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Year-End Tasks for US Employers Facing Compliance Obligations

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In recent years, we have seen numerous notable employment and labor law developments annually, and 2023 was no exception. As the year comes to a close, US employers should take time to prepare for 2024 by reviewing their key employment practices in light of new developments. Below, we've identified some year-end tasks to prepare for changes in the new year.

1. Review and revise your employee handbooks and policies

The beginning of the year brings many new compliance obligations for employers, who should ensure their policies and handbooks are reviewed and updated for compliance with new employment laws, such as those **in California** and **in New York**. For a comprehensive overview of key 2023 US employment developments that impact handbooks and policies, check out Sessions 1 and 2 of Cooley's **HR Network Series**.

When reviewing and updating employee handbooks, employers should take special note of the August 2, 2023, decision by the National Labor Relations Board (NLRB) in ***Stericycle, Inc.*, 372 NLRB No. 113**, which adopted a new legal standard in evaluating whether an employer's work rule expressly restricts employees' protected concerted activity under the National Labor Relations Act (NLRA). The new standard interprets work rules from the perspective of an employee who is economically dependent on the employer and who also contemplates engaging in activity protected under Section 7 of the NLRA. If an employee could reasonably interpret the rule to have a coercive meaning, the work rule is presumptively unlawful, even if a contrary, noncoercive interpretation of the rule also is reasonable. Employers may then rebut that presumption by proving that the rule advances a legitimate and substantial business interest and that it is unable to advance that interest with a more narrowly tailored rule. If the employer is successful in proving this defense, the work rule will be found lawful. Notably, the NLRB will no longer consider an employer's intent in adopting or maintaining the work rule.

The new standard is a significant departure from the prior standard, which analyzed a rule from the perspective of an "objectively reasonable employee who is aware of [their] legal rights" and established a categorical approach to workplace rules by holding that certain types of work rules are presumptively lawful to maintain.

Employers should therefore carefully scrutinize rules, policies and procedures through the lens of the new *Stericycle* standard. By establishing a "case-by-case approach," under which the NLRB examines the specific language of particular rules and employer interests invoked to justify them, employers should expect more challenges to their workplace rules. Employers should pay special attention to rules governing confidentiality, social media and technology use, employee monitoring and recording, anti-harassment, employee discipline, and complaint reporting. Employers should be able to articulate the legitimate business reasons justifying the rules – and ensure that each rule is as narrowly tailored as possible in advancing those interests.

2. Review your restrictive covenants

2023 was a watershed year for employers using noncompete agreements and other restrictive covenants. Employers should review their agreements for compliance with several new laws cracking down on these provisions, including **in California** and **in**

Minnesota.

New York employers, however, can continue using their existing noncompete agreements and other restrictive covenants – for now. As we reported in a client alert on October 31, 2023, New York passed a proposed ban on noncompete agreements earlier in the year. At the end of November 2023, Gov. Kathy Hochul rejected the proposed ban, but indicated that she may support such a ban if it included a wage threshold of $250,000. In speaking with reporters, Hochul said, "[w]hat I'm looking at right now is striking the right balance between protecting low and middle-income workers, giving them flexibility to have mobility to go from job to job as they continue up the ladder of success … . But those who are successful have a lot more negotiation power, and they're at the industries that are an important part of our economy here in New York."

If a wage threshold is implemented for the proposed noncompete ban, New York would join several other locations that have enacted such bans for high-income earners, such as Washington, DC, Colorado and Washington state. Beyond a wage threshold, a sale-of-business exception (allowing owners and partners to sign noncompetes in connection with a sale or merger involving their business) has been advocated for inclusion in a revised bill. Adding such an exception would bring the revised bill more in line with what other states, such as California, have included in their own noncompete laws. Employers should watch for a revised proposal soon.

3. Review your arbitration agreements

Employers should review their arbitration agreements to ensure they contain appropriate language in response to the latest court rulings affecting arbitration of employment disputes.

PAGA claims

Golden State employers in particular should take note of the California Supreme Court's recent ruling on California Private Attorneys General Act (PAGA) claims. In *Adolph v. Uber Technologies, Inc.*, the court analyzed standing issues in the wake of the US Supreme Court's decision in *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022), which held that an individual lacks standing to retain a representative PAGA claim once their individual PAGA claim is sent to arbitration. In a departure from *Viking River*, the *Adolph* court held that an order compelling arbitration of an individual PAGA claim does not strip the plaintiff of standing to litigate the non-individual (or representative) PAGA claim in court. Rather, the trial court will retain the discretion to issue a stay of a non-individual representative PAGA claim while the individual claim is arbitrated.

