



2023 Labor & Employment Practice Group Seminar

June 21-23, 2023

2023 Quick Fire Hot Topics

Joel Andersen

Moderator

NILAN JOHNSON LEWIS P.A.

Minneapolis, MN

jandersen@nilanjohnson.com

Mike Chesney

FRANZ WARD LLP

Cleveland, OH

mchesney@frantzward.com

It is important to stay up-to-date with the latest legal trends and developments in employment law. In this article, we discuss the top five hot topics in employment law that are currently impacting both employers and employees, but start with the bonus topic of AI in the workplace.

I. Artificial Intelligence (AI)

Artificial intelligence (AI) has the potential to revolutionize the workplace and transform the way that employers and employees interact. However, the use of AI in the workplace also raises a number of legal and ethical issues that employers must address to ensure compliance with all applicable laws and regulations. In this article, we will discuss the top AI-related employment law issues and provide practical guidance for employers.

a. Bias in AI-Based Decision Making

One of the most significant AI-related employment law issues is the potential for bias in AI-based decision making. AI systems are only as unbiased as the data they are trained on, and if the data is biased, the AI system will produce biased results.

Employers must take appropriate measures to ensure that AI-based decision making is fair and unbiased, including auditing AI systems for bias and conducting regular reviews of AI-based decision making to identify and address any potential bias.

Employers should also ensure that they are complying with all applicable laws related to discrimination, including Title VII of the Civil Rights Act of 1964 and state and local anti-discrimination laws.

b. Privacy and Data Security

The use of AI in the workplace also raises significant privacy and data security issues. AI systems may collect and analyze large amounts of personal data about employees, including biometric data, health information, and other sensitive information.

Employers must take appropriate measures to safeguard this data and comply with all applicable data privacy and security laws, including the General Data Protection Regulation (GDPR) and the California Consumer Privacy Act (CCPA).

Employers should also be transparent with employees about the data being collected and how it will be used, and obtain employees' consent where required by law.

c. Employment Contract and Intellectual Property Issues

The use of AI in the workplace may also raise contractual and intellectual property issues. Employers must ensure that their employment contracts are clear and specific with respect to ownership of any intellectual property developed through the use of AI systems.

Employers should also consider whether they need to update their employment contracts to address issues related to the use of AI, including ownership of AI-generated works and the use of AI in the employment relationship.

Employers should consult with legal counsel to ensure that their employment contracts are compliant with all applicable laws and regulations related to AI in the workplace.

d. Practical Guidance

In light of these AI-related employment law issues, employers should take several practical steps to ensure compliance with applicable laws and regulations and mitigate the legal and ethical risks associated with the use of AI in the workplace. These steps include:

- Conduct regular audits of AI systems to identify and address any potential bias.
- Develop and implement clear policies and procedures related to data privacy and security, including employee consent and transparency requirements.
- Update employment contracts to address issues related to AI, including ownership of AI-generated works and the use of AI in the employment relationship.
- Provide regular training to employees on AI-related best practices, including the potential legal and ethical risks associated with the use of AI in the workplace.
- Consult with legal counsel to ensure that AI-related policies, procedures, and employment contracts are compliant with all applicable laws and regulations.

e. Conclusion

AI has the potential to transform the workplace and improve efficiency and productivity. However, the use of AI in the workplace also raises significant legal and ethical issues that employers must address to ensure compliance with all applicable laws and regulations. By taking proactive steps to identify and address potential AI-related legal and ethical issues, employers can minimize their legal liability and ensure that the use of AI in the workplace is fair, transparent, and compliant with all applicable laws and regulations.

II. Diversity, Equity, and Inclusion (DEI)

Diversity, equity, and inclusion (DEI) are becoming increasingly important in the workplace. Employers must ensure that their workplace is inclusive and welcoming to all employees, regardless of their race, gender, sexual orientation, or other protected characteristics. In this article, we will discuss the top DEI workplace issues and provide practical guidance for employers.

a. Unconscious Bias

Unconscious bias is a significant issue in the workplace, and it can affect everything from hiring decisions to performance evaluations. Employers must be vigilant in identifying and addressing unconscious bias in the workplace.

One way to address unconscious bias is through training and education. Employers should provide regular training to all employees on the importance of DEI in the workplace, as well as how to identify and address unconscious bias.

Additionally, employers should review their hiring and promotion processes to ensure that they are free from bias. This may include implementing blind resume reviews or structured interview processes.

b. Harassment and Discrimination

Harassment and discrimination based on race, gender, sexual orientation, or other protected characteristics are unacceptable in the workplace. Employers must take proactive steps to prevent harassment and discrimination and to address any complaints that arise.

