

# Employment Laws Shaping 2023

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2023 is in full swing. While everyone is abuzz about ChatGPT taking over the world, a newly divided Congress is finding its sea legs and state capitols are eyeing new regulations. Agencies and courts have taken up hot-button labor and employment matters, from noncompetes to biometric privacy. And not to be left out, the NLRB and the FTC have taken aim at employment contracts and severance agreements.

**What will this all mean for employers?** There are challenges for sure, but with planning they are manageable. We take a look at the top trends that will shape labor and employment law in the months to come.

## DISCRIMINATION AND EEO ISSUES

### More enforcement

Given trends from last year and public messaging from top enforcers, we anticipate an increase in harassment and discrimination litigation, particularly for class-based claims.

In its recently released 2022 Financial Report, the EEO signaled its plan to strengthen enforcement around systemic discrimination. The Agency heralded several victories including obtaining \$29.7 million in monetary benefits for victims and collecting over \$28 million in damages from 10 lawsuits asserting systemic discrimination last year. Enforcers also recovered a combined \$403 million from the Agency's top 10 settlements of 2022 (nearly doubling rates from the previous year). Highlights include an \$18 million settlement with Activision Blizzard over sexual harassment and pregnancy-bias claims and \$8 million from Circle K stores over disability and pregnancy discrimination issues.

Even more, the EEOC's enforcement hike has considerable support from the White House. The President's proposed budget requests \$481 million for the EEOC – a 5.7% increase over its 2023 allocations. While this money is unlikely to materialize in full, it does underscore the growing political support for anti-discrimination and harassment enforcement.

For its part, the workplace plaintiffs' bar is also seeing historic scores. Last year, plaintiffs won nearly \$2 billion combined and saw higher rates of success certifying classes in employment bias, benefits, and wage and hour cases. Top settlements included \$597 million from Sterling Jewelers for sex bias claims; \$118 million from Google in a pay discrimination dispute; and \$185 million between the MLB and minor league players for violations of state and federal wage laws.

### Expanded protections

The list of protected classes is growing – quickly. New York added discrimination based on citizenship or immigration status to its prohibitions while Illinois amended its anti-discrimination laws to include

“work authorization status.” Seattle passed a first-of-its kind law banning “caste” discrimination while California joined New York in adopting protections based on an employee’s “reproductive health decision making” and off-duty cannabis use. CROWN Act legislation, which prohibits discrimination based on hairstyle and hair texture, is also making its way through the states. The Illinois version became effective most recently, on January 1, when the state joined California, New York, New Jersey, Washington D.C., and several other jurisdictions that have based similar bans. Because these classifications are jurisdiction specific, employers have an added burden of keeping up with numerous changing state and local laws to ensure compliance.

Pregnancy protections are also ramping up. In late December, the Protections for Nursing Mothers (PUMP) Act took effect, expanding protections for nursing employees under the FLSA. The new law covers both exempt and non-exempt employees, expanding its reach to nearly 9 million more employees, including teachers and nurses. Even more, the federal Pregnancy Workers Fairness Act will take effect this June, requiring employers to provide reasonable accommodations for workers with known limitations connected to pregnancy, childbirth, or related medical conditions.

### **Practical considerations for employers**

Watch out for these “hot” areas and be wary if there is an EEOC investigator poking around your company. Be especially careful concerning potential workplace harassment or indications of systemic or ongoing infractions, requests for accommodation (including related to disability and FMLA leave), any accommodations for pregnant persons, and issues of pay disparity. All of these are examples of complaints that can lead to class actions, or large verdicts, so they should be handled carefully.

### **ARTIFICIAL INTELLIGENCE**

Maybe it is not surprising to hear that nearly 1 in 4 organizations use artificial intelligence HR tools, according to a 2022 survey from the Society for Human Resource Management. **Nearly 80 percent use AI for recruiting and hiring.** This has sparked backlash from government regulators, who worry this software may run afoul of nondiscrimination laws if it illegally rejects candidates based on a protected characteristic.

In its recently proposed “Strategic Enforcement Plan,” the EEOC makes clear that it will target employers using HR software, including programs that incorporate algorithmic decision-making in recruitment, selection, or production and performance management tools. Last May, the EEOC sued three companies under the “iTutorGroup” umbrella for programming its online recruitment software to reject some older applicants. The agency sought back pay and liquidated damages for more than 200 applicants they say were illegally denied jobs based on age.

