October 2018: The Top 14 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 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 14 stories from last month that all employers need to know about:

1. **Labor Department Will Tackle Joint Employment And Overtime Issues...But When?** – Right after the clock struck midnight on October 17, the U.S. Department of Labor unveiled its new regulatory agenda for Fall 2018 and announced its intention to soon tackle two of the hottest topics in the labor and employment world: joint employment and overtime pay. But employers can be forgiven if they approach this announcement with some degree of skepticism, as the USDOL has missed previous target dates—at least when it comes to the long-delayed overtime rule. What does this latest development mean for employers, and when can you expect to see some tangible results? (read more here)
2. **EEOC Sees Sexual Harassment Statistics Explode In Past Year** – The Equal Employment Opportunity Commission (EEOC) released its preliminary findings examining sexual harassment in the workplace over the past year on October 3, and, in wake of the #MeToo movement, no one should be surprised to see the figures rise dramatically. The numbers demonstrate that employers need to be more vigilant than ever when it comes to addressing issues of harassment and discrimination in the workplace (read more here).
3. **New SCOTUS Term Starts With A Whimper...Will It End With A Bang?** – The Supreme Court term that wrapped up in Junewas one of the most exciting sessions for workplace law in recent memory, with several blockbuster decisions impacting a wide range of labor and employment law issues. From wage-and-hour exemptions to same-sex wedding cakes, class action waivers to agency shop fees, retaliation standards to travel bans—the past term had it all. So employers might be eagerly anticipating the current term, hoping for a repeat performance. If you're in this camp, we have some bad news for you. The current Supreme Court (SCOTUS) term that just kicked off on October 1 includes but four cases that will have an impact on labor and employment matters, and none are particularly exciting. While there's always a chance that

high-profile cases will be added to its docket as the term unfolds—especially if a ninth Justice is seated—we'll be in "wait-and-see mode" for the next few months to see if things heat up. For now, let's take a brief look at the four cases the Court will be deciding this term (read more here).

4. **New Jersey Employers Must Now Provide Paid Sick Leave** – New Jersey employers are now required to comply with the state's new Paid Sick Leave Act. Once the calendar turned to October 29, New Jersey employers of all sizes will need to provide up to 40 hours of paid sick leave per year to covered employees. The state Department of Labor and Workforce Development (DOL) recently published both a mandatory workplace poster and a set of sweeping regulations covering the new law—and you'll want to familiarize yourself with both. And just days before the effective date, the state Department of Labor and Workforce Development (DOL) published a Frequently Asked Questions (FAQs) document aimed at addressing unanswered questions about the law (read more here and here).
5. **OSHA OKs Drug Testing And Incentive Programs ... Sort Of** – The U.S. Occupational Health and Safety Administration (OSHA) issued a standard interpretation clarifying its position on the new recordkeeping rule's anti-retaliation provisions on October 11. OSHA's memorandum essentially rolls back its enforcement of the anti-retaliation provisions, particularly concerning safety incentive programs and post-accident drug testing. Why is this important? Mainly because many employers struggled to understand the anti-retaliation provisions since they were published, in guidance materials accompanying the new regulations, in May 2016. Indeed, OSHA has gone to great lengths to explain the anti-retaliation provisions in the new rule's preamble, with OSHA guidance and several memorandums. To be blunt, OSHA's explanations have been extremely vague and confusing. But alas, the struggle to understand the anti-retaliation provisions is over ... hopefully. This interpretation supersedes all the prior guidance on this topic (read more here).
6. **Kentucky Becomes First State To Prohibit Mandatory Arbitration As A Condition of Employment** – The Kentucky Supreme Court recently outlawed mandatory arbitration agreements that require applicants or employees to sign if they want to be hired or remain employed, making the Bluegrass State the first in the nation to do so. The ruling in *Northern Kentucky Area Development Dist. v. Snyder* (issued on September 27 but only published on October 2) will send shockwaves through the state and cause many employers to immediately change a very common business practice—but will the decision stand? What do employers need to know about this decision and what do they need to do about it? (read more here)
7. **Appeals Court Clamps Down On OSHA Investigations** – In a significant victory for employers, a federal appeals court recently limited OSHA's ability to expand accident investigations beyond their original and intended scope. The 11th Circuit's decision in *United States v. Mar-Jac Poultry, Inc.* will immediately aid those employers with operations in Florida, Georgia, and Alabama, but could also be of benefit to employers across the country. What do you need to know about the October 9 decision? (read more here)
8. **Did Your Workers Go On Strike In October? What You Need To Know** – Employee walkouts and protests occurred on a large scale from October 2 through 4, spurred on by the union-supported

