# January 2019: The Top 16 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 16 stories from last month that all employers need to know about:

1. **Labor Board Makes It Harder For Employees To Claim Their Complaints Are Protected** – In a 3-1 ruling that should be hailed by employers across the country, the National Labor Relations Board just made it harder for employees to successfully claim that their workplace gripes constitute protected concerted activity. The January 11 decision (*Alstate Maintenance, LLC*) reverses a 2011 Obama-era decision that was widely derided as tilting the playing field too far in favor of employees. Under that precedent, essentially any employee complaint made to management in the presence of coworkers was sufficient to qualify as protected concerted activity under the National Labor Relations Act (NLRA). Under *Alstate Maintenance*, however, the NLRB has returned to the more stringent standard whereby only those complaints that seek to initiate group action, or that involve truly "group" complaints, will be considered protected concerted activity (read more here).
2. **Longest Government Shutdown In History Impacted Workplace Law** – As of January 12, the federal government shutdown became the longest in our nation's history—and employers felt the sting. While the peculiarities of the federal budget process meant that this shutdown started out by not hitting the nation's employers as hard as prior shutdown events, the lingering nature of the event eventually started to take its toll. Read on to get a better understanding of how employers were impacted (read more here).
3. **Labor Board Makes It Easier To Classify Workers As Independent Contractors** – In a significant ruling which will benefit companies, the National Labor Relations Board revised the test it uses for determining whether workers are employees or independent contractors by making it easier for entities to classify them as contractors (*SuperShuttle DFW, Inc.*). The January 25 decision throws a roadblock into unionization efforts involving such workers, as

federal law does not permit independent contractors to unionize or join forces with employees in organizing efforts. What do employers need to know about this development? (read more here)

4. **Salary Increase On Its Way? Proposed "Overtime" Rule Reportedly Headed To White House** – The U.S. Department of Labor is moving closer to releasing is proposed changes to the white-collar exemptions, otherwise known as the infamous so-called "Overtime Rule." The USDOL reportedly submitted a proposed rule for review by the federal Office of Management and Budget (OMB) on or about January 10. Neither the OMB nor the USDOL have elaborated upon what this proposal actually says. Although there has been no announcement of how long the OMB's evaluation will take, the agency commonly completes its assessment within no more than 90 days. If the OMB approves the submission for publication, then history suggests that the USDOL will probably release the proposal for a public-comment period of 60 days. This is on target with the agency's regulatory agenda, which anticipated that the proposed overtime rule would be released in March 2019 (read more here).
5. **Grounded! Supreme Court Rejects Lower Courts' Ability To Axe Arbitration Agreements** – In a unanimous opinion issued on January 8, the United States Supreme Court continued its expansive reading of the Federal Arbitration Act and arbitration provisions, rebuffing an effort by some to erect an additional hurdle that would interfere with an employers' ability to enforce arbitration agreements (*Henry Schein Inc. v. Archer and White Sales Inc.*). By rejecting the "wholly groundless" exception that courts had used to "spot-check" whether a claim of arbitrability was plausible before compelling arbitration, all lower federal courts must now compel arbitration in all cases where the parties have agreed to delegate the issue of "who decides what is arbitrable" to an arbitrator. The Court's decision—the first authored by Justice Brett Kavanaugh—extinguishes a conflict among various circuit courts of appeal and provides uniform guidance to employers who use arbitration agreements throughout the country. Employers should familiarize themselves with the ruling in order to ensure that their dispute resolution plans are fully compliant and in line with the decision (read more here).
6. **OSHA Rescinds Part Of Electronic Recordkeeping Requirement** – OSHA has issued a final rule that rescinds the prior requirement for companies with 250 or more employees to electronically submit the OSHA 300 log and OSHA Form 301. These companies will still be required to submit the OSHA Form 300A (the annual summary), along with its Employer Identification Number (EIN). The deadline to submit the Form 300A is March 2, 2019. The final rule does not change the requirement for employers to maintain the OSHA 300 log and Form 301 on site for OSHA to review (read more here and here).
7. **Illinois Supreme Court Clears Path For More Biometric Data Privacy Lawsuits** – The Illinois Supreme Court made it far easier for workers to bring suit against their employers for technical violations of the state's biometric information privacy statute, putting employers on notice that they must immediately improve their biometric practices in order to avoid the same fate. The long-awaited decision in *Rosenbach v. Six Flags Entertainment Corporation*, released on January 25, means that any time an employer violates the technical aspects of the state statute—even if no specific injury or adverse effect results—their employees have standing to sue them for

violations under the Illinois Biometric Information Privacy Act. Illinois employers that utilize biometric information must now be hyper-cautious with regard to the collection, maintenance, transmission, and destruction of this data (read more here).

