WEB EXCLUSIVE: April 2019: The Top 16 Labor And Employment Law Stories

Insights
5.01.19

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 16 stories from last month that all employers need to know about:

1. 1. **September 30 Is Your Pay Data Reporting Due Date** – A federal court announced on April 25 that employers have until September 30, 2019 to turn over pay data as part of your revised EEO-1 reporting obligations. After several weeks of uncertainty, you now have a definitive due date to mark on your calendars for this unprecedented new obligation. While there is still a chance that an appeals court could put the pay data reporting requirement on hold once again, you need to start taking action immediately under the assumption that September 30th is the actual due date for the delivery of your 2018 compensation information. This ruling is very significant because it impacts all employers with 100 or more workers (read more here).
2. **Supreme Court Dims The Light On Class Arbitration** – By a 5-to-4 vote, the Supreme Court ruled on April 24 that the Federal Arbitration Act does not allow a court to compel class arbitration when the agreement does not clearly provide for it. As a result, employers whose valid arbitration agreements do not contain an explicit class action waiver (assuming they do not expressly consent to class arbitration) can rest easy knowing that the agreements allow them to compel alleged class claims to individual arbitration (*Lamps Plus Inc. v. Varela*) (read more here).
3. **Labor Department's Proposed Four-Factor Rule Would Limit Joint Employment** – The U.S. Department of Labor became the latest federal agency to propose a rule to limit the scope of joint employment liability, this time for wage and hour matters. If the rule released on April 1 is adopted in its current form, the USDOL would examine whether a business is a "joint employer"—equally liable for liability under federal wage and hour laws—through the use of a four-factor balancing test, assessing whether the potential joint employer:
    1. 1. hires or fires the employee;

2. supervises and controls the employee's work schedule or conditions of employment;
3. determines the employee's rate and method of payment; and
4. maintains the employee's employment records.

If this rule is adopted, it would almost certainly mean that fewer businesses would be found to be a joint employer by a court or agency when it comes to minimum wage, overtime, and other similar liability under the Fair Labor Standards Act (FLSA). The Labor Department's move is in the same vein as the proposal unveiled by the National Labor Relations Board in September, which also aims to fundamentally alter the definition of joint employment in matters related to unionization purposes. What do employers need to know about this development? (read more here)

4. **Supreme Court To Take Up LGBT Workplace Bias Cases For First Time** – In a highly anticipated move, the U.S. Supreme Court today agreed to consider a trio of cases that will determine whether the nation's most prominent workplace discrimination statute prohibits employment discrimination against LGBT workers. The issue: whether Title VII's ban against "sex" discrimination covers claims involving sexual orientation and gender identity. Employers will finally have a definitive answer regarding the contours of the federal primary civil rights law as it applies to members of the LGBT community (read more here).
5. **Department Of Labor Says Certain Gig Workers Are Contractors** – In a major positive development for gig economy businesses, the U.S. Department of Labor today issued an opinion letter on April 29 confirming that certain workers providing work for a virtual marketplace company are, indeed, independent contractors. While this letter can only be used as an authoritative legal defense by the specific (unnamed) gig economy business that requested the letter, this publication still provides the federal government's official interpretation on whether a certain business model or practice complies with the law. We now have a solid understanding of how the current USDOL views the misclassification question and will approach it from an enforcement perspective, and the news is all good for gig businesses (read more here).
6. **Sexual Harassment Charges Increase Once Again, According To EEOC Stats** – Despite a 10 percent overall drop in the number of charges of employment discrimination, the Equal Employment Opportunity Commission reportedon April 10 that sexual harassment charges filed with the agency jumped by 13.6 percent from the previous year. The 7,609 sexual harassment charges received in FY clearly demonstrate that the #MeToo movement is in no way slowing down. What do employers need to know about this development? (read more here)
7. **Tennessee Employers Get Bullying Lawsuit Safe Harbor** – Tennessee employers who want to avoid workplace-bullying lawsuits need only adopt the state's model anti-bullying policy and they will enjoy immunity from such claims, thanks to a new law just signed into effect on April 23. Thanks to H.B. 856, an expansion of the Healthy Workplace Act, private employers can now take advantage of the law to shield themselves from troublesome legal claims

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spurred by allegations of workplace bullying. What should Tennessee employers do in order to capitalize on this new law? (read more here)