"Fight for $15" movement and in anticipation of the upcoming midterm elections. Employees working at fast-food establishments, janitors, caregivers, and even some higher education adjunct professors were the primary participants, but it was not surprising to see other workers seeking higher pay and possible union status join in as well. What do you need to know about these protests to be prepared for a future wave of similar action? (read more here)

9. **NYC Council Mandates Workplace Lactation Rooms** – New York City employers will almost certainly need to provide lactation rooms to breastfeeding employees in the near future thanks to a slate of new laws passed by city lawmakers. On October 17, the City Council passed a package of bills—dubbed the Mother's Day bills—aimed at helping mothers and children. Included among the legislation is a requirement that employers with 15 or more employees provide a lactation room to any employee needing to express breast milk, and provide employees with written information on the room's availability. The newly passed legislation awaits the mayor's signature, and he is expected to sign the suite of bills. If signed, the lactation room laws will take effect 120 days from the date of signature. What do New York City employers need to know about these new requirements? (read more here)
10. **Whiplash For D.C. Employers As Council Blocks Tipped Minimum Wage Increase** – When D.C. voters passed Initiative 77 in June, employers began to prepare for a steady increase in the minimum wage they would need to pay their tipped workers. The tipped minimum wage was set to slowly, but significantly, accelerate until it matched the city's general minimum wage in the year 2026—which would be at least $15 per hour. However, the D.C. Council passed a measure to overturn and repeal Initiative 77 on October 21 because of fears about potential cost increases and other concerns. This means we're back to square one, for the most part. But the Council's 8-5 vote also had another impact: for the first time, D.C. employers of tipped workers will be subject to mandatory sexual harassment and wage-and-hour training. What do employers need to know about these two developments? (read more here)
11. **Court Holds Dynamex ABC Test Applies Only to Wage Order Claims** – As we have covered extensively, the California Supreme Court dropped a proverbial bomb earlier this year in the *Dynamex* case when it adopted a new legal standard known as the "ABC Test," making it much more difficult for businesses to classify workers as independent contractors. On October 26, a California Court of Appeal held that the new test is limited to claims arising under the California Wage Orders, and that other claims continue to be governed by the prior (and more employer-friendly) standard known as the *Borello* test. This holding, if it stands, is good news for employers. However, it's not all treats for employers on this Halloween. The new case has a few tricks of its own, as the good news appears to be tempered by some other less-favorable positions (read more here).
12. **Westchester County Mandates Employee Sick Leave** – Westchester County just enacted an Earned Sick Leave Law which will soon require Westchester employers to provide sick leave to its employees. All Westchester employees—both full-time and part-time—who work more than 80 hours per year are eligible to earn sick time. The law, which was passed on October 1, will

take effect 180 days from its adoption: March 30, 2019. What do employers need to know about this new law? (read more here)

