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## HOW DO NEW LEAVE LAWS AFFECT MY WORKFORCE?

Hot Button Issues Affecting  
the Workplace - part 2

There are precious few federal laws protecting an employee's job during a leave of absence from work. The most well-known is the Family Medical Leave Act (FMLA). Another example is the Uniform Services Employment and Reemployment Rights Act (USERRA), providing job-protected leave to members of the armed services. Both laws have existed for some time, although they remain tricky for many employers to apply properly.

With the start of 2023, many new state and local leave laws (providing both paid and unpaid leave) took effect, and not only in California (which has, for



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some time, been the most active jurisdiction in this area of legislation). Now, however, an increasing number of states and local jurisdictions are expanding the scope of job-protected leave and benefits. Any employer with a multijurisdictional presence should pay close attention to new legislation in the states and localities where their employees work, how that

affects protected leaves of absence, and whether or not an employee must be paid while on leave. These laws affect employers of many different sizes, and employers risk running afoul of these laws by assuming they have too few employees to be covered under these state and local laws.

### Are My Company's Non-compete Agreements Still Valid?

The landscape for employers that wish to enforce non-compete agreements against former employees continues to become more complex. States are actively restricting enforcement of these agreements, either entirely or as against any employee who earns wages below particular thresholds. As with the increase in job-protected leave, many employers continue to assume that these restrictions only apply in California, which is untrue. Many states nationwide have varying levels of restrictions on non-compete AND non-solicitation agreements.

Employers with employees in multiple jurisdictions must carefully review the laws that apply in these jurisdictions

and consult with counsel to get ahead of any challenges they may face enforcing these types of contracts. In addition, every employer needs to carefully watch for the expected Federal Trade Commission regulations that will restrict these agreements nationwide, coming later this spring. It is too late to address these matters when an employee leaves.

Like many other business owners, you may be left with more questions than answers as you review your employment practices. Set your business up for success in 2023 by contacting your employment law attorney or any member of our employment law team. ■

*Alicia Nesline Shaw represents business entities in her corporate and employment law practices, as well as individuals in the estate planning process at Carlile Patchen & Murphy.*

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## IN THE SPOTLIGHT: THE DANGERS OF DARK PATTERNS

With websites often anchoring a business's marketing efforts, it's no surprise that many will utilize design patterns in their user interface to achieve an easy and aesthetically pleasing online experience for consumers.

However, when design patterns are purposely or inadvertently used to manipulate consumers into taking actions that they otherwise might not, they become "dark patterns." In the eyes of regulators, the use of dark patterns in marketing is considered unfair and deceptive, and ultimately, illegal. In a competitive online marketplace, some businesses have increased dark pattern tactics to secure revenue at the consumer's expense. Not surprisingly, state and federal consumer protection agencies have noticed and have begun to focus their enforcement authority on prohibiting these practices.

Dark patterns can be hard to spot for



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consumers, as well as the businesses using them, because they appear in multiple forms to achieve diverse goals on both websites and mobile applications. These can include:

- A countdown timer that pressures consumers to purchase when in reality the offer is not time-limited might be used to induce false urgency.

- Material terms might be buried in the middle of a dense service agreement to hide pertinent information.

- Subverting consumer privacy requirements, an app might force users to accept location tracking before access is granted even when location is not necessary for the app's services.

- A prominent accept button might be displayed with no, or a significantly smaller or confusing, decline button to inhibit consumer choice.

Whatever the form, lawmakers fear these tactics unfairly and deceptively lure consumers into purchasing potentially unwanted goods or services, or accepting contractual terms that are in fact harmful to them. There is no specific federal or state dark pattern law yet, but legislative and enforcement activity suggest that it is only a matter of time.

The Federal Trade Commission, the primary federal agency charged with enforcing federal consumer protection laws, recently warned or fined multiple businesses for using dark patterns, including a record-breaking 2022 court order that required internet phone service provider Vonage to refund \$100 million to consumers for surprise, unauthorized negative option fees and to stop using dark patterns to prevent consumers from cancelling their services. The Consumer Financial Protection Bureau has also taken action to prevent dark pattern practices under the prohibition on unfair, deceptive, or abusive acts or

practices (UDAAP) in the Consumer Financial Protection Act.

State lawmakers, too, have methods to weed out dark patterns. Along with UDAAP laws, many state automatic renewal laws require businesses to offer an easy, immediate cancellation method for subscriptions. New state privacy laws such as the California Privacy Rights Act, help reign in dark patterns by requiring "symmetry in choice," meaning the path for consumers to exercise more privacy protection must be as easy, or easier than, the path to exercise less protection.

Dark patterns may be lucrative for businesses, but can also cause consumer harm, invade consumer privacy, and disintegrate public trust in the business and online marketplace. Assessing your website and sales and marketing initiatives with experienced counsel can help identify and minimize dark pattern usage by implementing default privacy and consumer-friendly designs that promote choice and transparency. ■



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