March 2019: The Top 14 Labor And Employment Law Stories

Insights
4.01.19

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. **Late Night Shocker: EEO-1 Once Again Poised To Gather Pay Data Information** – A federal judge in Washington D.C. sent shockwaves through the employment law community late in the night on March 4 by reinstating a revised version of the EEO-1 report, which is now once again set to gather compensation information from employers across the country. The resurrection of the controversial revisions, which had been cast aside by the White House shortly after President Trump took over, will almost certainly be challenged by an appeal and could also lead to further agency maneuverings. While we have not yet seen the final chapter of this controversy written, employers need to prepare for the possibility that their pay practices will soon be placed under a federal microscope like never before (read more here).
2. **Employers Get A Pay Data Reporting Reprieve – But For How Long?** – But despite that court ruling, the EEOC unveiled its 2019 EEO-1 reporting system on March 18 that failed to include any request for such pay data. It appears as though employers will not have to provide information about their employees' 2018 compensation for the time being – although you should still be prepared for this to change at a moment's notice, and should begin preparing for such pay disclosures in the near future (read more here).
3. **USDOL Releases Proposed Overtime Rule 2.0** – We have waited years to see where the U.S. Department of Labor would land with its much anticipated revised "overtime rule"— the agency finally delivered on March 7. The USDOL released its long-awaited proposed rulewhich, if adopted, would set the minimum salary threshold at $679 per week, annualizing to $35,308 per year. For now, the proposed rule does not include an automatic update provision (which many were concerned would simply serve to periodically inflate the threshold level), nor does it revise the duties test that accompanies the rule. Published in the Federal Register on March 22, the public will have 60 days to submit comments regarding, among other things, the proposed

minimum salary threshold. What do you need to know about this breaking news? (read more here).

4. **USDOL's Proposal Reaffirms That There Is Nothing "Regular" About The Regular Rate** – The U.S. Department of Labor continues to plow through its regulatory agenda; on March 28, it released its proposed guidance regarding the "regular rate" for purposes of calculating FLSA overtime pay. The NPRM is intended to update and clarify the FLSA's requirements regarding the "regular rate" and the (rarely used) alternative "basic rate." Once published in the Federal Register, the public will have 60 days to submit comments. What do you need to know about this breaking news? (read more here)
5. **New Jersey Bars Common Workplace Contract And Settlement Terms** – Employers in New Jersey will need to immediately adjust their employment contracts and settlement agreements to come into compliance with a sweeping new law that just took effect. New Jersey's governor signed Senate Bill 121 on March 18, which limits employment contracts and settlement agreements in two major ways:

    - It renders unenforceable any nondisclosure clause that would conceal any details relating to claims of discrimination, retaliation, or harassment; and
    - It prohibits any agreement that waives any substantive or procedural rights or remedy in cases of discrimination, retaliation, or harassment– such as the right to a court and jury trial – effectively barring mandatory workplace arbitration provisions.

    In response to critics' complaints that mandatory arbitration and nondisclosure agreements relating to sexual harassment claims silence workplace victims of sexual assault and harassment, several other states have already banned these commonplace agreements. Under its new law, however, New Jersey goes further than any other state, banning such agreements with respect not just to harassment but to all claims of workplace discrimination and retaliation. Here's an overview (read more here).
6. **Kentucky Governor Reestablishes Employment Arbitration** – Kentucky Governor Matt Bevin signed into law Senate Bill 7on March 25, bringing Kentucky back in line with every other state by allowing employers to require employees to arbitrate claims as a condition of employment. The new law also allows employers and employees to contractually limit the time period in which employees must file employment-related claims and specifically allows an employer to require, as a condition of employment, a background check. This is all very good news for Kentucky employers (read more here).
7. **OFCCP Releases Corporate Scheduling Announcement List** – The Office of Federal Contractor Compliance Programs (OFCCP) released its Corporate Scheduling Announcement List (CSAL) in the OFCCP FOIA Library on March 25. You can find the list here. Previously, contractors were provided CSAL letters by mail, advising them of the OFCCP's intent to conduct a compliance audit. However, as foreshadowed in recent directives, OFCCP will only be posting the CSAL in the FOIA library without mailing advanced notification to contractors. Contractors may access this

large Excel spreadsheet which contains, among other things, the parent name, the establishment name, and the type of review OFCCP intends to conduct (read more here).