States are also taking up this cause. Illinois was the first in 2020, followed by Maryland, to regulate the use of automated decision tools in hiring interviews. New York City moved the goalpost even further with a new law that will require employers to audit certain automated tools for bias and post a number of public disclosures. While that law was set to take effect on January 1, enforcement has been postponed until April 15, 2023 to give regulators time to finalize proposed rules surrounding the law. California regulators have taken similar steps to ensure employers and vendors could face liability under state law, regardless of whether there was discriminatory intent, through a new proposed rulemaking. Even more, the California Consumer Privacy Act recently took effect, expanding data privacy law to cover employees, applicants, and others in the workplace.

### **Practical considerations for employers**

In short, employers will likely need to contend with a growing number of state laws on this issue, compounded by complexities of advertising remote work across several jurisdictions. For businesses using AI, consult with outside counsel (yes, you can call us) to ensure compliance with this legal patchwork. For businesses not formally using AI, be sure to audit whether employees are using AI tools. Clients are increasingly beginning to monitor employee use of various AI tools and create policies around their use in the workplace. Even if a tool is not *distributed* by the company, it may still raise legal concerns for employers if employees are using it unlawfully for work purposes. New York City employers can read more about the city's [recently passed sweeping AI law here](#).

### **LABOR, LABOR, LABOR!**

Unions are, once again, getting prime political billing in Washington while the NLRB continues its pattern of aggressive enforcement. During the State of the Union, President Biden called on Congress to pass the Protecting the Right to Organize Act and condemned companies for “breaking the law by preventing workers from organizing.” While the Act is unlikely to succeed, this does signal that unions will take center-stage in the upcoming elections.

The NLRB got a \$25 million funding boost to its 2023 budget. It had originally requested more than \$100 million to account for an increase in its caseload, including an uptick in union representation petitions. In the last year, the NLRB has handed down a host of pro-union decisions and overturned some key Trump-era decisions. This included requiring employers to again deduct union dues after a collective bargaining agreement expired and a major opinion on severance agreements (more on that below).

On the horizon, the NLRB's general counsel has signaled an interest in reconsidering when an employee is an “independent contractor,” educating the workforce about their rights under federal law, and tackling captive audience meetings.

As unions spread into new, non-traditional industries and we see a general uptick in labor activism (including strikes), the NLRB will likely continue its active role in shaping the workplace.

### **Practical considerations for employers**

Employers with unions should already be familiar with the NLRB and the requirements of the NLRA. However, be aware that unions are becoming more active, and are looking now to organize pockets of the workforce who may not be unionized yet. Employers without unionized employees should watch out for new union organizing *and* upcoming rulings from the NLRB impacting all employees, not just those already unionized.

### **PAY TRANSPARENCY**

Pay transparency has become a hallmark of the Equal Pay movement. With legislatures around the country enacting a patchwork of new restrictions and obligations, this is becoming a potential landmine for multistate employers.

This started years ago when several jurisdictions enacted laws prohibiting employers from inquiring about an applicant's salary history. Next, states began requiring employers to disclose compensation ranges to applicants upon request or when making an offer. And now, states including California and New York, are moving the ball even further with laws requiring employers to disclose salary ranges in job postings if the job could be performed in that jurisdiction, including sometimes for internal opportunities. California and Illinois also require some employers to submit their pay data to state agencies. This not only affects how employers negotiate compensation for newcomers, it could also

open the door to costly lawsuits should transparency laws unearth potentially discriminatory pay disparities. Even more, some states now prohibit retaliating against an employee for discussing their own or other employees' pay.

On the federal level, the EEOC has also established pay equity as a main enforcement priority. So as pay ranges become more common on job applications and general anti-discrimination enforcement kicks up, we expect pay transparency issues to be a major focus to come.

### **Practical considerations for employers**

Pay transparency issues can create exposure on multiple fronts for employers, including legal liability and public scrutiny. Employers operating in California and New York should take particular note of local laws, including requirements for job postings and data reporting. This may mean conducting an internal audit, updating hiring templates, and consulting with counsel. Read more of our coverage on laws in [New York](#) and [California](#).

