

JULY 2018: THE TOP 13 LABOR AND EMPLOYMENT LAW STORIES

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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 have been an unprecedented number of changes for the past few years—and this past month was no exception.

In fact, there were so many significant developments taking place during the past month that we were once again forced to expand our monthly summary well 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 13 stories from last month that all employers need to know about:

1. [**Brett Kavanaugh Nominated For Vacant Supreme Court Seat: Will He Treat Employers Well? Magic-8 Ball Says "You May Rely On It"**](#) – President Trump selected Judge Brett Kavanaugh to fill the [**vacant seat**](#) on the Supreme Court (SCOTUS) bench on July 9. Assuming he is confirmed by the Senate, Justice Kavanaugh would solidify the pro-business bloc of Justices on the Court, seemingly creating an impenetrable five-Justice majority of conservative jurists. The question on the mind of employers: how would Justice Kavanaugh treat workplace law cases that come before the Supreme Court? To answer that question, we once again turn to the Magic 8-Ball. We first used the Magic 8-Ball in 2006, examining the future of the Court when Justice Samuel Alito was appointed; we did the same for [**Justice Sonia Sotomayor in 2009**](#), [**Justice Elena Kagan in 2010**](#), and [**Justice Neil Gorsuch in 2017**](#). We now ask the same question of the Magic 8-Ball that we asked of previous

Related People



Davis C. Bae

Partner

206.693.5060



Melissa Camire

Partner

212.899.9965

appointees: if confirmed, will Justice Kavanaugh be kind to employers? The answer: "You May Rely On It" ([read more here](#)).

2. **[De Minimis No More? California Supreme Court Finds Modern Technology Requires Employers to Better Track and Compensate Employees](#)** – The California Supreme Court issued its ruling in *Troester v. Starbucks Corporation* on July 26 and departed from federal law's more employer-friendly version of the *de minimis* rule, which it characterized as stuck in the "industrial world." In holding that Starbucks Corporation must compensate hourly employees for off-the-clock work that occurs on a daily basis and generally takes four to 10 minutes after the employee clocks out at the end of their shift, the California Justices announced they were ensuring California law was in line with the modern technologies that have altered our daily lives. Although the decision does not foreclose employers from raising defenses to wage claims based on circumstances where recording time would be difficult, it places employers at risk for greater exposure to claims and penalties for time spent on tasks that are not compensable under the federal *de minimis* rule ([read more here](#)).
3. **[ICE Turns Up The Heat On Employers This Summer](#)** – Immigration and Customs Enforcement (ICE) significantly increased the number of Notices of Inspection issued to employers nationwide in July, leading to a dramatic spike in I-9 audits. Unlike the enforcement initiative rolled out by federal authorities [in February of this year](#), the latest sweep is no longer concentrated in Southern California but appears to be nationwide in scope. There appears to be somewhat of a pattern with regard to which employers are targeted by this effort. ICE seems to be focusing on businesses operating in states, counties, and cities that have designated "sanctuary" status, and has also ramped up efforts to follow up with employers who have been subject to an I-9 audit in the past. Regardless of whether you fall into either of these two categories, you are at increased risk of a visit from federal immigration authorities. What should you do today to prepare for a possible knock on the door from federal officials tomorrow? ([read more here](#))
4. **["Flagged" You're It? Will OSHA Inspect Your Workplace if You Electronically Report Injury and Illness Data After July 1?](#)** – The Occupational Safety and Health



Benjamin Dudek

Partner

803.255.0000



Benjamin M. Ebbink

Partner

916.210.0400



David Klass

Partner

704.778.4163

Administration (OSHA) just warned employers that it will take note of worksites that electronically report their 2017 OSHA 300A information after the July 1 deadline. The agency offered this caveat for unwary employers:

Employers can continue to electronically report their Calendar Year (CY) 2017 Form 300A data to OSHA, but submissions after July 1, 2018 will be flagged as “Late”

The 2017 OSHA 300A data was required to be submitted by July 1. This requirement stems from a new [rule](#) that requires certain employers 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 rule, employers were required to submit their OSHA 300A forms for 2016 to OSHA by [December 15, 2017](#), although OSHA accepted submissions until December 31, 2017 ([read more here](#)).

- [State Court Concludes ABC Test Should Be Applied Retroactively](#)** – You remember the game-changing, earth-shattering, monumental [decision from the California Supreme Court](#) a few months ago that fundamentally changes the test to determine whether your workers are independent contractors or employees, don't you? The test appears notoriously difficult to overcome; [we've written about this test extensively](#). One of the biggest questions remaining about the test was whether it should be applied retroactively. In other words, should businesses be protected for having relied upon the current law for years, or should they be held liable for years of possible wage and hour violations under a brand test just adopted out of the blue? On July 18, an Orange County state court [issued a ruling](#) in a separate case involving exotic dancers and concluded that the ABC test should be applied retroactively ([read more here](#)).
- [States Look for New Angle to Fight No-Poach Agreements](#)** – Attorneys general in 10 states and the District of Columbia recently launched an investigation into the employment practices of eight fast-food franchises. The group sent a [joint letter](#) to the companies in July requesting information on the companies' use of restrictive covenants including “employee non-competition,” “no solicitation,” “no poach,” “no hire,” or “no



Richard R. Meneghello

Chief Content Officer

[503.205.8044](#)



Ashton M. Riley

Partner

[949.798.2186](#)



Shanon R. Stevenson

Partner

[404.240.5842](#)

switching' agreements (collectively referred to as 'No Poach Agreements')." With the recent rise in interest and increasing scrutiny of restrictive covenants, and in particular no-poach agreements, you need to be mindful of the types of provisions you are including in your agreements ([read more here](#)).

