



# Don't Read This: 2016 Workplace Law Year In Review

Insights

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Reverse psychology isn't the only explanation for the title of this article (although, if you've made it this far, it seems to have worked). No, another explanation is that 2016 was a very rough year for employers when it comes to the state of workplace law, and you can be forgiven if you'd rather stick your head in the sand than relive it.

But, if you're a glutton for punishment, please read on. Or, if you want to make sure you are fully up to speed on all of the labor and employment law developments from the past 12 months, despite the pain it might inflict, you've found the right article.

## The Game Changers

In the world of employment law, 2016 saw four massive game changers. First and foremost, the nation was prepared to awake to a new reality on December 1. Under new U.S. Department of Labor (USDOL) rules announced in May, employers would have to pay white collar workers \$913 per week, or \$47,476 per year, in order to be classified as exempt from overtime starting this date. These amounts, which more than double the previous minimum threshold, were slated to be "adjusted" (read: raised) every three years beginning in 2020.

But on November 22, in the most shocking development of the year, a federal court judge blocked the rules from taking effect as scheduled. Employers now sit in limbo during this uncertain time period, waiting to see if an appeals court will resurrect the rules, and unsure whether the incoming Trump administration will work to modify or undo these changes in the new year.

Second, in January, the federal government announced plans to revise the EEO-1 form to require all businesses with over 100 workers to provide detailed information about their pay practices in an effort to address gender discrimination. Although the first mandated report won't be due until March 2018, the information collected on that form will include compensation data from 2017 – so your pay practices will be under the microscope like never before starting in just a few weeks.

Third, the Occupational Safety and Health Administration (OSHA) announced plans in May to radically enhance injury and illness data collection from employers. The new rule will require many employers to electronically submit information about workplace injuries and illnesses to the government, and this data will be posted on OSHA's public website. Hand-in-hand with that announcement came a heightened anti-retaliation focus, which could impact employers' abilities to

carry out common practices such as requiring employees to participate in post-accident drug tests. Finally, for the first time ever, two federal appeals courts agreed with the National Labor Relations Board (NLRB) this year and struck down mandatory class action waivers as illegal. These agreements, which bar employees from asserting class or collective action lawsuits in court and instead require them to bring individual arbitration claims, had been universally accepted until the 7th Circuit struck them down in May and the 9th Circuit ruled against them in August. If any silver lining is to be found, there is now a clear circuit split among the federal appeals courts, increasing the odds that the Supreme Court will take up the dispute in the near future.

### **Labor Law Game Changers**

Seemingly not a month went by in 2016 without a monumental development in the traditional labor world, almost all of which boosted unions and harmed employers. The bad news started in February when Justice Scalia, a longtime conservative champion on the Supreme Court, unexpectedly passed away. Within weeks of his death, the Court declined to overrule a case that upheld state rules forcing public sector employees to pay agency shop fees to their unions, which seemed poised to tilt against unions before his demise.

In an expected but still disappointing development, the NLRB followed up last year's joint employment decision with an equally disastrous decision in July's *Miller & Anderson* case, making it easier to combine jointly employed temporary workers with an employer's existing workforce to form a union. Employers were shocked, however, when the NLRB held that an employer violated the National Labor Relations Act (NLRA) by hiring permanent replacements during an economic strike, overturning decades of precedent allowing employers to hire such replacements regardless of motive.

By the time the Board ruled in August that university students who work as teaching and research assistants at private universities are "statutory employees" under the NLRA who can organize to form unions, no one was surprised, despite the unprecedented nature of the ruling and the dramatic impact it will have on the labor law landscape.

### **Supreme Court (SCOTUS) Setbacks**

The death of reliably conservative Antonin Scalia was not the only bad SCOTUS news for employers in 2016. The term saw employers lose a useful weapon in the battle against costly class action lawsuits in January, and saw workers gain an advantage when it comes to advancing constructive discharge claims against their former employers in May. That same month, the Court issued a "no decision" on another class action issue, leaving employers in a quandary regarding the important issue of standing.

### **Miscellaneous Stumbling Blocks**

Some other losses for employers were not as prominently publicized, but still contributed to the overall negative atmosphere that pervaded 2016. One such case that could end up having significant consequences was the February decision upholding the right of employees to sue their employer for allegedly cutting employee hours to avoid offering health insurance under the Affordable Care Act

(ACA). Workers who believe their employer “right-sized” their workforces for the purpose of avoiding healthcare costs now have a leg to stand on when they seek relief in court.