### **EMPLOYEE PRIVACY (Looking at You, Biometrics)**

Biometric data has become big business for employers. This includes a host of services that rely on fingerprints, facial scans and voice recognition to do things like verify an employee's identity, launch automated assistants, access events, or track time. But as these types of tools became more common, regulators took notice.

Illinois was the first state to directly regulate biometric data as a consumer (and employee) privacy matter. We've been covering the state's Biometric Information Privacy Act (BIPA) since it first starting making waves for employers in court. Just recently, two monuments state supreme court decisions were handed down that should give any employer operating in the jurisdiction pause. The court made clear that BIPA violations will be tallied by act, not by individual. This means a new violation could accrue every time an employee uses a biometric time clock, potentially several times per work shift, and could open even more cases on this already contentious law. We expect this will lead to even more BIPA-related cases with huge payouts for employees and the plaintiffs' bar.

Even more, other states are trying their hand at similar types of legislation. Texas and Washington have similar biometric laws, but do not allow for a private right of action. As of this January, Maryland and Mississippi have introduced new biometric privacy bills and other states may follow suit. We will continue to monitor major developments in this area of law as the legislative season moves forward.

### **Practical considerations for employers**

Biometric tools can be very valuable in the workplace, but compliance with related privacy laws is also a challenge. The best advice is get good privacy counsel, as this is an area of the law which has become increasingly complex and specialized. [Read more on BIPA - a monster of privacy statute - here.](#)

### **RESTRICTIONS ON RESTRICTIVE COVENANTS**

#### **Noncompetes: An FTC Final Rule on ... Maybe?**

We've covered the Federal Trade Commission's proposed rule that would ban essentially all noncompete agreements extensively (read more here) as unfair restraints of trade. From the Agency's vantage, these common contractual provisions illegally suppress competition and employee wages. Before promulgating a final rule, the agency must accept public comment. The

deadline to submit comments has been extended several times. Even if the rule is finalized, it will likely face a host of court challenges.

### **Practical considerations for employers**

We've covered the FTC's proposed rulemaking in depth ([read that here](#)), but there are some key takeaways for employers:

- Craft any restrictive covenant with caution. Restrictions on an employee's post-employment prospects (be it their next job or their ability to "speak out" against their former employer) are increasingly disfavored.
- Restrictions should be targeted and narrowly tailored to protect an employer's interests. In other words, try not to use boilerplate agreements, and tailor each agreement to the position or the person who is signing it.
- Carefully consider who signs a noncompete. This should be limited to senior executives or those who have access to sensitive data or information. Even more, be aware of local laws that could render restrictive covenants more difficult to enforce.

### **Nondisclosures and Non-disparagement**

The Biden administration has seemingly adopted a whole-of-government approach to restrictive covenants. Aside from the FTC's historic rulemaking, the EEOC has identified overly broad waivers, releases, and non-disclosure and non-disparagement agreements as priorities for the Agency as barriers to access to the judicial system. And in December, Congress passed the Speak Out Act, which curtailed the use pre-dispute restrictive covenants that would prohibit employees from speaking out against sexual assault or sexual harassment.

The NLRB's *McLaren Macomb* decision also took aim at the use of non-disclosure and non-disparagement clauses in severance agreements, which may apply to both union and non-union employers. ([We covered that here](#).) And in a [recent memo](#), the Board's General Counsel Jennifer Abruzzo issued guidance following *McLaren*. Notably, it reasons that maintaining or enforcing a severance agreement with offending provisions would constitute a continuous violation and suggests employers may avoid liability by notifying former employees that certain provisions are no longer applicable in their severance agreements.

### **Practical considerations for employers**

What to do with existing non-disclosure or non-disparagement agreements is a tricky issue, as there is no clear answer here. The "safest" option would be to look at all agreements and revise any agreement that contains a clause which may conflict with these new regulations. However, most clients are taking a "wait and see" attitude. The devil may be in enforcement of agreements in the future, and there may need to be consideration of whether an agreement should be enforced, if it contains a conflicting provision.

As the year unfolds and new laws and regulations come into view, we'll keep you up-to-date with the major changes and issues you should be thinking about.