



## WEB EXCLUSIVE - September 2018: The Top 13 Labor And Employment Law Stories

Insights

10.01.18

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. **Labor Board Proposes Complete Overhaul To Joint Employment Rule** – In a move that has been anticipated for several months, the National Relations Labor Board published a proposed rule on September 14 that would fundamentally alter the definition of joint employment, making it more difficult for businesses to be held legally responsible for alleged labor and employment law violations by staffing companies, franchisees, and other related organizations. The rule, if eventually adopted, would also limit the ability of employees from affiliated companies to join together to form unions.

Under the proposed rule, an employer may be considered a joint employer of a separate employer's employees only if the two employers share or co-determine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. As the Board states, a putative joint employer must possess *and actually exercise* substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine. While this is just the first step in what may be a long process, it is a welcome development for the employer community. What do you need to know about this proposed rule and the impact it could have on your workplace? ([read more here](#))

2. **California Takes A STAND Against Non-Disclosure Agreements** – California Governor Jerry Brown signed legislation on September 30 that will broadly prohibit non-disclosure clauses in settlement agreements involving sexual assault, sexual harassment, or sex discrimination. Known as the STAND (Stand Together Against Non-Disclosure) Act, the new law will take effect on January 1, 2019—and the provisions of any settlement agreement entered into on or after that date that violates the new prohibitions will be null and void ([read more here](#)).

3. **California Dramatically Expands Sexual Harassment Prevention Training Requirements** – Governor Brown also signed legislation on September 30 that will significantly increase California employers’ obligations to provide sexual harassment prevention training—which may result in significant time and expense for California employers. Senate Bill 1343 will soon require employers with five or more employees to provide sexual harassment prevention training to both supervisory and non-supervisory employees by 2020 ([read more here](#)).
4. **California Enacts The “Mother Of All #MeToo Bills”** – When Governor Brown signed Senate Bill 1300 (Jackson) into law on September 30, he activated one of the more comprehensive and far-reaching pieces of legislation to emerge from the #MeToo movement. SB 1300 contains a number of sweeping provisions that will change the way sexual harassment claims are litigated in California once the law takes effect on January 1, 2019. First, SB 1300 makes it unlawful for an employer, “in exchange for a raise or bonus, or as a condition of employment or continued employment,” to require an employee to sign a release of a claim or right under FEHA. Second, SB 1300 states that a prevailing defendant in a FEHA action will only be entitled to attorneys’ fees and costs if the court finds that the plaintiff’s action was “frivolous, unreasonable, or totally without foundation when brought or the plaintiff continued to litigate after it clearly became so.” Third, the new law will expand sexual harassment liability for third parties. Fourth, the new law introduces the concept of “bystander intervention training” to workplaces across California. Finally, SB 1300 also contains some unusual (and largely unprecedented) legislative “intent” language with respect to a number of issues related to the application of workplace harassment law by the courts ([read more here](#)).
5. **The Freeze Is On: Employers Must Immediately Update Background Check Forms** – There is a little-known provision from a new federal law that will most likely impact your hiring practices and your standard hiring documents—and it just kicked in. As of September 21, all employers must update their background check forms to advise applicants and employees of the ability of a “national security freeze,” allowing them additional protections from identity theft. This change could require you to make an immediate change to your standard hiring methods: what do you need to do in order to comply? ([read more here](#))
6. **Other Shoe Drops: Court Hands Uber Massive Class Action Win After SCOTUS Victory** – It was just a matter of time. After the Supreme Court cleared the way for businesses to use class waivers with their employees and contractors with the *Epic Systems* ruling this past May, many observers expected that the decision would come back to haunt a class of Uber drivers who wanted to litigate a class action misclassification case against the ride-sharing company in court. On September 25, sure enough, the other shoe dropped. In a 3-0 ruling, a panel of judges from the 9th Circuit Court of Appeals barred a class of hundreds of thousands of Uber drivers from collectively continuing with their litigation against Uber (*O’Connor v. Uber Technologies*) ([read more here](#)).
7. **California Governor Signs Lactation Accommodation Bill** – Under prior state law, employers in California are required to make reasonable efforts to provide employees with the use of a room or location other than a toilet stall in close proximity to the employee’s work area, for the

employee to express breast milk in private. However, AB 1976—signed into effect on September 30—changes the law to instead specify that, as of January 1, 2019, employers have to make reasonable efforts to provide a room “other than a bathroom” to accommodate such employees ([read more here](#)).

