

COLUMNS

What retailers are watching in 2023

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As retailers look to 2023, they are facing uneven consumer demand, a rumored recession, and new federal and state regulations that could drastically alter the way they do business.

Proactive retailers are actively reviewing the way they pay and classify employees and their safety priorities as identified recently by the Consumer Product Safety Commission (CPSC).

Below are some of the top issues that are positioned to be significant for retailers in 2023.

Independent contractor rule

Retailers are awaiting the final rulemaking from the U.S. Department of Labor (DOL) on how to classify independent contractors, which could have a significant impact on the gig economy, as well as distribution and delivery channels and other vendor/contractor relationships.

The DOL published the [Proposed Rule](#) in October, which indicated the desire of the DOL to return to applying a test that would make it more difficult for certain workers to qualify as independent contractors.

The Proposed Rule revises the standard for determining when a worker is an employee or an independent contractor under the Fair Labor Standards Act (FLSA).

In issuing the Proposed Rule, the DOL seeks to return to the totality-of-the-circumstances approach to the economic realities test and offers detailed guidance as to how the underlying factors should be applied.

The six factors are as follows: (1) the worker's opportunity for profit or loss depending on managerial skill; (2) investments by the worker and the employer; (3) the degree of permanence of the working relationship; (4) nature and degree of control; (5) extent to which the work performed is an integral part of the alleged employer's business; and (6) skill and initiative.

The issue of whether a worker qualifies as an independent contractor will likely remain the subject of frequent litigation under the FLSA and applicable state wage and hour laws. Retailers should continue to review how their workers are classified.

Consumer Product Safety Commission

The CPSC will take a hard-and-fast approach to product safety in fiscal year 2023 according to its recently passed operating plan, with enforcement being at the top of its priority list.

Companies, including sellers, distributors and importers, can prepare for this enforcement focus and other CPSC objectives identified in the plan by ensuring that internal compliance programs are comprehensive and consistently implemented, confirming that Standard Operating Procedures (SOPs) are current and closely followed, and proactively engaging with voluntary standards organizations and the CPSC to reach a consensus on workable solutions.

Chronic hazards associated with per- and polyfluoroalkyl substances in textiles and children's products are also part of a larger initiative to enhance the agency's efforts to track international standards on all chemicals that impact consumer products.

Safety equity will be enhanced by the CPSC's commitment to integrate data and analyses of product risks having disparate impacts on age and gender.

The agency will also study whether certain products or product classes more adversely impact underserved communities. Expect secondary markets, resellers and e-platforms to be a primary focus in those research reports.



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New York Pay Act 191

New York Labor Law (NYLL) 191(1)(a) requires that manual workers be "paid weekly and not later than seven calendar days after the end of the week in which wages are earned."

While that section of the law has been in place for decades, employees could not sue their employers for violations in pay schedule in a private action. That all changed with an [appellate court decision in 2019](#) that allowed for private action by employees, which has led to a tidal wave of litigation against employers including, disproportionately, retailers.

The stakes are very high for retailers with this particular statute as the penalties are equal to 100 percent of underpaid or late paid wages, and those penalties can be retroactive for six years.

The Appellate Division also found that full payment prior to the commencement of the action did not "eviscerate the employee's statutory remedies."

Instead, it applied the liquidated damages analysis used under the FLSA and held that employees are entitled to liquidated damages as a remedy for untimely payment of wages, in addition to the complete nonpayment or partial payment.

There are three things employers should do as more lawsuits are filed.

One, be mindful of what their pay practices are. If a retailer is paying biweekly, think about changing that to weekly to avoid any manual worker classification issue.

The term "manual worker" is defined under the NYLL as "a mechanic, workingman or laborer," but has been expanded to generally include individuals who spend more than 25 percent of their working time engaged in "physical labor." These tasks do not have to be strenuous or taxing.

Two, ask for a variance from the New York Department of Labor. Employers of a certain size can get an exception to pay employees biweekly. While this will not erase liability retroactively, it can effectively eliminate liability

prospectively.

Three, be aggressive in responding when litigation arises.

Minimum wage and tipping

Following the November elections, Nebraska, Nevada and Washington, DC will increase minimum wage for both tipped and nontipped employees.

While each dollar amount differs, these legislation changes will increase labor costs for retailers, especially those who employ a large number of hourly, low-wage workers, such as food service and hospitality.

In addition, there is an increase in the number of claims related to tip practices. These actions are coming from delivery drivers who claim that they were not doing tip work for the majority of their time; from employees who claim improper tip pools when management takes part or improper disclosures concerning administrative fees/charges; and regular rate claims by delivery drivers when it comes to some bonuses.

In light of this, some states are becoming more restrictive on tip credits. Many companies in the service industry are already changing language across the boards to stay compliant with specific state requirements for bills or menus.

Dobbs

Dobbs v. Jackson Women's Health overturned prior Supreme Court decisions in *Roe v. Wade* and *Planned Parenthood v. Casey*, which held that the U.S. Constitution prohibits states from banning abortion or unduly burdening access to abortion services in the initial phases of pregnancy.

The *Dobbs* decision will impact retailers in two main ways.

One, as employers themselves, retailers need to regularly conduct a state-specific risk analysis of their benefit plans or employment policies to ensure that they are compliant with evolving state laws.

Two, retailers need to regularly analyze the services they offer to determine if they are affected by state or federal law in this area.

For instance, the U.S. Department of Health and Human Services confirmed that its Office of Civil Rights (OCR) is investigating retail pharmacies for allegedly refusing to stock and dispense medication related to abortion.

The investigations stem from guidance the OCR issued to retail pharmacies that said that the nondiscrimination provisions in the Affordable Care Act require pharmacies to stock and dispense these drugs when lawfully prescribed, including in states that may ban the sale or use of the medication for abortion.

This places retailers in a difficult legal situation if they operate pharmacies in states that ban or highly restrict medication related to abortion.

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