7. **[Federal Court Blocks Portions of California's New Workplace Immigration Law](#)** – Immigration has, and continues to be, a major flashpoint between California and the Trump administration. In 2017, the California legislature passed significant legislation (AB 450) impacting how California employers deal with federal immigration authorities. The Trump administration sued over these policies, putting California on a collision course with the federal government—with California employers stuck squarely in the middle. On July 4, a federal judge issued a preliminary injunction siding with the Trump Administration and blocked enforcement of several of the key provisions AB 450 as applied to private employers – while allowing other provisions to move forward ([read more here](#)).
8. **[South Carolina's New Expungement Law Could Increase Applicant Pool](#)** – In an effort to increase the state's potential workforce, the South Carolina General Assembly passed legislation that will expand the state's current expungement law and allow individuals to more easily remove criminal convictions from their records. The hope is that prospective employees with low-level crimes on their records will no longer be discouraged from applying for jobs; this, then, should make it easier for employers to recruit qualified workers. What do South Carolina employers need to know about this new law? ([read more here](#))
9. **[NYC Releases Posting Requirement for New Schedule Change Law](#)** – The New York City Temporary Schedule Change Law took effect on July 18. As we [previously reported](#), under the new law, eligible employees have a right to temporary changes to their work schedule for certain "personal events," up to two times a year, for one business day per event. The New York City Department of Consumer Affairs (DCA), the agency tasked with enforcing the law, recently launched a new [website](#) containing information and frequently asked questions about the new law. Notably, the DCA announced a new posting requirement and published a



Travis W. Vance

Regional Managing Partner

704.778.4164

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model [Notice of Employee Rights](#), titled “You Have a Right to Temporary Changes to Your Work Schedule.” Employers must conspicuously post the notice on 11×17 paper in the workplace, in English and any language that is the primary language of at least 5 percent of workers at the workplace ([read more here](#)).

10. [Labor Department Offers Hint It May Be Supportive Of Gig Companies In Misclassification Situations](#) –

Although the document itself is fairly dense and complex, specifically focusing on the home-care registry industry, the U.S. Department of Labor’s (USOLD’s) latest field assistance bulletin could provide a helpful clue to gig economy companies about how the agency could regulate the concept of misclassification on a broader scale. The [July 13 document](#) tilts the scales back towards an even playing field, which should be music to the ears of gig economy businesses across the country. It “offers a glimpse into how the Trump administration may task federal investigators to handle an issue that’s perplexing businesses throughout the economy—including app-based companies like Uber and TaskRabbit—that want to maintain an independent contractor model without running afoul of the law.” The bulletin provides detail regarding the factors that wouldn’t necessarily lead to a misclassification finding (such as providing general training) and those that might (dictating how to care for a client) ([read more here](#)).

11. [California Governor Signs Legislation To Clarify State Ban On Salary History Information](#) –

As many of you will recall from last year, Governor Brown signed legislation to prevent employers from asking about or relying on salary history information when making hiring decisions. That legislation went into effect on January 1, 2018; check out our recap of that bill [here](#). That new law raised a number of questions among employers, especially regarding key terms that were undefined, vague or unclear.

Acknowledging these concerns, a follow-up measure ([Assembly Bill 2282](#)) defined some key phrases and provides further guidance to California employers.

Governor Brown signed the bill into law on July 18, and it will go into effect on January 1, 2019. What do California employers need to know about these new provisions? ([read more here](#))

12. [MSHA Citations Upheld by Administrative Law Judges Before April 3, 2018 May Be Invalid](#) –

Over the last few

years, there has been debate regarding whether ALJs are “inferior officers” under the Appointments Clause of the Constitution. This provision provides that officers, including inferior officers, may only be appointed by the President, “Courts of Law,” or “Heads of Departments.” In June, the U.S. Supreme Court held that ALJs within the Securities and Exchange Commission are “inferior officers” and therefore must be appointed according to the Appointments Clause. What does this have to do with the Mine Safety and Health Administration (MSHA)? On July 31, the 6th Circuit Court of Appeals held that Commission ALJs were inferior officers, also holding that while the Commission may have illegally delegated its appointment power to the Chief ALJ, it had “cured” the defect by the April 3 ratification by the Commission. Accordingly, it held that the company cited by MSHA was entitled to a new hearing before a different ALJ. The ramifications of this decision may be far-reaching ([read more here](#)).

13. **[USDOL Field Bulletin Reiterates That Third-Party Structures Are Often A Mixed Bag](#)** – On July 13 the USDOL issued a [Field Assistance Bulletin](#) to its enforcement administrators addressing how to determine if and when a home health caregiver referred to a client by a “home care, nurse, or caregiver registry” has an employer-employee relationship with a *registry* under the Fair Labor Standards Act (FLSA). The bulletin explains that “a registry is an entity that typically matches people who need caregiving services with caregivers who provide the services, usually nurses, home health aides, personal care attendants, or home care workers with other titles. . . .” The bulletin further clarified that it will apply the “economic reality test” when making such determinations. Although the bulletin itself may have limited application, the factors set forth in the bulletin give insight into how the USDOL under President Trump’s administration may tackle independent contractor determinations moving forward ([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.

