KILPATRICK TOWNSEND

7 KEY TAKEAWAYS

Retail Workplace Update: Labor and Employment Updates for Retailers

Kilpatrick Townsend attorneys Chris Caiaccio and Drew Williamson recently presented at the "**Kilpatrick Townsend Retail and Consumer Goods Summit,"** featuring members of the firm's Retail and Consumer Goods Industry Team who led discussions on current issues and topics that impact retailers and consumer goods manufacturers and suppliers in the marketplace. Mr. Caiaccio and Mr. Williamson focused on "Labor and Employment Updates for Retailers."

Key takeaways from the presentation, include:

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Pause Before You Discipline: Before disciplining employees for offensive or abusive workplace conduct, employers must first consider the context in which the conduct occurred. If it occurred while the employee was even arguably engaging in protected activity, disciplinary action may be unlawful under the National Labor Relations Act (the "Act"), even for egregious misconduct.

Time to Revise Workplace Policies: Employers should scrutinize their workplace rules, policies, and procedures—current and future—through the lens of the Board's new Stericycle standard. Where possible, rules and policies should be narrowed to avoid the appearance of potential to chill employees' Section 7 activity. Otherwise, workplace rules—even commonplace ones—are likely unlawful under the Act.

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Plan and Prepare for "Quickie" Elections: The Board's recent overhaul of union election rules and procedures expedites the election process and will inevitably lead to an uptick in organizing efforts. As a result, retailers must proactively train supervisors in the art of developing positive employee relations and early detection of organizing efforts. They should also develop an internal playbook for responding to requests for recognition based on authorization cards, including strategies for assessing the union's majority status.

Know Before You Post: Given the recent proliferation of pay transparency laws across the country, retailers should determine and document pay ranges for all positions, review or create job posting templates that comply with the laws, and develop processes for consistently publishing that information in connection with all job postings, including internal ones.

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The Gig Is Up?: The rise of technology and digitization has created innovative shopping scenarios where more and more retailers are using gig workers are used to help with tasks ordinarily performed by traditional employees. If finalized, the Department of Labor's proposed independent contractor rule would require retailers to treat many of them as employees, entitled to minimum wage, overtime, and health benefits. Because of the proposed rule's focus on a businesses' reserved right to control the worker, retailers should carefully review agreements with their contractor workforce and determine whether revisions are needed to avoid losing the benefits of the independent contractor relationship.

Pay Frequency Litigation Surge: Retailers in New York have increasingly been the target of collective- and class-action lawsuits alleging violations of the state's weekly pay requirement for "manual workers." It is important for retailers to determine whether any of their non-exempt workers would be deemed manual workers under New York law. If so, those workers should be paid on a weekly basis. Alternatively, large retailers should consider applying for an exemption from the weekly pay requirement under New York law, as the exemption will shield them from future lawsuits alleging late payments.

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Fair Workweek Complications: The City of Los Angeles recently became the latest in a growing number of major cities to subject retailers to complicated predictive scheduling requirements. The fair workweek laws are nuanced and carry the potential for significant penalties, as evidenced by recent settlements between employers and New York City for violations of its fair workweek law. Retailers must review their onboarding, scheduling, training, documentation, and staffing procedures in light of the laws and ensure their processes track the laws requirements.

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