13. **New Opinion Means Attorneys Must Consider Ethical Obligations Associated with a Data Breach** – Most attorneys are well aware of statutory obligations that require private and governmental entities to notify individuals of data breaches that involve the loss or disclosure of personally identifiable information. An area that may be less clear, however, is what ethical obligations they have to guard against data breaches involving client information and what steps attorneys must take when a data breach occurs. On October 17, the American Bar Association Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 483, addressing attorneys' obligations after an electronic data breach or cyberattack, including the applicability of the Model Rules of Professional Conduct when a data breach is detected or suspected. The Opinion also provides input regarding best practices in preventing and responding to data breaches, and emphasizes the importance for attorneys to plan ahead. Attorney obligations discussed in the Opinion can be broken down into four components: (1) an obligation to monitor for data breaches; (2) prompt action to address a data breach; (3) evaluation of what occurred; and (4) providing notice, if necessary (read more here).
14. **This Could Be A Game-Changer: Will Uber Provide Benefits For Drivers?** –During Fortune's Most Powerful Women Summit, Uber's CEO Dara Khosrowshahi dropped a bombshell: the company wants to soon provide benefits to its drivers in an effort to close the gap between what is received by its contractor fleet and its employee workforce. If this comes to fruition, it could revolutionize the way that gig workers are compensated, could lead to even more people jumping into the gig worker pool—and could spark a renewed misclassification battle over contractor status. What's unclear at present is what this offering might look like. Khosrowshahi recently described a portable benefits system that would allow gig workers and other contractors to maintain coverage from job to job (or gig to gig). In such a system, the hiring entities might be on the hook to provide a percentage of the cost for such benefits, but the state may also fund part—or all—of the service. In any event, this could be a game-changer. "For the first time, I think we are now listening to our drivers, and we are building out our services in concert with them," Khosrowshahi saidin his October 3 address (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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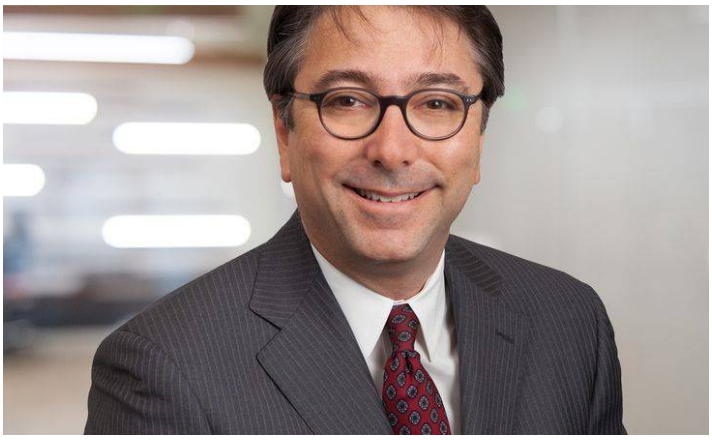

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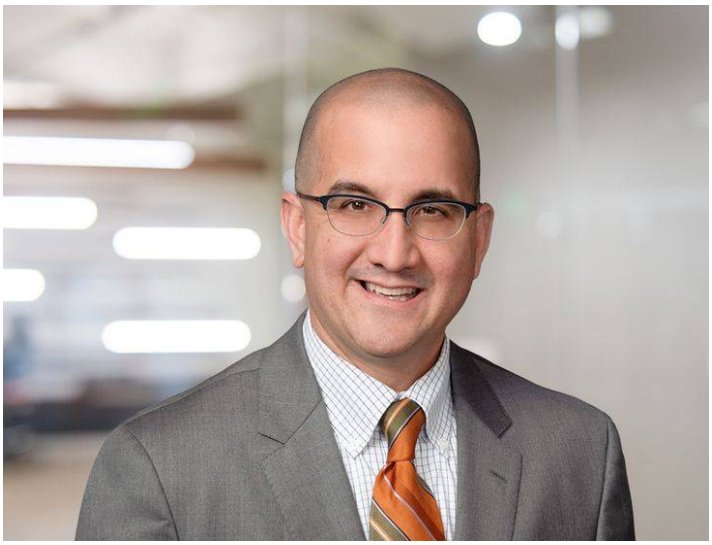

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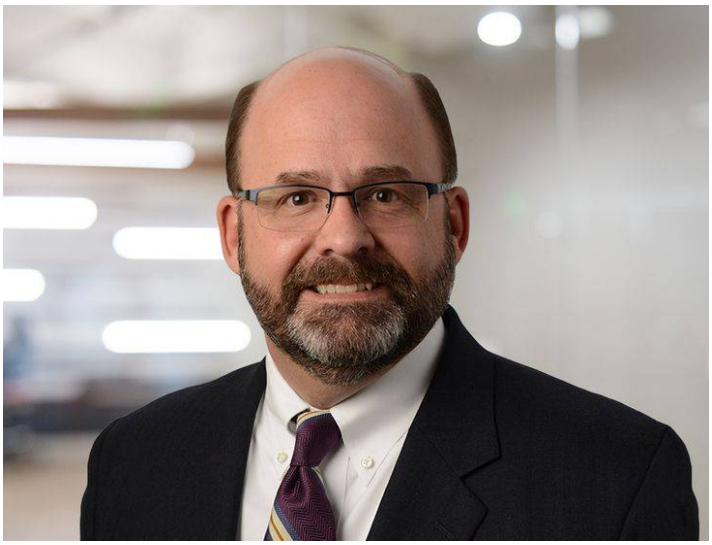