2023 Quick Fire Hot Topics

One way to prevent harassment and discrimination is through training and education. Employers should provide regular training to all employees on what constitutes harassment and discrimination, as well as how to report any incidents that occur.

Additionally, employers should have clear policies and procedures in place for reporting and investigating complaints of harassment and discrimination. Employers should take all complaints seriously and investigate them promptly and thoroughly.

c. Accommodating Employees with Disabilities or Religious Beliefs

Employers must ensure that they are accommodating employees with disabilities or religious beliefs in the workplace. This may include providing reasonable accommodations, such as modifying job duties or providing assistive technology.

Employers must engage in an interactive process with employees to determine what accommodations are necessary and reasonable. Employers should also be aware of their obligations under the Americans with Disabilities Act (ADA) and other applicable laws.

Additionally, employers must be careful to avoid religious discrimination. Employers must ensure that employees are not subjected to disparate treatment or harassment based on their religious beliefs.

d. Practical Guidance

In light of these DEI workplace issues, employers should take several practical steps to ensure compliance with applicable laws and regulations. These steps include:

- Develop and implement clear policies and procedures related to DEI, harassment and discrimination, and accommodations for employees with disabilities or religious beliefs.
- Provide regular training to all employees on DEI, harassment and discrimination, and accommodations.
- Have clear procedures in place for reporting and investigating complaints of harassment and discrimination.
- Consult with legal counsel to ensure that any policies or procedures related to DEI compliance are compliant with applicable laws and regulations.

e. Conclusion

DEI is an important issue in the workplace, and employers must ensure that their workplace is inclusive and welcoming to all employees. By taking proactive steps to address unconscious bias, prevent harassment and discrimination, and accommodate employees with disabilities or religious beliefs, employers can create a workplace that is fair and equitable for all employees. By staying informed and taking practical steps to ensure compliance with applicable laws and regulations, employers can protect their employees and their businesses from legal liability.

III. Wage and Hour Compliance

Wage and hour compliance is a critical issue for employers. Employers must ensure that they are in compliance with all applicable federal, state, and local laws related to minimum wage, overtime pay, and other wage and hour requirements. In this article, we will discuss the top wage and hour compliance issues and provide practical guidance for employers.

a. Misclassification of Employees

Misclassification of employees is a common wage and hour compliance issue. Employers must ensure that they are properly classifying their employees as either exempt or non-exempt under the Fair Labor Standards Act (FLSA).

Exempt employees are not entitled to overtime pay, while non-exempt employees are entitled to overtime pay for any hours worked over 40 in a workweek. Employers must ensure that they are properly classifying their employees to avoid legal liability for unpaid overtime.

Additionally, misclassifying employees as independent contractors can also result in legal liability for employers. Employers must ensure that they are properly classifying workers as employees or independent contractors under applicable laws.

b. Off-the-Clock Work

Off-the-clock work is another common wage and hour compliance issue. Employers must ensure that they are properly compensating employees for all hours worked, including work performed outside of regular working hours.

Employers must also be aware of their obligations under state and local laws related to meal and rest breaks. Many states have specific requirements related to the timing and duration of meal and rest breaks, and employers must ensure that they are in compliance with these requirements.

c. Recordkeeping Requirements

Employers must maintain accurate records of hours worked, wages paid, and other wage and hour-related information. Failure to maintain accurate records can result in legal liability for employers.

Employers must also ensure that they are retaining these records for the appropriate amount of time under applicable laws. Many states have specific requirements related to the retention of wage and hour-related records.

d. Practical Guidance

In light of these wage and hour compliance issues, employers should take several practical steps to ensure compliance with applicable laws and regulations. These steps include:

- Conduct regular audits of wage and hour practices to identify any potential compliance issues, such as misclassification of employees or off-the-clock work.
- Develop and implement clear policies and procedures related to wage and hour compliance, including recordkeeping requirements.
- Provide regular training to all employees on wage and hour compliance, including the importance of accurate recordkeeping.
- Consult with legal counsel to ensure that any policies or procedures related to wage and hour compliance are compliant with applicable laws and regulations.

e. Conclusion

Wage and hour compliance is a critical issue for employers. By taking proactive steps to identify and address potential compliance issues related to misclassification of employees, off-the-clock work, and

recordkeeping requirements, employers can minimize their legal liability and ensure that they are in compliance with applicable laws and regulations. By staying informed and taking practical steps to ensure compliance with applicable laws and regulations, employers can protect their employees and their businesses from legal liability.

