WEB EXCLUSIVE: January 2018: The Top 18 Labor And Employment Law Stories

Insights
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It's hard to keep up with all the recent changes to labor and employment law. While the law always seems to evolve at a rapid pace, there were an unprecedented number of changes each month in 2017—and if January is any indication, 2018 will be no different. There were so many significant developments taking place during the past month that we were forced to expand our monthly summary beyond the typical "Top 10" list. In order to make sure that you stay on top of the latest changes, here is a quick review of the Top 18 stories from last month that all employers need to know about:

1. **Nationwide 7-Eleven Immigration Raids Herald New Worksite Enforcement Strategy** – Slurpees are not the only ICE-y things being served at 7-Eleven these days. For the second time in five years, Immigrations and Customs Enforcement (ICE) raided dozens of 7-Eleven stores across the country in search of undocumented workers and managers who knowingly employ them. The raids carried out on January 10 involved 98 stores in 17 states from coast to coast, and resulted in at least 21 arrests. In conjunction with the raids, ICE also announced its new worksite enforcement strategy, with which all employers should immediately familiarize themselves (read more here).

2. **Chronic Dispute: What The Sessions Marijuana Memo Means For Employers** – Attorney General Jeff Sessions issued a one-page memorandum on January 4 rescinding Obama-era guidance that had allowed states to legalize medical and recreational marijuana with marginal federal interference, eliminating any doubt about his position against the trend towards legalization. The bad news is that the current state of the law regarding the legality of marijuana use remains confusing, to say the least: it is dependent on the state you are in, and while the legislatures and courts across the country continue to revisit and shape the laws at issue, marijuana continues to be classified as an illegal Schedule I drug pursuant to the Federal Controlled Substances Act. The good news for employers: the memorandum doesn't seem to have impacted your approach to the issue from a workplace law perspective. Where state law had permitted you to take a zero tolerance approach to those testing positive for marijuana, you can continue on the same course. And if you took a more relaxed approach—whether due to state law or your own company philosophy—you can likely carry on with business as usual. But there could be turbulence ahead, so you will want to get up to speed on the latest and pay close

attention to the upcoming developments on this topic (read more here).

3. **What A Government Shutdown Meant For Employers** – Starting on midnight on January 20, the federal government experienced its first shutdown since 2013. It was brief in nature but had a dent in the lives of employers across the country. Moreover, it may only be a brief reprieve given that another deadline looms in early February and another shutdown may be right around the corner. How did it impact employers and what might another shutdown look like for workplace law? Read more here.

4. **Growing Number Of Employers Are Removing Pay History Questions From Job Interviews And Applications** – In this past month alone, Bank of America and Amazon have joined Google, Facebook, and Cisco Systems Inc., as companies that will no longer ask applicants about salary history in an effort to help address the gender pay gap. Cheryl Pinarchick, who co-chairs the Fisher Phillips Pay Equity Practice Group, stated in a January 29 interview for the Washington Post that companies "don't want to have to keep up with what's happening, quite literally, on a day-to-day basis." She advised employers to adopt the policies more widely: "Unless you have a team of people who can be tracking this, even on a daily basis, you could find yourself violating a law where you didn't even know a law existed," she said. "It's best practice going forward" (read more here).

5. **Grubhub Trial Decision Could Be Delayed For A Very Scary Reason** – The first few days of 2018 did not go to plan for those gig economy businesses hoping that the new year might bring some relief in the seemingly never-ending misclassification struggle. As we sit on pins and needles waiting for a decision from the trial court judge in the blockbuster *Grubhub* trial (you can familiarize yourself with the trial here and here if you need a refresher), the plaintiff's attorney is asking for a delay in the court's ruling. On January 2, plaintiff Raef Lawson's attorney provided the court with a quick one-page filing that might otherwise seem innocuous; after all, it was just a "Notice of Supplemental Authority," a common legal tool intended to alert the court to some additional legal precedent that might impact the case. But its contents could signal that a bombshell is on the way (read more here).

