Insights, News & Events

WEB EXCLUSIVE: THE TOP 14 WORKPLACE LAW STORIES OF DECEMBER 2019

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

1. **NLRB Confirms Prohibiting Use Of Company Equipment, Including Work Emails, Is Lawful** – The National Labor Relations Board decided on December 17 that employees have no statutory right to use an employer's equipment, including work emails and IT resources. Therefore, employers may legally restrict the use of their equipment, such as work emails, even for union organizing activities or for other activities protected under Section 7 of the National Labor Relations Act. In reversing a significant Obama-era ruling, the *Caesar's Entertainment*decision holds that employees' statutory rights to engage in protected, Section 7 activities must yield to the property rights of employers to control the use of their equipment, provided that employers do not target union-related communications and activity and that employees have reasonable alternate means of communication available to them (read more here).

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2. **NLRB: Employers May Require Confidentiality In Workplace Investigations** – The National Labor Relations Board ruled that employers may now require confidentiality from employees involved in open workplace investigations. Importantly, the December 17 decision in *Apogee Retail LLC*resolves conflicting commands from the Board and the Equal Employment Opportunity Commission regarding investigation confidentiality that has plagued employers for years (read more here).

3. **EEOC Scraps Policy That Took Aim At Mandatory Workplace Arbitration** – The Equal Employment Opportunity Commission withdrew its 1997 policy statementthat had disapproved of the practice of requiring workers to enter into arbitration agreements to resolve workplace discrimination claims and instructed its staff to proceed with claims against employers despite the existence of such agreements. The December 17 move, following two decades of Supreme Court decisions supporting the use of arbitration, is yet another recent step taken by federal agencies to restore a natural balance in the area of workplace conflicts. It's not yet known how this policy will impact day-to-day operations at the EEOC, but it could limit the type of enforcement action employers may face if they have enforceable arbitration agreements in place (read more here).

4. **Federal Court Blocks California's Ban On Mandatory Arbitration Agreements** – California employers received a last-minute reprieve from complying with a newly enacted law that aims to prevent them from utilizing mandatory arbitration agreements with their employees – at least for now. A federal court on December 30 granted a temporary restraining order requested by a coalition of business groups that presses pause on the new law before it could take effect on January 1. But the battle is just beginning, so California employers will want to pay particular attention to upcoming developments to ensure they are in compliance with the current state of employment arbitration agreement law (read more here).

5. **Balance Restored: The NLRB Curtails "Quickie Election" Rule** – At the end stages of lone Democrat Board Member McFerran's term, the National Labor Relations Board (NLRB) issued the first of what may be a number of rulings in the form of a procedural regulation rolling back some of the onerous requirements of the agency's

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"quickie election" rule. That rule, which took effect in April 2015, removed long-standing due process rights that had been available to employers served with a union representation petition. It dramatically shrank the election campaign timeframe and disadvantaged employers desiring to educate workers on the facts surrounding union representation, while leaving employees with less time to consider those facts and less of a chance to make an informed choice at the ballot box. In words that will be music to employers' ears, Chairman Ring on December 13 described the new rule as "common sense changes to ensure expeditious elections that are fair and efficient." The rule –which is "final" in nature and thus slated to take effect within 120 days – is a welcome move toward equipoise of power between employers and labor organizations. Although not a complete return to the pre-2014 landscape, the rule scales back many of the onerous election timelines, while allowing for resolution of many representational issues prior to an election (read more here).

6. **USCIS Drastically Changes H-1B Cap Processing** – For the first time ever, federal immigration authorities will be implementing an electronic registration system for H-1B petitions that is intended to simplify the annual process. In a December 6 announcement, U.S. Citizenship and Immigration Services (USCIS) revealed that employers seeking to file H-1B cap-subject petitions for Fiscal Year 2021's season – which will run from March 1 to March 20, 2020 – will be required to electronically register and pay a $10 registration fee. "The electronic registration process will dramatically streamline processing by reducing paperwork and data exchange," the agency said in the announcement, "and will provide an overall cost savings to petitioning employers" (read more here).

7. **Labor Department Offers Employers Some FLSA Clarity Through New "Regular Rate" Interpretation** – For the first time in over 60 years, the U.S. Department of Labor issued a final rule updating its interpretative guidance with respect to permissible exclusions from the "regular rate." According to the USDOL, the proposed rule is intended to better reflect the modern workplace and provide clarity to employers on what types of compensation, benefits, or perks may be excluded from the regular rate. While the majority of the changes in the final rule are "interpretative" – meaning they do not have

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the force of full-fledged regulations – they provide needed clarity to employers and should help reduce litigation over what is and what is not included in the "regular rate." The Final Rule was published on December 16, with an effective date of January 15, 2020 (read more here).