8. **Kentucky Employers Face New Pregnancy Accommodation Law** – Under a new law signed into effect by Governor Matt Bevin on April 9, many Kentucky employers will need to change their human resources practices and provide reasonable accommodations to workers for pregnancy, childbirth, and related conditions. The new law went into effect upon signature, so employers will need to make adjustments immediately in order to stay in compliance. What exactly must Kentucky employers do? (read more here)
9. **NYC Council Votes To Ban Pre-Employment Marijuana Testing** – The New York City Council passed legislation on April 9 which will prohibit employers from requiring a prospective employee to submit to drug testing for the presence of tetrahydrocannabinols (THC), the active ingredient in marijuana, as a condition of employment. The law, which is expected to soon be signed into effect by the mayor, will amend the New York City Human Rights Law and make it a discriminatory practice to require a job applicant undergo pre-employment marijuana testing. What do New York City employers need to know about this latest development? (read more here)
10. **California Bill Would Prohibit Employment Race Discrimination Based On Hairstyles** – A measure currently pending in the California Legislature, and garnering wide bipartisan support, would provide that prohibited employment discrimination based on race under the Fair Employment and Housing Act (FEHA) also includes discrimination based upon hair texture and hairstyles. If enacted into law, this bill will require California employers to re-evaluate workplace grooming standards applicable to their work sites in order to ensure compliance with the law. The legislation, Senate Bill 188 by Senator Holly Mitchell (D-Los Angeles), specifically amends the definition of "race" under FEHA to include "traits historically associated with race, such as hair texture and protective hairstyles," including "braids, locks, and twists." The legislation, which passed the state Senate on April 22, was recently amended to address similar discrimination in the public school education context. According to the author and supporters of the proposal, the legislation is necessary because societal stereotypes that define European features as the norm for "professionalism" disproportionately impact persons of color, especially African-Americans (read more here).
11. **Maine Becomes Latest State To Pass Salary History Ban** – Maine has recently joined the growing number of states that have passed laws prohibiting employers from requiring new or prospective employees to provide information regarding their prior salary or compensation. On April 12, Maine's first female Governor Janet Mills signed into law "An Act Regarding Pay Equality." The new law, which will go into effect on September 17, 2019—90 days after Maine ends its current legislative section—seeks to end wage inequality by prohibiting employers from taking salary history into account when setting compensation for new employees. Maine is the latest state in New England to pass legislation imposing this prohibition, following Massachusettsand Connecticut (read more here).

12. **Everything's (Gig)ger In Texas: New State Law Classifies Gig Workers As Contractors** – The confusion surrounding worker classification is not a new topic for any gig economy employer. Whether gig workers are classified as employees or independent contractors is a constant battle businesses face both in the legislature and the judiciary. But independent contractor classification may have just gotten a little simpler in Texas thanks to the Texas Workforce Commission. The agency responsible for determining whether workers are properly classified and assessing unemployment taxes just adopted a rule on April 9 classifying workers hired for jobs through a digital app as independent contractors for unemployment insurance purposes. The TWC reasoned that its adoption of the rule provides employers with more stability in this growing sector of the economy (read more here).
13. **Non-Lawyers Can No Longer Represent Kentucky Employers At Unemployment Proceedings** – The Kentucky Court of Appeals just held that non-lawyers may no longer represent employers in unemployment proceedings, ruling that such a practice is unconstitutional. As a result of the April 26 ruling, you must immediately adjust any business practice that involves human resources managers, supervisors, or other non-lawyers handling such administrative proceedings (read more here).
14. **Massachusetts Agency Issues Paid Leave Notice Guidance** – The Massachusetts Department of Paid Family and Medical Leave—the agency charged with regulating and enforcing the Commonwealth's nascent paid leave program—issued its mandatory workplace poster and guidance on the law's notification requirements on April 18. The announcement provides employers with needed guidance on the law's notice requirement—an obligation you must meet by May 31, 2019. What do Massachusetts employers need to know about this latest development? (read more here)
15. **Round One Of Critical *New Prime* Battle Goes To Gig Businesses** – Great news for gig economy businesses from an Illinois federal court: a judge recently ruled that Grubhub's delivery drivers were not operating in "interstate commerce," and therefore were not excluded from the company's mandatory arbitration agreement. The ruling is one of the first decisions on this subject following January's Supreme Court ruling casting this issue into doubt. While the fight is not over, round one goes to gig economy companies (read more here).
16. **MSHA Launches Pilot Program For Conferencing Citations** – The Mine Safety and Health Administration (MSHA) has launched a pilot program for Part 100 conferencing in the hopes of reducing the number of contested citations. Under the pilot program, which will run from April 1 through June 30, MSHA will hold conferences with operators with the understanding that the goal of the conference is to reach a negotiated settlement before the contest process begins. During the conference, the operator and MSHA would negotiate both paper changes and penalty amounts for all citations conferenced. If a resolution is reached, both parties would sign an agreement indicating the terms of the settlement and that the operator agrees not to contest the citations or assessments before the Federal Mine Safety and Health Review Commission (FMSHRC). If a settlement is not reached, the operator would retain its contest