8. **Dueling Paid Leave Plans Introduced In Congress** – There seems to be growing momentum in Washington, D.C. to establish a national paid leave program, but – as with most things in the nation's capital – there seem to be differing views on how to accomplish this stated goal of both political parties. Although the White House unveiled a budget proposal on March 11 calling for the establishment of a paid parental leave program, that $750 million funding wish aims for the creation of paid leave programs at the state level that are "most appropriate for their workforce and economy." Meanwhile, leaders from both parties have recently unveiled their own plans to create sweeping federal paid leave programs – one of which goes beyond parental leave (read more here).
9. **NLRB Deals Blow To Unions' Ability To Use Fees For Lobbying Purposes** – The National Labor Relations Board decided on March 1 that private sector unions cannot use fees paid by nonmembers to fund their lobbying efforts. Especially when coupled with last year's momentous *Janus* decision at the U.S. Supreme Court, the decision in *United Nurses & Allied Professionals (Kent Hospital)*could further impact the effectiveness of union lobbying activities. What do employers need to know about the latest decision from the Labor Board? (read more here)
10. **Federal Appeals Court Reworks Legal Test To Determine Faculty's Union Status** – In a unanimous opinion, a federal appeals court rejected the National Labor Relations Board's "subgroup majority status rule" for determining when college and university faculty members are to be deemed managers and therefore excluded from coverage under the National Labor Relations Act (*University of Southern California v. NLRB*). The rule, first articulated in the Board's 2014 *Pacific Lutheran*decision, required that a faculty subgroup (*e.g.* nontenure faculty) seeking to organize must have majority control of any committee that made managerial decisions before the Board would find that subgroup to be managers. By rejecting the Board's "subgroup majority status rule," the March 12 D.C. Circuit Court of Appeals decision dispensed with the Board's reliance on "crude headcounts" and held that the proper test is for the Board to assess whether the faculty members at issue are "structurally included within a collegial faculty body to which the university has delegated managerial authority." Colleges and universities should familiarize themselves with this decision and its potential impact on faculty bargaining units (read more here).
11. **Cincinnati Joins Growing Number of Jurisdictions Banning Salary History Queries** – The Cincinnati City Council passed an ordinance on March 13 barring employers from asking applicants for their salary history. The city becomes the latest of a growing number of jurisdictions to adopt a salary history ban on employers. The new law will prohibit employers from asking about or relying on the prior salary history of prospective employees in setting starting pay. The purpose of this ordinance is to "ensure that Cincinnati residents' rights are protected and that job applicants in Cincinnati are offered employment positions and subsequently compensated based on their job responsibilities and level of experience, rather

than on prior work histories, which actions can serve to perpetuate existing discrimination against women in the workforce." The ordinance will take effect in March 2020 and will apply to employers located within the City of Cincinnati that have 15 or more employees located within the city limits (read more here).

12. **When Does A $20 Million Settlement Feel Like A Bargain? Uber Shows You How** –When the news broke on March 12 that Uber had agreed to pay a group of drivers $20 million to settle a long-running misclassification claim, you could be forgiven for thinking that the deal sounded like a massive blow to the gig economy giant. After all, $20 million is a substantial sum – no matter how large a company is – and in most cases would be an indication that the paying party had given in to the exorbitant demands of the claimants. But this settlement is different. It resolves a claim that Uber had originally agreed to settle for $100 million – five times the amount of the final total. How did Uber get such a bargain? (read more here)
13. **New Jersey's Anticipated Expansion Of Data Breach And Privacy Laws** – An amendment to New Jersey's data breach notification requirements of the Consumer Fraud Act is currently awaiting signature by State Governor Phil Murphy. The bill, Assembly No. 3245, was recently passed by both the New Jersey Senate and Assembly. If signed into law as expected, the amendment will expand the definition of personal information to include "user name, email address, or any other account holder identifying information, in combination with any password or security question and answer that would permit access to an online account." In turn, it would require businesses to notify consumers of online account security breaches – thereby eliminating a business's ability, under the current law, to avoid notifying consumers when there is a breach of online information. The bill's statement indicates that its purpose is to provide consumers with the opportunity to quickly change online account information to prevent outside access to online accounts, and to put consumers on notice to monitor for potential identity theft (read more here).
14. **Lyft's IPO Warns About Misclassification Risks And Local Regulations** – Lyft recently filed for an initial public offering with the hopes of raising as much as $2.1 billion. As part of its registration statement for its IPO, Lyft acknowledged the company could be negatively impacted by several potential business risks. The March 1 filing acknowledged not only increased and intense competition from competitors, but also the specter of litigation across the country as drivers contest their classification as independent contractors and the applicability of Lyft's arbitration agreement. Within its S-1, Lyft cited lawsuits disputing the employment status of its drivers – as well as new municipal regulations – as potential risks that investors should consider when evaluating the company (read more here).

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

Related People

Joseph W. Ambash
Partner
617.532.9320
Email

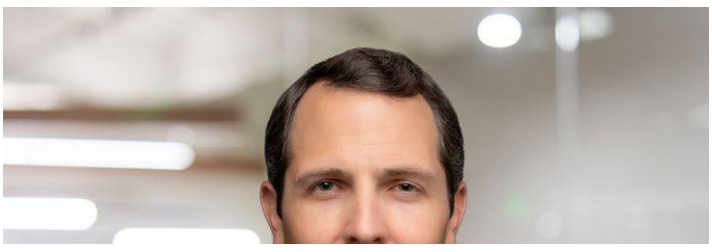
Cheryl L. Behymer
Senior Counsel
803.255.0000
Email

Ted Boehm
Partner
404.240.4286
Email

Melissa A. Dials
Partner
440.740.2108
Email

Rosemary S. Gousman
Partner
908.516.1060
Email

Marty Heller
Partner
404.231.1400
Email



Phillips L. McWilliams
Partner
803.255.0000
Email

Richard R. Meneghello
Chief Content Officer
503.205.8044
Email

Joshua D. Nadreau
Regional Managing Partner and Vice Chair, Labor Relations Group
617.722.0044
Email

Brett P. Owens
Partner
813.769.7512
Email

Cheryl Pinarchick
Senior Counsel
617.532.8215
Email

Heather Zalar Steele
Partner
610.230.2134
Email

Sheila M. Abron
Partner
803.740.7676
Email

Service Focus

Affirmative Action and Federal Contract Compliance

Privacy and Cyber

Employee Leaves and Accommodations

Employment Discrimination and Harassment

Labor Relations

Litigation and Trials

Pay Equity and Transparency

Counseling and Advice

Wage and Hour

Industry Focus

Education

Higher Education