

WEB EXCLUSIVE: AUGUST 2018: THE TOP 15 LABOR AND EMPLOYMENT LAW STORIES

Publication
Aug 31, 2018

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 15 stories from last month that all employers need to know about:

1. **Government Revises Pay Bias Standards For Federal Contractors** – The agency overseeing federal contractors issued a revised pay bias directive that somewhat loosens the standards by which it will evaluate employer compensation practices during compliance investigations. The Office of Federal Contractor Compliance (OFCCP) released DIR 2018–05, also known as "Analysis of Contractor Compensation Practices During a Compliance Evaluation," to replace a 2013 directive which had ratcheted up the heat on contractors and scrutinized their compensation practices to identify and root out pay bias. The August 24 directive has two main functions:
Whereas the previous directive only required statistical data when investigating potential pay discrimination, the new standard announces that the value of statistics in

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such situations may be tied to their ability to be corroborated by other evidence—meaning that raw numerical data will not necessarily be the be-all and end-all when it comes to a final conclusion. This significant revision stops short of the requiring anecdotal evidence, which had been the standard before the now-rescinded Directive 307, but it is a significant improvement.

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- Contractors will now be able to submit explanations to the agency to provide context about any identified pay gaps between men and women in order to demonstrate the lack of gender bias ([read more here](#)).

2. **[One If By Land, Two If By Sea, Noncompete Reform Is Coming! Midnight Session In Massachusetts Legislature Alters Noncompete Landscape](#)** – After nearly 10 years of start-and-stop efforts on Beacon Hill, Governor Charlie Baker signed “An Act Relative to Economic Development in the Commonwealth” on August 10, which includes sweeping changes to the way the Commonwealth treats noncompetition agreements. Among other things, the bill prohibits enforcement of noncompetition agreements against non-exempt employees, limits their length to just 12 months, and precludes the use of “continued employment” as acceptable consideration in any noncompetition agreement entered into on or after October 1, 2018 ([read more here](#)).
3. **[Picking Up The Pace: USDOL Tackling Overtime Updates And New Opinion Letters](#)** – As [we wrote about earlier this year](#), the Wage and Hour Division of the United States Department of Labor has been very active this year. That hot streak continued in August, as one week alone saw the USDOL took two big steps. First, on August 27, the agency issued a press release announcing that it will hold “[listening sessions](#)” in Atlanta, Seattle, Kansas City,



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Denver, and Providence, “to gather views” on the white collar exemptions. Although it is not clear what, if any, new information USDOL will share during these sessions, USDOL says it “plans to update the Overtime Rule and is interested in hearing the views and ideas of participants on possible revisions to the regulations.” Second, on August 28, USDOL released six new [Opinion Letters](#), four of which interpret the FLSA. The Opinion Letters involve (1) the application of a motion theater exemption to an establishment that is both a movie theater and a restaurant; (2) the volunteer status of “global credentialing examiners” (which is a fancy term for people who voluntarily grade tests); (3) the definition of a retail or service establishment under Section 7(i) of the FLSA; and (4) the compensability of time spent at wellness benefit fairs ([read more here](#)).

4. [Federal Appeals Court Overturns Decades Of Precedent To Revive Workplace Claim](#) – Overturning 40 years of precedent, the 10th Circuit Court of Appeals ruled that an employee’s failure to file an EEOC charge does not necessarily bar consideration of a private discrimination lawsuit. By concluding that an Equal Employment Opportunity Commission (EEOC) charge is not a jurisdictional prerequisite to suit, the federal appeals court’s August 17 decision provides a new lifeline for disgruntled employees and former employees to bring suit against their employers (*Lincoln v. BNSF Railway Company, Inc.*) ([read more here](#)).

5. [The EpicSequel: Federal Appeals Court Extends Class Waiver Victory To Wage Claims](#) – On the heels of the Supreme Court’s decision in [Epic Systems Corporation v. Lewis](#), which held that the National Labor Relations Act (NLRA) does not bar class or collective action waivers in arbitration agreements, the 6th Circuit Court of Appeals took up the corollary question of whether the Fair Labor Standards Act (FLSA), and its specific collective action mechanism, would invalidate arbitration agreements with collective action waivers. Relying on the lessons learned from the Supreme Court in *Epic*, the 6th Circuit held on August 15 that the FLSA likewise did not bar collective action waivers in arbitration agreements ([Gaffers v. Kelly Services, Inc.](#)). For employers, the 6th Circuit’s decision comes as a relief. There was a fear that the victory in *Epic* could be diminished by an inability to avoid costly FLSA collective actions on a broad—and sometimes nationwide



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—scale via individual arbitration agreements. The *Gaffers* decision puts that fear to bed, at least for those employers with operations in the 6th Circuit’s jurisdiction (Ohio, Tennessee, Michigan, and Kentucky) ([read more here](#)).

6. **[Strip Club Win Shows The Power Of The EpicSCOTUS Ruling For Misclassification Cases](#)** – On August 23, the 6th Circuit Court of Appeals (hearing federal cases arising out of Ohio, Tennessee, Kentucky, and Michigan) struck down a proposed class-action lawsuit filed by a group of exotic dancers hoping to prevail on an argument that they were misclassified as contractors, relying on the Supreme Court’s *Epic decision* for the proposition that the workers’ arbitration agreements precluded class litigation. This is welcome news for gig companies and all businesses that hire independent contractors, as the ruling demonstrates that this standard can apply to federal misclassification proceedings, and is a good reminder that there are significant benefits associated with arbitration agreements with class waiver provisions ([read more here](#)).

