Top 50 Workplace Law Stories Of 2018

Insights
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It's hard to keep up with the news these days. It sometimes feels like you can't step away from your phone, computer, or TV for more than an hour or so without a barrage of new information hitting the headlines—and you're expected to consume and immediately understand all of it. It's especially difficult to filter through and absorb information that's relevant for your job as an employer, knowing that you then have to decide whether and how to apply this new material to your day-to-day practices.

The bad news is that 2018 was one of the more chaotic years in recent memory when it comes to new legal developments in the area of workplace law. The good news? We've compiled the top 50 stories you need to know about from the past year so you can stay in the know.

1. **Employers Face Joint Employer Whiplash: NLRB Reverts To Unworkable Joint-Employer Test...** – In what employers hope is just a temporary—but stinging—setback, the National Labor Relations Board (NLRB) vacated its December 2017 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 employer. 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.
2. **...But Rules Changes Are On The Way** – But on September 14, the Board published a proposed rule that would make 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.

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3. **Epic Win: Supreme Court Saves Employment Arbitration As We Know It**– To the relief of employers across the country, the Supreme Court ruled in a 5-to-4 decision that class action waivers in employment arbitration agreements do not violate the National Labor Relations Act (NLRA) and are, in fact, enforceable under the Federal Arbitration Act (FAA). The May 21 decision in the three consolidated cases—*Epic Systems Corporation v. Lewis; Ernst & Young, LLP v. Morris;* and *NLRB v. Murphy Oil USA, Inc.*—maintains what had long been the status quo and halts the NLRB's crusade to invalidate mandatory class waivers.
4. **Contractor Apocalypse: California Supreme Court Adopts Broad New Misclassification Test** – In a groundbreaking decision, the California Supreme Court adopted a new legal standard on April 30 that will make it much more difficult for businesses to classify workers as independent contractors, drastically changing the legal landscape across the state. The decision will directly affect the trucking and transportation industry because the workers involved in the case were delivery drivers, but also has the potential to affect nearly every other industry—including the emerging gig economy. Specifically, the court adopted the ABC Test as the new standard for determining whether a company "employs" or is the "employer" for purposes of the California Wage Order (*Dynamex Operations West, Inc. v. Superior Court*).
5. **SCOTUS Hands Significant Defeat To Both Public Sector Unions And National Labor Movement**– In a 5-4 decision on the final day of the 2017-2018 term, the U.S. Supreme Court ruled that the First Amendment prohibits public sector entities from collecting fees from non-union members. The June 27 decision is a significant blow to public sector labor organizations across the country, which rely on these fair share fee arrangements as a significant source of revenue. But this decision will have an impact far beyond public employers. By severely weakening the ability of public sector unions to raise funds, it could also signal an end to the continued assault on all employers—both public and private—through union-sponsored legislation at both the state and local level (*Janus v. AFSCME, Council 31*).
6. **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.
7. **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, 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.)*.
8. **Another Landmark Ruling: Court Says Transgender Discrimination Violates Federal Anti-Bias Law**– In what appears to be the first time a federal appeals court has extended the nation's main

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federal employment discrimination statute to cover transgender and transitioning employees, the 6th Circuit Court of Appeals ruled on March 7 that employers cannot discriminate against such employees without violating Title VII. The appeals court also rejected the employer's attempt to claim that its religious beliefs should shield it from such discrimination claims, opening the door for other applicants, employees, and former employees to avail themselves of statutory anti-bias law.

9. **Labor Board Evens Playing Field Once Again**– With the Senate's confirmation of John Ring to the National Labor Relations Board on April 11 and the administration's subsequent announcement on April 12 that he will be designated as the agency's Chair, the Board is once again in a position to restore balance to the nation's labor laws. During most of the eight years of the Obama administration, the Board was stocked with a majority of Democratic appointees, and the NLRB issued decision after decision tilting the playing field decidedly in favor of unions and workers. However, now that the NLRB has a full complement of five members, three of whom were nominated by President Trump, changes are soon to follow.

10. **The Top 10 Things Employers Need To Know About Midterm Election Results** – As many predicted, Democrats recaptured the House for the first time in eight years in this year's midterm elections, while Republicans retained and strengthened their grip on the Senate. That will lead to a dynamic in Washington, D.C. that the Trump administration has yet to face: a fractured legislature and a tug-of-war at the federal level. What does this development mean for employers? Here are the top 10 things to expect in the labor and employment law arena given the results in yesterday's historic elections.