6. **SCOTUS Ruling Helps Plaintiffs Get Second Bite At The Apple Through Supplemental State Claims** – In a 5 to 4 decision, the U.S. Supreme Court ruled that any statute of limitations applicable to an employee's state law claims are suspended during the pendency of a federal lawsuit in which the state law claims are included. The January 22 decision in *Artis v. District of Columbia* gives employees additional time to refile claims in state court once a federal court declines to decide them. As a result, employers may be stuck in state court re-litigating issues previously litigated years before in federal court. By granting these plaintiffs a second bite at the judicial apple, the Supreme Court has made life more challenging for employers defending

workplace law claims in court (read more here).

7. **New Jersey Now Bans Breastfeeding Discrimination** – New Jersey Governor Chris Christie began his final week in office by signing 40 bills into law, including an amendment to the New Jersey Law Against Discrimination that immediately bars discrimination against breastfeeding employees. The new law also requires employers to provide such employees with reasonable accommodation. New Jersey employers should take steps to familiarize themselves with the new legal requirements, signed into law on January 8, and adjust policies and practices to ensure compliance (read more here).

8. **New York City Employers Will Soon Be Obligated To Talk Out Reasonable Accommodations With Employees** – The New York City legislature enacted an amendment to the New York City Human Rights Law (NYCHRL) on January 19 which codifies an employer's obligation to engage in a cooperative dialogue with any employee who may be entitled to a reasonable accommodation. Although the amendments do not take effect until October 15, 2018, you should start the process of adjusting to this new reality right away (read more here).

9. **Take Two: Pay Equity Plaintiffs Attempt To Resurrect Class Action Against Google** – A group of former Google employees filed an amended complaint in California federal court in an attempt to breathe new life into their equal pay class action lawsuit, which had been dismissedin December for failing to sufficiently allege facts demonstrating an ascertainable class. The pay equity world will now have its collective eyes on Google to see how the company responds to the January 3 filing, and to follow the latest chapter in one of the most high-profile pay equity claims ever filed (read more here).

10. **Labor Department's Inflexible Intern Test Headed To The Shredder** – The U.S. Department of Labor (USDOL) announced that it will abandon its six-part test for determining whether interns qualify as employees after yet another court favored the alternative, primary beneficiary test. As we have blogged about before, the agency historically has taken the position that six factors control whether an intern of a for-profit employer is, in fact, an employee. The USDOL's articulated test required that each and every factor be met to exclude the individual from the FLSA's minimum wage and overtime protections. But with the January 5 announcement, the agency instead lined up with a number of federal courts that have adopted a more flexible approach (read more here).

11. **Labor Department Initiative Could Permit Gig Workers To Obtain Healthcare Benefits** – There is another federal move afoot that could make it more hospitable for your average American to throw their hat into the gig economy ring. On January 4, the Department of Labor announcedthat it would make some changes that would clear the path for small businesses and solo entrepreneurs to link together for the purpose of creating association health plans (AHPs). Our

firm's Employee Benefits Practice Group wrote about this development in a newsletter a few months back; you can read about AHPs in more depth here if you are so inclined. As a gig business, you really only need to know one thing: the move is primarily meant to make it easier for smaller employers to offer health benefits to their workers while also steering clear of Obamacare requirements. But It also appears to give gig workers the ability to join together to create their own health plans (read more here).

12. **Lawyers Suing Lawyers: $300 Million Pay Equity Claim Filed Against National Law Firm** – Call it ironic, but even providers of legal services are targets for pay equity litigation. Case in point: a $300 million dollar class action lawsuit filed against a labor and employment law firm in a California federal court. A female non-equity shareholder at Ogletree Deakins alleges in her January 12complaint that male non-equity shareholders earn more, receive more business development and networking opportunities, and get more credit for the business that they originate than their female counterparts. In addition to its pay discrimination claims, the lawsuit alleges causes of action for gender discrimination and retaliation. The plaintiff seeks $100 million for underpayment, $100 million for compensatory damages, and $100 million in punitive damages. Additionally, she has filed a separate declaratory relief action alleging that the arbitration agreement that Ogletree circulated to its employees via email is not enforceable against her because she did not sign it. The Ogletree litigation is one of several cases filed against large law firms recently that allege that less-deserving male partners outearned their female colleagues (read more here).