rights before the FMSHRC. The pilot program applies only to 104(a) citations that are not subject to a special assessment (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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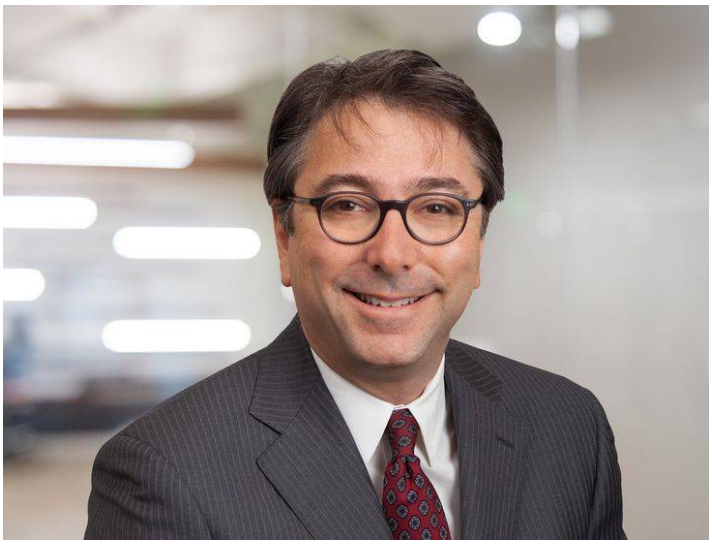

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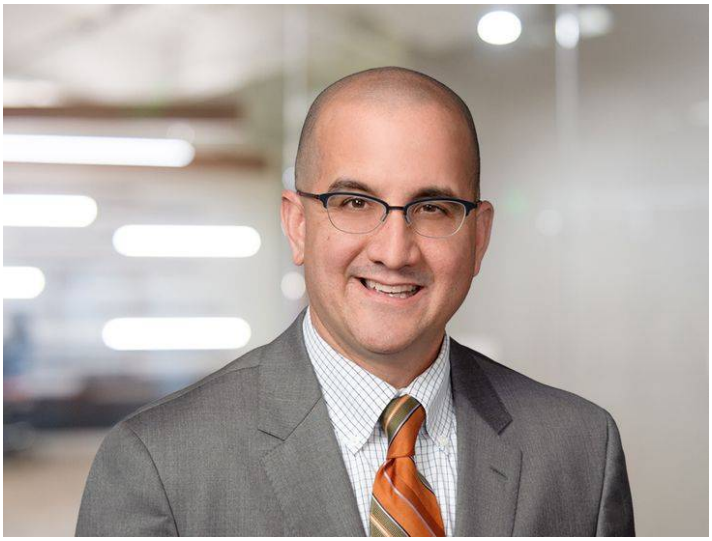

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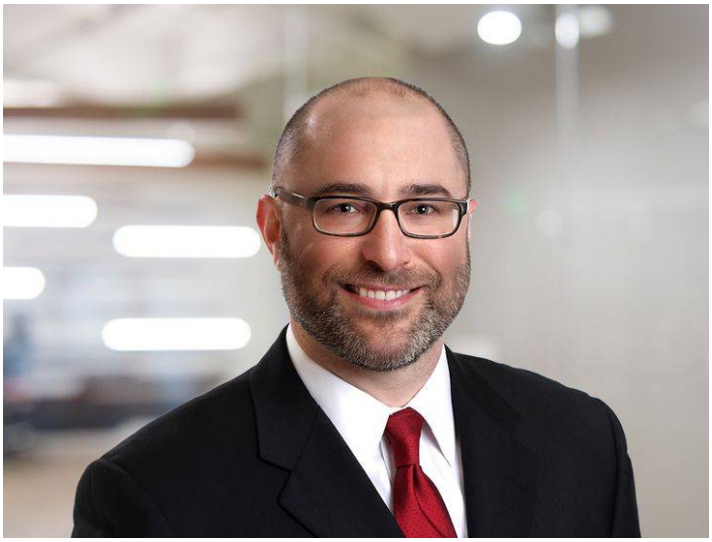