IV. Privacy and Data Security

In the modern digital age, privacy and data security are critical issues for businesses. Employers must ensure that they are taking appropriate measures to protect the personal and sensitive information of their employees, customers, and other stakeholders. In this article, we will discuss the top privacy and data security issues and provide practical guidance for employers.

a. Data Breaches

Data breaches are a significant privacy and data security issue for businesses. A data breach occurs when unauthorized individuals gain access to personal or sensitive information. Data breaches can result in legal liability, reputational harm, and financial losses for businesses.

Employers must take appropriate measures to prevent data breaches, including implementing strong password policies, regularly updating software and hardware, and providing regular training to employees on data security best practices.

In the event of a data breach, employers must have a response plan in place to minimize the harm caused by the breach. This plan should include steps for notifying affected individuals, law enforcement, and regulatory authorities, as well as providing credit monitoring services and other support to affected individuals.

b. Privacy Policies and Notices

Privacy policies and notices are essential documents that inform individuals of a business's data collection, use, and sharing practices. Employers must ensure that their privacy policies and notices are accurate, up-to-date, and comply with all applicable laws and regulations.

Employers should also ensure that they are obtaining appropriate consent from individuals for data collection, use, and sharing practices. This includes obtaining consent from employees for data collection and sharing practices related to their employment.

c. Employee Monitoring

Employee monitoring is a privacy issue that can be particularly sensitive for employees. Employers must ensure that they are balancing their legitimate business interests with employees' privacy rights when implementing employee monitoring practices.

Employers should develop and implement clear policies and procedures related to employee monitoring, including obtaining appropriate consent from employees for monitoring practices, limiting monitoring to the extent necessary to achieve legitimate business interests, and ensuring that monitoring practices comply with all applicable laws and regulations.

d. Practical Guidance

In light of these privacy and data security issues, employers should take several practical steps to ensure compliance with applicable laws and regulations and protect the personal and sensitive information of their employees, customers, and other stakeholders. These steps include:

- Conduct regular risk assessments to identify potential privacy and data security vulnerabilities and take appropriate measures to address these vulnerabilities.
- Develop and implement clear policies and procedures related to privacy and data security, including data breach response plans, privacy policies and notices, and employee monitoring practices.
- Provide regular training to all employees on data security best practices, including password management, software and hardware updates, and identifying and reporting potential data security incidents.
- Consult with legal counsel to ensure that privacy and data security policies and procedures are compliant with all applicable laws and regulations.

e. Conclusion

Privacy and data security are critical issues for businesses in the modern digital age. By taking proactive steps to identify and address potential privacy and data security vulnerabilities related to data breaches, privacy policies and notices, and employee monitoring, employers can minimize their legal liability and protect the personal and sensitive information of their employees, customers, and other stakeholders. By staying informed and taking practical steps to ensure compliance with applicable laws and regulations, employers can protect their businesses and maintain the trust of their stakeholders.

V. Non-Compete Agreements and Trade Secrets

Non-compete agreements and trade secrets are essential tools for employers to protect their businesses' valuable intellectual property and confidential information. However, employers must ensure that they are using these tools appropriately and in compliance with all applicable laws and regulations. In this article, we will discuss the top non-compete and trade secrets issues and provide practical guidance for employers.

a. Non-Compete Agreements

Non-compete agreements are contractual provisions that limit an employee's ability to compete with their former employer after leaving their job. Non-compete agreements are generally enforceable in most states, provided that they are reasonable in scope and duration.

Employers must ensure that non-compete agreements are tailored to the specific circumstances of their business and comply with all applicable laws and regulations. Non-compete agreements should be limited in scope and duration to the extent necessary to protect the employer's legitimate business interests, such as trade secrets, confidential information, and customer relationships.

Employers should also consider the potential impact of non-compete agreements on their employees' ability to find new employment and comply with all applicable state and local laws related to non-compete agreements.

b. Trade Secrets

Trade secrets are valuable confidential information that gives a business a competitive advantage. Trade secrets can include anything from customer lists to manufacturing processes to proprietary software.

Employers must take appropriate measures to protect their trade secrets from disclosure, including implementing policies and procedures to safeguard trade secrets and providing regular training to employees on trade secret protection best practices.

In the event of a trade secret misappropriation, employers must have a response plan in place to minimize the harm caused by the misappropriation. This plan should include steps for identifying the misappropriation, preserving evidence, and pursuing legal remedies.

c. Non-Disclosure Agreements

Non-disclosure agreements are contractual provisions that prohibit employees from disclosing confidential information, including trade secrets, to third parties. Non-disclosure agreements are an important tool for protecting a business's confidential information and trade secrets.