13. **Key Portion Of NYC's Fair Workweek Law Put On Pause** – One of the key provisions of New York City's Fair Workweek Law was put on hold while a federal judge sorts out a constitutional challenge brought by two restaurant advocacy organizations. The "Deductions Law" portion of the new city statute allows certain employees of fast food establishments to authorize a portion of their wages to be paid to registered and approved not-for-profit organizations, and also directs fast food establishments to deduct, collect, and remit those employee wages to the designated organizations. However, thanks to a lawsuit brought by the Restaurant Law Center and the National Restaurant Association, enforcement of the Deductions Law was put on pause on January 17, and could be permanently scrapped if found unconstitutional (read more here).

14. **Feds Announce Increase To FLSA Penalties** – In the first week of the New Year, the U.S. Department of Labor publishedincreases in the civil money penalties it can impose for certain violations of the federal Fair Labor Standards Act (FLSA). These new levels, approximately two percent higher than those established last year, apply to any penalties assessed after the effective date of January 2 for predicate violations that occurred after November 2, 2015 (read more here).

15. **Recent PAGA Case Provides Rare Procedural Victory For California Employers** – If you're a California employer, perhaps no single law strikes fear into your heart quite as much as the Labor Code Private Attorneys General Act of 2004 (PAGA). The law allows individual "aggrieved employees" to bring representative actions on behalf of themselves and other aggrieved employees to recover civil penalties for Labor Code violations, sometimes extracting staggering amounts from employers. However, a January 4 appellate court decision in *Khan v. Dunn-Edwards Corp.* granted a significant procedural "win" to employers in PAGA cases. While this might be a limited victory, California employers should celebrate any good news on the PAGA front (read more here).

16. **Supreme Court Accepts Travel Ban Ban Case (Again)** – For the second time, the Supreme Court has accepted a case for review that will allow it to rule, once and for all, on the legality of the president's immigration travel ban. The first such case was dismissed after the travel ban was revised, but now the third iteration of his executive action limiting those permitted to enter or stay in the country will be argued before the Supreme Court this term after the Court accepted review on January 19. Expect a final decision by late June (read more here).

17. **Uber-Union Partnership May Jumpstart the "Portable Benefits" Movement in the Gig Economy** – Of all the public policy debates surrounding the gig economy of late, one of the hottest topics has been "portable benefits" – the concept that gig economy workers should have flexible, portable benefits that they can take with them from job to job, or "gig to gig." This push just got a major jumpstart that may turn out to be a game-changer. On January 23, Uber and the Service Employees International Union (SEIU) jointly called for the state of Washington to develop a "portable benefits system" that would cover gig economy workers (read more here).

18. **Discovery In FLSA Cases May Soon Hit The Fast-Track** – Early discovery in cases brought under the Fair Labor Standards Act (FLSA) may be changing significantly if courts begin to adopt the new *Initial Discovery Protocols For Fair Labor Standards Act Cases Not Pleaded As Collective Actions*. The Federal Judicial Center's FLSA Protocols Committee, which includes judges as well as lawyers engaged in FLSA matters, developed and released discovery protocols in January that seek to change a party's initial disclosure requirements to include additional documents and information specifically relevant to FLSA cases (read more here).

If you have any questions about these developments or how they may affect your business, please contact your Fisher Phillips attorney.

This Legal Alert provides an overview of specific legal developments. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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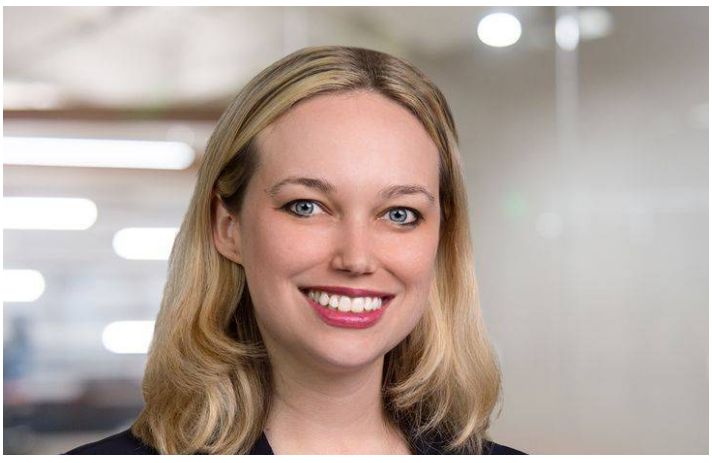

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