Kate Belsito

The #MeToo movement has been a catalyst for legislative action related to employee protections in agreements containing non-disclosure, confidentiality, and non-disparagement provisions, and recent legislative developments show how that movement is evolving. On December 7, 2022, President Biden signed the Speak Out Act, making nondisclosure or non-disparagement clauses, agreed to before a sexual assault or sexual harassment dispute arises,

unenforceable where the conduct alleged has violated Federal, Tribal, or State law. While the Speak Out Act and many existing state laws protect victims of sexual harassment or sexual assault, several states, as described below, have recently expanded their non-disclosure and non-disparagement laws to address all forms of discrimination and harassment.

Effective January 1, 2023, Senate Bill 1586 amended Oregon's Workplace Fairness Act. The Act prohibits separation agreement provisions that prevent employees from disclosing work-related discrimination, harassment, or sexual assault, unless the employee requests it. Among other things, the amendments make clear that an employer cannot include a provision that prevents current, former, or prospective employees from disclosing the amount or fact of any settlement, unless the individual requests it, nor may employers condition settlement on the individual's request to include such a provision. However, non-disclosure and non-disparagement provisions unrelated to discrimination, harassment, and sexual assault remain enforceable.

Washington's Silenced No More Act went into effect on June 9, 2022, and renders unenforceable all nondisclosure and non-disparagement provisions that prohibit disclosure of conduct or the existence of a settlement involving conduct that the individual reasonably believes to be illegal discrimination, harassment, retaliation, a wage/hour violation, or sexual assault. The Act applies to current, former, or prospective employees or independent contractors. Provisions prohibiting disclosure of a settlement amount, trade secrets, proprietary information, or confidential information that does not involve illegal acts remain enforceable. Importantly, Washington's law applies retroactively to existing agreements and invalidates nondisclosure or non-disparagement provisions in agreements created before the effective date. However, agreements to settle legal claims entered into before June 9, 2022 are exempt from the law's retroactive effect. While existing nondisclosure and non-disparagement provisions will be ultimately unenforceable, employees cannot recover damages for non-compliant provisions entered into before the law's effective date unless the employer attempts to enforce them.

Maine's Act Concerning Nondisclosure Agreements in Employment, which became effective August 8, 2022, bans pre-employment and employment agreement provisions that prohibit an employee, intern, or applicant from waiving or limiting any right to report or discuss unlawful employment discrimination occurring in the workplace or at work-related events. Settlement, separation, and severance agreement provisions preventing subsequent disclosure of factual information relating to a claim of unlawful employment discrimination are enforceable only if the agreement states that the individual retains the right to report, testify, or provide evidence to federal and state agencies enforcing employment or discrimination laws and to testify in federal and state court proceedings.

New York Senate Bill S738, which passed the Senate in March 2022, would, if signed into law, invalidate any releases of claims of discrimination, harassment, or retaliation where (1) the employee, potential employee, or independent contractor is required to pay liquidated damages, or is required to forfeit all or part of the separation/settlement payment, if they violate the agreement's confidentiality or non-disparagement provisions; or (2) the agreement contains an affirmative statement, assertion, or disclaimer that the employee was not subjected to discrimination, harassment, or retaliation. Agreements must state that nothing precludes the employee from speaking with the New York Attorney General, law enforcement, the EEOC, the state or local commission of human rights, or an attorney.

While none of the above laws, if violated, would render an entire separation agreement void and unenforceable, violation of Oregon, Washington, and Maine's laws carry civil penalties ranging from $1,000 to $10,000; Washington's and Oregon's laws provide for private rights of action; and, of course, any non-compliant provisions entered into after each law's effective date (or, in Washington's case, all non-compliant provisions) will themselves be unenforceable. Employers should therefore review their existing form separation agreements to ensure

any new agreements entered into are in compliance with the above laws and continue to monitor state and federal developments in this area.

In addition to monitoring new developments, employers should also remain cognizant of those laws already on the books in this area, such as New York State's confidentiality preference requirement, which prohibits confidentiality and nondisclosure provisions in any settlement, agreement or other resolution of any claim involving discrimination unless such a provision is the employee's preference and all parties sign a separate agreement memorializing that preference; California's Silenced No More Act, which prohibits provisions in separation agreements that restrict the disclosure of information about unlawful acts in the workplace and requires specific carve-out language to be included in any non-disparagement, confidentiality, separation, or other employment-related agreement that restricts an employee's ability to disclose information related to workplace conditions; and New Jersey's law deeming a provision in any employment contract or settlement agreement which requires the concealment of details relating to a claim of discrimination, retaliation, or harassment void as against public policy. The legislative trend is clear, as more states promulgate broader non-disclosure and confidentiality provision protections for employees; employers should remain sensitive to this developing area and reform their form agreements accordingly.

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