11. **Nationwide 7-Eleven Immigration Raids Herald New Worksite Enforcement Strategy**– Slurpees weren't the only ICE-y things being served at 7-Eleven in 2018. For the second time in five years, Immigrations and Customs Enforcement (ICE) raided dozens of 7-Eleven stores across the country in search of undocumented workers and managers who knowingly employed them. The raids carried out on January 10 involved 98 stores in 17 states from coast to coast, and resulted in at least 21 arrests. In conjunction with the raids, ICE also announced its new worksite enforcement strategy, with which all employers should immediately familiarize themselves. Federal enforcement officials amplified their efforts to crack down on undocumented workers and the businesses that employ them in February, as ICE officials raided over 120 businesses between February 11 and 16.

12. **Brett Kavanaugh Sworn In To 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. Once confirmed by the Senate in October, Justice Kavanaugh solidified 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 will 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 and ask the same question that we asked of previous appointees: if confirmed, will Justice Kavanaugh be kind to employers? The answer: "You May Rely On It."

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13. **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.

14. **Supreme Court Gives Dealerships The Green Light: Service Advisors Are Exempt From FLSA Overtime Requirements**– The Supreme Court handed auto dealerships—especially those on the west coast—a long-awaited 5-4 victory on April 2 by holding that service advisors are exempt from the Fair Labor Standards Act's overtime-pay requirement because they are "salesm[en]…primarily engaged in… servicing automobiles" (*Encino Motorcars, LLC v. Navarro)*. The ruling returns the law to the place it had been for decades prior to a stunning and controversial 2011 agency decision that upended what had been standard practice at many dealerships. The Supreme Court's ruling brings finality to a legal battle that had contained more twists and turns than a Formula One race track, including two separate trips to the Supreme Court by a dealership represented by attorneys from the Fisher Phillips Automotive Dealership Practice Group.

15. **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.

16. **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.

17. **Appeals Court Says Salary History Can't Block Equal Pay Act Claims**– In a landmark decision that will accelerate the growing pay equity movement, especially for employers on the west coast, the 9th Circuit Court of Appeals became the latest federal court of appeals to rule that employers cannot justify a wage differential between men and women by relying on prior salary. By tightening the language contained in the Equal Pay Act, the 9th Circuit made it more difficult for employers to justify pay differentials and defend pay equity claims. The April 9 ruling is a wake-up call for all employers to ensure their compensation structures do not unfairly limit the amount of money women earn at their organizations.

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18. **California Dramatically Expands Sexual Harassment Prevention Training Requirements**– Governor Brown 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.

19. **California Enacts The "Mother Of All #MeToo Bills"**– When Governor Brown signed Senate Bill 1300 into law on September 30, he activated one of the more comprehensive and far-reaching pieces of legislation to emerge from the #MeToo movement. 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.

20. **Department Of Labor Resurrects Opinion Letters**– As promised by the new administration, the U.S. Department of Labor (USDOL) revived the practice of issuing opinion letters to enable employers to better understand their obligations under the Fair Labor Standards Act (FLSA). On April 12, the USDOL published opinion letters—on the topics of rest breaks, travel time, and garnishments—for the first time since 2009. While the FLSA is often too cumbersome to be tied up in a nice and neat opinion letter, it is encouraging to see the USDOL provide some measure of guidance to help employers avoid violations.

21. **Supreme Court: Small Public Employers Now Subject To ADEA…Is This A Prelude To Individual Liability?** – In a unanimous 8-0 decision, the United States Supreme Court issued its first ruling of the new term on November 6 and delivered a blow to small public-sector employers fending off age discrimination lawsuits. The Court ruled that the Age Discrimination in Employment Act (ADEA) applies to all states and political subdivisions regardless of the number of people the public entity employs. The ruling in *Mount Lemmon Fire District v. Guido*has implications for small public employers—who must now comply with the ADEA—but also raises the serious specter for individual liability under the ADEA for all employers.

22. **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

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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 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.
- 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

23. **De Minimis No More? California Supreme Court Finds Modern Technology Requires Employers to Better Track and Compensate Employees** – When the California Supreme Court issued its ruling in *Troester v. Starbucks Corporation* on July 26, it 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. The Court's ruling sets the applicability of the *de minimis*defense at odds with its application under FLSA where the defense is recognized more broadly. Further, although the decision does not foreclose employers from raising defenses to wage claims based on circumstances where recording time would be difficult, the ruling 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.

24. **OSHA OKs Drug Testing And Incentive Programs ... Sort Of**-- The U.S. Occupational Health and Safety Administration (OSHA) issued a new iterpretation 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. The new interpretation states that it supersedes all the prior guidance on this topic.