That same month, the 9th Circuit Court of Appeals – which covers most Western states in the U.S. – upheld a controversial USDOL rule that prohibits businesses from requiring employees to share their tips even if the tipped employees are paid minimum wage. This decision has already pushed many restaurants and hospitality businesses to alter their labor and tip-pooling practices, although employers are holding out hope for a reprieve by the Supreme Court.

In August, the Securities and Exchange Commission (SEC) issued six-figure fines to employers for crafting restrictive severance agreements it believed violated agency rules aimed at preventing companies from discouraging employee whistleblowing. This surge in enforcement activity required employers to remove offending language from current template settlement agreements, and could also encourage them to revisit past agreements to make retroactive amends.

### **Struggles For The New Economy**

Whether you call it the gig economy, the sharing economy, the on-demand economy, or the app economy, this 21st century phenomenon dominated headlines for much of 2016 when it came to forging new workplace law. Most businesses in this sphere classify their workers as independent contractors and not employees, which is why many of them were shaken by the NLRB pronouncement in October that it would essentially “assume” all gig workers to be misclassified employees. The news didn’t get better when, within a matter of days, New York City passed “wage theft” protections for freelance workers, aimed squarely at offering gig workers options to bring claims against these businesses.

Of course, the major news resonating in this industry throughout the year involved the multimillion dollar litigation against ride-sharing service Uber. All eyes turned to the litigation in April when the company announced a \$100 million settlement with workers that would retain their status as independent contractors and create a template for the preferred 21st century workplace model. When that settlement fell apart in August because of court concerns over the fairness and adequacy of the relief, companies realized they were still on their own when it comes to navigating the 21st century economy using 20th century laws.

### **Bright Spots**

It wasn’t all bad news for employers in 2016. Many businesses feared the worst in March when the federal government finalized a significant new regulation that would have interfered with businesses seeking legal counsel to help in opposing or dealing with unions. The USDOL’s “persuader” rule would have forced attorneys and their clients to report in public records their confidential attorney-client and financial relationships, providing an unfair boost to unions in their organizing efforts. But in June, a federal court blocked the rule from taking effect by labeling it as “defective to its core,” and in November the same court acted to make the ruling permanent in nature, delivering what could be the final nail in its coffin.

Another victory was earned in October when a federal court similarly blocked the government from implementing most of the federal contractor “blacklisting” rules that were slated to go into effect late that month. The final rules and guidance implementing the Fair Pay and Safe Workplaces Executive Order, signed by President Obama in July 2014 and published in August 2016, would have required contractors to disclose violations of numerous workplace laws, such as Title VII and the FLSA, when bidding for work with the government. But by virtue of the court’s order, contractors can proceed without present concern about most of the blacklisting rules.

### **What’s In Store For 2017?**

After enduring a year like 2016, there’s nowhere to go but up. And there are some positive signs on the horizon when it comes to the immediate future of workplace law. As outlined in our preview of the next administration, we expect that President Trump will restore the conservative status quo to the Supreme Court, and could roll back some of the more onerous regulations facing employers. However, given his unpredictable nature, employers cannot rest assured that things will fall their way with regard to traditional labor, wage and hour, immigration, pay equity scrutiny, and numerous other workplace concerns.

There are also some dark clouds on that same future horizon. Seattle passed a complex and burdensome “secure scheduling” ordinance in September, which will require certain employers to provide a “livable schedule” to their employees two weeks in advance. The new law will also require employers to provide workers with a right to request their desired shifts, the right to “on-call” pay, and a prohibition on back-to-back closing and opening shifts, among other things. No doubt other local and state governments will seek to follow in Seattle’s footsteps and craft similar regulations in 2017, creating union-like working conditions without the need of an actual union.

It could be reminiscent of the “Fight for \$15” movement, which started in a few isolated locations and then spread like wildfire in 2015 and 2016. Speaking of which, we can expect to see a continuation of the same minimum wage increases at the state and local levels throughout 2017, forcing employers to make difficult decisions about compensation plans in the new year.

### **Conclusion**

Despite the warning contained in the title of this article, you read the entire thing. Whether you are a glutton for punishment or want to stay on top of the latest developments (or both), don’t wait until next year’s version to catch up on all of 2017’s happenings. You can ensure you are up to speed on the most significant workplace law issues by subscribing to our monthly newsletters and our legal alert service by clicking here or visiting [fisherphillips.com/newsroom-signup](http://fisherphillips.com/newsroom-signup).

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