Employers with California employees should therefore review and revise their agreements to ensure that any non-arbitrable claim – which includes any representative PAGA claim – is stayed (i.e., suspended) pending the outcome of any arbitrable claim, including individual PAGA claims. Ensuring that an individual PAGA claim is adjudicated first can help prevent a representative PAGA claim from proceeding in the event that the arbitrator finds that the plaintiff is not an aggrieved employee. Employers also should ensure that their agreements contain a robust severability clause, including within any class or representative action waiver provision, so that properly arbitrable claims are compelled to arbitration.

Mandatory stay of proceedings

In revising arbitration agreements, California employers should take stock of Senate Bill 365, which takes effect January 1, 2024. As we reported in our November 7 client alert, this new law amends the California Code of Civil Procedure so that trial court proceedings are not automatically stayed when a party appeals an order dismissing or denying a petition to compel arbitration. This law contrasts with the US Supreme Court's decision in *Coinbase, Inc. v. Bielski* earlier in 2023, which held that a party's appeal from the denial of a motion to compel arbitration triggers an automatic stay of the merits of the underlying federal court

proceedings. While SB 365 undoubtedly will be challenged on preemption grounds, employers can take steps in the meantime to mitigate against the risk that actions do not proceed while court decisions are challenged. For example, employers can ensure that their agreements are expressly governed by the Federal Arbitration Act (FAA). SB 365 could suffer the same fate as California's Assembly Bill 51 limiting the ability of employers to require mandatory arbitration of certain statutory employment claims, which was declared preempted by the FAA by the US Court of Appeals for the Ninth Circuit earlier this year. In addition, employers should be prepared for potential increased costs as a result of defending a case in trial court during the pendency of an appeal of an order denying a motion to compel arbitration, and they may want to consider, if possible, removing cases to federal court, which generally provides a more favorable forum.

Other possible arbitration developments

All US employers should stay tuned, as the new year likely will bring further developments regarding arbitration. For example, the Supreme Court will be hearing *Bissonnette v. LePage Bakeries Park St., LLC*, which may resolve a circuit split regarding the exemption under the FAA of transportation workers engaged in interstate transportation. Legislation pending in Congress also may limit the arbitrability of certain claims, such as **age discrimination** and **race discrimination** claims.

4. Take stock of your relationships

In October 2023, the NLRB issued a final rule on determining joint employer status under the NLRA. The rule greatly expands the circumstances under which a business entity may be found to be a joint employer of another entity's employees. Although the rule – originally slated to take effect on December 26, 2023 – was delayed to February 26, 2024, due to legal challenges, employers should take the time now to review and assess their business relationships with any vendors, independent contractors, staffing agencies, professional employer organizations, or other third parties who may supply labor or services.

The rule establishes that two or more entities may be considered joint employers of a group of employees if each entity has an employment relationship with the employees, and if the entities "share or codetermine one or more of the employees' essential terms and conditions of employment." It rescinds the 2020 rule, which established a joint employer relationship if the putative joint employer had "direct and immediate control" over an essential term or condition of employment.

The rule defines such "essential terms and conditions of employment" to include:

1. Wages, benefits, and other compensation.
2. Hours of work and scheduling.
3. The assignment of duties to be performed.
4. The supervision of the performance of duties.
5. Work rules and directions governing the manner, means and methods of the performance of duties, and the grounds for discipline.
6. The tenure of employment, including hiring and discharge.
7. Working conditions related to the safety and health of employees.

Under the rule, a business is a "joint employer" even if the control over these essential terms and conditions of employment are not actually exercised. The NLRB explained that including such "reserved control" accounts for situations in which an employer maintains authority but has not yet exercised such control because the "reality is that an entity holding such control may step in at any moment to affect essential terms." In addition, an employer now includes "any person acting as an agent of an employer, directly or indirectly." The NLRB explained that this modification prevents an entity that has an employment relationship with

employees from avoiding joint employer status by using intermediaries to implement decisions about essential terms and conditions of employment.

