WEB EXCLUSIVE: February 2018: The Top 15 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 all through 2017. And if the first two months of 2018 are any indication, things won't be slowing down anytime soon. In fact, 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 15 stories from last month that all employers need to know about:

1. **Title VII Evolution Continues: Another Appeals Court Finds Sexual Orientation Discrimination Actionable** – Another federal court of appeals decided that Title VII covers claims of sexual orientation discrimination, continuing the evolution of workplace discrimination law that has begun to sweep over the country in recent years. With the February 26 ruling by the 2nd Circuit Court of Appeals—covering federal claims arising in New York, Connecticut, and Vermont—employers across the country have been put on notice that Title VII is increasingly being interpreted more expansively than it had been just a few short years ago (*Zarda v. Altitude Express, Inc.)* (read more here).
2. **Back To Square One: NLRB Reverts To Unworkable Joint-Employer Test – For Now** – In what employers are sure to hope is just a temporary—but stinging—setback, the National Labor Relations Board vacated its December ruling that had freed employers from having to deal with an unworkable and expansive legal test for determining whether an entity was considered a joint employers. Because of allegations that one of the three-member majority was ethically compromised due to his former law firm's involvement in a related case, the Board decided on February 26 that it would pull the new legal test and instead revert to the troubling and controversial standard that had been in place since August 2015. What do employers need to know about this development? (read more here)
3. **February Forecast Calls For Persistent ICE Immigration Raids Across The Country** – Federal enforcement officials amplified their efforts to crack down on undocumented workers and the businesses that employ them in February, as Immigration and Customs Enforcement (ICE) officials raided over 120 businesses between February 11 and 16. While most of these latest efforts have been concentrated in California, no business in the country is immune from this show of strength from the federal government. Moreover, President Trump's 2019 budget

proposal includes a 35 percent increase in penalties for employers that hire undocumented workers, so the stakes could soon be much higher for employers. What can you do today to minimize the risk of your business being a target, and what should you do if you are visited by federal officials? (read more here)

4. **States Ask Congress To Prohibit Arbitration In Sex Harassment Claims** – A unanimous block of attorneys general from all 50 states and the District of Columbia, not to mention several U.S. territories, sent a letter to Congress on February 12 asking federal lawmakers to prohibit the use of mandatory arbitration agreements when it comes to claims of sexual harassment. If Congress responds by passing legislation as requested, employers would need to adjust to a new reality that would have significant implications on human resources practices and employment litigation (read more here).
5. **Victory For Grubhub In First-Ever Gig Economy Trial** – In what is believed to be the first time in our nation's history that a trial court has reached a judicial merits determination in a gig economy misclassification case, a federal judge in California ruled in favor of the company on February 8 and found that a delivery driver was properly classified as an independent contractor. By rejecting the driver's claim that he was actually an employee deserving of minimum wage, overtime, and other benefits associated with employee status, the court handed gig economy companies everywhere a groundbreaking victory (read more here).
6. **SCOTUS Slams Door On Attempt To Expand Retaliation Law** – In a unanimous decision issued on February 21, the U.S. Supreme Court declined to broaden the definition of "whistleblower" in federal anti-retaliation law, ruling that employees who simply raise complaints with their employers are not protected by the Dodd-Frank Act despite regulations which sought to provide additional protections. The decision in *Digital Realty Trust, Inc. v. Somers* is a positive development for employers because it significantly limits the type of reports protected by the Act, while decreasing the likelihood that you could face liability for discharging an employee (read more here).
7. **Fisher Phillips Launches Interactive Pay Equity Map** – In response to the recent avalanche of pay equity legislation and the challenges facing employers working to understand and comply with a patchwork quilt of equal pay laws, Fisher Phillips announced on February 22 the launch of the "Pay Equity Interactive Map," a web-based tool. The map allows visitors to explore the pay equity laws of states and major cities by simply clicking on each state on the map. The firm's Pay Equity Practice Group developed the map as part of the firm's commitment to keep employers informed of developments in the evolving area of pay equality (read more here).
8. **Goodbye, Guidance? Feds Limit Power Of Agency Guidance Documents** – A short policy memorandum quietly issued by the U.S. Department of Justice's No. 3 official late last month could end up having positive implications for employers defending claims brought by the federal government. The January 25 memo(sure, it was issued late last month, but didn't really make waves until it began to be widely circulated in mid-February, so we're counting it here) introduces new stringent limits on the use of guidance documents by Department of Justice officials in civil actions against businesses, including employment claims. By limiting the

effectiveness of such guidance documents—and in some cases, eradicating them altogether—the Trump administration may have handed employers a gift that could pay off in the long run (read more here).