25. **Chronic Dispute: What The Sessions Marijuana Memo Means For Employers**– Attorney General Jeff Sessions issued a one-page memorandum on January 4 rescinding Obama-era guidance that had allowed states to legalize medical and recreational marijuana with marginal federal interference, eliminating any doubt about his position against the trend towards legalization. The bad news is that the current state of the law regarding the legality of marijuana use remains confusing, to say the least: it is dependent on the state you are in, and while the legislatures and courts across the country continue to revisit and shape the laws at issue,

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marijuana continues to be classified as an illegal Schedule I drug pursuant to the Federal Controlled Substances Act. The good news for employers: the memorandum doesn't seem to have impacted your approach to the issue from a workplace law perspective. But there could be turbulence ahead, so you will want to get up to speed on the latest and pay close attention to the upcoming developments on this topic.

26. **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 kicked in on September 21. As of that date, 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 a change to your standard hiring methods: what do you need to do in order to comply?

27. **GDPR Is Here: Not Yet Compliant? What Employers Need to Consider**– After much anticipation, the General Data Protection Regulation (GDPR) finally went into effect on May 25. For employers, that means some enhanced employee rights, and the risk of significant penalties for non-compliance. This includes potential maximum fines of up to 4 percent of global annual revenue or 20 million euros, whichever is greater. Employers, even those based in the U.S., may be subject to GDPR with respect to employee data. Generally, the GDPR regulates how "Data Controllers" and "Data Processors" use and protect the personal data of the "Data Subject."

28. **New York State Employers Face Significant New Sexual Harassment Laws**– Employers operating in New York are now facing a raft of new sexual harassment laws. The state budget bill for the 2019 fiscal year approved by the New York State Legislature on March 31 and signed into law by Governor Andrew Cuomo in April contains a host of significant provisions to strengthen the state's sexual harassment laws. The New York State Senate passed a bill in March aimed at strengthening and reforming the state's sexual harassment laws. Now, through the 2019 budget bill, many of these provisions have become the law of the land—along with additional requirements beyond those contemplated by the Senate's bill. For employers in New York City, these new laws are in addition to the legislation increasing sexual harassment protections citywide.

29. **Supreme Court's Same-Sex Wedding Cake Decision Does Not Grant Right To Discriminate** – In a 7-to-2 decision, the Supreme Court ruled on June 4 that a baker's Free Exercise Clause rights under the Constitution were not properly considered by the Colorado Civil Rights Commission when it held that he was legally required to bake and sell a wedding cake for a same-sex couple. However, the much-anticipated decision in *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Commission* does not create any sort of safe harbor for businesses defending against bias claims. Most importantly, the decision certainly does not extend a green light for businesses or employers to freely discriminate against customers, patrons, guests, or employees due to their sexual orientation or any other protected class status.

30. **California Supreme Court Embraces Employee-Friendly Formula For Calculating OT Pay** In a unanimous decision, the California Supreme Court ruled on March 5 that when calculating

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overtime in pay periods in which an employee earns a flat rate bonus, employers must divide the total compensation earned in a pay period by only the non-overtime hours worked by an employee. This decision formally breaks from the federal manner of calculating overtime which allows for dividing total compensation by total hours worked to compute overtime pay. (*Alvarado v. Dart Container Corporation of California*).

31. **One If By Land, Two If By Sea, Noncompete Reform Is Coming! Midnight Session In Massachusetts Legislature Alters Noncompete Landscape**
32. **NLRB Counsel Returns Common Sense To Workplace Rules**
33. **Kentucky Becomes First State To Prohibit Mandatory Arbitration As A Condition of Employment**
34. **Missouri Voters Pass Minimum Wage Increase**
35. **Missouri Voters Block Right-To-Work Law**
36. **Kansas City Decides 2018 Is The Year For Private Employers To "Ban the Box"**
37. **Court Permits Website Accessibility Lawsuit Against Hooters To Proceed**
38. **Light at the End of The Tunnel? USDOL Signals Intent to (Finally) Issue Classification Rules**
39. **New Jersey Passes New Paid Sick Leave Law: What Employers Need to Know**
40. **New Jersey Becomes Latest State To Pass Equal Pay Legislation**
41. **Big Changes Coming for Baystate Employers: Paid Family & Medical Leave And Minimum Wage Increases**
42. **Federal Appeals Court Makes It Easier For Workers To Advance Class Claims**
43. **Supreme Court Upholds Trump's Third Travel Ban**
44. **Federal Court Blocks Portions of California's New Workplace Immigration Law**
45. **Medical Marijuana In Missouri: New Law Brings New Questions For Employers**
46. **Did Your Workers Go On Strike In October? What You Need To Know**
47. **New Government Report On Gig Economy Size Raises More Questions Than It Answers**
48. **Federal Appeals Court Overturns Decades Of Precedent To Revive Workplace Claim**
49. **Will Congress Do The DEW? What A Proposed Labor-Education Department Merger Would Mean For You**
50. **South Carolina's New Expungement Law Could Increase Applicant Pool**

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