If the rule survives legal challenge, the implications are vast. For example, the final rule provides that a joint employer must bargain collectively with representatives of the employees that it possesses the authority to control or exercises the power to control (regardless of whether that term or condition is deemed to be an essential term or condition of employment under the rule). Putative joint employers also could be held liable for unfair labor practices brought before the NLRB. Employers should consider their relationships with third parties supplying services or labor, then review relevant agreements for language that could be construed as demonstrating an ability to control – even indirectly – an essential term and condition of employment over a third party's employees. Although the final rule could look different as a result of legal challenge, this assessment will help employers get ahead and understand the range of control they exercise or retain the ability to exercise, and the kinds of terms and conditions over which they have such control. (**Note:** The NLRB's joint employment rule only affects joint employment under the NLRA, and does not impact joint employment under other laws, such as the Fair Labor Standards Act.)

5. Audit your artificial intelligence

The end of the year is a great time for employers using AI-based tools that significantly contribute to employment decisions to audit their technology, in coordination with counsel. Even though a bias audit may be required in some instances, such as under New York City's Local Law 144, employers still should conduct regular audits of any tool used, because algorithms and data used in AI systems can continuously change and, as a result, the tool may require continuous "tweaking." Further, some laws, including NYC's Local Law 144, only require a bias audit to analyze certain selection criteria, such as race/ethnicity and sex categories. Employers should consider conducting an audit of qualifying tools that examines all protected categories. In addition, such audits can help ensure that the outputs of AI tools continue to meet business objectives.

Employers can expect that the new year will bring further legislation and guidance from the federal government regulating employers' use of AI. For example, in its October 2023 **executive order on AI**, the Biden administration tasked the US attorney general's office and civil rights offices within independent regulatory agencies to discuss preventing and addressing discrimination in the use of automated systems, including algorithmic discrimination. In the meantime, employers can review our **10-Step Plan for Employers Using Artificial Intelligence in Employment Processes** to learn more about best practices for using AI tools in employment processes.

If you have questions about how to address any of these issues, please contact a member of Cooley's employment group.

Key Contacts

Ariane A. Andrade Chicago	aandrade@cooley.com +1 312 881 6641
Frederick Baron Palo Alto	fbaron@cooley.com +1 650 843 5020
Ann Bevitt London	abevitt@cooley.com +44 (0) 20 7556 4264
Wendy Brenner Palo Alto	brennerwj@cooley.com +1 650 843 5371
Leslie Cancel San Francisco	lcancel@cooley.com +1 415 693 2175
Helenanne Connolly Reston	hconnolly@cooley.com +1 703 456 8685
Michelle Doolin San Diego	mdoolin@cooley.com +1 858 550 6043
Ross Eberly Los Angeles Santa Monica	reberly@cooley.com +1 310 883 6415
Mary Maher Lewis Reston	mmlewis@cooley.com +1 703 456 8569
Joseph Lockinger Washington, DC	jlockinger@cooley.com +1 202 776 2286
Joshua Mates San Francisco	jmates@cooley.com +1 415 693 2084
Ryan Montgomery Boston	rmontgomery@cooley.com +1 617 937 1449
Gerard O'Shea New York	goshea@cooley.com +1 212 479 6704

Nyron J. Persaud New York	npersaud@cooley.com +1 212 479 6670
Miriam Petrillo Chicago	mpetrillo@cooley.com +1 312 881 6612
Michael Sheetz Boston	msheetz@cooley.com +1 617 937 2330
Nicola Squire London	nsquire@cooley.com +44 (0) 20 7556 4506
Chris Stack London	cstack@cooley.com +44 (0)20 7556 4389
Laura Terlouw San Francisco	lterlouw@cooley.com +1 415 693 2069
Ryan Vann Chicago	rhvann@cooley.com +1 312 881 6640
Lois Voelz Palo Alto	lvoelz@cooley.com +1 650 843 5058
David Walsh Reston	dwalsh@cooley.com +1 703 456 8021
Summer Wynn San Diego	swynn@cooley.com +1 858 550 6030
Joshua Elefant Palo Alto	jelefant@cooley.com +1 650 843 5572
Haylee Saathoff San Diego	hsaathoff@cooley.com +1 858 550 6112
Anna Matsuo New York	amatsuo@cooley.com +1 212 479 6827