



Workplace Law Predictions For 2019

Insights

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The past year has seen quite a few changes in labor and employment law. But with the New Year having just rung in, it's time to look forward rather than backward. The question on the tip of everyone's tongue is: what's next? Here are our predictions for what to expect in 2019 when it comes to workplace law.

Expect More Class Actions

We're going to start out with the bad news. Because of the potential for a big payout, class and collective actions are a favorite for plaintiffs' attorneys. You should not expect that to change in 2019.

The California Supreme Court's decision in *Troester v. Starbucks Corporation* has opened up even more avenues for potential wage and hour claims in the Golden State, and the trend could hit the rest of the country, too. In July 2018, the California Supreme Court narrowed the scope of the *de minimus* doctrine under state law and held that employees must be paid for off-the-clock work that regularly lasts several minutes per day. While the California Supreme Court refused to shut the door entirely on the *de minimus* doctrine, it noted that technological advances should help employers track small bits of time, and that employers can restructure work to avoid off-the-clock time.

Employers outside of California may see plaintiffs' attorneys attempting to use the same rationale employed by the California Supreme Court to argue that the *de minimus* doctrine should not apply in the circumstances of their case. Moreover, with more employees having remote access to emails and other mobile platforms, the number of ways for employees to argue that they were working off the clock has increased.

The Ascendancy Of Arbitration Agreements

One way for employers to avoid class actions is through arbitration agreements. Last May, the Supreme Court ruled in *Epic Systems Corporation v. Lewis* that mandatory class action waivers in arbitration agreements are enforceable. As a result, you can expect to see an increase in the number of companies rolling out updated agreements to include class action waiver language. (Note: if you have not had your arbitration agreement reviewed since May when *Epic Systems* came out, make it your New Year's Resolution to do so.)

However, while popular with employers, arbitration agreements are decidedly not so with the plaintiffs' bar. Expect to see plaintiffs' counsel becoming more creative in challenging arbitration agreements on grounds related to unconscionability.

We may even be starting to see a backlash against arbitration agreements. Most recently, some law students have been pressuring big law firms to do away with them when it comes to their own hires. And last year, the California legislature passed a law banning mandatory employment arbitration agreements for claims arising out of alleged violations of the Fair Employment and Housing Act or California Labor Code. Although the bill was ultimately vetoed by outgoing Governor Jerry Brown, expect to see the fight continue in 2019.

Don't Look To Congress To Lead The Way

With Democrats controlling the House, and Republicans controlling the Senate and Executive Branch, you can expect that most employment legislation will be dead on arrival. When it comes to innovative legislation impacting the workplace, you should look to the states to lead the way. This is not to say that there won't be any changes to labor and employment law on the federal level in 2019. However, we expect the most significant changes to be made by agencies (such as the National Labor Relations Board, the Department of Justice, the Equal Employment Opportunity Commission, etc.) rather than Congress.

NLRB Will Narrow The Definition Of Joint Employer

One of those agencies—the NLRB—made noise last year when it published a proposed rule that would alter the definition of joint employment to make it more difficult to hold multiple businesses responsible for alleged labor and employment law violations by staffing companies, franchisees, and other related organizations. Expect to see continued movement and updates on this proposed rule in 2019.

But before getting too excited at any potential changes, you should keep in mind that states may have their own rules regarding joint employment that could differ from what the NLRB comes up with. Any new rules may not affect your organization's liability under state law.

USDOL Has A Full Plate

Another agency you should keep an eye on is the U.S. Department of Labor (USDOL). Not only is the USDOL considering its own joint employment rule, but the agency has proposed regulations regarding the regular rate of pay and white collar exemptions (also known as the "overtime" rule).

The regular rate of pay is of particular importance to employers because it is used to calculate the overtime rate of non-exempt employees. While we know that changes to the proposed regulations are targeting sections 7(e)(2) and 7(g)(3) of the Fair Labor Standards Act, the USDOL has been rather vague about what the proposed regulations will look like. The USDOL states that they aim to "provide employers more flexibility in the compensation and benefits packages they offer employees" and "lessen litigation regarding the regular rate."

The regulation relating to the white collar exemption is less opaque. As employers may recall, the minimum salary threshold for white collar exemptions was supposed to increase from \$455 per week (or \$23,660 annually) to \$913 per week (or \$47,476 annually), with the amount to be updated every three years. However, right before these changes were scheduled to take effect in December

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2016, a federal court blocked their implementation. Under a new administration, we expect that we will see a more modest proposed increase in the white collar exemption in 2019—perhaps in the low \$600s per week.

Paid Sick Leave Will Continue To Be On Trend

Although there are no federal laws mandating paid sick leave (yet), you can expect that paid sick and family leave will continue to be a big issues, with states and localities picking up the slack. Right now, 11 states and the District of Columbia require paid sick leave. Additionally, various cities and counties have stepped in where states have not provided for such leave or to give more generous benefits than the state.

You generally should anticipate an expansion of paid sick leave benefits in 2019. The New Jersey Paid Sick Leave Act went into effect October, while Michigan, Washington, and Westchester County (NY) have paid sick leave laws going into effect this year.

While some municipalities in Texas want to get in on this trend, a Texas appeals court ruled the Austin Paid Sick Leave Ordinance violates the state constitution because it preempts the Texas Minimum Wage Act. San Antonio passed its own sick leave ordinance in 2018, but it may only be a matter of time before it, too, is challenged in court.

Privacy Issues Remain Paramount

The EU General Data Protection Regulation (GDPR) went into effect in May 2018, ushering in sweeping reforms for companies that do business in the EU or employ EU residents. The GDPR threatens strict penalties for non-compliance—up to the greater of 20 million Euro or 4 percent of *global* annual turnover in the prior year. Having been in effect less than a year, it is still not clear how fines will be assessed and what the potential exposure will be for companies that are found to be non-compliant. As 2019 progresses, you can expect to see many investigations that began in 2018 come to a close, and we'll begin to get a better idea of how regulatory authorities will assess fines for non-compliance—including whether the fearsome 4 percent penalty will be assessed.

Lest you think the major developments in privacy are safely across the ocean in Europe, you can be sure there will be plenty of action closer to home in 2019. The Illinois Supreme Court currently has a case before it over whether a technical violation of the Illinois Biometric Information Act (BIPA) gives standing to sue absent a person suffering a concrete injury. If the court answers in the affirmative, you can expect to see a continued proliferation of BIPA class actions.

Further, California passed the California Consumer Privacy Act (CCPA) in 2018, which goes into effect at the beginning of 2020. While the law is not as comprehensive as the GDPR, California employers will soon need to figure out this year if it applies to them. You should take compliance seriously: the CCPA allows consumers whose rights have been violated under the Act to bring suit for actual damages or statutory penalties (whichever is greater) under a mechanism somewhat akin to a California Labor Code Private Attorneys General Act. You can expect the proliferation of CCPA lawsuits will be on next year's list of predictions.

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Are We Right?

2019 promises to be an exciting year for employers. If you follow along with Fisher Phillips' Newsletters, Blogs, and Legal Alerts, you can decide for yourself whether our predictions of the top trends play out.

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