

Publication

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Top Workplace Issues to Watch in the Second Half of 2022

While employers continue to deal with the fallout of the COVID-19 pandemic, they're also faced with the economic uncertainty of a probable recession and a tight labor market, among other risks.

In light of these concerns, what are the top workplace issues that employers should closely watch in the second half of 2022?

To help in-house counsel, HR professionals, and employers keep pace with the swiftly evolving workplace and employment landscape, Neal Gerber Eisenberg (NGE) attorneys from the Labor & Employment practice hosted a virtual Labor & Employment Symposium to discuss top concerns and provide guidance on how employers should think about them in the months ahead.

Highlights from the event include:

- COVID-19, Equal Pay Still Top of Mind
- Restrictive Covenants
- Wage and Hour
- Labor Union Updates
- Workplace Technology
- Hybrid and Remote Work

COVID-19, Equal Pay Still Top of Mind

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COVID-19 issues are still top of mind for employers, especially concerning compliance requirements under the Americans with Disabilities Act (ADA). NGE partners William Tarnow and Sonya Rosenberg urged attendees to participate in ongoing conversations if they are unsure whether an employee's condition is covered under the ADA and whether they must provide accommodations.

Tarnow and Rosenberg also encouraged employers to navigate employees' medical issues, which can often resurface and shouldn't be swept under the rug.

Other key issues for employers include navigating equal pay laws and updates to the Federal Arbitration Act.

Several states have enacted equal pay acts that are broader than the federal law, going beyond gender to prohibit discrimination based on race, ethnicity, and sexual orientation. For example, New York prohibits discrimination based on all prohibited classifications, including race, ethnicity, sexual orientation, disability, religion, national origin, or age. Several states and municipalities have also banned employers from asking about an applicant's salary history.

Attendees asked whether their businesses could become subject to state-specific laws if an employee is working remotely in a city or state with these laws, or if the laws just apply where a business is physically located. NGE associate Corinne Biller said employers should assume they are subject to these laws unless they can confirm otherwise.

In March, President Joe Biden signed a bill into law banning forced arbitration in cases of workplace sexual assault and harassment. While a significant change for dispute resolution in some workplace issues, Tarnow stressed that it doesn't apply to claims regarding disability, religious discrimination, or pay, meaning

arbitration is still a viable option for many workplace claims.

Moreover, arbitration is still an option if both employer and employee agree on it – employers just can't compel it, as partner Alex Dominguez explained. Even in cases of sexual harassment, parties can go through arbitration if both sides agree.

Restrictive Covenants

Partner Chad Moeller said that restrictive covenants are a crucial tool for employers in the current tight labor market. However, some employers don't use covenant agreements because there is a misconception that such restrictions are not enforceable in states where laws regulate their use. Covenant agreements and related policies not only are permissible but are advisable in most employment situations.

Simply having such properly-tailored documentation in place can act as an effective deterrent against unwanted employee turnover or executive disloyalty. Tarnow encouraged attendees to review any existing restrictive covenant policies their companies have in place, as it's a critical time to retain talent and preserve corporate secrets for a competitive advantage. An employer's review of its covenant program should ensure that best practices are being applied in a company-specific manner, in full compliance with the nuances of state and local laws.

Wage and Hour

Partners Jason Kim, Dominguez, and Rosenberg spoke about pressing wage and hour concerns for employers, such as avoiding liability for employees' unpaid work and navigating worker classification issues as the gig economy expands.

Best practices include maintaining a reporting procedure for nonscheduled time and requiring employees to

review and attest to their timesheets. Employers can also enact strict policies requiring employees to get approval for time worked and to record all such time – and train supervisors to enforce those rules.

The consequences for misclassifying workers as contractors can be steep. In a recent class action settlement, DoorDash agreed to pay \$100 million to drivers.

