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CORPORATE COUNSEL AWARDS 2023

What Businesses Need to Plan for in 2024

From the shifts in e-commerce litigation to the impending implementation of the Corporate Transparency Act, below are some key legal updates from the experts at Greenberg Glusker that are crucial for businesses to be aware of as 2024 approaches.

CORPORATE TRANSPARENCY ACT

Update by Arthur Moore, Corporate & Tax

The Corporate Transparency Act (CTA) will come into effect on January 1, 2024, and impose new federal reporting requirements on many business entities operating in the US. While there are exceptions for certain highly regulated entities and large operating companies, most business entities formed by a filing with a secretary of state's office will be required to disclose to FinCEN certain information about the entity and personal identifying information about the individual creating the entity and the beneficial owners of such newly created entity. The CTA will also require that such information be updated and/or corrected within 30 days of any changes to the initially reported information.

AVOIDING THE CONSEQUENCES OF GREENWASHING

Update by Sedina L. Banks and Sherry Jackman, Environmental

"Green marketing" can be an effective tool in a company's marketing and corporate public relations strategies as environmental sustainability becomes more important to consumers. However, companies must also exercise caution to ensure that green marketing claims do not inadvertently slip into the deceptive realm of "greenwashing," which can expose companies to private and public lawsuits and reputational damage. Companies should consider a few principles as part of their green marketing campaign strategy to avoid the consequences of greenwashing.

First, green marketing claims must be factually supported and legally allowed. A company cannot make a green marketing claim based on aspirations or euphoric-sounding taglines. There are numerous laws and regulatory guidance that can potentially impact a company's green marketing claims that companies must consider. Second, companies should avoid unqualified environmental benefit claims such as "eco-friendly" or "all natural." Such ambiguity in terms, without qualifying information, renders a company potentially liable for greenwashing. Finally, it is important for companies to periodically review and reassess a green marketing campaign to ensure that it is still factually accurate and legally compliant.

MORE SICK LEAVE UNDER HEALTHY WORKPLACES, HEALTHY FAMILIES ACT

Update by Karina B. Sterman, Employment

California's new Paid Sick Leave (PSL) requirement raises the minimum number of paid sick leave days that employers must provide employees from three to five days per year. The new law goes into effect on January 1, 2024, and continues to permit employers to apply either the "accrual" method or the "front loaded" method for their paid sick leave policies. However, under the new law, the accrual method requires at least 24 hours/3 days of PSL or general PTO by the 120th day of employment and at least 40 hours/5 days by the 200th day of employment. The "front loaded" method remains the same but for the higher number of hours/days. While you're deciding which method to apply next year, also remember to update the LC Section 2810.5 Notice to Employee to ensure it reflects your new policy.

REPRODUCTIVE LOSS LEAVE

Update by Wendy Lane, Employment

Beginning January 1, 2024, private employers with five or more employees are required to provide employees with up to five days of time off following enumerated reproductive loss events, including failed adoption and surrogacy, miscarriage, still birth or unsuccessful assisted reproduction. Unless an employer's own policies provide otherwise, the leave may be unpaid, although an employee may use vacation or sick leave to receive pay during their absence. Employees are not required to provide documentation in support of a leave request under this law, and all requests for such leave must be kept confidential. Although leave must be provided for each reproductive loss event, the employer is only required to provide up to 20 days of leave in a 12-month period. Leave must be taken within three months of the reproductive loss event but need not be taken on consecutive days.

WAVE OF E-COMMERCE LITIGATION

Update by Ira Steinberg, Litigation

By now most businesses are aware that a relatively small number of repeat litigants and firms are filing hundreds of claims asserting that websites are not accessible to the visually impaired. These suits seek relief under the Americans with Disabilities Act as well as state disability access statutes. Courts are increasingly cracking down on the most egregious ADA abusers. California courts, for example, have issued a series of rulings emphasizing that only genuine customers, and not serial litigants, have standing to bring a disability access claim. The US Supreme Court has entered the fray, hearing argument this term in a case challenging standing under the ADA for "testers," individuals who visit a site specifically for the purpose of testing compliance and bringing litigation.

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The coming wave of e-commerce litigation is plaintiffs invoking anti-wiretapping laws to litigate data privacy. Their theory is that websites that allow third-parties, such as chat-bot and session replay operators, to access communications with visitors are aiding and abetting wiretapping by the third-parties. The rapidly solidifying legal consensus is that third-parties that only use the data they obtain to provide services to the website owner are not third-party interceptors under the wiretapping laws because they are akin to agents of a party to the communication and subsumed within the party they serve. On the other hand, third-parties that exploit data for their own benefit can be independent actors engaged in wiretapping. Businesses can immediately mitigate their risk of such wiretapping claims by engaging counsel to review contracts with e-commerce vendors to ensure that the limits on the use of customer data are legally compliant.

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