8. **National Labor Relations Board Turns Up The Heat On Negligent Unions** – Summer might be coming to a close, but labor unions continue to feel a rise in temperature. Unions can expect to face a change in how the National Labor Relations Board’s Regional Offices will handle duty of fair representation (DFR) charges brought by individual employees, and it doesn’t appear as if unions will be happy with the change. Specifically, the Board’s General Counsel’s Office provided Regional Offices with new instructions on September 14 on how to handle charges against unions in DFR cases in the wake of a steep increase in “mere negligence” defenses raised by unions. Where unions have previously been able to argue such a defense to evade these types of claims with ease, the Regional Offices will now look more closely at these cases to determine if there was in fact gross negligence or arbitrary behavior exhibited by the union, and will likely prosecute them if such findings present themselves. What do employers need to know about this development? ([read more here](#))
9. **Hurricane Florence Causes Havoc To Carolinas** – When Hurricane Florence made landfall on September 14, it brought along with it many employment-related concerns facing employers in the wake of hurricane-related disasters, including military leave, family and medical leave, unemployment compensation, workplace safety issues, and more. Fisher Phillips updated our Comprehensive FAQs For Employers On Hurricanes And Other Workplace Disasters to assist employers manage through this difficult time ([read more here](#)).
10. **State Appeals Court Expands Scope Of NYC’s Marital Status Discrimination Law** – The scope of New York City’s marital status discrimination law was just expanded by a state appeals court, meaning that employers need to be even more wary when it comes to any workplace decisions taken on the basis of who someone is married to. On September 6, the Appellate Division for New York’s First Department answered for the first time the following question under the New York City Human Rights Law (HRL): may an employer dismiss an employee simply because the employee’s spouse, also a former employee, had taken a job with the employer’s competitor? By holding that the HRL’s prohibition against discrimination based on “marital status” not only protects employees from discrimination based on whether the employee is married or not, but also extends to protect an employee from discharge based solely on the identity of the employee’s spouse, the court rejected the employer’s defense and created a new set of headaches for business owners, managers, HR professionals, and legal counsel ([read more here](#)).
11. **Light at the End of The Tunnel? USDOL Signals Intent to (Finally) Issue Classification Rules** – We’ve been waiting for something like this since the gig economy was established: a set of rules and regulations, adapted for the modern era and with the gig economy in mind, addressing the issue of independent contractor classification. And yesterday’s news may mean we may actually have our wish granted. [In an interview with Bloomberg Law](#), Secretary of Labor Alexander

Acosta told reporter Chris Opfer on September 25 that the USDOL is looking at issuing amended regulations that would govern independent contractors in the context of the gig economy, finally recognizing that the 21st-century workforce deserves (and demands) a 21st-century regulatory framework. “The workforce is changing,” [Acosta told Bloomberg Law](#). “How we approach work is changing, and we need to start looking at our rules and recognize that what fit 20 or 30 years ago is not going to fit for the modern workplace.” So what do you need to know about this positive development? ([read more here](#))

12. **California Governor Signs Additional Workplace Laws Into Effect** – The governor signed a raft of new employment laws into effect on September 30, including a requirement that all California-based publicly traded corporations must have at least one female director on their board of directors by the end of 2019; that all hotel or motel employers, by 2020, provide 20 minutes of training to employees that are likely to come into contact with victims of human trafficking; and that no settlement agreements bar testifying in legal or legislative proceedings ([read more here](#)).
13. **“People Before Robots” – Possible Strike Over Driverless Buses** – In Columbus, Ohio, negotiations between the Central Ohio Transit Authority and the Transportation Workers Union of America are currently underway in the midst of what government officials call a “tsunami of job change” resulting from the surge of automated intelligence in the workplace. On September 18, the international president of the union, which currently represents 700 drivers, introduced the union’s “People Before Robots” campaign and threatened a strike should state leaders attempt to bring automated driverless buses onto the streets of Columbus. A low-speed driverless shuttle is already set to begin operating in the fall, fueling bus drivers’ concerns about the possibility of losing their jobs ([read more here](#)).

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

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*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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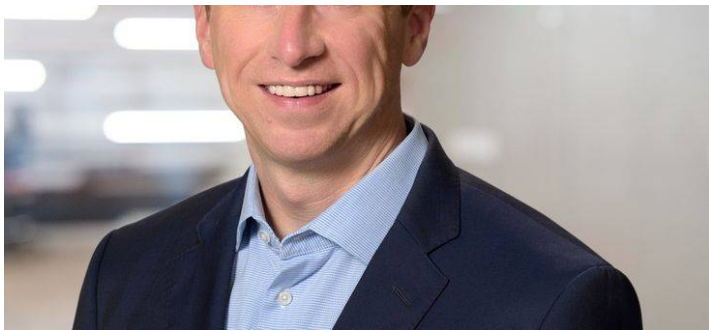
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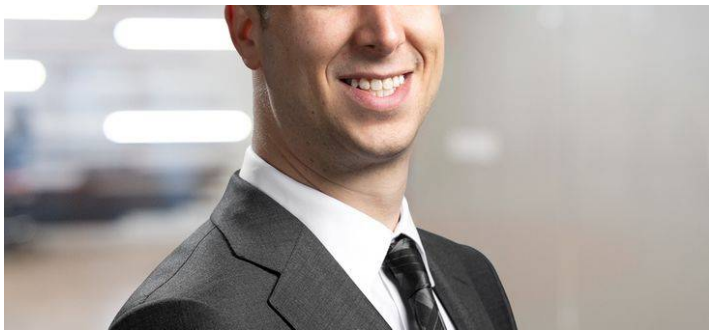


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