Employers must ensure that non-disclosure agreements are tailored to the specific circumstances of their business and comply with all applicable laws and regulations. Non-disclosure agreements should be limited in scope and duration to the extent necessary to protect the employer's legitimate business interests, such as trade secrets, confidential information, and customer relationships.

Employers should also consider the potential impact of non-disclosure agreements on their employees' ability to disclose information protected under state and federal whistleblower laws.

d. Practical Guidance

In light of these non-compete and trade secrets issues, employers should take several practical steps to ensure compliance with applicable laws and regulations and protect their businesses' valuable intellectual property and confidential information. These steps include:

- Conduct regular risk assessments to identify potential non-compete and trade secrets vulnerabilities and take appropriate measures to address these vulnerabilities.
- Develop and implement clear policies and procedures related to non-compete agreements, trade secrets, and non-disclosure agreements, including response plans for misappropriation and breach incidents.
- Provide regular training to all employees on non-compete, trade secret, and non-disclosure best practices, including safeguarding confidential information and identifying and reporting potential misappropriation and breach incidents.
- Consult with legal counsel to ensure that non-compete, trade secret, and non-disclosure policies and procedures are compliant with all applicable laws and regulations.

e. Conclusion

Non-compete agreements, trade secrets, and non-disclosure agreements are essential tools for employers to protect their businesses' valuable intellectual property and confidential information. By taking proactive steps to identify and address potential non-compete and trade secrets vulnerabilities related to non-compete agreements, trade secrets, and non-disclosure agreements, employers can minimize their legal liability and protect their businesses' valuable intellectual property and confidential information.

VI. Continuing COVID-19 Issues

COVID-19 has had a significant impact on the workplace, creating new challenges for employers and employees alike. As employment attorneys, it is our responsibility to stay informed about these developments and provide our clients with the guidance they need to navigate these complex legal issues. In this article, we will discuss the top COVID-19 workplace issues and provide practical guidance for employers.

a. Remote Work

The COVID-19 pandemic has led to a surge in remote work, with many employees working from home or other remote locations. This has created new challenges for employers, including how to manage remote employees and ensure compliance with employment laws.

One major issue is wage and hour compliance. Employers must ensure that remote employees are accurately tracking their time and that they are properly paid for all hours worked. Additionally, employers must ensure that remote employees are taking the appropriate meal and rest breaks as required by law.

Another issue is workplace safety. Employers must ensure that remote employees have a safe and healthy work environment, free from hazards that could cause injury or illness. This includes providing appropriate equipment and training for remote employees.

b. Vaccine Mandates

As COVID-19 vaccines become more widely available, employers are facing increasing pressure to implement vaccine mandates for their employees. However, vaccine mandates raise a host of legal issues, including employee privacy, discrimination, and religious accommodations.

Employers must ensure that any vaccine mandate is compliant with applicable laws and regulations. This includes ensuring that the mandate is job-related and consistent with business necessity, and that employees have the opportunity to request a reasonable accommodation for medical or religious reasons.

Additionally, employers must be careful to protect employee privacy when implementing a vaccine mandate. Employers should ensure that they are not collecting more information than necessary and that any information collected is kept confidential.

c. Accommodating Employees with Disabilities or Underlying Health Conditions

COVID-19 has disproportionately affected individuals with underlying health conditions and disabilities. As such, employers must be careful to ensure that they are accommodating employees with disabilities or underlying health conditions in the workplace.

Employers must engage in an interactive process with employees to determine what accommodations are necessary and reasonable. This may include allowing remote work, providing personal protective equipment, or modifying job duties or work schedules.

Additionally, employers must be careful to avoid disability discrimination. Employers must ensure that employees with disabilities are not subjected to disparate treatment or harassment based on their disability status.

d. Practical Guidance

In light of these COVID-19 workplace issues, employers should take several practical steps to ensure compliance with applicable laws and regulations. These steps include:

- Develop and implement clear policies and procedures related to remote work, vaccine mandates, and accommodations for employees with disabilities or underlying health conditions.
- Provide training to managers and supervisors on how to manage remote employees, comply with employment laws, and avoid discrimination.
- Ensure that all employees are aware of their rights and obligations under applicable laws and regulations, including wage and hour laws, privacy laws, and disability discrimination laws.
- Consult with legal counsel to ensure that any policies or procedures related to COVID-19 compliance are compliant with applicable laws and regulations.

e. Conclusion

COVID-19 has had a significant impact on the workplace, creating new challenges for employers and employees. As employment attorneys, it is our responsibility to stay informed about these developments and provide our clients with the guidance they need to navigate these complex legal issues. By staying informed and taking practical steps to ensure compliance with applicable laws and regulations, employers can protect their employees and their businesses from legal liability.