The advent of remote work is complicating expense reimbursement. NGE attorneys advised employers to:

- Maintain a documented policy regarding the portion of work-from-home expenses the employer will pay. Include well-thought-out reasoning on why the policy is reasonable.
- Provide work-from-home tools when needed or appropriate, and monitor for new guidance and rulings.
- Recall that current state laws requiring reimbursement only apply to work-from-home expenses when remote work is necessary.
- Federal reimbursement requirements only apply when unreimbursed expenses cause an employee's wages to drop below federal wage or overtime requirements.

Labor Union Updates

Kim and of counsel Gerry Golden shared updates on labor, such as shifts under the Biden administration and how employers can respond to unionization drives.

President Biden has taken several pro-union actions, including supporting striking Kellogg workers and forcing out Trump-era labor appointees – something not done since the 1950s. He also reversed Trump-era rules that softened worker protections, signed legislation that included billions of dollars to stabilize union pension

plans in last year's infrastructure bill, and supported the PRO Act, which would expand protections for employees' rights to organize and collectively bargain in workplaces.

Under the current National Labor Relations Board (NLRB) leadership, employers can expect a return to Obama-era decisions that often come down on the side of workers. Kim and Golden said NLRB general counsel Jennifer Abruzzo has articulated an extreme agenda that prioritizes:

- prosecuting employer speech critical of unionization
- reinstating the Joy Silk doctrine, which would force employers to accept and bargain with union officials who present union authorization cards
- overturning *Johnson Controls*, which allows employers to withdraw recognition of a union based on signatures of a majority of workers opposing the union.

Kim and Golden said newer labor campaigns have involved a significant amount of "self-organization," a shift away from traditional, more centralized tactics led by veteran organizing officials. Recent organizing drives have relied on current or former workers instead of professional organizers and raised money through websites like GoFundMe rather than using union coffers.

Kim and Golden said employers facing a unionization drive should take the following steps:

- alert human resources that a drive has begun
- educate employees on the mechanics of the bargaining process, the costs of labor representation, and
- educate employees on potential risks to the company, its employees, and customers

- watch for card signing

Employers should not:

- make threats – or imply there will be consequences as a result of unionization
- make promises – such as offering benefits to incentivize voting against unionizing
- interrogate employees – do not ask how they or their coworkers feel about unions, or if they are involved in union-related activities
- conduct surveillance – do not spy on employees or give the impression of spying
- discriminate – do not treat employees who support unions differently than those who do not

Workplace Technology

The event also covered workplace technology risks and benefits for employers. Rosenberg, Biller and associate Alissa Griffin discussed the heightened risk of data breaches as remote or hybrid work strains existing cybersecurity systems.

Protocols and infrastructure are key – particularly if a business collects or receives sensitive information. The average cost of a data breach is rising, so employers need to consider measures such as data encryption, vulnerability scans and penetration tests, as well as multi-factor authentication and limiting employee access to sensitive information.

Tracking technology has become more popular in the remote work environment. Under the right framework, monitoring employees' productivity can be helpful. But employers should avoid making rash decisions in implementing the technology, which the NGE lawyers

said can also lead to worker-morale or other workplace issues.

Rosenberg said that if clients can identify a specific need behind the monitoring, there generally is a legal way to do it. Companies who do use tracking technology should avoid targeting protected classes, leave monitoring devices out of non-work areas, be consistent in applying the technology and avoid selective discipline.

Hybrid and Remote Work

NGE lawyers also discussed the legal aspects of the return to work and teleworking at this phase of the pandemic.

Decisions about remote work should be based on business needs, they said. While employers have the right to require employees to be in the office five days a week, that policy could make it difficult to recruit and retain future employees.

The biggest legal issues involving remote or hybrid work include dealing with out-of-state employees and the associated wage and hour and tax laws, and handbook policies around temporary disability pay or leave.

The bottom line: Rosenberg, Biller and Griffin said a clear teleworking policy is the best way to navigate the current environment.