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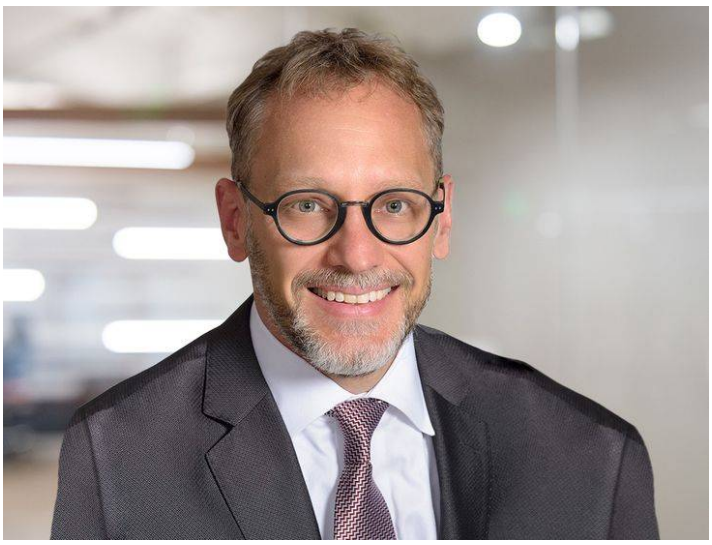

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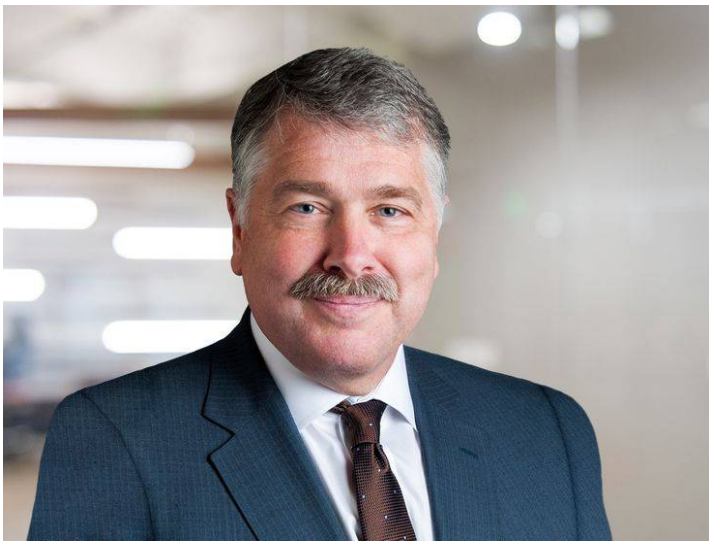

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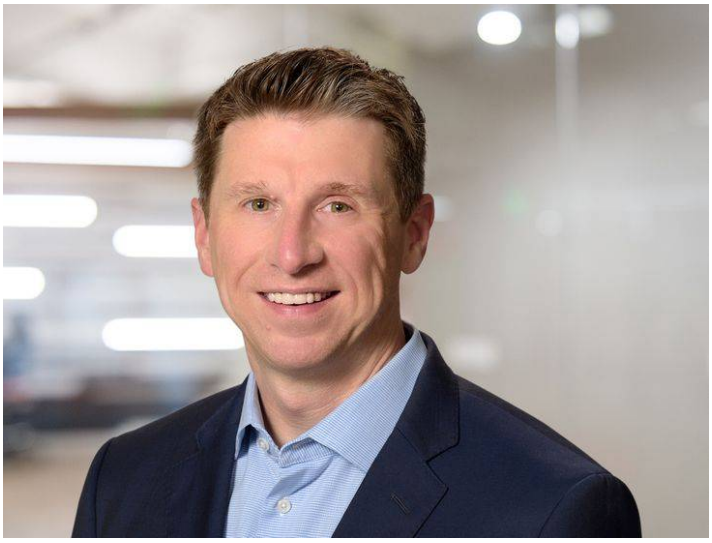

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