9. **Sexual Harassment Dominates California Legislation in 2018** – Sexual harassment appears to be the hot topic for the California State Legislature's 2018 session. This is certainly not a surprise, as issues related to sexual harassment and the #MeToo movement have dominated discussion across all industries and sectors of business, entertainment, sports, and politics. February 16 was the last day to introduce new bills for consideration during the 2018 legislative year. Therefore, we now have a good sense of the types of proposals that will be considered in 2018. The overwhelming majority of these proposals impose new requirements or liability on California businesses, so you will want to keep a close eye on these proposals as the year progresses (read more here).
10. **Fisher Phillips Submits Comments On Proposed Revisions To Tip-Credit Rule** – The U.S. Department of Labor (USDOL) has requested public comments on proposed regulatory revisions that would essentially extend certain tip credit restrictions to circumstances where an employer is not taking a tip credit. The proposed regulatory action is effectively a correction based on the limited scope of USDOL's authority with respect to tips and the unauthorized attempt to expand it in 2011. On February 5, attorneys from the Fisher Phillips Wage and Hour Practice Group submitted comments on behalf of the many hospitality clients impacted by this proposal (read more here).
11. **OSHA Issues Guidance On How To Cite Employers That Failed To Electronically Submit Injury And Illness Information** – The Occupational Safety and Health Administration (OSHA) issued new interim enforcement procedures regarding employers that failure to submit electronic injury and illness records. According to one of OSHA's more recent rules, employers are required to electronically submit injury and illness information—including that found on the OSHA Form 300A Summary of Work-Related Injuries and Illnesses and OSHA Form 300 Log of Work-Related Injuries and Illnesses—directly to OSHA over the next several years. Under the February 21 interim guidance, OSHA states that employers "that were required to submit records and failed to do so [by the December 31, 2017 deadline] may be subject to citation" (read more here).
12. **Kansas City Decides 2018 Is The Year For Private Employers To "Ban the Box"** – The City Council in Kansas City, Missouri passed an extension of its 2013 public sector "ban the box" rule on February 2, which will soon be extended to apply to private sector employers. The new ordinance will go into effect on June 9, 2018, requiring most businesses operating in the city to adjust their hiring practices. Employers should consider following a five-step plan to ensure they are on the right side of the law once it becomes effective (read more here).
13. **Tax Season Phishing Scams on the Rise** – It is tax season once again, and with it comes an increased threat of phishing scams targeting human resources and payroll personnel. Two years ago, the IRS alerted employers to a then-emerging email phishing scheme in which messages purporting to come from company executives requested the release of personal information relating to employees, including W-2 tax forms. Since then, the scam has evolved into a

significant threat facing employers in multiple industries, from small and large businesses to public schools and universities, hospitals, tribal governments and charities. According to the IRS, in 2017 alone, more than 200 employers reported falling victim to the scam, with hundreds of thousands of employees impacted. You should educate yourself about the scam now so you don't fall victim in 2018 (read more here).

14. **Can OSHA Look Back Farther Than 5 Years For Repeat Citations? Recent Court Decision Reaffirms That There Is No Limitation On OSHA's Repeat Violation Period** – Until 2015, it was the practice of OSHA to look back only three years to establish "repeat" violations under the Occupational Safety and Health Act (OSH Act). In 2015, OSHA increased that period to five years. The United States Court of Appeals for the 2nd Circuit recently reminded us that OSHA is actually not bound by any temporal limitation to establish repeat violations. On February 14, the 2nd Circuit reaffirmed that the period of time set forth in OSHA's own Field Operations Manual is not binding on the agency (read more here).
15. **Lessons From The Waymo v Uber Trade Secrets Trial** – Just hours after the Eagles clinched their upset Super Bowl win over the Patriots, a different battle royale began in a San Francisco courtroom between an established juggernaut and its upstart rival. For techies and trade secret geeks, the Waymo v. Uber trial was shaping up to be the Super Bowl of trade secret litigation. But on February 9, just one week into the trial, Uber and Waymo—Google's autonomous driving spin-off—announced a surprise settlement, ending the year-long litigation and turning the rivals into business partners. Under the terms of the settlement, Waymo dropped its claims that Uber stole key trade secret technology from Waymo when it hired former Waymo wünder-engineer Anthony Levandowski and acquired Otto, Levandowski's self-driving truck startup, in 2016. In exchange, Uber agreed to ensure that it is not using any of Waymo's proprietary information (including the laser technology at the center of this trade secret imbroglio) in its self-driving technology, and to give Waymo a 0.34 percent ownership interest in Uber—worth about $245 million at Uber's $72 billion valuation (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.