7. **[New York Releases Model Training And Policy To Comply With New Sexual Harassment Laws](#)** – Employers in New York have been eagerly awaiting the state’s anticipated model sexual harassment training and policies ever since the [state passed significant new sexual harassment laws back in April](#). That day has finally arrived. New York released drafts of a model sexual harassment prevention policy and a model sexual harassment training program on August 23, along with other key documents in connection with the new sexual harassment laws. Employers, and other members of the public, now have the opportunity to weigh in on these requirements, as the state has invited comments on the proposed materials. What do you need to know about these materials? ([read more here](#))

8. **[Missouri Voters Block Right-To-Work Law](#)** – In a sweeping victory for labor unions, Missouri voters overwhelmingly rejected a right-to-work law which sought to ban unions from requiring union fees as a condition of employment in Missouri. By capturing 67% of the August 7 vote, opponents of the measure prevented employees in unionized workplaces from opting out of joining a union or paying union dues if they were so



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inclined. What does this development mean for Missouri employers? ([read more here](#))

9. **[Workers In High-Risk Industries At Greater Risk For Opioid Deaths, Study Says](#)** – It is well known that prescription use of opioids for specific medical problems can turn into addiction and dependency for some, and many of the prescriptions for opioids originate from workplace injuries. Now, a new study in Massachusetts has confirmed the connection, finding that workers in higher-risk industries are at greater risk for opioid deaths. On August 8, the Massachusetts Department of Public Health issued a [report](#) that broke down opioid-related overdose deaths by industry and occupation from 2011 through 2015. While finding that the rate of fatal opioid overdoses vary considerably by occupation and industry, it found the “rate of fatal opioid-related overdose was higher among workers employed in industries and occupations known to have high rates of work-related injuries and illnesses” ([read more here](#)).
10. **[Inartful Wording Dooms Employer’s Arbitration Agreement](#)** – A New York judge recently rejected an employer’s attempt to force an employment claim into arbitration due to a poor choice of wording in the written agreement. The August 7 decision might draw attention because of the identity of the employer—the Trump for President campaign organization—but it should be on your radar screen solely because it provides a lesson about the value of carefully drafted employment agreements ([read more here](#)).
11. **[Will He or Won’t He? California Employment Arbitration Ban Proposal Heads to Governor Brown](#)** – The #MeToo movement and the national focus on sexual harassment have sparked significant legislative activity at the state level designed to address these issues. The most significant California bill to address the situation, which passed the legislature on August 23 and is now on the governor’s desk, is Assembly Bill 3080 by Assemblywoman Lorena Gonzalez Fletcher (D-San Diego). Among other things, AB 3080 would prohibit mandatory arbitration agreements for nearly all types of employment law claims in California. AB 3080 is the most closely watched employment bill on the governor’s desk and, if signed into law, will potentially have significant and widespread impacts on California employers across all industries. The lingering question: will Governor Brown

sign the bill or won't he? We'll soon have our answer ([read more here](#)).

12. **[OFCCP Issues 2 Directives Affecting Federal Contract Compliance Reviews](#)** – A focus on equal employment opportunity and the protection of religious freedom will become part of future reviews for federal supply and service contractors' compliance with regulations under two policy directives issued by the Office of Federal Compliance Programs (OFCCP) on August 10. One directive adds to the agency's enforcement activity reviews, focusing on federal contractors' compliance with workforce antidiscrimination laws. The other requires OFCCP personnel to follow, in all their activities, recent court rulings and White House executive orders protecting the rights of organizations in the exercise of religion ([read more here](#)).
13. **[NYC Regulates Ride-Sharing Businesses With Minimum Wage Base And License Limits](#)** – We've been asking for increased regulation of the gig economy, and we got it—just not the kind of regulation businesses were hoping for. While gig businesses are craving a modern regulatory approach to misclassification issues, the New York City Council instead issued [a series of new laws](#) on August 8 that could serve to cool off the growth that we've been seeing for the past few years. Among the new laws, ride-sharing drivers will soon be entitled to what appears to be the nation's first minimum payment wage rates, and the number of licenses for permissible ride-sharing drivers will be artificially capped for the first time ([read more here](#)).
14. **[California Supreme Court Forces Employers To Comply With Strictest Background Check Standard](#)** -- In a case involving the potential overlap between the Investigative Consumer Reporting Agencies Act (ICRAA) and the Consumer Credit Reporting Agencies Act (CCRAA), the state's high court ruled that employers must comply with the more restrictive of the two laws. In a unanimous [decision](#), the California Supreme Court ruled that an employer obtaining an investigative background check must comply with the stricter of two state laws—which requires it to obtain the individual's prior written authorization before doing so. *Connor v. First Student, Inc.* (No. S229428). The August 20 decision will impact those employers, lenders, and landlords who frequently conduct background checks under these two laws when

making any number of hiring, employment, credit, and housing decisions ([read more here](#)).

15. **[Senator Warner Once Again Hopes To Provide Portable Benefits For Gig Workers](#)** – Senator Mark Warner (D-Va) introduced an amendment to the pending congressional appropriations package ([H.R. 6157](#)) on August 22 that would move us one step closer to allowing gig workers to maintain portable benefits. [According to Bloomberg's Ty Richardson](#), Warner's amendment would establish a \$20 million grant program through the Department of Labor that would allow for some experimentation with the concept of health care, retirement, and other portable benefits for the contingent workforce. If this sounds familiar, you're right. It essentially mimics [the same proposal he introduced last year](#), which is [stalled out in committee](#) and doesn't seem very likely to proceed ([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.