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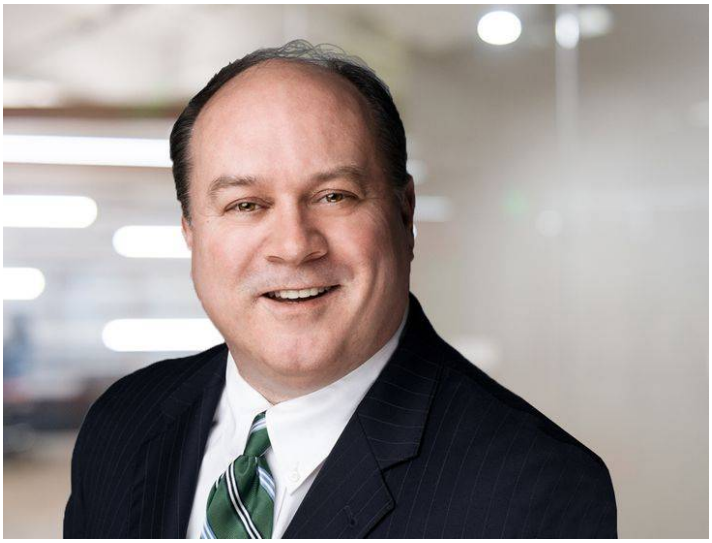

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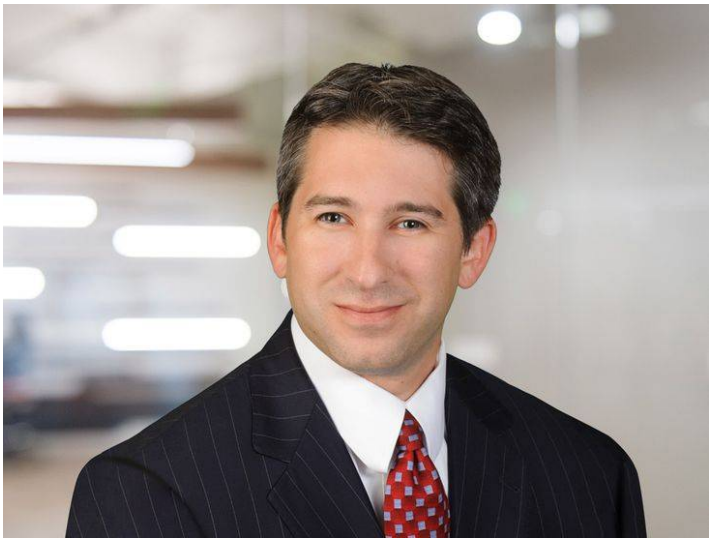

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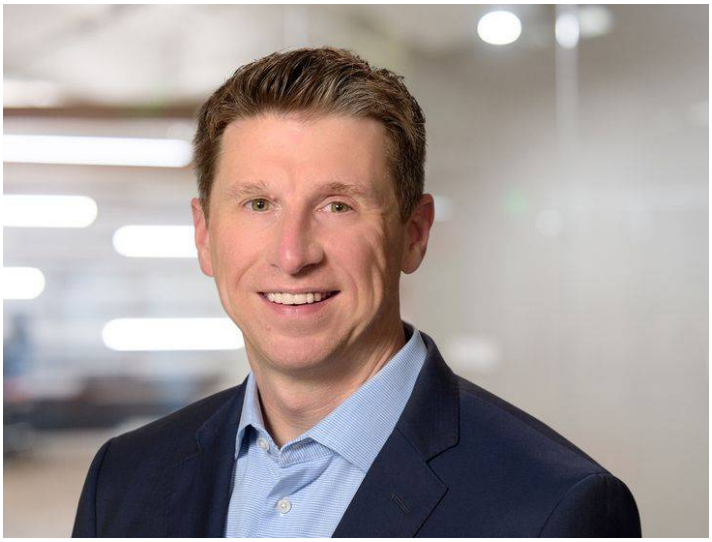

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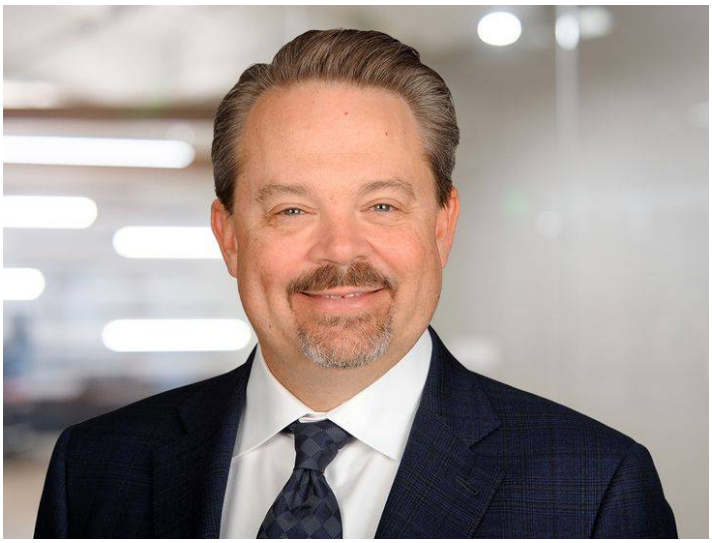

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