WEB EXCLUSIVE: May 2019: The Top 17 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 17 stories from last month that all employers need to know about:

1. **Double Duty: You Will Soon Have To Turn Over Pay Data From Both 2017 And 2018** – The EEOC announced on May 2 that, in order to comply with a recent shocking court order, most employers will need to turn over compensation information from both 2017 and 2018 when they submit their Component 2 pay data with their EEO-1 submission on September 30, 2019. While there is still a chance that an appeals court could put the pay data/hours worked reporting requirement on hold once again, or that a newly reconstituted EEOC Commission might modify the regulations, you should start taking action immediately under the assumption that all of this information will need to be disclosed by the recently announced due date. Meanwhile, the May 31, 2019 deadline for the traditional demographic data (now called "Component 1" data) remains firmly in place (read more here).
2. **What Employers Need To Know About The New EEOC Chair** – Janet Dhillon's confirmation as the new Chair of the Equal Employment Opportunity Commission (EEOC) on May 8 will have an impact on employers in more ways than one. Besides installing an agency head that is seemingly in a position to understand and balance the interests of the business community and workers alike, the Senate has restored a quorum to the agency for the first time in several months – meaning that the agency can get down to work on several critical initiatives. What do employers need to know about the new head of the federal employment law agency? (read more here)
3. **An Employer's 7-Step Guide To Navigating Newly Revived No-Match Letters** – The Social Security Administration recently resurrected its practice of issuing Employer Correction Request notices – also known as "no-match letters" – when it receives employee information from an employer that does not match its records. If you find yourself in receipt of such a letter, we recommend you take the following seven steps in conjunction with working with your Fisher Phillips counsel (read more here).

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4. **NLRB Advice Memo Could Mean End For "Scabby The Rat"** – An advice memorandum just released by the National Labor Relations Board General Counsel's office could be the beginning of the end for "Scabby the Rat," "Corporate Fat Cat," and similar oversized balloons often employed by unions to exert pressure on neutral employers as part of secondary picketing actions. The Board's counsel recommended in a May 14 release that the NLRB reverse several Obama-era decisions that permitted the use of such balloons, as well as the erection of stationary banners, as lawful non-picketing secondary activity under the National Labor Relations Act (NLRA). If the current Board follows the recommendation contained in the advice memo, businesses will have a valuable tool to help them with such union confrontations (read more here).
5. **Colorado Passes Slate Of New Employment Laws** – The 2018 Colorado state elections resulted in a Democratic House, Senate, and governor, smoothing the way for the 2019 legislature to pass six new employment bills. Some of these pieces of legislation had been proposed in various forms in previous sessions but failed to pass – until now. While a few still await Governor Jared Polis's signature, they are all expected to be signed and soon should be state law. These new laws address sex discrimination in pay, criminal history inquiries, felony convictions for wage violations, garnishments, local governments setting minimum wages, and a family and medical leave insurance program study (read more here).
6. **Labor Board Announces Rulemaking Agenda: Should Employers Pay Attention?** – The National Labor Relations Board announced on May 22 in its spring 2019 regulatory agenda that it intends to consider rulemaking in the following substantive areas arising under the National Labor Relations Act:
    - Current representation-case procedures;
    - Current standards for blocking charges, voluntary recognition, and the formation of Section 9(a) bargaining relationships in the construction industry;
    - The standard for determining whether students who perform services at private colleges or universities in connection with their studies are "employees" under the NLRA; and
    - Standards for access to an employer's private property.

    Along with the previously announced joint-employer standard, the representation-case procedure is listed on the Board's agenda as a "long-term action," while the other topics are identified as "short-term actions." Short-terms actions are generally expected to occur within the coming year, while long-term actions are generally expected to take longer. What do employers need to know about this announcement? (read more here)
7. **Limbo No More? EEOC May Soon Publish New Wellness Program Rules** – Pushing its deadline back for the second time, the Equal Employment Opportunity Commission (EEOC) recently announced that it plans to issue amended regulations related to incentivizing participation in employer-sponsored voluntary wellness programs under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) by the end of this year. What

should employers know about the May 22 announcement, and why might it be different from prior deadlines set by the EEOC? (read more here)