8. **Washington Employers: Prepare For Significant Salary Increase To Meet Overtime Exemptions** – Washington's Department of Labor and Industries just decided to substantially raise the state's salary threshold to meet the salary basis test for "white collar" overtime exemptions. As set out more specifically below, starting July 1, 2020, the state's salary threshold will be determined by both an employer's size and a multiple of the state's then-current minimum wage for a 40-hour workweek. The first major impact of the new state law will begin January 2021, when Washington's required minimum salary will exceed even the new amount under the federal FLSA rules ($684 per week, or $35,568 per year). Smaller employers (with 50 or fewer employees) will see the minimum salary level rise to $827 per week (or $43,004 per year), while all other employers will face an increase to $965 per week (or $50,180 per year). Washington's new rule, announced on December 11, also seeks to bring the duties tests for the white-collar exemptions (executive, administrative, professional, and outside sales) more in line with the FLSA duties tests. However, you should still work with your legal counsel to ensure all parts of the relevant duties test are met (read more here).

9. **2nd Circuit Decision Paves the Way for Streamlined FLSA Offers of Judgment** – In a much-anticipated decision, a federal appeals court ruled that Fair Labor Standards Act (FLSA) claims resolved through Rule 68(a) offers of judgment do not require fairness review and judicial approval. The 2nd Circuit Court of Appeals' December 6, 2019 decision is a critical ruling for employers seeking to resolve lawsuits filed under federal wage and hour law, providing a much clearer path for resolution (*Yu v. Hasaki Restaurant, Inc*) (read more here).

10. **Union Dues Collection May Terminate Once CBA Expires** – The National Labor Relations Board just decided that employers have the right to cease union dues collections once the relevant collective bargaining agreement expires, again restoring balance to the labor relations

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landscape. The Board's December 16 decision in *Valley Hospital Medical Center, Inc.*, which returns to a legal standard that had stood for decades before being overturned in 2015, will provide employers more options during the negotiation process (read more here).

11. **Business Groups Bring Legal Challenge to California's Prohibition on Mandatory Arbitration Agreements** – A coalition of business groups led by the U.S. Chamber of Commerce just filed a lawsuit against California Attorney General Xavier Becerra and other state officials seeking to block AB 51, a recently passed statutewhich will make it unlawful for California employers to require employees to sign arbitration agreements beginning January 1, 2020. The December 6 lawsuit seeks a declaration that AB 51 is preempted by the Federal Arbitration Act (FAA) and an injunction against the state enforcing AB 51. Although AB 51 states that its intent is not to prevent the enforcement of arbitration agreements that are valid under the FAA, the lawsuit argues otherwise (read more here).

12. **Good Faith Belief Leads To Employer Victory In Bias Claim** – Despite not being able to prove the alleged wrongdoings that led an Arkansas employer to terminate an employee, a federal appeals court just handed an employer a victory in a gender discrimination lawsuit because of its "good faith" belief that the worker actually committed misconduct. The December 9 ruling from the 8th Circuit Court of Appealscould serve as a helpful resource for employers fending off discrimination claims – so long as you understand the critical steps you need to take in order to take advantage of the good faith defense (read more here).

13. **Federal Appeals Court Lowers Bar To Advance Pay Equity Claims** – A federal appeals court just ruled that workers don't need to clear a heightened legal standard in order to pursue pay equity claims, setting the stage for a possible increase in the number of lawsuits seeking recovery for alleged unfair wages in 2020 and beyond. The analysis applied by the 2nd Circuit Court of Appeals' December 6 decision in *Lenzi v. Systemax, Inc.*could be applied by other courts across the country, creating a new outlet for workers to claim pay bias (read more here).

14. **New Jersey Employers Will Soon Learn When They Can Use "Good Faith" Defense In Wage Claims** – The New Jersey Supreme Court just agreed to review whether the

"good faith" defense is available to employers that rely upon determinations made by employees of the New Jersey Department of Labor and Workforce Development. In a case of first impression, the Supreme Court's action on December 5 means it will soon make clear when you can take advantage of this defense, which is a complete bar to wage and hour claims (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.