8. **New York Bans Transgender Discrimination** – The New Year has brought long-awaited and historic change to the legal rights of the LBGTQ community in the Empire State. On January 15, the State Assembly and State Senate voted to pass the Gender Expression Non-Discrimination Act (GENDA). The statute, which had languished in the New York State legislature for the past 16 years, will protect transgender individuals from discrimination. Governor Andrew Cuomo signed this law into effect on January 25, and the provisions related to workplace discrimination will take effect on February 24 (read more here).
9. **Here OSHA Goes Again: 2019 Increases to Maximum Penalty Amounts Announced** – Employers will be facing higher penalties from the federal Occupational Safety and Health Administration in 2019. On January 15, Fed-OSHA announced that it plans to increase the maximum penalty an employer can be issued for serious and other than serious citations to $13,260, and the highest amount that can be issued for repeat and willful violations to $132,598. Fed-OSHA's announcement regarding the increases can be found here, and a chart containing all increases by the agency can be found in our post (read more here).
10. **A Cost Of Getting Caught: FLSA Civil Money Penalties Now Increased** – The U.S. Department of Labor published increases in the civil money penalties it can impose for certain violations of the federal Fair Labor Standards Act. These new levels apply to any penalties assessed after the effective date of January 23, including with respect to predicate violations that already have occurred (read more here).
11. **End of the Road: SCOTUS Ruling Means Many Transportation Workers Are Now Exempt From Arbitration** – In a unanimous 8-0 decision, the Supreme Court ruled on January 15 that federal courts can't force interstate transportation workers—including contractors—into arbitration, ruling that the Federal Arbitration Act's Section 1 exemption for these workers is a threshold question for the court to resolve, not the arbitrator. Perhaps more importantly, the Court also applied the Section 1 "contract of employment" exemption from the FAA to include not only interstate transportation workers with employment agreements, but also to those interstate transportation workers with independent contractor agreements (*New Prime Inc. v. Oliveira*). Nearly 1 million men and women work as truck drivers nationwide. This ruling could open the floodgates to a host of new class and collective action lawsuits against interstate transportation employers in federal and state courts; employers in this industry should immediately coordinate with their labor and employment counsel to determine how this development might affect them (read more here).
12. **$15 Minimum Wage May Soon Be Reality For New Jersey Employers** – New Jersey is likely to follow California, Massachusetts, and New York in gradually raising its minimum wage to $15 an hour. Senate President Steve Sweeney and Assembly Speaker Craig Coughlin agreed on a proposal with Governor Phil Murphy on January 17, which could see the increase passed into law

around the end of the month, soon after full Senate and Assembly sessions are scheduled to convene. What do New Jersey employers need to know about this proposal? (read more here)

13. **Ohio Limits Joint Employment Status For Franchisors** – Ohio just amended its definition of "employer" in order to limit the joint employer status of franchisors. Effective March 20, franchisors will not be considered joint employers with their franchisees unless one of the following conditions is met:

    - the franchisor agrees in writing to assume the role of a joint employer; or
    - a court determines that the franchisor exercises control over the franchisee or the franchisee's employees that is not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademark, brand, or both.

    This newly amended definition, signed into law on January 20, is limited to Ohio law, specifically the Minimum Fair Wage Standards Law, the Bimonthly Pay Law, the Workers' Compensation Law, the Unemployment Compensation Law, and the Income Tax Law (read more here).

14. **NYC Mayor Proposes Mandatory Vacation Time For Workers** – New York City has once again shown its intent to be a national leader in implementing robust worker protections. On January 10, Mayor Bill de Blasio called for New York City to pass legislation mandating paid personal time for employees working in the city. If implemented, New York City would be the first jurisdiction in the country to mandate paid personal time for employees (read more here).

15. **Minimum Wage Hike Proposed: How Likely Is A Bump In Pay?** – Some lawmakers have plans to raise the federal Fair Labor Standards Act's minimum wage from $7.25 to $8.55 later this year, then step it up to $15 per hour by 2024, and subsequently increase it annually in relation to statistical data from the Bureau of Labor Statistics. If this sounds familiar, it should, but we expect some more traction this time around. Not surprisingly, Democrats introduced the Raise the Wage Act (H.R. 582) in the U.S. House of Representatives and a companion bill (S. 150) in the U.S. Senate on January 16. In May 2017, we wrote about a similar measure that would move the minimum wage up to $15 in seven annual steps. Almost two years later, the goal remains the same—and with two fewer annual steps such that the same net $7.75 increase would come about in a more compressed timeframe. It similarly includes both the gradual elimination of certain exceptions and credits and an indexing approach to future increases to the basic minimum wage once at the $15 rate (read more here).

16. **Oldest Nationwide Misclassification Case Against Uber Gets Settled For $1.3M** – The first-ever national misclassification case brought against Uber has now been put to bed. A federal court judge in North Carolina gave her blessing on a $1.3 million settlement wrapping up the litigation on January 3, handing some 5,000 workers payouts ranging from $50 to almost $5,000 (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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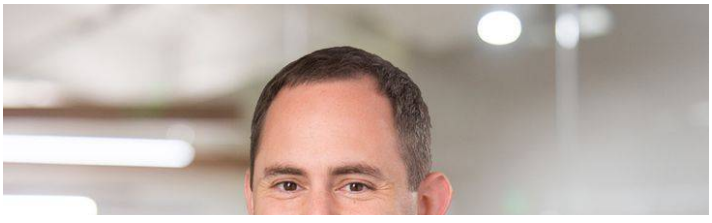

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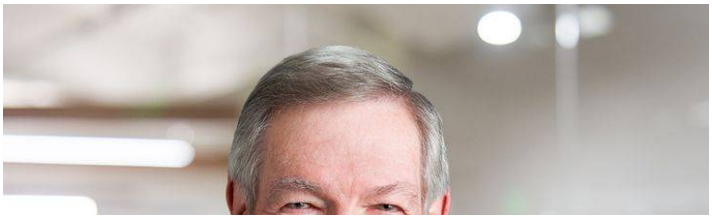

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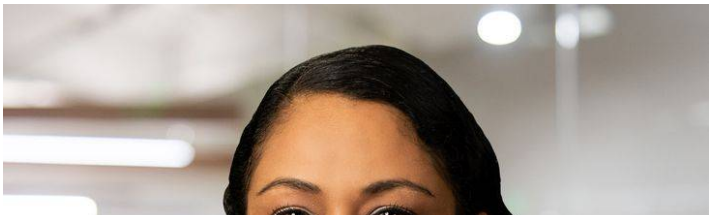

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