8. **Good Step For Gig Companies: Advice Memo From NLRB's General Counsel Concludes That Uber Drivers Are Contractors** – Gig companies are feeling the good kind of whiplash after the National Labor Relations Board's General Counsel released an advice memo concluding that a group of Uber drivers are properly classified as independent contractors and shouldn't be permitted to proceed with their labor claims. The May 14 advice memo means it is much less likely that a traditional gig economy company, structured in a typical fashion when it comes to workforce operations, will face a valid unionization effort or could be found liable for an unfair labor practice charge (read more here).
9. **Washington's New Non-Compete Bill Brings Challenges For Employers** – Finding that "workforce mobility is important to economic growth and development," Washington just passed a new law that will significantly restrict noncompetition agreements with both employees and independent contractors. The governor signed the bill into effect on May 8, ushering in a new era for restrictive covenants in the state. The new law also has provisions against moonlighting and no-poach agreements, and creates a brand new cause of action against employers who seek to enforce agreement that violate the new law. Washington employers who rely on noncompetition covenants to protect their companies must meet the new stringent conditions or face a cause of action from covered workers. What do you need to know about this new law? (read more here)
10. **Kamala Harris Proposes Pay Equity Punishment Plan** – If a prominent candidate for the 2020 Democratic nomination for president has her way, federal pay equity law would be strengthened to add some real teeth—and the spoils of the increased financial penalties would fund a national leave policy. Senator Kamala Harris (D-CA) unveiled a plan on May 20that would require employers to receive affirmative certification from the EEOC that they are in compliance with federal pay equity law, or risk facing a fine equal to 1 percent of their profits for every 1 percent of the wage gap that exists between genders. The fines collected would then be invested in building universal paid family and medical leave. This is the boldest proposal taken to date by any presidential candidate vying for a shot at the White House in 2020, and may spur the current slate of candidates to begin a substantive conversation about pay equity on the national stage. Here are the seven specific steps she proposes (read more here).
11. **FMLA Regs May Soon Get Revamped To Ease Employer Burdens** – If the Department of Labor has anything to say about it, employers may soon get a bit of a reprieve when it comes to dealing with the administrative and compliance difficulties associated with the Family and Medical Leave Act. In a May 21 announcement, the agency's spring regulatory agenda – highlighting its plans for the coming year and beyond – contained a noteworthy entry calling for information to help revise the statute's regulations to help "reduce administrative and compliance burdens on employers." What do employers need to know about this impending development, and how might they influence this process to their benefit? (read more here)
12. **In Big Loss For Gig Companies, 9th Circuit Says *Dynamex* And ABC Test Should Be Applied Retroactively** – There's no way to sugarcoat this one. The 9th Circuit handed a big loss to gig

economy companies on May 2 by concluding that last year's *Dynamex* decision from the California Supreme Court and its wide-reaching ABC test should be applied retroactively. That means that the ABC test – which makes it very difficult for gig economy businesses to properly classify their workers as independent contractors rather than employees – will be applied to federal cases when evaluating relationships that businesses thought were to be adjudged under a much more flexible standard (read more here).

13. **Labor Department Faces Blowback After Gig Economy Opinion Letter** – According to Bloomberg Law's weekly "Punching In" column (an absolute must-read each week), some congressional leaders are not too pleased with the Labor Department after it published an opinion letter a few weeks ago confirming that certain workers for an unnamed gig economy company were properly classified as independent contractors. Bloomberg's Jaclyn Diazwrites that the letter has "raised [the] ire" of congressional Democrats. She cites to a May 14 letter sent to Labor Secretary Alexander Acosta by Representative Rosa DeLauro (D-Conn.), chair of the House Labor Appropriations subcommittee, and Senator Sherrod Brown (D-Ohio), ranking member of the Committee on Banking, Housing, and Urban Affairs, where they indicated they were "extremely disappointed" with what they labeled an "unfortunate" opinion letter (read more here).

14. **Nike Workers May Pursue Class Sex Discrimination Claims, Court Confirms** – An Oregon federal court judge recently denied Nike's motion to dismiss a class action on behalf of 500 or more of its current and former female employees alleging sex discrimination in pay.

    Nike had asked the court to dismiss class and collective claims, arguing that the members of the proposed class were too broad and disparate to establish that they sustained the same harm, which is necessary to proceed as a class action. Earlier this year, we reported that a federal magistrate judge issued findings and a recommendation that Nike's motion to dismiss be denied. Neither party objected to the magistrate's recommendation, so it was adopted by Judge Marco Hernandez on May 20 without further comment (read more here).

15. **Groups Request Delayed Start For Massachusetts Paid Leave Law** – Led by Associated Industries of Massachusetts (AIM), a nine-member coalition of the Massachusetts business community, along with employee and low-income advocacy groups, just requested a three-month delay to the start of contributions to the Commonwealth's nascent paid family and medical leave program. In their May 20 letter to Governor Baker and the leaders of both chambers of the legislature, the coalition sought the delay in order to ensure the successful rollout of the program, clarify employee and employer confusion, and to permit additional time for the legislature to consider five amendments to the statute to align the state program with the federal FMLA (read more here).

16. **NY Farmworkers Win Collective Bargaining Rights – Will Other States Follow Suit?** – In a groundbreaking decision, a New York state appeals panel just extended union organizing rights to farmworkers, perhaps setting the stage for other states to do the same. While farmworkers have traditionally been exempted from the National Labor Relations Act (NLRA) since the

statute's inception, states can supplement the federal law by, for example, granting agricultural workers the rights to organize and bargain collectively. A split panel did just that with its May 23 decision, finding that the farmworker exclusion from the New York State Employee Relations Act (SERA), which was passed in 1937, violated the state constitution. New York employers will now need to adjust to this new reality, while employers in other states should pay attention to this development in the event similar sweeping rights for farmworkers are put in place elsewhere (read more here).

17. **California Opinion Letter Extends *Dynamex* Reach** – It's been a busy month on the *Dynamex* front, and the news for businesses continues to get worse. California's Division of Labor Standards Enforcement (DLSE) recently released an opinion letter concluding that the ABC test applies to both IWC Wage Order Claims and certain Labor Code provisions that enforce Wage Order requirements. According to the May 3 opinion letter, "because wage order provisions are not independently actionable..., the obligations imposed by the wage orders do not appear only in the wage orders themselves. Wage order obligations are also imposed by certain Labor Code provisions, which serve to enforce the wage orders" (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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